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## The Demise of Capital Clemency

Paul J. Larkin Jr.

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# The Demise of Capital Clemency

Paul J. Larkin, Jr.\*

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## *I. Introduction*

Over the last four decades, numerous commentators have criticized the institution of executive clemency.<sup>1</sup> Opponents of

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1. See generally JEFFREY P. CROUCH, *THE PRESIDENTIAL PARDON POWER* (2009); Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131 (2010); Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593 (2013). Such

capital punishment have been particularly vocal. Their principal complaint has been that, with a few isolated exceptions,<sup>2</sup> far too many chief executives have granted condemned prisoners clemency far too infrequently.<sup>3</sup> This is an unfortunate

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criticism is not an entirely new phenomenon. *See, e.g.*, James P. Goodrich, *Use and Abuse of the Power to Pardon*, 11 J. AM. INST. CRIM. L. & CRIMINOLOGY 334, 335 (1920–1921) (“Thoughtful persons fear that a maudlin sentimentality may go too far in the direction of mercy and lay too little emphasis on the necessity of certain and inflexible punishment for violated law.”).

2. Several governors have issued a mass clemency to all death row prisoners. Three governors—Tony Anaya of New Mexico, Richard Celeste of Ohio, and George Ryan of Illinois—commuted the sentence of every condemned prisoner in their states just before leaving office. Two governors—Jon Corzine of New Jersey and Pat Quinn of Illinois—commuted the death sentences of every prisoner on death row just before signing separate bills repealing capital punishment in their respective states. In 2015, Maryland Governor Martin O’Malley commuted the death sentence of every death row inmate after the state repealed capital punishment, but did not make that legislation retroactive. *See* Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 259 (1990–1991) (noting the 1986 mass commutation by New Mexico Governor Tony Anaya); Michael Heise, *The Death of Death Row Clemency and the Evolving Politics of Unequal Grace*, 66 ALA. L. REV. 949, 956, 980 (2015) [hereinafter Heise, *Unequal Grace*] (explaining how Illinois Governor George Ryan removed inmates from death row because of concerns about the possibility of executing innocent prisoners); Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1308 (2004) (calling George Ryan’s mass commutation “the single sharpest blow to capital punishment since the United States Supreme Court declared it unconstitutional in 1972”); DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Sept. 6, 2016) (tracking clemency statistics by state) (on file with the Washington and Lee Law Review). Critics have faulted those exercises of the clemency power too. *See generally* David A. Wallace, *Dead Men Walking—An Abuse of Executive Clemency Power in Illinois*, 29 U. DAYTON L. REV. 379 (2004).

3. *See, e.g.*, Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1124 (2012) (“[B]etween 1923 and 1972 Texas executed 461 people . . . [and] . . . commuted 100 capital sentences . . . . Since 1976, when the United States reinstated the death penalty, Texas has executed 477 people . . . [and] granted clemency [twice] . . . .”) (footnotes omitted). *See generally* Michael A.G. Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349 (1996); Victoria J. Palacios, *Faith in Fantasy: The Supreme Court’s Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996); Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289 (1993); Stephen E. Silverman, Note, *There is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates’ Last Appeals*, 37 ARIZ. L. REV. 375 (1995). There are three forms of clemency in capital cases: (1) a reprieve, which merely postpones execution; (2) a commutation, which can reduce a death sentence to life imprisonment, with or

development—critics argue—one due entirely to the politicization of criminal justice, particularly on the subject of capital punishment.<sup>4</sup> Governors are unwilling to risk their political future by commuting the sentences of condemned prisoners absent proof of their innocence—the argument goes—because they anticipate receiving few political benefits from extending mercy to killers,<sup>5</sup> and they fear being tarred with the label “soft on crime” in their next campaign.<sup>6</sup> Perhaps what frightens governors most of all—critics maintain—is the prospect that commuting a condemned prisoner’s sentence could ultimately lead to his release and his commission of new, horrific, but preventable, crimes.<sup>7</sup>

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without the possibility of parole, or a lesser sentence; and (3) a pardon, which releases an offender from custody. See Elkan Abramotiz & David Paget, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 137–38 (1964) (describing executive clemency).

4. See *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 280–81 (1994) (examining the political pressures associated with death penalty decisions).

5. See, e.g., MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 190 (2015) (“As Senator James Webb (D-VA) once said at a conference on prisoner reentry, ‘The question is about fear. And I think it pervades the political process.’”).

6. For example, in 1992 then-Governor Bill Clinton suspended his presidential campaign to return to Arkansas for the execution of Ricky Rector, a brain damaged prisoner who put his last meal dessert aside “for later,” so that he could not be labeled “soft on crime”—a label that hurt Michael Dukakis’ presidential efforts four years earlier. See James R. Acker & Charles S. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 200–01 (2000) (noting that Rector would occasionally lapse into “crazed fits of barking and howling”); Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105, 105 (“Bill Clinton had to prove that he was a Democrat who could handle mainstream priorities—including the death penalty.”). See generally Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. ON C.L. & C.R. 191 (2003); Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 436, 444–45 (1999); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J. L. & PUB. POL’Y 833, 874–80 (2016) [hereinafter Larkin, *Revitalizing Clemency*] (describing political influences in clemency); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL’Y 715, 731–35, 756–63 (2013) (describing political influences in criminal justice policy generally).

7. That concern is not hypothetical. See, e.g., EDMUND G. (PAT) BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR’S EDUCATION ON DEATH ROW iii, 90–115 (1989) (describing the case of Edward Wein, a multiple rapist and murderer,

This Article maintains that these criticisms are unfounded or overstated. Part II describes the new procedures that the federal and state governments have instituted to satisfy constitutional capital sentencing requirements that did not exist when governors regularly granted condemned prisoners clemency. Part II also identifies some of the criticisms leveled against the use of clemency in capital cases over the last forty years. Part III addresses the question of whether governors should use their clemency power whenever there is a risk that a condemned prisoner is innocent. Part III concludes that a governor should not merely grant clemency, but also issue a pardon to any offender who proves to be innocent of his crime, but notes that the instances in which that scenario might occur are few and far between. Part IV deals with the argument that chief executives have failed to sift out those cases in which death is an inappropriate penalty for a particular offender. It concludes that, given the numerous opportunities for the jury and state courts to spare those offenders, there is far less need today for a governor to second-guess the unanimous view of the local community and state judiciary that a death sentence is the appropriate punishment. Finally, critics do not address the horrific facts of some capital cases—facts that can signify that death is the appropriate penalty.

## *II. Capital Punishment and Clemency*

### *A. The History of American Capital Punishment*

Capital punishment for heinous crimes and executive clemency for condemned prisoners have co-existed throughout the

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who raped and killed one woman and attempted to murder another, crimes made possible only because California Governor Pat Brown had commuted his original death sentence); Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 823 (2015) (noting that former Arkansas Governor Mike Huckabee commuted an offender's sentence, the inmate was later released, and afterwards he murdered four police officers); *Jailhouse Nation*, ECONOMIST (June 20, 2015), <http://www.economist.com/news/leaders/21654619-how-make-americas-penal-system-less-punitive-and-more-effective-jailhouse-nation> (last visited Sept. 7, 2016) (“One reason Michael Dukakis was never president was that a murderer called Willie Horton, who was released on furlough while Mr. Dukakis was governor of Massachusetts, took the opportunity to rape someone.”) (on file with the Washington and Lee Law Review).

history of Western Civilization.<sup>8</sup> The two institutions have always co-existed in an opposing manner: one symbolizing society's abhorrence of certain conduct,<sup>9</sup> and the other signaling that sometimes mercy can adequately promote society's criminal justice needs.<sup>10</sup> Capital punishment has been defended on the ground that it serves several different purposes of punishment: retribution, deterrence, incapacitation, and education.<sup>11</sup> Executive clemency for condemned prisoners has been justified on the ground that it serves purposes that the criminal justice system cannot satisfy.<sup>12</sup>

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8. See, e.g., *McGautha v. California*, 402 U.S. 183, 197–98 (1971) (explaining that death was the mandatory penalty for felonies at common law), *reh'g granted and judgment vacated on other grounds sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972); *Genesis* 4:8–16 (telling how after Cain murdered Abel, God granted Cain the Mark of Cain so that he would not be killed by others); *Exodus* 21:12 (“Whoever strikes a man so that he dies shall be put to death.”); *Matthew* 27:20 (saying Pontius Pilate pardoned Barabbas instead of Jesus); 4 WILLIAM BLACKSTONE, COMMENTARIES \*201 (noting that, at common law, death was the punishment for murder), *id.* at \*397–440 (discussing the crown's authority to grant clemency); CHARLES L. GRISWOLD, FORGIVENESS: A PHILOSOPHICAL EXPLORATION xviii n.10 (2007) (explaining that Julius Caesar granted clemency to some conquered nations); John Milton, *Paradise Lost*, in 2 THE WORKS OF JOHN MILTON bk. X 307 (F. Patterson ed., 1931) (“[T]emper . . . Justice with Mercie . . .”). See generally NAOMI D. HURNAND, THE KING'S PARDON FOR HOMICIDE BEFORE AD 1307 (1970).

9. In *Gregg v. Georgia*, the lead opinion written by Justice Potter Stewart concluded that “the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.” 428 U.S. 153, 184 (1976). Justice Stewart reached that conclusion in the context of justifying capital punishment on retributive grounds. *Id.* The rationale is that, in executing an offender, particularly for some of the hideous crimes that condemned prisoners have committed, see *infra* text accompanying notes 146–156 and Appendix C, the sovereign demarks certain conduct as being so far beyond the limits of even “ordinary” homicide that it must signify its abhorrence by declaring that the offender is no longer fit to live in society. *Id.*

10. See, e.g., *Biddle v. Perovich*, 274 U.S. 480, 486 (1927)

A pardon . . . is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.

11. See *Gregg*, 428 U.S. at 183, 175 n.20 (describing the purposes of capital punishment as retribution, deterrence, and incapacitation).

12. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (calling clemency a “relief mechanism” for the fallible justice system).

It acts as an external “fail safe”<sup>13</sup> for mistaken convictions and unduly severe punishments; it allows the chief executive discretion to override the decisions of prosecutors, juries, and judges, and to impose his own stamp on the criminal justice system; and it allows mercy to trump justice even when a conviction and sentence cannot be deemed flawed or unduly harsh.<sup>14</sup> Both practices have been in existence in the United States from the nation’s earliest days.<sup>15</sup>

At common law, death was the mandatory punishment for every felony.<sup>16</sup> The American colonies, which inherited the

13. *Id.* (quoting KATHLEEN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989)).

14. *See, e.g., Ex parte Grossman*, 267 U.S. 87, 120 (1925) (“Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”); *In re Flournoy*, 1 Ga. 606, 607 (1846) (“[A pardon] proceeds upon the idea of innocence . . . And as all good governments are founded upon essential equity, the sovereign authority will not permit, so far as it can be prevented consistently with the maintenance of general laws, injustice to be done.”); Larkin, *Revitalizing Clemency*, *supra* note 6, at 848–50 (“Presidents have extended offenders [clemency] for a host of reasons: as correction for an errant conviction or unduly severe punishment, . . . [because] a lesser punishment better serves the nation’s interests, . . . [to] demonstrate[] that he oversees the operation of the criminal law, or simply as an act of grace.”); Williams W. Smithers, *Nature and Limits of the Pardoning Power*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 549 (1911) (surveying the justifications for clemency); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 89 (2002) (“[P]ardons may be issued when justice would otherwise not be served either because the sentence was too harsh or because the person was wrongly convicted.”). Presidents have also used their clemency power in matters of state. *See* Larkin, *Revitalizing Clemency*, *supra* note 6, at 850–51, 850 n.55.

15. *See, e.g., Crimes Act of 1790*, ch. 9, §§ 1, 3, 8–10, 14, 23, 1 Stat. 112 (1790) (imposing mandatory capital punishment for various crimes, such as: treason; murder within exclusive federal jurisdiction; murder or robbery on the high seas; piracy; being an accomplice to murder, robbery, or piracy on the high seas; counterfeiting; and using force to help a condemned prisoner escape); *United States v. Wilson*, 32 U.S. 150, 160 (1833) (“As this [clemency] power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon . . . .”); STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 53–62 (2002) (describing capital punishment and clemency in seventeenth- and eighteenth-century America); CROUCH, *supra* note 1, at 12–19 (describing the Framers’ opinions regarding clemency); HUGH F. RANKIN, *CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA* 105–10, 121–22, 171 (1965) (describing capital punishment and clemency in seventeenth- and eighteenth-century Virginia).

16. *McGautha v. California*, 402 U.S. 183, 197–98 (1971), *reh’g granted and*

common law,<sup>17</sup> also used capital punishment for various crimes, such as treason, murder, piracy, arson, robbery, and burglary.<sup>18</sup> Juries, however, disliked seeing a mandatory death sentence in cases where the offender did not deserve to die and would refuse to convict a defendant if doing so would send him to the gallows.<sup>19</sup> The federal and state governments responded to those decisions over time by progressively modifying their criminal laws in different ways.

The first step was to redefine the crime of capital murder. Late in the eighteenth century, Pennsylvania divided capital murder into two degrees, with death as the penalty only for first-degree murder, then classified as a “willful, deliberate and premeditated” homicide.<sup>20</sup> Other states followed in Pennsylvania’s wake to limit a mandatory death penalty to the most heinous offenses.<sup>21</sup> That reform, however, did not work. Denied the discretion to impose a punishment less than death for even a newly-limited category of capital murders, juries “on occasion took the law into their own hands”<sup>22</sup> and refused to convict clearly guilty defendants who, in the jury’s view, did not deserve to be executed.<sup>23</sup>

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*judgment vacated on other grounds sub nom.* Crampton v. Ohio, 408 U.S. 941 (1972); 4 BLACKSTONE, *supra* note 8, at \*201.

17. Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. (forthcoming 2016) (manuscript at 38–39).

18. Woodson v. North Carolina, 428 U.S. 280, 289 (1976); BANNER, *supra* note 15, at 54.

19. See generally Woodson, 428 U.S. at 289; *McGautha*, 402 U.S. at 198–99; Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1102 (1953).

20. *McGautha*, 402 U.S. at 198 (quoting Pa. Laws 1794, ch. 1777); Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949); Philip English Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. REV. 32 (1974).

21. See, e.g., *McGautha*, 402 U.S. at 198 (“[Pennsylvania’s] reform was soon copied by Virginia and thereafter by many other states.”); Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 707–09 (1937) (discussing statutory reforms in the United States).

22. *McGautha v. California*, 402 U.S. 183, 199 (1971).

23. See, e.g., Woodson, 428 U.S. at 289–90 (1976) (examining the “not infrequent refusal of juries to convict murderers”); *McGautha*, 402 U.S. at 198 (describing that history as a “rebellion” against mandatory capital sentences); *Andres v. United States*, 333 U.S. 740, 753 (1948) (Frankfurter, J., concurring) (explaining that the nineteenth century movement against the death penalty was impelled in part by the “practical consideration that jurors were reluctant to bring

Conceding defeat, the federal government and the states' next response was to grant juries complete discretion whether to impose the death penalty in murder cases.<sup>24</sup> By 1963, discretionary capital sentencing in murder cases was universal.<sup>25</sup> Some groups, such as the American Law Institute (ALI), recommended that juries be given standards to guide their discretion,<sup>26</sup> but standardless discretion remained the typical sentencing format in capital cases. In fact, in 1971 in *McGautha v. California*,<sup>27</sup> the Supreme Court of the United States expressly rejected a due process challenge to standardless jury sentencing.<sup>28</sup> The Court concluded that, given the countless factors potentially relevant in the myriad of cases, any guidance would end up being "either meaningless 'boiler-plate' or a statement of the obvious that no jury would need."<sup>29</sup> The Court

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in verdicts which inevitably called for its infliction").

24. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 291 (1976) (noting that Tennessee was the first state to do so in 1838); *Winston v. United States*, 172 U.S. 303, 313 (1899) (ruling that a federal law had "committed the whole matter" of the death penalty's "exercise to the judgment and conscience of the jury").

25. *Woodson*, 428 U.S. at 291–92.

26. See, e.g., MODEL PENAL CODE § 210.6 (1962) (enumerating aggravating and mitigating circumstances that capital sentencing juries should consider).

27. 402 U.S. 183 (1971), *reh'g granted and judgment vacated on other grounds sub nom.* *Crampton v. Ohio*, 408 U.S. 941 (1972).

28. See *id.* at 207 (finding "it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution").

29. *Id.* at 208. The Court went on to criticize such guidance in depth:

It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. In short, they do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected. Thus, they indeed caution against this Court's undertaking to establish such standards itself, or to pronounce at large that standards in this realm are constitutionally required. In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are

also saw no need to mandate a two-stage trial process so that a defendant who declined to testify at trial could plead for his life at a separate proceeding devoted to sentencing.<sup>30</sup>

All that changed only one year later. Relying now on the Eighth Amendment Cruel and Unusual Punishments Clause,<sup>31</sup> the Supreme Court did a complete about-face in *Furman v. Georgia*.<sup>32</sup> By a five-to-four vote, the Court in *Furman* held unconstitutional the identical discretionary sentencing laws that it had sustained in *McGautha*.<sup>33</sup> Two members of the Court—Justices William Brennan and Thurgood Marshall—concluded that the death penalty could never serve as the punishment for any crime,

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entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

*Id.* 207–08 (footnotes omitted).

30. *Id.* at 210–20.

31. The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

32. 408 U.S. 238 (1972). Nothing in the Court’s prior capital punishment decisions gave any hint that the death penalty might violate the Eighth Amendment. *See, e.g., McGautha v. California*, 402 U.S. 183, 207 (1971) (“[W]e find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the [C]onstitution.”); *id.* at 226 (Black, J., concurring) (“The Eighth Amendment forbids ‘cruel and unusual punishments.’ In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted.”); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (holding that carrying out a second attempt at execution after first attempt was unsuccessful was not unconstitutional); *In re Kemmler*, 136 U.S. 436 (1890) (upholding electrocution as a permissible method of execution); *id.* at 447 (“Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the [C]onstitution. It implies there something inhuman and barbarous[,] something more than the mere extinguishment of life.”); *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878) (“Cruel and unusual punishments are forbidden by the Constitution, but . . . the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the [E]ighth [A]mendment.”).

33. *Furman*, 408 U.S. at 239–40.

regardless of the procedures used at sentencing.<sup>34</sup> Justice William Douglas found that discretionary sentencing schemes were “pregnant with discrimination,” but he reserved judgment about mandatory death penalties.<sup>35</sup> Justices Potter Stewart and Byron White concurred in the judgment on narrower grounds. Justice Stewart, because purely discretionary sentencing schemes had led to arbitrariness;<sup>36</sup> Justice White, because the death penalty had been imposed so infrequently that it no longer made any measurable contribution to a legitimate purpose of punishment.<sup>37</sup> Four members of the Court—Chief Justice Warren Burger and Justices Lewis Powell, William Rehnquist, and Harry Blackmun—concluded that the death penalty was a constitutionally valid punishment and that juries could be given discretion to decide whom to condemn and whom to spare, as the Court had decided in *McGautha*.<sup>38</sup>

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34. *See id.* at 305 (Brennan, J., concurring in judgment) (“Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment.”); *id.* at 358–59 (Marshall, J., concurring in judgment) (“[T]he death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment.”).

35. *See id.* at 257–58 (Douglas, J., concurring in judgment) (“Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.”) (citation omitted).

36. *See id.* at 309–10 (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”).

37. *See id.* at 313 (“[A]s the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.”).

38. *Id.* at 375–82 (Burger, C.J., dissenting) (“[I]t seems fair to ask what factors have changed that capital punishment should now be ‘cruel’ in the constitutional sense as it has not been in the past.”); *id.* at 405–11 (Blackmun, J., dissenting) (arguing that, despite his “distaste, antipathy, and, indeed, abhorrence, for the death penalty” the decision “should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue”); *id.* at 421–65 (Powell, J., dissenting) (“It is important to keep in focus the enormity of the step undertaken by the court today. Not only does it invalidate hundreds of state and federal laws, it deprives those jurisdictions of the power to legislate with respect to capital punishment in the future . . .”); *id.* at 465–70 (Rehnquist, J., dissenting) (“The Court’s judgments today strike down a penalty that our Nation’s legislators have thought necessary since our country was founded.”).

The federal and state governments believed that capital punishment remained a worthwhile and permissible sanction as long as the jury's discretion was guided or eliminated.<sup>39</sup> Trying yet again, Congress and state legislatures each chose one of two different responses.<sup>40</sup> One approach was to adopt discretionary sentencing schemes like the one recommended by the ALI.<sup>41</sup> Georgia, for example, went that route and adopted a two-stage process, with a separate sentencing phase at which the judge would offer the jury guidance in making its life-or-death decision.<sup>42</sup> The other approach was to return to mandatory capital sentencing—North Carolina and some other states followed that path.<sup>43</sup> Either approach—Congress and state legislatures believed—would avoid the risk of arbitrariness that had troubled Justices Stewart and White.<sup>44</sup> That was important because adding either justice's vote to the four *Furman* dissenters would create a majority to sustain capital punishment.

Four years later, the Court revisited this issue in *Gregg v. Georgia*<sup>45</sup> and rejected the claim that the death penalty was invariably a "cruel and unusual punishment" forbidden by the Eighth Amendment.<sup>46</sup> *Gregg* upheld the State's new guided-discretion capital sentencing procedure, based on the ALI's proposed model sentencing law—the same approach that the Court had labeled "meaningless 'boiler-plate'" in *McGautha*.<sup>47</sup> By

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39. Jeffrey T. Heintz, *Legislative Response to Furman v. Georgia—Ohio Restores the Death Penalty*, 8 AKRON L. REV. 149, 154 (1974) ("Predictably, the state legislatures began expressing the intention to reinstitute the death penalty soon after the *Furman* decision was announced.").

40. *See id.* (stating that legislatures had a choice between instituting a mandatory death penalty for certain offenses or creating "workable standards").

41. *See* MODEL PENAL CODE § 210.6 (1962) (identifying aggravating and mitigating circumstances relevant to a jury's capital sentencing decision).

42. *See* *Gregg v. Georgia*, 428 U.S. 153, 160–68 (1976) (describing Georgia's new sentencing procedures).

43. *See, e.g.,* *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976) (discussing North Carolina's mandatory capital sentencing law).

44. *See, e.g.,* *Gregg*, 428 U.S. at 167 (explaining how Georgia's sentencing procedures specifically included tests to guard against arbitrariness).

45. 428 U.S. 153 (1976).

46. *Id.* at 168–87.

47. *McGautha v. California*, 402 U.S. 183, 208 (1971), *reh'g granted and judgment vacated on other grounds sub nom.* *Crampton v. Ohio*, 408 U.S. 941 (1972).

contrast, in a companion case to *Gregg*, *Woodson v. North Carolina*,<sup>48</sup> the Court ruled that a mandatory death penalty was now not just an unsatisfactory way to deal with capital crimes, but also an unconstitutional approach, rejected by years of experience with juries.<sup>49</sup> *Gregg* brought to a close the decade-long period in which a small number of lawyers working at the NAACP Legal Defense & Educational Fund had effectively persuaded the federal courts to impose a moratorium on the use of capital punishment while their nationwide campaign to have the death penalty declared unconstitutional wended its way through the courts.<sup>50</sup>

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48. 428 U.S. 280 (1976).

49. *See id.* at 285–305 (“[O]ne of the most significant developments in our society’s treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense.”).

50. For an insider’s account of that effort, see generally MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973). There were second-, third-, and fourth-order claims that could still be litigated after *Gregg*, such as the following: (1) the death penalty discriminated against black defendants (because they were sentenced to death at a disproportionately high rate) or members of the black community (because murderers of black victims were sentenced to death at a disproportionately low rate); (2) the “death qualification” of jurors—that is, the exclusion at the guilt stage of jurors who would not consider imposing the death penalty at the sentencing stage—violated a defendant’s Sixth Amendment right to a jury taken from a “fair cross-section” of the community; (3) individual capital sentencing schemes were unconstitutional under *Gregg*; (4) executing some categories of defendants—for example, the mentally incompetent, juveniles—was unconstitutional; and (5) old criminal procedure doctrines, such as the permissible use of an “*Allen* charge,” a supplemental jury instruction telling a potentially deadlocked panel to continue deliberating to reach a verdict, see *Allen v. United States*, 164 U.S. 492 (1896), should be reconsidered and forbidden in capital cases. Over time, the Supreme Court accepted some of those claims and rejected the others. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (ruling that the Cruel and Unusual Punishments Clause prohibits the execution of an offender who was a juvenile at the time of the crime); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (same, a mentally retarded offender); *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988) (rejecting challenge to use of an *Allen* charge in a capital case); *Sumner v. Shuman*, 483 U.S. 66, 85 (1987) (ruling that a mandatory sentence of death cannot be imposed on a prisoner serving a sentence of life imprisonment without the possibility of parole); *McCleskey v. Kemp*, 481 U.S. 279, 319–20 (1987) (rejecting claims of discriminatory application of the death penalty); *Ford v. Wainwright*, 477 U.S. 399, 416–18 (1986) (ruling that the Cruel and Unusual Punishments Clause prohibits the execution of an offender incompetent at the time of his execution even if he was found competent to stand trial and sane at the time of the crime); *Lockhart v. McCree*, 476 U.S. 162, 184 (1986) (rejecting the argument that the dismissal at the guilt stage of jurors who would not consider the death

*B. Post-Gregg Criticisms of the Clemency Process in Capital Cases*

Following *Gregg*, there was not only a material increase in the number of offenders sentenced to death, but also an even greater decline in the number of offenders whose death sentences were commuted.<sup>51</sup> That was a new development. Until 1976, governors had commuted capital sentences with some degree of frequency throughout the twentieth century.<sup>52</sup> The post-*Gregg* decrease in

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penalty violates the Sixth Amendment Jury Trial Clause); *Roberts v. Louisiana*, 431 U.S. 633, 638 (1977) (ruling that a mandatory sentence of death cannot be imposed on an offender for the first-degree murder of a police officer).

51. See, e.g., Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. 1, 6 (2014) (describing how, excluding mass commutations, governors and pardon boards commuted only sixty-six death sentences from 1976–2013); Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 241 (2003) [hereinafter Heise, *Numbers*] (explaining that, despite an increase in the number of death sentences, there has been “a decrease in the number of defendants removed from death row through clemency”); Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. L. 37, 45–46 (2009) (tracking the decrease in commutations in California); William Alex Pridemore, *An Empirical Examination of Commutations and Executions in Post-Furman Capital Cases*, 17 JUST. Q. 159, 161 fig.1 (2000) (charting the number of executions compared to commutations); Sarat & Hussain, *supra* note 2, at 1310 (noting the “dramatic shift” during the 1990s in the diminishing number of inmates granted clemency).

52. Different commentators have offered different statistics or calculations. One has said that, from 1900 to 1968, there were more than 700 commutations, but from 1976 to 2013, aside from mass commutations that cleared out death row, governors commuted the death sentences of only sixty-six people, many of which occurred when a governor was leaving office. Gershowitz, *supra* note 51, at 6, 50. Another commentator calculated that, from 1960 to 1970, the ratio of executions to commutations was 5:4, while from 1976 to 1996 the ratio decreased to 5:1. Korengold et al., *supra* note 3, at 357; see also BANNER, *supra* note 15, at 291 (“For centuries governors commuted death sentences in significant numbers. That pattern continued for the first two-thirds of the twentieth century. Florida commuted nearly a quarter of its death sentences between 1924 and 1966. North Carolina commuted more than a third between 1909 and 1954.”); JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIA NEW YORK* 227 n.17, 757–59 (1970) (“In general, the pardon power seems to have been exercised not ungenerously . . .”); GOTTSCHALK, *supra* note 5, at 186 (showing the number of pardons by president); Bedau, *supra* note 2, at 262–66 & tbls.1 & 2 (analyzing the number of death sentences and commutations from 1960–1988 and 1900–1985). For a discussion of the standards used and reasons given by governors, see *id.* at 260–61 (identifying nine specific reasons); David Paget, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 159–77 (1964) (examining various standards governors have applied to reach their decision).

the number of commutations, coupled with an increase in juries' decisions to impose the death penalty, meant that a greater number of condemned prisoners faced the prospect of crossing the River Styx.

Some commentators have bemoaned the drop-off in the number of commutations in capital cases.<sup>53</sup> Some critics have argued that the decline is troublesome in its own right, but capital punishment opponents go further, claiming that the figures disguise a deeper problem: namely, that governors have abandoned their responsibility to ensure that justice is done in each condemned prisoner's case.<sup>54</sup> Fearing the electorate's political wrath, governors have refused to commute death sentences, particularly in election years.<sup>55</sup> In fact, the argument goes, some governors have allowed prisoners to be executed even though their trials were marred by fundamental irregularities, their cases cried out for leniency, or there was a serious doubt as to their guilt.<sup>56</sup>

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53. See generally *supra* note 3; cf. Gershowitz, *supra* note 51, at 6, 54–55 (criticizing the practice of delaying clemency consideration until after a prisoner has exhausted all avenues of judicial relief).

54. See, e.g., Korengold et al., *supra* note 3, at 350 (“The decline in clemency grants arguably reflects an abdication by state executives of their traditional role in the capital system.”).

55. See, e.g., Laura M. Argys & H. Naci Mocan, *Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States*, 33 J. LEGAL STUD. 255, 280 (2004) (“We find that if an inmate’s stay on death row ends at a point in time where the governor is a lame duck, the probability of commutation increases significantly.”); Burnett, *supra* note 6, at 198, 200 (naming specific instances of political backlash to grants of clemency); Gershowitz, *supra* note 51, at 4 (“In large part, the decline of clemency can be attributed to tough-on-crime politics.”); Jeffrey D. Kubik & John R. Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Elections*, 46 J.L. & ECON. 1, 3 (2003) (“We find that the occurrence of a gubernatorial election increases the probability of state execution by approximately 25 percent.”); Pridemore, *supra* note 51, at 172, 176, 180 (concluding in a post-*Gregg* study that governors are less likely to commute death sentences in election years than in off years). Governors themselves have admitted that political considerations entered into their clemency decisions. See, e.g., BROWN, *supra* note 7, at iii, 90–115 (explaining the decision to commute the sentence of Edward Wein, who afterward raped and murdered a woman). But see Heise, *Numbers*, *supra* note 51, at 292–93 (concluding that there is no significant variation in cases where a governor is retiring from office).

56. See, e.g., Burnett, *supra* note 6, at 200 (“Prisoners have been executed in cases where appeals were still pending, where their attorneys missed filing issues or filed a brief over the page limit, and where significant, new or withheld evidence was yet to be evaluated by any trier of fact.”); Daniel T. Kobil, *How to*

There is more. Because the clemency power has long been deemed a prerogative of presidents and governors,<sup>57</sup> they have defined their decision-making procedures largely on their own without any legislative or judicial oversight.<sup>58</sup> The result is that,

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*Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 219–20 (2003) (describing George W. Bush’s denial of Karla Faye Tucker’s request for clemency despite widespread support); Silverman, *supra* note 3, at 394, 398 (arguing the Texas Board of Pardons and Paroles’ refusal to hear “Gary Graham’s facially convincing claim of innocence” is an example of how Texas has “in practice” abolished clemency).

57. Prior to 1998, the Supreme Court had consistently ruled that, because the clemency power was a prerogative of the chief executive, the Constitution did not regulate its exercise. *See generally* *Herrera v. Collins*, 506 U.S. 390, 414 (1983); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981); *Schick v. Reed*, 419 U.S. 256 (1974); *Solesbee v. Balkcom*, 339 U.S. 9 (1950), *abrogated on other grounds by Ford v. Wainwright*, 477 U.S. 399 (1986); *Ex parte Wells*, 59 U.S. 307 (1856). In 1998, however, the Court created uncertainty in this regard by issuing a fractured opinion in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998). The question in *Woodard* was whether the old rule directing the courts to maintain a “hands off” posture toward clemency still applied to condemned prisoners despite the development of new procedural rights for convicted offenders. *Id.* at 276. A plurality of four justices concluded that a condemned prisoner has no right at clemency proceedings that is protected by the Due Process Clause. *Id.* at 275, 279–85 (plurality opinion). But five justices concluded that condemned offenders are entitled to minimal due process protections. *Id.* at 288–89 (O’Connor, J., concurring in judgment); *id.* at 291–95 (Stevens, J., dissenting). Because one of those five justices (Justice John Paul Stevens) was in dissent, however, there was no majority opinion on this issue. So far, the lower federal courts have rejected post-*Woodard* attempts to regulate clemency proceedings under the Due Process Clause as long as the governor does not use a decision-making process entirely devoid of any reason, such as flipping a coin to see who should receive clemency. *See generally* *Gissendaner v. Comm’r, Georgia Dep’t of Corr.*, 794 F.3d 1327 (11th Cir. 2015); *Winfield v. Steele*, 755 F.3d 629 (8th Cir. 2014) (en banc); *Wellons v. Comm’r, Georgia Dep’t of Corr.*, 754 F.3d 1268, 1269 (11th Cir. 2014); *Anderson v. Davis*, 279 F.3d 674 (9th Cir. 2002); *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032 (11th Cir. 2001); *Workman v. Bell*, 245 F.3d 849 (6th Cir. 2001); *Duvall v. Keating*, 162 F.3d 1058 (10th Cir. 1998); *Davis v. Scott*, No. 8:14-CV-01676-T-27TBM, 2014 WL 3407473, at \*3 (M.D. Fla. July 10, 2014); *Schad v. Brewer*, No. CV-13-01962-PHX-ROS, 2013 WL 5551668 (D. Ariz. Oct. 4, 2013) *aff’d*, 732 F.3d 946 (9th Cir. 2013); *Workman v. Summers*, 136 F. Supp. 2d 896 (M.D. Tenn. 2001) *aff’d*, 8 F. App’x 371 (6th Cir. 2001).

58. *See, e.g., Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280–81 (1998) (plurality opinion) (“[T]he heart of executive clemency . . . is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.”); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (“[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”); *Schick v. Reed*, 419 U.S. 256, 266 (1974) (“A fair reading of the history . . . of the

critics say, governors have often used procedures that are so manifestly unfair that they would be held unconstitutional if all that were at stake were the denial of public welfare benefits.<sup>59</sup> Add in the fact that there is no consensus on the standards that governors should use when making clemency decisions,<sup>60</sup> and you get a large number of cases in which it is impossible to explain why clemency was granted or denied. Some argue that the result, viewed at a nationwide level, is the same type of arbitrariness that the Supreme Court found unconstitutional in *Furman*.<sup>61</sup>

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language of that clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone . . . and that it cannot be modified, abridged, or diminished by the Congress.”); *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950) (“Power of executive clemency . . . has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom, if ever, has this power of executive clemency been subjected to review by the courts.”), *abrogated on other grounds by Ford v. Wainwright*, 477 U.S. 399 (1986); *United States v. Klein*, 80 U.S. 128, 147 (1871) (“To the executive alone is intrusted [sic] the power of pardon; and it is granted without limit.”).

59. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that due process requires notice and an opportunity for an evidentiary hearing before a neutral decisionmaker in order for the state to terminate welfare benefits); Deborah Leavy, Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 910 (1981) (“The Supreme Court has set high procedural standards to reduce the risk of informational error and provide individualized sentencing in death penalty cases. Yet the effect . . . is negated when the lack of procedural protection reintroduces those risks at the clemency stage.”). For a detailed description of state clemency laws and processes, see Paget, *supra* note 52, at 141–77.

60. See Daniel T. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567, 567 (2000) (describing clemency as a “largely unprincipled, almost standardless component in our justice system”).

61. See *id.* (claiming clemency “has been exercised in an arbitrary fashion” but also arguing that it has been underutilized). One remedy that critics propose is to impose on governors the same procedural safeguards seen as a necessary ingredient of the trial process in capital and non-capital cases alike, such as an adversary proceeding at which the condemned prisoner is represented by state-appointed counsel. Some commentators have even gone further and urged states to create independent clemency boards staffed by career officials to prevent politics from entering into clemency decisions. See Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 225 (1993) (“[C]onsiderations of fairness require that the hearing should take place before an unbiased decision-maker.”); Silverman, *supra* note 3, at 395–97 (outlining the procedure a hearing before an independent clemency board would follow); Leavy, *supra* note 59, at 907 (calling for the use of capital sentencing safeguards at clemency proceedings).

Interestingly, one factor does not appear to play a role in clemency decisions, a factor that has haunted the American criminal justice system since Virginia was a colony: race.<sup>62</sup> Several studies of post-*Gregg* executions over different periods since 1976 have concluded either that race was not a factor in governors' decisions whether to commute a death sentence or that condemned black prisoners are *more likely* than white death row inmates to receive clemency.<sup>63</sup>

By contrast, those studies found that men are more likely than women to be sentenced to death and executed.<sup>64</sup> On its face, that fact is not surprising, because men—particularly young men—commit more crimes, including more violent crimes, than women.<sup>65</sup> In any event, that disparity does not by itself establish the invidious discrimination necessary to establish an equal protection

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62. See Gershowitz, *supra* note 51, at 22 (“[R]ace... has played a comparatively minor role in successful commutations during the modern era.”).

63. See Argys & Mocan, *supra* note 55, at 272 tbl.2 (2004) (comparing commutation rates among blacks, Hispanics, and other races); *id.* (noting that with the exception of a condemned prisoner who received clemency *because* he was black, race did not appear to play a role in clemency decisions); Matthew C. Heise, *The Geography of Mercy: An Empirical Analysis of Clemency for Death Row Inmates*, 39 T. MARSHALL L. REV. 3, 17 (2013) [hereinafter Heise, *Geography*] (“[C]lemency rates for black and white defendants do not appear to differ, at least at statistical levels.”); Heise, *Numbers*, *supra* note 51, at 281–84 (concluding that there is no evidence that “racial or ethnic minorities on death row were any less successful in obtaining clemency than their non-minority counterparts” which “comports with prior empirical studies of clemency yet conflicts with widely-held perceptions about the general influence of race in the death penalty context”); Heise, *Unequal Grace*, *supra* note 2, at 973–75, 985 (“[W]hen it comes to clemency decisions, any systemic racial tilt *favours* African-Americans.”); Pridemore, *supra* note 51, at 175, 180 (“Neither the presence of at least one prior felony conviction nor the offender’s race seems to play a role in the final disposition.”); John Kraemer, Note, *An Empirical Examination of the Factors Associated with the Commutation of State Death Row Prisoners’ Sentences Between 1986 and 2005*, 45 AM. CRIM. L. REV. 1389, 1410 (2008) (“Prisoners of black, Hispanic, or other racial/ethnic heritage have slightly over twice the odds of commutation (OR=2.01) compared to their white counterparts after removing the effect of other factors. This association is highly unlikely to have been caused by chance (p=0.004).”).

64. Argys & Mocan, *supra* note 55, at 272 tbl.2; Heise, *Geography*, *supra* note 63, at 971–73, 985; Heise, *Numbers*, *supra* note 51, at 275–76 & tbl.5; Kraemer, *supra* note 63, at 1408–10; Pridemore, *supra* note 51, at 176, 180.

65. MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT, BROOKINGS, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES: POLICY MEMO 6 (May 2014); Heise, *Unequal Grace*, *supra* note 2, at 971; John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 432 (2006).

violation.<sup>66</sup> Men are more likely than women to commit predatory, brutal, or horrific crimes.<sup>67</sup> Women who kill principally commit crimes of passion within the domestic environment, perhaps because they have been the victims of domestic violence.<sup>68</sup> In addition, the criminal justice system has not unfairly targeted men for disparate treatment based on statistically and morally unjustified stereotypical views about their sex.<sup>69</sup> Under those circumstances, the correlation some commentators have found would not establish an equal protection violation.

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The next step is to determine whether those criticisms are persuasive. It turns out that they are either unconvincing or overstated. Indeed, parties seeking the abolition of capital punishment do not give themselves sufficient credit for the sizeable amount of progress they have made in that campaign.<sup>70</sup> The sentencing stage of capital prosecutions now eliminates almost all of the people who would have received clemency in days gone by.<sup>71</sup> The small number of commutations seen today is a testament to that success and is an entirely logical result of the

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66. See generally *United States v. Armstrong*, 517 U.S. 456 (1996); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Washington v. Davis*, 426 U.S. 229 (1976).

67. KEARNEY ET AL., *supra* note 65, at 6.

68. Heise, *Numbers*, *supra* note 51, at 274–78; Kraemer, *supra* note 63, at 1409; Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 43 (1998). *But see* *Harris v. Alabama*, 513 U.S. 504, 507 (1995) (detailing how a woman arranged the contract killing of her husband so that she could continue an affair).

69. See Paul J. Larkin, Jr., *Managing Prisons by the Numbers: Using the Good-Time Laws and Risk-Needs Assessments to Manage the Federal Prison Population*, 1 HARV. J. L. & PUB. POL'Y 1, 19 (2014) (“The evidence justifies treating men differently from women.”).

70. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2016), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Sept. 8, 2016) (tracking the decrease in executions over the last ten years) (on file with the Washington and Lee Law Review).

71. See *infra* notes 151–156 and accompanying text (describing how the criminal justice system now considers those mitigating factors that used to be considered only for the purposes of clemency).

new capital sentencing rules adopted by the Supreme Court over the last forty years.<sup>72</sup>

### III. Capital Punishment, Clemency, and Innocence

Critics of today's clemency practices will argue that governors have failed to ensure that no innocent person is executed.<sup>73</sup> According to those critics, given the horrific facts of some capital cases, there is a unique risk that innocent defendants will be convicted and executed in capital cases because the public will demand that someone pay for those crimes.<sup>74</sup> That risk has always existed,<sup>75</sup> critics say, but the proof is now far more persuasive. Relying on the work of the Innocence Project as well as opinions by Supreme Court Justices David Souter and Stephen Breyer, capital punishment opponents will contend that their claim is now supported by credible scientific proof that the death penalty poses an unacceptable likelihood of executing an innocent man.<sup>76</sup> Executive clemency will not stop this event from happening, according to death penalty opponents, because governors, fearing the wrath of angry voters—especially at the cusp of an election—

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72. See *infra* text accompanying notes 146–150 (noting the various situations where capital punishment is off the table).

73. See, e.g., Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 92 (1987) (describing the execution of Everett Applegate, a man denied clemency despite the governor's doubts regarding his guilt).

74. See, e.g., Frady, *supra* note 6, at 105 (characterizing the execution of Rickey Rector as “a test in Arkansas of the lengths to which a society would pursue the old urge to expiate one killing by performing another”).

75. See Bedau & Radelet, *supra* note 73, at 72–75 (collecting early studies alleging the execution of innocent parties). See generally BANNER, *supra* note 15, at 121–22, 303–05; FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* (2008); EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* (1932); BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2012); BARRY SCHECK, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (2003).

76. See *Glossip v. Gross*, 135 S. Ct. 2726, 2756–57 (2015) (Breyer, J., dissenting) (detailing cases where allegedly innocent people have been executed); *Kansas v. Marsh*, 548 U.S. 163, 208–10 (2006) (Souter, J., dissenting) (exploring cases where innocent individuals might have been executed without a death penalty moratorium).

will refuse to grant clemency to condemned prisoners regardless of their innocence whenever the public demands blood.<sup>77</sup>

That criticism is more often leveled against the institution of capital punishment itself rather than advanced as a fault in the clemency process.<sup>78</sup> Moreover, the argument is as much designed to undermine the resolve of death penalty supporters and scare them into changing sides in the debate—or at least remaining neutral—as it is used to persuade courts that the clemency process is flawed. And that argument has the potential to silence capital punishment’s supporters. It is, in fact, the most potent argument that abolitionists can advance and could persuade a large number of people. The execution-of-the-innocent claim forces people to confront the greatest potential miscarriage of justice facing the system. The assumptions are that no one wants to see an innocent person executed and that few people are willing to support a penalty carrying that risk whatever its other benefits may be.<sup>79</sup> At least, that is what abolitionists believe.

It would be possible to side step this issue in an article discussing the clemency process. The reason would be that the question of whether the institution of capital punishment poses a risk of executing an innocent defendant is materially different from the question of whether the institution of executive clemency adequately serves as the last line of protection for the innocent. Clemency could be perfectly capable of protecting the vast number of innocent parties who have not already been identified in the judicial process even if there were a unique conviction-of-the-innocent risk in capital cases. Of course, the clemency process might be incapable of performing that function perfectly. No criminal justice system could pass that test, however,<sup>80</sup> so we should not demand perfection where it is not attainable. After all, we demand only that the jury find a defendant guilty beyond a

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77. See Burnett, *supra* note 6, at 205 (“The circumstantial evidence of political influence leads me to convict the clemency process of failure to ensure justice.”).

78. See *id.* at 205 (“Executions . . . [are] about justice not politics.”).

79. See, e.g., Silverman, *supra* note 3, at 377 (“It seems obvious beyond explanation that it is wrong—in a moral and a legal sense—to put an innocent person to death.”).

80. See *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (“It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”).

“reasonable doubt,” not “any doubt.”<sup>81</sup> Perfection, therefore, should not be the standard. In any event, the question of whether executive clemency can satisfactorily perform a goalkeeping function should be analyzed separately from the question whether capital punishment poses a unique risk of convicting the innocent.

That approach, however, is ultimately unsatisfactory because it just kicks the can down the road. Whether the criminal justice system will mistakenly execute an innocent party is hardly a new problem. That risk has been around as long as the death penalty has been a sentencing option. Executive clemency has promised to function as the “fail safe” in the criminal justice system as long as the death penalty has been an available punishment, which means as long as the criminal justice system has been in operation.<sup>82</sup> If that risk is not a significant one, there is little reason to believe that executive clemency cannot identify the few cases where an innocent person remains on death row after exhausting all of his legal challenges to his conviction and sentence. Accordingly, it makes sense to examine the execution-of-the-innocent risk in federal and state cases to determine if executive clemency is an adequate “fail safe.”

Start with the federal cases. The Justice Department will not bring a capital case unless the Attorney General personally approves it after review by the Capital Case Section of the Criminal Division and the Attorney General’s Review Committee on Capital Cases.<sup>83</sup> The federal government has executed only

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81. See also, e.g., *Victor v. Nebraska*, 511 U.S. 1, 18–21 (1993) (upholding the use of a jury instruction that defined reasonable doubt as “actual and substantial doubt”); *Herrera*, 506 U.S. at 398 (“A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt.”); *In re Winship*, 397 U.S. 358, 386 (1970) (ruling that the reasonable doubt standard is constitutionally required).

82. See *supra* note 8 (exploring the long history of the death penalty and clemency from case law, the Bible, and narrative works).

83. CAPITAL CASE SECTION, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/capital-case-section> (last visited Sept. 9, 2016) (on file with the Washington and Lee Law Review). Trial and post-trial procedures are more favorable to the defense in capital than noncapital cases. See, e.g., 18 U.S.C. § 3005 (2012) (requiring the appointment of two defense lawyers in every capital case, one of whom must be “learned in the law applicable to capital cases”); *id.* § 3592 (listing aggravating and mitigating factors for the jury to consider); *id.* § 3593 (requiring a hearing before the judge or jury on the appropriateness of the death penalty); *id.* § 3595 (requiring appellate review in every case where a prisoner was sentenced to death); *id.* § 3599 (providing counsel for indigent

three offenders over the last fifty years, the best known one being Timothy McVeigh, who was responsible for the Oklahoma City bombing that killed 168 people and injured hundreds of others.<sup>84</sup> No one claims that McVeigh, or the other two executed offenders, were innocent. Atop that, since the attacks on this nation on 9/11, the federal government has carried out various operations in foreign countries to kill parties like Osama Bin Laden<sup>85</sup> who were responsible for the nearly three thousand murders that occurred at the World Trade Center, the Pentagon, and Shanksville, Pennsylvania. No one claims that Bin Laden or the other terrorists were innocent. The execution-of-the-innocent claim therefore does not have much valence with regard to the federal government.

Turn to the state cases. Even there, the underlying risk of executing an innocent party is insubstantial. There is no logical reason to distinguish between capital and non-capital cases regarding the risk of convicting an innocent man.<sup>86</sup> Most capital cases involve a murder.<sup>87</sup> The same law enforcement officers (ordinarily detectives), forensic examiners, prosecutors, judges, and juries will be used in all homicide cases, whether or not the government charges the defendant with capital murder and

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prisoners for post-conviction proceedings in capital cases); *id.* § 3600 (offering DNA testing); *see also* Jones v. United States, 527 U.S. 373, 376–78 (1999) (describing the operation of the Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591–3599 (2012)).

84. *See generally* United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1999). The other two are Juan Raul Garza and Louis Jones, Jr.; Jones v. United States, 527 U.S. 373 (1999); United States v. Flores, 63 F.3d 1342 (5th Cir. 1995); FACTS ABOUT THE DEATH PENALTY *supra* note 70.

85. *See* Helene Cooper, *Obama Announces Killing of Osama bin Laden*, N.Y. TIMES (May 1, 2011, 11:29 PM), [http://thelede.blogs.nytimes.com/2011/05/01/bin-laden-dead-u-s-official-says/?\\_r=0](http://thelede.blogs.nytimes.com/2011/05/01/bin-laden-dead-u-s-official-says/?_r=0) (last visited Sept. 9, 2016) (reporting that the death of Osama bin Laden came as a result of a “targeted assault” by U.S. operatives) (on file with the Washington and Lee Law Review).

86. *See* Glossip v. Gross, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring) (“[I]t is *convictions*, not *punishments*, that are unreliable.”).

87. *See, e.g.*, 18 U.S.C. §§ 1111, 1114, 1116, 1118–1121 (2012) (murder of different parties or by a prisoner sentenced to life imprisonment); *id.* § 3591(a)(2) (authorizing death penalty for intentional homicide); 21 U.S.C. § 848(e) (2012) (requiring proof of intent to kill in a drug case). In fact, there is some question whether the death penalty is a constitutionally permissible sanction for any other crime. *See* Coker v. Georgia, 433 U.S. 584, 600 (1977) (ruling that the death penalty cannot be imposed for the crime of the rape of an adult woman); Kennedy v. Louisiana, 554 U.S. 407, 413 (same, for a minor), *opinion modified*, 554 U.S. 945 (2008).

whether or not the jury later returns a capital sentence. Moreover, there are various procedural safeguards used only in capital cases that minimize the risk that an innocent defendant will be convicted and sentenced to death.<sup>88</sup> Courts are also far more likely to critically examine the proof against an offender facing the gallows, rather than imprisonment, regardless of the term imposed.<sup>89</sup> Finally, journalists in the national media seeking a Pulitzer Prize would be hot on the trail of any condemned prisoner with any remotely plausible claim of innocence.<sup>90</sup> In sum, it is unlikely that the state governments will execute an innocent party.

Now look at this issue from a legislative perspective. Congress and state assemblies may legitimately balance the risk of executing an innocent offender against the risk that abolishing capital punishment will lead to the murder of innocent parties.<sup>91</sup> After all, elected officials regularly make numerous decisions that have life or death consequences;<sup>92</sup> whether to use capital punishment is just one of them. As Professor Ron Allen and Amy Shavell have explained:

Although it seems to have escaped the attention of the death penalty debate, a common feature of social planning is that it affects the incidence of death. Virtually all social policies and decisions quite literally determine who will live and who will

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88. See Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau–Radelet Study*, 41 STAN. L. REV. 121, 147–54 (1988) (discussing state procedures).

89. See *Glossip*, 135 S. Ct. at 2758 (Breyer, J., dissenting) (“Researchers have calculated that courts (or State Governors) are 130 times more likely to exonerate where a capital murder, rather than a noncapital murder, is at issue.”).

90. See, e.g., *Chronicle’s Falkenberg Wins Pulitzer for Commentary*, HOUSTON CHRONICLE (Apr. 20, 2015), <http://www.chron.com/news/houston-texas/article/Chronicle-s-Falkenberg-wins-Pulitzer-for-6211676.php> (last visited Sept. 9, 2016) (describing how columnist Lisa Falkenberg’s reporting on the innocence of a man on death row for ten years won her the Pulitzer Prize and led to his release) (on file with the Washington and Lee Law Review).

91. See generally Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625 (2005); Markman & Cassell, *supra* note 88, at 145–160; Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) [hereinafter Sunstein & Vermeule, *Life-Life Tradeoffs*]; Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 STAN. L. REV. 847, 853 (2005) [hereinafter Sunstein & Vermeule, *Reply*].

92. See Allen & Shavell, *supra* note 91, at 628 (using the example of regulating road safety).

die. Every year for half a century, between 25,000 and 40,000 people have died in vehicular accidents, many of whom are innocent in every sense of the word. The number of deaths on the roads is clearly quite sensitive to current regulation; faster speed limits mean more deaths, safety devices on cars affect the outcome of crashes, and so on. Merely permitting people on the roads guarantees a slaughter, and the mere fact of innocent deaths is not sufficient to put an end to the slaughter. But, is that not because of the benefits that result? Maybe so, but that, actually, is our point: explicit tradeoffs are made between benefits and costs, including the costs of innocent deaths.<sup>93</sup>

Consider a recent example of that tradeoff: the adoption of medical or recreational marijuana initiatives. Federal and state laws have outlawed the possession and distribution of marijuana since the 1930s.<sup>94</sup> Recently, however, numerous states have modified their criminal codes by adopting so-called “medical marijuana programs”—viz., laws that permit marijuana to be used for medical purposes.<sup>95</sup> A few states and the District of Columbia have also decriminalized the possession of small quantities of marijuana for personal use.<sup>96</sup> Supporters of those initiatives argue

93. *Id.* at 628 (footnote omitted).

94. *See generally* RICHARD J. BONNIE & CHARLES H. WHITBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 38–52 (1999).

95. *See generally* ALA. CODE § 13A-12-214.2 (2014); ALASKA STAT. ANN. §§ 17.37.010–17.37.080 (West 2014); ARIZ. REV. STAT. ANN. §§ 36-2801 to 36-2819 (2014); CAL. HEALTH & SAFETY CODE §§ 11362.5, 11362.7–11362.83 (West 2014); COLO. REV. STAT. ANN. § 25-1.5-106 (West 2014); CONN. GEN. STAT. § 21a-408 (2014); DEL. CODE ANN. tit. 16, Ch. 49A (2015); HAW. REV. STAT. ANN. §§ 329-121 to 329-128 (West 2014); 410 ILL. COMP. STAT. ANN. 130/1 (West 2014); ME. REV. STAT. ANN. tit. 22, § 2383-B (2014); MASS. GEN. LAWS ch. 94C, § 32L (2014); MICH. COMP. LAWS § 333.26424(j) (2014); MONT. CODE ANN. § 50-46-301 (2014); NEV. REV. STAT. ANN. §§ 453A.010 to 453A.240 (West 2014); N.H. REV. STAT. ANN. § 126-X:2 (2013); N.J. STAT. ANN. §24:6I (West 2014); N.M. STAT. ANN. § 30-31C-1 (2014); 2014 N.Y. Laws 90 (A.6357-E); OR. REV. STAT. ANN. § 475.300 (West 2014); R.I. GEN. LAWS ANN. § 21-28.6 (West 2014); VT. STAT. ANN. tit. 18, §4474b (2014); WASH. REV. CODE ANN. § 69.51A.040 (West 2014). *See also, e.g.*, William Vertes & Sarah Barbantini, *Caught in the Crossfire: The Dilemma of Marijuana “Medicalization” for Health Care Providers*, 58 WAYNE L. REV. 103, 105 n.17 (2012) (collecting ballot measures).

96. 2013 Wash. Legis. Serv. ch. 3 (1.M.502) (West) (amending WASH. REV. CODE § 69.50.4013 (2014)); AMENDMENT 64: USE AND REGULATION OF MARIJUANA (2012) (amending COLO. CONST. art. XVIII, § 16(3)); *see also* TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, *STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES 1–5* (Jan. 13, 2014) (summarizing the

that the benefits from those exemptions outweigh any costs from greater use of that drug.<sup>97</sup>

A factor that is rarely discussed in that debate, however, is the effect of medical or recreational marijuana use on highway safety.<sup>98</sup> There is little doubt that enacting such programs increases the risk of highway morbidity and mortality: the National Institute of Medicine, the British Medical Association, the World Health Organization, the federal officials in this nation responsible for highway safety, and numerous researchers have concluded that driving under the influence of marijuana poses a serious risk of death or serious injury due to a vehicle crash.<sup>99</sup> Moreover, that risk is aggravated if a person consumes both marijuana and alcohol because each drug amplifies the effect of the other.<sup>100</sup> The result is this: adoption of medical and recreational marijuana initiatives poses the risk of killing entirely innocent parties, such as other motorists, passengers, or pedestrians.<sup>101</sup> Those people are no less innocent than the hypothetical individual who is wrongfully convicted of a capital crime and sentenced to death. If we are willing to leave to the public the authority to decide whether the perceived benefits of medical or recreational marijuana usage outweighs the costs of killing parties innocent of a capital crime (any crime, in fact), we ought to be equally willing

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Colorado and Washington initiatives); WILLIAM J. BENNETT & ROBERT A. WHITE, *GOING TO POT: WHY THE RUSH TO LEGALIZE MARIJUANA IS HARMING AMERICA* 9–10 (2015) (listing the states that have allowed marijuana for medicinal use). That issue is likely to appear on the ballot in additional states in 2016.

97. For a discussion of the pros and cons of marijuana regulation, see generally BENNETT & WHITE, *supra* note 96; BONNIE & WHITBREAD II, *supra* note 94; JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* (2d ed. 2016); ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES* (2001); WAYNE HALL, *CANNABIS USE AND DEPENDENCE: PUBLIC HEALTH AND PUBLIC POLICY* (2003); JOHN KAPLAN, *MARIJUANA: THE NEW PROHIBITION* (1969); MARK A.R. KLEIMAN, *MARIJUANA: COSTS OF ABUSE, COSTS OF CONTROL* (1989); KEVIN A. SABET, *REEFER SANITY: SEVEN GREAT MYTHS ABOUT MARIJUANA* (2013).

98. See generally Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453 (2015) (discussing this issue at length).

99. *Id.* at 476–78, nn.98–103.

100. *Id.* at 478–79, nn.104–108.

101. See *id.* at 477 (“[S]tudies justify the conclusion that marijuana use is associated with an increased risk of motor-vehicle accidents, particularly ones involving fatalities, due to its effects on psychomotor performance.”).

to allow the public to decide whether the perceived benefits of capital punishment outweigh the costs of killing the same type of people.

It is no argument that legislators discount the risk of executing an innocent party, or give that factor far less weight than the risk of traffic accidents or other potentially fatal occurrences. Any legislator who believes that capital punishment serves legitimate purposes has an incentive to eliminate any execution-of-the-innocent risk because that result would arm abolitionists with their most treasured weapon.<sup>102</sup>

When we ask whether elected officials have reasonably analyzed the execution-of-the-innocent risk, we need to recognize that eliminating capital punishment will surely lead to the murder of innocent parties. History proves that point. Murderers have been released or escaped and committed the same crime again;<sup>103</sup>

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102. See, e.g., BANNER, *supra* note 15, at 303–05 (discussing the political ramifications of executing innocent people).

103. See, e.g., *Mu'Min v. Virginia*, 500 U.S. 415, 418 (1991) (explaining how Mu'Min, while on work release, absconded and murdered a woman); *Tison v. Arizona*, 481 U.S. 137, 139–41 (1987) (detailing how, while serving a life sentence for murder, Tison, with the aid of his wife and two sons, escaped and murdered a family of four—which included a two-year-old—with repeated shotgun blasts); Paul G. Cassell, *In Defense of the Death Penalty*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT* 208 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) (“In fact, the balance of risk tips decisively in favor of retaining the death penalty. . . . If they are not executed, they will remain serious threats to kill again—either inside prison walls or outside them following an escape or a parole.”); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 25–26 (1995) (stating “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” and listing several examples, including “Robert Massie, who celebrated the California Supreme Court’s commutation of his 1965 murder conviction by murdering again” (footnotes omitted)); Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 518 (2005) (noting that “the additional victims of the freed” include “[n]ine, killed by Kenneth McDuff, who had been sentenced to die for child murder in Texas and then was freed on parole after the death penalty laws at the time were overturned”); Joshua K. Marquis, *Truth and Consequences: The Penalty of Death*, in Bedau & Cassell, *supra* note 103, at 133–34 (noting that Kenneth McDuff, Richard Marquette, Jack Henry Abbott, and Robert Lee Massie committed additional murders after being paroled); Allen & Shavell, *supra* note 91, at 631 (“According to the Bureau of Justice reports, 6.6% of released murderers in 1983 were arrested for murder within three years of their release. Of the state prisoners released in 1994, 1.2% of the 4,443 persons (or 53 individuals) who had served time for homicide were rearrested for homicide.”); Sewell Chan, *Mailer and the Murderer*, N.Y. TIMES, Nov. 12, 2007, <http://cityroom.blogs.nytimes.com/2007/11/12/mailer-and-the->

others have committed additional murders while imprisoned.<sup>104</sup> Former U.S. District Court Judge, now Professor, Paul Cassell has made that point well:

Perhaps the most straightforward argument for the death penalty is that it saves innocent lives by preventing convicted murderers from killing again. . . . Some sense of the risk here is conveyed by the fact that of roughly 52,000 state prison inmates serving time for murder, an estimated 810 had previously been convicted of murder and had killed 821 persons following those convictions. Executing each of those inmates after the first murder conviction would have saved the lives of more than 800 persons. . . . In plain words, *some innocent people will die if we abolish the death penalty.*<sup>105</sup>

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murderer/?\_r=0 (last visited June 12, 2016) (relating how well-known author Norman Mailer helped secure the parole of Jack Henry Abbot, who subsequently committed another murder within weeks of his parole) (on file with the Washington and Lee Law Review); *supra* notes 7 & 55 (discussing the case of Edward Wein who was released and committed murder); *infra* Appendix A (listing additional cases).

104. See, e.g., *Arave v. Creech*, 507 U.S. 463, 465–66 (1993) (“Thomas Creech has admitted to killing or participating in the killing of at least 26 people. . . . Creech’s most recent victim was David Dale Jensen, a fellow inmate . . . . When he killed Jensen, Creech was already serving life sentences for other first-degree murders.”); *Sumner v. Shuman*, 483 U.S. 66, 67 (1987) (“In 1958, respondent Raymond Wallace Shuman was convicted . . . of first-degree murder . . . [and] was sentenced to life imprisonment without possibility of parole . . . . [W]hile serving his life sentence, Shuman was convicted of capital murder for the killing of a fellow inmate.” (citations omitted)); *State v. Smith*, 781 S.W.2d 761, 769 (Mo. 1989) (while imprisoned for a “second degree murder conviction for shooting an eighty-six-year-old woman while defendant was attempting to break into her home,” Smith repeatedly stabbed another inmate, killing him), *judgment vacated and case remanded on other grounds*, 495 U.S. 916 (1990), *capital sentence reinstated on remand*, 790 S.W.2d 241 (Mo. 1990); *State v. Bolder*, 635 S.W.2d 673, 677 (Mo. 1982) (noting that while serving a life sentence for first degree murder, Bolder murdered another prison inmate); Cassell, *supra* note 103, at 192 (“[T]hose serving a sentence of life without parole (often offered as a substitute for capital punishment) have a ‘license to kill’ without the availability of the death penalty.”); Allen & Shavell, *supra* note 91, at 630–31, 639 (noting that a Lexis-Nexis search from 1999–2005 revealed more than thirty instances of inmates committing murder); WILLIAM WELD & PAUL CASSELL, REPORT TO THE DEPUTY ATTORNEY GENERAL ON CAPITAL PUNISHMENT AND THE SENTENCING COMMISSION 28 (Feb. 13, 1987) (“At least five federal prison officers have been killed since December 1982, and the inmates in at least three of the incidents were already serving life sentences for murder.”).

105. Cassell, *supra* note 103, at 187–88.

Imprisonment therefore cannot eliminate the risk of murder; it merely limits the pool of possible victims from the general public to (at best) guards, administrative personnel, and other prisoners. Their lives matter too, and a legislature can legitimately decide not to make them bear that risk.

It is also far from obvious that a legislature must assemble proof that the death penalty has a marginally greater deterrent value than life imprisonment (with or without the possibility of parole) before it can impose that punishment for a crime.<sup>106</sup> There

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106. Belief in the deterrent effect of punishment, including capital punishment, has ancient origins. See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 1 (1973) (“Belief in the deterrent efficacy of penal sanctions is as old as the criminal law itself.” (quoting Norval Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 631 (1966))); Morris, *supra* note 106, at 631 (“As Sir Arthur Goodhart wrote, if punishment ‘cannot deter then we might as well scrap the whole of our criminal law.’” (footnote omitted)). That belief “has informed and does inform political, administrative, and judicial policy to so great a degree that deterrence has been described as a ‘primary and essential postulate’ of almost all criminal law systems.” ZIMRING & HAWKINS, *supra* note 106, at 1. Accompanying that postulate is “the alleged truism that men fear death more than any other penalty, and that therefore it *must* be a stronger deterrent than imprisonment.” H.L.A. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U. L. REV. 433, 458 (1957). Hart goes on to quote Victorian judge and criminal law historian James Fitzjames Stephen:

No other punishment deters men so effectively from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of *instant* death is the one to which resort has always been made when there was an absolute necessity for producing some result. . . . No one goes to *certain inevitable* death except by compulsion. Put the matter the other way. Was there ever a criminal who, when sentenced to death and *brought out to die*, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because ‘All that a man has he will give for his life.’ Any secondary punishment, however, terrible, there is hope; but death is death; its terrors cannot be described more forcefully.

*Id.* at 458. Stephens’ argument is flawed in several respects, but it is important to note the difference between the deterrent theory of punishment and modern theories of physics, such as Einstein’s Theory of Relativity. The latter can predict consequences with mathematical certainty and reliability. The former cannot because it is more a moral justification for the state’s use of punishment than a scientific explanation of how punishment works. The deterrent theory of punishment is one of several justifications for the state’s decision to inflict pain

is no freestanding principle that only effective legislation is constitutional.<sup>107</sup> As far as the text of the Constitution is

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on an offender for breaking the law. The *raison d'être* for that and all other justifications is simply to distinguish that form of public violence from the private ones that offenders inflict on the public.

[T]heories of punishment are not theories in any normal sense. They are not, as scientific theories are, assertions or contentions as to what is or is not the case; the atomic theory or kinetic theory of gasses is a theory of this sort. On the contrary, those major positions concerning punishment which are called deterrent or retributive or reformative 'theories' of punishment are moral claims as to what justified the practice of punishment—claims as to why, morally, it should or may be used.

*Id.* at 466–67. Demanding that capital punishment justify its constitutionality by proving its marginal utility over life imprisonment as a deterrent therefore misses the point. As explained below, reasonable people can disagree over the deterrent effect of capital punishment. Under those circumstances, we allow the people to select a governing theory of punishment through the democratic process. *See infra* notes 119 & 125 (discussing *Gregg v. Georgia*, 428 U.S. 153 (1976) and that whether deterrence is effective should be left to legislatures).

107. *See, e.g.*, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984) (“[T]his Act . . . may not achiev[e] its intended goals. When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.”); *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671–72 (1981) (“[W]hether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective.”); *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (“It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.” (quoting *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916))). In *Minnesota v. Clover Leaf Creamery Co.*, the Supreme Court addressed this issue further in depth:

States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker . . . . Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, . . . they cannot prevail so long as it is evident from all the considerations presented to the legislature, and those of which we may take judicial notice, that the question is at least debatable . . . . Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken . . . . The Equal Protection Clause does not deny the State of Minnesota the authority to ban one type of milk container conceded to

concerned, the relevant provision is the Eighth Amendment's Cruel and Unusual Punishments Clause.<sup>108</sup> The Framers took that clause from the English Bill of Rights of 1689<sup>109</sup> and intended it to prohibit only hideously painful punishments, ones that were not authorized by law, and (perhaps) grossly disproportionate penalties.<sup>110</sup> Neither that clause nor its lineal ancestor compels a legislature to prove that a more severe punishment is a marginally better deterrent than a less onerous penalty for it to be a lawful sanction.<sup>111</sup>

Moreover, it would have been unfathomable to the Framers<sup>112</sup>—or to anyone in the seventeenth and eighteenth

cause environmental problems, merely because another type, already established in the market, is permitted to continue in use. Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives.

449 U.S. 456, 464, 466 (1981) (citations, footnote, and internal punctuation omitted).

108. See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). That fact is significant because the Supreme Court has often made it clear that the courts should consider only the specific constitutional provision addressing a particular subject. See, e.g., *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (noting that substantive due process analysis is inappropriate if a party’s claim is “covered by” a different constitutional provision); *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (“Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.” (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989))).

109. *An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (The Bill of Rights), 1 W. & M., sess. 2, ch. 2 (1688–89), reprinted in 9 Statutes at Large 67 (Pickering 1764).

110. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 967–73, 973 n.4, 979–85 (1991) (plurality opinion) (examining the history of the phrase “cruel and unusual punishment”); *Gregg*, 428 U.S. at 169–70, 170 n.17 (same); Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CALIF. L. REV. 839, 839–44 (1969) (same).

111. See *Gregg*, 428 U.S. at 175 (“We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.”).

112. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2747 (Scalia, J., concurring) (explaining that the Fifth Amendment “explicitly contemplates” capital punishment).

centuries—for someone to claim that capital punishment can be a lawful penalty only if it is a superior deterrent to crime than long-term imprisonment. That is true for a host of reasons: Every common law felony was a capital crime;<sup>113</sup> the text of the Constitution expressly recognized that capital punishment would be imposed for some offenses;<sup>114</sup> the First Congress adopted several capital crimes;<sup>115</sup> imprisonment did not exist as a punishment until early in the eighteenth century;<sup>116</sup> and the first federal prisons did not go into operation until the cusp of the twentieth century.<sup>117</sup> To be sure, the Supreme Court has greatly expanded the scope of that clause over the past sixty years, and occasionally it has concluded that the death penalty is an excessive punishment for certain crimes or offenders.<sup>118</sup> The Court, however, has left to the political process the authority to decide the question whether capital punishment simpliciter is an effective deterrent.<sup>119</sup> Neither

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113. See *supra* note 16 (citing cases explaining the history of capital punishment).

114. See U.S. CONST. amend. V (“No person shall be held to answer for a *capital, or otherwise infamous crime*, unless on a presentment or indictment of a grand jury; . . . nor shall any person be subject for the same offense to be twice put in *jeopardy of life or limb*; . . . nor be *deprived of life, liberty, or property*, without due process of law.” (emphasis added)).

115. See Crimes Act of 1790, ch. 9, §§ 1, 3, 8–10, 14, 23, 1 Stat. 112 (1790) (imposing mandatory capital punishment for treason, certain types of murder, murder or robbery on the high seas, piracy, and other crimes).

116. Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 308 (2013).

117. *Id.*

118. See *infra* text accompanying notes 146–149 (discussing various categories of individuals and situations where the death penalty is automatically not imposed).

119. See *Gregg v. Georgia*, 428 U.S. 153, 185–86 (1976)

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility . . . not available to the courts . . . . Indeed, many of the post-*Furman* statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent. “In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing

the text of nor the background to the Eighth Amendment justifies abandoning that position.

In any event, the empirical question whether capital punishment actually deters homicide to a greater extent than life imprisonment—with or without the possibility of parole—has vexed the criminal justice system for decades (as has the question whether life imprisonment alone deters). Reasonable people have lined up on both sides of the issue. Originally, participants in that debate invoked logic, anecdotes, or competing psychological theories to bolster their arguments.<sup>120</sup> Some economists and sociologists have conducted regression analyses of the available data and have concluded that capital punishment has a measurable deterrent advantage over life imprisonment.<sup>121</sup> As

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evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

(citing *Furman v. Georgia*, 408 U.S. 238, 403–05 (1972) (Burger, C.J., dissenting)); see also *id.* at 206 (White, J., concurring) (incorporating by reference *Roberts v. Louisiana*, 428 U.S. 325, 354–56 (1976) (White, J., dissenting)).

120. See generally ROYAL COMM'N ON CAPITAL PUNISHMENT 1949–1953, REPORT: PRESENTED TO PARLIAMENT BY COMMAND OF HER MAJESTY (Sept. 1953); HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* (Hugo Adam Bedau ed., 1967); *supra* note 106.

121. See generally DALE O. CLONINGER & ROBERTO MARCHESINI, EXECUTION MORATORIUMS, COMMUTATIONS AND DETERRENCE: THE CASE OF ILLINOIS, Econ. Working Paper Archive, Working Paper No. 0507002 (2005), [mcadams.posc.mu.edu/blog/Illinois\\_study.pdf](http://mcadams.posc.mu.edu/blog/Illinois_study.pdf); Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569 (2001); Hashem Dezhbakhsh & Joanna M. Shepherd, *The Deterrent Effect of Capital Punishment: Evidence from a “Judicial Experiment,”* 44 ECON. INQUIRY 512 (2006); Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003); Isaac Ehrlich & Zhiqiang Liu, *Sensitivity Analysis of the Deterrence Hypothesis: Let’s Keep the Econ in Econometrics*, 42 J. L. & ECON. 455 (1999); Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977); Isaac Ehrlich & John Gibbons, *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence*, 6 J. LEGAL STUD. 35 (1977); Isaac Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975); Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); Zhiqiang Liu, *Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence*, 30 E. ECON. J. 237 (2004); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453, 453 (2003); David P. Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, 86 AM. J. SOC. 139 (1980); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s*

Professors Cass Sunstein and Adrian Vermeule have noted, “the recent evidence of a deterrent effect from capital punishment seems impressive, especially in light of its “apparent power and unanimity.”<sup>122</sup> Other scholars, however, doubt that conclusion.<sup>123</sup>

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*Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 308 (2004); Steven Stack, *Publicized Executions and Homicide, 1950–1980*, 52 AM. SOC. REV. 532 (1987); James A. Yunker, *Is the Death Penalty a Deterrent to Homicide? Some Time Series Evidence*, 5 J. BEHAV. ECON. 45 (1976); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163 (2004).

122. Sunstein & Vermeule, *Life-Life Tradeoffs*, *supra* note 91, at 713 (quoting Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 ANN. REV. L. & SOC. SCI. 151, 159 (2005)). Sunstein and Vermeule do note, however, that even the new studies do not conclusively prove that capital punishment has a deterrent effect. *See id.*

But in studies of this kind, it is hard to control for confounding variables, and reasonable doubts inevitably remain. Most broadly, skeptics are likely to question the mechanisms by which capital punishment is said to have a deterrent effect. In the skeptical view, many murderers lack a clear sense of the likelihood and perhaps even the existence of executions in their states; further problems for the deterrence claim are introduced by the fact that capital punishment is imposed infrequently and after long delays. Emphasizing the weakness of the deterrent signal, Steven Levitt has suggested that “it is hard to believe that fear of execution would be a driving force in a rational criminal’s calculus in modern America.” And, of course, some criminals do not act rationally: many murders are committed in a passionate state that does not lend itself to an all-things-considered analysis on the part of perpetrators.

(quoting Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 175 (2004)).

123. *See generally* William C. Bailey, *Murder, Capital Punishment, and Television: Execution Publicity and Homicide Rates*, 55 AM. SOC. REV. 628 (1990); William C. Bailey & Ruth D. Peterson, *Murder and Capital Punishment: A Monthly Time-Series Analysis of Execution Publicity*, 54 AM. SOC. REV. 722 (1989); David C. Baldus & James W.L. Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303 (2005); William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich’s Research on Capital Punishment*, 85 YALE L.J. 187 (1975); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005); Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003); Peter Passell & J.B. Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 AM. ECON. REV. 445 (1977); Peter Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61 (1975); Jon K. Peck, *The Deterrent Effect of Capital*

It could be that each side's view of the evidence is colored by its judgment about the morality of the death penalty.<sup>124</sup> At the end of the day, the debate may prove only that reasonable people can disagree over this issue, and we leave disputes over the efficacy of government programs to be resolved in the legislatures and at the ballot boxes.<sup>125</sup>

Does that mean there will never be an instance in which newly discovered evidence proves beyond any doubt that a condemned prisoner is innocent? Of course not—people make mistakes, and even serious mistakes can go unremedied despite numerous opportunities for correction.<sup>126</sup> Unfortunately, the work of the

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*Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1976); Ruth D. Peterson & William C. Bailey, *Felony Murder and Capital Punishment: An Examination of the Deterrence Question*, 29 CRIMINOLOGY 367 (1991); Sunstein & Vermeule, *Life-Life Tradeoffs*, *supra* note 122. See also Sunstein & Vermeule, *Life-Life Tradeoffs*, *supra* note 91, at 711–14 (collecting authorities finding that capital punishment has a deterrent effect); *id.* at 708–09 n.16 (collecting authorities criticizing the deterrence studies); see also James Fox & Michael Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 LOY. L.A. L. REV. 29, 29–30, 29 n.3 (1989) (collecting criticisms of Ehrlich's original study).

124. See BANNER, *supra* note 15, at 281 (“There was a raging methodological disagreement [among economists] over how to pick the best variables [to measure the deterrent effect of the death penalty], and a nagging suspicion that researchers’ own attitudes toward capital punishment were subconsciously influencing the forms of equations.”); Sunstein & Vermeule, *Reply*, *supra* note 91, at 857 n.10 (“Those who oppose the death penalty on moral grounds often seem entirely unwilling to consider apparent evidence of deterrence. . . . Those who accept the death penalty on moral grounds often seem to accept the claim of deterrence whether or not good evidence has been provided.”). Two conclusions seem true in this regard: Indisputable proof of capital punishment’s greater deterrent effect would never persuade death penalty opponents to abandon their campaign against the death penalty, and equally persuasive proof of the lack of a deterrent effect would not persuade capital punishment defenders to settle for a lesser penalty. See Kozinski & Gallagher, *supra* note 103, at 26 (“[T]he deterrence argument is beside the point. Death penalty opponents never . . . concede they would change their minds if they were somehow to learn that [it] does deter. At the same time, people who support the death penalty do not care all that much if it deters crime.”).

125. See *Gregg v. Georgia*, 428 U.S. 153, 185–86 (1976) (“The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility . . . not available to the courts.”); see also *supra* note 119 (citing *Gregg*).

126. See *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (“[H]istory is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.”).

Innocence Project proves that this scenario is true. Sixty-one condemned inmates were released from prison from 1987 to 1999 alone.<sup>127</sup> Some of them were exonerated by DNA evidence; the rest, because of the post-sentencing discovery of perjured testimony by dishonest witnesses or law enforcement officers.<sup>128</sup>

If such a case were to arise, should the governor exercise his clemency authority? Of course he should. No governor should knowingly send an innocent man to the gallows. That would be tantamount to murder. It would, moreover, arm capital punishment's opponents with their most powerful argument for abolition.<sup>129</sup> In any event, governors are not reluctant to consider a condemned prisoner's evidence of his innocence: doubts about a condemned prisoner's guilt have served since *Gregg* as the most common reason why governors have commuted a death sentence.<sup>130</sup>

Ironically, the same DNA evidence that has been used to establish the innocence of numerous wrongly convicted parties reduces the likelihood that a state will execute an innocent man. DNA proof will not be available in every capital case, but, where it is available, it can powerfully exculpate or inculpate someone. When used early in the investigation or charging process, it can eliminate suspects from being charged, avoiding a mistaken conviction. Where it is used later in the process, it can exonerate the wrongfully convicted. Yet, as one scholar has noted, "one less appreciated aspect of increased DNA testing in the post-conviction appeals context is that from a statistical standpoint, DNA testing supports capital convictions far more often than it calls convictions into question."<sup>131</sup> The result is this "paradox": DNA evidence has reduced the number of parties wrongfully charged with or convicted of a capital crime, but in the process it has reduced a governor's need to grant clemency to someone who can raise a reasonable doubt about his guilt.<sup>132</sup>

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127. BANNER, *supra* note 15, at 303.

128. *Id.* at 303–04.

129. *Id.* at 304–05.

130. See Gershowitz, *supra* note 51, at 7 ("The most common reason for governors' commuting a sentence [from 1976 to 2013] from death to life imprisonment relates to doubts about the inmate's guilt.").

131. Heise, *Unequal Grace*, *supra* note 2, at 965.

132. See *id.* (discussing this paradox of the Innocence Project's "legacy").

The bottom line is this: the specter of executing an innocent man, on which capital punishment opponents often rely, may be just that: an illusion, not reality. At worst, the specter appears far more often in academic journals than in real cases. To be sure, that risk is always present, but whether it should lead to the abolition of capital punishment hinges on the utilitarian judgment whether the benefits of that penalty outweigh its costs.<sup>133</sup> That is a macro-level judgment based on factors that are irrelevant to the micro-level question of whether a particular person is innocent. The two issues are distinct and must be answered separately. If there is reason for Congress and state legislatures to believe that capital punishment deters homicides that would not otherwise have occurred—and recent scholarship argues that there is<sup>134</sup>—legislatures can legitimately and reasonably decide to prefer the innocent lives that will be lost to homicide over the ones that would be lost to the mistaken imposition of the death penalty.<sup>135</sup>

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133. See BANNER, *supra* note 15, at 304 (“The prospect of killing an innocent person seemed to be the one thing that could cause people to rethink their support for capital punishment.”).

134. See *Glossip v. Gross*, 135 S. Ct. 2726, 2748 (2015) (Scalia, J., concurring) (“Justice Breyer speculates that it does not ‘seem likely’ that the death penalty has a ‘significant’ deterrent effect. . . . It seems very likely to me, and there are statistical studies that say so.”).

135. See Markman & Cassell, *supra* note 88, at 159–60 (“The minimal but unavoidable risk of error in the administration of capital punishment must not be allowed to induce a ‘failure of nerve’ that would paralyze society from taking steps necessary to protect its citizens.”); Sunstein & Vermeule, *Reply*, *supra* note 91, at 856 (“In the United States, at least, no one is likely to execute innocent people in order to produce greater deterrence.”).

I find the critics’ argument unpersuasive for another reason too, one that I can only sketch here. They assume that American society has a greater interest in preventing mistakes before or at trial than it actually has. In truth, the public—and some Supreme Court justices for that matter—are quite hypocritical in their attitude toward the operation of the criminal process.

Justice Hugo Black once wrote that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” *Griffin v. Illinois*, 351 U.S. 12, 19 (1965) (plurality opinion). But neither he nor the other justices have ever taken that Olympian statement seriously. If the Court did, it would cap the amount of money that people like Bill Gates or Warren Buffet could spend at a trial were they ever charged with a crime or order the states to provide to each defendant the same amount of money that those two people could spend. Yet, we know that the public has never expressed sufficient outrage to force states to choose either option. See, e.g., Dominick Dunne, *The Verdict*, VANITY FAIR (Mar. 1992), <http://www.vanityfair.com/magazine/1992/03/dunne199203> (last visited Sept. 9, 2016) (discussing the William Kennedy Smith rape trial) (on file with the

*IV. Capital Punishment, Clemency, and Severity*

Correcting an unjust sentence has been an historic rationale for clemency.<sup>136</sup> Critics will maintain that clemency is necessary to

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Washington and Lee Law Review).

Two other defense attorneys had preceded [Roy] Black on this case: Herbert 'Jack' Miller of Washington, D.C., who had been Senator Edward Kennedy's lawyer in the Chappaquiddick affair in 1969 and who was replaced after the prosecution likened his strategy to those he had used at that time, and Mark Schnapp of Miami, who received a call from Willie Smith two days after the incident and remained on the case as part of the four-lawyer defense team after Black took over. Although Black reportedly received only a quarter of a million dollars for his services, a relatively low fee considering the family involved, he took the case because of the international attention focused on it. However, the total amount spent on Smith's defense seemed, by comparison with the money the prosecution spent, prodigious. Five private investigators worked for months digging up information on the background of Patricia Bowman, as well as of Anne Mercer and her boyfriend, Chuck Desiderio, the two people Bowman telephoned to come to the Kennedy compound on the night of the incident. In addition, a dozen or so expert witnesses were called to cast doubt on Bowman's story.

*Id.* It has been fifty years since Justice Black penned that remark in *Griffin*, and the Court has done nothing of the kind since then, and it never will. It is one thing to make such grandiose statements, another to mean them. A far better reflection of the Court's attitude toward the criminal process is its decision in *McCleskey v. Kemp*. 481 U.S. 279 (1987). *McCleskey* challenged the constitutionality of the death penalty on the ground that the evidence showed a material difference in the likelihood of receiving the death penalty based on the race of the victim, with juries far less likely to sentence a killer to death when the victim was black. *See id.* at 286 (stating that *McCleskey's* evidence "purport[ed] to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim"). The Court assumed that *McCleskey's* statistics were correct but rejected his argument for several reasons, one of them being that its effect, if true, would call into question the operation of the entire criminal justice system. *See id.* at 314–15 ("McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."). It may be cynical to say it, but the public is willing to be hypocritical about the operation of the criminal justice system. As long as it believes that only other people can wind up in its maw and as long as it does not see too many of the system's warts on television, the public is glad to let the criminal process operate with whatever degree of accuracy the system's professionals can produce. That certainly won't be the degree of accuracy that Judge Kozinski and other professionals expect the criminal justice system to have, *see, e.g.*, Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii (2015) ("Although we pretend otherwise, much of what we do in the law is guesswork."), but they underestimate the number of errors that most members of the public are willing to overlook (as long as *those individuals* are *not* the ones mistakenly locked up).

136. Alexander Hamilton made this point in the *Federalist Papers*.

ensure that the death penalty is an appropriate punishment in capital cases. That argument, however, is unpersuasive. It is true that Presidents and governors no longer grant clemency in capital cases with the same frequency society witnessed for most of American history.<sup>137</sup> It is also true that the reason why is, in part, because of the fear that extending mercy to a killer will prove politically costly.<sup>138</sup> But that is not the only or even the principal

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Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.

THE FEDERALIST No. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 2003). The need has endured since then. As one commentator noted early in the twentieth century,

The very nature of criminal law makes such a power vested somewhere essential to relieve the vigor and cruelty of the law. The law must, in theory, apply to all persons alike. It cannot take into consideration the particular individual, nor the defects or injustices that frequently arise in its consideration. Cases frequently arise to which no general rule can apply without the gravest of injustices, and the most grievous inhumanity, cases where had the legislature known of the particular facts, and had been familiar with the general surroundings, it would have relieved them of the general terms of the law, and the courts had they the power, would have exempted them from the particular statute.

Goodrich, *supra* note 1, at 336–37. The problem still exists today. *See, e.g.*, United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2005); U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 71 (2011); Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 4–5 (2015); Jane L. Fryod, *Safety Valve Failure: Low-Level Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1491 (2000) (“[T]he [Sentencing] Guidelines provide graduated, proportional increases in sentence severity for additional misconduct or prior convictions, whereas mandatory minimums sentences do not.”); *cf.* Brian Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Capital Cases*, 27 U. RICH. L. REV. 227, 234–35 (1993) (arguing that executive clemency has been and should also be used if an offender undergoes a fundamental character change in prison).

137. *See* BANNER, *supra* note 15, at 291 (“For centuries governors commuted death sentences in significant numbers. That pattern continued for the first two-thirds of the twentieth century. Florida commuted nearly a quarter of its death sentences between 1924 and 1966. North Carolina commuted more than a third between 1909 and 1954.”).

138. *See id.* (“Part of clemency’s decline was attributable to the growing popularity and salience of the death penalty. . . . [M]any of the post-*Gregg*

reason for the steep drop-off in the number of commuted death sentences over the last forty years.

Beginning in the 1960s, the battle over capital punishment shifted from the political arena to the courts.<sup>139</sup> Judges assumed the responsibility that governors historically had performed to ensure that a death sentence was imposed fairly.<sup>140</sup> The Supreme Court has played the principal role in that transition. Since its decision in *Furman v. Georgia* forty years ago, the Court has rigorously scrutinized the capital sentencing process on the ground that the death penalty is different in kind from any other punishment.<sup>141</sup> In the process, the Court has developed a considerable body of case law identifying the types of sentencing schemes that do and do not satisfy constitutional requirements.

The Court has upheld sentencing schemes that use reasonably defined aggravating circumstances to limit the class of death-eligible defendants and allow a defendant to introduce virtually any evidence that he considers mitigating.<sup>142</sup> By contrast, the presence of an unconstitutionally vague aggravating factor—a factor whose terms are so vague that the sentencing party has no effective guidance to determine whether it is present<sup>143</sup>—could

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commutations were granted by governors who did not intend to seek reelection.”).

139. See *id.* at 231–66, 285–86 (discussing the Supreme Court’s role in the death penalty process); MELTSNER, *supra* note 50, at 20 (same).

140. See BANNER, *supra* note 15, at 291–93 (“Judges, not governors, now decided whether trials had been conducted fairly . . .”).

141. See *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976) (stating that “death is a punishment different from all other sanctions in kind rather than in degree”).

142. For cases upholding capital sentences in those circumstances, see generally *Kansas v. Marsh*, 548 U.S. 163 (2006); *Harris v. Alabama*, 513 U.S. 504 (1995); *Tuilaepa v. California*, 512 U.S. 967 (1994); *Romano v. Oklahoma*, 512 U.S. 1 (1994); *Johnson v. Texas*, 509 U.S. 350 (1993); *Boyde v. California*, 494 U.S. 370 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *California v. Brown*, 479 U.S. 538 (1987); *Zant v. Stephens*, 462 U.S. 862 (1983); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

143. See, e.g., *Stringer v. Black*, 503 U.S. 222, 235 (1992) (“A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer’s discretion.”); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (holding that the aggravating circumstance provision of Oklahoma’s death penalty statute was unconstitutionally vague); *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (same, Georgia Supreme Court’s interpretation of Georgia statute).

require that a death sentence be set aside.<sup>144</sup> In addition, the Court has found that restrictions on a defendant's ability to introduce most types of mitigating evidence deny him the opportunity to argue in favor of a sentence less than death.<sup>145</sup>

That is not all. Since its decision in *Gregg*, the Supreme Court has ruled that certain categories of offenders cannot be executed at all, regardless of the procedures used at sentencing. Those categories consist of offenders who were minors at the time of the crime;<sup>146</sup> who are mentally retarded or developmentally

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144. Some capital sentencing laws require the jury to weigh aggravating factors against mitigating factors. If an aggravating factor is unconstitutional, the sentence must be set aside and the case remanded for resentencing. *See, e.g.,* *Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992) (reaffirming the principle of setting aside sentences for unconstitutional aggravating factors); *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (same); *Stringer*, 503 U.S. at 232 (1992) (same); *Parker v. Dugger*, 498 U.S. 308, 319–321 (1991) (same); *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990) (same). By contrast, other states use the existence of aggravating factors only as a “bridge” that, once found, permits the jury to consider the death penalty in light of all the evidence in the case. The existence of an unconstitutional aggravating factor in a particular case does not automatically require a death sentence to be set aside. *See, e.g., Zant*, 462 U.S. at 891 (1983) (holding that a death sentence was not constitutionally impaired by an invalid statutory aggravating circumstance held found by the jury).

145. For cases vacating capital sentences in those circumstances, see generally *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Mills v. Maryland*, 486 U.S. 367 (1988); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Green v. Georgia*, 442 U.S. 95 (1979); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (concluding that “the [Constitution] require[s] that the sentence . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”). *But see Oregon v. Guzek*, 546 U.S. 517, 527 (2006) (ruling that a defendant does not have a constitutional right to introduce evidence of an alibi that is inconsistent with the jury’s finding that he committed the crime); *cf. Franklin v. Lynaugh*, 487 U.S. 164, 173 n.6 (1988) (plurality opinion) (doubting that a defendant can rely at capital sentencing on any “residual doubt” that the jury might have as to his guilt for a non-death sentence); *id.* at 187 (O’Connor, J., concurring in the judgment) (rejecting that claim outright).

146. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (ruling that the Cruel and Unusual Punishments Clause prohibits the execution of an offender who was a juvenile at the time of the crime). Not every juvenile, however, would always deserve some form of clemency. *See* CHARLES D. STIMSON & ANDREW M. GROSSMAN, ADULT TIME FOR ADULT CRIMES: LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 56 (2009) (“Used sparingly, as it is, life without parole is an

disabled;<sup>147</sup> who did not themselves kill, attempt to kill, or intend either that a killing take place or that lethal force would be employed;<sup>148</sup> and who are mentally incompetent at the time of their execution.<sup>149</sup> Those factors historically served as a basis for executive clemency. Now, the Constitution has taken its place. Moreover, since *Gregg*, even when the evidence is insufficient to establish one of those exemptions as a matter of law, governors have relied on that evidence as a basis for clemency.<sup>150</sup>

The Court has also shown special solicitude for claims of error in post-*Gregg* capital cases. For example, the Court has imposed stricter, defense-friendly rules on the capital sentencing process than those that apply to non-capital cases.<sup>151</sup> Finally, in its self-assumed role as “Supreme Court of Capital Cases,” the Court has reviewed the legality of sentences imposed in cases that did

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effective and lawful sentence for the worst juvenile offenders. On the merits, it has a place in our laws.”).

147. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (ruling that the Cruel and Unusual Punishments Clause prohibits the execution of a mentally retarded offender); accord *Brumfield v. Cain*, 135 S. Ct. 2269, 2273 (2015) (applying *Atkins*).

148. See *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (adopting that rule).

149. See *Ford v. Wainwright*, 477 U.S. 399, 418 (1986) (ruling that the Cruel and Unusual Punishments Clause prohibits the execution of an offender incompetent at the time of his execution even if he was found competent to stand trial and sane at the time of the crime); accord *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007) (applying *Ford*).

150. See Gershowitz, *supra* note 51, at 12–16 (noting that governors relied on an offender’s age, mental capacity, mental defect, and history of abuse as a child to grant clemency).

151. Compare, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991), *Chapman v. United States*, 500 U.S. 453, 466–67 (1991), and *Ex parte United States*, 242 U.S. 27, 37 (1916) (holding that Congress and the states may impose mandatory sentences of imprisonment), with *Sumner v. Shuman*, 483 U.S. 66, 85 (1987), *Roberts v. Louisiana*, 431 U.S. 633, 638 (1977), and *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding that the states may not impose mandatory capital sentences even if the defendant commits a particularly egregious crime or is already serving a sentence of life imprisonment without the possibility of parole). Compare, e.g., *Williams v. New York*, 337 U.S. 241, 251–52 (1949) (holding that due process does not require disclosure to the defense of information used to impose a death sentence), with *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (holding, post-*Furman*, that due process requires disclosure to the defense of any information used to impose a death sentence; overruling *Williams* for capital cases).

not involve the type of broad, precedent-setting legal issues that characterize nearly all of the Court's noncapital decisions.<sup>152</sup>

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152. For examples of the Supreme Court acting in that role, see *Weary v. Cain*, 136 S. Ct. 1002, 1008 (2016) (engaging in a fact-specific application of the rule adopted in *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution must disclose exculpatory information to the defense); *Brumfield v. Cain*, 135 S. Ct. 2269, 2273 (2015) (issuing a fact-specific decision applying the rule adopted in *Atkins* that the state cannot execute a mentally retarded offender); *Martinez v. Ryan*, 132 S. Ct. 1309, 1321 (2010) (engaging in a fact-specific inquiry whether offender could establish “cause” for failing to raise a claim earlier); *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014) (issuing a fact-specific ruling that the capital defendant received ineffective assistance of counsel); *Sears v. Upton*, 561 U.S. 945, 957 (2010) (engaging in a fact-specific inquiry whether petitioner suffered prejudice under *Strickland v. Washington*, 466 U.S. 684 (1984)); *Magwood v. Patterson*, 561 U.S. 320, 330 (2010) (engaging in a fact-specific inquiry whether offender's habeas petition was a “second” or “successive” petition); *Porter v. McCollum*, 558 U.S. 30, 44 (2009) (same); *Cone v. Bell*, 556 U.S. 449, 476 (2009) (engaging in a fact-specific application of *Brady*); Panetti, 551 U.S. at 962 (applying the rule adopted in that the state cannot execute a condemned prisoner who is mentally incompetent at the time of his execution); *Smith v. Texas (Smith II)*, 550 U.S. 297, 310 (2007), and *Smith v. Texas (Smith I)*, 543 U.S. 37, 52 (2004) (engaging in two fact-specific inquiries whether jury instructions adequately allowed the jury to consider mitigating evidence); *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007) (engaging in a fact-specific application of the rule adopted in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), that a capital defendant must be allowed to offer relevant mitigating evidence); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 240 (2007) (same); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (issuing a fact-specific ruling that the capital defendant received ineffective assistance of counsel); *Bradshaw v. Stumpf*, 545 U.S. 175, 176 (2005) (engaging in a fact-specific inquiry whether offender's guilty plea was voluntary); *Deck v. Missouri*, 544 U.S. 622, 624 (2005) (engaging in a fact-specific application to the penalty phase of a capital case of the rule adopted in *Holbrook v. Flynn*, 475 U.S. 560 (1986), that the Constitution forbids the use of visible shackles unless that use is justified by an essential state interest, such as the interest in courtroom security); *Tennard v. Dretke*, 542 U.S. 274, 289 (2004) (issuing a fact-specific ruling that a particular condemned prisoner was entitled to appeal the denial of habeas relief to the circuit court of appeals, but without taking a position on the merits of his claim); *Banks v. Dretke*, 540 U.S. 668, 680 (2004) (engaging in a fact-specific application of the rule adopted in *Brady*); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003) (issuing a fact-specific ruling that the capital defendant received ineffective assistance of counsel); *Shafer v. South Carolina*, 532 U.S. 36, 48 (2001) (engaging in a fact-specific application of the rule adopted in *Simmons v. South Carolina*, 512 U.S. 154 (1994), that a defendant in a capital case has the right to inform the jury that, under the governing state law, he would not be eligible for parole in the event that the jury sentences him to life imprisonment); *Gray v. Netherland*, 518 U.S. 152, 170 (1996) (engaging in a fact-specific application of *Brady*); *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995) (engaging in a fact-specific application of the rule adopted in *Ake v. Oklahoma*, 470 U.S. 68 (1985), that in some circumstances a capital defendant has a right to assistance of a court-appointed psychiatrist); *Kyles v. Whitley*, 514 U.S. 419, 454 (1995)

One consequence of the Supreme Court's repeated interventions is that the capital sentencing process is materially different today than it was as recently as the middle of the twentieth century. From the founding of the nation through that point, the clemency process was the principal mechanism for correcting errors at the guilt or sentencing stages of a capital case and for ensuring that the death penalty was appropriate for an individual offender.<sup>153</sup> Governors granted relief for trial errors that appellate courts would today use as a basis for granting an offender a new trial or sentencing hearing. Governors also used their pardon power to tailor the punishment to the heinousness of the crime or the incorrigibility of the offender.<sup>154</sup> For example, governors would grant an offender clemency if he was young, an inexperienced criminal, unlikely to reoffend, or the product of a criminogenic environment.<sup>155</sup> Today, by contrast, the defendant

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(engaging in a fact-specific application of *Brady*); *Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992) (engaging in a fact-specific application of the rule in *Clemons v. Mississippi*, 494 U.S. 738 (1990), that a sentencer may not weigh an invalid aggravating factor); *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (engaging in a fact-specific application of *Clemons*); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (engaging in a fact-specific application of the rule adopted in *Harper v. Washington*, 494 U.S. 210 (1990), that the Due Process Clause establishes requirements before a capital defendant may be involuntarily medicated to enable him to stand trial); *Trevino v. Texas*, 503 U.S. 562, 568 (1992) (engaging in a fact-specific inquiry whether an offender preserved a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Stringer v. Black*, 503 U.S. 222, 237 (1992) (issuing a fact-specific answer to the question of whether the particular Supreme Court decisions in *Maynard v. Cartwright*, 486 U.S. 356 (1988), or *Clemons*, amounted to a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989), that generally cannot be raised in federal habeas corpus); *Parker v. Dugger*, 498 U.S. 308, 323 (1991) (engaging in a fact-specific inquiry whether the trial judge adequately considered mitigating evidence); *Selvage v. Collins*, 494 U.S. 108, 110 (1990) (engaging in a fact-specific inquiry whether petitioner's claim was procedurally barred); *Truesdale v. Aiken*, 480 U.S. 527, 527 (1987) (engaging in a fact-specific inquiry whether a capital offender was able to offer relevant mitigating evidence at trial); *Bowden v. Francis*, 470 U.S. 1079, 1079 (1985) (engaging in a fact-specific application of the rule adopted in *Ake*).

153. See BANNER, *supra* note 15, at 56–58 (noting that clemency was the only means available to correct errors that occurred at trial and also served to spare "incidental" from hardened and "viscious[]" criminals).

154. See *id.* at 54–55 ("While every death sentence was the same, the circumstances of every capital crime were different, and so were the life histories of the condemned criminals. The power of clemency was understood as a means by which the state could tailor the sentence to the individual case.").

155. See *id.* at 57–58

has the right to offer such mitigating evidence at sentencing to avoid a death sentence, the jury has the responsibility to determine whether an offender is eligible for the death penalty, the jury or trial judge must decide whether that punishment is appropriate, and state appellate courts review the conviction and sentence.<sup>156</sup>

The result has been to leave a chief executive with little or no reason to halt an execution. Local juries and judges have already filtered out those offenders to whom governors would have historically granted a commutation. By the time that a condemned prisoner has run out of legal challenges to his sentence and applies for clemency, the chances are virtually nil that the death penalty is an unduly severe or inappropriate punishment for him: “Clemency was once a regular part of the capital sentencing process, but once the process was constitutionalized, clemency

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Where the condemned person’s guilt was clear and his trial conducted properly, youth or inexperience as a criminal might save him from being hanged. This was a second function served by clemency, that of classifying offenders according to what was often called their ‘character,’ which tended to be synonymous with the perceived likelihood that they would commit more crimes in the future.

*See also id.* at 103 (“Youth and inexperience had long been common reasons to grant clemency, especially when the condemned person had been under the sway of an older, hardened offender, so the idea that a person could be influenced to commit a crime by those around him was a familiar one.”).

156. *See id.* at 286 (“In the end the [Supreme] Court held that the states could not restrict the jury’s consideration of mitigating evidence—that the jury must be allowed to consider any kind of evidence that might point against a death sentence, not . . . the evidence relevant to one of the statutory mitigating circumstances.” (footnote omitted)). The jury must make the findings necessary to establish that a convicted defendant is eligible for the death penalty. *See Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) (“The Sixth Amendment protects a defendant’s right to an impartial jury. This right required Florida to base [the defendant’s] death sentence on a jury’s verdict, not a judge’s factfinding.”); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (“The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant’s sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both.”). Once the jury makes the necessary eligibility findings, it or the trial judge can decide what sentence is appropriate for a particular defendant. *Hurst*, 136 S. Ct. at 624; *see also Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013) (“Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury.”); *United States v. Booker*, 543 U.S. 220, 233 (2005) (“For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”).

became a freak occurrence.”<sup>157</sup> As Professor Stuart Banner has explained:

Part of clemency’s decline was attributable to the growing popularity and salience of the death penalty. A commutation could be political suicide for an elected official in the new climate, and so many of the post-*Gregg* commutations were granted by governors who did not intend to seek reelection. But of course the death penalty had also been very popular in earlier eras, when governors had nevertheless commuted death sentences in large numbers. The difference after *Gregg* was that the courts were now handling many of the kinds of cases that had once been suitable for clemency instead. Judges, not governors, now decided whether trials had been conducted fairly, so when considering applications for clemency governors tended to defer to the courts that resolved the defendant’s constitutional claims. Such deference left a vacuum in cases where the death penalty seemed too severe, or where the defendant might have been innocent, because these were issues courts normally did not consider. Where the sentence had been affirmed as constitutional at all stages of judicial review, however, the assumption within governors’ offices tended to be that the sentence ought not to be disturbed, an assumption very different from the one that had prevailed for the preceding several centuries, when the executive branch was supposed to exercise its independent judgment as to the propriety of an execution. When the courts moved in, the governors moved out.<sup>158</sup>

Of course, a governor could always disagree with the judgment of the local citizens and officials about the appropriateness of executing a particular defendant, and there may be cases where it is sensible to remove a specific prisoner from death row. The argument, however, that chief executives should do so on a regular basis is nothing more than a thinly veiled effort to persuade the chief executive to nullify the capital sentencing laws in the relevant jurisdiction under the disguise of exercising clemency.

One final point: Critics of the current use of executive clemency argue that governors should be willing “to forgive the unforgivable.”<sup>159</sup> Yet, those critics and death penalty opponents

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157. BANNER, *supra* note 15, at 291.

158. *Id.* at 291–92.

159. Molly Clayton, Note, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751 (2013).

generally do not discuss the facts of the cases that take offenders to death row. Some condemned prisoners committed multiple murders. Dzhokhar Tsarnaev—one of the “Boston Marathon Bombers”—murdered three people, maimed seventeen, and injured more than 200.<sup>160</sup> Jerry William Correll murdered four people, including his five-year-old daughter.<sup>161</sup> Joseph Edward Duncan also murdered four people, one of whom was only thirteen years old, another only eight.<sup>162</sup> Dustin Lee Honken murdered five people, including two girls, one age ten and the other age six, who were shot in the back of the head.<sup>163</sup> Lawrence Sigmond Bittaker and Roy Norris, known as the “Toolbox Killers,” kidnapped and murdered five teenage girls.<sup>164</sup> Erwin Charles Simants murdered six people, one of whom was a five-year-old, another was a seven-year-old, and a third was a ten-year-old.<sup>165</sup> William George Bonin, dubbed the “Freeway Killer” in California, received the death penalty for each of the (at least) ten murders he

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160. *In re Tsarnaev*, 780 F.3d 14, 16 (1st Cir. 2015); Judgment for United States v. Tsarnaev, No. 1:13-cr-10200-GAO-1 (D. Mass. June 24, 2015), <https://www.justice.gov/usao-ma/file/643096/download>; Press Release, Dep’t of Justice & U.S. Attorney’s Office, Judge Imposes Death Sentence for Boston Marathon Bomber (June 24, 2015), <https://www.justice.gov/usao-ma/pr/judge-imposes-death-sentence-boston-marathon-bomber>.

161. *Correll v. State*, 523 So. 2d 562, 564 (Fla. 1988).

162. *United States v. Duncan*, 643 F.3d 1242, 1244 (9th Cir. 2011).

163. *United States v. Honken*, 541 F.3d 1146, 1148, 1151 (8th Cir. 2008). The Court described the facts:

In 1993, after being indicted on federal drug trafficking charges, Dustin Lee Honken (Honken) and his girlfriend, Angela Johnson (Johnson), kidnapped and murdered a federal witness, the witness’s girlfriend, and the girlfriend’s two young daughters. Honken and Johnson murdered another potential federal witness three months later. . . . Using the maps Johnson drew, officers discovered the bodies of Nicholson and the Duncan family, buried in a single hole located in a wooded area outside Mason City. Kandi and Amber each had a single bullet hole in the back of their heads. Nicholson and Duncan were bound, gagged, and shot multiple times, including once in the head. DeGeus’s body was found in a field a few miles away, face down in a shallow hole. DeGeus had been shot one or more times, and his skull was severely fragmented, requiring significant reconstruction.

*Id.*

164. *People v. Bittaker*, 774 P.2d 659, 664 (Cal. 1989), *as modified on denial of reh’g* (Aug. 24, 1989). Only Bittaker received the death penalty. *Id.* at 1062.

165. *State v. Simants*, 250 N.W.2d 881, 885 (Neb. 1977).

committed.<sup>166</sup> George Banks murdered a dozen people.<sup>167</sup> Randy Stephen Kraft, nicknamed, the “Freeway Killer” or the “Scorecard Killer,” murdered at least sixteen young men.<sup>168</sup> John Wayne Gacy was sentenced to death for twelve murders even though he had murdered at least thirty-three young men.<sup>169</sup> Finally, as noted earlier, Timothy McVeigh killed 168 people and wounded more

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166. *Bonin v. Calderon*, 59 F.3d 815, 821 (9th Cir. 1995). The court described the facts as follows:

Between 1979 and 1980, Bonin committed a string of shockingly brutal murders in Southern California. As a result of his activities, Bonin became known as the “Freeway Killer.” Although the details of each murder vary and need not be repeated here, they shared a number of common features. In general, Bonin would pick up boys between the ages of 12 and 19 years. After engaging in various forms of homosexual activity with the boys, Bonin would murder them. The victims were usually killed by strangulation. The bodies of the victims exhibited signs that they had been beaten around the face and elsewhere, including the genital area. Marks were found on the wrists and ankles of the victims, indicating that they had been tied. Several of the bodies exhibited other more gruesome injuries. When Bonin was through with the boys, he would then dump their nude bodies along Southern California freeways.

*Id.* at 821; *see also id.* at 829 (describing Bonin’s earlier crimes).

167. *Beard v. Banks*, 542 U.S. 406, 408 (2004).

168. *People v. Kraft*, 5 P.3d 68, 81 (Cal. 2000).

169. *Gacy v. Welborn*, 994 F.2d 305, 306 (7th Cir. 1993).

John Wayne Gacy is a serial killer. Between 1972 and 1978 he enticed many young men to his home near Chicago for homosexual liaisons. At least 33 never left. Gacy tied up or handcuffed his partners, then strangled or choked them. Twenty-eight of the bodies were dumped into the crawl space under the Gacy residence; one was entombed under the driveway; the rest were thrown into the Des Plaines River. Gacy, who operated a construction business, had his workers dig trenches and throw lime into the crawl space. Gacy’s wife complained about an “awful stench.” But the slaughter continued until the disappearance of 15-year-old Robert Piest on December 11, 1978. Piest vanished after telling his mother that he was going to see a building contractor about a summer job. The presence of Gacy’s truck outside the place where Piest was to meet his potential employer led to Gacy’s arrest within two days.

*Id.* Gacy received only 12 death sentences because the state could only prove that he had committed those murders after the Illinois capital sentencing statute had gone into effect. *Id.*

than 680 when he destroyed a federal building.<sup>170</sup> Other cases could also be cited, but that would be just gilding the lily.<sup>171</sup>

Other murderers acted not in the heat of passion, but rather under circumstances manifesting either the intent to make the victims suffer or total indifference toward their agony. For example, as the Supreme Court summarized it in *Glossip v. Gross*, here is how Benjamin Cole murdered his nine-month-old daughter and how he reacted to her death: “Cole murdered his 9-month-old daughter after she would not stop crying. Cole bent her body backwards until he snapped her spine in half. After the child died, Cole played video games.”<sup>172</sup> Next, consider the facts in *McCorquodale v. State*,<sup>173</sup> a case involving Timothy McCorquodale and another culprit named Leroy, a case that the Supreme Court once described as “a horrifying torture-murder”:<sup>174</sup>

The appellant, after telling Donna how pretty she was, raised his fist and hit her across the face. When she stood up, he grabbed her by her blouse, ripping it off. He then proceeded to remove her bra and tied her hands behind her back with a nylon stocking. McCorquodale then removed his belt, which was fastened with a rather large buckle, and repeatedly struck Donna across the back with the buckle end of the belt. He then took off all her clothing and then bound her mouth with tape and a washcloth. Leroy then kicked Donna and she fell to the

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170. *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1999).

171. For other cases of multiple murders drawn from decisions by the Supreme Court decisions and a few state courts, see *infra* Appendix B.

172. *Glossip v. Gross*, 135 S. Ct. 2726, 2735 (2015) (quoting *Cole v. State*, 164 P.3d 1089, 1092–93 (Okla. Crim. App. 2007)); see also *Cole v. State*, 164 P.3d 1089, 1092 (Okla. Crim. App. 2007).

Appellant’s nine-month-old daughter, Brianna Cole, was murdered on December 20, 2002. According to the State Medical Examiner, Brianna’s spine had been snapped in half, and her aorta had been completely torn through due to non-accidental stretching. The official cause of death was described as a fracture of the spine with aortic laceration. . . . Appellant eventually admitted causing the fatal injuries. In a statement he gave to police, Appellant said he’d been trying, unsuccessfully, to get the child, who was lying on her stomach, to stop crying. Appellant eventually grabbed his daughter by the ankles and pushed her legs toward her head until she flipped over. This action broke the child’s back and resulted in fatal injuries.

*Id.*

173. 211 S.E.2d 577 (Ga. 1974).

174. *Gregg v. Georgia*, 428 U.S. 153, 201 (1976).

floor. McCorquodale took his cigarette and burned the victim on the breasts, the thigh, and the navel. He then bit one of Donna's nipples and she began to bleed. He asked for a razor blade and then sliced the other nipple. He then called for a box of salt and poured it into the wounds he had made on her breasts. At this point Linda, who was eight months pregnant, became ill and went into the bedroom and closed the door. McCorquodale then lit a candle and proceeded to drip hot wax over Donna's body. He held the candle about 1/2 inch from Donna's vagina and dripped the hot wax into this part of her body. He then used a pair of surgical scissors to cut around the victim's clitoris.

While bleeding from her nose and vagina, Leroy forced the victim to perform oral sex on him while McCorquodale had intercourse with her. Then Leroy had intercourse with the victim while McCorquodale forced his penis into the victim's mouth. McCorquodale then found a hard plastic bottle which was about 5 inches in height and placed an antiseptic solution within it, forcing this bottle into Donna's vagina and squirted the solution into her. The victim was then permitted to go to the bathroom to 'get cleaned up.' While she was in the bathroom, McCorquodale secured a piece of nylon rope and told Bonnie and her roommate that he was going 'to kill the girl.' He hid in a closet across the hall from the bathroom and when Donna came out of the bathroom he wrapped the nylon cord around her neck. Donna screamed, 'My God, you're killing me.' As McCorquodale tried to strangle her, the cord cut into his hands and Donna fell to the floor. He fell on top of her and began to strangle her with his bare hands. He removed his hands and the victim began to have convulsions. He again strangled her and then pulled her head up and forward to break her neck. He covered her lifeless body with a sheet and departed the apartment to search for a means of transporting her body from the scene.<sup>175</sup>

Consider Lisa Ann Coleman's murder of nine-year-old Davontae Williams:<sup>176</sup>

This case arises out of the death of nine-year-old Davontae Williams. On the morning of July 26, 2004, emergency services were summoned to Davontae's home upon report of his "breathing difficulty." Paramedic Troy Brooks arrived at the residence only minutes later to find Davontae "obviously dead," inferring that Davontae had passed away several hours earlier. Davontae, Brooks testified, was clad only in bandages and a diaper, so "emaciated and underweight" that it was "shocking."

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175. *McCorquodale*, 211 S.E. at 579–80.

176. *Coleman v. Thaler*, 716 F.3d 895 (5th Cir. 2013).

Brooks and another paramedic each believed that nine-year-old Davontae weighed only twenty-five pounds.

Crime Scene Investigator Regina Taylor testified that Davontae had “numerous injuries throughout . . . his entire body,” including a disfigured ear, swollen hands, a slit in his lip, and “ligature marks around his wrists and ankles.” Pediatrician Nancy Kellogg identified over 250 wounds on his corpse. Dr. Konzelmann testified that injuries to Davontae’s hands, arms, and ankles were consistent with his having been bound repeatedly. Konzelmann initially believed that Davontae had “life-threatening blunt-force injuries, perhaps bleeding on the brain, broken bones, et cetera” that caused his death.

Ultimately, however, Dr. Konzelmann deemed the cause of Davontae’s death to be malnutrition with pneumonia. Dr. Peerwani, Chief Medical Examiner for Tarrant County, further testified that Davontae’s pneumonia resulted from his malnutrition. And although Davontae was born prematurely, Dr. Kellogg explained that Davontae previously had “a normal growth velocity;” a metabolic disease, she inferred, was not responsible for his malnutrition. According to the State of Texas, however, Lisa Coleman was.<sup>177</sup>

Or the facts in the case of Williams Andrews:<sup>178</sup>

“[Dale Pierre,] Andrews, and [Keith] Roberts were airmen stationed at Hill Air Force Base, Utah. Stanley Walker, Michelle Ansley, Carol Naisbitt, Cortney Naisbitt (son of Carol Naisbitt), and Orren W. Walker, Jr. (father of Stanley Walker) were tied up, made to lie on the floor, and forced to drink liquid Drano on the evening of April 22, 1974, in the basement of the Hi-Fi Shop in Ogden, Utah, by [Pierre] in company with Andrews, who aided [Pierre] by pouring the caustic substance into a plastic cup for accomplishment of these violent acts. [Pierre] and Andrews both had hand guns and [Pierre] finally shot all of the victims in the head with either a .25 caliber or .38 caliber handgun, which caused the deaths, within a brief period of time during that April evening, of Stanley Walker, Michelle Ansley (who had also been raped by [Pierre] just before he shot her) and Carol Naisbitt.

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177. *Id.* at 898.

178. *Andrews v. Shulsen*, 802 F.2d 1256 (10th Cir. 1986).

“[A]fter shooting [Orren Walker, Pierre] vehemently kicked a ball point pen into one of his ears and attempted to strangle him with a cord.”<sup>179</sup>

Then, there are the facts of *Weisheit v. State*:<sup>180</sup>

Early in the morning of April 10, 2010, the German Township Fire Department arrived at Weisheit’s Evansville, Indiana home, which was engulfed in flames. After the fire was extinguished, investigators found the bodies of eight-year-old Alyssa Lynch and five-year-old Caleb Lynch. The children and their pregnant mother Lisa Lynch, Weisheit’s girlfriend, had been living with Weisheit since 2008. On the night of the fire, Weisheit was home with the children while Lisa worked.

Alyssa was found in a closet, where she had either been trapped inside or attempted to flee the fire. Over ninety percent of her body was charred black, and a pathologist thought it possible that she burned while she was still alive or as she asphyxiated to death from soot and smoke inhalation. She likely experienced a sensation similar to drowning in her final moments.

Also charred beyond recognition, Caleb was found on his mattress, hog-tied with duct tape and with a twelve-inch-by-twelve-inch washcloth stuffed in his mouth and secured by duct tape. A railroad flare had been placed in his underwear, and another railroad flare was found under his body. The flare in his underwear burnt his left thigh while he was still alive and conscious. He died in agony of suffocation from soot and smoke inhalation.<sup>181</sup>

\* \* \* \*

In an act of extreme heinousness, Weisheit set fire to a house that he knew contained eight-year-old Alyssa Lynch and five-year-old Caleb Lynch. His innocent victims, one of whom he hog-tied with duct tape and gagged, spent the last moments of their young lives in torturous pain. Lisa Lynch trusted Weisheit to care for her children, and at his hands they suffered agonizing deaths. That Weisheit had been planning to murder the children and flee the state is evident from the fact that, on the day before the fire, he quit his job and withdrew all of the money in his bank account, and that on the night of the fire he packed the money along with his clothes and toiletries into his

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179. *Id.* at 1258–59 (quoting *State v. Pierre*, 572 P.2d 1338, 1343–44 (Utah 1977)).

180. 26 N.E.3d 3 (Ind. 2015).

181. *Id.* at 6–8.

car before starting the deadly fire. And all because he apparently believed Lisa may have been unfaithful.<sup>182</sup>

Let's finish with the facts of the crimes committed by two brothers, Reginald and Jonathan Carr. The Supreme Court described their crimes in *Kansas v. Carr*:<sup>183</sup>

In December 2000, brothers Reginald and Jonathan Carr set out on a crime spree culminating in the Wichita Massacre. On the night of December 7, Reginald Carr and an unknown man carjacked Andrew Schreiber, held a gun to his head, and forced him to make cash withdrawals at various ATMs.

On the night of December 11, the brothers followed Linda Ann Walenta, a cellist for the Wichita symphony, home from orchestra practice. One of them approached her vehicle and said he needed help. When she rolled down her window, he pointed a gun at her head. When she shifted into reverse to escape, he shot her three times, ran back to his brother's car, and fled the scene. One of the gunshots severed Walenta's spine, and she died one month later as a result of her injuries.

On the night of December 14, the brothers burst into a triplex at 12727 Birchwood, where roommates Jason, Brad, and Aaron lived. Jason's girlfriend, Holly, and Heather, a friend of Aaron's, were also in the house. Armed with handguns and a golf club, the brothers forced all five into Jason's bedroom. They demanded that they strip naked and later ordered them into the bedroom closet. They took Holly and Heather from the bedroom, demanded that they perform oral sex and digitally penetrate each other as the Carrs looked on and barked orders. They forced each of the men to have sex with Holly and then with Heather. They yelled that the men would be shot if they could not have sex with the women, so Holly—fearing for Jason's life—performed oral sex on him in the closet before he was ordered out by the brothers.

Jonathan then snatched Holly from the closet. He ordered that she digitally penetrate herself. He set his gun between her knees on the floor. And he raped her. Then he raped Heather.

Reginald took Brad, Jason, Holly, and Aaron one-by-one to various ATMs to withdraw cash. When the victims returned to the house, their torture continued. Holly urinated in the closet because of fright. Jonathan found an engagement ring hidden in the bedroom that Jason was keeping as a surprise for Holly.

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182. *Id.* at 19.

183. 136 S. Ct. 633 (2016).

Pointing his gun at Jason, he had Jason identify the ring while Holly was sitting nearby in the closet. Then Reginald took Holly from the closet, said he was not going to shoot her yet, and raped her on the dining-room floor strewn with boxes of Christmas decorations. He forced her to turn around, ejaculated into her mouth, and forced her to swallow. In a nearby bathroom, Jonathan again raped Heather and then again raped Holly.

At 2 a.m.—three hours after the mayhem began—the brothers decided it was time to leave the house. They attempted to put all five victims in the trunk of Aaron's Honda Civic. Finding that they would not all fit, they jammed the three young men into the trunk. They directed Heather to the front of the car and Holly to Jason's pickup truck, driven by Reginald. Once the vehicles arrived at a snow-covered field, they instructed Jason and Brad, still naked, and Aaron to kneel in the snow. Holly cried, "Oh, my God, they're going to shoot us." Holly and Heather were then ordered to kneel in the snow. Holly went to Jason's side; Heather, to Aaron.

Holly heard the first shot, heard Aaron plead with the brothers not to shoot, heard the second shot, heard the screams, heard the third shot, and the fourth. She felt the blow of the fifth shot to her head, but remained kneeling. They kicked her so she would fall face-first into the snow and ran her over in the pickup truck. But she survived, because a hair clip she had fastened to her hair that night deflected the bullet. She went to Jason, took off her sweater, the only scrap of clothing the brothers had let her wear, and tied it around his head to stop the bleeding from his eye. She rushed to Brad, then Aaron, and then Heather.

Spotting a house with white Christmas lights in the distance, Holly started running toward it for help—naked, skull shattered, and without shoes, through the snow and over barbed-wire fences. Each time a car passed on the nearby road, she feared it was the brothers returning and camouflaged herself by lying down in the snow. She made it to the house, rang the doorbell, knocked. A man opened the door, and she relayed as quickly as she could the events of the night to him, and minutes later to a 911 dispatcher, fearing that she would not live.

Holly lived, and retold this play-by-play of the night's events to the jury. Investigators also testified that the brothers returned to the Birchwood house after leaving the five friends for dead,

where they ransacked the place for valuables and (for good measure) beat Holly's dog, Nikki, to death with a golf club.<sup>184</sup>

Sadly, those cases do not stand alone.<sup>185</sup> The point is not simply that some people can do horrible, detestable, sickening things to others—they certainly can and have throughout history; everyone would concede as much. Rather, the point here is that a reasonable person could readily decide that some offenders do not deserve even to be considered for clemency. It would be difficult to blame governors for reaching the same conclusion.

### V. Conclusion

For most of our history, governors granted condemned prisoners clemency with some degree of regularity based on factors such as the youth of the offender at the time of the crime, the presence of a mental disease or defect, and the lesser sentence received by a confederate for the same crime. Since the Supreme Court upheld the constitutionality of capital punishment in *Gregg* in 1976, however, governors have granted clemency only infrequently. Critics, particularly steadfast opponents of capital punishment, have sought to explain that turnabout on the ground that, over the last forty years, governors have abandoned their duty to exercise mercy in appropriate cases.

That criticism is mistaken. The best explanation for the decline in clemency grants is that the legal environment surrounding capital punishment today is wholly unlike the one that predated *Gregg*. Today, the capital sentencing process no longer leaves the decision whether a murderer should live or die to the unguided discretion of a jury or judge, who may not have heard relevant mitigating evidence. A defendant may offer the same mitigating evidence to a jury or judge at sentencing that, in years past, he would have submitted to the governor in clemency proceedings. Atop that, the Supreme Court has placed out of

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184. *Id.* at 638–39.

185. For other cases drawn from decisions by the Supreme Court and a few state courts of offenders who intended to make the victim(s) suffer or who were indifferent toward that suffering, see *infra* Appendix C (listing cases with defendants that completely disregarded the harm and pain that they inflicted on their victims).

bounds the execution of certain categories of offenders—the young, the mentally disabled, the less culpable—who would have been the most likely candidates to receive clemency under the now obsolete pre-*Gregg* capital sentencing processes, leaving only those offenders most deserving of death. Clemency's critics should recognize that the success of capital punishment's opponents in limiting the pool of clemency applicants is the likely explanation for the decline in clemency grants.

*Appendix A**Examples of Cases in Which a Murderer Was Paroled or Escaped from Prison and Committed Another Murder*

*Greenawalt v. Ricketts*, 943 F.2d 1020, 1022 (9th Cir. 1991). While serving a sentence of life imprisonment for murder, Greenawalt escaped with Gary Tison and murdered a family of four, which included a two-year-old, with repeated shotgun blasts. *See Tison v. Arizona*, 481 U.S. 137, 139–41 (1987) (describing Tison’s involvement with the prison escape and murders).

*Kennedy v. Dugger*, 933 F.2d 905 (11th Cir. 1991). While serving a sentence of imprisonment for murder, Kennedy escaped and later murdered a highway patrol officer. *Id.* at 907–08

*Commonwealth v. Bomar*, 104 A.3d 1179 (Pa. 2014). After being released on parole from a second-degree murder conviction, Bomar murdered a college student. *Id.* at 1185.

*Dillbeck v. State*, 964 So. 2d 95 (Fla. 2007). Dillbeck was sentenced to life imprisonment for murdering a police officer, but he escaped and murdered a woman by repeatedly stabbing her. *Id.* at 97.

*People v. McRae*, No. 217052, 2001 WL 788481 (Mich. Ct. App. Jan. 12, 2001) *vac. by* 634 N.W.2d 361 (Mich. 2001). McRae appealed from his conviction for his 1987 murder involving acts similar to his 1950 murder conviction. *Id.* at \*2. McRae’s 1950 conviction had been reversed on procedural grounds. 678 N.W.2d 425, 435 (Mich. 2004).

*Ferrell v. State*, 680 So. 2d 390 (Fla. 1996). Ferrell, who was sentenced to death for shooting his girlfriend, had a prior second-degree murder conviction for shooting an earlier girlfriend. *Id.* at 391.

*Geary v. State*, 930 P.2d 719 (Nev. 1996), *modified on other grounds on reh'g*, 952 P.2d 431 (1998). While on parole from a 20-year-old murder conviction, Geary murdered his roommate. *Id.* at 721–22.

*Parker v. State*, 456 So. 2d 436 (Fla. 1984). Parker was sentenced to life imprisonment for murder in 1967. He was later released and committed another murder in Florida, one month before he

committed a third murder, this time in Washington, D.C. *Id.* at 440.

*King v. State*, 436 So. 2d 50 (Fla. 1983). Previously convicted of “the axe-slaying of his common-law wife,” King was sentenced to death for murdering a woman with a blunt object to the head. *Id.* at 55.

### *Appendix B*

#### *Examples of Capital Cases Involving Offenders Who Committed Multiple Murders or Attempted Murders (Some cases could also be placed in Appendix C)*

*White v. Wheeler*, 136 S. Ct. 456, 458 (2015) (two people murdered, one of whom was pregnant).

*Davis v. Ayala*, 135 S. Ct. 2187, 2193 (2015) (three people murdered).

*Bobby v. Mitts*, 563 U.S. 395, 395 (2011) (two people murdered).

*Smith v. Spisak*, 558 U.S. 139, 142 (2010) (three people murdered and two attempted murders).

*Uttecht v. Brown*, 551 U.S. 1, 4–5 (2007) (two people murdered, each victim was a woman who also was robbed and raped).

*Oregon v. Guzek*, 546 U.S. 517, 519 (2006) (two people murdered).

*Brown v. Sanders*, 546 U.S. 212, 214 (2006) (one murder, one attempted murder).

*Tennard v. Dretke*, 542 U.S. 274, 276 (2004) (two people murdered).

*Bell v. Cone*, 535 U.S. 685, 689 (2002) (two people murdered).

*Hopkins v. Reeves*, 524 U.S. 88, 91 (1998) (two people murdered).

*Buchanan v. Angelone*, 522 U.S. 269, 271 (1998) (four people murdered).

*Loving v. United States*, 517 U.S. 748, 751 (1996) (two people murdered).

*Romano v. Oklahoma*, 512 U.S. 1, 3 (1994) (two people murdered).

*Arave v. Creech*, 507 U.S. 463, 465–66 (1993) (at least twenty-six people murdered).

*Delo v. Lashley*, 507 U.S. 272, 272 (1993) (two people murdered).

*Herrera v. Collins*, 506 U.S. 390, 394 (1993) (two people murdered).

*Lankford v. Idaho*, 500 U.S. 110, 112 (1991) (two people murdered).

*Whitmore v. Arkansas*, 495 U.S. 149, 151–52 (1990) (two people murdered, three others wounded).

*Tison v. Arizona*, 481 U.S. 137, 139–41 (1987) (four people murdered, one was a two-year-old, another was 15).

*Poland v. Arizona*, 476 U.S. 147, 148–49 (1986) (two people murdered).

*Strickland v. Washington*, 466 U.S. 668, 671 (1984) (three people murdered, along with torture, kidnapping, assaults, attempted murder, attempted extortion, and theft).

*Pulley v. Harris*, 465 U.S. 37, 40 n.1 (1984) (two people murdered).

*California v. Ramos*, 463 U.S. 992, 994–95 (1983) (one murder, one attempted homicide).

*Hopkinson v. Shillinger*, 888 F.2d 1286, 1287 (10th Cir. 1989) (four people murdered).

*Lambrix v. State*, 494 So. 2d 1143, 1145 (Fla. 1986) (two people murdered).

*Bundy v. State*, 455 So. 2d 330, 334 (Fla. 1984) (two people murdered and two attempted murders).

*State v. Wells*, 864 P.2d 1123, 1124 (Idaho 1993) (two people murdered).

*Baze v. Com.*, 965 S.W.2d 817, 819 (Ky. 1997) (two people murdered).

*Appendix C**Examples of Capital Cases Involving Offenders Who Intended to Make the Victim(s) Suffer or Who Were Indifferent Toward that Suffering (Some cases could also be placed in Appendix B)*

*Ayers v. Belmontes*, 549 U.S. 7 (2006). Respondent unexpectedly encountered the nineteen-year-old victim while burglarizing a home and struck her in the head fifteen to twenty times with a steel dumbbell. *Id.* at 11

*Kansas v. Marsh*, 548 U.S. 163 (2006). Respondent broke into the home of Marry Ane Pusch and waited for her to return. *Id.* at 166. Upon arrival, he shot her, stabbed her, and slit her throat. Respondent then set the house on fire, burning Pusch's toddler alive. *Id.*

*Payne v. Tennessee*, 501 U.S. 808 (1991). Petitioner was convicted by a jury for two counts of first-degree murder as well as one count of assault with intent to commit murder in the first degree. *Id.* at 811. A jury sentenced him to death for his murders and thirty years for his assault. *Id.* The Court described the gruesome scene of the crime:

The victims of Payne's offenses were 28-year-old Charisse Christopher, her 2-year-old daughter Lacie, and her 3-year-old son Nicholas. . . . [I]nside the apartment, the police encountered a horrifying scene. Blood covered the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and a transfusion of 1,700 cc's of blood—400 to 500 cc's more than his estimated normal blood volume. Charisse and Lacie were dead.

Charisse's body was found on the kitchen floor on her back, her legs fully extended. She had sustained 42 direct knife wounds and 42 defensive wounds on her arms and hands. The wounds were caused by 41 separate thrusts of a butcher knife. None of the 84 wounds inflicted by Payne were individually fatal; rather, the cause of death was most likely bleeding from all of the wounds.

*Id.* at 811–13.

*Sawyer v. Smith*, 497 U.S. 227 (1990). Petitioner and accomplice, Charles Lane, tortured and murdered Frances Arwood, a woman whom he thought had given drugs to his girlfriend's children. *Id.* at 229–30. The Court discussed the heinous nature of the attack, explaining that,

For reasons that are not clear, petitioner and Lane struck Arwood repeatedly with their fists and dragged her by the hair into the bathroom. There they stripped the victim naked, literally kicked her into the bathtub, and subjected her to scalding, dunkings, and additional beatings. Petitioner left Lane to guard the victim, and apparently to rape her, while petitioner went to the kitchen to boil water to scald her. Petitioner kicked Arwood in the chest, causing her head to strike the tub or a windowsill and rendering her unconscious. The pair then dragged Arwood into the living room, where they continued to beat and kick her. Petitioner poured lighter fluid on the unconscious victim, particularly her torso and genital area, and set the lighter fluid afire. He told Lane that he had done this to show “just how cruel he could be.”

*Id.* at 230.

*Blystone v. Pennsylvania*, 494 U.S. 299 (1990). After bragging to his friends that he was going to rob a disabled hitchhiker who he had driven by on the road, petitioner brought the man to his car and demanded his money. *Id.* at 301. Dissatisfied with the amount of money the hitchhiker possessed, petitioner pulled out his revolver, pulled to the side of the road into a field, and searched the man. *Id.* Petitioner forced the man to lie on the ground, returned to his friends to tell them that he was going to shoot the disabled man, then returned to the victim and shot him in his head. *Id.* at 301–02.

*Darden v. Wainwright*, 477 U.S. 168 (1986). The defendant was convicted of murder, robbery, and assault with intent to kill. *Id.* at 170. He was sentenced to death for his gruesome crimes. *Id.* After killing a man, the defendant then forced the first victim's wife to perform oral sex while on the floor next to her husband's body. *Id.* at 172. Defendant then shot a teenage boy who came into the store to make sure everything was ok. *Id.* at 173.

*Wainwright v. Witt*, 469 U.S. 412 (1985). The defendant was convicted of first-degree murder for killing an eleven-year-old boy. *Id.* at 414. The defendant and his accomplice previously discussed

killing a human while on hunting trips. *Id.* The boy suffocated from being gagged and stuffed in a truck. *Id.* After the defendant and his accomplice killed him, they performed various sexual and violent acts on the body. *Id.*

*Wainwright v. Goode*, 464 U.S. 78 (1983). Respondent kidnapped a ten-year-old boy from a school bus stop in Florida. *Id.* at 79. He sexually assaulted the boy and killed him. *Id.* Respondent then kidnapped two more young boys, one of whom he killed in Virginia. *Id.* During his sentencing for the Florida murder, respondent described his crime in graphic detail and gloated that he was extremely proud of his killing and would do it again if given the chance. *Id.* at 79–80.

*Barclay v. Florida*, 463 U.S. 939 (1983) (plurality opinion). The four defendants in this case were members of a group called the “BLACK LIBERATION ARMY.” *Id.* at 942. Their goal was to kill white people indiscriminately and to start a revolution and racial war. *Id.* The defendants randomly selected their white victim, drove him to a dump, and repeatedly stabbed him. *Id.* After the murder, they left a note on the body discussing their revolutionary race war goals. *Id.* at 943.

*Dobbert v. Florida*, 432 U.S. 282 (1977). The court convicted petitioner of first-degree murder of his nine-year-old daughter and seven-year-old son. *Id.* at 284. The court also found him guilty of torturing his eleven-year-old son and abusing his five-year-old daughter. *Id.* at 285. The trial judge described the crimes, explaining that the “evidence and testimony showed premeditated and continuous torture, brutality, sadism and unspeakable horrors committed against all of the children over a period of time.” *Id.*

*Boyle v. State*, 154 So. 3d 171 (Ala. Crim. App. 2013). The jury sentenced the defendant to death for killing a two-year-old girl. *Id.* at 183. After defendant brought her to a hospital, doctors found significant head trauma. *Id.* The doctor who conducted the autopsy determined that the girl died as a result of brain swelling from blunt-force trauma and that her brain swelled to such a degree that part of it broke off and pushed into her spinal cord. *Id.* The victims’ sister testified that the week before her sister’s death she saw defendant hit the toddler against the car door and also throw her against a wall the night before her death. *Id.* at 183–84.

*Gobble v. State*, 104 So. 3d 920 (Ala. Crim. App. 2010). Defendant was convicted of murdering her baby. *Id.* at 935. The four-month-old boy died “as a result of blunt-force trauma to his head,” with fractured skull, ribs, right arm, both wrists, “multiple bruises on his face, head, neck, and chest and a tear in the inside his mouth that was consistent with a bottle having been shoved into his mouth.” *Id.*

*Wilson v. State*, 751 S.W.2d 734 (Ark. 1988). The defendant raped, bound, and strangled his first victim with a telephone cord. *Id.* at 735. The next day, he then beat and raped a second victim on the hood of her car in a parking lot. *Id.* His second victim survived, but underwent life-threatening surgery to treat a blood clot in her brain that resulted from the beating. *Id.*

*People v. Rodriguez*, 794 P.2d 965 (Colo. 1990). The victim was raped, sodomized, and stabbed around twenty-eight times with a folding knife. *Id.* at 969. The evidence revealed that it was the killer’s intention to torture the victim before she died, demonstrated by the shallow nature of the cuts around her neck. *Id.* at 969–70.

*State v. Rizzo*, 833 A.2d 363 (Conn. 2003). The defendant bludgeoned his thirteen-year-old victim to death by repeated blows to the head with a three-pound sledgehammer. *Id.* at 375.

*Correll v. State*, 523 So. 2d 562 (Fla. 1988). Defendant was sentenced to death for killing his ex-wife, his five-year-old daughter, his ex-wife’s sister, and their mother. *Id.* at 564. Each victim died from massive hemorrhaging, caused by multiple stab wounds. *Id.*

*State v. Strong*, 142 S.W.3d 702 (Mo. 2004). The defendant was convicted of killing a mother and child. *Id.* at 710. The mother was stabbed twenty-one times and had five slash wounds while the two-year-old child was stabbed nine times and had twelve slash wounds. *Id.*

*Lockett v. State*, 53 P.3d 418 (Okla. Crim. App. 2002). Petitioner was sentenced to death for his crimes of conspiracy, first-degree burglary, assault with a dangerous weapon, forcible oral sodomy, first-degree rape, kidnapping, robbery, as well as first-degree murder. *Id.* at 421.

*Commonwealth v. Fahy*, 516 A.2d 689 (Pa. 1986). The defendant was sentenced to death for rape and murder of a twelve-year-old girl.

*State v. Keen*, 31 S.W.3d 196 (Tenn. 2000). The defendant was sentenced to death for the rape and murder of an eight-year-old girl. *Id.* at 201

*State v. Davidson*, No. E2013-00394-CCA-R3-DD, 2015 Tenn. Crim. App. LEXIS 164 (Tenn. Crim. App. Mar. 10, 2015). Defendant gruesomely raped and killed two victims, C.C. and C.N. The medical examiner described the heinous nature of the crimes:

C.N. had been bound at the ankles by a belt and a strip of fabric and at the wrists with “something like a shoelace.” He had also been blindfolded and gagged, and his head had been wrapped in a sweatshirt. Based upon the location of unburned skin on his body, she determined that he had been wrapped in “some sort of comforter and placed face up” before being set on fire. C.N. suffered three gunshot wounds. A contact gunshot wound to his head severed his brain stem, causing “instantaneous death.” A gunshot wound “between the back of the neck and the shoulders” did not “cause any major damage.” Another gunshot wound entered C.N.’s back and traveled “steeply upward” where it caused severe damage to his spinal cord. Lacerations, abrasions, and bruising in the area of C.N.’s anus indicated anal penetration that occurred before his death. . . . C.C.’s body was inside the trash can, and strips of fabric had been used to bind her body into a fetal position. A small plastic bag had been tied around her head, and then her body had been placed in five different large garbage bags before being placed into the trash can. She was nude from the waist down. The autopsy findings indicated that C.C. died inside the trash can of a combination of positional asphyxiation due to the position of her body, suffocation due to the plastic bag on her face, and mechanical asphyxiation due to being placed in the confined space of the trash can with bedding. Blood and other fluids were smeared around her abdomen and upper chest. She suffered “excoriations”—“like a carpet burn”—to her lower back and upper buttocks. C.C.’s anogenital region sustained “tremendous damage.” She had tears to her vagina and rectum as well as severe blunt force trauma to the area. Doctor Mileusnic-Polchan explained,

[T]he whole area was just a blunt-force trauma which is bruising, contusion, and abrasions, and lacerations. . . . The depth of the injury was so grave that there’s no way that just a

regular rape could—could inflict this. . . . [T]his is an object coming in contact with the body to inflict the serious injury of this kind. C.C. also suffered blunt force trauma to her head, contusions on her shoulders, bruising on her arms, and a small cut on her hand. She suffered a torn frenulum, which was likely caused by something being forcefully put into her mouth. C.C.'s blood was negative for drugs and alcohol.

*Id.* at \*11–13.

*Archuleta v. Galetka*, 267 P.3d 232 (Utah 2011). The victim in this case was kidnapped and driven to an isolated area. He was then

[B]ound . . . with tire chains and a bungee cord . . . . [R]emoved . . . from the trunk and [defendants] attached battery cables to his testicles and to the car battery in a failed attempt to electrocute him. They inflicted severe blows to [victim]'s head with a tire jack and tire iron. And they inserted the tire iron into [victim]'s rectum, forcing it eighteen inches into his body and puncturing his liver. . . . [Victim] was found naked from the waist down, with a gag around his mouth and the tire chains wrapped tightly around his neck.

*Id.* at 241, ¶ 4.