

The Rehnquist Court and the Death Penalty

ERWIN CHEMERINSKY*

This Symposium results from two stunning rulings in favor of criminal defendants during October Term 2003: *Crawford v. Washington*¹ and *Blakely v. Washington*.² I suggest these rulings must be understood as part of a broader trend concerning the Rehnquist Court. In its last few years, the Rehnquist Court has ruled in a way one would predict a more moderate Court would act. This was especially evident in a series of rulings concerning the death penalty, where the Rehnquist Court overturned death sentences on a number of different grounds.³

I believe that there were three distinct phases of the Court between the time William Rehnquist was elevated to Chief Justice in 1986 to his passing in 2005. The first phase, from 1986 to about 1992, was characterized by great deference to the executive and legislative branches. Rarely during this time did the Court invalidate federal, state, or local laws.⁴ Instead, the Court frequently proclaimed the need for great judicial deference to the elected branches of government.⁵

The second phase, from 1992 through about 2002, witnessed a wholesale shift in the Court's philosophy. During this period, the Court was aggressive in invalidating federal statutes and overruling even recent precedents.⁶ The Court's penchant for striking down federal laws and overturning precedent was perhaps most notable in its federalism decisions limiting the scope of Congress's powers and greatly expanding state sovereign immunity.⁷

Since 2002, however, the Court has been decidedly more moderate. Two years ago, for example, the Court upheld affirmative action by colleges and

* Alston & Bird Professor of Law and Political Science, Duke University. © 2006, Erwin Chemerinsky. I want to thank Sarah Kline for her excellent research assistance and James Coleman for his excellent comments on an earlier draft of this Article.

1. 541 U.S. 36 (2004) (holding the Confrontation Clause of the Sixth Amendment bars the use of out-of-court statements that are "testimonial" against a criminal defendant, absent cross-examination, because they are unreliable).

2. 542 U.S. 296 (2004) (holding that any factor, other than a prior conviction, that mandates a penalty greater than that which could be imposed based on the jury's verdict or what the defendant admitted must be proven to the jury beyond a reasonable doubt).

3. For a summary of these cases, see *infra* text accompanying notes 28–52.

4. See, e.g., Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 56–59 (1989) (describing judicial deference during October Term 1988).

5. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding state law that denied unmarried father all parental rights based on deference to legislature).

6. See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59, 66 (1996) (overruling a recent precedent and holding that Congress may authorize suits against states only if acting pursuant to Section 5 of the Fourteenth Amendment); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (overturning a recent precedent and holding that strict scrutiny is to be used for federal affirmative action programs).

7. See Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1074 (2001) (describing the frequency of Supreme Court invalidations of federal laws during this period).

universities⁸ and invalidated a state law prohibiting private consensual sodomy.⁹ Contrary to the preceding period, every federalism case in the last few years has been resolved in favor of federal power and against states' rights.¹⁰ Moreover, many of the most significant cases argued during October Term 2004 were resolved in a way that progressives, not conservatives, would prefer. For example, the Court invalidated the death penalty for crimes committed by juveniles,¹¹ affirmed the use of eminent domain for economic development,¹² and expanded the protections of federal civil rights statutes.¹³

There seems to be a simple explanation for this final phase of the Rehnquist Court: it was easier to get one vote than two. Especially in controversial areas, Justices Stevens, Souter, Ginsburg, and Breyer frequently voted together, as did the bloc of Chief Justice Rehnquist and Justices Scalia and Thomas.¹⁴ More often than not, the more liberal wing comprised of Justices Stevens, Souter, Ginsburg, and Breyer prevailed by attracting the support of either Justice O'Connor or Justice Kennedy, thereby producing 5-4 decisions that favored more progressive results.¹⁵ Indeed, of the seventy-six decisions in October Term 2004, nineteen were decided by a 5-4 margin, and in only four of these closely divided decisions was the majority comprised of Chief Justice Rehnquist and

8. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

9. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

10. See, e.g., *Sabri v. United States*, 541 U.S. 600, 608 (2004) (holding Congress, under its spending power, may criminally prohibit and punish bribes of government officials of entities receiving federal funds); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding state governments may be sued for violating Title II of the Americans with Disabilities Act when the fundamental right of access to the courts is involved); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737-40 (2003) (holding state governments may be sued for violating the family leave provision of the Family and Medical Leave Act).

11. See *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005).

12. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2664-65 (2005) (holding "public use" within the meaning of the Takings Clause is satisfied when a private corporation uses the government's eminent domain power for legislatively sanctioned economic development); *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2087 (2005) (holding a government regulation need not be shown to "substantially advance" legitimate interests in order to avoid being a taking).

13. See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1544 (2005) (holding disparate impact employment discrimination claims may be brought under the Age Discrimination in Employment Act); *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1504 (2005) (holding claims of retaliation for complaining of sex discrimination are actionable under Title IX).

14. There are, of course, notable exceptions, such as *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), where the majority was comprised of Justices Stevens, Scalia, Souter, Thomas, and Ginsburg. Another exception was *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), where the majority upholding a Ten Commandments display was comprised of Chief Justice Rehnquist, and Justices Scalia, Kennedy, Thomas, and Breyer.

15. See, e.g., *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005) (Souter, J., joined by Stevens, O'Connor, Ginsburg, and Breyer, JJ.) (holding that the posting of the Ten Commandments in government buildings for the purpose of advancing religion violates the Establishment Clause); *Kelo*, 125 S. Ct. at 2655 (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.); *Rompilla v. Beard*, 125 S. Ct. 2456, 2467-68 (2005) (Souter, J., joined by Stevens, O'Connor, Ginsburg, and Breyer, JJ.) (invalidating a death sentence for ineffective assistance of counsel); *Jackson*, 125 S. Ct. at 1497 (O'Connor, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.); *Roper*, 543 U.S. at 551 (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.).

Justices O'Connor, Scalia, Kennedy, and Thomas. This is far different from prior years when this more conservative group was more often the majority in 5-4 decisions.¹⁶

I do not want to overstate this. There certainly have been many instances, especially in the area of criminal justice, where the Rehnquist Court ruled as one would predict a conservative Court to act. In 2003, for instance, the Court upheld twenty-five-year-to-life sentences for shoplifters under California's three strikes law.¹⁷ Further, in October Terms 2003 and 2004, there were ten Fourth Amendment cases, nine of which were decided in favor of law enforcement and against criminal defendants.¹⁸ But overall, the Rehnquist Court in its last few terms was quite different than in its earlier years, ruling—in a striking number of cases—in a more progressive way than expected.

In this Article, I want to explore one aspect of the Rehnquist Court's more progressive phase: its death penalty decisions. Part I of this Article describes a surprising number of recent rulings overturning death sentences. Part II then offers an explanation for this development, to wit, that a majority of the Court was (and continues to be) deeply concerned about how the death penalty is administered in the United States. The work of the Innocence Projects and others in exposing both the flaws of the death penalty's administration and the reality of innocent people facing execution has had a profound effect on the Justices. To be sure, no Justices currently on the Court take the position espoused by Justices Brennan, Marshall, and Blackmun that the death penalty is

16. There is a stark contrast to prior terms with regard to the frequency of the majority in 5-4 decisions being comprised of Rehnquist, O'Connor, Scalia, Kennedy, and Thomas. For example, looking five years ago to October Terms 1999 and 2000, in October Term 1999, there were 18 cases decided by a 5-4 margin, and in 11 of them the majority was those five Justices; no other grouping of Justices was present more than once in 5-4 decisions. See *The Supreme Court 1999 Term—The Statistics* 114 HARV. L. REV. 390, 395 (2000). In October Term 2000, there were 27 cases decided by a 5-4 margin and that grouping was present in 15, by far more than any other grouping of Justices. See *The Supreme Court 2000 Term—The Statistics* 115 HARV. L. REV. 539, 544 (2001). Similarly, 10 years ago, in October Term 1996, there were 18 cases decided by a 5-4 margin, and that grouping was present in 11 of the cases; no other grouping was present more than twice as the majority. See *The Supreme Court 1996 Term—The Statistics* 111 HARV. L. REV. 431, 434 (1994).

17. See *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (holding the sentence not disproportionate or contrary to established law and thus did not warrant habeas relief); *Ewing v. California*, 538 U.S. 11, 30-31 (2003) (holding the sentence does not violate the Eighth Amendment).

18. See, e.g., *Muehler v. Mena*, 125 S. Ct. 1465, 1471-72 (2005) (holding the police may detain in handcuffs and question a person who is not suspected of any crime, but happens to be in someone else's house that is being searched, and that additional questioning beyond the scope of the search is not a violation of the Fourth Amendment); *Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005) (holding the Fourth Amendment does not require reasonable, articulable suspicion to justify using drug-detection dogs to sniff a vehicle during a legitimate traffic stop); *Devenpeck v. Alford*, 543 U.S. 146, 155-56 (2004) (holding a warrantless arrest is valid so long as there was probable cause at the time of the arrest, regardless of whether the offense was "closely related" to the offense the arresting officer identified as the reason for arrest). The only exception in the last two years was *Groh v. Ramirez*, 540 U.S. 551 (2004), which held that a warrant was facially invalid for failing to specify with particularity that which is to be searched or seized. Interestingly enough, this opinion's majority consisted of Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer.

inherently unconstitutional.¹⁹ But over the last few years, an increasing number of Justices have expressed grave concerns about the administration of the death penalty in the United States, as reflected in the cases described in Part I. The Rehnquist Court's decisions overturning death sentences and imposing new procedural requirements in capital cases occurred at the same time as other decisions mandating new protections for criminal defendants, such as in *Crawford* and *Blakely*. It is difficult to tie these developments together except by proximity; however, the changes, though motivated by different concerns, together have significantly changed the landscape of criminal law.

Finally, Part III offers thoughts about the future with a new Chief Justice in John Roberts and Third Circuit judge Samuel Alito's elevation to fill Justice O'Connor's seat. Given that Chief Justice Roberts is sure to be equally conservative as his predecessor and that there has never been a 5-4 case in which Chief Justice Rehnquist was in the majority in overturning a death sentence, the new Chief's arrival is unlikely to change many outcomes. Justice O'Connor, however, has been in the majority in such 5-4 decisions.²⁰ Thus, Justice Alito may change the Court's ideological balance in this area. As in every area of constitutional law, two new Justices raise the possibility of significant changes in the years ahead.

I. RECENT RULINGS

The recent decisions overturning death sentences must be understood in the context of a Supreme Court that was very supportive of the death penalty since it was reinstated in *Gregg v. Georgia* in 1976.²¹ Prior to being elevated to Chief Justice in 1986, William Rehnquist virtually never voted to overturn a death sentence.²² In the first two phases of the Rehnquist Court, from 1986 to 2002, the Supreme Court repeatedly rejected challenges to the death penalty and

19. For example, Justice Blackmun expressed this eloquently in his dissent from a denial of certiorari in *Callins v. Collins*:

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 and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

20. See, e.g., *Rompilla*, 125 S. Ct. at 2456 (overturning death sentence for ineffective assistance of counsel); *infra* text accompanying notes 36–42.

21. 428 U.S. 153 (1976). After *Furman v. Georgia*, 408 U.S. 238 (1972), appeared to invalidate the death penalty, executions in the United States had stopped.

22. Erwin Chemerinsky, *The Judicial Conscience of a Conservative*, L.A. HERALD EXAMINER, Sept. 24, 1986, at A13 (comparing Rehnquist's record on the death penalty with that of California Justice Rose Bird).

upheld countless death sentences.²³ For example, the Court during this time rejected challenges to the constitutionality of executing the mentally retarded²⁴ and juveniles.²⁵ The Court dramatically narrowed habeas corpus relief, including for capital defendants.²⁶ Finally, I can find no case prior to 2003 in which the Rehnquist Court overturned a death sentence because of ineffective assistance of counsel. In fact, the Rehnquist Court even went so far as to suggest that the execution of an innocent person was not itself a constitutional violation.²⁷

From 2002 on, however, the Rehnquist Court overturned a number of death sentences on several different grounds. First, the Court found that the imposition of the death penalty for crimes committed by the mentally retarded and by juveniles is cruel and unusual punishment in violation of the Eighth Amendment. In *Atkins v. Virginia*,²⁸ the Supreme Court invalidated the death penalty for the mentally retarded in a 6-3 decision. With Justice Stevens writing for the Court—and only Chief Justice Rehnquist and Justices Scalia and Thomas dissenting—the Court reaffirmed that “evolving standards of decency” are to be used to determine what is cruel and unusual punishment.²⁹ The Court looked to the trend among the states in eliminating the death penalty for crimes committed by the mentally retarded and how few foreign countries permitted this.³⁰ Quite importantly, Justice Stevens’s majority opinion stressed that there is a significant risk of executing innocent individuals because those with mental disabilities are more likely to make false confessions and are less likely to be able to work with counsel.³¹

In *Roper v. Simmons*,³² the Court ruled five-to-four that it was cruel and unusual punishment to impose the death penalty for crimes committed by

23. For an excellent discussion of the Court’s treatment of capital cases during the early years of this period, from about 1988 through the early 1990s, see generally EDWARD LAZARUS, *CLOSED CHAMBERS* (1998).

24. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (upholding the death penalty for crimes committed by the mentally retarded).

25. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (upholding the death penalty for crimes committed by 17 year olds). *But see* *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (declaring unconstitutional the death penalty for crimes committed by 15 year olds).

26. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 496 (1991) (precluding a successive habeas petition in a death penalty case and more generally holding that successive petitions were allowed only if a habeas petitioner could show either actual innocence or cause and prejudice to not being heard); *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991) (precluding a challenge to a death sentence because of a procedural forfeiture).

27. See *Herrera v. Collins*, 506 U.S. 390, 416–17 (1993) (“Our federal habeas cases have treated claims of ‘actual innocence,’ not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.”).

28. 536 U.S. 304 (2002).

29. *Id.* at 321.

30. See *id.* at 314–16 & n.21.

31. See *id.* at 320–21.

32. 541 U.S. 551 (2005).

juveniles. Justice Kennedy wrote the opinion for the Court, which was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Once more, the Court rested its decision on the premise that “evolving standards of decency” should be used to determine what is cruel and unusual punishment. Justice Kennedy explained: “To implement this framework we have established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.”³³ The Court again looked to the trend among the states and international practice in determining those “evolving standards of decency.”³⁴

The most controversial aspect of the *Roper* decision was Justice Kennedy’s invocation of foreign practices. However, the criticism is misplaced: Justice Kennedy did not base his decision on the law in other countries. Instead, he pointed to it as an indication of evolving standards of decency. He observed that as of 2000, only six countries in the world allowed the death penalty for crimes committed by juveniles, and the United States would not want to be grouped together with any of these countries from a human rights perspective.³⁵

Second, the Court overturned death sentences for ineffective assistance of counsel. In *Wiggins v. Smith*.³⁶ the Court found that the failure of the defense attorney to investigate or present evidence of the defendant’s mistreatment as a child constituted ineffective assistance of counsel.³⁷ In a 7-2 decision, with Justice O’Connor writing for the Court and only Justices Scalia and Thomas dissenting, the Court held that the American Bar Association standards for the defense function and for handling capital cases reflect the prevailing norms for defense lawyers.³⁸ The Court noted the requirement in those standards for investigating a capital defendant’s childhood for possible mitigating evidence and concluded that the failure to do so was ineffective assistance of counsel, expressly rejecting the Fourth Circuit’s conclusion that it was just a tactical choice—the way ineffective assistance of counsel claims have often been dismissed.³⁹

Most recently, in *Rompilla v. Beard*, the Court held that the failure of the defense attorney to read the files from the defendant’s prior conviction and to investigate possible abuse and mental retardation of the defendant was ineffective assistance of counsel.⁴⁰ Justice Souter wrote the opinion for the Court, joined by Justices Stevens, O’Connor, Ginsburg, and Breyer, reinforcing the Court’s holding two years prior in *Wiggins* that courts must closely examine the

33. *Id.* at 560–61.

34. *See id.* at 568–69, 575–78.

35. *See id.* at 575–78.

36. 539 U.S. 510 (2003).

37. *See id.* at 534–35.

38. *See id.* at 524–25.

39. *See id.* at 534–38.

40. *See* 125 S. Ct. 2456, 2467–68 (2005).

performance of defense counsel in capital cases.⁴¹ *Rompilla* did not involve an incompetent attorney who slept through the trial—the lawyer had provided a somewhat diligent defense, including interviewing family members. But the Court stressed that the attorney knew that the prosecutor would rely on the prior conviction as an aggravating factor in sentencing. The failure to read that file and thus gain key rebuttal evidence was, according to the prevailing standards, ineffective assistance of counsel.⁴²

Third, the Court overturned death sentences because of the failure to have the jury determine the aggravating factors warranting imposition of a death sentence. In *Ring v. Arizona*,⁴³ the Court applied its recent decision in *Apprendi v. New Jersey*⁴⁴ and held that the jury, not the judge, must find the factors that warrant imposition of capital punishment.⁴⁵ The Court, in a 7-2 decision with Justice Ginsburg writing for the Court, reversed its earlier decision in *Arizona v. Walton*,⁴⁶ explaining: “*Apprendi*’s reasoning is irreconcilable with *Walton*’s holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”⁴⁷

Fourth, the Court overturned some death sentences as violating the Due Process and Equal Protection Clauses. In *Deck v. Missouri*, the Court concluded seven-to-two that the use of visible shackles on a defendant during the sentencing phase of a capital case violates Due Process unless there is a showing of a compelling need.⁴⁸ The Court did not prohibit all use of visible restraints, rather Justice Breyer’s opinion for the Court, with Justices Scalia and Thomas dissenting, recognized the importance of ensuring safety in courtrooms.⁴⁹ But the Court said that there must be a showing of a need for restraints in the particular case and that the defendant need not prove that the jury was prejudiced from seeing him in visible restraints.⁵⁰

In *Miller-El v. Dretke*, the Court overturned a death sentence because of racial bias in jury selection in violation of Equal Protection.⁵¹ The Court found that the defendant proved that the prosecutor’s office had a policy of striking prospective jurors who were black when there was a black defendant, that

41. *See id.* at 2467.

42. *See id.*

43. 536 U.S. 584 (2002).

44. 530 U.S. 466 (2000) (holding that any factor, other than a prior conviction, that leads to a sentence greater than the statutory maximum must be proven to the jury beyond a reasonable doubt).

45. *See Ring*, 536 U.S. at 609.

46. 497 U.S. 639 (1990) (holding that it was constitutional to have the judge impose capital punishment without involvement of the jury in determining the sentence).

47. *Ring*, 536 U.S. at 589.

48. 125 S. Ct. 2007, 2015 (2005).

49. *See id.*

50. *See id.*

51. 125 S. Ct. 2317, 2339 (2005).

blacks were struck when similarly situated whites were not, that blacks were asked different questions than whites, and that the prosecutor “shuffled” the jury when prospective black jurors were coming up, all of which violated Equal Protection.⁵² Justice Souter’s opinion for the Court in a 6-3 decision should send a clear message to trial and appellate courts dealing with this issue: they are required to examine the record closely, as the Supreme Court did, to see if race or gender has been impermissibly used in the exercise of peremptory challenges.

Although each of these death penalty decisions is notable in itself, together they are dramatic—all have been handed down recently, and cumulatively they indicate a Court that has become quite concerned about the administration of the death penalty.

II. THE COURT LOOKS AT REALITY

Why the shift on the Rehnquist Court? Strikingly, it occurred without any change in membership—the same nine Justices who had so frequently upheld death sentences throughout the 1990s also decided the cases of the last few years. The answer is simultaneously simple and profound: The death penalty as administered in the United States is terribly flawed, and the Justices recognize this. In fact, two sitting Justices—Stevens and Ginsburg—along with then-Justice O’Connor, have given recent speeches expressing great concerns over the death penalty.⁵³ The recent cases indicate that their views were shared by a majority of the Rehnquist Court, and by at least a significant portion of the Roberts Court.

In 1994, about six months before he retired from the United States Supreme Court, Justice Harry Blackmun wrote the following words:

Twenty years have passed since this Court declared that the death penalty must be imposed, fairly, and with reasonable consistency, or not at all, and, despite the efforts of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.⁵⁴

To what was Justice Blackmun referring? I will identify below three interrelated problems with regard to the administration of the death penalty. After doing so, I will suggest that recognition of these problems has influenced the Justices and is responsible for the recent decisions striking down death sentences described above.

First, innocent people are on death row, which raises grave questions about

52. *See id.* at 2332.

53. These speeches are described *infra* text accompanying notes 77–88.

54. *Callins v. Collins*, 510 U.S. 1141, 1143–44 (1993) (Blackmun, J., dissenting from denial of certiorari) (citation omitted).

how the death penalty is administered in the United States. The work of Innocence Projects across the country has brought to public attention people who are wrongly convicted and then sentenced to death.⁵⁵ In Illinois alone, the Innocence Projects identified over a dozen individuals who were unquestionably convicted wrongly and then sentenced to death. As a result of these discoveries, the then-governor of Illinois, George Ryan, imposed a moratorium on the death penalty in that state and commuted the sentences of all death row inmates in Illinois.⁵⁶

There is nothing uniquely bad about the procedural system or the courts in Illinois compared to any other state. Close examination of those on death row throughout the country would no doubt yield many similar cases. The leading study on the wrongful imposition of the death penalty was done by Hugo Bedau and Michael Radelet, who found that between 1900 and 1991, 416 unquestionably innocent people were sentenced to death in the United States. Of these cases, they identified thirty in which individuals were found to be wrongfully convicted only hours or days before their scheduled execution, and they documented twenty-three cases where innocent people were ultimately executed by the state.

The reality is that any human system will make mistakes, especially a system with as many problems as our criminal justice system. At times innocent people are wrongly convicted because of police or prosecutorial misconduct. It is sometimes proven that the police fabricated evidence or that prosecutors withheld evidence in violation of their constitutional obligations. Other times the problem is with eyewitness identification. Eyewitness identification is tremendously powerful in a courtroom—pointing to a defendant and saying, “He is the one,” has tremendous sway with the jury. And yet, eyewitness identification is often flawed, especially in cross-racial circumstances. As one commentator explained: “By far the most common error found by researchers studying exonerations after wrongful convictions is faulty eyewitness identification testimony.”⁵⁷ Sometimes the conviction rests simply in the wrong person being in the wrong place at the wrong time. Whatever the reason, the reality is that innocent people are living on death row today. This realization undoubtedly has affected the Court’s perception of capital punishment.

Related to the idea of wrongful convictions is a second problem: ineffective assistance of counsel. One of the key reasons innocent people get convicted is the lack of a good lawyer. Many studies have been done comparing capital

55. See generally JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000) (describing the work of the Innocence Projects).

56. See Robert E. Pierre & Kari Lyderson, *Illinois Death Row Emptied*, WASH. POST, Jan. 12, 2003, at A1 (reporting Governor George Ryan’s commutation of 167 Illinois death sentences).

57. Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 890 n.112 (2005); see also EDWARD CONNORS ET AL., NATIONAL INSTITUTE OF JUSTICE, *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* (1996); DWYER ET AL., *supra* note 55.

defendants who have privately retained counsel to those with court-appointed counsel. As one scholar notes, “Empirical evidence shows that in certain states, three-quarters of those convicted of capital murder while represented by court-appointed lawyers were sentenced to death, while only about one-third of those represented by private attorneys received the death penalty.”⁵⁸ Another study done in Georgia found that those who had court-appointed lawyers were 2.6 times more likely to be sentenced to death than those who had privately retained lawyers.⁵⁹ A third study of 131 individuals put to death in Texas during the governorship of George W. Bush found that forty-three had an attorney who had previously been disciplined by the Bar for misconduct; forty of those who had been convicted had a lawyer who presented no evidence on their behalf or, at most, one witness on their behalf.⁶⁰

The late Justice Thurgood Marshall talked about the problems inherent in capital defendants’ representation by lawyers who either had no prior experience trying criminal cases or who were handling their first death penalty case.⁶¹ We also know of instances where lawyers representing defendants in capital cases literally slept through the trial; what is more astonishing is the lack of judicial response. In *Burdine v. Johnson*, two of three judges on a Fifth Circuit panel, followed by five judges in an en banc rehearing (though not a majority), said the defense lawyer’s sleeping through a good deal of the trial was not ineffective assistance of counsel.⁶² Of course, if that is “effective” assistance of counsel, then virtually anything would be deemed sufficient and “ineffective assistance” has been read a dead letter.

The reality is that court-appointed lawyers handling death cases are often tremendously undercompensated. Leading death penalty attorney Steven Bright has remarked that in Alabama, a court-appointed lawyer handling a capital case gets paid \$20 per hour on average. In Mississippi, he calculates that average compensation is \$11.50 an hour.⁶³

Moreover, the right to an attorney only inheres at trial and on the direct

58. Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. REV. L. & SOC. CHANGE 425, 431 (2004).

59. See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 158 (1990).

60. See Steve Mills et al., *Flawed Trials Lead to Death Chamber: Bush Confident in System Rife with Problems*, CHI. TRIB., June 11, 2000, at 1.

61. See Thurgood Marshall, *Remarks Made on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1–2 (1986). Marshall’s experience as a lawyer and as a judge caused him to see the all too often reality of capital defendants with woefully inadequate lawyers. He saw that the appointed counsel system used in so many states, with lawyers receiving tremendously inadequate compensation, caused inexperienced and incompetent lawyers to be handling many capital cases.

62. 231 F.3d 950, 964 (5th Cir. 2000), *vacated*, 262 F.3d 336, 357, 402 (5th Cir. 2001) (en banc).

63. See Stephen Bright, *Symposium: Gideon—A Generation Later: Introduction & Keynote Speakers*, 58 MD. L. REV. 1333, 1375 (1999); see also MISS. CODE ANN. § 99-15-17 (1972) (limiting compensation for appointed counsel to \$1000 per case and, in capital cases, in which two attorneys may be appointed, \$2000).

appeal.⁶⁴ There is no right to an attorney under the United States Constitution for collateral review or for state and federal habeas corpus.⁶⁵ To seemingly exacerbate the problem, in 1996 Congress passed the Antiterrorism and Effective Death Penalty Act,⁶⁶ which tried to streamline habeas corpus proceedings in death penalty cases. The statute provides that habeas petitions generally must be brought within one year of the completion of state proceedings.⁶⁷ The law also says, though, that a capital defendant only gets six months to bring a habeas petition if a state provides adequate counsel for postconviction proceedings in which a conviction has been upheld on appeal.⁶⁸ Nine years after enactment of this law, not one state has yet provided attorneys on collateral review to qualify for the shorter statute of limitation in death cases.

Of course, there are other problems with representing capital defendants than inadequate compensation for attorneys. For example, expert assistance, such as in explaining to the jury mitigating circumstances such as the defendant's abuse and neglect as a child and its effects, is usually crucial in the penalty phase; however, expert assistance has not been guaranteed as a right.

A third problem with the administration of the death penalty in the United States is the racism inherent therein. Racism is not unique to death penalty cases; studies demonstrate the effects of racism at every stage of criminal justice. A study in Memphis, Tennessee, found that from 1969–1974 an African-American was ten times more likely to be shot by a police officer than a white individual in that city, eighteen times more likely to be wounded, and five times more likely to be killed by a police officer.⁶⁹ A Minneapolis, Minnesota study found that white criminal defendants with a criminal record were much more likely to get released with no bail required than African-American criminal defendants who did not have a prior criminal record.⁷⁰ A national study of sentencing in the United States found that on the average, an African-American defendant was sentenced to a term of incarceration ten percent longer than a white defendant sentenced for the same crime, holding constant prior criminal

64. See *Ross v. Moffitt*, 417 U.S. 600, 610–11 (1974).

65. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

66. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered provisions of 28 U.S.C.).

67. See 28 U.S.C. § 2244(d)(1) (2000).

68. See 28 U.S.C. §§ 2261(b), 2263(a) (2000).

69. See James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 718–20 (1982).

70. See Minnesota Supreme Court, Task Force on Racial Bias in the Courts, Final Report app. D (Hennepin County Misdemeanor Processing Analysis) (1993), available at http://www.courts.state.mn.us/documents/CIO/pubsAndReports/Race_Bias_Report_Complete.pdf. For assault charges, white defendants with prior convictions were released without bail in 13% of cases, compared with only 8% of black defendants without prior convictions; for prostitution charges, white defendants with prior convictions were released without bail in 25% of cases, compared with only 16% of black defendants without prior convictions; for theft charges, white defendants with prior convictions were released without bail in 46% of cases, compared with only 40% of black defendants without prior convictions.

Id.

records.⁷¹ With regard to the federal courts, the average sentence for white defendants was 44.7 months while the average sentence for black defendants was 68.5 months.⁷²

In any aspect of the criminal justice system where there is discretion, racism will manifest itself, and there is tremendous discretion with regard to the death penalty. There is discretion as to whether or not the prosecutor will seek the death penalty, whether the jury will find aggravating factors that outweigh mitigating circumstances and recommend imposition of the death penalty, and whether the judge will allow the imposition of the death penalty. And statistics show that racism affects outcome at each of these phases.

A study by David Baldus at the University of Iowa, cited by the Court in *McClesky v. Kemp*, found that prosecutors sought the death penalty seventy percent of the time when it was a black defendant and a white victim, fifteen percent of the time if it was a black defendant and a black victim, and nineteen percent of the time if it was a white defendant and a black victim.⁷³ That is a huge disparity. As part of this same study, Baldus found, looking at the state of Georgia, that those who murdered whites were four times more likely to have a death sentence imposed than those who murdered blacks. In Alabama, the State's population is twenty-four percent African-American, but its death row is forty-three percent black.⁷⁴ A national study found that killers of whites were three times more likely across the country to have the death sentence imposed than those who killed African-Americans.⁷⁵ In the state of Florida, however, killers of whites were ten times more likely to have the death sentence imposed than killers of blacks.⁷⁶ And all of these studies found that African-American defendants were much more likely to be charged with a capital crime, prosecuted with a capital crime, and sentenced to death than white defendants, holding all other variables constant.⁷⁷

All of these problems with the death penalty have been recounted by many others. I repeat them here because it is likely that the Justices on the Supreme

71. Charles Ogletree, *Does Race Matter in Criminal Prosecutions?*, CHAMPION, July 1991, at 14; see also SAMUEL GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION 35-94 (1989); JOAN PETERSILLA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM (1983).

72. See *United States v. Prestemon*, 929 F.2d 1275, 1279 n.4 (1991) (noting the findings of the Nationwide Sentencing Commission).

73. See 481 U.S. 279, 287 (1987) (citing a study by Professor David C. Baldus offered by the defendant that purported to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and the race of the defendant). "Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims." *Id.* For the raw data, see David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

74. H.R. REP. NO. 103-458 (discussing the Racial Justice Act, H.R. 4017, 103d Congress (2d Sess. 1994)), available at 1994 WL 107569.

75. *Id.*

76. GROSS & MAURO, *supra* note 71, at 44.

77. *Id.* at 35-94.

Court are familiar with them and that they help explain the shift on the Rehnquist Court in capital cases.

Three Justices on the Rehnquist Court have given powerful speeches in recent years questioning the administration of the death penalty in the United States. In July 2002, then-Justice O'Connor gave a speech in which she declared, "If statistics are any indication, the system may well be allowing some innocent defendants to be executed."⁷⁸ She continued, "Serious questions are being raised about whether the death penalty is being fairly administered in this country."⁷⁹ She also noted that in the prior year, six death row inmates were exonerated, bringing the total since 1973 to ninety.⁸⁰ She went on to criticize the fact that only nine of the forty states that have the death penalty allow for postconviction DNA testing.⁸¹ She noted that in the prior year, those who were represented by court-appointed defense lawyers in Texas were twenty-eight percent more likely to be convicted than those who had retained their own attorneys; if convicted, they were also forty-four percent more likely to be sentenced to death.⁸² She concluded: "Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."⁸³

After O'Connor gave this speech, she voted with the majority in *Wiggins v. Smith* and *Rompilla v. Beard* in finding ineffective assistance of counsel in capital cases. She was likewise in the majority in *Atkins v. Virginia*, where the Court invalidated the death penalty for the mentally retarded, in part because of concerns over the risk of executing innocent individuals.

Then-Justice O'Connor's words echoed ideas expressed by Justice Ruth Bader Ginsburg a year earlier. In April 2001, in delivering the Joseph L. Rauh Lecture at the University of the District of Columbia, Justice Ginsburg declared: "In the United States, the most daunting of those criminal matters currently are cases in which death may be the punishment. I have yet to see a death case, among the dozens coming to the Supreme Court on the eve of execution petitions, in which the defendant was represented well at trial."⁸⁴

In August of 2005, Justice John Paul Stevens also voiced criticisms of how the death penalty is implemented, declaring:

Since [Thurgood Marshall's] retirement, with the benefit of DNA evidence, we have learned that a substantial number of death sentences have been

78. Maria Elena Baca, *O'Connor Critical of Death Penalty*, MINN. STAR TRIB., July 3, 2001, A1. A transcript of the speech could not be found.

79. *Id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *Id.*

84. Associate Justice Ruth Bader Ginsburg, Joseph L. Rauh Lecture at the University of the District of Columbia School of Law: In Pursuit of the Public Good: Lawyers Who Care (April 9, 2001) (transcript available at www.supremecourtus.gov/publicinfo/speeches/sp_04-09-01a.html).

imposed erroneously. That evidence is profoundly significant—not only because of its relevance to the debate about the wisdom of continuing to administer capital punishment, but also because it indicates that there must be serious flaws in our administration of criminal justice.⁸⁵

Like Justices O'Connor and Ginsburg, Justice Stevens pointed to the inadequacy of representation in capital cases, stating: "Many thoughtful people have quickly concluded that inadequate legal representation explains those errors. It is true, as many have pointed out and as our cases reveal, that a significant number of defendants in capital cases have not been provided with fully competent legal representation at trial."⁸⁶

Stevens, however, went further than O'Connor and Ginsburg in identifying many other problems with the administration of the death penalty in the United States. He said, "My review of many trial records during recent years, however, persuaded me that there are other features of death penalty litigation that create special risks of unfairness."⁸⁷ Justice Stevens described the jury selection process, which allows prosecutors to "death qualify" a jury and exclude jurors with views against the death penalty in general.⁸⁸ He also expressed concern that elected judges were likely to have a bias in favor of the death penalty and that the introduction of victim-impact statements creates a similar bias in juries:

The fact that most of the judges who preside and often make the final life-or-death decisions must stand for reelection creates subtle bias in favor of death. Moreover, the admissibility of victim impact evidence that sheds absolutely no light on either the issue of guilt or innocence, or the moral culpability of defendant, serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.⁸⁹

Although these are the only three members of the Rehnquist Court to speak off the bench about the death penalty, their views likely influence those of their colleagues and may well reflect the views of other Justices as well. Thus, it is not at all surprising, given these views, that the Court in recent years has overturned a significant number of death sentences.

85. Associate Justice John Paul Stevens, Address to the American Bar Association at the Thurgood Marshall Awards Dinner Honoring Abner Mikva (August 6, 2005) (transcript available at www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html).

86. *Id.*

87. *Id.*

88. *Id.* Justice Stevens was referring to *Lockhart v. McCree*, 476 U.S. 162, 184 (1986) (allowing prosecutors to strike jurors who express opposition to the death penalty).

89. *Id.* Justice Stevens was referring to *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (allowing prosecutors to present victim impact statements to juries in death penalty cases).

III. THE FUTURE

After eleven years without a vacancy, there are now two new Justices on the Supreme Court. Also, with the exception of Clarence Thomas, every other Justice remaining from the Rehnquist Court is over sixty-five years old, with John Paul Stevens the eldest at eighty-five. Future vacancies are likely, and predicting the future direction of any area of constitutional law is very difficult.

Certainly, one can identify the cases in which Justice O'Connor or Chief Justice Rehnquist was in the majority in 5-4 or 6-3 decisions and speculate about whether Chief Justice Roberts and Justice Alito are likely to vote the same way or to overturn the recent precedents. Interestingly, of the cases discussed in Part I, only *Rompilla v. Beard*, overturning a death sentence for ineffective assistance of counsel, and *Roper v. Simmons*, striking down the death penalty for crimes committed by juveniles, were 5-4 decisions. Justice O'Connor was in the majority in *Rompilla*, but neither O'Connor nor Rehnquist was in the majority in *Roper*.

Nor did any of the decisions by a 6-3 margin have both Justice O'Connor and Chief Justice Rehnquist in the majority. Some were 6-3, such as *Atkins v. Virginia*, which declared unconstitutional the death penalty for the mentally retarded, and *Miller-El v. Dretke*, which overturned a death sentence because of bias in jury selection. O'Connor was in the majority in both of these decisions, but her leaving the Court still leaves the other five Justices in the majority.

With respect to the new Chief Justice, John Roberts, I have been unable to find anything he has written about the death penalty. But his overall record—as indicated by the briefs and memos that he wrote before his appointment to the bench and his opinions on the District of Columbia Circuit—suggests that he is likely to be more conservative than O'Connor but no more conservative than his predecessor. However, the comparison between O'Connor and Samuel Alito on death penalty cases is much easier. Then-Judge Alito's record on the Third Circuit indicates that he is likely to be much less willing to overturn death sentences than O'Connor. For example, Alito wrote the opinion for the Third Circuit in *Rompilla* finding that there was not ineffective assistance of counsel.⁹⁰ The Supreme Court, with Justice O'Connor in the majority, came to the opposite conclusion and reversed. This case allows for a clear comparison between O'Connor and Alito. Moreover, in numerous other cases, Alito dissented from Third Circuit decisions overturning death sentences.⁹¹

It is also worth noting that some of the recent decisions expanding the rights of criminal defendants have not been split along traditional ideological lines.

90. *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), *rev'd*, 125 S. Ct. 2456 (2005).

91. *See, e.g.*, *Riley v. Taylor*, 277 F.3d 261, 317 (3d Cir. 2001) (en banc) (Alito, J., dissenting) (disagreeing with a decision finding racial bias in jury selection in a death penalty case); *United States v. Kauffman*, 109 F.3d 186, 191 (3d Cir. 1997) (Alito, J., dissenting) (disagreeing with a decision finding ineffective assistance of counsel); *Ramseur v. Beyer*, 983 F.2d 1215, 1242 (3d Cir. 1992) (Alito, J., concurring) (disagreeing with a decision finding racial bias during selection of grand jury).

For example, in the *Apprendi* line of cases—*Apprendi v. New Jersey*,⁹² *Blakely v. Washington*,⁹³ and *United States v. Booker*⁹⁴—Justices Scalia and Thomas were two of the five Justices in the majority. Likewise, in *Crawford v. Washington*, Justice Scalia wrote the opinion for the Court, joined by Justice Thomas in the majority, enforcing the Sixth Amendment's Confrontation Clause to limit the use of hearsay evidence against criminal defendants.⁹⁵

However, the willingness of conservatives on the Court to expand the protections for criminal defendants has not extended to the death penalty context. In not one of the decisions discussed in this Article where the Rehnquist Court overturned a death sentence were either Justices Scalia or Thomas in the majority.⁹⁶ Sometimes, such as in *Wiggins v. Smith* and *Deck v. Missouri*, they were the only dissenters. This certainly offers reason to doubt that Chief Justice Roberts and Justice Alito, or indeed any appointees to the Court by George W. Bush, will be votes to reform the death penalty.

There is another, more subtle reason to have concerns over whether the new Justices will share the concerns expressed by Justices O'Connor, Ginsburg, and Stevens concerning how the death penalty is administered in the United States. The reservations these Justices articulated are a product of reviewing countless death penalty cases over many years on the Court. Each of these Justices has seen countless capital cases where there was not effective assistance of counsel, where procedures were not fair, and where there was a risk that an innocent person faced execution. It was the experience of decades on the Supreme Court that turned Harry Blackmun from a Justice who repeatedly voted to uphold death sentences into one who concluded he would never again do so.

Perhaps over time the new Justices, after having the same experience, will come to the same conclusion. But, at best, this will take time. There is a real risk that, in the meantime, the progress made in the past few years, with the Court overturning many death sentences and attempting to reform the process, will come to an end.

92. 530 U.S. 466, 490 (2000) (holding that any factor, other than a prior conviction, that leads to a sentence greater than the statutory maximum, must be proven to the jury beyond a reasonable doubt).

93. 542 U.S. 296 (2004) (holding that any factor, other than a prior conviction, that leads to a sentence greater than that which could be based on the jury's verdict of what the defendant admitted to, must be proven to the jury beyond a reasonable doubt).

94. 543 U.S. 220, 243–44 (2005) (holding that *Apprendi* and *Blakely* apply to the federal Sentencing Guidelines).

95. 541 U.S. 36, 68–69 (2004) (holding that the Confrontation Clause bars the use of "testimonial" hearsay evidence absent the witness's unavailability and a prior opportunity for cross-examination).

96. Thus, I do not believe that there is any connection between the recent Supreme Court decisions overturning death sentences and the Court's decisions in *Crawford* and *Blakely* providing more protection for criminal defendants. Conservative Justices, such as Scalia and Thomas, were part of the latter but not the death penalty decisions, except for *Ring v. Arizona*, which extended *Apprendi* to the death penalty context.

IV. CONCLUSION

The death penalty as administered in the United States is deeply flawed. Finally, in the last few years, the Supreme Court has begun to acknowledge this and has overturned a number of death sentences. Unfortunately, replacing Justice O'Connor with Justice Alito means that there is a shift in the Court that will make it less likely to continue down this essential path.

The last few years of the Rehnquist Court were surprising in many areas, especially in criminal law. In the area of the death penalty, a majority of the Justices seemed to recognize that there are enormous problems and inequities in the way the death penalty is administered. Innocent people are sentenced and put to death in the United States. Those being tried for capital crimes often lack even minimally competent counsel and have no right to attorneys at all in collateral proceedings. Racial bias infects every aspect of the criminal justice system, especially in death penalty cases.

This is an area where the political process often fails. There are notable exceptions, such as in Illinois where then-Governor Ryan commuted death sentences after learning of many innocent individuals on death row. But generally, politicians and voters are not concerned about those facing capital sentences. Protection for those facing the ultimate sentence must come from the courts. Recent decisions of the Supreme Court offer reason for hope that it has begun to recognize the deep flaws in the death penalty in the United States, but recent changes in the composition of the Court give reason to doubt whether this trend will continue.