Pace Law Review

Volume 11
Issue 3 *Summer 1991*

Article 2

June 1991

Justice Brennan and the Death Penalty

Ronald J. Tabak

Justice Brennan and the Death Penalty

Ronald J. Tabak†

I. The Fallacy of the Assertion that the Death Penalty Is Necessarily Constitutional

Justice Brennan first articulated his jurisprudence on the death penalty in detail in 1972. In *Furman v. Georgia*,[1] the United States Supreme Court, held unconstitutional the death sentences of all 558 people then on death row.[2] Justice Brennan's concurring opinion in *Furman* set forth three principal bases for his conclusion that the death penalty was unconstitutional under the eighth amendment.[3] Two of them, I have understood for a long time. The third, I did not fully understand until very recently.

The first aspect of Justice Brennan's *Furman* opinion which I will cover is his counter to the assertion that because the death penalty is mentioned in the Bill of Rights, it is obviously constitutional.[4] Justice Brennan pointed out that the framers of the Bill of Rights, in merely mentioning the death penalty, did not necessarily intend to sanction its use.[5] In the fifth amendment, the framers merely provided that if we do have the death penalty, which "was then a common punishment," then "a person charged with that crime is entitled"[6] to due process of law.[7]

Although the eighth amendment's prohibition of cruel and

---

† Special Counsel, Skadden, Arps, Slate, Meagher & Flom; B.A. 1971, Yale University; J.D. 1974, Harvard University. Mr. Tabak is also Chairman of New York Lawyers Against the Death Penalty and the recipient of the Outstanding Volunteer Award of The Legal Aid Society, 1984, the New York State Bar Association President's Pro Bono Service Award, 1985 and the American Lawyer's Best Pro Bono Performance Award, 1986.

1. 408 U.S. 238 (1972).

2. *See* Marquart & Sorensen, *From Death Row to Prison Society: A National Study of the Furman-Commuted Inmates*, 23 LOY. L.A. L. REV. 5 (1989).

3. *Furman*, 408 U.S. at 257-306 (Brennan, J., concurring).

4. *Id.* at 282-84.

5. *Id.* at 283-84.

6. *Id.* at 283.

7. *Id.* n.27 (quoting fifth amendment).

unusual punishment does not say whether death is or is not cruel or unusual, the definition of what is "cruel and unusual" is, as Justice Brennan emphasized, "not static."[8] If the definition of what constitutes cruel and unusual punishment consisted only of those things which were considered cruel and unusual when the English stopped ruling our country, the eighth amendment's "general principles would have little value and [would] be converted by precedent into lifeless formulas."[9] Indeed, since, at the time of the eighth amendment's submission to Congress, it was understood "potentially to *bar* — not approve — capital punishment,"[10] Justice Brennan has concluded that those who seek to justify the death penalty's constitutionality by reference to the framers' intent are exhibiting "arrogance cloaked as humility."[11]

Justice Brennan also rejected the assertion that the wisdom of state-enforced killings is a matter for legislative determination and thus cannot violate the eighth amendment. Instead, as the Supreme Court recognized in the 1940's, "the right to be free of cruel and unusual punishments like the other guarantees of the Bill of Rights, may not be submitted to vote; [it depend[s] on the outcome of no election. . . . The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . and to establish them as legal principles to be applied by the courts."[12]

II. The Arbitrary and Capricious Imposition of the Death Penalty

Justice Brennan recognized in his *Furman* concurrence that there is a substantial likelihood that the death penalty will not be carried out in any given case.[13] Given all the people who commit murders, very few wind up on death row, and even fewer get

8. *Id.* at 269 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

9. *Id.* (quoting Welms v. United States, 217 U.S. 349, 373 (1910)).

10. *See id.*, at 262-63; Brennan, *The 1986 Oliver Wendell Holmes, Jr. Lecture: Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313 (1986).

11. Brennan, The Constitution of the United States: Contemporary Ratification, Georgetown U. Text and Teaching Symposium (Oct. 12, 1985).

12. *Id.* at 268-69 (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

13. *Id.* at 291-93.

executed. In view of the many discretionary elements which determine who ends up being executed, "the conclusion is virtually inescapable that [capital punishment] is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery."[14]

Justice Brennan maintained that if, under these circumstances, a significantly less severe punishment exists that is adequate to achieve the purposes for which the punishment of death is purportedly inflicted, the death penalty is excessive within the meaning of the eighth amendment.[15]

Justice Brennan concluded that long-term imprisonment is an alternative which achieves all legitimate purposes of capital punishment. As Justice Brennan explained, there is no reason to believe that the death penalty — as opposed to long-term imprisonment — deters crime by people who have yet to commit a crime, or is likely to prevent people who have committed murder from committing another murder while they are in prison.[16]

Four years after *Furman*, the Supreme Court upheld new death sentence laws in *Gregg v. Georgia*,[17] *Proffitt v. Florida*,[18] and in *Jurek v. Texas*.[19] Justice Brennan's dissent in *Gregg* (which applied also to *Profitt* and *Jurek*), pointed out that the plurality opinion which was crucial in the upholding of these death penalty laws did not focus "on the essence of the death penalty itself, but primarily on the procedures" employed by the states.[20] According to the plurality, these procedures were sufficient to guard against the arbitrary and capricious imposition of the death penalty.[21] However, the actual operation of these and other death penalty statutes has turned out to be extremely arbitrary and capricious, in numerous respects.

A major source of arbitrariness and capriciousness is the provision of counsel to indigent people in capital cases. Justice Brennan dissented in several cases such as *Burger v. Kemp*[22] in

14. *Id.* at 293.
15. *See id.* at 303-05.
16. *See id.* at 300-04.
17. 428 U.S. 153 (1976).
18. 428 U.S. 242 (1976).
19. 428 U.S. 262 (1976).
20. *Gregg*, 428 U.S. at 227.
21. *Id.* at 227 (Brennan, J., dissenting).
22. 483 U.S. 776 (1987).

which the Court rejected, or failed to consider, claims that appointed counsel for poor people were ineffective in capital cases.

Perhaps the best discussion of the impact of the Court's disposition of ineffective assistance of counsel claims in capital cases is the concurring opinion by two of the three Fifth Circuit judges who upheld the death sentence in *Riles v. McCotter*.[23] They said that under the ineffective assistance standard imposed by the Supreme Court in *Strickland v. Washington*,[24] a prisoner on death row is only entitled to release if he shows not only that his lawyer bungled, but also that the bungling likely affected the result. Hence, "accused persons who are represented by 'not-legally-ineffective' lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence."[25]

Another source of arbitrariness and capriciousness is trial judges' errors of constitutional dimension, in their charges to juries during the guilt/innocence phase of capital cases. Such constitutional error occurred at the Georgia trial of Raymond Franklin.[26] Fortunately Franklin's constitutional claim was ultimately upheld by the Supreme Court. The majority opinion, by Justice Brennan, held that in a case in which intent to kill was the key issue, it was unconstitutional for a judge to instruct the jury that the defendant is presumed to have intended the killing unless that presumption is rebutted.[27] Mr. Franklin, whom I represented before the Court, received a life sentence at his retrial.

Justice Brennan vehemently objected to upholding death sentences for people who neither kill nor intend to kill. The leading case on the issue of how culpable and responsible a defendant must be in order for the death sentence to be constitutional is *Tison v. Arizona*.[28] This case involved Ricky and Raymond Tison, who helped their father and their father's friend escape from prison, and subsequently steal a car.[29] The two sons

23. 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., joined by Johnson, J., concurring).
24. 466 U.S. 668 (1984).
25. *Riles*, 799 F.2d at 955 (emphasis in original).
26. Francis v. Franklin, 471 U.S. 307 (1985).
27. *Id.* at 325.
28. 481 U.S. 137 (1987).
29. *Id.* at 139-40.

went off to get some water for the family whose car they had stolen.[30] In their absence, their father and his friend killed the family.[31]

The sons had not intended a killing, they had not participated in a killing, they had not contemplated a killing, and yet they were given the death sentence.[32] The Court held it was constitutional for the sons to get the death sentence because they supposedly showed extreme indifference to human life.[33]

In his dissent, Justice Brennan criticized the fact that the state was allowed to use, as an aggravating factor against the sons, the heinous nature in which the murders were committed, even though the sons were not even there at the time of the killings.[34] Justice Brennan then attacked the Court's holding that it is constitutional to impose the death penalty on someone who neither killed nor intended to kill while committing a felony.[35] As Justice Brennan stressed, "because the person has not chosen to kill, his or her moral and criminal culpability is of a different degree than that of one who killed or intended to kill."[36]

In Justice Brennan's opinion, another example of capital punishment's application to people lacking responsibility is the imposition of the death penalty on juveniles who have reached their sixteenth birthday. In 1989, in *Stanford v. Kentucky*,[37] the United States Supreme Court held by a 5-4 vote that it is constitutional to execute such juveniles. In his dissent, Justice Brennan pointed out that over fifty countries have abolished the death penalty or apply it only to cases of treason, that twenty-seven other countries do not, in fact, impose capital punishment and that most of the remaining countries prohibit the execution of juveniles.[38] Moreover, Justice Brennan noted that according to Amnesty International, since 1979 only eight juveniles in the entire world have been executed — three of them in the United

30. *Id.* at 140-41.
31. *Id.* at 141.
32. *Id.* at 150.
33. *See id.* at 158.
34. *Id.* at 160 (Brennan, J., dissenting).
35. *Id.* at 163, 168-71.
36. *Id.* at 171.
37. 492 U.S. 361 (1989).
38. *Id.* at 389 (Brennan, J., dissenting).

States.[39]

Justice Brennan's dissent in *Stanford* also pointed out that "[l]egislative determinations distinguishing juveniles from adults" abound in a whole variety of contexts, wherein people do not have rights until they reach age eighteen. These statutes reveal much about how our society regards juveniles as a class, and about societal beliefs regarding levels of responsibility.[40] Justice Brennan's conclusion was that "the same categorical assumption that juveniles as a class are insufficiently mature to be regarded as fully responsible that we make in so many other areas is appropriately made in determining whether minors may be subject to the death penalty."[41]

Justice Brennan employed this same rationale against the imposition of capital punishment for those who lack responsibility because of limited mental capacity. Justice Brennan dissented from the Court's opinion in *Penry v. Lynaugh*,[42] which held that it is not unconstitutional to execute mentally retarded people. Justice Brennan noted that while not all mentally retarded people are mentally handicapped to the same degree, there are certain "characteristics as to which there is no danger of spurious generalization because they are part of the clinical definition of mental retardation."[43] These traits include low intelligence, meaning an IQ below 70, and also being "subject to 'significant limitations in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for those of the same age level and cultural group.' "[44]

Justice Brennan concluded that "[t]he impairment of a mentally retarded offender's reasoning ability, control over impulsive behavior, and moral development in my view limits her culpability so that whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to their blameworthiness, and hence is

39. *Id.*
40. *Id.* at 394.
41. *Id.* at 403.
42. 492 U.S. 302 (1989).
43. *Id.* at 344 (Brennan, J., dissenting).
44. *Id.* (quoting AAMR, CLASSIFICATION IN MENTAL RETARDATION 11-12 (H. Grossman ed. 1983)).

unconstitutional."[45]

Although several states have abolished the use of capital punishment for the mentally retarded, most states have not.

Justice Brennan was in the majority on the issue of the use of victim impact statements in trying to secure a death verdict. Writing for the Court in *South Carolina v. Gathers*,[46] Justice Brennan held that it was unconstitutional for the prosecutor to suggest that the defendant get the death penalty because the victim was a religious man and a registered voter, when the defendant had no knowledge of these facts.[47] Under such circumstances, the victim's admirable qualities "cannot provide any information relevant to the defendant's moral culpability."[48]

However, soon after Justice Brennan left the Court, it overruled *Gathers*. It did so in 1991, in *Payne v. Tennessee*.[49]

In *California v. Brown*,[50] the Supreme Court upheld as constitutional the judge's instruction in the penalty phase of a capital case that the jurors "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[51] The Court rejected the death row inmate's contention that the charge was unconstitutional because (a) sympathy was what the defense was trying to evoke through a great deal of mitigating evidence concerning the defendant's background and (b) the Court has consistently held that a capital defendant is allowed to introduce in mitigation anything about his background that might cause the jury to give him a sentence less than death.[52] In his dissent, Justice Brennan wrote that the language in the charge to the jury "precludes precisely the response that a defendant's evidence of character and background is designed to elicit, thus effectively negating the Court's requirement that all mitigating evidence be considered."[53] He went on to point out that the vast majority of jurors are rational — not,

45. *Id.* at 346.
46. 490 U.S. 805 (1989).
47. *Id.* at 810.
48. *Id.* at 812.
49. 111 S. Ct. 2597 (1991).
50. 479 U.S. 538 (1987).
51. *Id.* at 539.
52. *See, e.g.*, Skipper v. South Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586 (1978).
53. *California*, 479 U.S. at 548 (Brennan, J., dissenting).

as the majority seemed to think, "telepathic." Thus, the "vast majority of jurors" likely would interpret the word " 'sympathy' to mean 'sympathy,' " and not what the majority said jurors would somehow interpret it to mean: "untethered sympathy," *i.e.*, sympathy that has no relationship to any of the evidence presented at trial.[54]

Appellate court review of death sentences should be, but generally is not, an occasion for dealing with the arbitrariness and capriciousness in capital sentencing. When the Supreme Court upheld the Georgia death sentence scheme in *Gregg v. Georgia*,[55] the key opinion pointed to "meaningful appellate review" as a "safeguard . . . to ensure that death sentences are not imposed capriciously or in a freakish manner,"[56] and stressed that the Georgia Supreme Court would compare "each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate."[57] Unfortunately, the Georgia Supreme Court has not done that,[58] nor have the courts of most states.

Just eight years after the opinion in *Gregg* stressed how important proportionality review was, the Supreme Court held in *Pulley v. Harris*[59] that a state does not have to have proportionality review. Thus, a state Supreme Court does not have to look at whether people in similar cases, or even those whose crimes were much worse than the defendant's, received the death penalty or not. Nor need they look at whether the co-defendant in the same case — who may have killed the victim while the unknowing defendant was in the getaway car — also received the death penalty.

Justice Brennan's dissent in *Pulley* said that "the Court is simply deluding itself, and also the American public, when it insists that those defendants who have already been executed or are today condemned to death have been selected on a basis that

54. *See id.* at 548-51.

55. 428 U.S. 153 (1976).

56. *Id.* at 195 (opinion of Stewart, Powell, and Stevens, JJ.).

57. *Id.* at 198.

58. *See* Tabak and Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOYOLA OF L.A. L. REV. 59, 82 (1989).

59. 465 U.S. 37 (1984).

is neither arbitrary nor capricious, under any meaningful definition of those terms." He added that "[c]omparative review of death sentences imposed on similarly situated defendants might eliminate some, if only a small part, of the irrationality that currently surrounds the imposition of the death penalty."[60] However, in the wake of *Pulley*, such review almost never takes place.

In his *Pulley* dissent, Justice Brennan focused on the subject of racial discrimination in the imposition of the death penalty. He argued that an examination of racial factors in death penalty cases could not be put off much longer, and that the Court had better deal with it soon.[61] It did so in the following year, in *McCleskey v. Kemp*.[62] The Court said in *McCleskey* that for purposes of analysis, it would assume that, as demonstrated by the study introduced by McCleskey, a defendant was many times more likely to get the death penalty if he killed a white person than if he killed a black person, even if everything else about the case was the same.[63] But the Court held that this did not violate the Constitution.[64] It said that this was something for legislative bodies to deal with.[65]

In dissent, Justice Brennan wrote:

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have had to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that the victim was white. . . . Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are [after considering 200 variables] 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. . . .[66] In addition, frankness would have compelled the disclosure that it was more likely than not that the race of McCleskey's victim would determine

60. *Id.* at 60-61 (Brennan, J., dissenting).
61. *Id.* at 64-67.
62. 481 U.S. 279 (1987).
63. *See id.* at 292.
64. *Id.* at 307.
65. *Id.* at 319.
66. 4.3 times is a higher multiplier than in statistics about smoking causing cancer. *See id.* at 321 (Brennan, J., dissenting).

whether he received a death sentence. . . .[67]

III. The Execution of People Who Were Convicted or Sentenced in Serious Violation of The Bill of Rights — Due to Procedural Barriers Erected by the Supreme Court

Justice Brennan dissented in a series of cases through which the Supreme Court has made it impossible for many death row inmates to get a ruling on the merits of their claims that they were convicted or sentenced to death in serious violation of the Bill of Rights. As a result of these Supreme Court decisions, a growing number of people are being executed even though the Bill of Rights *was* violated in such egregious respects as to have likely affected the outcome of their trials. In these cases, death row inmates would have gotten relief if the federal courts had simply considered the merits of their meritorious claims.

Through three different doctrines, the supposedly conservative, non-activist majority of the Supreme Court has been engaging in judicial legislation which is eviscerating the right to get a federal court to rule on such claims.

One of these doctrines is procedural default. The first case in the judicial enactment of procedural bars was *Wainwright v. Sykes*.[68] The *Sykes* Court partially overruled the test enunciated by Justice Brennan for the Court in *Fay v. Noia*.[69] Under *Fay* a federal court would consider a prisoner's constitutional claim unless the prisoner's lawyer, as a result of a deliberate strategy, decided not to raise the claim in state court in an attempt to bypass the state court and get to federal court. Except where such a strategy was followed, the prisoner's claim would be considered by a federal court, even if the state courts had not considered it.

In *Sykes* the Court held that a prisoner who failed to raise a claim in all state court proceedings in which raising the claim was mandated by state procedure could not then secure any ruling on the merits of that claim from a federal court unless he could show: (a) cause "for why he didn't raise the claim in state

67. *Id.* Mr. McCleskey was executed on September 25, 1991.
68. 433 U.S. 72 (1977).
69. 372 U.S. 391 (1963).

court" and (b) "actual prejudice"[70]— and it defined "cause" and "actual prejudice" in very limiting ways.[71]

Justice Brennan's dissent in *Sykes* proved prescient about where the Court was headed. He warned that if the standard adopted in *Sykes* was "later construed," as it has been in such cases as *Murray v. Carrier*, and *Dugger v. Adams*, "to require that the simple mistakes of attorneys are to be treated as binding forfeitures, it would serve to subordinate the fundamental rights contained in our constitutional charter to inadvertent defaults of rules promulgated by state agencies and would essentially leave it to the states through the enactment of procedures and the certification of the competence of local attorneys to determine whether a habeas applicant will be permitted the access to the federal forum that is guaranteed him by Congress."[72]

That, in fact, is what has happened, most recently in *Coleman v. Thompson*,[73] in which the Court overruled *Fay* in its one remaining context — where a lawyer's incompetence results in a prisoner's complete failure to file *any* timely appeal. In *Coleman*, counsel's obviously "inadvertent error" to file the state post-conviction brief on time rather than three days late was held to completely preclude federal court review of all of the death row inmate's constitutional claims.[74]

As Justice Brennan warned in his *Sykes* dissent, the consequence of the Court's procedural default doctrine is that the State's alleged constitutional violations (or, in some cases, what we know for sure to be the State's *actual* constitutional violations) which are not harmless error are insulated "from any and all judicial review" in both state and federal courts, simply "because of a lawyer's mistake."[75]

Yet, as Justice Brennan stated, if either the defendant or the State is to be held responsible for an appointed defense counsel's error of not objecting, it should be the State, because the State controls the "admissions and certification policy" for attorneys and the appointments of attorneys for indigent people.

---

70. *See Wainwright*, 433 U.S. at 91 (Brennan, J., dissenting).
71. *Id.*
72. *Id.* at 107 (footnote omitted).
73. 111 S. Ct. 2546 (1991).
74. *Id.* at 2564, 2568.
75. Wainwright v. Sykes, 433 U.S. 72, 108 (1977).

Hence, the State "is more fairly held to blame for the fact that practicing lawyers too often are ill-prepared or ill-equipped to act carefully and knowledgeably when faced with decisions governed by state procedural requirements."[76] Justice Brennan added that if habeas corpus jurisdiction were to be severely limited by a procedural default doctrine, the courts "will have to reconsider whether to continue to indulge the comfortable fiction that all lawyers are skilled or even competent craftsmen in representing the fundamental rights of their clients."[77]

A second doctrine by which the merits of a case are ignored is abuse of the writ of habeas corpus. It concerns *inter alia*, situations in which prisoners: (a) raise certain claims in federal court, (b) subsequently discover that the State lied to or severely mislead them or their lawyers about other constitutional claims and (c) submit a second habeas corpus petition in the federal courts in order to raise the additional claims.

Subsequent to Justice Brennan's departure from the Court, it held in *McCleskey v. Zant*[78] that the *Sykes* "cause" and "actual prejudice" test would now also apply to the question of whether a second or subsequent federal habeas corpus petition constitutes an abuse of the writ and should therefore be dismissed — regardless of the seriousness of the State's violation of the Bill of Rights. The Court enunciated and applied the "cause" and "actual prejudice" test so narrowly in *McCleskey* that it seems clear that almost no one will be able to get a ruling on the merits of a successor habeas claim.

Although this decision was handed down after he had left the Court, Justice Brennan's opinions leave little doubt that he would vigorously disagree with the *McCleskey* holding. This is apparent from his dissenting opinion in *Kuhlmann v. Wilson*,[79] which concerned a petitioner who attempted to present the same claim for a second time in a subsequent federal habeas corpus petition. In that dissent, Justice Brennan rejected the idea of balancing "the interests of the State and the prisoner"[80] in order

76. *Id.* at 114.
77. *Id.* at 118.
78. 111 S. Ct. 1454 (1991).
79. 477 U.S. 436 (1986).
80. *Id.* at 467 (Brennan, J., dissenting).

to determine whether an unconstitutionally convicted or death-sentenced prisoner may secure relief from the federal courts. Justice Brennan stated that the only circumstance under which a second or subsequent habeas petition could be dismissed as an abuse of the writ was if the petition is "vexatious and meritless."[81] Justice Brennan would surely have opposed any effort to judicially legislate any more stringent standard with respect to claims being raised in federal court for the first time. Yet, that is what the Court has now done in *McCleskey*.

A third aspect of the Court's effort to eviscerate habeas corpus began with *Teague v. Lane*,[82] and reached a climax with *Butler v. McKellar*.[83] Under the judicial legislation in these holdings, the following type of situation can now occur. A defendant raises at and before trial, on appeal and in the certiorari petition every conceivable constitutional claim, waiving nothing (under *any* waiver test); but the appeal is unsuccessful and certiorari is denied. One of the defendant's claims seeks a holding which would constitute only a modest extension of existing Supreme Court holdings. Before the defendant's case gets into federal court, the Supreme Court rules — in a legal and factual context indistinguishable from the defendant's case — that the conviction or death sentence is unconstitutional and not harmless error, and states that this holding is governed by Supreme Court decisions which had been handed down before the direct appeal in the defendant's case was completed. Defendant's meritorious constitutional claim will nevertheless be dismissed by the federal courts, because the Supreme Court holding which is directly on point was decided after his direct appeal was completed and because the prior Supreme Court decisions — while close enough analytically to have governed the Supreme Court's on-point holding — were not directly right on-point with his case.

That is essentially what happened in *Butler v. McKellar*. Mr. Butler attempted to present a constitutional claim based on the Supreme Court's holding in *Edwards v. Arizona*[84] which had

81. *Id.* at 469.
82. 489 U.S. 288 (1989).
83. 494 U.S. 407 (1990).
84. 451 U.S. 477 (1981).

been handed down before Butler's direct appeal was decided. In *Edwards*, the Court held that if a suspect is in custody and the police begin questioning him about a crime and the suspect states at some point that he does not want to be questioned further in the absence of an attorney, the police cannot question him further. Mr. Butler was questioned further, but the additional questions were about a different crime than the one about which he had previously been questioned. Mr. Butler contended, throughout all proceedings in his case, that the additional questioning was unconstitutional. Before Mr. Butler's case got into federal court, but after his direct appeal was completed, the Court ruled in *Arizona v. Roberson*[85] that the police cannot question an accused about a different crime after he has invoked his right to counsel. In so holding the Court said that its decision in *Roberson* was "directly controlled" by *Edwards*.[86]

Mr. Butler's claim was, like Mr. Roberson's, an obvious extension of *Edwards*. But the Supreme Court held in 1990 that Butler could not get relief, because (a) *Roberson* was a "new rule" handed down *after* Butler's direct appeal had been completed and (b) *Edwards* did not dictate a ruling in Butler's favor because, prior to *Roberson*, "reasonable minds" had debated whether *Edwards* applied to the facts of such cases as Roberson's and Butler's.[87] Hence, even though his claim was a simple extension of a pre-existing Supreme Court holding and was identical to a Supreme Court holding handed down before he first petitioned the federal courts, Butler was not allowed to benefit from the *Edwards* decision.

Justice Brennan's vigorous dissent in *Butler* stated that:

> Today, under the guise of fine-tuning the definition of 'new rule,' the Court strips state prisoners of virtually *any* meaningful federal review of the constitutionality of their incarceration. . . . [A] state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was *so* clearly invalid under then prevailing legal standards that the decision could not be defended by any reasonable jurist. With this requirement, the Court has finally succeeded in its thinly veiled

85. 486 U.S. 675 (1988).
86. *Id.* at 682.
87. *Butler*, 494 U.S. at 415.

crusade to eviscerate Congress' habeas corpus regime.[88]

IV. The Death Penalty Only Creates More Victims

I will conclude by discussing the other part of Justice Brennan's eighth amendment jurisprudence which he articulated in *Furman*. Justice Brennan said that "[a]t bottom," the eighth amendment "prohibits the infliction of uncivilized and inhuman punishments."[89] The eighth amendment requires that "[t]he state, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."[90]

Justice Brennan concluded that this fundamental principle applies to punishment for even the most brutal crimes. "The true significance," he said, of history's condemnation of such punishments "as the rack, the thumbscrew, the iron boot, the stretching of limbs" is that those practices treated "members of the human race as non-humans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the [eighth amendment] that even the vilest criminal remains a human being possessed of common human dignity."[91]

Justice Brennan stressed that "the calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity."[92] This fundamental aspect of capital punishment — when combined with (a) the arbitrary application of the death penalty, (b) the "grave societal doubts" about it (as reflected, *inter alia*, in the infrequency of its use) and (c) the likelihood that it "cannot be shown to be serving any penal purpose that could not be served equally well by some less severe punishment,"[93] led Justice Brennan to conclude that the death penalty violates the eighth amendment.

I have long understood the other aspects of Justice Brennan's capital punishment jurisprudence, but I only recently have appreciated the validity of his most basic principle: that "death

---

88. *Id.* at 120 (Brennan, J., dissenting)(emphasis in original).

89. Furman v. Georgia, 408 U.S. 238, 270 (1972).

90. *Id.*

91. *Id.* at 237-38 (quoting O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting)).

92. *Id.* at 290.

93. *Id.* at 300.

stands condemned as fatally offensive to human dignity."[94]

I came to appreciate this only when — after many years of representing death row inmates, including two before the Supreme Court — I decided to really get to know some of my clients personally. The time which I have spent with these death row inmates has given me a deeper understanding of what Justice Brennan recognized implicitly: that death row inmates — no matter what heinous crimes they have committed — are human beings, and our society's decision on whether to treat these inmates with human dignity is a crucial test of our civilization. I now realize that Justice Brennan was correct in concluding that the death penalty should not be applied to anyone because "Death, quite simply, does not . . . comport[ ] with human dignity."[95]

The death penalty is being used as a sanction in this country because too many people consider *only* the terrible thing that has happened in the past — the horrible murder which has been committed usually (but not always) by the person who is convicted. When viewed in this light, the death penalty is deemed justifiable, because a terrible, horrendous crime has been committed; a wonderful life has been snuffed out; and the person responsible should be punished and should not be allowed to commit any further murders. Yet, there is another possible perspective, which recognizes what has occurred in the past but which focuses on what best to do in the future in light of the situation we face now. From this frame of reference, we can recognize that even if the convicted person really committed the murder and is not (as many death row inmates are) mentally retarded or severally mentally ill, he remains a human being; that application of the death penalty will only create more victims; and that it will neither bring the victim back to life nor prevent others from being murder victims.

If we consider the issue with the latter, more complete perspective, we can begin to grapple with a crucial question which capital punishment enables many of our politicians to avoid: What should we do with respect to human beings who are now alive: both the human beings who may be future victims of mur-

94. *Id.* at 305.
95. *Id.* at 305.

der and the human beings who have been found guilty of murder? I submit that if we evaluate the death penalty against the alternative of "long-term imprisonment, which may well be for the rest of [a criminal's] life,"[96] we would recognize that by implementing capital punishment society (a) kills innocent people, (b) continues to have the same — or even higher — murder rate, (c) commits racial discrimination in executing people, (d) spends more money in dealing with murderers, than if there were no death penalty, (e) fails to deal with, and may aggravate, the situations of survivors of murder victims, and (f) places this country at odds with virtually all other democratic countries.[97]

However, all too few people consider the issue from that type of perspective. Instead, they listen to politicians who say that they are for the death penalty and therefore must be against crime; or to death penalty opponents who say that the death penalty is so clearly immoral that they will not discuss its purported practical benefits.

Yet, public opinion surveys have repeatedly shown that the public would be responsive to a reasoned discussion of the death penalty *and* real-life alternatives to the death penalty. These polls indicate that the majority of the public favors some version of life without parole over the death penalty.[98] Unfortunately, most people do not know that in most states, a life sentence for *capital* murder (the only type of murder for which the death sentence is possible) is a life sentence with no chance of parole for 20, 25, 30 or more years or even — in many states — forever.[99] Jurors ask about this frequently in death penalty trials and, after judges refuse to tell them what a life sentence really would mean — usually vote for the death sentence.[100] It is equally tragic that the public is unaware of the real-life evidence — from those saved from death by *Furman* and subsequent cases, that there are effective ways of preventing further killings by convicted capital murderers.[101]

Meanwhile, our society continues to execute even (a) people

96. *Id.* at 301.
97. *See generally* Tabak and Lane, *supra* note 58.
98. *See id.*
99. *Id.* at 126-27.
100. *Id.* at 78-80.
101. *Id.* at 123-24.

who have developed evidence sufficient to generate serious doubts about their guilt,[102] (b) a man who saved numerous prison guards during a prison riot,[103] (c) a man who was supported for clemency by the father of the victim and the trial prosecutor,[104] and (d) a 17 year-old semi-retarded black youth with partial brain damage, who was convicted and sentenced to die by an all-white jury and whose pardon board recommended clemency.[105]

In view of all this, I agree — subject to one modification indicated in brackets — with the conclusion to Justice Brennan's Oliver Holmes Lecture in 1986: "I believe that a majority of the Supreme Court [or a majority of society] will one day accept that when the state punishes with death, it denies the humanity and dignity of the victim and transgresses the prohibition against cruel and unusual punishment. That day will be a great day for our country, and also for our Constitution."[106]

102. *Id.* at 112-13.
103. *See* Evans v. Muncy, 111 S. Ct. 309, 310 (1990) (Marshall, J., dissenting).
104. *See* Tabak and Lane, *supra* note 58, at 130-31.
105. *See* Shapiro, *A Life in His Hands*, TIME (May 28, 1990).
106. *See* Brennan, *supra* note 10, at 331.