

CANARY LECTURE

DEATH: THE ULTIMATE RUN-ON
SENTENCE¹

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In his last term with the Supreme Court, Justice Blackmun threw down the gauntlet on the death penalty, stating, in the great tradition of Justices Brennan and Marshall, "From this day forward, I no longer shall tinker with the machinery of death."² This left many court-watchers wondering what happened to the view he stated so staunchly twenty-two years ago in *Furman v. Georgia*,³

1. This article is adapted from a lecture delivered by Judge Kozinski at Case Western Reserve University School of Law as part of the Sumner Canary memorial lecture series. Please address all reprint requests to Judge Kozinski, U.S. 9th Circuit Court, 125 S. Grand Avenue, Pasadena, CA 91105.

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2. *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from the Court's denial of certiorari). Justice Brennan first articulated his absolute opposition to the death penalty in *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring) ("Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishment Clause, death stands condemned as fatally offensive to human dignity."). Justice Marshall similarly voiced his conclusion that capital punishment is unconstitutional in *Furman*. Capital punishment in his view violates the Eighth Amendment because "[t]here is no rational basis for concluding that capital punishment is not excessive . . . [and] because it is morally unacceptable to the people of the United States at this time in their history." *Id.* at 359-60 (Marshall, J., concurring).

3. 408 U.S. 238 (1972). Justice Blackmun dissented in *Furman* in part because he

when he dissented from the Court's decision to strike down all death penalty statutes then in effect. Apparently, nothing happened to change this view except two decades of death penalty cases. Justice Blackmun concluded that the task the Supreme Court had taken on in *Furman*—overseeing the administration of the death penalty to ensure it is not “so wantonly and so freakishly imposed”⁴—was fruitless.⁵ So he did exactly what he accused the *Furman* Court of doing: He “just decided that it [was] time to strike down the death penalty.”⁶

With Justice Blackmun's retirement, no sitting Supreme Court Justice, insofar as we know,⁷ holds the view that the death penalty violates the Constitution. We can take it for granted, then, that the Supreme Court will not abolish the death penalty in the United States within the foreseeable future.⁸ But that ought not to obscure other questions fairly presented by Justice Blackmun's cry of exasperation: Is the death penalty morally justified? Does it serve a legitimate societal purpose? Is it worth the resources we are devoting to it?

Death cases⁹ consume more and more of courts' time and attention these days,¹⁰ and no other cases are quite so grave or

felt that “the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary.” *Id.* at 407 n.4 (Blackmun, J., dissenting) (quoting *Maxwell v. Bishop*, 398 F.2d 138, 154 (8th Cir.), cert. granted, 393 U.S. 997 (1968), vacated, 398 U.S. 262 (1970)).

4. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

5. *See Callins*, 114 S. Ct. at 1129, 1134-35, 1137 (Blackmun, J., dissenting from the Court's denial of certiorari).

6. *Furman*, 408 U.S. at 408 (Blackmun, J., dissenting).

7. Some recent murmuring from Justice Stevens suggests, however, that he may be taking up the mantle. *See, e.g., Lackey v. Texas*, 115 S. Ct. 1421, 1422 (1995) (Stevens, J., respecting the denial of certiorari) (questioning whether the principal purposes of capital punishment (retribution and deterrence) are served by executing a prisoner who has been on death row for 17 years); *Harris v. Alabama*, 115 S. Ct. 1031, 1037 (1995) (Stevens, J., dissenting) (concluding that an Alabama statute giving the trial judge unbridled discretion to sentence a defendant to death is unconstitutional).

8. Even if several Justices were to undergo a complete change of heart and declare the death penalty unconstitutional, it is extremely unlikely that a majority of the Supreme Court would agree with this. The closest the Supreme Court has ever come to declaring the death penalty unconstitutional was in *Furman*. Since then, the Court has denied every systematic challenge to capital punishment, albeit occasionally by only a narrow margin. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279 (1987) (5-4 decision) (rejecting the claim that Georgia's capital punishment scheme is unconstitutional because it has a racially discriminatory impact).

9. By “death case” we mean any criminal case in which the death penalty is a possible sentence.

10. The number of death cases reaching the federal courts of appeals has increased

present quite the same mix of urgency, emotion, complexity, and drama. Somewhat less obviously, the death penalty is also a fascinating study of democracy in action. Our process for imposing and carrying out the death penalty reflects an uneasy accommodation between the will of the majority—and a fairly substantial majority at that—who favor the death penalty, and the determined resistance of a small but able minority.¹¹

The net effect is that we have little more than an illusion of a death penalty in this country.¹² To be sure, we have capital trials;

substantially in the past few years. *See generally* United States Court of Appeals for the Ninth Circuit, Request for Extending Funding for the Ninth Circuit Death Penalty Law Clerk Program (July 28, 1993) (on file with authors). But federal judges do not spend nearly as much time on the death penalty as their counterparts in the state supreme courts, who spend as much as one-third of their time handling capital cases. *See, e.g.*, Robert Sherrill, *Death Row on Trial*, N.Y. TIMES, Nov. 13, 1983, § 6 (Magazine), at 112 (indicating that the Florida Supreme Court spends one third of its time on death penalty appeals); Gerald F. Uelmen, *The Lucas Court's Seventh Year: Achieving a Balanced Menu*, L.A. DAILY J., June 8, 1994, Res Ipsa (Magazine), at 8 tbl. 1 (noting that between 1987 and 1994 an average of 28.6% of all opinions published by the California Supreme Court per year were capital cases).

The Supreme Court of the United States also spends a remarkable amount of time on death penalty appeals due to its recently acquired role in administering capital punishment. *See Godfrey v. Georgia*, 446 U.S. 420, 438 (1980) (Marshall, J., concurring) ("Nearly every week of every year, this Court is presented with at least one petition for certiorari raising troubling issues of noncompliance with the strictures of *Gregg* and its progeny." (footnotes omitted)). In an era when the number of published opinions from the Supreme Court has dwindled, the Supreme Court continues to issue a regular stream of opinions in death cases. For instance, in the 1993 term, the Court published only 84 opinions, *see* David F. Pike, *Productivity is Low this Term for High Court*, L.A. DAILY J., Dec. 15, 1994, at 1, but seven of those were death penalty cases. *U.S. Supreme Court*, L.A. DAILY J., Aug. 10, 1994, Res Ipsa (Magazine), at 33, 33-38. By our unofficial count, the Court has issued over 80 full opinions in death penalty cases since *Furman*.

11. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF JUSTICE STATISTICS 1993, at 200-01 (Kathleen Maguire & Ann L. Pastore eds., 1994) [hereinafter SOURCEBOOK] (noting that in 1993, 72% of Americans favored the death penalty for murder, while only 21% were opposed).

12. For this phrase we are indebted to Chief Justice Rehnquist, who in 1980 had the following to say about the procedures that must be followed before a death sentence can be carried out:

It seems to me that we have thus reached a stalemate in the administration of federal constitutional law. Although this Court has determined that capital punishment statutes do not violate the Constitution, and although 30-odd States have enacted such statutes, apparently in the belief that they constitute sound social policy, the existence of the death penalty in this country is virtually an illusion. Since 1976, hundreds of juries have sentenced hundreds of persons to death, presumably in the belief that the death penalty in those circumstances is warranted, yet virtually nothing happens except endlessly drawn out legal proceedings. . . . Of the hundreds of prisoners condemned to die who languish on the various "death rows," few of them appear to face any imminent prospect of

we have convictions and death sentences imposed; we have endless and massively costly reviews by the state and federal courts; and we do have a small number of people executed each year.¹³ But the number of executions compared to the number of people who have been sentenced to death is minuscule, and the gap is widening every year.¹⁴ Whatever purposes the death penalty is said to serve—deterrence, retribution, assuaging the pain suffered by victims' families—these purposes are not served by the system as it now operates.

If you think about it, this is a remarkable state of affairs in a country where polls consistently show that 70% or more of the people favor the death penalty,¹⁵ state supreme court justices are

their sentence being executed. . . .

I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system.

Coleman v. Balkcom, 451 U.S. 949, 957-58 (1980) (Rehnquist, J., dissenting from the Court's denial of certiorari) (citations omitted).

13. "Small" is, of course, a relative term. The number of yearly executions has increased recently to a high of 38 in 1993. *Death Row, U.S.A.*, REPORT (NAACP Legal Defense and Educational Fund, New York, N.Y.), Winter 1994, at 733. To some, this is an unacceptably large number, but this number pales in comparison to the number of executions carried out in the years before *Furman*. In the late 1950s, the states slowed to an average of approximately 50 executions per year, but in the preceding years the numbers were much higher. See SOURCEBOOK, *supra* note 11, at 676 (noting that in 1951, the peak year for executions in the 1950s, 105 inmates were executed, but that in 1958 and 1959 only 49 individuals were executed each year).

14. As of January 31, 1995, there were 2976 inmates on death row. *Death Row, U.S.A.*, *supra* note 13, at 731. Not surprisingly, the rate at which they were put there far exceeds the rate at which they are being removed. In 1992, 31 inmates were executed and 265 new prisoners were sentenced to death. LAWRENCE A. GREENFELD & JAMES J. STEPHAN, U.S. DEP'T OF JUST., CAPITAL PUNISHMENT 1992, at 5 (1993) [hereinafter CAPITAL PUNISHMENT 1992]; *Death Row, U.S.A.*, *supra* note 13, at 733. This means the ratio of death sentences to executions in 1992 was nearly 9-1. The ratio in 1993 was lower, but still high: As compared to 38 inmates executed, there were 282 individuals newly sentenced to death. JAMES J. STEPHAN & PETER BRIEN, U.S. DEP'T OF JUST., CAPITAL PUNISHMENT 1993, at 7 (1993) [hereinafter CAPITAL PUNISHMENT 1993]; *Death Row, U.S.A.*, *supra* note 13, at 733.

15. See SOURCEBOOK, *supra* note 11, at 200-01 (indicating that more than 70% of the American public has favored the death penalty since 1982). These polls are somewhat misleading in that they ask only whether you "favor . . . the death penalty for persons convicted of murder." *Id.* at 201. No jurisdiction in America imposes the death penalty for all murders, nor could any jurisdiction so impose the death penalty without running afoul of Supreme Court precedent. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (holding unconstitutional a North Carolina statute mandating the death sentence for first degree murder); *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976) (holding a similar Louisiana statute unconstitutional). Many Americans may favor the death penalty only for certain murders or in certain circumstances. These polls might therefore understate support for the death penalty. Neil Vidmar & Phoebe C. Ellsworth, *Research on At-*

ousted on a wholesale basis when they are perceived to be too stridently opposed to the death penalty,¹⁶ and Congress and the state legislatures fall all over themselves adding new crimes carrying the death penalty.¹⁷

I. THE WAY IT WORKS

Leaving for others the question of how we got here, let's see if we can figure out where we are. Think of our judicial system as a large snake. It feeds largely on field mice, an occasional squirrel, maybe a game hen here and there. Then, one day, it sees a moose, and ravenously swallows it. For a long time thereafter, it lies immobilized, as the bulge slowly works its way toward the part of the snake opposite its mouth. In this metaphor, our capital cases are a herd of caribou.¹⁸

titudes Toward Capital Punishment, in *THE DEATH PENALTY IN AMERICA* 68, 83 (Hugo A. Bedau ed., 3d ed. 1982). But they might similarly overstate the support because they do not permit those polled to express their preference for other options, nor do they consider the possibility that people may exaggerate their views when asked whether they favor capital punishment in the abstract. *Id.* When polls provide an alternative—for instance, by asking “do you favor capital punishment or life in prison without possibility of parole?”—support for capital punishment seems to wane. *See, e.g.*, HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* 116 (1993) (finding that while 70% of those surveyed in a 1986 Gallup poll favored the death penalty, only 43% did so when asked to compare the death penalty to the alternative of life in prison without possibility of parole); James A. Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 514 (1990-91) (citing Amnesty International polls). Even so, the statistics do firmly show that the percentage of people who are opposed to the death penalty on moral grounds under any and all circumstances is small, undermining Justice Marshall's claim in *Furman* that the death penalty is “morally unacceptable to the people of the United States.” *Furman v. Georgia*, 408 U.S. 238, 360 (1972).

16. In a November 1986 retention election, California voters removed Chief Justice Rose Bird, who was blamed for the fact that the California Supreme Court had affirmed only five death sentences in the preceding seven years. Gerald F. Uelmen, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237, 237-38 (1989). The voters also ousted Associate Justices Joseph Grodin and Cruz Reynoso, who were considered unsupportive of capital punishment. *Id.*

17. The 1994 federal crime bill added dozens of new federal crimes to the lists of those for which the death penalty is presently available. *See* Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, Title VI, §§ 60001-26, (codified as amended in scattered sections of 18 U.S.C.). This proves, once again, that the death penalty is a political ping-pong ball. *See generally* Glen L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711 (1990-1991) (discussing the influence of politics on the relative popularity and function of the death penalty in the United States).

18. For the snake analogy, we are indebted to Ada M. Kaus, former Justice of the California Supreme Court. *See* Philip Carrizosa, *Ex-Justices Give Rare Peek into Inner*

To get a sense of how time consuming and expensive death penalty cases can be, let's follow a case through the entire process. It all starts, of course, with whatever act of depravity renders the criminal eligible for the death penalty.¹⁹ Imagine our capital defendant is someone like John Dobbert, who was convicted in Florida for the murder of his own daughter and sentenced to death because of the "premeditated and continuous torture, brutality, sadism and unspeakable horrors" he committed. He beat her, burned her, held her under water, scarred her body with a belt and board, and left her wounds to fester. After several years of this, he choked her to death, then "placed her body in a plastic garbage bag and buried her in an unmarked and unknown grave."²⁰ Assume that our hypothetical defendant is, in fact, guilty, that he's not insane, and that the investigation and trial were flawless. We want to see how long it takes to process an easy case.

Within a year or two, our capital defendant will have been convicted, sentenced, and sent to death row. Post-trial proceedings begin with a mandatory appeal (everywhere except Arkansas and federal court),²¹ usually to the state supreme court. If the California Supreme Court is any indication, these appeals are backed up. The California Supreme Court generally decides no more than three-quarters of the death cases it receives annually, and currently has slightly more than 200 death cases pending,²² half of which are on hold because the state has been unable to find lawyers

Sanctum, L.A. DAILY J., Oct. 7, 1994, at 1. Justice Kaus, however, compared California's death penalty cases to a "rabbit." *Id.* In our view, that far understates the magnitude of the problem.

19. Since *Coker v. Georgia*, 433 U.S. 584 (1977), eligibility for the death penalty has been confined to murder. However, the federal government and many states retain the death penalty for other crimes. For example, California, Georgia, and Louisiana impose the death penalty for treason. CAPITAL PUNISHMENT 1993, *supra* note 14, at 5. Mississippi retains the death penalty for "capital rape." *Id.* The new federal crime bill adds the death penalty for some drug crimes. See 18 U.S.C. § 3591(b) (1994).

20. *Dobbert v. Florida*, 432 U.S. 282, 285-86 (1977).

21. CAPITAL PUNISHMENT 1993, *supra* note 14, at 6. By "mandatory," most states mean not only that the court must hear the appeal but also that the defendant must bring it, whether or not he wants to challenge his conviction or sentence. *Id.*; see also *Grasso v. State*, 857 P.2d 802, 806-08 (Okla. Crim. App. 1993) (holding that a capital defendant can waive the right to appeal the judgment against him but not the right to appeal the sentencing decision); Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1368 (1988) ("[M]ost state courts have found direct review of death sentences to be obligatory.").

22. Uelmen, *supra* note 10, at 8 (reporting that there were 216 capital cases as of June 1994 on the docket of the California Supreme Court).

willing and able to take them.²³ Between 1988 and 1994, roughly one-quarter of all the opinions issued by the California Supreme Court involved capital cases.²⁴ In the 1993-1994 term, the California Supreme Court disposed of twenty death cases, but that was just under ten percent of the total pending.²⁵

In order to be eligible for federal habeas, our inmate must first avail himself of state post-conviction remedies and collaterally attack his conviction and sentence in state court.²⁶ Assuming his guilt and penalty trials were impeccable, he loses. He then petitions the United States Supreme Court for a writ of certiorari, which is denied.

At some point, a death warrant is issued, which is often the signal for starting federal habeas proceedings. A federal stay of execution is entered while this first petition is considered, and although the district court can make a decision in as little as three months,²⁷ it can take more than two years if the court decides to hold extensive evidentiary hearings,²⁸ which is not at all unusual. The inmate then appeals the district court's decision, which keeps the stay of execution in place. In a death case involving a first habeas petition, it is fairly typical to consume a year on the appeal, although two years or more certainly is not unheard of.²⁹ While our inmate loses this appeal, he inevitably petitions for rehearing and suggests rehearing en banc. At least in the Ninth Circuit, this guarantees a vote on whether to go en banc, which adds a few more weeks to the procedure. Our inmate then petitions the United

23. Carrizosa, *supra* note 18, at 1. Texas has roughly 50 cases on hold for lack of lawyers. See Terry B. Pristin, *New York Bar Avoids Death Penalty Cases*, N.Y. TIMES, Dec. 30, 1994, at B4 ("In Texas, for example, the number of condemned inmates without lawyers has dropped in recent months to 46.").

24. Uelmen, *supra* note 10, at 8 tbl. 1.

25. *Id.* at 8 tbl. 2.

26. See *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (discussing the role state courts play in the enforcement of federal law and that as a matter of comity, federal courts will not entertain habeas corpus petitions raising claims that have not first been fully reviewed in state court).

27. See Joseph B. Ingle, *Final Hours: The Execution of Velma Barfield*, 23 LOY. L.A. L. REV. 221, 224 n.6 (1989) (tracing the procedural history of a representative death penalty case).

28. See, e.g., *McKenzie v. McCormick*, 27 F.3d 1415, 1418 (9th Cir. 1994) (ruling on a petition three years after its filing and multiple evidentiary hearings), *cert. denied*, 115 S. Ct. 916 (1995).

29. See *In re Blodgett*, 502 U.S. 236, 237-39 (1992) (describing the tortuous delay in a recent Ninth Circuit case).

States Supreme Court for a writ of certiorari, and for the second time his petition is denied.

In this streamlined version of events, we now stand poised for execution—maybe. The case has been reviewed at four levels of the state and federal courts and the United States Supreme Court has twice passed up the opportunity to jump in. The federal stay of execution is then lifted,³⁰ and the case goes back to the state court where the government will obtain a death warrant setting a new execution date.

With an execution date in place, the petitioner's lawyers go into high gear to raise some issue that will forestall the execution. They might seek collateral relief (and a stay of execution) in state court.³¹ But, more likely, they will file a successive federal habeas petition. In the Ninth Circuit, the district court can enter a stay while the new issues raised by this petition are considered; if it refuses a stay, the appellate panel assigned to the case can enter one,³² and if execution is imminent, any single judge of the cir-

30. Under FED. R. APP. PROC. 41(B), the mandate from the Court of Appeals can be stayed for 30 days (more if an extension is granted) pending the filing of a petition for writ of certiorari. When the Supreme Court denies the writ of certiorari, the mandate immediately issues. At that point, any federal stay of execution is lifted. *Id.*

31. At this late stage, the defendant will have few, if any, avenues of appeal left open in the state courts. Indeed, he may be left with no state option except a request for clemency from the governor, a form of relief that has proven increasingly difficult to obtain. See Jason Berry, *Is Justice Forgiving?: Governors Shy Away from Death Row Pardons*, DALLAS MORNING NEWS, Aug. 15, 1993, at J1 (noting that governors fear the political consequences of commuting sentences). In the case of Robert Alton Harris, for example, Governor Pete Wilson of California received a plea for clemency from no less an authority on mercy than Mother Teresa; nonetheless, he denied any relief. Lorie Hearn, *Harris' Chances for Execution Stay Appear Dim*, SAN DIEGO UNION TRIB., Mar. 15, 1992, at A-3. In addition to being generally fruitless, clemency proceedings are time-consuming. See PHILIP J. COOK & DONNA B. SLAWSON, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* app. V (1993) [hereinafter *NORTH CAROLINA STUDY*] (finding that defense and state attorneys spent over 600 hours, and the governor close to 60 hours, on a single clemency proceeding). Occasionally they are also corrupt. See PREJEAN, *supra* note 15, at 169-74 (recounting an interview with Howard Marsellus, former chairman of the Louisiana Pardon Board, who was convicted of taking bribes to rig pardon board recommendations).

Today, only 1 in 40 death sentences is commuted to a lesser sentence. Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 266 (1990-91). However, clemency is not always withheld. In 1990, the Governor of Ohio commuted to life in prison the sentences of eight death row inmates. PREJEAN, *supra* note 15, at 255 n.35. In 1986, the governor of New Mexico commuted the sentences of *all* inmates then residing on that state's death row. *Id.* These actions, however, seem more like political statements than an individualized exercise of the power of executive clemency.

32. 9TH CIR. R. 22-4(c). In the case of successive petitions, the appellate panel that

cuit can enter a temporary stay.³³ Any federal stay entered can remain in effect until long after the putative execution date.³⁴

Often this successive federal petition will raise unexhausted claims, which may get shipped off to state court, with the federal stay intact.³⁵ Otherwise, in this hypothetical, squeaky-clean case, the district court reaches a decision against the defendant. In the Ninth Circuit, a panel of three court of appeals judges is standing by and has been receiving the briefs at the same time as the district court.³⁶ When an execution is pending, the Supreme Court also gets papers in the case as they are filed in the lower federal courts. Unique to the Ninth Circuit, there is also an eleven-judge en banc panel standing by.³⁷ If the three-judge panel refuses to issue a stay of execution or a certification of probable cause, any active judge of the circuit can force an expedited en banc vote by simply requesting it.³⁸ There are close to thirty active judges in

decided the appeal of the first petition is automatically assigned to the case. 9TH CIR. R. at 22-1(a).

33. 9TH CIR. R. 22-5(d)(5). The panel assigned to the case can vacate this stay by a majority vote. *Id.* However, en banc review of the panel's decision whether to grant a certificate of probable cause or a stay of execution is available, *see* 9TH CIR. R. at 22-5(e)(3), and it is frequently invoked. *See, e.g.,* McKenzie v. Day, 57 F.3d 1461, 1463 n.1 (9th Cir.) (granting an en banc review after first habeas petition), *aff'd*, 57 F.3d 1493 (9th Cir.) (en banc) (reviewing denial of stay of execution on habeas petition), *cert. denied*, 115 S. Ct. 1840 (1995).

34. For example, Robert Alton Harris was originally scheduled to be executed in California in April of 1990, but a federal stay of execution pushed his execution date back to April of 1992. Hearn, *supra* note 31, at A-3.

35. *See, e.g.,* Fetterly v. Paskett, 997 F.2d 1295, 1296-97 (9th Cir. 1993) (remanding a case to the district court so the defendant could litigate his newly unexhausted claims), *cert. denied*, 115 S. Ct. 290 (1994).

36. 9TH CIR. R. 22-3(b)(1).

37. *Id.* ("Upon the filing in the district court of a subsequent habeas corpus petition . . . the Clerk of the Court of Appeals shall select an en banc court of eleven judges which shall receive forthwith copies of all pleadings filed in the district court.").

38. 9TH CIR. R. 22-5(e)(2). This rule establishes the procedure for en banc review of an order denying, or granting, a certificate of probable cause or a stay of execution in a successive habeas case:

Any active judge of the court may request that the en banc court review the panel's order. The request shall be supported by a statement setting forth the requesting judge's reasons why the order should be vacated. Such a request for rehearing en banc shall result in en banc review if a majority of active judges has voted in favor of en banc review. A judge's failure to vote within the time established . . . shall be considered a "yes" vote in favor of en banc review. The en banc coordinator, if time permits, may set a schedule in which other judges may respond to the points made in the request for en banc review. If a majority of active judges votes in favor of en banc review, the clerk shall notify the parties that the matter will receive en banc review, and will identify

the Ninth Circuit and, without exception, one of them will seek en banc reconsideration. The en banc panel meets to consider the case, rules against the petitioner, and dissolves the stay of execution.³⁹ Within hours, sometimes within minutes, the petitioner's lawyers are before the Supreme Court with a stay petition. The Justices are polled, often at home and occasionally woken from sleep,⁴⁰ and they deny the stay. This usually signals the end of the process.

It should come as no surprise that death penalty cases take a long time to work through the system. It takes several minutes just to walk through the steps of a streamlined case, without even discussing the many ways in which the process can be deliberately prolonged. Nor does this hypothetical case delve into the legal issues, which often pose some of the most difficult questions in the law. Putting aside the relatively few cases in which a death row inmate simply gives up,⁴¹ a case that comes to its conclusion within seven years of the crime is relatively rare. Ten years is about the average,⁴² and cases like that of Duncan Peder

the members of the en banc court.

Id.

39. When confronted with an imminent execution date, Ninth Circuit en banc panels seldom hold oral arguments or even physically meet. The case is usually heard by conference call or by memorandum transmitted by e-mail.

40. In the case of Robert Alton Harris, the state was forced three times to request that the Supreme Court lift last-minute stays of execution entered by the Ninth Circuit. These requests arrived at the Supreme Court at 2:20 a.m., 3:00 a.m., and 7:05 a.m.. Charles Fried, *Impudence*, 1992 S. Ct. REV. 155, 166 (1992).

41. Five of the first eight people to be executed after the death penalty was reinstated in 1976 were "volunteers." Richard C. Dieter, Note, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 802 (1990). All five inmates executed in Nevada since *Furman* have been volunteers. *Death Row, U.S.A.*, *supra* note 13, at 739. Still, as of 1990, only "[o]ver ten percent of the executions carried out since . . . 1976 have been of those who elected to die." Dieter, *supra*, at 800.

Obviously, those who decline any efforts to oppose their executions move through the system much more quickly than those who vigorously oppose it. In the case of Gary Gilmore, for instance, the first man to be executed after *Furman*, only six months passed between his crime and his punishment. Welsh S. White, Essay, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 853-54 (1987). Despite a condemned prisoner's decision not to appeal, however, family and fellow death row inmates commonly carry on the battle. *See, e.g.*, *Demosthenes v. Baal*, 495 U.S. 731, 732-37 (1990) (per curiam) (reviewing a habeas corpus request from a "next friend" despite defendant's decision not to fight the death sentence); *Gilmore v. Utah*, 429 U.S. 1012, 1012-13 (1976) (terminating a stay of execution which had been granted at the mother's request after deciding that the prisoner had made an intelligent waiver of his rights after sentencing); *Washington v. Dodd*, 838 P.2d 86, 96-97 (Wash. 1992) (finding that the defendant was competent and able to waive his general right of review of his death penalty, but could not waive statutory review).

42. *See* CAPITAL PUNISHMENT 1993, *supra* note 14, at 11 tbl. 12 (stating that the

McKenzie,⁴³ whose case took over two decades to shuttle its way repeatedly between the state and federal courts, are not all that atypical.⁴⁴

II. WHAT IT COSTS

It's fair to ask ourselves what all this costs us. After all, the death penalty is a public good we all pay for—like roads and post offices—so we should find out whether we are getting our money's worth. This question turns out to be not all that easy to answer.

For instance, it is exceedingly difficult to compare the cost of a death penalty case with that of a non-capital murder case because the typical course of litigation diverges so widely.⁴⁵ Roughly 80-90% of all criminal cases, including murder cases, result in a plea bargain,⁴⁶ while 80% of capital cases go to trial.⁴⁷ Many of the costs are also difficult to isolate. Prosecutors, state investiga-

average stay on death row for white defendants is 112 months—for blacks, the average is 121 months).

43. *McKenzie v. Day*, 57 F.3d 1461, 1463 n.1 (9th Cir.), *aff'd*, 57 F.3d 1493 (9th Cir.) (en banc), *cert. denied*, 115 S. Ct. 1840 (1995).

44. *See, e.g., Lackey v. Texas*, 115 S. Ct. 1421 (1995) (Stevens, J., respecting the denial of certiorari) (regarding Texas inmate on death row for 17 years).

45. Numerous states have attempted systematic studies of the costs of the death penalty. *See, e.g., N.Y. STATE DEFENDER'S ASS'N., INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE* (1982); *NORTH CAROLINA STUDY, supra* note 31, at 37; Memorandum from the Kansas Legislative Research Dep't on Cost Considerations of Implementing the Death Penalty (Feb. 15, 1994) (on file with authors). The Administrative Office of the United States Courts commissioned a limited study of the cost of defender services in federal habeas corpus death penalty cases that is also helpful. *See THE SPANGENBERG GROUP, CASELOAD AND COST PROJECTIONS FOR FEDERAL HABEAS CORPUS DEATH PENALTY CASES IN FY 1988 AND FY 1989* (1987). The Administrative Office also prepared an estimate of the costs of the death penalty provisions of the Violent Crime Control and Law Enforcement Act of 1994. *ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL IMPACT STATEMENT, VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994*, at 4 (1994); *ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL IMPACT STATEMENT, SPECIFIC AMENDMENTS TO THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994*, at 3 (1994).

In addition to these official studies, there have been numerous unofficial estimates of the costs of the death penalty. *See, e.g., DEATH PENALTY INFO. CENTER, MILLIONS MIS-SPENT: WHAT POLITICIANS DON'T SAY ABOUT THE HIGH COSTS OF THE DEATH PENALTY* (1992); Barry Nakell, *The Cost of the Death Penalty*, 14 *CRIM. L. BULL.* 69 (1978); Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 *LOY. L.A. L. REV.* 45 (1989); Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 *U.C. DAVIS L. REV.* 1221 (1985). Unfortunately, most studies are conducted or financed by someone with a point to prove, thus casting doubt on their reliability.

46. Garey, *supra* note 45, at 1246-47.

47. *NORTH CAROLINA STUDY, supra* note 31, at 37.

tors, judges, and law clerks do not have to prepare vouchers to be reimbursed for the time they spend on death cases, and often no separate accounting is maintained for the expenses incurred.⁴⁸ And then there are the subsequent hoops and hurdles as the capital case winds its way through state and federal court: mandatory appeals, all those state collateral proceedings, federal habeas petitions, and repeated petitions for certiorari. These take time, and when you are paying lawyers and other professionals, time most certainly is money.⁴⁹

The expenses start to mount as early as the pretrial stage, as a capital defendant vastly outspends his non-capital counterpart on investigators, psychiatric evaluations, and other expert assistance.⁵⁰

48. These hidden costs can be quite substantial. In one Arizona death penalty case for which records were kept, the state spent \$260,000 on investigation costs: almost twice the amount spent reimbursing defense counsel for her time. *Untitled*, UPI, June 26, 1987, available in LEXIS, News Library, UPI File ("The Pima County Board of Supervisors has budgeted \$150,000 to pay for the death penalty appeal of convicted child killer Frank J. Atwood.").

49. Compensation rates for defense attorneys in capital cases vary from a low of \$20 to a high of \$150 per hour in California. THE SPANGENBERG GROUP, FINAL REPORT, SURVEY OF COMPENSATION RATES FOR COUNSEL AND EXPERTS IN CAPITAL CASES ON DIRECT APPEAL, STATE POST-CONVICTION AND FEDERAL HABEAS CORPUS 6-8 & tbls. 1-4 (1991). Payment for indigent defense expenses is provided at the county level, and at least one county in California now pays a flat fee for capital cases, which is calculated according to the difficulty of the case and paid in percentages over the course of the trial. See Memorandum from the L.A. County Board of Supervisors, Capital Case Appointments and Fee Schedule (approved Feb. 15, 1994) (on file with authors).

For a cogent assault on the low priority given to compensating attorneys for death penalty cases, see generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

50. NORTH CAROLINA STUDY, *supra* note 31, at 15-16, 59-60. In one California case, taxpayers picked up the tab for the \$255,000 in fees charged by the defendant's forensic and legal experts and \$100,000 paid to investigators. Alan Abrahamson, *Cinco Murder Defense Costs Are Revealed*, L.A. TIMES, June 19, 1990, at B1. Attorneys' fees demand a similarly large chunk of change. Even though court-appointed defense attorneys are compensated at discount rates in death cases, see *supra* note 49, the bill can add up after decades of litigation. See Paul Chavez, *Bringing a Killer to Justice: Campbell Exacts a Price for Execution*, NEWS TRIB., May 24, 1994, at A1 (quoting a total cost between \$2 million and \$3 million for the capital proceedings of one individual). One reason capital cases cost more than non-capital cases is the amount of attention they receive. Consider the following description of one serial killer's defense team:

[T]wo lawyers have worked full time . . . for five years. A third lawyer has worked almost full time for four years. The lawyers have hired at least five private investigators, two paralegals, a criminalist with as many as five others working for him at one point, and a variety of other experts, such as specialists in computer graphics and photography, for example.

Jerry Hicks & Eric Lichtblau, *Trial Costs May Be Secret Until Execution*, L.A. TIMES, Aug. 12, 1989, at B4.

Keep in mind that a capital defendant is essentially preparing for two trials—the guilt phase and the penalty phase—and counsel has an obligation to search not only for viable defenses to the criminal charges, but also for mitigating evidence that will be useful at sentencing.⁵¹ Voir dire also takes considerably longer in a capital case,⁵² because both the defense and the prosecution are allowed to death-qualify the jury by inquiring into their personal beliefs about the death penalty⁵³ and each side gets more peremptory challenges.⁵⁴

The actual trial of a capital case is also longer and thus much costlier than an ordinary trial.⁵⁵ One major factor is the penalty phase. Instead of holding a twenty minute hearing before a sentencing judge, the state has the opportunity to put on an entire case to prove that the defendant deserves the death penalty. The defendant, in turn, has a chance to respond. In one celebrated capital trial in California, the case of David Carpenter, “The Trailside Murderer,” the defendant took over two weeks to present his life story as a mitigating circumstance.⁵⁶

California reportedly spends \$90,000,000 each year on the death penalty.⁵⁷ With 395 death row inmates,⁵⁸ that is over \$200,000 per inmate per year. Using that number as a benchmark, that means California has already spent over \$450,000,000 on the death penalty this decade. And what can California show for its

51. See *Siripongs v. Calderon*, 35 F.3d 1308, 1312-16 (9th Cir. 1994) (addressing defendant's claim that he was provided ineffective assistance of counsel because his lawyer did not adequately investigate and prepare for the penalty phase of his capital trial).

52. *Garey*, *supra* note 45, at 1257 (estimating that jury selection in capital cases takes 5.3 times longer than in non-capital cases based on an informal study of 20 cases).

53. See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (“[T]he Constitution does not prohibit the States from ‘death qualifying’ juries in capital cases.”).

54. See, e.g., CAL. CIV. CODE § 231 (West Supp. 1995) (permitting 20 peremptory challenges in capital cases and cases that may result in a sentence of life in prison, as opposed to 10 peremptory challenges allowed in common criminal cases); N.C. GEN. STAT. § 15A-1217(a) (1988 & Supp. 1994) (permitting 14 peremptory challenges to defendants in capital cases but only 6 in non-capital criminal cases).

55. See NORTH CAROLINA STUDY, *supra* note 31, at 61-62 (reporting that on average, capital murder trials last over 3.5 times longer than non-capital murder trials); *Garey*, *supra* note 45, at 1258 (estimating that capital cases last 30 days longer than non-capital cases, based on an informal study of 20 first degree murder cases).

56. WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES 81 (1991). Carpenter's appeals are still winding their way through the courts. See *Court to Hear Appeal of “Trailside Killer,”* THE RECORDER, Dec. 7, 1994, at 6.

57. THE DEATH PENALTY INFO. CENTER, *supra* note 45, at 3.

58. This reflects California's death row population as of October 1, 1994. CAL. DEP'T OF CORRECTIONS, DEATH SENTENCE STATUS 1 (1994).

efforts? It's had all of two executions⁵⁹ since it passed its post-*Furman* death statute in 1972.⁶⁰

None of this includes the cost to the federal government of processing capital habeas cases, which itself can be enormous.⁶¹ In one habeas corpus petition recently brought in the Ninth Circuit, the district court alone authorized payment of over \$400,000 in attorney's fees for the defense lawyers.⁶² Attorneys in non-capital federal cases are entitled to a maximum of \$750 in fees.⁶³ Adding to that the cost of appeals and petitions for certiorari, our own rough, but conservative, estimate is that death penalty cases each cost an extra million dollars, net of correction costs.⁶⁴ With 5,000

59. *Id.* Both executions occurred within the past three years. Robert Alton Harris, who was on death row for thirteen years, was executed in 1992. CAL. DEP'T OF CORRECTIONS, CONDEMNED INMATE INFORMATION 1 (Mar. 1990). David Mason was on death row for nine years before he was executed in 1993. CAL. DEP'T OF CORRECTIONS, CONDEMNED INMATE INFORMATION 1 (July 1993).

60. CAL. CONST. art. I, § 27.

61. Under the Criminal Justice Act, 18 U.S.C. § 3006(A) (1988), and the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848, compensation rates for court-appointed attorneys in federal habeas corpus cases can vary from \$40 to \$150 per hour depending on the circuit and district in which the petition is brought. THE SPANGENBERG GROUP, *supra* note 49, at 6, 8.

62. Memorandum from Theodore J. Lidz, Chief, Defender Services Division of the Administrative Office of the United States Courts to L. Ralph Mecham, Attach. 1, 3 (Aug. 26, 1993) (on file with authors).

63. 18 U.S.C. § 3006A(d)(3) (1988).

64. This estimate may be low. *Compare* Henry P. Curtis, *No Plea in Fatal Carjacking*, ORLANDO SENTINEL TRIB., Mar. 13, 1993, at 1 (estimating the death penalty in Florida costs \$3.2 million per execution, as compared to \$600,000 for life in prison), *with* John Gilardi, *Houston Sets Record with Six Death Penalty Cases*, REUTERS, LTD., Sept. 12, 1994, available in LEXIS, News Library, Cumwvs File (reporting that an execution in Texas costs \$2.3 million as compared to \$750,000 to incarcerate someone for forty years). Curtis and Gilardi take into account the costs to the state, whereas our estimate also takes into account the substantial costs to the federal government. One difficult expense to calculate is the cost of conducting capital trials that do not result in a death sentence. According to one estimate, only 1 of every 10 murder cases brought as a capital case results in a death sentence. Charles A. Lindner, *Capital Cases Are Crippling State Courts*, SACRAMENTO BEE, Sept. 5, 1993, at Forum 1. A study commissioned by the North Carolina legislature found that the death sentence was imposed in only one-third of all capital cases. NORTH CAROLINA STUDY, *supra* note 31, at 68. Whatever the actual conviction rate of capital trials, it is clear that not all result in death sentences. Yet much of the added expense peculiar to capital cases is incurred before the verdict. The costs of these failed attempts to secure the death penalty, over and above those that would have been incurred had they been tried as ordinary murder cases, must be factored into any calculation of the overall cost of the death penalty. When all costs at all levels are counted, we would not be surprised to discover that death cases cost two or three times more than we estimate.

Insofar as correction costs go, the death penalty is less expensive than housing an inmate for life. The average life expectancy of a death row inmate is almost 10 years,

or so inmates who have found their way onto death row in the last quarter-century, as Senator Dirkson used to say, pretty soon you get into real money.

Diehard supporters of the death penalty wave aside the monetary costs. "We spend a lot of money on a lot of useless things," they say, "at least this is money spent on something I can really get behind." Although a lot of effective law enforcement could be bought for what it costs to wind up the machinery of death, let's momentarily put aside the monetary costs and look at the intangibles. A very significant one is the opportunity cost. State supreme courts find themselves flooded with mandatory death penalty appeals, and what cases these are. An average California Supreme Court opinion in a death case analyzes over three times the number of issues as in other types of cases, and four times as many issues if the court affirms the sentence.⁶⁵ Briefs in these cases often run into the hundreds of pages, the record well into the tens of thou-

CAPITAL PUNISHMENT 1993, *supra* note 13, at 1, while the average life expectancy of a 30-year-old man (the average age and typical sex of those sentenced to death) is 42 years. *Id.* at 9. In California, it costs \$20,760 to house a man for one year in prison, but it costs \$22,400 to house a man for one year on death row at San Quentin. CAL. DEP'T OF CORRECTIONS, CDCFACTS 1 (Sept. 1, 1994); CAL. DEP'T OF CORRECTIONS, CAPITAL PUNISHMENT IN CALIFORNIA 3 (Sept. 1993) [hereinafter CAPITAL PUNISHMENT IN CALIFORNIA]. Ten years at \$22,400 comes to an average cost of \$224,000 to house a man on death row awaiting execution, significantly less than the average \$869,000 the state would have to spend to house that man for life.

The cost of the actual execution does not make up the difference. The California Department of Corrections insists that the cost of executing a man is "minimal." CAPITAL PUNISHMENT IN CALIFORNIA, *supra*, at 3. But one article reports that the cost of an aborted execution in Georgia exceeded \$250,000. N.Y. STATE DEFENDER'S ASS'N, INC., *supra* note 45, at 27. Another article states that an execution by lethal injection would cost the state of Arizona \$28,000. Pamela Manson, *Matter of Life or Death: Capital Punishment Costly*, THE ARIZONA REPUBLIC, Aug. 23, 1993, at A1. Yet another article recounts that Marin County, California expected that crowd control at the execution of Robert Alton Harris would cost \$130,000. *Marin County Struggles with Pending Execution*, UPI, Mar. 17, 1990, available in LEXIS, News Library, Arcnws File.

Given the high percentage (35%) of death row inmates who get their conviction or sentence reversed, CAPITAL PUNISHMENT 1993, *supra* note 13, at 15, any complete comparison of the correction costs of capital punishment as opposed to life in prison would have to take into account the cost of housing inmates on death row for several years, and then housing them in the general prison population for life. This could prove to be quite a complex analysis for which the raw statistics are not readily available.

65. ADMIN. OFFICE OF THE U.S. COURTS, SPECIAL REPORT: ANALYSIS OF THE SUPREME COURT'S WORKLOAD 1 (1994).

sands of pages,⁶⁶ and death penalty opinions comprise a striking percentage of the yearly output of the California Supreme Court.⁶⁷

Because direct death penalty appeals are mandatory, whereas appeals in other areas are discretionary, the time and energy devoted to death cases are often paid for by litigants whose cases cannot be considered, and indirectly by all those who must conduct their businesses or lives despite uncertainties and conflicts in the law that the state supreme court has no time to resolve.⁶⁸ Then there's the time spent by federal district and circuit judges and Supreme Court Justices resolving federal habeas petitions in death cases.⁶⁹ It's hard to give an accurate estimate of the judicial resources devoted to such petitions,⁷⁰ but ten times the average case is probably a conservative estimate.⁷¹

66. The average size of the record in a California death penalty habeas case is 5700 pages. United States Court of Appeals For the Ninth Circuit, *supra* note 8, at 2-3 (citing California Attorney General, Status of Capital Cases Affirmed by the California Supreme Court (Apr. 3, 1993) (on file with authors)); *see also* *Jeffers v. Lewis*, 38 F.3d 411, 426 (9th Cir. 1994) (en banc) (Noonan, J., dissenting) (discussing a case with exhibits and filings of over 15,000 pages and an opinion of over 60 pages), *cert. denied*, 115 S. Ct. 1709 (1995); J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 452 (1994) (estimating that it takes anywhere from six to nine months for a staff attorney to prepare a death penalty case, and the papers filed in death penalty cases can contain as many as 80,000 pages).

67. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 65, at 4 ("During the period 1987-1993 capital cases accounted for 26% of the court's opinions. . . ."); Kelso, *supra* note 66, at 452 (reporting that 20% of the California Supreme Court's opinions during the 1991-92 term were regarding capital cases).

68. Kelso, *supra* note 66, at 453.

69. Ironically, much of this time is spent deciding whether federal courts should even reach the merits of a habeas petition. As a result, the procedural bars that the Supreme Court has developed in an attempt to cut back on habeas corpus might in fact extend the time and effort spent litigating these petitions in federal court. *See* James S. Liebman, *More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 8 N.Y.U. REV. L. & SOC. CHANGE 537, 630-35 (1990-91).

70. David von Drehle, who has reported extensively on the death penalty for the *Miami Herald* and the *Washington Post*, indicates that the Eleventh Circuit spends as much as one-third of its staff resources on the death penalty. David von Drehle, *When Harry Met Scalia: Why the Death Penalty is Dying*, WASH. POST, Mar. 6, 1994, at C3.

71. McKenzie's case was the subject of three opinions by the Montana Supreme Court and four opinions from the Ninth Circuit Court of Appeals, including one en banc opinion. *See, e.g.,* *McKenzie v. Day*, 57 F.3d 1461, 1463 n.1 (9th Cir. 1995). This does not count the attention given the case by the United States Supreme Court, which twice reversed the state supreme court in memorandum decisions, and three times denied certiorari. *Id.* Nor does this include the attention given McKenzie's third and final federal petition for a writ of habeas corpus. Two days before he was to be executed, the Ninth Circuit denied McKenzie's motion for a stay of execution in a 16-page order, which drew a 40-page dissent. *Id.* at 1461, 1470. The next day, an en banc panel of 11 Ninth Circuit judges affirmed, also reaching the merits of McKenzie's habeas petition. *McKenzie v.*

This brings us to what may be the most significant cost of the death penalty—lack of finality. Death cases raise many more issues, and more complex issues, than other criminal cases,⁷² and they are attacked with more gusto and reviewed with more vigor in the courts. This means there is a strong possibility that the conviction or sentence will be reconsidered—seriously reconsidered—five, ten, twenty years after the trial. While only a tiny percentage of state and federal criminal cases are reversed on direct appeal,⁷³ the rate of reversal in death cases approaches 50%.⁷⁴ In federal courts, habeas petitions are granted in less than 7% of cases,⁷⁵ but the figure for death cases peaked in 1982 at 80% and averaged around 40% between 1978 and 1991.⁷⁶ While this figure may have dropped in recent years,⁷⁷ the fact remains that serious, sustained assaults on the validity of the conviction and death sentence continue for many years, with the case never quite reaching finality until the sentence is carried out. One has to wonder and worry about the effect this has on the families of the victims,⁷⁸ who

Day, 57 F.3d 1493, 1493-94 (9th Cir. 1995) (en banc). The Supreme Court, with Justice Stevens dissenting, declined to lift the stay. *McKenzie v. Day*, 115 S. Ct. 1840 (1995). For a concise overview of the procedural history of the case, see *McKenzie v. Day*, 57 F.3d 1461, 1490-93 (1995).

72. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 65, at 1 (estimating that capital cases raise four times more issues than other criminal cases).

73. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES, 6 tbl. B-5 (Dec. 31, 1993) (indicating that 7.4% of criminal cases were reversed in the federal courts of appeals).

74. Professors James Liebman and Randy Hertz, editors of the leading treatise on federal habeas corpus, JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (James S. Liebman & Randy Hertz eds., 1988), have done extensive research into the reversal rates for capital convictions on federal habeas corpus, and have now turned their attention to the reversal rate on direct appeal in state court. Professor Liebman reports that the reversal rate in all direct appeals in capital cases in the United States between 1976 and 1991 was 46.2%. See Memorandum from James Liebman and Randy Hertz to Sean Gallagher 8 (Apr. 10, 1995) (using data supplied by the NAACP Legal Defense Fund) (on file with authors). In Oregon, the reversal rate was as high as 95%. *Id.*; see also CRIME STATE RANKINGS 95 (Kathleen O'Leary Morgan et al. eds., 1994) (noting that between 1973 and 1991 the national percentage of death penalty sentences commuted or overturned was 38%).

75. NORTH CAROLINA STUDY, *supra* note 31, at 20.

76. Brief Amici Curiae of Benjamin R. Civiletti et al., in Support of Respondent, at B-2 tbl. II, *Wright v. West*, 505 U.S. 277 (1992) (No. 91-542); Liebman, *supra* note 69, at 541 n.15.

77. See Liebman, *supra* note 69, at 541-42 n.15 (predicting that the decision in *Teague v. Lane*, 489 U.S. 288 (1989), requiring the retroactive application of all new rules, would result in a number of state court decisions which would be rejected in habeas corpus proceedings).

78. See Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and*

have to live with the possibility—and often the reality—of retrials, evidentiary hearings, and last-minute stays of execution for decades after the crime.⁷⁹

But let's put aside all these costs for the time being and look at the other side of the coin: What are we getting in exchange? Maybe the best way to approach this is through the following riddle: As of 1992, what was the single largest cause of death for death row inmates? It clearly was not death by firing squad, or hanging, or the gas chamber. In fact, few death row inmates die from these causes.⁸⁰ Lethal injection, the method of execution in Texas, came in a close third.⁸¹ The first runner up, by a hair, was electrocution.⁸² So what's left? You guessed it, the dreaded "Other Causes."⁸³ California has sentenced 512 people to death since 1973 but has executed only 2; meanwhile at least 18 have died in prison.⁸⁴ Arizona had 1 execution between 1977 and 1992, but sentenced to death 103.⁸⁵ Even Texas, responsible for one-third of all executions since 1977,⁸⁶ and nearly half the executions in 1993,⁸⁷ manages to execute only 1 in 8 death row inmates.⁸⁸

Lack-of-Benefit Analysis of the Death Penalty, 23 LOY. L.A. L. REV. 59, 129-32 (1989) (arguing that the death penalty prolongs and exacerbates the suffering of victims' families). Two recent books on capital punishment aptly demonstrate the anguish suffered by victims' families due to execution delays. See DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW* 366-70 (1995) (describing the decade of anguish suffered by a murder victim's family awaiting the execution of their daughter's killer); PREJEAN, *supra* note 15, at 223-29 (describing parents' inability to deal with their daughter's death primarily because they lost their object of rage when the murderer was executed).

79. See, e.g., John Makeig, *Alleged Assassin Faces Retrial Monday*, HOUS. CHRON., Oct. 16, 1993, at A34 (describing the story of Allen Wayne Janecka, who was convicted in 1980 of the contract killing of a 14 month old boy, and faced retrial in 1993 after the person who arranged for the killing had been executed).

80. CAPITAL PUNISHMENT 1992, *supra* note 14, at 12. Between 1973 and 1992, no inmate had been hanged, only one had died before a firing squad (that inmate, Gary Gilmore, was a volunteer), and only seven had died from lethal gas. *Id.*

81. As of 1992, a total of 82 inmates had been executed by lethal injection. *Id.*

82. A total of 98 death row inmates had been executed in the electric chair. *Id.*

83. Between 1973 and 1992, 188 inmates were executed and 100 simply "died." *Id.* at 13; see also von Drehle, *supra* note 70, at C3 ("What should a man on death row fear most: electrocution, gassing or lethal injection? Try: Old age.").

84. CAPITAL PUNISHMENT 1993, *supra* note 14, at 15.

85. *Jeffers v. Lewis*, 38 F.3d 411, 425 (9th Cir. 1994) (en banc) (Noonan, J., dissenting), *cert. denied*, 115 S. Ct. 1709 (1995).

86. CAPITAL PUNISHMENT 1993, *supra* note 14, at 11; *Death Row, U.S.A.*, *supra* note 13, at 739.

87. See *Death Row, U.S.A.*, *supra* note 13, at 733, 737-38 (deriving this number by adding all executions in Texas in 1993 (17) and dividing by the total number of execu-

Nationwide, there are close to 3000 inmates on death row, and we are adding upwards of 250 more every year.⁸⁹ The largest number of executions in any year since 1977 was 38 in 1993, and 7 of those were what we have called volunteers.⁹⁰ This means the states would have to triple, and possibly quadruple, the number of yearly executions just to maintain the backlog at its current size. To eliminate the backlog, there would have to be 1 execution every day for the next 26 years.⁹¹

Even if the machinery of death were to become this well-greased, the courts could hardly keep pace.⁹² Our institutions of justice simply are not geared to handle that many executions—or anything close to it. Never mind the burden on the courts. Don't even consider that we would have to neglect every other type of civil and criminal case and devote all our time to death cases. Forget that the United States Supreme Court would have to consider daily applications for last minute stays of execution. The real sticking point is the lack of lawyers.⁹³ The death penalty may be the one area of the law where there are too few lawyers willing and able to handle the available caseload.⁹⁴ Despite a sustained and usually sincere effort over the course of many years, the state

tions in 1993 (38)).

88. *Id.* at 745.

89. In each of the past three years, the states have added over 280 new inmates to death row, while only executing approximately 30. CAPITAL PUNISHMENT 1993, *supra* note 14, at 12.

90. *See Death Row, U.S.A., supra* note 13, at 3, 7-8 (deriving this number by counting all those defendants who gave up their appeals in 1993).

91. Mathematically, this can be arrived at by solving the following equation: $3000 + 250x = 365x$, where x is the number of years. Since Sean majored in English and judges are notoriously bad at math, we do not account for leap years.

92. "At the [California Supreme Court's] present rate of deciding appeals in these [capital] cases, it would take ten years just to process the existing capital cases, and . . . juries are imposing the death penalty at a rate of about forty-eight per year." Kelso, *supra* note 66, at 455-56.

93. *See id.* at 455 n.82 (concluding that, because the California Supreme Court noted in its 1992 Annual Report that "[t]he backlog was worsened by lack of counsel for more than 60 inmates on death row," that "the bottleneck in processing capital cases appears to be due to a lack of appellate counsel").

94. Those willing to take these cases, at great personal sacrifice—both emotional and financial—are to be applauded. They perform an unpopular but necessary task and often are paid only a pittance. *See Bright, supra* note 49, at 1868 n.191 (describing how two attorneys in a capital case effectively earned below the minimum wage). Participation in capital punishment also presents a bit of a moral dilemma for those who oppose the death penalty. Although their participation might save lives, without the participation of these attorneys, the state cannot perform the execution. Thus, by participating in the process, they help the system.

and federal courts have been unable to find enough lawyers versed in the arcane jurisprudence of death to handle the massive review process needed to make any meaningful inroad on our death row population.⁹⁵

III. THE COMPETING ARGUMENTS

The consequence of all this is that we have the worst of all possible worlds. We have capital punishment, and the enormously expensive machinery to support it, but we don't really have the death penalty. The reason for this is hotly debated: too many procedural hurdles, too many appeals, too many dilatory tactics, too few lawyers, too *many* lawyers. But for our purposes here, what must be noted is that the reason is *not* that opponents of the death penalty have won the political and moral debate.

The typical debate over the death penalty is easy to reconstruct.⁹⁶ Abolitionists often start by noting that no other "civi-

95. States like Texas and Florida, which have had the highest execution rates in recent years, CAPITAL PUNISHMENT 1993, *supra* note 14, at 11, pay some of the lowest counsel compensation rates. See THE SPANGENBERG GROUP, *supra* note 49, at tbls. 1, 2 (describing the average compensation for counsel at the state direct appeal level and state post conviction level). In those states, the lack of lawyers might fairly be attributed to the paucity of payment. But in a state like California, which is relatively generous in its compensation of appointed counsel in capital cases, the shortage of lawyers is less easily explained. *Id.*; see also *supra* note 49 (noting that California defense attorneys are paid the most).

96. In 1978, Henry Schwarzschild articulated the following "classic arguments about the merits of the death penalty," which in actuality is a list of the arguments made by those who oppose capital punishment:

Its dubious and unproved value as a deterrent to violent crime;

The arbitrariness and mistakes inevitable in any system of justice instituted and administered by fallible human beings;

The persistent and ineradicable discrimination on grounds of race, class, and sex in its administration in our country's history (including the present time);

The degrading and hurtful impulse toward retribution and revenge that it expresses;

The barbarousness of its process (whether by burning at the stake, by hanging from the gallows, by frying in the electric chair, by suffocating in the gas chamber, by shooting at the hands of a firing squad, or by lethal injection with a technology designed to heal and save lives);

Even the deeply distorting and costly effect the death penalty has upon the administration of the courts, upon law enforcement, and upon the penal institutions of the country.

Henry Schwarzschild, *In Opposition to Death Penalty Legislation*, in THE DEATH PENALTY IN AMERICA, *supra* note 15, 130, at 364-65. The arguments raised in opposition to the death penalty today, with a few exceptions, simply recast these arguments. See Lackey v. Texas, 115 S. Ct. 1421, 1421-22 (1995) (Stevens, J., respecting the denial of certiorari)

lized"—meaning European—country has maintained the death penalty.⁹⁷ But what exactly is it about the morality in Western European countries that we should emulate? Within living memory, Germany and its allies sent millions of people to die in gas chambers. Long after World War II, France was still fighting wars to maintain its colonies in Africa and Asia. And, reaching back another generation, England allowed millions of Irishmen to starve to death in the Great Famine. Or perhaps we should take our moral bearings from another country that has recently abolished the death penalty—Romania—which not so long ago was being run by that paragon of Western morality—Nicolae Ceaucescu. By contrast to this recent squeamishness about the death penalty, the United States has taken a far more consistent position on capital punishment.

Henry Schwarzschild, former director of the ACLU Capital Punishment Project, has neatly summed up another moral argument against the death penalty: "Killing human beings is an act so awesome, so destructive, so irremediable that no killer can be looked upon with anything but horror, even when that killer is the state."⁹⁸ His argument really has two parts, neither of which is all that compelling. The first is that we might make a mistake that could never be corrected. But errors that go to guilt or innocence are exceedingly rare in criminal cases, and even more rare in death cases.⁹⁹ Even if an error occurs, it is most likely to turn up soon-

(discussing petitioners' argument designating capital punishment as cruel and unusual punishment because petitioner has spent 17 years on death row); *Jeffers v. Lewis*, 38 F.3d 411, 425 (9th Cir. 1994) (en banc) (Noonan, J., dissenting) (finding capital punishment cruel because its administration in Arizona is so arbitrary), *cert. denied*, 115 S. Ct. 1709 (1995).

97. Anthony Amsterdam, *Capital Punishment*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 15, 130, at 346, 358.

98. RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 175 n.1 (1982) (quoting Stuart Taylor, Jr., *Death Penalty Laws Return Amid Rising Debate in U.S.*, N.Y. TIMES, June 14, 1981, at 28).

99. Recent scholarship suggests as many as 23 people may have been wrongly executed in the United States this century. MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* 271, 272-73 n.* (1992). Only one of these 23, however, James Adams, was convicted after *Furman* inaugurated a new era of vigilance in death penalty appeals. *Id.* at 272-73 n.*, 283-356 (providing an inventory of the 26 cases). Radelet and Bedau's findings, especially their discussion of the *Adams* case, have been vigorously challenged. *See, e.g.*, Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 128-33 (1988) (illustrating the flaws and exaggerations in the analysis of the *Adams* case).

For an interesting perspective on what happens when we are wrong about a death row inmate's innocence, see William F. Buckley, Jr., *The Protracted Life of Edgar Smith*, LIFE, Feb. 1979, at 54 (explaining "[h]ow the author, who believed that a condemned

er rather than later. Cases where a defendant is exonerated years after his conviction because the one-armed man is found and made to confess are seen only on television.¹⁰⁰ And, of course, all punishment, once it is meted out, is to that degree final. No one can give back the twenty years someone has wrongfully spent behind bars.

There is also the second strain of Schwarzschild's argument, which is that capital punishment connotes a depraved disregard for human life.¹⁰¹ But that's like saying we do not value liberty because we punish people by putting them behind bars. It is precisely because we do value life and liberty that we consider their denial a punishment. And it is precisely our commitment to the idea that an individual *is* entitled to his own life that makes us so angry when we learn that human life has been taken intentionally and with malice aforethought, particularly in the depraved manner in which it is accomplished by many of those who populate our death rows.

Take for example Jacob Dougan, who brutally murdered an eighteen-year-old boy and then sent a tape to the boy's mother bragging about the crime. Dougan told the victim's mother, "He was stabbed in the back, in the chest, and the stomach, it was beautiful. You should have seen it. I enjoyed every minute of it. I loved watching blood gush from his eyes."¹⁰² Other examples abound: Robert Alton Harris, who abducted two young boys from a McDonald's, and after shooting them down in cold blood calmly

murderer was innocent and went all out to save him, was used and betrayed").

100. Opponents of capital punishment often cite the number of capital convictions that have been overturned. *See, e.g.,* *Jeffers v. Lewis*, 38 F.3d 411, 425 (9th Cir. 1994) (en banc) (Noonan, J., dissenting) (noting the number of reversals), *cert. denied*, 115 S. Ct. 1709 (1995). A large number of these reversals, however, concern only the sentencing decision, not the underlying conviction. When these commentators speak of the numbers of innocent people who have been sentenced to death, they generally mean people who are "innocent of the death penalty." The Supreme Court has specifically referred to such "innocent" defendants. *See, e.g.,* *Sawyer v. Whitley*, 112 S. Ct. 2514, 2516 (1992) ("[T]he concept of 'actual,' as distinct from 'legal,' innocence does not translate easily in the context of an alleged error at the sentencing phase of a trial on a capital offense." (citations omitted)); *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989) (using the term "'actually innocent' of a death sentence"). Nonetheless, the term can best be described as an euphemism because it refers to criminals who are guilty of serious crimes, but who for one reason or another are not bad enough to be executed.

101. *See Amsterdam, supra* note 97, at 352-53 ("The plain message of capital punishment, on the other hand, is that life ceases to be sacred whenever someone with the power to take it away decides that there is a sufficiently compelling pragmatic reason to do so.").

102. *Dougan v. State*, 595 So. 2d 1, 3 (Fla.), *cert. denied*, 113 S. Ct. 383 (1992).

finished off the burgers they had been eating and laughed about how the bullets had dismembered them;¹⁰³ Thomas Schiro, who drugged, raped, beat, and ultimately strangled a woman, then mutilated and sexually assaulted her corpse;¹⁰⁴ Buddy McCollum, who along with three other men raped an eleven-year-old girl and “then killed [her] by stuffing her panties down her throat;”¹⁰⁵ Thomas Dean Stevens, who kidnapped a taxi driver in Georgia, sodomized him, stole sixteen dollars from him, then drowned him by locking him in the trunk of the taxi and rolling it into a water-filled pit;¹⁰⁶ Gerald Gallego, who enlisted his common law wife’s aid in kidnapping several young women for the avowed purpose of making them his “sex slaves,” and then, after playing out his twisted fantasy, murdered them and dumped their bodies in the desert.¹⁰⁷ And there are many more who lend substantial appeal to the retribution theory of capital punishment, including such famous examples as John Wayne Gacy,¹⁰⁸ Juan Corona,¹⁰⁹ Theodore

103. John M. Glionna, *Harris Murders Leave Mark on Mira Mesa*, L.A. TIMES, Apr. 19, 1992, at B1.

104. *Schiro v. Farley*, 114 S. Ct. 783, 786-87 (1994).

105. *Callins v. Collins*, 114 S. Ct. 1127, 1128 (1994) (Scalia, J., concurring in the denial of certiorari).

106. *Burger v. Kemp*, 483 U.S. 776, 778-79 (1987); see also *Court Stays Execution of Cab Driver Slayer*, UPI, Dec. 17, 1990, available in LEXIS, News library, UPI file (detailing these crimes).

107. See Cy Ryan, *Untitled*, UPI, Sept. 13, 1985, available in LEXIS, News Library, Arcnws File.

108. Gacy tortured, drugged, sexually assaulted and dismembered 33 young men, then buried them in the crawl space under his house. *People v. Gacy*, 468 N.E.2d 1171, 1176-77, 1188-92 (Ill. 1984), cert. denied, 470 U.S. 1037 (1985).

109. Corona was convicted of “hacking to death” 25 itinerant farm workers in California in 1972. Pamela A. MacLean, *Corona Mass Murder Convictions Upheld*, UPI, June 15, 1989, available in LEXIS, News library, UPI file. Corona’s original conviction was overturned, but he was reconvicted in 1982. *Id.* His retrial cost the state of California in excess of four million dollars. Ian Gray, *A Shameful—and Expensive—Logjam at Death’s Door*, L.A. TIMES, Dec. 17, 1989, at M3. Despite these heinous murders, Corona escaped California’s gas chamber because he committed the crimes in 1973 when California had no death penalty. *Id.*

Frank,¹¹⁰ Ted Bundy,¹¹¹ Charles Manson,¹¹² and Jeffrey Dahmer.¹¹³

In the final analysis, the claims of those who argue that capital punishment is immoral rest in large part on their own personal revulsion at having to participate—as members of society—in the taking of human life.¹¹⁴ Insofar as this is a moral and not merely an aesthetic claim, it stands on no stronger footing than the argument of those who believe it is wrong to allow someone like John Dobbert or John Wayne Gacy—someone who has shown utter contempt for human life—to enjoy life while his victims are long dead and his victims' families continue to suffer his existence.

The latest twist on the moral argument is exemplified by Justice Stevens' memorandum opinion in *Lackey v. Texas*¹¹⁵ and Judge Noonan's dissent in the recent case *Jeffers v. Lewis*.¹¹⁶ Justice Stevens suggests that the death penalty might be cruel and unusual—and hence unconstitutional—because it usually takes so long to carry out. Judge Noonan suggests the death penalty is cruel

110. Frank molested a two-and-a-half year old girl, forced beer down her throat, tortured her with tools, then strangled her and dumped her body in Topanga Canyon, near Los Angeles. Mack Reed, *Federal Judge Gives Child Killer 45-Day Stay of Execution*, L.A. TIMES, Nov. 27, 1991, at B4.

111. Bundy confessed to sexually assaulting and killing over 20 women across the country. *Bundy Pinpointed Two More Bodies Minutes Before He Died*, REUTERS, LTD., Jan. 26, 1989, available in LEXIS, News Library, Reuna File.

112. Manson murdered actress Sharon Tate, among others, as part of a cult ritual. Along with Sirhan Sirhan, Manson was one of the more famous murderers whose death sentence was commuted as a result of the 1972 decision in *Furman*. See Martin Kasindorf, *Keeping Manson Behind Bars*, L.A. TIMES MAGAZINE, May 14, 1989, at 9, 13 (discussing Manson's commutation due to the California Supreme Court's holding that the then existing capital punishment statute was unconstitutional).

113. Dahmer kidnapped, sexually abused, tortured, murdered, and mutilated over a dozen young men. Hugh Davies, *Dahmer "Tried to Create Zombies,"* THE DAILY TELEGRAPH (London), Jan. 31, 1992, at 9.

114. For example, in *Callins*, Justice Scalia described Justice Blackmun's rationale for opposing the death penalty as follows:

Justice Blackmun dissents from the denial of certiorari in this case with a statement explaining why the death penalty "as currently administered" . . . is contrary to the Constitution of the United States. That explanation often refers to "intellectual, moral and personal" perceptions, but never to the text and tradition of the Constitution. It is the latter rather the former that ought to control.

Callins v. Collins, 114 S. Ct. 1127, 1127 (1994) (Scalia, J., concurring in the denial of certiorari).

115. 115 S. Ct. 1421, 1421-22 (1995) (Stevens, J., respecting the denial of certiorari).

116. 38 F.3d 411, 425 (9th Cir. 1994) (en banc) (Noonan, J., dissenting), *cert. denied*, 115 S. Ct. 1709 (1995).

and unusual because so few convicted murderers are actually executed. These arguments will persuade only those who are already convinced. The simple fact is the process takes so long because there is a concerted effort afoot to slow it down, and because our legal system requires scrupulous review before a death sentence can be carried out.¹¹⁷ It is somewhat akin to the classic definition of *chutzpah*¹¹⁸ for death penalty opponents to say we can't execute someone too fast because he is entitled to a searching review, and then to say what we are doing is immoral when we delay the execution precisely to afford such review.¹¹⁹

Which brings us to the perennial argument about whether the death penalty serves as a deterrent.¹²⁰ Rather than go through the competing considerations, let's cut to the meat of the coconut. The death penalty, as we now administer it, has no deterrent value because it is imposed so infrequently and so freakishly. To get executed in America these days you have to be not only a truly nasty person, but also very, very unlucky, as only 263 out of some 5,000 sentenced to death have been executed since 1972.¹²¹ The death penalty does, however, undeniably serve as a deterrent in one respect: once the sentence is carried out, the recidivism rate is quite low. And, the simple fact is, people sentenced to life in prison without parole, or even to a death sentence, do, occasionally, get out and do it again. Consider, for example, Donald Thigpen, who celebrated the commutation of his pre-*Furman* death sentence by escaping and murdering a Florida farmer;¹²² Robert Massie, who celebrated the California Supreme Court's commuta-

117. See *supra* note 71 (reviewing the extensive procedural history of *McKenzie v. Day*).

118. See Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, 103 YALE L.J. 463, 467 (1993) (explaining that a man has "chutzpah" when "a man kills both his parents and begs the court for mercy because he's an orphan").

119. Arguments like those of Justices Blackmun and Stevens about the unconstitutionality of the death penalty as it is currently administered are more than a little ironic coming from those who have played such a major role in shaping the way the death penalty is administered in this country.

120. See James A. Fox & Michael L. Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 LOY. L.A. L. REV. 29, 29 n.3 (1989) (citing upwards of 20 articles that discuss the deterrence question).

121. *Death Row, U.S.A.*, *supra* note 13, at 731 (determining the total number of sentences by adding the "total number of death row inmates known to LDF" and the "dispositions since January 1, 1973").

122. See *Thigpen v. Smith*, 603 F. Supp. 1519, 1523 (S.D. Ala. 1985), *vacated* 792 F.2d 1507 (11th Cir. 1986).

tion of his 1965 murder conviction by murdering again;¹²³ Dawid Majid Mu'Min, who was convicted for murdering a woman in Virginia while out of prison on work detail;¹²⁴ David Edwin Mason, who killed his cellmate while awaiting trial for the murder of four elderly victims;¹²⁵ Johnaton George, who, while serving a life sentence without possibility of parole for committing a series of rapes, killed an innocent bystander during an escape attempt;¹²⁶ or Christopher Scarver, who is charged with murdering Jeffrey Dahmer in prison while serving a life sentence for murder.¹²⁷

In any event, the deterrence argument is beside the point. Death penalty opponents never for a minute concede they would change their minds if they were somehow to learn that the fear of execution does deter.¹²⁸ At the same time, people who support the death penalty do not care all that much if it deters crime. For example, a poll conducted in 1992 showed that 60% of Californians favored the execution of Robert Alton Harris even though they felt it would "'discourage' few or no 'serious crimes.'"¹²⁹ The fact of

123. See *The State*, L.A. TIMES, Mar. 31, 1989, at Part 1, 2.

124. *Mu'Min v. Virginia*, 500 U.S. 415, 417 (1991).

125. CAL. DEP'T OF CORRECTIONS, CONDEMNED INMATE INFORMATION: DAVID EDWIN MASON 1 (1993).

126. Joe Wayne, *Convicted Killer Represents Self*, L.A. DAILY J., May 16, 1992, at 2.

127. *Inmate Charged in Dahmer Killing*, L.A. DAILY J., Dec. 16, 1994, at 5.

128. Opponents of the death penalty generally raise the deterrence argument only to buttress what is essentially a moral claim; in other words, they argue that the death penalty is not only wrong, but also that it does not work. As one opponent of the death penalty noted,

If I believed the opposite of what I do believe; if I believed it established, beyond the possibility of doubt, that the death penalty is preventive of murder as nothing else could be; if—I am anxious to put my case in as extreme a form as possible, so that nobody can misunderstand me—if I felt certain that abolition [of the death penalty] would immediately be followed by a startling increase in the numbers of murders: I should still say, and say with undiminished conviction, that the most urgent of all tasks which confront us, or could confront any people that had a care for religious or humane values, is the ending of capital punishment.

VICTOR GOLLAN CZ, CAPITAL PUNISHMENT: THE HEART OF THE MATTER 7 (1955) *quoted in* WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 30 (1991). Others who oppose the death penalty regularly make the same assertion. For example, Henry Schwarzschild has stated, "If the death penalty were shown, or even could be shown, to be socially necessary or even useful, I would personally still have a deep objection to it." Schwarzschild, *supra* note 96, at 370.

129. George Skelton, *Death Penalty Support Still Strong in State*, L.A. TIMES, Apr. 29, 1992, at A1; *see also* PREJEAN, *supra* note 15, at 257 n.9 (noting that a 1991 CNN/Gallup poll indicated that 76% of Americans favor the death penalty, but only 13% for deterrence and only 19% for protection).

the matter is, voters consistently vote to retain the death penalty, regardless of what courts or social scientists say about its utility. Look what happened in the wake of *Furman*, when there was a veritable "stampede of state reenactments of the death penalty."¹³⁰ Florida, for instance, retrofitted its death statute within six months,¹³¹ and California was up and running again within the year.¹³²

IV. QUO VADIS?

Where does all this leave us? Unfortunately, we're not in a very different position than we were in twenty-three years ago when the Supreme Court wiped the slate clean of all death statutes, and with them the death sentences of every inmate then on death row.¹³³ With remarkable consistency, our political institutions have gone about reenacting and expanding the death penalty. At the same time, the judicial system has tied itself in knots trying to carry out the popular will while also addressing the misgivings of those who have strong moral objections to having their government, their tax dollars, and their authority used to take human life.

So we are left in limbo, with machinery that is immensely expensive, that chokes our legal institutions so they are impeded from doing all the other things a society expects from its courts,

130. JOHN H. ELY, *DEMOCRACY AND DISTRUST* 65 (1980). As Hugo Bedau noted in 1982, "There seems little doubt that the public is in favor of having the death penalty 'on the books,' given the unbroken record . . . of public referenda enacting death penalties: Illinois (1970), California (1972), Washington (1975), and Oregon (1978)." *THE DEATH PENALTY IN AMERICA*, *supra* note 15, at 68.

131. Sherrill, *supra* note 10, at 104. It was Florida's alacrity in passing a new—and constitutional—death penalty that allowed the conviction and eventual execution of John Dobbert. *See Dobbert v. Florida*, 432 U.S. 282, 286-87 (1977) (addressing the ex post facto problem); *supra* text accompanying note 20 (describing Dobbert's crime).

132. *CAPITAL PUNISHMENT IN CALIFORNIA*, *supra* note 64, at 2. In fact, California has three times reinstated the death penalty after the courts struck it down, once after *Furman*, and twice (in 1972 and 1976) after it was struck down by the California Supreme Court. *Id.* Indeed, California's popular support for the death penalty was so strong it ultimately resulted in the removal of three state supreme court justices who were viewed as unsupportive of the death penalty. *Supra* note 16.

133. *Furman* vacated the death sentence of 629 death row inmates. Jack Greenberg, *Capital Punishment as a System*, 91 *YALE L.J.* 908, 915 (1982). Two other Supreme Court cases, *Gregg v. Georgia* and *Woodson v. North Carolina*, invalidated 414 capital sentences between them. *Id.*; *see Gregg v. Georgia*, 428 U.S. 153, 176-87 (1976) (discussing the constitutional boundaries of the death penalty and its application); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (holding unconstitutional a North Carolina statute mandating the death sentence for first degree murder). Some of these inmates have gone on to murder again. *See supra* text accompanying notes 122-27.

that visits repeated trauma on victims' families, and that ultimately does not produce anything like the benefits we would expect from an effective death penalty. As time passes, the balance is likely to shift even farther toward the costs and away from the benefits. This is surely the worst of all worlds.

Though hardly a victory of majority rule, this impasse on the death penalty is nevertheless an object lesson in how our democracy works. The process exasperates the judges and law clerks whose task it is to administer it. It frustrates and angers state officials who feel stymied in carrying out the mandate of the people. And it disappoints the families of the victims who cannot put the tragedy behind them so long as the conviction and sentence are not final. Nevertheless, it is a tribute to our constitutional democracy that the popular will has been thwarted to such a substantial degree.

The death penalty provides an important lesson in the way the Constitution can serve as a brake on majority will, even where it does not contain an outright prohibition, so long as a determined minority of the population chooses not to acquiesce in the majority's resolution of an issue. Rather than demonstrating the weakness of democracy, the willingness of the majority to let itself be buffaloes in this fashion shows the fundamental soundness of our constitutional system, which strives for substantial consensus and accommodation with strongly held minority views. The more important, the more morally-laden the issue, the more substantial the consensus must be.

This observation does not change the fact, however, that we are devoting very substantial resources to a problem that leaves proponents and opponents of the death penalty frustrated and exhausted. From a theoretical perspective, where we are now is not really all that bad, but it is a *practical* mess. Is there a way out?

Only two solutions suggest themselves, one judicial and the other political. The judicial solution would require a wholesale repudiation of the Eighth Amendment case law developed by the Supreme Court over the last quarter century. This is not nearly as easy to accomplish as it might seem, even when seven of the current Justices were appointed by fairly conservative Republican Presidents. The essential teaching of *Furman* is that death really *is* different,¹³⁴ and that the Constitution calls for an extraordinary

134. This principle is so firmly established as to be practically unassailable. *See, e.g.,*

measure of caution before the state may take human life. While this conclusion may not be required by the constitutional text, it surely is permitted, and as we learned a few terms back in *Planned Parenthood v. Casey*,¹³⁵ conservative justices are reluctant to revisit major constitutional judgments reached by earlier Courts. The established application of the Eighth Amendment to the administration of the death penalty will continue to give opponents a legitimate platform from which to impede even the most determined efforts to carry out the death penalty on a routine basis.

The political solution is, perhaps, equally difficult to achieve, but it's really all we have left. Any hope that death penalty opponents will just go away (thus allowing the death penalty to be carried out in an assembly-line fashion) is surely unrealistic. Driven by strong moral convictions, opponents have shown they are here to stay. If we must have a death penalty, we will have to carry it out over their sustained and vigorous opposition.

The key to a solution, if there is to be one, lies in the hands of the majority, precisely those substantial numbers in our midst who strive for the application of the death penalty to an ever-widening circle of crimes. The majority must come to realize that this is a self-defeating tactic. Increasing the number of crimes punishable by death, widening the circumstances under which death may be imposed, obtaining more guilty verdicts, and expanding the population of death rows will not do a single thing to accomplish the objective, namely to ensure that the very worst members of our society—those who, by their heinous and depraved conduct have relinquished all claim to human compassion—are put to death.¹³⁶

Eddings v. Oklahoma, 455 U.S. 104, 117-118 (1982) (O'Connor, J., concurring) ("Because sentences of death are 'qualitatively different' from prison sentences, . . . this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." (citation omitted)), *cert. denied*, 470 U.S. 1051 (1985); *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in this country."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from any other sentence."). The question now is no longer whether death is different, but how different is it.

135. 112 S. Ct. 2791, 2796 (1992) (concluding that doctrine of *stare decisis* requires reaffirmance of *Roe v. Wade*).

136. Opponents of the death sentence focus their arguments on numerous procedural concerns. They frequently emphasize the arbitrariness with which criminal defendants are selected for death penalty prosecution. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) ("Death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."). They also focus on the arbitrariness

What the majority must come to understand is that we as a society may be willing and able to carry out thirty, forty, maybe fifty executions a year, but that we cannot and will not do a thousand a year, or even two hundred and fifty.

Once that reality is accepted, a difficult but absolutely necessary next step is to identify exactly where we want to devote our death penalty resources. To be sure, everyone on death row is very bad or else they wouldn't be there. But even within that depraved group, it is possible to make moral distinctions as to how far someone has stepped down the rungs of hell.¹³⁷ Hitler was worse than Eichman, though both are unspeakably evil by any standard; John Wayne Gacy, with two dozen or so brutal deaths on his conscience, must be considered worse than John Spenkelink, who killed only once.¹³⁸

The Supreme Court already requires the states and the federal government to differentiate between murderers who deserve the death penalty and murderers who do not,¹³⁹ and that directive has proved difficult to implement. Further differentiating only the most depraved killers would not be an easy task; it would not be pleasant;¹⁴⁰ it would require some painful soul-searching about the na-

with which death row inmates are chosen for execution. *See, e.g.*, *Jeffers v. Lewis*, 38 F.3d 411, 425 (9th Cir. 1994) (en banc) (Noonan, J., dissenting) (stating that arbitrariness violates the cruel and unusual punishment clause), *cert. denied*, 115 S. Ct. 1709 (1995). And they decry the length of time inmates spend on death row. *See, e.g.*, *Lackey v. Texas*, 115 S. Ct. 1421, 1421-22 (1995) (Stevens, J., respecting the denial of certiorari) (comparing the deterrent effect of waiting to be executed with actually being executed). The expansion of crimes for which the death penalty is available, and the concomitant expansion of the population on death row, will only fuel these arguments.

137. Perhaps for this very reason, Chief Justice Burger stated in *Furman* that he would limit the death penalty to "a small category of the most heinous crimes," as a matter of policy, not constitutional law. *Furman v. Georgia*, 408 U.S. 238, 375 (1972). Others have also echoed this sentiment. *See, e.g.*, BERNIS, *supra* note 128, at 179 ("Not all murderers deserve to be executed; not even all first-degree murderers deserve to be executed, because not all first-degree murders are equally terrible. . . . We can recognize the difference between the culpability of Jack Ruby, for example, the killer of Lee Harvey Oswald, and that of Lee Harvey Oswald himself. . . .").

138. *See Spenkelink v. Wainwright*, 442 U.S. 1301, 1304 (1979) (Rehnquist, J., denying application for stay of execution).

139. *See, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 358-59 (1988) (imposing death penalty after determining that the aggravating circumstances outweighed the mitigating evidence); *Godfrey v. Georgia*, 446 U.S. 420, 426 (1980) (imposing the death penalty after specifying that the aggravating circumstances were "outrageously or wantonly vile, horrible and inhuman"), *cert. denied*, 456 U.S. 919 (1982).

140. The task would not be made any simpler by Supreme Court precedent, which prohibits mandatory imposition of the death penalty for certain crimes. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (reversing the North Carolina Supreme Court's

ture of human evil.¹⁴¹ But it would have three very significant advantages. First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would ensure that the few who suffer the death penalty really are the worst of the very bad—mass murderers, hired killers, terrorists.¹⁴² This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random.

decision to uphold mandatory death statute for certain crimes, and reversing the mandatory death sentences on the petitioners). States could not limit the scope of the death penalty by making it a firm requirement in a narrow class of heinous crimes—like genocide. However, to be constitutional, any statutory scheme imposing the death penalty must satisfy two requirements: It must both narrow the class of crimes for which the death penalty is an option (an eligibility question), and it must permit sentencing discretion (a selection question). *See Tuilaepa v. California*, 114 S. Ct. 2630, 2634-35 (1994) (“To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. . . . We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence.”). There are two ways a state could validly channel juror discretion to eliminate the risk of arbitrary and capricious sentencing. First, a state could broadly define capital offenses and specify the aggravating circumstances that must be found in order to impose the death sentence. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 196-98 (1976) (judge instructing the jury at sentencing that it could consider mitigating or aggravating circumstances when considering whether to impose the death sentence). Secondly, a state could narrowly define the offenses that warrant capital punishment. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (“[T]he ‘narrowing function’ was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder.”). As a matter of eligibility, then, the states could significantly narrow the class of cases in which the death penalty is available.

141. As social science research confirms, however, we make this distinction instinctively. People favor the death penalty far more strongly for serial killers and mass murderers than they do for felony murderers. *Fox et al., supra* note 15, at 511.

142. By most contemporary accounts, there is no rational relationship between the severity of the crime committed and the likelihood of receiving the death sentence or having that sentence carried out:

Empirical evidence suggests that at least in extreme cases the severity of the defendant's crime is an important factor in determining whether a death sentence will be imposed. . . . Aside from the extreme cases, the importance of the severity of the crime is less clear.

WHITE, *supra* note 56, at 36. The other major factors in determining whether a death sentence will be imposed, White reports, are race and the effectiveness of trial counsel, which White reports to be notoriously poor in many jurisdictions. *Id.* at 36-38.

The third advantage of such a political solution is that it will place the process of accommodation back into the political arena where it belongs. This means that the people, through their elected representatives, will reassert meaningful control over this process, rather than letting the courts and chance perform the accommodation on an ad hoc, entirely irrational basis. Some objections to capital punishment—for example, that broadly-drafted death penalty statutes allow latent racial biases to affect sentencing decisions¹⁴³—might be removed by statutes that are drafted so narrowly that racial considerations become irrelevant. And death penalty opponents might react quite differently to a regime where executions are rare, extraordinary events, reserved for the most depraved in our society, rather than everyday occurrences that don't even make the morning paper. A political solution—a true compromise—might yet enable us to reach a consensus where both sides feel that their essential interests have been considered and accorded deference.

It will not be easy. It will surely take a massive act of will for the majority to admit a measure of defeat and take the initiative toward compromise. However, as in the case of democracy itself, the alternatives are all much worse.

143. DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 2 (1990). As these authors point out, “[t]he challenge to the system . . . is whether it can be modified to limit death sentencing to the worst offenders. This goal might be achieved by drastically narrowing the categories of cases for which death sentences are authorized, for example, by limiting death sentences to cases involving extreme and systematic torture or mass killings.” *Id.* at 3.