The Death Penalty in the United States

School of Law
University of Washington
Seattle, Washington
February 23, 2012

William A. Fletcher

My topic today is the modern death penalty. Where have we been? Where are we now? And where do we go from here? In 1972, in *Furman v. Georgia*, 408 U.S. 238 (1972), by a vote of five to four, the Supreme Court came very close to holding the death penalty unconstitutional as cruel and unusual punishment under the Eighth Amendment. The five justices in the majority each wrote an individual opinion. Justices Brennan and Marshall wrote that, in their view, the death penalty was flatly unconstitutional. The three others, Justices Douglas, Stewart and White were more cautious. They wrote only that the death penalty, as then administered, was unconstitutional. Justice Douglas wrote that the death penalty was unconstitutional because it was unevenly applied. at 256. Justice Stewart wrote that death sentences were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." at 309-10. Justice White wrote

that the death penalty was infrequently applied, with too few constraining principles. He particularly objected to the "recurring practice of delegating sentencing authority to the jury[.]" at 314. The four dissenters were Chief Justice Burger and Justices Blackmun, Powell and Rehnquist.

In response to *Furman*, the states with the death penalty did not abandon it. Instead, they redrafted their statutes in an attempt to meet the objections of Justices Douglas, Stewart and White. There were essentially two kinds of new statutes. One imposed mandatory death sentences for murders committed under certain circumstances — such as murder of a law enforcement officer, multiple murders, murder during the commission of a felony (that is, felony murder), and murder for hire. The other attempted to channel the imposition of the death penalty by specifying particular aggravating circumstances that had to be found before the death penalty could be imposed. Many of these circumstance were the same as those I just listed for the mandatory death penalty statutes. The central difference between these two kinds of statutes was that in the first the particular circumstance mandated the death penalty, whereas in the second an aggravating circumstance was a necessary but not sufficient condition for imposing the death penalty.

Four years later, the Supreme Court responded to the two kinds of statutes,

striking down the first and upholding the second. In *Gregg v. Georgia*, 428 U.S. 153 (1976), and two companion cases, the Court upheld statutes that specified particular aggravating circumstances as qualifying a murder defendant for the death penalty. Though there was not a single opinion for the Court, the vote was not close. The vote in all three cases was seven to two. Justice Douglas was no longer on the Court. He had been replaced by Justice Stevens who voted to uphold the death penalties. Justices Stewart and White, who had voted to strike down the death penalty in *Furman v. Georgia* four years earlier, now voted to uphold it.

It may be helpful to describe the procedure established under Georgia law and upheld by the Court in *Gregg*, for this statute is the model upon which modern death penalty statutes are constructed. Georgia's statute provided that the punishment for first degree murder was either the death penalty or life in prison. In order to recommend to the judge that the death penalty be imposed, a jury had to find beyond a reasonable doubt that at least one of ten specified aggravating circumstances were present. In addition, the jury was permitted to consider mitigating circumstances. A capital murder trial was conducted in two phases — a guilt phase and a penalty phase. At the end of the penalty phase, the jury recommended to the judge either for or against the death penalty. The judge then

decided whether to impose it. (This jury-recommendation procedure is still followed in many states, but many states give the final determination to the jury.) There was a mandatory appeal to the state supreme court.

It has now been over thirty years since *Gregg v. Georgia.* What has been our experience with the death penalty since then? Have the American states that retain the death penalty succeeded in meeting the standards set forth by the five justices in the majority in *Furman v. Georgia*?

I. Overview of the Death Penalty

Let me begin with an overview. The United States is unusual among the industrialized nations of the world. Among those nations, only Japan (and China, if we now count it as an industrialized nation) join the United States in retaining the death penalty.

All countries adhering to the European Convention of Human Rights have renounced the death penalty. Signatories to the convention include not only the countries of Western Europe, but also many of the countries of Eastern Europe and Central Asia. Many of the countries of Western Europe renounced the death penalty by statute before the European Convention abolished it. At the time some of these countries abolished the death penalty, popular sentiment, as measured by polling numbers, showed that considerable majorities in those countries supported

the death penalty.

Within the United States, there is substantial variation. Sixteen states, largely in the Northeast and northern Midwest, do not have the death penalty. Thirty-four states and the federal government do have the death penalty. The New York Court of Appeals struck down the death penalty in 2004 as unconstitutional under the state constitution. New Jersey abolished the death penalty in 2007. New Mexico abolished it in 2009. Illinois abolished it in 2011.

As of the beginning of this year, there were about 3,300 people on death row around the country. Just over 98% of them are male. About 45% are white, 42% are black, and 11% are Latino. Since 1976 — that is, since *Gregg v. Georgia* — there have been a total of just under 1,250 executions in the United States. The peak year was 1999 with 98 executions. That number has diminished somewhat. There were 53 executions in 2006, 42 in 2007, 37 in 2008, 52 in 2009, 46 in 2010. Beginning with the states with the largest number of executions since 1976 and working toward the smaller number: Texas (466), Virginia (108), Oklahoma (96), Florida (69), Missouri (68), Alabama (50), Georgia (49), North Carolina (43), Ohio — here we have the first non-southern state on the list — (43), South Carolina (42), Louisiana (28), Arkansas (27), Arizona (24).

Most states execute most of their death row prisoners sooner or later. But

that is not true for two states. As of the beginning of last year, California, my state, had 697 prisoner on death row; it has had only 13 executions since 1976. Pennsylvania had 222 prisoners on death row; it has had 3 executions since 1976. Those numbers suggest a deep ambivalence about the death penalty in those states.

Popular sentiment in favor of the death penalty has varied over the years. According to a series of Gallup polls, the percentage of the American population in favor of the death penalty between 1965 and 1972 fluctuated between 42 and 54%. The low point was 1966 with 42%. In March of 1972, three months before *Furman v. Georgia* was decided, 50% favored the death penalty. In March of 1976, three months before *Gregg v. Georgia*, 66% favored the death penalty. Support for the death penalty climbed to a high of 80% in 1994, but declined thereafter. For the last six years, it has hovered around 65%. Of the things I will say today, the fact that 65% of the population now favors the death penalty may be the most important. This compares with [France]

Popular sentiment — at least as expressed in polls — in favor of the death penalty varies slightly from region to region in the United States. According to a 2001 Gallup poll, 59% of people in the South favored the death penalty, compared to 60% of the people in the West, and 72% of the people in the Midwest and the East. These polling numbers are somewhat surprising, in that they show that the

South is the region that least favors the death penalty by a small margin, even as it far outstrips the rest of the country in the number of executions.

II. The Modern Death Penalty

The Supreme Court has tinkered with the death penalty since its 1976 decision in *Gregg*. It has required that a wide range of mitigating circumstances be presented to the jury. Further, it has required that juries rather than judges make the determination that there are aggravating circumstances that qualify a defendant for a death penalty. For a time, in some states, that determination was made solely by a judge.

And the Court has nibbled around the edges of the death penalty, forbidding its imposition in certain circumstances. In *Atkins v. Virginia*, it held in 2000 that it is unconstitutional to execute a mentally retarded person. In *Roper v. Simmons*, it held in 2005 that it is unconstitutional to execute someone who was under 18 at the time of the commission of the crime. In *Kennedy v. Louisiana*, in 2008, it extended its 1977 holding in *Coker v. Georgia* which had held capital punishment for rape of an adult unconstitutional, to cases of rape of a child.

But the basic legal structure of the death penalty has not changed substantially since 1976 when the Court decided *Gregg*.

There are many arguments for and against the death penalty. I don't mean

to suggest that the appropriateness, or the constitutionality, of the death penalty can be decided simply by counting the number of arguments on each side, for some arguments count far more than others, and people have quite different views of the relative importance of the arguments. I will not attempt to analyze and evaluate all of these arguments. I will merely note some important arguments, and then pass on to my principal concern today. Those arguments include:

(1) The death penalty is extremely expensive. It costs many times more to execute a person than to keep him in prison for life.

(2) The death penalty is extremely slow. In some states it is not unusual for there to be more than 20 years between the time of the crime and the execution. And those are just the defendants who are executed. In states like California, most death row inmates will die of natural causes rather than by execution.

(3) There is little showing that the death penalty deters crime. Indeed, many studies show that it has no effect on crime.

(4) Certain methods of execution are, or may be, unconstitutional. For example, the electric chair, once thought more humane than hanging, has been held to be unconstitutional. Lethal injection is now the preferred method in almost all states, but there has been extended litigation over the manner in which it may be carried out. There is currently a moratorium in effect in California because of

concerns about lethal injection. Just last month, in Arizona, the federal district court stayed an execution of a man named Jeffrey Landrigan because of concerns about the provenance and efficacy of the chemical the state planned to use to anesthetize Landrigan before giving him chemicals that would paralyze and then kill him. A three-judge panel of the Ninth Circuit affirmed the district court's stay. I was on that panel. The Supreme Court, by a vote of 5 to 4, then lifted the stay, and Landrigan was executed a few hours later.

(5) Further, there are strong non-instrumental arguments – I can call them, loosely, moral arguments – on both sides. Opponents of the death penalty emphasize the sanctity of human life, and argue on that basis against state-sanctioned killing. Proponents also emphasize the sanctity of human life, and argue that certain killers – the worst of the worst – having violated the sanctity of human life have forfeited any claim to their own.

But I will pass over those arguments. Instead, I will return to the theme of *Furman v. Georgia* in 1972, when the Supreme Court struck down the death penalty, as then administered, across the entire country. The Court in *Furman*, particularly the swing Justices Stewart and White, was concerned about the death penalty being applied erratically and arbitrarily, and therefore unfairly. The Court's central concern was that juries were given insufficient guidance by death

penalty statutes as to how they should distinguish those killers who deserved to die from those who did not.

I will be concerned more broadly than was the Court in *Furman* with the problem of arbitrariness and unfairness. I will not be concerned only with the problem of guidance to the jury, for that is hardly the only area in which arbitrariness is produced. I will be concerned with the entire process by which we choose those whom we will execute, beginning with the initial police investigation, running through the various decisions by prosecutors whom to charge and how to present evidence, running through the judicial process focusing on the behavior of the judges, and finishing with the possibility of executive clemency by the governor.

The great academic Professor Charles Black of the Yale Law School, now deceased, wrote a book after *Furman* and before *Gregg*, seeking to show that, under this broad view of arbitrariness, the death penalty was, if I can say it this way, fatally flawed. Perhaps for strategic reasons, he concluded his argument in terms of the system as a whole, largely leaving to one side the weakness and venality of some of the participants in the process. He wrote, "All this is not to say, of course, that there are not some hanging prosecutors, hanging juries, hanging judges, and hanging governors. But, overwhelmingly, the trouble is not

in the people but in the system – or nonsystem." C. Black, Capital Punishment, The Inevitability of Caprice and Mistake, at 105.

I will take something like Professor Black's approach, except that I will try not to shy away from describing human frailty as it influences our system of state-administered death. And I will not be looking forward — toward *Gregg* — as Professor Black was. Instead, I will be looking backward, almost 35 years after *Gregg*.

I will not proceed by way of statistical proof, but rather by way of example. My examples will be drawn from the West Coast, for two reasons. First, it is the region whose laws and practices are most familiar to me. Second, and perhaps more important, I want to make the point — too often overlooked or not understood in an eagerness always to use Texas as an example of what is wrong with the death penalty — that problems with the administration of the death penalty are widespread and endemic rather than merely regional or episodic.

I will begin with police investigation. The case I am about to describe is horrible in many ways. The murders were horrible. Kevin Cooper, the man now sitting on death row, may well be — and in my view probably is — innocent. And he is on death row because the San Bernardino Sheriff's Department framed him. You can find my dissent from our failure to take this case en banc at 565 F.3d 581

(9th Cir. 2009).

On the morning of June 5, 1983, a father came to the semi-rural home in Chino Hills, California, where his son had spent the night as an overnight guest. He found the mother and father, their daughter, and his own son dead, killed during the night. They had been chopped with a hatchet, sliced with a knife or knives, and stabbed with an ice-pick or ice-picks. The son of the dead mother and father, Josh Ryan, had been left for dead, but he survived. His throat had been cut. The family station wagon was gone. The mother's purse was in plain sight on the kitchen counter, but no money had been taken.

The San Bernardino Sheriff's Department Deputies who responded to the call, decided almost immediately who was the likely killer. Kevin Cooper had escaped two days earlier from a nearby minimum security prison by walking across an open field. He had hidden out in the house next door, 125 yards away, for two days. He had repeatedly called two women friends from this house, asking for money to help with his escape. They had refused. Cooper testified at trial that he had left his hideout house as soon as it got dark on June 4, and had hitchhiked to Mexico. We know that Cooper checked in to a hotel in Tijuana at 4:30 on the afternoon of June 5. Tijuana is about 50 miles south of Chino Hills. The family station wagon was discovered several days later in a church parking lot in Long

Beach, California, about 100 miles west of Chino Hills.

Eight-year-old Josh was "interviewed" at the hospital by a clinical social worker. Because his throat had been cut, he could not talk. He pointed to letters and numbers on a clipboard, indicating that there had been 3 or 4 killers, and that they had been white. Cooper is black. During his stay in the hospital, Josh twice saw a picture of Cooper on the television. Both times, he said that Cooper was not one of the killers. A Sheriff's Department Deputy interviewed Josh at the hospital after the social worker and got him to change his story so that he no longer said that three or four white men had done it. Eventually, Josh said that he had seen a black man with a great "poof" of hair standing over his parents' bed. At the time of the killing, Cooper had had his hair in cornrows. At the time of his arrest six months later — which was widely shown on television — he had his hair in an Afro.

During the next day or so, Sheriff's Department deputies "discovered" — I use the word in quotation marks — a bloody button from a prison-issue jacket in the house where Cooper had been hiding out. They discovered it in the middle of the floor of an empty bedroom that had previously been searched. The Sheriff's Department later learned that the prison jacket Cooper had been wearing had had buttons of a different color. Deputies also "discovered" footprints in the murder

house and the hideout house that supposedly matched prison-issue tennis shoes that are not sold on the open market. But they managed not to respond to a telephone call from the prison Warden who said that, after inquiry at the prison, she had learned that such special shoes where not worn in her prison. And they managed not to pass on to Cooper and his lawyers the fact that the prison Warden had called them.

On June 9, a woman named Diana Roper called the Sheriff's Department to tell them that her boyfriend, Lee Furrow, had come home in the early hours on the night of June 4. He arrived in an unfamiliar station wagon with some people who stayed in the car. He changed out of his overalls, which he left on the floor of a closet. He was not wearing a t-shirt that he had been wearing earlier in the day. He left the house after about five minutes and did not return. Roper called her father the next day to come look at the overalls. They both concluded that the overalls were spattered with blood. Roper turned the overalls over to the Sheriff's Department and told the deputy that she thought Furrow was involved in the murders. Roper later provided an affidavit stating that a bloody t-shirt found beside the road leading from the murder house had been Furrow's. It was a Fruit-of-the-Loom t-shirt with a breast pocket. Roper stated that she recognized it because she had bought it for him. She also stated that a bloody hatchet with a

distinctive handle found beside the road matched a hatchet that was now missing from her garage.

Furrow had been released from state prison a year earlier. He had been part of a murderous gang, but had been given a short sentence in return for turning state's evidence against the leader of the gang. The leader was sentenced to death. Furrow told friends that while he was part of the gang he killed a girl, cut up her body, and thrown her body parts into the Kern River. The Sheriff's Department never tested the overalls for blood, never turned them over to Cooper or his lawyers, and threw them away in a dumpster on the day of Cooper's arraignment.

Cooper has maintained his innocence from the beginning. Long after his conviction — by which time DNA testing had become available — he sought DNA testing of blood on the t-shirt. The DNA testing showed Cooper's blood on the t-shirt. Cooper claimed that the only way his blood could be on the t-shirt was that it had been planted by the authorities. The Sheriff's Department had taken blood from him at the time of his arrest and had put it in a vial containing a preservative. Cooper asked that the blood on the t-shirt be tested for the presence of the preservative. I will not delay you by recounting the way in which this testing was bungled. I will say only the following. During the testing process, the Sheriff's Department inadvertently sent to one of the labs a sample of blood from

the vial containing Cooper's blood. The lab was startled to discover that this sample contained the DNA of two people — Cooper and one other person. Remember the trick of the teenager who takes whiskey from his parents' bottle, and who then adds something to the bottle to bring it back up to the right level.

There is more, but you get the idea. What happened is a familiar story. It is by no means the usual story. But it happens often enough to be familiar. The police are under heavy pressure to solve a high profile crime. They know, or think they know, who did the crime. And they plant evidence to help their case along. By the time Diana Roper called the Sheriff's Department a few days after the murder, eight-year-old Josh had been persuaded that he had been wrong about the three or four white men. (Josh decided later that the murderer had had a "poof" of hair.) The bloody button had been "discovered." And the footprints in the two houses had been "discovered." The bloody coveralls were, to say the least, inconvenient. So they were thrown away.

Next, let us look at prosecutorial discretion. As you may already know, prosecutors have absolute immunity from damage suits for activities undertaken in connection with litigation. A prosecutor may knowingly conceal exculpatory evidence or put on perjured testimony without fear of liability in a later civil suit from someone who has been wrongly convicted as a result. I want to emphasize

that the great majority of prosecutors are ethical and hardworking. But there are exceptions. When there are exceptions, they often involve the failure to hand over to the defense exculpatory evidence in violation of *Brady v. Maryland.*

An example is *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002). On February 10, 1988, Gary Benn shot and killed his half brother and a friend. All three of them had been drinking. Benn immediately called the police, told them what he had done, and asked them to come to the house. There was no question Benn had committed a double homicide. The question was whether it warranted the death penalty. The Pierce County prosecutor's office (that's Tacoma, where I spent part of my growing up years) decided to seek the death penalty. What made Benn death-eligible under Washington law was that — at least in the prosecutor's view — Benn had killed the men to cover up another crime. The other crime, in the prosecutor's view, was arson, followed by insurance fraud.

Benn's house trailer had burned, and Benn had made an insurance claim based on the fire. After the fire, three reports were prepared by fire marshals. The first report tentatively concluded that the fire had been an accident. The second report, prepared after a more thorough investigation, conclusively determined that the fire was an accident. Among other things, the second report recounted that the Coleman heater in the trailer was known to have a flaw that caused fires. The

third report did not describe the heater problem, and did not refer to the conclusion of the second report that the fire had been an accident. The third report stated only that there an electrical problem had not caused the fire. The prosecutor handed over to Benn and his lawyers the first and the third report. He kept the second report secret.

At trial, the prosecutor used a jail-house informant — a snitch — to provide evidence to support the arson theory. The snitch testified that Benn had told him, while in jail awaiting trial, that he had killed the men because they threatened to reveal the arson scam. The snitch was well-known to police as a dishonest drug dealer who had provided false snitch testimony in an earlier case. The prosecutor revealed the name of the snitch only the day before trial in order to prevent the defense from investigating him. The prosecutor told the court that he had delayed revealing his name because he was in a witness protection program and needed to be protected. In fact, the snitch had never been in a witness protection program.

The Ninth Circuit unanimously granted habeas based on the prosecutor's violation of *Brady v. Maryland*. I was on the panel. I remember asking at oral argument what had happened to Mr. Johnson, the prosecutor. The answer: "He has retired, your honor." In my view, the answer should have been: "He was held in criminal contempt by the state trial court, and he has been disbarred, your

honor."

Next, let us look at courts. Almost all death penalty cases are brought in state courts under state law. As I am sure you know, state court judges are generally elected. Federal judges, by contrast, are appointed for life. The political vulnerability of state court judges, because of the necessity to be reelected, has important consequences for death penalty cases (as does, indeed, the comparable vulnerability of elected state prosecutors). I will take as my example the Supreme Court of California.

Professor Sam Kamin, now on the faculty at the University of Denver, studied the behavior of the California Supreme Court between 1976 and 1986, and then between 1986 and 1996. The first period, from 1976 to 1986, is the immediate post-*Gregg* period, when California had a new death penalty statute. It was also a period of fairly liberal decisions by the California Supreme Court under Chief Justice Rose Bird. During this period, the Court found constitutional error in 60% of the capital cases that came before it. It held that the errors were non-harmless in 70% of those cases, resulting in an overall reversal rate of 60% times 70%, or 42% of the cases.

In 1986, there was a contested election in which the defense bar in civil cases, and their clients (mostly insurance companies), mounted a campaign against

three of the justices on the Supreme Court. They did not campaign on a platform of making the world safe for insurance companies. Rather, they campaigned on a platform of getting rid of justices who refused to enforce the death penalty. The three justices were all defeated — Chief Justice Rose Bird, and Associate Justices Cruz Reynoso and Joseph Grodin.

The new California Supreme Court, now under Chief Justice Malcolm Lucas, behaved somewhat differently. In the second period of the study, between 1986 and 1996, the Court found constitutional error at about the same rate — 55% of the cases (compared to 60% under the earlier Court). But now the errors were mostly harmless. Now the errors were non-harmless in only 7% of the cases (compared to 70% under the earlier Court). Now the overall reversal rate was 55% times 7%, or not quite 4% (compared with a reversal rate of 42% under the earlier Court).

Here is an example of how the post-1986 California Supreme Court behaves. To be fair, I have to say that it is a somewhat extreme example, but it is an example nonetheless. In *Morris v. Woodford*, 273 F.3d 826 (9th Cir. 2001), during the penalty phase trial, the lawyers referred several times to the jury's choice as being between death and life in prison *without* the possibility of parole. That is the law in California. But for reasons that are unclear, the written jury

instruction, which went into the jury room, did not say that. The written instruction told the jury that the choice was between death and life in prison *with* the possibility of parole. Part way through its deliberations, the jurors sent a note to the judge, stating that they were not unanimous, and asking him to "please explain" the instruction. The judge apparently did not look at the instruction. Or, if he did, he did not understand the problem. He told the jurors that the instruction was self-explanatory, and urged them to return a verdict. at 838.

The jury then returned a verdict of death. The California Supreme Court held that the mistake in the written instruction was constitutional error, but that it was harmless. If there is one thing more than any other on the minds of jurors in a capital case, it is the whether the killer will ever be freed so he can kill again. Yet the Court said that the error was harmless. I think I need to say no more about the California Supreme Court's fear of the voters.

The vulnerability of the state courts to political pressures in capital cases is partially counteracted by the availability of federal habeas corpus, under which a federal court reviews decisions of state courts in criminal cases to correct errors of federal constitutional law. The high water mark of availability of federal habeas corpus for state prisoners was *Fay v. Noia*, decided in 1963. After *Fay*, beginning in earnest in the mid 1970s, as a matter of judge-made law (or judicial activism if

you like), the increasingly conservative Supreme Court made habeas corpus more difficult to obtain. This culminated in the adoption of a federal statute in 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996, often referred to by its acronym, AEDPA. The purpose, and effect, of AEDPA was to codify — and then some — the restrictions on federal habeas corpus that the Supreme Court had imposed as it retreated from *Fay*.

I could give you many figures, but I will confine myself to one comparison. Between 1973 and 1995, the federal courts in capital cases granted some form of relief on habeas — usually only from the penalty — in 40% of the cases. Between 2000 and 2002, after the effect of AEDPA had been fully felt, the success rate in capital cases had dropped from 40% to 9% — again, usually granting relief only from the penalty. If you have been wondering why Kevin Cooper is still on death row, a significant part of the answer is AEDPA.

Finally, executive clemency. Fifty years ago, a clemency plea to a governor in a capital case meant something. Governors took seriously their responsibility to decide whether a death sentence should be carried out. In recent decades — with a few exceptions, notably Governor Ryan in Illinois — clemency pleas have been a useless exercise. Governors, sensing political vulnerability in same way the California Supreme Court senses its vulnerability, almost never grant clemency.

The picture I have just painted is unsettling. As an overarching matter — and I will not dwell on this — we know that poverty and race make a difference. It is very expensive to defend a capital case. Good lawyers (and good investigators), with enough money to do the job right, can make a huge difference. And we know that members of racial minorities make up a disproportionate percentage of death row inmates.

Further, there is not only a chance that we have executed, and will execute, people who are actually innocent. There is a virtual certainty that we have already done so, and, if the system remains as it is, that we will do so in the future. I am sure that many of you have read a New Yorker story about a year ago about the execution in Texas of Cameron Willingham, who was almost certainly innocent. But there is a subtler, and more pervasive, problem of "innocence of the death penalty." The problem in such cases is that the defendant did in fact kill someone, but the circumstances of the case do not warrant the death penalty. Jeffrey Landrigan, who was just executed by the State of Arizona, is an example. He clearly participated in a killing, but was probably not himself the killer. Further, he had brain damage and had been severely abused as a child. Largely due to the incompetence of his trial counsel, his brain damage and abuse had not been revealed during the penalty phase of the trial. In Arizona at that time, the judge

rather than the jury determined the sentence. Because almost no mitigating evidence was put on by Landrigan's lawyer, the judge sentenced him to death. When the mitigating evidence later came out during federal habeas corpus proceedings, the state trial judge reassessed, but it was too late for her to do anything about it. That state judge has stated publicly and repeatedly that, had she known at sentencing what she came to know later, she never would have sentenced Landrigan to death. Her most recent statement was to the Arizona Parole Board just last month, asking the board to recommend commutation of the death sentence by the Governor. The Board voted 2 to 2 on the question. Governor Brewer, up for re-election and only days away from election day, declined to commute the sentence.

To focus directly on the problem that concerned the *Furman* Court in 1972, the imposition of the death penalty is extremely uneven, to the point of capriciousness. Not only is there substantial variation from state to state, which results from our federal system. There is substantial variation within states. For example, in California a murder defendant is much more likely to get the death penalty in a rural than an urban area. And among the urban areas in California, a murder defendant is much more likely to get the death penalty in Los Angeles, Orange, and Riverside Counties. And in all states there are variations from police

force to police force, from prosecutor to prosecutor, from court to court.

What if the death penalty could be administered fairly, even handedly, and predictably, sorting out reliably and uniformly those who deserve to die from those who do not? This is not an important question for those who are categorically against the death penalty irrespective of the manner in which it is administered. But for many people, it could be an important question. But I am afraid, in the real world in which we live, it is not an important question. I suppose it is theoretically possible that our death penalty system could be administered with sufficient consistency and evenhandedness to satisfy the standard articulated by the Court in *Furman*. But to borrow from Professor Black, it is possible same sense that is possible that I could learn to speak decent Japanese by the end of the month. We cannot get there from here. We now know, from unhappy experience, that the problems I have just described are ineradicable.

Justice Marshall wrote in his separate opinion in *Furman v. Georgia* in 1972 that if the average citizen knew all the facts presently available regarding capital punishment, that citizen would find it "shocking to his conscience and sense of justice" and on that basis flatly unconstitutional.

Two Justices eventually came to believe that the death penalty is unconstitutional. In 1994 in *Callins v. Collins*, (510 U.S. 1141) Justice Blackmun

nearing the end of his career, wrote: "From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years, I have endeavored — indeed I have struggled — along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved . . . , I feel morally and intellectually obligated to concede that the death penalty experiment has failed."

In 2008, in *Baze v. Rees*, Justice Stevens himself then nearing the end of his career, similarly renounced the death penalty.

Justices Blackmun and Stevens had initially favored the death penalty. Justice Blackmun had dissented in *Furman* and concurred in *Gregg*. Justice Stevens, then a newly appointed Justice replacing Justice Douglas, had concurred in *Gregg*. By 1999 in Blackmun's case, and by 2008 in Stevens', they had seen enough.

I am pretty sure that if Justice Marshall's "average citizen" knew what Justice Blackmun and Justice Stevens came to know, and what I think I know, only a minority of our population would favor the death penalty. But it is unrealistic to hope that the average citizen should come to this level of knowledge.

In saying this, I am not criticizing. People are busy with other things. They live their lives, do their jobs, educate their children. They have neither the time nor the incentive to learn about the death penalty as it is actually administered.

And yet. I think that sooner or later, probably not in my lifetime, but perhaps in some of yours, we will abolish the death penalty in this country. Perhaps, we, as a country, will eventually have seen enough.