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Reflections on Capital Punishment

Rob Warden*

¶1 When the death penalty is subjected to a cost-benefit analysis, the ledger is one-sided—huge costs, both social and monetary, and no discernible benefits, other than perhaps mollifying a hunger for retribution. This reality has prompted the legislatures of New Jersey and New Mexico to abandon capital punishment¹ and has moved the legislatures of Colorado, Illinois, Kansas, Nebraska, and New Hampshire in that direction.²

¶2 In light of the continuing public debate over capital punishment, this Article discusses some of the principal arguments against it, underscored with cases that show how the death penalty works, not in theory, but in practice.

¶3 The arguments, in the order presented, are:

- That the death penalty has no demonstrable deterrent effect—but has, in fact, caused some murders and, more generally, may contribute to a cycle of violence that raises murder rates.
- That maintaining the death penalty costs significantly more than keeping convicted murderers in prison for life.
- That the system has wrongfully condemned scores of innocent defendants whose executions have been averted only by the serendipitous discovery of evidence that was not presented at their trials.
- That there is no reasonable doubt that innocent persons have been executed in recent decades in the United States.
- That, notwithstanding Supreme Court declarations to the contrary, the death penalty has not been reserved for the worst offenders, as it is supposed to be,³ and is still being applied in a freakish manner.
- That the distinction between capital and non-capital cases often is nothing more than an accident of time and geography.
- That, if the death penalty is not legally cruel and unusual,⁴ neither is it in any sense kind and ordinary.

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¹ Dan Boyd, *Richardson Signs Bill Abolishing Death Penalty*, ALBUQUERQUE J., Mar. 19, 2009, at 1; Keith B. Richburg, *N.J. Approves Abolition of Death Penalty, Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3.

² Deborah Hastings, *High Cost May Kill Off States' Death Penalty*, CHI. SUN-TIMES, Mar. 7, 2009, at 7; Ian Urbina, *In Push to End Death Penalty, Some States Cite Cost-Cutting*, N.Y. TIMES, Feb. 25, 2009, at A1. The Colorado House of Representatives approved an abolition bill by a single vote this year, but the measure died in the upper house. Kirk Johnson, *Death Penalty Repeal Fails in Colorado*, N.Y. TIMES, May 5, 2009, at A14.

³ *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005).

⁴ The Supreme Court has consistently held that state-sanctioned killing is not cruel and unusual. *See, e.g.,*

- That equality under the law may be the great American ideal, but, in practice, racial discrimination remains a hallmark of the capital punishment system.

I. THE DETERRENCE HYPOTHESIS

¶4 On a summer day in 1983, Charles Walker, an ex-convict and alcoholic, was fishing on the bank of a creek in southern Illinois when Kevin Paule and Sharon Winker happened along. Walker had just run out of beer and had no money, so he decided to rob the couple. As he tied them to a tree, Paule blurted out, “I know you. You’re Walker.”⁵ Undeterred by the specter of the death penalty, Walker shot the couple to death and went to a tavern to drink with their money.⁶

¶5 If capital punishment has ever deterred anyone like Walker, that fact has escaped the attention of the major news media, at least since the advent of online databases some three decades ago, as well as the authors of hundreds of law review articles about the death penalty.

¶6 There is, however, no question that on occasion the death penalty not only has failed as a deterrent, but also has actually *caused* murders. One such case arose in 1963 when two plainclothes Los Angeles police officers stopped a car because its license plate was not illuminated. Unaware of the reason for the stop, the men in the car, Jimmy Lee Smith and Gregory Powell, assumed that they were being apprehended for a string of armed robberies they had committed. Thus, they disarmed and kidnapped the officers. When Smith learned the actual reason for the stop, he exclaimed, “Son of a bitch . . . I didn’t want to get into this business, but now that I am in it I have got to go all of the way.”⁷ Smith and Powell mistakenly thought that the kidnapping they had just committed was a capital offense⁸—and decided to eliminate the witnesses. In an onion field in Kern County, they shot one of the officers to death, but the other escaped and lived to identify the killers, who were convicted and sentenced to death.⁹

¶7 Another instructive case began in Florida in 1991 when Ricardo Gill, an ex-convict with a long history of mental problems and suicidal impulses, pled guilty to the murder of a travel agent. At sentencing, Gill told the judge he wished to be sentenced to death, threatening that, if denied that wish, he would kill again. The judge, however, citing Gill’s long history of mental problems, sentenced him to life. Four days later, Gill strangled his cellmate to death. In 2005, he pled guilty to that murder as well, again

Baze v. Rees, 128 S. Ct. 1520, 1530 (2008); Wilkerson v. Utah, 99 U.S. 130, 134–35 (1878).

⁵ Rob Karwath, *Walker’s Violence Fueled by Alcohol*, CHI. TRIB., Sept. 11, 1990, at 1.

⁶ People v. Walker, 109 Ill. 2d 484 (1985). Seven years later, after abandoning his discretionary appeals, he was executed; it was the first Illinois execution in twenty-eight years. See Rob Karwath & William Grady, *Walker Becomes 1st Execution in 28 Years*, CHI. TRIB., Sept. 12, 1990, at 1.

⁷ People v. Powell, 67 Cal. 2d 32, 38 (1967).

⁸ Only three years earlier, in a highly publicized and controversial case, Caryl Chessman had been executed under California’s “Little Lindbergh Law.” What Smith did not realize was that kidnapping was a capital offense only if a victim suffered bodily harm. See, e.g., *The Quality of Mercy*, TIME, Feb. 29, 1960, at 21.

⁹ *Killers of L.A. Policemen Get Death Penalty*, L.A. TIMES, Sept. 13, 1963, at A1. The convictions were reversed because Smith and Powell had not been advised of their rights before they made statements used against them at trial. *Powell*, 67 Cal. 2d at 58–62. Upon retrial, they were convicted and sentenced to life in prison. *Man Convicted for Second Time of Murdering Officer*, L.A. TIMES, Jan. 6, 1969, at A3; *Man Sentenced to Die in Killing of Officer Gets Life in 2nd Trial*, L.A. TIMES, Nov. 7, 1969, at 3. For a thorough account of the case, see JOSEPH WAMBAUGH, *THE ONION FIELD* (1973).

demanding a death sentence, telling the judge: “You will give me a license to kill if you give me another life sentence. I am a hundred percent sure this time it will not be an inmate that is killed.” This time, the judge obliged.¹⁰

¶8 Cases in which killers have abducted victims in non-death penalty jurisdictions and transported them into death penalty jurisdictions before killing them—something no informed, rational person would do¹¹—also undermine the deterrence hypothesis. In 1979, for instance, someone abducted a female bartender from a tavern near Kenosha, Wisconsin,¹² took her across the state line into Illinois, and shot her to death on the shoulder of a desolate highway. Robert Kubat, a truck driver from Chicago, was convicted of the crime and sentenced to death.¹³ Had the murder occurred just a mile to the north, above the Wisconsin line, the maximum penalty would have been “life”—a sentence under which the killer would have been eligible for parole in eleven years and three months.¹⁴

¶9 In 2006, Bruce E. Burt, a contract killer, was hired by a man accused of molesting a thirteen-year-old girl to kill the complaining witness, Donnisha Hill.¹⁵ Burt abducted Hill as she left school in Waterloo, Iowa, and took her across the Mississippi River into Jo Davies County, Illinois, where he killed her and disposed of her body.¹⁶ Contract killing is a capital offense in Illinois,¹⁷ but there are no capital offenses in Iowa.¹⁸ Burt was charged and convicted of the crime in Illinois. He did not receive a death sentence,¹⁹ but that is beside the point—the point being that, had Burt simply stayed on the other side of the river, he would not have been eligible for the death penalty.

¶10 These may be atypical incidents, but evidence rebutting the hypothesis that killing murderers deters other murderers goes beyond the anecdotal. If the death penalty

¹⁰ Karen Voyles, *Convicted Murderer Gets What He Wants: A Death Row Cell*, GAINESVILLE SUN (Fla.), July 1, 2006, at 1. As of Aug. 17, 2009, Gill was one of 392 prisoners on death row in Florida. See Florida Department of Corrections, Death Row Roster, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited Aug. 17, 2009).

¹¹ There are no reported examples of kidnap-murders in which there has been any indication that, for the purpose of avoiding the possibility of being sentenced to death, killers transported victims from death penalty jurisdictions to non-death penalty jurisdictions before carrying out murders.

¹² Wisconsin abolished the Death Penalty in 1853. HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 8 (1997).

¹³ Kubat may well have been innocent. The evidence against him was the testimony of his ex-wife, Carolyn Sue Quick, who testified that she was with Kubat when he committed the crime—a dubious claim, given that Quick had attempted to implicate Kubat in a previous murder he had not committed, and given that the victim was shot to death with a gun that belonged to the man with whom Quick was living. Although Kubat also was identified by witnesses from the tavern, his car did not match initial descriptions of the car used in the crime, and Kubat had an exceptionally strong alibi. See Amended Petition for Executive Clemency, *In The Matter of Robert Kubat*, Illinois Prisoner Review Board, Autumn Term, 2002. His death sentence was vacated by a federal judge in 1988. *Kubat v. Thieret*, 679 F. Supp. 788 (N.D. Ill. 1988). He was resentenced to sixty years in prison and, with time off for good behavior, is scheduled for release on August 24, 2009, at age seventy-four. See Illinois Department of Corrections, Inmate Search, <http://www.idoc.state.il.us/subsections/search/default.asp> (search Kubat in “Inmate Search”) (last visited June 19, 2009).

¹⁴ Wis. Stats. 940.01(1); 939.50(3)(a); 304.06.

¹⁵ Jeff Reinitz, *Waterloo Man Arrested for Killing Hill Girl in Illinois*, WATERLOO COURIER (Iowa), Oct. 31, 2006, at 1; *David Damm Sentenced to Die*, GALENA GAZETTE (Ill.), Oct. 22, 2008, at 1.

¹⁶ Reinitz, *supra* note 15.

¹⁷ 720 ILCS 5/9-1(5).

¹⁸ Iowa abolished the death penalty in 1965. BEDAU, *supra* note 12.

¹⁹ Burt was spared the death penalty because he agreed to testify against the man who hired him, David Damm, who was sentenced to death. *David Damm Sentenced to Die*, *supra* note 15.

deterred murder, it would follow logically that having and using it would result in lower murder rates, but studies spanning more than a century and a half have found the opposite to be true.²⁰ A comparison of United States and Canadian murder rates is telling:

[T]he homicide rate in Canada has moved in virtual lockstep with the rate in the United States, while approaches to the death penalty have diverged sharply. Both countries employed the death penalty in the 1950s, and the homicide trends were largely similar. However, in 1961, Canada severely restricted its application of the death penalty (to those who committed premeditated murder and murder of a police officer only); in 1967, capital punishment was further restricted to apply only to the murder of on-duty law enforcement personnel. As a result of these restrictions, no executions have occurred in Canada since 1962. Nonetheless, homicide rates in both the United States and Canada continued to move in lockstep.²¹

¶11 Within the United States, studies have consistently shown that proportionately fewer murders occur in states that do not have the death penalty than in states that do²² and that, in the latter, murder rates increase after highly publicized executions²³—findings that support the hypothesis that, as George Bernard Shaw put it, “[m]urder and capital punishment are not opposites that cancel one another, but similars that breed their kind.”²⁴

¶12 General deterrence, in any event, is a myth—which is hardly surprising to anyone who has studied the population of a United States death row because, as one observer has noted, the theory that killing some killers deters others:

[R]ests on the notion that the hyper-rational tools of mathematics can measure the irrational brain of a murderer. . . . [I]t assumes that killers calculate risk and reward. The reality, with few exceptions, is that murderers are not clear-thinking people. They are impulsive, self-centered, often warped; overwhelmingly they are the products of violent homes; frequently they are addled by booze or drugs; and most are deeply anti-social. The values and sanctions of society don’t concern them.²⁵

²⁰ The phenomenon was documented in 1846 by Robert Rantoul, Jr., the U.S. Attorney for Massachusetts, who studied international murder and execution rates over a forty-year period. See MEMOIRS, SPEECHES AND WRITINGS OF ROBERT RANTOUL, JR. 504 (Luther Hamilton ed., 1854).

²¹ John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 799 (2005) (internal citations omitted).

²² See, e.g., David Baldus & James W.L. Cole, *Statistical Evidence on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 164 (1975). There have been a few studies by economists purporting to document a deterrent effect—notably, Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Matter of Life and Death*, 65 AM. ECON. REV. 397 (1975)—but rigorous analysis of these studies has shown their conclusions to have been false. For a succinct analysis of research on the issue, see RAYMOND PATERNOSTER, ROBERT BRAME & SARAH BACON, *THE DEATH PENALTY: AMERICA’S EXPERIENCE WITH CAPITAL PUNISHMENT* 140–48 (2008).

²³ William J. Bowers & Glenn Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453, 453 (1980).

²⁴ GEORGE BERNARD SHAW, *MAN AND SUPERMAN: MAXIMS FOR REVOLUTIONISTS* 232, para. 60 (1903).

²⁵ DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD* 209 (1995).

II. THE PRICE OF DEATH

¶13 During the first week of 2006, in Richmond, Virginia, Ricky Gray and Ray Dandridge committed seven of the most atrocious murders in the annals of crime. On New Year's Day, they invaded the home of Kathryn and Bryan Harvey and their two daughters, Stella and Ruby, bound and gagged them, slashed their throats, stabbed them, beat their heads with two claw hammers, and set the house afire. The adults died of blunt force to their heads. One of the children died of a stab wound and blunt trauma so severe that brain tissue exuded from her skull, the other of smoke inhalation, carbon monoxide poisoning, and head injuries.²⁶ Five days later, in another home invasion, Gray and Dandridge bound and gagged Percyell Tucker, his wife, Mary, and Mary's daughter, Ashley Baskerville, all of whom, according to the medical examiner, struggled for several minutes before dying of suffocation.²⁷

¶14 Gray was sentenced to death following a jury trial,²⁸ but Dandridge was allowed to plead guilty in exchange for a life sentence.²⁹ Gray almost certainly would have taken the deal Dandridge took if had it been offered; his guilt was not an issue.³⁰ Thus, the amount by which the costs of Gray's case eventually exceed those of Dandridge's case will represent, for the taxpayers of Virginia, the price of death.

¶15 The relative cost of capital and non-capital cases has not been studied in Virginia, but the issue has been studied in two neighboring states—North Carolina, where a 1993 study found that the cost of a capital case exceeds the cost of a non-capital murder case by \$2.2 million,³¹ and Maryland, where a 2008 study found the difference to be \$1.9 million.³² These figures do not reflect the true cost of the death penalty, however, because many of the extra expenses accrue in cases in which the death penalty is sought but not imposed. The Maryland study, for instance, found that when those cases are added, the cost per case in which a death sentence was imposed shot up to \$2.2 million,³³ and the costs per execution carried out was a mind-boggling \$37.2 million.³⁴

¶16 Virginia has carried out more than twice as many executions as have North Carolina and Maryland combined³⁵ and relatively few capital cases are overturned in Virginia.³⁶ Thus, Virginia may enjoy economies of scale that lower the price of death, but every study ever conducted anywhere has shown that modern capital cases are significantly more costly than non-capital cases.³⁷

²⁶ Gray v. Commonwealth, 645 S.E.2d 448, 452–54 (Va. 2007).

²⁷ *Id.* at 454.

²⁸ *Id.* at 451.

²⁹ Paige Akin Mudd, *Plea Deal: Life; Richmond Prosecutors Didn't Want to Risk Conviction on Lesser Charge*, RICHMOND TIMES-DISPATCH, Sept. 20, 2006, at A1.

³⁰ VON DREHLE, *supra* note 25, at 295.

³¹ PHILIP J. COOK & DONNA B. SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN N.C. (1993).

³² JOHN RONAN ET AL, URBAN INST., THE COSTS OF THE DEATH PENALTY IN MARYLAND 2 (2008), available at www.urban.org/publications/411625.html.

³³ *Id.* at 3.

³⁴ *Id.* at 1, 3.

³⁵ Supporting data on file at the Center on Wrongful Convictions.

³⁶ See Frank Green, *Odds Poor Gray Avoids Execution*, RICHMOND TIMES DISPATCH, Aug. 24, 2006, at B1.

³⁷ See, e.g., CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FAIR ADMINISTRATION OF THE DEATH PENALTY (2008); OFFICE OF DEFENDER SERVS. OF THE ADMIN. OFFICE OF THE U.S. COURTS, UPDATE ON THE COST, QUALITY, AND AVAILABILITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES (2008); KAN. LEGISLATIVE DIVISION OF POST AUDIT, COSTS INCURRED FOR DEATH PENALTY CASES (2003); CONN. COMM'N ON THE DEATH PENALTY, STUDY PURSUANT TO PUBLIC ACT NO. 01-151 (2003).

¶17 When a death sentence is in the offing, costs are higher at every stage than the costs of cases in which the death penalty is not sought, and they will likely to continue to spiral upward as measures are put into place to safeguard against wrongful convictions stemming from poorly trained lawyers and inadequate funding of investigators and expert witnesses. In Illinois, for instance, a Capital Litigation Trust Fund was established in 2000 to provide, *inter alia*, substantially more money for defense and prosecution in capital cases.³⁸ During the following eight years, more than \$60 million was expended from the fund, while twenty death sentences were imposed³⁹—\$3 million for each death sentence—not including administrative costs.

¶18 While capital trials typically cost at least twice as much as non-capital murder trials, the cost differential widens in the appellate process. The standard steps in the appellate process are, first, a direct appeal to the highest court in the state, followed by a petition for certiorari, followed by a state post-conviction petition, followed by a second petition for certiorari, followed by a petition for a federal writ of habeas corpus, followed by an appeal to the federal circuit court of appeals, followed by a third petition for certiorari, followed by a petition for executive clemency, followed by a flurry of last ditch petitions for extraordinary remedies. The process sometimes drags on for decades.⁴⁰

¶19 Virginia plows through capital appeals faster than average,⁴¹ but taxpayers of the commonwealth are likely to spend millions on Gray's appeals—money that would be off the table if he, like Dandridge, had been allowed to plead guilty in exchange for a life sentence. Although it is possible that Gray could abandon his discretionary appeals⁴²—volunteering to be executed, in effect committing state-abetted suicide⁴³—he has shown no inclination in that direction, having already gone to the Supreme Court, which denied certiorari.⁴⁴

¶20 Dandridge's case, in contrast, is over—and paid for in full. Taxpayers, of course, will pay the costs of his imprisonment—roughly \$23,000 a year⁴⁵—for the rest of his life. He was twenty-nine when convicted, and if he were to enjoy a normal life expectancy for a healthy black male of that age—he would live approximately another forty years.⁴⁶ The tab for that would be less than one million dollars.⁴⁷ That may seem like a lot, but it

³⁸ 725 ILCS 124/5.

³⁹ Supporting data on file at the Center on Wrongful Convictions.

⁴⁰ William Lee Thompson had spent 32 years on death row in Florida when, on March 9, 2009, the Supreme Court denied a writ of certiorari. *Thompson v. McNeil*, 129 S.Ct. 1299 (2009).

⁴¹ See text accompanying notes 35–37.

⁴² The only mandatory appeal is the direct appeal, which Gray lost. *Gray v. Commonwealth*, 645 S.E.2d 448, 452–54 (Va. 2007).

⁴³ Of 1171 prisoners executed since 1976, 133, or 11.4%, have been volunteers (as of Aug. 17, 2009). See Death Penalty Information Center, Searchable Execution Database, <http://deathpenaltyinfo.org/executions> (search “Volunteer” in “Other Factors”) (last visited Aug. 17, 2009).

⁴⁴ *Gray v. Virginia*, 128 S. Ct. 1111 (2008).

⁴⁵ VIRGINIA DEP'T OF CORRECTIONS, STATISTICAL SUMMARY FY 2007, at 5, available at <http://www.vadoc.virginia.gov/about/facts/research/new-statsum/fy07statsummary.pdf>.

⁴⁶ Life expectancy for a black American male born in 1975 is 68.8 years. National Vital Statistics Reports, Vol. 56, No. 9, Table 12, Dec. 28, 2007, at 34, available at http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_09.pdf.

⁴⁷ The present value of \$1 million paid in equal installments over forty years is slightly more than \$208,000 in current dollars, assuming an annual interest rate of 4%.

would be a bargain compared with what Virginia's efforts to execute Gray are likely to cost.

¶21 Politicians have been quick to embrace the death penalty without regard to how the resources it devours might be redeployed to programs that unquestionably would improve public safety and the quality of life in general. As Boyce F. Martin, Jr., Chief Judge Emeritus of the U.S. Court of Appeals for the Sixth Circuit, recently explained:

[T]he choice to pay for the death penalty is a choice *not* to pay for other public goods like roads, schools, parks, public works, emergency services, public transportation, and law enforcement. So we need to ask whether the death penalty is worth what we are sacrificing to maintain it.⁴⁸

III. SAVED BY SERENDIPITY

¶22 Of approximately 7400 men and women sentenced to death under state laws enacted after *Furman v. Georgia*,⁴⁹ 135 have been exonerated and released.⁵⁰ That number, of course, does not reflect the actual extent of the problem of wrongful convictions in capital cases. Given the sheer serendipity of most of the exonerations, the inescapable conclusion is that the number of wrongful convictions greatly exceeds the number of exonerations.

¶23 Consider, for example, the case of Kirk Bloodsworth, a former Marine discus champion who had been sentenced to death in Maryland in 1985 for the murder and rape of a nine-year-old girl based on the testimony of five eyewitnesses who claimed to have seen him with the victim shortly before she disappeared. The Court of Appeals of Maryland reversed Bloodsworth's conviction and remanded the case for retrial the following year because the prosecution had withheld exculpatory evidence at the trial. But Bloodsworth was again convicted in 1987 and sentenced to life in prison. This time, the conviction was affirmed.⁵¹

¶24 At that point, an experienced death penalty lawyer, Robert Morin, entered the case at the behest of Gary Christopher, the chief of the Capital Defense Division of the Maryland Public Defender's office. Morin filed a motion to preserve the physical evidence, even though it had been examined earlier and no biological material other than the victim's had been detected. Morin arranged for the evidence to be sent to Edward T. Blake, a pioneer of forensic applications of a DNA replication technique known as polymerase chain reaction (PCR).⁵² Blake found a tiny semen spot and, after DNA

⁴⁸ *Wiles v. Bagley*, 561 F.3d 636, 643 (6th Cir. 2009) (Martin, C.J., concurring).

⁴⁹ 408 U.S. 238 (1972) (voiding all state death penalty laws on the ground that they were being applied arbitrarily in violation of the Eighth Amendment).

⁵⁰ As of Dec. 31, 2008, the number was 7349. See Bureau of Justice Statistics Bulletin, Capital Punishment Annual Reports: Exonerations through Apr. 16, 2009. See Death Penalty Information Center, Innocence: List of those Freed from Death Row, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Aug. 15, 2009). The definition of an exoneration generally used by scholars is "an official act declaring a defendant not guilty of a crime for which he or she had been convicted." See Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

⁵¹ *Bloodsworth v. State*, 543 A.2d 382 (Md. 1988).

⁵² Blake had gained renown in 1989 for using PCR to exonerate Gary Dotson, who had been convicted of a rape in Illinois based on a story fabricated by the purported victim, Cathleen Crowell Webb. TIM JUNKIN, BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE TO BE EXONERATED BY DNA 242–56

replication, positively eliminated Bloodsworth as its source, leading to his exoneration.⁵³ Tim Junkin, who wrote a book about the case, described Bloodsworth's good fortune:

When he heard the news, Gary Christopher considered Kirk Bloodsworth to be the luckiest man alive. To have Bob Morin as an advocate, for him to file a motion to preserve evidence that was supposedly of no value, to have this coincide with an emerging technology that could exclude a person from a tiny sperm sample, to have a stain of semen discovered on discarded clothing after nine years, to have all this converge—it really was miraculous.⁵⁴

Other examples of serendipitous exonerations include four members of a motorcycle gang who were wrongfully convicted and sentenced to death for a kidnapping and murder in New Mexico,⁵⁵ a school custodian who was framed for the murder of the student manager of a visiting girls' volleyball team in Texas, and a Chicago man whose exoneration and release from Illinois death row grew out of a Northwestern University journalism class project.

¶25 The New Mexico motorcycle gang case stemmed from the murder of a young male homosexual whose bullet-riddled and mutilated body was found in an arroyo east of Albuquerque in 1974. A police profiler speculated that the crime had been committed by a roving band of homosexuals, perhaps motorcyclists. Two weeks after the crime, five members of a Los Angeles motorcycle gang were arrested in Oklahoma City. From photographs, a part-time maid at an Albuquerque motel frequented by gays identified the bikers as men she had seen at the motel around the time of the murder. Although they could not have been there—a fact documented by credit card gasoline purchases tracking their trip from Los Angeles to Oklahoma City—the maid's story evolved during a series of police interviews. At the trial, she testified that she actually had seen the bikers cut off the victim's penis and shoot him to death. A jury, believing the maid's story rather than the credit card records, returned verdicts of guilty against four of the bikers—Thomas Gladish, Richard Greer, Ronald Keine, and Clarence Smith.

¶26 Fifteen months after the bikers were sentenced to death, the actual killer strolled into a church in South Carolina and confessed to the crime, describing the murder weapon—a handgun he had stolen from the father of a woman he had dated. The gun had been found near the victim's body and linked to the crime by ballistics before the bikers' trial, but it had been locked in a police safe and its existence had not been disclosed to the defense. After the killer confessed, the motel maid made a confession of her own—that she had fabricated her testimony at the behest of police and, in truth, that she had neither seen the bikers at the motel nor witnessed the murder.⁵⁶ The convictions

(2004); Larry Green, *12-year Legal Nightmare at an End*, L.A. TIMES, Aug. 15, 1989, at 5.

⁵³ Paul W. Valentine, *Jailed for Murder, Freed by DNA*, WASH. POST, June 29, 1993, at A1.

⁵⁴ JUNKIN, *supra* note 52. A decade after Bloodsworth's release, the technology that exonerated him identified the actual perpetrator as Kimberly Shay Ruffner. Susan Levine, *Ex-Death Row Inmate Hears Hoped-for Words: We Found Killer*, WASH. POST, Sept. 6, 2003, at A1.

⁵⁵ This summary of the case is drawn from court records and copies of articles provided to the Center on Wrongful Convictions by Ronald Keine, one of the wrongfully convicted defendants.

⁵⁶ John Parker, *Key Witness Says She Lied about Slaying*, ALBUQUERQUE TRIB., Jan. 22, 1975, at A1.

were then vacated and the charges dropped.⁵⁷ Had the killer not come forward, the bikers in all likelihood would have gasped their last in the New Mexico gas chamber.⁵⁸

¶127 The wrongfully convicted Texas school custodian was Clarence Brandley,⁵⁹ one of five custodians on the school premises when the visiting volleyball team's student manager was raped and slain in 1980. The victim was white, as were the other four custodians, one of whom years later quoted a Texas Ranger involved in the investigation as declaring that somebody had to pay for the crime and telling Brandley, "[s]ince you're the nigger, you're elected."⁶⁰ The crime occurred in Montgomery County, where the Ku Klux Klan was still active.⁶¹ Brandley was indicted by an all-white grand jury⁶² and semen recovered from the victim that might have established his innocence was discarded by the Montgomery County medical examiner.⁶³ After one trial ended in a hung jury, Brandley was convicted at his second trial and sentenced to death. (The prosecution used peremptory challenges to exclude all blacks from both juries.)⁶⁴ His conviction was affirmed by the Texas Court of Criminal Appeals in 1986.⁶⁵

¶128 Shortly thereafter, a young woman came forward claiming that her common law husband, from whom she was estranged, had told her he committed the crime.⁶⁶ James McCloskey of Centurion Ministries launched a reinvestigation⁶⁷ and the case began to attract national attention.⁶⁸ McCloskey established that key testimony implicating Brandley at the trial had been perjured, prompting the Court of Criminal Appeals to designate a special judge, Perry Pickett, to conduct an evidentiary hearing.⁶⁹ After ten days of testimony, Judge Pickett recommended that the Court of Appeals grant Brandley a new trial, declaring that never in his thirty years on the bench had he seen "a more shocking scenario of the effects of racial prejudice . . . and public officials who for whatever motives lost sight of what is right and just."⁷⁰ After the Court of Appeals accepted Pickett's recommendation, and the prosecution dropped the charges against Brandley, setting him free,⁷¹ McCloskey observed:

Clarence Brandley is lucky. He's lucky because his case developed a lot of notoriety. A lot of good and competent people came to his aid—the

⁵⁷ Douglas Glazier, *Bikers Cleared of Murder*, DETROIT NEWS, Dec. 16, 1975, at 1.

⁵⁸ On March 18, 2009, the New Mexico death penalty was abolished. Boyd, *supra* note 1.

⁵⁹ The account of this case is drawn in large part from MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE* 119–36 (1992).

⁶⁰ *Id.* at 131.

⁶¹ *Id.* at 121.

⁶² *Id.* at 123.

⁶³ *Id.* at 125.

⁶⁴ *Id.* at 125, 131. Both of Brandley's trials occurred more than five years before the Supreme Court held in *Batson v. Kentucky*, 476 U.S. 79 (1986) that exercising peremptory challenges purposefully to exclude jurors of a defendant's race violated the Equal Protection Clause of the Fourteenth Amendment.

⁶⁵ Brandley v. State, 691 S.W.2d 699 (Tex. Crim. App. 1985).

⁶⁶ RADELET, BEDAU & PUTNAM, *supra* note 59, at 126.

⁶⁷ *Id.* at 129.

⁶⁸ Peter Applebome, *The Truth Is Also on Trial in a Texas Death Row Case*, N.Y. TIMES, Oct. 4, 1987, at 26.

⁶⁹ RADELET, BEDAU & PUTNAM, *supra* note 59, at 132.

⁷⁰ *Id.* at 134.

⁷¹ *Id.* at 135–36.

public, lawyers, and investigators. He's lucky because there are a lot of Clarence Brandleys and they are still buried in prison or on Death Row.⁷²

¶29 Even luckier, perhaps, was Anthony Porter, a Chicagoan who was saved from execution by a journalism class project.⁷³ Convicted of two murders that occurred in 1982, Porter had exhausted his appeals, his family had made his funeral arrangements, and he was just fifty hours away from execution when the Illinois Supreme Court granted a reprieve in late 1998.⁷⁴ The reprieve was granted not out of concern that Porter might be innocent, but because he had tested so low on an IQ test that the court was not sure he could comprehend what was about to happen to him, or why.⁷⁵

¶30 Although the court's intent was merely to provide time to explore the question of the condemned man's mental fitness to be executed,⁷⁶ it had an unintended consequence: It created a time interval that allowed a team of students in Professor David Protes's investigative reporting class at Northwestern University's Medill School of Journalism to investigate the case and establish Porter's innocence. After a private investigator working with the class obtained a video-recorded confession from the real killer in 1999, Porter was freed.⁷⁷ Prosecutors dismissed the charges two weeks later.⁷⁸

¶31 The probability of the strokes of luck that saved Bloodsworth, Gladish, Greer, Keine, Smith, Brandley, and Porter is incalculable, but there is no room for doubt that for every man so lucky there must be several who are not so lucky—a point removed from the realm of speculation by two nineteenth-century capital cases, one of which ended in the exoneration of two condemned men, the other in the execution of an innocent man, to wit: in 1819, Steven and Jesse Boorn falsely confessed to the murder of their brother-in-law, Russell Colvin, and were sentenced to death. They were exonerated and freed in 1820 upon proof positive of their innocence—Colvin was found alive and well and living in New Jersey.⁷⁹ In 1886, William Jackson Marion was hanged in Nebraska for the murder of his best friend, John Cameron. There is proof positive of Marion's innocence

⁷² *Id.* at 135.

⁷³ Mark LeBien & Charlie Meyerson, *Porter Freed from Prison*, CHI. TRIB., Feb. 5, 1999, at 1.

⁷⁴ Christi Parsons, *Court Stalls Execution, Asks if Killer is Smart Enough to Die*, CHI. TRIB., Sept. 22, 1998, at 1.

⁷⁵ *Id.*

⁷⁶ *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁷⁷ E.g., Douglas Holt & Steve Mills, *Double Murder Case Unravels*, CHI. TRIB., Feb. 4, 1999, at 1; Douglas Holt & Flynn McRoberts, *Porter Fully Savors 1st Taste of Freedom: Judge Releases Man Once Set for Execution*, CHI. TRIB., Feb. 6, 1999, at 1; Daniel J. Lehmann, *Porter Murder Convictions Thrown Out*, CHI. SUN-TIMES, Mar. 11, 1999, at 1.

⁷⁸ Porter's exoneration set in motion a chain of events that prompted Illinois Governor George H. Ryan to declare a moratorium on executions in 2000 and to commute the death sentences of all Illinois death row prisoners three years later. See Ken Armstrong & Steve Mills, *Ryan: 'Until I Can be Sure': Illinois is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1; Maurice Possley & Steve Mills, *Clemency for All*, CHI. TRIB., Jan 12, 2003, at 1. Ryan's action, in turn, prompted significant criminal justice reforms. See, e.g., Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381 (2005); John Cullerton et al., *Capital Punishment Reform in Illinois—A Model for the Nation*, 16:8 J. DUPAGE COUNTY BAR ASS'N. (Apr. 2004).

⁷⁹ LEONARD SARGEANT, THE TRIAL CONFESSIONS AND CONVICTION OF JESSE AND STEPHEN BOORN FOR THE MURDER OF RUSSELL COLVIN AND THE RETURN OF THE MAN SUPPOSED TO HAVE BEEN MURDERED (1873).

as well—Cameron was found alive in Kansas. Unlike Colvin, however, Cameron did not turn up in time to prevent a wrongful execution.⁸⁰

IV. EXECUTED DESPITE DOUBTS ABOUT GUILT

¶32 Although supporters of capital punishment, including Supreme Court Justice Antonin Scalia, delight in pointing out that there has not been a proven execution of an innocent person in the United States in recent decades,⁸¹ such serious doubts have been raised about the guilt of a sufficiently significant number of those executed in the post-*Furman* age that it defies common sense, and the laws of probability, to deny that some of them had to have been innocent.

¶33 Here are a dozen examples of possible mistaken executions:

1. James Adams

¶34 James Adams, a black man, was executed in Florida in 1984, for the murder eleven years earlier of a well-to-do white rancher, in the wake of what Supreme Court Justice Thurgood Marshall termed “an indecent desire to rush to judgment in capital cases.”⁸² The conviction rested on what Adams’ all-white jury saw as conclusive evidence—the testimony of a witness who claimed to have seen Adams and the victim shortly before the crime driving their respective cars in the vicinity of the victim’s home, the testimony of other witnesses who said they had seen Adams’ car in the driveway of the home, jewelry taken from the home recovered from the trunk of Adams’s car, and currency in Adams’ possession stained with blood of the victim’s type.⁸³

¶35 Other facts, however—some known at the time of the trial, others not discovered until years later—supported Adams’ claim of innocence and undermined the credibility of the prosecution case. First, the only witness who positively identified Adams as the driver of the car near the victim’s home had previously accused Adams of having an affair with his wife and threatened revenge, according to sworn statements by three of the witness’s friends. Second, another witness who saw the car told the police he was certain that Adams was not the driver. Third, Adams had claimed from the beginning that he had lent his car to a female friend, who had the car at the time of the crime. In a pretrial interview, the woman had substantiated his account, but, when called as a defense witness at the trial, changed her story, indicating that she had the car at a different time. Fourth, a witness stated that he heard a female yell from the victim’s home, “In the name of God, don’t do it.” Fifth, the currency with blood on it consistent with the victim’s blood was a single bill and the blood type was O positive—a type the victim shared with forty-five percent of the population. Sixth, before trial, the Florida State Crime Laboratory had excluded Adams as the source of hairs found in the victim’s hands.⁸⁴

⁸⁰ *The Dead is Alive: Jack Marion Not Guilty of the Crime for Which he was Executed*, Beatrice Daily Express (Neb.), Aug. 3, 1891, at 1. On the hundredth anniversary of his hanging, Marion received a pardon from Gov. Robert Kerrey. *In the Matter of a Posthumous Pardon to William Jackson Marion, Neb. Board of Pardons*, Mar. 25, 1987.

⁸¹ *Kansas v. Marsh*, 548 U.S. 163, 182 (2006) (Scalia, J., concurring) (devoting more than 6000 words to debunking claims of scholars, activists, and journalists that innocent persons have been executed recently).

⁸² *Wainwright v. Adams*, 466 U.S. 964, 965 (1984) (Marshall, J., dissenting).

⁸³ *Adams v. State*, 341 So. 2d 765, 766 (Fla. 1976).

⁸⁴ RADELET, *supra* note 59, at 5–10.

2. Timothy Baldwin

¶36 Convicted of beating an eighty-five-year-old former neighbor woman, a family friend, to death during a robbery in 1978 in West Monroe, Louisiana, Timothy Baldwin was executed six years later despite a post-trial discovery of a receipt indicating that he had checked into a motel seventy miles away less than an hour after the crime.⁸⁵

¶37 Before the discovery of the receipt, there was ample cause to question Baldwin's guilt. The victim, who survived the attack and regained consciousness before dying the next day in a hospital, stated that she did not know her attacker—although she knew Baldwin well. Also, witnesses reported seeing a man in his twenties with long hair and wearing a short-sleeved shirt leave the victim's home shortly after the crime. Baldwin, who had no record of violence, was thirty-eight, had a crew cut, and always wore long-sleeved shirts because he was embarrassed by tattoos he had inflicted upon himself in his youth.⁸⁶

3. Ruben Cantu

¶38 Ruben Cantu was executed in 1993 in a Texas case that transformed former Bexar County District Attorney Sam D. Millsap Jr., the man who sent Cantu to death row, from a proponent into an opponent of capital punishment—after an epiphany that “a prosecution and execution that I was responsible for may well have . . . produced the execution of an innocent man.”⁸⁷

¶39 Cantu was seventeen in 1984 when two youths broke into a house that was under construction in San Antonio and robbed and repeatedly shot two workmen who were sleeping there to protect the premises. One of the workmen died. The other was left for dead, but survived. Cantu was convicted and sentenced to death solely on the basis of an identification by the surviving victim,⁸⁸ who had twice failed to identify Cantu from photo spreads before finally identifying him from a third photo spread. At trial, the victim claimed that he had recognized him in all three spreads but did not identify him out of fear of Cantu.⁸⁹

¶40 The case attracted little publicity as Cantu exhausted his appeals. Even his last request—for a piece of bubble gum—was denied. Twelve years later, however, his story burst into the headlines when two witnesses—one was the survivor of the 1984 attack who had been the star witness for the prosecution, the other Cantu's codefendant who had been tried separately and sentenced to prison—told the *Houston Chronicle* that Cantu had not been involved in the crime.⁹⁰

¶41 Bexar County District Attorney Susan B. Reed pronounced the disclosures “very troubling” and vowed a thorough investigation.⁹¹ The result was a 113-page report issued in 2007 concluding that Cantu had in fact been guilty.⁹² Reed's spokesperson proclaimed

⁸⁵ Baldwin v. Maggio, 704 F.2d 1325, 1329 n.7 (5th Cir. 1983).

⁸⁶ Tom Wicker, *In the Nation: Death is Different*, N.Y. TIMES, May 25, 1982, at A23.

⁸⁷ Kim Cobb, *Cantu DA's New Views Get a Tough Reception in Texas*, HOUSTON CHRON., Jan. 30, 2007, at 1.

⁸⁸ Cantu v. State, 738 S.W.2d 249, 250 (Tex. 1987).

⁸⁹ *Id.* at 251.

⁹⁰ Lise Olsen, *Cantu Case: Death and Doubt*, HOUSTON CHRON., Nov. 21, 2005, at 1.

⁹¹ Rick Casey, *San Antonio DA to Probe Questions Over '93 Execution*, HOUSTON CHRON., Nov. 23, 2005, at 1.

⁹² Investigation Relating to *The State of Texas v. Ruben Cantu*, Cause No. 85-CR-1303, available at

the report fair, but the attorney for the surviving victim disagreed, saying: “What we got with the DA’s report is not a fair evaluation, but an evaluation with a cloud over it—a cloud created by a fact-finder with a significant interest in the outcome.”⁹³

4. Girvies Davis

¶42 The chain of events that culminated in the execution of Girvies Davis in Illinois in 1995 began sixteen years earlier when he was arrested and jailed for a different crime. Ten days after his arrest, officers took him for a midnight ride in a squad car, ostensibly looking for evidence, and, according to the officers, he voluntarily signed confessions to every unsolved murder in two counties—some of which prosecutors conceded he could not have committed.⁹⁴

¶43 Davis claimed that he signed the confessions under duress after the officers took him out of the squad car on a secluded road, removed his shackles, and offered him a choice—run for his life or sign the confessions.⁹⁵ Jail records indicated that he had been taken from his cell around 10:00 P.M. and not returned until after he signed the confessions.⁹⁶

¶44 An all-white jury accepted the white officers’ account over that of the black defendant, whom the jury found guilty of the crime for which he would die—the murder of an eighty-nine-year-old retired farmer in Belleville in 1978. The jury, however, was unaware of a pertinent fact—that Davis had been illiterate when he signed the confession. He could not read, and could not write anything except his name.⁹⁷

¶45 When Davis’s illiteracy was widely publicized shortly before the execution, one juror was stunned. “We never would have found him guilty if we’d known he couldn’t read or write,” the juror was quoted as saying.⁹⁸ Just fifteen hours before the execution, when Davis’s only hope was executive clemency, the juror sent a fax to Governor Jim Edgar saying, “I believe my verdict was wrong. I deeply regret this terrible mistake on our part, and I hope it does not cause [*sic*] Mr. Davis his life.”⁹⁹

¶46 Unmoved, Governor Jim Edgar rejected clemency, saying in a news release that he was convinced Davis was “responsible for the murder for which he received the death penalty.”¹⁰⁰

5. Carlos De Luna

¶47 Carlos De Luna was executed in Texas in 1989 for the murder of a Corpus Christi filling station clerk six years earlier—a crime that De Luna’s relatives, friends, and supporters believe was committed by a violent felon named Carlos Hernandez. About forty minutes after the attack, police found De Luna shirtless and shoeless and hiding

http://www.bexar.org/da2/body_pages/morenocantuinvestigation.pdf.

⁹³ Maro Robbins with contributions from Lise Olsen, *Cantu Case Report Hasn't Shut Door on Debate*, HOUSTON CHRON., July 8, 2007, at B4.

⁹⁴ Dennis Byrne, *Commute Davis' Death Sentence*, CHI. SUN-TIMES, May 14, 1995, at 33.

⁹⁵ Jill Smolowe, Michelle Donley & James Wilwerth, *Untrue Confessions*, TIME, May 22, 1995, at 51.

⁹⁶ *Id.*

⁹⁷ Eric Zorn, *Shadows of Doubt Cast Executions in Different Light*, CHI. TRIB., Mar. 28, 1995, Chicagoland Sect., at 1.

⁹⁸ DAVID PROTESS & ROB WARDEN, A PROMISE OF JUSTICE 4 (1998).

⁹⁹ *Id.* (alteration in original).

¹⁰⁰ Alex Rodriguez, *Davis Put to Death*, CHI. SUN-TIMES, May 17, 1995, at 1.

under a pickup truck a few hundred yards from the station. “I didn’t do it,” he said, “but I know who did.”¹⁰¹

¶48 There was no physical evidence linking De Luna to the crime—no blood, even though the victim, who had been stabbed repeatedly, had struggled with her attacker and bled profusely. Two eyewitnesses identified De Luna at trial, one saying he saw him outside the station with a knife, the other saying he saw him fleeing the scene. De Luna had been in the area when the police arrived. He testified that he had hidden under the pickup because he was on parole and had been drinking—a violation that could send him to prison. He stated that Hernandez had committed the crime, but the lead prosecutor told the jury that Hernandez was a “phantom,” although in fact Hernandez was well known to the prosecutor’s second chair, who had prosecuted him in another case.

¶49 The jury found De Luna guilty, and he was sentenced to death.¹⁰² After a 2006 reinvestigation of the case, the *Chicago Tribune* reported that five persons who knew Hernandez stated that he had boasted of committing the crime and gloated that De Luna, whom he called his “stupid todayo” (namesake) had gone to Death Row in his place. Several of the witnesses said they had not come forward initially because they feared that Hernandez would kill them; Hernandez died in prison in 1999. A senior Corpus Christi detective, Eddie Garza, who knew both Hernandez and De Luna, was quoted saying the filling station stabbing was the kind of crime Hernandez, but not De Luna, would commit.¹⁰³

6. Gary Graham

¶50 Gary Graham (a.k.a Shaka Sankofa) was executed in Texas in 2000 for a murder that occurred nineteen years earlier during a purported armed robbery in the parking lot of a Houston supermarket.¹⁰⁴ Graham was convicted solely on a cross-racial identification by a woman named Bernadine Skillern, who had seen the killer for only a few seconds through her car windshield, at night, from about thirty-five feet away.¹⁰⁵

¶51 Graham, age seventeen,¹⁰⁶ was arrested for a string of armed robberies a week after the murder. His trial lawyer was Ronald G. Mock, who, although just three years out of law school, had been appointed to the case by the trial judge. If Mock had done even a cursory investigation, he would have learned of two eyewitnesses who were certain that Graham was not the killer; both of these witnesses had better views of the killer than Skillern did. An investigation also would have revealed that, although Skillern positively identified Graham in a live line-up, she initially had identified him only tentatively from an array of five photographs shown to her by police. Graham’s photo was the only one of the five depicting a person who fit the description of the killer Skillern had given to

¹⁰¹ Maurice Possley & Steve Mills, *Did This Man Die for This Man’s Crime?* (with photos of Carlos De Luna and Carlos Hernandez), CHI. TRIB. June 25, 2006, at 1 (part 1 of 3).

¹⁰² Possley & Mills, *A Phantom or the Killer?*, CHI. TRIB. (part 2 of 3), June 26, 2006, at 1.

¹⁰³ Possley & Mills, *For Another Man’s Crime?: The Secret that Wasn’t*, CHI. TRIB. (part 3 of 3), June 27, 2006, at 1.

¹⁰⁴ Pete Slover & George Kuempel, *Graham Executed Amid Protests*, DALLAS MORNING NEWS, June 23, 2000, at 1A.

¹⁰⁵ IN RE GARY GRAHAM, PETITION FOR A RECOMMENDATION OF A REPRIEVE OF EXECUTION AND PARDON, OR ALTERNATIVELY, A CONDITIONAL PARDON OR COMMUTATION OF DEATH PENALTY, at 8–10.

¹⁰⁶ Five years after Graham’s execution, the Supreme Court banned capital punishment for defendants convicted of crimes committed before attaining age eighteen. *Roper v. Simmons*, 543, 568 U.S. 551, 543 (2005).

police.¹⁰⁷ Mock called no defense witnesses¹⁰⁸ and even told the jury that Skillern deserved a standing ovation for her bravery in testifying against Graham.¹⁰⁹

¶52 By the time of Graham’s execution, Mock had been appointed in other Harris County capital cases—and had a perfect record of losing; a dozen of his clients were on death row in a unit mockingly called the Mock Wing.¹¹⁰ In the days leading up to Graham’s execution, the case attracted international attention¹¹¹ because his last hope of escaping his fate was a grant of clemency from Governor George W. Bush, who was in the heat of his presidential campaign. Bush denied clemency and Graham went to his death professing innocence. “I would like to say that . . . I’m an innocent black man that is being murdered,” he said. “This is a lynching that is happening in America tonight.”¹¹²

7. Larry Griffin

¶53 Larry Griffin was executed in Missouri in 1995 for the murder of a drug dealer named Quintin Moss, who had been killed in a drive-by shooting fifteen years earlier.¹¹³ Griffin was a logical suspect because his older brother, who also was a drug dealer, had been gunned down six months earlier—and Moss had been a prime suspect in that case.¹¹⁴

¶54 The only evidence linking Griffin to the Moss murder was the testimony of a purported eyewitness named Robert Fitzgerald who, as Missouri Supreme Court Justice Charles B. Blackmar would put it, “had a seriously flawed background.”¹¹⁵ Fitzgerald was a criminal recidivist whom the U.S. Justice Department, in exchange for his cooperation in an on-going investigation in Massachusetts, had placed in the federal witness protection program and relocated from Boston to St. Louis.¹¹⁶

¶55 Fitzgerald, according to his testimony, was driving a friend and the friend’s little girl to a relative’s house on a scorching summer afternoon in 1980 when, as they were passing through a drug-infested area of St. Louis, the car overheated and stalled, its battery drained. The friend removed the battery and went to get it charged, leaving his daughter in Fitzgerald’s care. The friend returned with the charged battery and was reinstalling it when gunfire rang out from a slow-moving car. Fitzgerald pushed the little girl to the ground and threw his body over hers, protecting her from harm, all the while focusing his attention on the slow-moving car. He had a clear view of the car, the license number of which he memorized, and of a man in the front seat firing a handgun.¹¹⁷

¹⁰⁷ IN RE GARY GRAHAM, *supra* note 105.

¹⁰⁸ Graham v. Johnson, 168 F.3d 762, 765 (5th Cir. 1999).

¹⁰⁹ Sara Rimer & Raymond Bonner, *Texas Lawyer’s Death Row Record a Concern*, N.Y. TIMES, June 11, 2000, at 1.

¹¹⁰ *Id.*

¹¹¹ For instance, CNN carried substantial stories on June 9, 2000 (transcript No. 60900V12), June 13, 2000 (transcript No. 61311V08), June 20, 2000 (transcript No.62005V23), June 21, 2000 (transcript Nos. 62102V23 & 62109V08), June 22, 2000 (transcript Nos. 62209V00 & 62201V62), and June 23, 2000 (transcript No. 62303V09).

¹¹² Gary Graham, Last Statement (June 22, 2000), Texas Department of Criminal Justice, *available at* <http://www.tdcj.state.tx.us/stat/grahamgarylast.htm>.

¹¹³ Carolyn Tuft, *Killer Put to Death in Decade-old Murders*, ST. LOUIS POST-DISPATCH, July 27, 1995, at 3B.

¹¹⁴ State v. Griffin, 662 S.W.2d 854, 855 (Mo. 1983).

¹¹⁵ *Id.* at 860.

¹¹⁶ Kevin Cullen, *Court Clears the Way for Missouri Execution*, BOSTON GLOBE, June 20, 1995, at 23.

¹¹⁷ *Griffin*, 662 S.W.2d at 856.

¶56 After Fitzgerald identified Griffin from a police photo as the man firing from the front seat, Griffin was arrested and charged with the murder of Moss.¹¹⁸ There was no physical evidence linking Griffin to the crime, but Fitzgerald's dubious account of what happened was enough for a jury to find Griffin guilty, enough for the trial judge to sentence him to death, and enough for appellate courts at all levels to affirm his conviction and sentence.¹¹⁹

¶57 Griffin professed innocence from the start and, by the time he was executed, substantial evidence had been developed to support his contention: Fitzgerald admitted that before he identified Griffin a police officer showed him a photo of Griffin and said, "[W]e know that this man is involved."¹²⁰ Additional evidence of Griffin's innocence was discovered by investigators hired by the NAACP Legal Defense Fund (LDF) after the execution: A bystander who was wounded in the drive-by shooting stated that he, too, saw the killers and would have recognized Griffin, whom he had known for years, if Griffin had been involved.¹²¹ Moss's sister, who also witnessed the shooting, stated that Fitzgerald was not at the scene.¹²² The first police officer who arrived at the scene stated that Fitzgerald was not there when they arrived and Fitzgerald had not provided the license number of the car, as he had claimed.¹²³ (Fitzgerald could not be confronted with the post-execution evidence because he had died in 2004.)¹²⁴

¶58 In view of the LDF findings, the St. Louis Circuit Attorney designated a team of prosecutors and investigators to reinvestigate the case.¹²⁵ Unlike the LDF investigators, who had no access to non-public law enforcement records, the Circuit Attorney's team was able to locate the man who, according to Fitzgerald, had been reinstalling the car battery when the shooting occurred.¹²⁶ While that man corroborated parts of Fitzgerald's account, he provided details that contradicted Fitzgerald on two salient points: First, the car did not stall when they were passing through the neighborhood, as Fitzgerald had testified. They had gone there to buy narcotics. In fact, Moss was Fitzgerald's drug dealer.¹²⁷ Second, Fitzgerald had not shielded the man's daughter, as he claimed, and the child was not the man's daughter—but rather his son.¹²⁸

¶59 Despite the findings leaving no doubt that Fitzgerald had committed perjury at the Griffin trial, the Circuit Attorney concluded that, "[t]he wrong person was not executed for the murder of Quintin Moss."¹²⁹

¹¹⁸ *Id.*

¹¹⁹ *Id. cert. denied*, 469 U.S. 873 (1984); *Griffin v. State*, 748 S.W.2d 756 (Mo. 1988); *Missouri v. Griffin*, 469 U.S. 873 (1984); *Griffin v. Delo*, 946 F.2d 1356 (8th Cir. 1991), *aff'd* 961 F.2d 793 (8th Cir. 1992), *aff'd on other grounds*, 33 F.3d 959 (8th Cir. 1994), *reh'g denied*. 515 U.S. 1138 (1995).

¹²⁰ *Griffin v. Delo*, No. 88-1704 C(2), U.S. Dist. Ct., E.D. Mo., hearing tr., Oct. 6, 1993, at 19–23.

¹²¹ SAMUEL R. GROSS, THE MURDER OF QUINTIN MOSS, Report Commissioned by LDF, June 10, 2005, at 7–8, available at <http://truthinjustice.org/griffin-report.htm>.

¹²² *Id.* at 5.

¹²³ *Id.* at 5–6.

¹²⁴ Terry Ganey, *After Execution, Case is Reopened*, ST. LOUIS POST-DISPATCH, July 12, 2005, at A1.

¹²⁵ *Id.*

¹²⁶ REPORT OF THE CIRCUIT ATTORNEY: ON THE MURDER OF QUINTIN MOSS AND CONVICTION OF LARRY GRIFFIN (E.D. Mo.) (July 12, 2007) 96–100.

¹²⁷ *Id.* at 97.

¹²⁸ *Id.*

¹²⁹ *Id.* at 119.

8. Leonel Herrera

¶160 When Leonel Herrera was executed in 1993 for the murder twelve years earlier of a Texas police officer,¹³⁰ his last words were: “I am innocent, innocent, innocent. Make no mistake about this; I owe society nothing I am an innocent man, and something very wrong is taking place tonight. May God bless you all. I am ready.”¹³¹

¶161 After Herrera was sentenced to death for the crime for which he was executed, he pled guilty to the murder of a second officer. The officers were shot and killed together on a lonely stretch of highway near Los Fresnos in 1981.¹³² Twelve years later, Herrera was executed despite new evidence indicating that his brother, Raúl Herrera, had slain the officers.¹³³

¶162 The evidence of the convicted man’s innocence and his brother’s guilt—affidavits from, among others, the brother’s son, former attorney, and a former cellmate—came to light after Leonel Herrera had lost his state and federal appeals and after Raúl Herrera had died. The latter, according to the attorney and the cellmate, had admitted to committing the crime to them. The son said he was present when his father shot the officers to death.¹³⁴

¶163 Based on the affidavits, Herrera filed a petition for a state writ of habeas, claiming that he was innocent of both murders. After that was denied, he filed a successor petition for a federal writ of habeas corpus, which also was denied. The Supreme Court granted certiorari and held, infamously, that a freestanding claim of actual innocence is not a ground for federal habeas relief.¹³⁵

¶164 In what Americans unschooled in the sophistry of death jurisprudence no doubt would take for granted, Justice Harry Blackmun wrote in a dissenting opinion joined by Justices John Paul Stevens and David H. Souter: “Nothing could be more contrary to contemporary standards of decency . . . than to execute a person who is actually innocent. . . . The execution of a person who can show that he is innocent comes perilously close to simple murder.”¹³⁶

9. Leo Jones

¶165 Leo Jones, a twenty-nine-year-old black man, was convicted by an all-white jury of the sniper murder of a white police officer in 1981 in Duval County, Florida.¹³⁷ The conviction rested primarily on a signed confession that Jones claimed had been beaten out of him by sheriff’s officers.¹³⁸

¶166 While Jones’ appeals were pending, more than a dozen witnesses came forward to testify that the murder had been committed not by Jones but by a criminal named Glen

¹³⁰ *Herrera v. State*, 682 S.W.2d 313, 316 (Tex. 1984).

¹³¹ Leonel Torres Herrera, Last Statement (May 12, 1993), Texas Department of Criminal Justice, *available at* <http://www.tdcj.state.tx.us/stat/herreraleonellast.htm>.

¹³² *Herrera v. State*, 682 S.W.2d 313 (Tex. 1984).

¹³³ Kathy Fair, *‘I am Innocent, Innocent’: Herrera Executed in Shooting Death of South Texas Lawman*, HOUSTON CHRON., May 12, 1993, at 1.

¹³⁴ *Herrera v. Collins*, 506 U.S. 390, 396 (1993).

¹³⁵ *Id.* at 405.

¹³⁶ *Id.* at 430–46 (Blackmun, J., dissenting).

¹³⁷ Steve Mills, *Questions of Innocence; Legal Roadblocks Thwart New Evidence on Appeal*, CHI. TRIB., Dec. 18, 2000, at 1.

¹³⁸ *Jones v. State*, 709 So. 2d 512, 515 (Fla. 1998).

Schofield. Among the witnesses were six of Schofield's former cellmates who testified that he told them he had committed the crime, two witnesses who testified that they had seen Schofield in the vicinity of the shooting with a rifle, a woman who testified that Schofield had asked her to provide a phony alibi, and another woman who testified that shortly after the crime Schofield told her he had just shot "a guy."¹³⁹

¶67 In addition, a retired sheriff's officer, Cleveland Smith, testified at an evidentiary hearing that, beginning two days after the sniper shooting, one of the officers who obtained Jones' confession, Lynwood Mundy, had repeatedly stated that he had beaten persons in the building where Jones was arrested.¹⁴⁰ Smith also testified that he personally had seen Mundy extract a confession from a suspect in an unrelated case by squeezing the suspect's genitals with a vice grip.¹⁴¹

¶68 Despite the new evidence, the Florida Supreme Court, in a five-to-two decision issued on March 13, 1998, rejected Jones' final appeal for a new trial.¹⁴² Eleven days later, Jones went to the electric chair, saying only, "I bear witness that there is no God but Allah, and Mohammed is his messenger."¹⁴³

10. Joseph O'Dell

¶69 Joseph O'Dell was executed in Virginia in 1997 after he was denied DNA testing that could have exonerated him of the rape and murder for which he had been convicted and sentenced to death twelve years earlier.¹⁴⁴

¶70 In 1983, O'Dell and the victim left a Virginia Beach bar separately. A little more than two hours later, O'Dell appeared at a convenience store with blood on his face, hands, and clothes. The victim's body was found the next day. She had been beaten, raped, sodomized, and strangled. O'Dell was arrested on a tip from a woman with whom he was living and his conviction rested primarily on the blood on his clothes, which matched the victim's blood type.¹⁴⁵ At the time, O'Dell was on parole for a Florida kidnapping and robbery in which the victim had alleged that he tried to rape her.¹⁴⁶

¶71 In 1990, rudimentary DNA testing established that the blood on O'Dell's clothes was not the victim's. Later, after DNA testing became more sophisticated, O'Dell sought testing of the bodily fluids recovered from the victim. The testing had the potential of excluding O'Dell as the rapist, but O'Dell's request was denied even though, unless it proved exculpatory, it would not have delayed the execution and would have cost the state nothing.¹⁴⁷

¶72 After the execution, the Roman Catholic Diocese of Richmond sought to have the evidence tested. The state objected, asserting that if the results indicated O'Dell had not raped the woman, "it would be shouted from the rooftops that the Commonwealth of

¹³⁹ *Id.* at 529 (Anstead, J., concurring in part, dissenting in part.).

¹⁴⁰ *Id.* at 530–31 (Shaw, J., dissenting).

¹⁴¹ *Id.* at 531.

¹⁴² *Id.* at 514–26.

¹⁴³ Monica Scott, *Cop Killer Goes To Death Praying*, ORLANDO SENTINEL, Mar. 25, 1998, at D1.

¹⁴⁴ John Tucker, *What's Wrong with Making Sure?*, WASH. POST, July 20, 1997, at C3.

¹⁴⁵ *O'Dell v. Commonwealth*, 234 Va. 672, 679–80 (1988). *See also* HELEN PREJEAN, *THE DEATH OF INNOCENTS* 54–166 (2005).

¹⁴⁶ *O'Dell*, 234 Va. at 706.

¹⁴⁷ Paul F. Enzinna, Op-Ed., *Afraid of a Shadow of a Doubt*, WASH. POST, May 7, 2000, at B8.

Virginia executed an innocent man.” The request was denied, and the evidence was destroyed.¹⁴⁸

11. Roy Roberts

¶73 Roy Roberts may have been innocent not only of the crime for which he was executed in 1999—the murder of a Missouri prison guard—but also of the crime for which he was in prison when the guard was slain.¹⁴⁹

¶74 The murder occurred in 1983 during a disturbance at the Moberly Correctional Center, where Roberts, thirty, was nearing completion of his sentence for an armed robbery, which occurred five years earlier. Four witnesses—three guards and an inmate—testified that Roberts held the victim while two other prisoners stabbed him to death. There was physical evidence linking the others to the crime, but none linking Roberts. Eight prisoners testified that Roberts was not involved.¹⁵⁰

¶75 Evidence that came to light later raised serious questions about the accuracy of the eyewitnesses who claimed Roberts was involved in the crime. An investigative report completed by the Missouri Department of Corrections fifteen days after the murder did not mention Roberts, even though the report was based on, *inter alia*, interviews with the four witnesses who belatedly identified him. The report did identify the two men who actually stabbed the victim, adding that “additional participants [in the crime] might not ever be identified.” Although Roberts weighed more than 300 pounds and seemingly would have been rather hard for the witnesses to have missed, the first witness to identify him did so two days after the report and seventeen days after the murder.¹⁵¹

¶76 While Roberts’ last-ditch plea for clemency was pending before Governor Mel Carnahan, *St. Louis Post-Dispatch* Columnist Bill McClellan interviewed a man who bore a striking resemblance to Roberts and who claimed to have committed the armed robbery for which Roberts was in prison when the guard was slain.¹⁵² The petition was denied by Carnahan, to whom Roberts addressed his last words: “You’re killing an innocent man, and you can kiss my ass.”¹⁵³

¹⁴⁸ *Id.*

¹⁴⁹ Bill McClellan, *As Execution Nears, Let's Hope the Courts Got This One Right*, ST. LOUIS POST-DISPATCH, Feb. 21, 1999, at C1.

¹⁵⁰ See, e.g., Jonathan Alter, *How Sure is Sure Enough?*, NEWSWEEK, Mar. 22, 1999, at 37; State v. Driscoll, 711 S.W.2d 512, 514 (Mo. 1986).

¹⁵¹ Application of Roy Michael Roberts to Gov. Mel Carnahan for Executive Clemency, Mo. Bd. of Pardons and Parole, Feb. 1999, at 6.

¹⁵² McClellan, *supra* note 149.

¹⁵³ Kim Bell, *In Last Words, Roy Roberts Maintains Innocence In Prison Guard's Killing*, ST. LOUIS POST-DISPATCH, Mar. 10, 1999, at A9.

12. Cameron Todd Willingham

¶77 Cameron Todd Willingham was executed in Texas in 2004 for the purported arson murder of his three daughters. A post-execution investigation by the *Chicago Tribune* indicated that a jury had convicted Willingham on arson theories that scientific advances had proved to be baseless.¹⁵⁴

¶78 The fire occurred in the Willingham home two days before Christmas 1991. The children—Amber, age two, and twins Karmon and Kameron, age one—died of smoke inhalation.¹⁵⁵ At Willingham’s 1992 trial, a prosecution expert witness testified that the floors, front threshold, and front concrete porch of the home had been burned, which could occur only when an accelerant has been used to purposely start a fire. The witness added that igniting of the floors and thresholds was typically employed by arson killers to impede any rescue attempts by firemen.¹⁵⁶

¶79 Willingham was convicted and, after all appeals failed,¹⁵⁷ went to his death, proclaiming: “I am an innocent man—convicted of a crime I did not commit. I have been persecuted for twelve years for something I did not do. From God's dust I came and to dust I will return”¹⁵⁸

¶80 In the years between the crime and the publication of the *Chicago Tribune* investigative report, many assumptions about arson held by so-called arson experts were found to be erroneous.¹⁵⁹ *Tribune* reporters consulted several leading authorities, who concluded unanimously that the testimony that sent Willingham to his death was baseless.¹⁶⁰

¶81 “There’s nothing to suggest to any reasonable arson investigator that this was an arson fire,” said one. Another said it “made [him] sick to think this guy was executed based on this investigation. . . . They executed this guy and they’ve just got no idea—at least not scientifically—if he set the fire, or if the fire was even intentionally set.” The *Tribune* also interviewed a Willingham juror who asked rhetorically, “[d]id anybody know about this prior to his execution? Now I will have to live with this for the rest of my life. Maybe this man was innocent.”¹⁶¹

¶82 These cases, as previously noted, are but a few examples of executions in which the presumption of guilt was, to say the least, questionable. Scholars, journalists, and activists have identified a substantial number of others. A study published in 1992 summarized twenty-three possible mistaken executions between 1905 and 1974.¹⁶² In

¹⁵⁴ Steve Mills & Maurice Possley, *Texas Man Executed on Disproved Forensics*, CHI. TRIB., Dec. 9, 2004, at 1.

¹⁵⁵ *Willingham v. State*, 897 S.W.2d 351, 354 (Tex. 1995).

¹⁵⁶ *Id.*

¹⁵⁷ Ending when the Supreme Court denied certiorari three months before the execution. *Willingham v. Dretke*, 540 U.S. 986 (2003).

¹⁵⁸ Cameron Todd Willingham, Last Statement (Feb. 17, 2004), Texas Department of Criminal Justice, available at <http://www.tdcj.state.tx.us/stat/willinghamcameronlast.htm>.

¹⁵⁹ In 1992, the National Fire Protection Association issued a report assessing the state of arson science. NFPA 921. For a concise overview of NFPA 921 and its relevance to the Willingham case, see Marc Price Wolf, *Habeas Relief from Bad Science*, 10 MINN. J.L. SCI. & TECH. 213 (2009).

¹⁶⁰ Mills & Possley, *supra* note 154.

¹⁶¹ *Id.*

¹⁶² RADELET, BEDAU, & PUTNAM, *supra* note 59, at 119–36. Those possibly executed by mistake were William H. Anderson, Fla., at 282; Everett Appelgate, N.Y., at 283; Thomas Bambrick, N.Y., at 284; Charles Becker & Frank Cirofici, N.Y., at 285; Roosevelt Collins, Ala., at 137–38; Sie Dawson, Fla., at 299; Vance Garner, Ala., at 306; Stephen Grzechowiak & Max Rybarczyk, N.Y., at 310; Richard Bruno

2000, the *New York Times* chronicled five possible wrongful executions in Texas.¹⁶³ Sister Helen Prejean has made a persuasive case that a man named Dobie Gillis Williams was executed in 1999 for a murder he did not commit.¹⁶⁴ Alan Dershowitz has chronicled evidence indicating that Ethel Rosenberg, who was executed for espionage in 1953, was innocent.¹⁶⁵ The Center on Wrongful Convictions has researched thirty-one additional possible wrongful executions.¹⁶⁶

V. FREAKISH APPLICATION OF DEATH

¶83 Another serious problem with the capital punishment system is that it is, as Tom Wicker of the *New York Times* aptly put it, “a hideously uncertain punishment.”¹⁶⁷ “If execution can be justified at all, it certainly should be reserved for those unquestionably responsible for the worst crimes,” Wicker wrote. “But for any number of reasons, whether a particular defendant should have been executed is all too often all too questionable.”¹⁶⁸

¶84 Reserving the most severe sanction known to the law not only is a moral imperative, but the Federal Constitution also requires that there be a meaningful distinction between the few cases in which the death penalty is imposed and the many cases in which it is not.¹⁶⁹ The death penalty is supposed to be reserved for “a narrow category of the most serious crimes.”¹⁷⁰ In practice, however, it has been applied in what some justices of the Supreme Court, in striking down all state capital punishment laws in 1972, concluded was an arbitrary, capricious, wanton, freakish, and discriminatory manner.¹⁷¹

¶85 In allowing the resumption of capital punishment four years later, the Supreme Court found that newly enacted state laws provided adequate safeguards against caprice.¹⁷² The decision brings to mind a riddle attributed to Abraham Lincoln: “How

Hauptmann, N.J., at 99–101; Joe Hill, Utah, at 314; Harold Lamble, Me., at 323; Maurice Mays, Tenn., at 332; Willie McGee, Mich., at 332; Nicola Sacco & Bartolomeo Vanzetti, Mass., at 97–99; Albert Sanders, Ala., at 343; Charles Sberna, N.Y., at 344; R. Mead Shumway, Neb., at 346–47; Charles Tucker, Mass., at 349; George Wing, N.Y., at 355.

¹⁶³ Raymond Bonner & Sara Rimer, *A Closer Look at Five Cases That Resulted in Executions of Texas Inmates*, N.Y. TIMES, May 14, 2000, at 1. The possibly wrongfully executed inmates were Odell Barnes (2000), James Beathard (1999), David Castillo (1998), Troy Farris (1999), and David Spence (1997).

¹⁶⁴ PREJEAN, *supra* note 145, at 3–53.

¹⁶⁵ ALAN M. DERSHOWITZ, *AMERICA ON TRIAL* 319–28 (2004).

¹⁶⁶ The possibly wrongfully executed persons were Brian Baldwin, Ala. (1999), Tim Baldwin, La. (1984), Charles Boyd, Tex. (1999), Earl Bramblett, Va. (2003), Windell Broussard, Tex. (2002), Dawud Abdullah Muhammad, a.k.a. David Junior Brown, N.C. (1999), David Castillo, Tex. (1998), Clydell Coleman, Tex. (1999), Willie Darden Jr., Fla. (1988), Robert Drew, Tex. (1994), James Earhard, Tex. (1999), Troy Farris, Tex. (1999), David C. Hill, S.C. (2004), Jerry Lee Hogue, Tex. (1998), Antonio James, La. (1996), Carl Johnson, Tex. (1995), Malcolm R. Johnson, Okla. (2000), Ricky Wayne Jones, Tex. (2001), Davis Losada, Tex. (1997), Frank McFarland, Tex. (1998), Robert Madden, Tex. (1997), Justin Lee May, Tex. (1992), Larry Moon, Ga. (2003), Kenneth Ransom, Tex. (1997), Charles Rector, Tex. (1999), Cornelius Singleton, Ala. (1992), David Stoker, Tex. (1997), Jesse Tafero, Fla. (1990), Thomas M. Thompson, Cal. (1998), Martin Vega, Tex. (1999), and Freddie Wright, Ala. (2000).

¹⁶⁷ Tom Wicker, *An Uncertain Penalty*, N.Y. TIMES, June 28, 1985, at 27.

¹⁶⁸ *Id.*

¹⁶⁹ *Furman v. Georgia*, 408 U.S. 238, 313 (1972).

¹⁷⁰ *Atkins v. Virginia*, 536 U.S. 394, 319 (2002).

¹⁷¹ *Furman*, 408 U.S. at 306 (1972) (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

¹⁷² *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

many legs does a dog have if you count its tail?” Knee-jerk answer: “Five.” Rejoinder: “No, four. Counting a tail as a leg doesn’t make it a leg.”¹⁷³ Alas, simply because the Supreme Court says something does not make it so, as two cases cited by Wicker illustrate.

¶86 The first case was that of Charles Milton, a black man with no record of violence, who was executed in Texas in 1985 for killing a woman during a liquor store robbery in Fort Worth. When the owner of the store grabbed the barrel of the gun Milton was pointing at him, the owner’s wife broke two bottles of wine over Milton’s head. As Milton and the owner continued to struggle for the gun, it went off, killing the woman.¹⁷⁴

¶87 The second case was that of John Young, a black man who had a record of violence. Young was electrocuted in Georgia in 1985 for a crime that was truly heinous—stomping three elderly persons to death in their homes. It was his background that gave rise to doubts about the appropriateness of the death penalty in his case. “As a child he was sleeping in the same bed with his mother, a prostitute, when she was murdered beside him; he was left to fend for himself from age eight, becoming, among other things, a child prostitute in order to survive,” Wicker reported.¹⁷⁵

¶88 The problem appears to be, as Justice John Marshall Harlan once observed, that, “[t]o 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, appear to be tasks which are beyond present human ability.”¹⁷⁶

VI. ACCIDENTS OF TIME AND GEOGRAPHY

¶89 Defendants convicted of other especially heinous murders have dodged death sentences simply because the crimes attributed to them occurred in jurisdictions that do not have death penalties.

¶90 Jeffrey Dahmer pled guilty in Wisconsin¹⁷⁷ to murdering seventeen boys and young men—whose heads, torsos, and various organs he kept in the refrigerator and freezer of his Milwaukee apartment. Had the venue of his crimes been Illinois—where he picked up at least three of his victims¹⁷⁸—Dahmer would have been a prime candidate for a death sentence.¹⁷⁹ He was sentenced to life in Wisconsin.¹⁸⁰

¶91 Joel Rifkin confessed in 1993 to murdering seventeen women in New York, a non-death penalty state.¹⁸¹ In adjacent New Jersey, Rifkin would have been eligible for the

¹⁷³ See Steve Chapman, *Misstating the Constitution*, CHI. TRIB., Feb. 26, 2009, at 29.

¹⁷⁴ Wicker, *supra* note 167.

¹⁷⁵ *Id.*

¹⁷⁶ *McGautha v. California*, 402 U.S. 183, 204 (1971).

¹⁷⁷ Wisconsin abolished the death penalty in 1853. HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 8 (1997).

¹⁷⁸ Rogers Worthington & Colin McMahon, *A Gruesome Pattern Unfolds*, CHI. TRIB., July 26, 1991, at 1.

¹⁷⁹ Section 720 ILCS 5/9-1(b)(3) makes the murder of two or more persons a death-eligible offense in Illinois.

¹⁸⁰ Dahmer was murdered in prison in 1994. *Dahmer Slain*, CAPITAL TIMES (Wis.), Nov. 28, 1994, at 1A.

¹⁸¹ In 1995, the New York State Assembly reinstated capital punishment. James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1. The Court of Appeals of New York declared the law unconstitutional nine years later. *People v. LaValle*, 3 N.Y.3d 88 (2004).

death penalty, but where he was he drew twenty-five years to life in exchange for agreeing to plead guilty to just one of the murders.¹⁸²

¶192 Anthony Calabrese, a Chicago organized crime assassin, admitted to fourteen murders and, in exchange for his testimony against his five former cohorts, was sentenced to just twelve years and four months in prison in March of this year.¹⁸³

¶193 In other high-profile murder cases, the death penalty was precluded for no reason other than timing. Although California had a death penalty on the books when Juan Corona hacked twenty-five migrant workers to death with a machete during a six-week killing spree in 1971, *Furman* came down before his 1972 trial. The maximum penalty for his crimes, thus, was life, which Corona received.¹⁸⁴

¶194 Richard Speck, who raped and stabbed eight young women to death in Chicago in 1965, was sentenced to death in 1967, but the Supreme Court vacated the sentence because jurors who objected to capital punishment had been systematically excluded from the jury that convicted him.¹⁸⁵ In 1972, after *Furman*, Speck was resentenced to an indeterminate term of 400 to 1200 years in prison.¹⁸⁶

¶195 Charles Manson's death sentence for the Tate/LaBianca murders was automatically reduced to life in prison when, shortly before *Furman*, the California Supreme Court held that the death penalty was "impermissibly cruel" and therefore violated the state constitution.¹⁸⁷

¶196 Geography and timing, of course, also can have the opposite effect—leading to death sentences for crimes which, if committed on a different date or in a different location, would have been punishable only by incarceration.

¶197 John Wayne Gacy was convicted of murdering thirty-three young men and boys in Illinois during the 1970s. Had he committed those crimes in Iowa, where he had lived, and been convicted of sodomy, before moving to Illinois,¹⁸⁸ he would not have faced a death sentence—because Iowa had abolished the death penalty in 1965.¹⁸⁹ Furthermore, the last of Gacy's murders occurred on December 11, 1978.¹⁹⁰ Had it occurred just six months earlier, he could not have been sentenced to death—because Illinois did not then have a death penalty.¹⁹¹

¶198 As the foregoing cases indicate, the severity of punishment in the United States depends less on the nature of the crimes for which it is prescribed than on when and where the crimes were committed—an absurd basis for criminal justice policy.

¹⁸² John T. McQuiston, *Rifkin, at Sentencing, Apologizes for 17 Murders*, N.Y. TIMES, Jan. 26, 1996, at 6.

¹⁸³ Jeff Coen, *He Killed 14 People. He Got 12 Years*, CHI. TRIB., Mar. 27, 2009, at 1.

¹⁸⁴ Jerry Gilliam, *Corona Sentenced to 25 Life Terms*, L.A. TIMES, Feb. 6, 1973, at A1.

¹⁸⁵ *Speck v. Illinois*, 403 U.S. 946 (1971) (reversing and remanding for further proceedings consistent with *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

¹⁸⁶ Frank Blatchford, *New Speck Term: 400 to 1,200 Years*, CHI. TRIB., Nov. 22, 1972, at 1.

¹⁸⁷ *People v. Anderson*, 6 Cal. 3d 628, 656 (1972).

¹⁸⁸ *See, e.g., United States ex rel. Gacy v. Welborn*, No. 89C6392, 1992 U.S. Dist. LEXIS 12498 at *3 (N.D. Ill. Aug. 26, 1992); CLIFFORD L. LINEDECKER, *THE MAN WHO KILLED BOYS: THE JOHN WAYNE GACY, JR. STORY* 23 (1980); Scott Fornek, *John Gacy's Last Hours*, CHI. SUN-TIMES, May 8, 1994, at 18.

¹⁸⁹ BEDAU, *supra* note 12.

¹⁹⁰ *People v. Gacy*, 103 Ill. 2d 1 (1984).

¹⁹¹ Capital punishment was not reinstated in Illinois until June 21, 1977. Michael Locin, *Thompson Signs Death Penalty into Law*, CHI. TRIB., June 22, 1977, at 1.

VII. THE QUEST FOR PAINLESS EXECUTION

¶99 For the execution of Thomas Connor in Baltimore in 1853, a gallows was erected above the jail wall, affording a clear view of the spectacle for the thousands of morbidly curious men, women, and children who came to witness it. Connor ascended the scaffold, the noose was affixed, and the trap was sprung—but the rope broke. Connor fell twenty-five feet to the ground. He was carried back up to the platform where he lay for some twenty minutes—“well-nigh lifeless, horror-stricken”¹⁹²—while another rope was tested with a 1000-pound weight. That rope passed the test, and Connor was hanged again, this time successfully.¹⁹³

¶100 The following month, in New Orleans, convicted killers Jean Adam and Anthony Delisle died in a similarly grotesque fashion; as a reporter who covered the event described it:

Both nooses slipped and the unfortunate men fell together upon the pavement in a senseless condition [O]fficers of the law rushed forward, and the criminals were conveyed into the prison through the main entrance The condemned revived in a few minutes, and . . . were conducted to the scaffold The ropes were again adjusted, the platform fell, and the criminals were launched into eternity.¹⁹⁴

¶101 Seventeen years later, the hanging of John H. Skaggs in Bloomfield, Missouri, was arguably even more horrific. After a drop of five feet, his neck was not broken and his extremities shook for several minutes. He was cut down after a physician prematurely pronounced him dead, but was then found still to be breathing. He was carried into the jail, where he opened and closed his eyes, breathing heavily until he finally died fifteen hours later.¹⁹⁵

¶102 Botched hangings—and there were many—spawned a quest for a less grotesque mode of execution. By the 1880s, newspapers were regularly extolling electricity as the answer—a quick and painless way to kill criminals.¹⁹⁶ In 1886, the New York State Assembly created a commission to find the “most humane and approved method” of execution.¹⁹⁷ After evaluating various methods—including gas, which was rejected because, although painless, it took several minutes to kill, and lethal injection with prussic acid, which was rejected in part out of concern that it would create a public prejudice against the hypodermic syringe, a relatively recent invention—the commission settled on electricity as the best option, declaring it “instantaneous and painless” and “devoid of all barbarism.”¹⁹⁸ The State Assembly responded promptly, approving a statute providing that:

¹⁹² *Public Executions*, N.Y. DAILY TIMES, Aug. 8, 1853, at 4.

¹⁹³ *Id.*

¹⁹⁴ *Execution of Adam and Delisle—Horrid Spectacle*, N.Y. DAILY TIMES, July 12, 1852 (quoting NEW ORLEANS CRESCENT, July 3, 1852).

¹⁹⁵ *Hanged and Not Hanged*, CHI. TRIB., Aug. 30, 1870, at 3; *The Resuscitation Horror*, N.Y. TIMES, Sept. 3, 1870, at 8 (quoting ST. LOUIS REPUBLICAN, Aug. 28, 1870).

¹⁹⁶ MARK ESSIG, *EDISON & THE ELECTRIC CHAIR* 90 (2003) (citing, inter alia, the N.Y. HERALD, Nov. 26, 1979; N.Y. WORLD, Nov. 1, 1885; N.Y. DAILY TRIB., Feb. 25, 1885).

¹⁹⁷ *Id.* at 91.

¹⁹⁸ *Id.* at 98.

The punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.¹⁹⁹

¶103 The first person sentenced to die by electricity was William Kemmler, a Buffalo man convicted of murdering a woman with a hatchet.²⁰⁰ Kemmler appealed, acknowledging guilt, but alleging that electrocution would be cruel and unusual, thus violating both the United States and New York Constitutions. Although it was indeed unusual, because it was new, the state courts held that it was not cruel—that, in fact, there was no reasonable doubt that “the application of electricity to the vital parts of the human body . . . must result in instantaneous and consequently in painless death.”²⁰¹

¶104 The Supreme Court rejected a writ of error,²⁰² clearing the way for Kemmler’s execution. A new age of kinder, gentler executions had arrived, or so it seemed—but not for long. Kemmler died on August 6, 1890, in a manner that was anything but instantaneous and painless. A reporter who witnessed the electrocution pronounced it “far worse than hanging” and “a disgrace to civilization”²⁰³—a judgment that seemed fully warranted by the details:

[W]ith the click of the lever, the body of the man in the chair straightened. Every muscle of it seemed to be drawn to its highest tension. It seemed as though it might have been thrown across the chamber were it not for the straps which held it. . . . The body was rigid as though cast in bronze, save the index finger of the right hand, which closed up so tightly that the nail penetrated the flesh on the first joint, and the blood trickled out of the arm of the chair. . . . The assembled witnesses . . . gave breath to a sigh. . . . The great strain was over. Then [they] gazed with horror on what they saw. . . . “Great God! he is alive,” someone said. “Turn on the electricity,” said another. . . . “For God’s sake kill him and have it over,” said a representative of the press association, [who] then, unable to bear the strain, fell on the floor in a dead faint. Again came that click as before, and again the body . . . became as rigid as one of bronze. . . . The current could be heard sharply snapping. Blood began to appear on the face of the wretch in the chair. It stood on the face like sweat. . . . An awful odor began to permeate the death chamber, and . . . it was seen that the hair under and around the electrode on the head and the flesh under and around the electrode at the base of the spine was singeing. The stench was unbearable.²⁰⁴

¶105 An official report to the governor dismissed the problems as “defects of a minor character”—things that “might naturally have been expected, at the first execution by this

¹⁹⁹ N.Y. Crim. Proc. Law § 505 (1888).

²⁰⁰ *Kemmler the First*, N.Y. TIMES, May 15, 1889, at 3.

²⁰¹ *People ex rel. Kemmler v. Durston*, 119 N.Y. 569 (1890).

²⁰² *In Re Kemmler*, 136 U.S. 436 (1890).

²⁰³ *Far Worse Than Hanging*, N.Y. TIMES, Aug. 7, 1890, at 1.

²⁰⁴ *Id.*

method”²⁰⁵—and the electric chair was on the way to replacing hanging as the nation’s preferred mode of execution, a trend that the Supreme Court attributed to a “well-grounded belief that electrocution is less painful and more humane than hanging.”²⁰⁶ Although widely held, the belief proved to be anything but well-grounded. The problems never abated, and over the ensuing century, the American experience with the electric chair was replete with ghastly footnotes.

¶106 One of the more horrifying was the ordeal that Willie Francis endured *before* his execution for killing a man during an armed robbery that netted four dollars in 1945. Francis, who was sixteen at the time of the crime, was seventeen when he was strapped into the electric chair in 1946. When the switch was thrown, Francis did not die, although, according to the sheriff, who was in charge of the execution, he “groaned and jumped so that the chair came off the floor.”²⁰⁷ A witness added:

I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out “Take it off. Let me breath.” Then they took the hood from his eyes and unstrapped him.²⁰⁸

Francis’ lawyer tried to block a second trip to the chair, contending both that it would be cruel and unusual and that it would violate the Double Jeopardy Clause of the Fifth Amendment, but the Supreme Court found merit in neither claim, holding that the execution could proceed²⁰⁹—which it did on May 9, 1947. Francis reportedly died quickly in the chair that spared his life a year earlier.²¹⁰

¶107 John Louis Evans took fourteen minutes to die in the Alabama electric chair in 1983. His lawyer said in an affidavit filed in another case that when the first jolt of 1700 volts passed through Evans’ body, sparks and flames erupted from the electrode attached to his left leg. The electrode burst from the strap holding it in place and caught fire. A puff of smoke and sparks poured out from under the hood that covered Evans’ face. There was a stench of burning flesh and cloth, but Evans was not dead. The electrode was reattached to his leg, and a second jolt was administered, causing more smoke and nauseating stench, but Evans’ heart continued to beat. It took a third jolt to kill him.²¹¹

¶108 Alpha Otis Stephens slumped after a two-minute jolt in the Georgia electric chair in 1984. His body was so hot that physicians waited six minutes for it to cool before examining him, finding him still alive. A second two-minute jolt killed him. A prison official explained that Stephens “was just not a conductor” of electricity.²¹²

¶109 William E. Vandiver was still breathing after receiving one 2300-volt jolt in the Indiana electric chair in 1985. The current had to be applied three more times to kill him.

²⁰⁵ *Killing by Electricity*, N.Y. TIMES, Oct. 9, 1890, at 9.

²⁰⁶ *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915).

²⁰⁷ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 480 n.2 (1947) (Burton, J. dissenting).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 462–66.

²¹⁰ *Willie Francis Goes to Death Without Fear*, CHI. DEFENDER, May 17, 1947, at 1.

²¹¹ *See Glass v. Louisiana*, 471 U.S. 1080, 1091–92 (1985) (Brennan, J., dissenting from denial of certiorari).

²¹² *Id.* at 1092.

A Department of Corrections spokesperson acknowledged that the execution “did not go according to plan.”²¹³

¶110 Florida sponsored three gruesome electrocutions during the 1990s. The first was that of Jesse Tafero in 1990. When the switch was thrown as Tafero sat strapped in Old Sparky, as the Florida chair was aptly known, flames leapt from his head—the result of a sponge catching fire in the headpiece. In previous executions, a natural sponge had been used, but it rotted and had been replaced with a synthetic one from a local supermarket. It took three jolts to kill him.²¹⁴

¶111 Seven years later, Pedro Medina died in Old Sparky after blue and orange flames shot four to five inches out of his head and smoke filled the death chamber.²¹⁵ The grotesque scene resulted from insufficient saline solution on the sponge in the headpiece of the chair.²¹⁶ Florida Attorney General Bob Butterworth made light of the situation, quipping that “[p]eople who wish to commit murder, they better not do it in the State of Florida because we may have a problem with our electric chair.”²¹⁷

¶112 In 1999, a new electric chair, which had replaced the 1923-vintage Old Sparky,²¹⁸ malfunctioned the first—and last—time it was used. The person on whom it was used was Allen Lee “Tiny” Davis. When the switch was thrown, according to a witness, Davis’s back straightened, his hands clenched, his chest heaved repeatedly. A tiny spot of blood appeared on the front of his shirt, expanding gradually until it was about eight inches across. A spokesman for Governor Jed Bush said that the blood was from a nosebleed and that the chair “performed flawlessly as it was designed to perform.”²¹⁹

¶113 Photographs of Davis’s corpse, still strapped in the electric chair, with the blood on his white shirt, were posted on the Internet.²²⁰ The result was a public outcry that prompted the Florida Legislature in 2000 to pass, and Bush to sign, a law providing that condemned persons “shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution.”²²¹

¶114 Thirty-four of thirty-five states that currently have death penalty laws on their books either prescribe lethal injection as the sole mode of execution or offer it as an alternative to other modes at the election of the person to be executed.²²² The exception is Nebraska, where electrocution, its sole mode, was declared unconstitutional by the Nebraska Supreme Court in February 2008²²³ and has not been replaced; in March 2009, a bill calling for lethal injection fell one vote short in the Judiciary Committee of Nebraska’s unicameral legislature.²²⁴

²¹³ Andrew Fegelman, *Indiana Execution Wasn’t “as Planned,”* CHI. TRIB., Oct. 17, 1985, at 9.

²¹⁴ VON DREHLE, *supra* note 25, at 409.

²¹⁵ Tom Kuntz, *Word for Word/Executing Justice: Tightening the Nuts and Bolts Of Death by Electric Chair*, N.Y. TIMES, Aug. 3, 1997, § 4, at 7.

²¹⁶ See Provenzano v. Moore, 744 So. 2d 413, 417 (1999).

²¹⁷ See Bill Thompson, *He Should Have Gotten the Hot Seat Sooner*, TAMPA TRIB., Apr. 5, 1997, at 14.

²¹⁸ Press Release, Fla. Dept. of Corrections, *Newly-constructed Electric Chair* (June 9, 1999), available at <http://www.dc.state.fl.us/secretary/press/1999/elechair.html>.

²¹⁹ Beau Halton, *Man Who Killed 3 Put to Death*, FLORIDA TIMES-UNION, July 9, 1999, at A-1.

²²⁰ See *Tortured to Death by the People of Florida*, CCADP, <http://www.ccadp.org/tinydavis.htm>.

²²¹ 2001 Fla. Stats. 922.105(1). The law effectively retired the electric chair. From its enactment through Feb. 11, 2009, there were twenty-three executions in the state, all by lethal injection.

²²² See *Methods of Execution*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/methods-execution>.

²²³ *State v. Mata*, 745 N.W.2d 229 (Neb. 2008).

²²⁴ Joanne Young, *Lethal Injection Bill Stalls*, LINCOLN J. STAR, Mar. 18, 2001, at B-1.

- ¶115 Lethal injection, however, has proved to be no panacea. Blunders by medically untrained executioners have been a problem.²²⁵ A classic example was the execution of John Wayne Gacy in Illinois in 1994. The Illinois lethal injection procedure, like those of most states, uses three drugs administered in sequence—first, sodium pentathol, which anesthetizes the prisoner; second, pancuronium bromide, which produces paralysis; third, potassium chloride, which stops the heart, causing death.²²⁶ During Gacy’s execution, the intravenous tube in his arm clogged when the pancuronium bromide began to flow. The execution was halted for ten minutes while the tube was replaced. The problem probably occurred because the executioners failed to rinse the sodium pentathol, a strong base, out of the tube before starting the flow of the pancuronium bromide, a mild acid. When a base mixes with acid, solids form; said a leading anesthesiologist, “It’s IV 101.”²²⁷
- ¶116 In Missouri, in 1995, seven minutes after the lethal chemicals began to flow into Emmitt Foster’s arm, he lay gasping and convulsing. Something was plainly wrong. The blinds to the execution chamber were closed and not opened until twenty-six minutes later, after Foster had died. The problem had been that the prison personnel attending the execution had strapped the condemned man too tightly to the gurney, restricting the flow of chemicals into his veins. When the strap was loosened, the flow resumed and Foster died a few minutes later, according to the coroner, a non-physician who was in the execution chamber.²²⁸
- ¶117 A macabre scene, perhaps the result of inadequate training, perhaps not, unfolded in Texas in 1988 when, two minutes after drugs began flowing into Raymond Landry’s arm, the catheter popped out, spewing a chemical across the death chamber. The catheter was reinserted, but it took an additional twenty minutes for Landry to die. A spokesman for the Attorney General said, “It was a mechanical and physical problem. Landry was very muscular and had ‘Popeye-type’ arms. When the stuff was flowing, it wouldn’t go into the veins and there was more pressure in the hose than his veins could absorb.”²²⁹
- ¶118 Some condemned prisoners have suffered violent allergic reactions to the drugs being used to kill them. When the lethal chemicals began flowing into Stephen McCoy as he lay on a Texas gurney in 1989, he wheezed, gasped, and choked violently, causing one witness to faint, knocking over another witness.²³⁰ Three years later, also on a Texas gurney, Justin Lee May went into “coughing spasms, groaned and gasped, lifted his head . . . and would have arched his back if he had not been belted down. After he stopped

²²⁵ Physicians generally have refrained from participating in executions. See Don Colburn, *Lethal Injection: Why Doctors Are Uneasy About the Newest Method of Capital Punishment*, WASH. POST., Dec. 11, 1990, Health Sect., at 13. The American Medical Association position is that “[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.” *Physician Participation in Capital Punishment*, JAMA 365–82 (1993).

²²⁶ According to the Death Penalty Information Center, at least twenty-six other states use the same three drugs; the other death penalty states do not specify the drugs used. Death Penalty Information Center, *Lethal Injection: Moratorium on Executions Ends After Supreme Court Decision*, <http://www.deathpenaltyinfo.org> (follow “Lethal Injection” hyperlink) (last visited Jul. 24, 2009).

²²⁷ Rob Karwath & Susan Kuczka, *Gacy Execution Delay Blamed on Clogged IV Tube*, CHI. TRIB., May 11, 1994, Chicagoland Sect., at 1, quoting Dr. Michael Roizen, chairman of the Department of Anesthesia & Critical Care at the University of Chicago Hospitals.

²²⁸ Tim O’Neil, *Too-Tight Strap Hampered Execution*, ST. LOUIS POST-DISPATCH, May 8, 1995, at 1B.

²²⁹ *Murderer Executed After a Leaky Lethal Injection*, N.Y. TIMES, Dec. 14, 1988, at 29.

²³⁰ Howard Swindle & Dan Malone, *Twists in the System*, DALLAS MORNING NEWS, Nov. 17, 1997, at 1A.

breathing his eyes and mouth remained open.”²³¹ In Oklahoma, in 1992, Robyn Parks suffered violent muscle spasms for the first forty-five seconds, and then gasped and gagged for another ten minutes or so before he died. A reporter-witness described the Parks execution as “overwhelming, stunning, disturbing—an intrusion into a moment so personal that reporters, taught for years that intrusion is their business, had trouble looking each other in the eyes after it was over.”²³²

¶119 Another problem is that it is sometimes difficult for the executioner to find a vein into which the catheter can be inserted. In the case of Tommie J. Smith, who in 1996 became the first person to die by lethal injection in Indiana, the execution team was unable to insert a catheter into either of his arms. The team then tried to insert the catheter near his heart. That also failed. Next, his neck and groin areas were tried, unsuccessfully. Finally, the needle was inserted into an artery in his foot. Smith, who refused a sedative, was awake for the entire process, which took about thirty-five minutes before the flow of lethal chemicals began.²³³

¶120 In South Carolina, in 1997, the execution of Michael Elkins was delayed forty minutes while numerous attempts were made to insert a catheter into his arms, legs, and feet. His body was bloated as a result of spleen and liver problems. Ultimately, the catheter was inserted into his neck.²³⁴ The following year in Texas, at the execution of Joseph Cannon, the vein into which a catheter had been inserted popped out after the flow of chemicals began. Cannon laid back and closed his eyes as officials pulled the blinds on the execution chamber. Fifteen minutes later, the execution resumed after the catheter was inserted into another vein.²³⁵

¶121 Even when everything appears to go right, lethal injection may cause excruciating undetectable pain. This would occur, and no doubt has occurred, when the first drug in the lethal cocktail—sodium pentathol—fails to adequately anesthetize the prisoner. The second drug—pancuronium bromide—then would produce paralysis, rendering the prisoner, although fully conscious, unable even to grimace to express the pain that the third drug—potassium chloride—inflicts.²³⁶ No one knows how often this has happened because:

Standard medical—and even veterinary—practice requires a hands-on determination of the depth of anesthesia of the patient, or of an animal, before the initiation of any painful procedures. Yet during lethal injection executions there is no one, much less someone trained in anesthesia, who either ascertains a prisoner's sedation level before the next two painful drugs are administered, or who continuously monitors the inmate's consciousness levels throughout the execution until the prisoner has died.

²³¹ Michael Browning, *Botched Efforts Scar Capital Punishment*, PALM BEACH POST (Fla.), Jan. 3, 2000, at 1A, quoting Michael Graczyk, of the Associated Press (who covered the execution).

²³² Julie DelCour, *From Noose to Needle*, TULSA WORLD, Aug. 27, 2006, quoting Wayne Greene (who covered the execution).

²³³ Darlene Scates, *Injection Flap Spurs Review*, SOUTH BEND TRIB., July 28, 1996, at A1.

²³⁴ *Killer Helps Officials Find a Vein at His Execution*, CHATTANOOGA FREE PRESS (Tenn.), June 13, 1997, at A7; Gregory Enns, *Son Gets Apology as Killer Dies*, ST. PETERSBURG TIMES (Fla.), June 14, 1997, at 1B.

²³⁵ Michael Graczyk, *Texas Executes Man Who Killed San Antonio Attorney at Age 17*, AUSTIN AMERICAN-STATESMAN, Apr. 23, 1998, at B5.

²³⁶ See Fernando J. Gaitan, Jr., *Challenges Facing Society in the Implementation of the Death Penalty: The Lethal Injection Debate: Law and Science*, 35 FORDHAM URB. L.J. 763, 774–80 (2008).

Similarly, there is no one who can make necessary adjustments to dosage amounts, should a problem emerge.²³⁷

When a prisoner is anesthetized upon a gurney, thus, it would be incorrect to say that he, or she,²³⁸ is treated like a dog—dogs are anesthetized more humanely—and, although execution by lethal injection is hardly unusual,²³⁹ it is something of a stretch to say that it is not cruel.

VIII. EQUAL IN THEORY, UNEQUAL IN PRACTICE

¶122 Of 305 defendants sentenced to death in Illinois after *Furman*, only three were whites convicted of killing blacks²⁴⁰—all for extremely heinous crimes. Charles Hattery murdered a young mother and her two children, ages seven months and twenty-two months, in reprisal against the children’s father for a drug deal gone wrong.²⁴¹ Maynard McCallister killed a man, the man’s wife, and their son during a drug transaction.²⁴² Edward Spreitzer was part of a gang of sadistic serial killers who tortured and murdered at least five women.²⁴³

¶123 Obviously, the degree of heinousness required to send white defendants to death row for killing blacks in Illinois is high. When the roles are reversed—when a black person kills a Caucasian—the crime need not be nearly so heinous: A young black man named Rodney Adkins, for instance, was sentenced to death for murdering a white woman who surprised him while he was burglarizing her apartment. He had no record of violence. He was not carrying a weapon; he killed her with a knife from her kitchen.²⁴⁴

¶124 Illinois is no outlier in this regard. Nationally, study after study has documented the fact that black defendants suffer the brunt of discrimination in the capital punishment system. In 1990, the U.S. General Accounting Office synthesized twenty-eight such studies, finding “a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision” and concluding that “those who murdered whites were more likely to be sentenced to death than those who murdered blacks.”²⁴⁵

¶125 In 1987, a study of Georgia’s post-*Furman* experience with capital punishment found that defendants charged with killing white victims were sentenced to death in eleven percent of the cases, while defendants charged with killing blacks were sentenced to death in only one percent of the cases. Black defendants with white victims were

²³⁷ SARAH TOFTE, SO LONG AS THEY DIE: LETHAL INJECTION IN THE UNITED STATES (2006), available at <http://www.hrw.org/en/node/11414/section/6>.

²³⁸ Eleven women have been executed post-*Furman*, ten by lethal injection and one by electrocution. See Death Penalty Information Center, Searchable Execution Database, *supra* note 43.

²³⁹ Of the 1156 post-*Furman* executions, 985, or 85.2%, have been by lethal injection. Since the first lethal injection, which occurred in Texas in 1982, only 167, or 14.5%, have been executed by other means—153 by electrocution, 10 by gas, 3 by firing squad, and 1 by hanging. *Id.*

²⁴⁰ Supporting data on file at the Center on Wrongful Convictions.

²⁴¹ *People v. Hattery*, 109 Ill. 2d 449, 453–54 (1985).

²⁴² *People v. McCallister*, 193 Ill. 2d 63, 68 (2000).

²⁴³ *People v. Spreitzer*, 123 Ill. 2d 1, 8 (1988).

²⁴⁴ Victoria Pierce, *Death Sentence in Slaying of Woman in Oak Park*, CHI. TRIB., Aug. 8, 2007, Metro Sect., at 5.

²⁴⁵ U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

sentenced to death twenty-two percent of the time, white defendants with white victims only eight percent of the time, and white defendants with black victims only three percent of the time.²⁴⁶

¶126 The study was the principal basis for a petition for a federal writ of habeas corpus brought on behalf of Warren McCleskey, a black man who had been sentenced to death in Georgia for the murder of a white police officer during a furniture store robbery.²⁴⁷ After the Court of Appeals for the Eleventh Circuit denied relief,²⁴⁸ the Supreme Court granted certiorari.

¶127 Although no justice questioned the validity of the study, relief was denied by a five-to-four vote. The death sentence stood. The majority, in an opinion written by Justice Lewis F. Powell, held that it was not sufficient for McCleskey to prove that racial discrimination was pervasive in the Georgia justice system. In order to prevail, the majority ruled, McCleskey would have to prove that purposeful discrimination occurred in his particular case.²⁴⁹

¶128 The *Harvard Law Review* declared that, “[i]n *McCleskey*, the Supreme Court placed a constitutional imprimatur on a racially discriminatory criminal justice system that places a higher value on the lives of whites than blacks. The decision in *McCleskey* is logically unsound, morally reprehensible, and legally unsupportable.”²⁵⁰ Anthony Lewis wrote in the *New York Times* that the Court had “effectively condoned the expression of racism in a profound aspect of our law.”²⁵¹

¶129 Shortly after Powell retired, he lamented to his biographer that, were it within his power, he would change his vote in *McCleskey*—and also in every other capital case he had ever voted to affirm. “I have come to think,” Powell said, “that capital punishment should be abolished.”²⁵²

¶130 Powell’s epiphany, which was too late to help McCleskey, who was executed in 1991, seemed to affirm a thesis advanced by Justice Thurgood Marshall in *Furman* from which Powell had dissented.²⁵³ Marshall’s thesis was that, if Americans understood the realities of capital punishment, they would demand that it be abolished.²⁵⁴

¶131 The evidence that the death penalty does not deter crime, that it is costly and cruel, that it has been imposed frequently upon the innocent and freakishly upon the guilty, who sometimes become candidates for it and sometimes escape it through accidents of timing and geography, and the hideous cruelty of it, render it more objectionable today than it was in the time of Marshall and Powell.

²⁴⁶ *McCleskey v. Kemp*, 481 U.S. 279, 282 (1987).

²⁴⁷ *Id.*

²⁴⁸ *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985).

²⁴⁹ *McCleskey*, 481 U.S. at 292.

²⁵⁰ *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 158 (1987).

²⁵¹ Anthony Lewis, *Bowing to Racism*, N.Y. TIMES, Apr. 28, 1987, at 31.

²⁵² JOHN C. JEFFERIES JR., JUSTICE LEWIS F. POWELL JR. 451 (1994).

²⁵³ *Furman v. Georgia*, 408 U.S. 238, 414–65 (Powell, J., dissenting).

²⁵⁴ *Id.* at 369.