Have Mercy: New Opportunities for Commutations in Death Penalty Cases

By Laura Schaefer and Michael L. Radelet

iStockphoto

In the first 15 years of the twenty-first century, we have seen several indicators that the use of the death penalty in the United States is in steep decline. According to the Death Penalty Information Center, an annual average of 275 new prisoners arrived on America's death rows between 1996 and 2000; in 2015, there were only 49 new death sentences. The average number of executions per year has dropped nearly 50 percent since the last five years of the twentieth century, from 74 between 1996 and 2000 to 37.6 in the years 2011–2015. Moreover, there were only 20 executions in 2016, a historic low in the modern death penalty era. Since 2000, seven states have abolished the death penalty, and four more have seen their governors impose moratoria on executions. And, whereas Gallup found that 80 percent of Americans supported capital punishment as recently as 1994, a 2015 Quinnipiac poll indicates that more Americans today prefer a sentence of life imprisonment without parole (48 percent), universally available in death penalty jurisdictions, to a death sentence (43 percent). This fact dramatically changes the moral and political climate around clemency decisions: More Americans now prefer life prison terms to the death penalty.

However, there is little indication that those involved in clemency decisions have been affected by the drop in death penalty support, as there has been no corresponding uptick in the number of death sentences commuted through executive action. In this article, we review and critique some of the prevailing explanations for the relative paucity of commutations in the modern era of death sentencing. We find that each of these explanations is weak, that there may in fact be something else contributing to the rarity of capital commutations, and conclude that there are excellent reasons why we should be seeing greater frequency of the exercise of capital clemency powers in the near future.

Clemency: Capital Punishment's "Safety Valve"

The clemency power—the authority of the executive to lessen or eliminate a criminal conviction or sentence—has long been considered a crucial "safety valve" in the capital punishment process. The authority for governors to impose moratoria on executions (halting all executions for a designated time, or until the governor leaves office) is one example of how the clemency power has been used. In individual cases, clemency typically comes in the form of a commutation: modifying a death sentence to a sentence of life in prison. All states allow for executive clemency, and few states impose any substantive limitations on this power. Indeed, the Supreme Court recognizes the centrality of clemency as a necessary check to ensure fairness in death penalty cases. In *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993), the Supreme Court noted that clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."

Given the decline in public support for the death penalty, one might have expected a concurrent increase in capital commutations over this same time period. Nonetheless, this expectation has not been realized. In the 43 years since the Supreme Court temporarily abolished the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), the Death Penalty Information Center reports that there have been only 280 death row inmates in the United States whose sentences were commuted. Of those 280 cases, however, 206 were included in "broad grants of clemency," whereby governors emptied death rows, usually close in time to the abolition of capital punishment in that state. Thus, in the four decades since the death penalty was reinstated in *Gregg v. Georgia*, 428 U.S. 153 (1976), only 82 commutations and five pardons have been granted on the *individual* merits of the case. That averages to about two commutations or pardons per year, and roughly one commutation for every 17.5 executions.

In sharp contrast, executive commutations of death sentences were much more common in the earlier years of the twentieth century. James Acker and Charles Lanier, for example, reviewed data from 15 states prior to 1972, finding a total of 900 commutations and 2,861 executions. This results in an overall ratio of one commutation for every 3.2 executions, indicating that commutations were *five times more common* before 1972 than in the decades since.

Why the Decline in Clemency Grants?

In the early 1990s, Hugo Adam Bedau—perhaps the most prolific death penalty scholar of the past six decades—offered three explanations for the decline in clemency grants since *Gregg*. *See The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 255, 268–69 (1990–1991). First is the belief that a governor who commutes a death sentence "verges on committing political suicide." Second is the notion that "death sentences are now meted out by trial courts with all the fairness that is humanly possible." And third is the idea that, "if a death sentence is unfairly imposed in a particular case by the trial court, the appellate courts—and especially the federal courts—can be counted upon to rectify the injustice and order a new trial." While many have accepted these hypotheses, a closer look at contemporary capital cases leads us to reject all three as valid explanations for the sharp decline in the use of clemency.

Fair and reliable imposition of death sentences? First, we consider: are death sentences actually imposed today in trial courts with enough fairness and reliability to justify the dearth of clemency? As we see it, this contention is absurd. Numerous studies highlighting lingering racial, gender, geographic, and other disparities in its imposition make it clear that we are far from reserving capital punishment for "the worst of the worst." For example, a 2014 study by Professor Cathi Grosso and her colleagues identified 36 studies since 1990 that had addressed disparities, only four of which did not uncover any significant effects of race on death sentencing. Catherine M. Grosso et al., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in* America's Experiment with Capital Punishment 525 (James R. Acker et al. eds., 3d ed. 2014).

In addition, it has become apparent that people are more likely to receive the death penalty due to *where* the crime was committed rather than due to the nature of the crime itself. Furthermore, many states still execute individuals under the "law of parties," which allows for a participant in a crime to be sentenced to death even if another person carried out the murder. For example, Robert Lee Thompson was executed in Texas in 2009 for his participation in a robbery that led to the shooting death of a drug store clerk, while his accomplice, Sammy Butler—who shot and killed the victim—received a life sentence. Strikingly, the Texas Board of Pardons and Paroles (BPP) recommended Thompson be granted clemency (one of only four times the BPP has done so); but this recommendation was denied by Governor Rick Perry, who was contemplating a run for national office. In addition, the law of parties allows prosecutors to pursue plea deals with the more culpable party in exchange for testimony against a co-defendant, thus ensuring that *someone* is sentenced to death for the crime. Richard Glossip—who has maintained his innocence, and whose conviction rests exclusively on the testimony of the man who committed the crime—faces execution in Oklahoma as a result of such legal maneuvering. Countless other cases illustrate the fact that today's death penalty is frequently reserved for those who are less able to negotiate a plea deal successfully with the state. There is no question that imposing the death penalty in such circumstances reeks of arbitrariness.

In addition, we now know of 156 individuals who have been released from death rows because of evidence of innocence—and only one, Earl Washington in Virginia, first saw his death sentence commuted before receiving a full pardon. This number of death row exonerations is astonishing and clearly demonstrates that our processes remain fallible, which should open the door for more commutations based on lingering doubt about the defendant's guilt.

Appellate correction of any errors? Second, is the decline in commutations attributable to any greater ability or willingness of appellate courts to correct errors made at earlier points on the path toward the execution chamber? Many problematic cases in which defendants have exhausted their judicial appeals have come to the attention of officials, and clemency has still been denied—oftentimes, with the clemency decision maker citing the appellate court rulings as grounds for denying clemency. This argument for why there is a decrease in commutations assumes that the appellate courts are indeed acting to correct prior errors. What this rationale misses, however, is not only the reluctance of at least some judges to grant relief in death penalty cases but, more importantly, that courts are often hamstrung in their ability to review all the facts and information necessary for the public to have full confidence in the appropriateness of a death sentence.

While capital cases endure years of appeals, in practice appellate courts often are statutorily restricted and unable to review all the information necessary to justify the ultimate punishment. In many cases, evidence that may substantially affect the fairness of a death sentence simply *cannot* be

weighed by the appellate courts due to procedural bars and other technical legal constraints. Changing societal and professional views of mental illness, for example, or an evolving understanding of whether 18 is truly old enough to be sentenced to death for a crime, are typically not the types of evidence a court can legally use to overturn (or even reconsider) the sentence. Clemency remains the most nimble vehicle through which evolving perspectives on such crucial issues as culpability and justice can be weighed—but it is almost never used to do so.

Furthermore, the role of the courts today is significantly changed from the time when Bedau attempted to explain the waning number of commutations. Specifically, the passage of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) significantly limited federal courts' ability to review state courts' death penalty opinions. (Indeed, AEDPA was in large part passed with precisely this goal in mind.) Under this statute, federal courts are unable to overturn a state court decision unless "there is *no possibility* [that] fair-minded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedent." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (emphasis added). As a result, many cases that might have won judicial relief in the years prior to AEDPA are now heavily insulated from federal review.

This now 20-year-old change in the law has rendered the clemency power even more important today, because clemency officials can no longer seriously assume that the courts have the power to correct all the major errors in a capital case. In recent years, prisoners have been executed despite strong evidence of developmental disabilities (Warren Hill, Georgia, 2015); doubts about guilt (Cameron Todd Willingham, Texas, 2004); unquestioned rehabilitation (Stanley "Tookie" Williams, California, 2005); lesser sentences imposed on an equally or more culpable co-defendant (Kelly Gissendaner, Georgia, 2015); and a wide array of other factors that make scores of death row inmates like these most likely not among the "worst of the worst." While federal courts were in fact more free (and willing) to overturn death sentences in the two decades following *Gregg*, this aspect of the process has now entirely changed. In short, AEDPA has effectively extended an invitation to clemency officials to use their powers where the courts are now prevented from doing so: but, sadly, that invitation has gone unanswered.

Political risk? Finally, we consider Bedau's third explanation for decline in clemency: Is it "political suicide" to commute death sentences? The short answer is "no," and the longer answer is "at least not anymore." No governor has suffered significant political backlash for any of the 280 commutations that have been granted in the past 43 years. Indeed, the state that saw the most commutations and pardons, Illinois (four pardons and 167 commutations in 2003), went on to see another 15 commutations and completely abolished the death penalty only eight years later. Ohio Governor John R. Kasich commuted five death sentences between 2011 and 2014, and then easily won reelection. None of his rivals for the Republican presidential nomination in 2015–2016 mentioned his commutations as reasons to distrust him or vote against him; nor did they claim that his use of commutations must mean he opposes the death penalty. One of the more controversial uses of the clemency power in recent memory—the 2013 reprieve granted to Nathan Dunlap, the so-called "Chuck E. Cheese shooter" in Colorado—did not prevent Governor John Hickenlooper from winning reelection in 2014. While political actors considering clemency for death row inmates likely do fear political repercussions for an affirmative clemency grant, the evidence suggests that this fear is not realized.

Trends away from the death penalty and recent public opinion polls actually indicate that *denial* of clemency, rather than its approval, may today constitute the bigger political risk for decision makers. In today's political climate, a governor's use of clemency powers might justifiably be seen as a sign of integrity, rather than weakness. There is no question that today's political environment in terms of our perspectives on crime and punishment is significantly evolved and different from that of the 1980s and 1990s.

One of the most memorable moments of the 1988 presidential race between George H.W. Bush and Michael Dukakis came early in their final debate, when the moderator began by asking Dukakis, a lifelong foe of the death penalty, if his opposition would be swayed if someone raped and murdered his wife. Dukakis's response, that he would still not favor the death penalty even in that instance, was seen as so unemotional, tepid, and off-the-mark that many attributed his eventual political demise in part to his dismal response. Politicians quickly viewed this as showing that publicly opposing the death penalty would spell political disaster.

Even if there were once some credence to this view, it is no longer the case. Tough-on-crime policies, now clearly linked to the mass incarceration so troubling to both sides of the political aisle, are steadily declining in popularity. Similarly, the National Academy of Sciences recently dismissed the claim that the death penalty is a stronger deterrent to homicide than long prison terms, throwing cold water on the idea that we need more executions to fight high crime rates. Moreover, public awareness of wrongful convictions and concern about the decades individuals typically spend on death row prior to execution has increased support for abolition. To the extent that granting clemency was politically untenable in the first two decades post-*Gregg*, due to fears of backlash amid widespread public approval of the death penalty, this rationale today is shrinking.

continued on page 23

Mental Illness, Diminished Responsibility, and the Death Penalty: A New Frontier

By Richard J. Bonnie

States that are most inclined to seek death sentences seem to be incapable of administering the system in a way that reliably and fairly selects the offenders *most* deserving of the ultimate penalty. Equally disheartening, they also seem incapable of exempting offenders who, by virtue of serious mental disability at the time of the crime, are *least* deserving of execution.

The moral impropriety of executing persons who were not "in their right mind" at the time of the crime was recognized by common-law courts hundreds of years ago. Defendants who were "insane"—who did not know the nature or quality of their acts or that their act was wrong—at the time of the offense were exempt from punishment. However, the test for insanity is typically quite narrow, and judges and juries are skeptical of claims that mental illness should exempt homicide defendants altogether from punishment—and are thus reluctant to find a defendant insane. Only a small fraction of defendants known to be severely mentally ill are acquitted by reason of insanity.

But the moral calculus is considerably different if the issue is whether mentally ill defendants should be *executed*. This is why contemporary capital sentencing statutes classify "diminished responsibility" due to mental illness at the time of the crime as a mitigating circumstance. In most states, "extreme mental or emotional disturbance" at the time of the offense and "significant impairment of capacity to appreciate the wrongfulness of conduct or to conform . . . to the requirements of the law" are mitigating circumstances. However, many defense attorneys worry, and research has shown, that evidence of mental illness will amount to a "double-edged sword" such that morally compelling mitigation narratives of childhood abuse, mental disability, or other frailties of humankind essentially warp from mitigating (i.e., factors in favor of not giving a death sentence) to aggravating (i.e., factors favoring a death sentence). Some attorneys will choose not to present highly relevant evidence of mental illness because of fear that jurors will not consider it, or will view it as evidence of future dangerousness rather than diminished moral culpability. It is precisely to remedy this conundrum that the Supreme Court held in 2002 that individuals with intellectual disability should be categorically exempt from the death penalty. Indeed, the Court worried that because of this "double-edged sword" phenomenon, which applies equally to those with intellectual disability, those who had the lowest moral culpability and were the least deserving of execution were actually *more* likely to be sentenced to death.

The only way to prevent this pattern of disproportionate capital sentencing, and to ensure that compelling claims of diminished mental responsibility are given adequate moral weight, is to (1) preclude a death sentence if one of these mitigating factors is proved, and (2) require aggressive judicial review of trial court findings that the evidence does not establish diminished responsibility. Unfortunately, that has not happened in most states. The common judicial failure to take seriously the moral importance of proportionality in capital sentencing is one of the reasons the Supreme Court has barred the death penalty for juveniles and persons with intellectual disability.

In 2006, the American Bar Association (ABA), American Psychiatric Association, American Psychological Association, and National Alliance on Mental Illness endorsed the principle that a finding of serious mental illness should preclude the death penalty; Mental Health America joined the endorsement in 2011. All of these organizations support the position that:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.

Legislation codifying this principle will be under consideration in several states in 2017, and the ABA has created a Mental Illness Initiative to support this effort. In addition, attorneys for capital defendants and condemned prisoners have used the above consensus statement as the backbone of an argument that imposing the death penalty on these defendants contravenes evolving standards of decency in a civilized society. Several state appellate judges have expressed interest in this argument, and support for such an exemption is likely to grow.

Embracing an exemption for diminished responsibility based on serious mental illness will not rectify the deep injustices of capital sentencing, but it will achieve a modest victory for human dignity.

Richard J. Bonnie is the Harrison Foundation Professor of Law and Medicine and the director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia.

Confronting Implicit Bias: An Imperative for Judges in Capital Prosecutions

By Gregory S. Parks and Hon. Andre M. Davis

iStockphoto

The esteemed lawyer Jonathan Rapping, founder and director of the non-profit Gideon's Promise, has often said that the most obvious feature of our legal system is the disparate treatment of African Americans. In no context is this observation more true and profound than in the administration of capital punishment. Therefore, our evolving appreciation for the adverse effects of automatic, subconscious, and implicit bias in virtually every domain of civic life holds important lessons for criminal justice policymakers, advocates, and judges, all of whom are involved in our death penalty system. The assumption that human thoughts are accessible to conscious awareness and that behavior is largely governed by conscious volition has been debunked in recent years. Reports of a person's cognitive processes are often inconsistent with his or her "actual" judgments. Many psychological influences on judgment and decision making operate wholly outside of conscious awareness.

One way in which subconscious judgments manifest is in the context of judgments of groups of individuals, particularly "out-groups." Some reasons for this are evolutionary or neuropsychological; some emerge from our earliest experiences with our parents' values and attitudes, which become our shared values, or from the media that washes over us on a consistent basis. Given our racial legacy, it should be no surprise that 75–90 percent of whites, 65 percent of Asian and Latino Americans, and 35–60 percent of blacks harbor automatic, implicit negative judgments of blacks and positive ones of whites, regardless of many people's expressed support of egalitarian norms.

Even more, the social scientific literature underscores that blacks (and not whites) are implicitly perceived as a threat and hostile, which is particularly important to consider in the context of racial disparities in death penalty sentencing—the punishment that should be reserved for the most "threatening" people or horrific crimes. For example, on neuroimaging measures, whites show more activation in the region of the brain associated with fear when they view black faces. Where there is a confrontation between people, whites also implicitly construe those interactions as more aggressive and hostile when there is a black perpetrator.

In the context of our criminal justice system, the research is even starker. Whites implicitly associate blacks (and not whites) with images of nonhuman primates, and the more easily they do so, the more inclined they are to endorse police violence against blacks. Not surprisingly, in studies of actual cases in Florida, Georgia, and Pennsylvania, researchers found that inmates with more prototypically black facial features (thicker lips, wider noses, etc.) were given longer (eight-month) sentences than those with less prototypically black features. Another study found that not only do blacks receive sentences 4.25 percent higher than whites, but medium- and dark-skinned blacks also receive sentences that are 4.8 percent higher than those for whites. Interestingly, light-skinned blacks receive sentences almost of the same severity as whites. Researchers also found that in cases involving a white victim, the more prototypically black the defendant was perceived to be, the more likely he or she was sentenced to death.

While perhaps surprising, it is worth noting that even many capital defense attorneys have demonstrated high levels of implicit, anti-black bias. Accordingly, it may be unsurprising that other participants in the criminal adjudication process also have biases that influence their decision making. Significantly, jury studies demonstrate that race has predicted juror judgments: where looking at the same evidence, jurors have deemed such as more indicative of guilt with respect to black/darker skin–toned defendants. This is another reason it is important to have racially diverse juries in capital cases, which *Batson v. Kentucky* and its progeny make clear is not simply a latent desire, but a constitutional mandate. In fact, one idea gaining traction is the use of preliminary instructions during voir dire to educate prospective jurors about implicit bias.

Finally, and perhaps most importantly, judges are not exempt from these biases. In a study of trial court judges, researchers found that judges with greater implicit anti-black biases meted out harsher punishments. However, where race was a front-and-center issue in the case, judges seemed able to override their biases and come to a fairer sentence.

Despite the unquestioned power and authority of prosecutors, we submit that judges are the real engineers of the criminal justice train. Fortunately, the judicial system is trying to improve what judges know about this research and to eradicate the insidious effects of implicit bias in the justice system. At a minimum, we believe it is imperative that judges:

- Attend to their own mindset and be more humble in wanting to learn;
- Slow down the frequent rush to judgments in and out of the courtroom, as speed and urgency heighten the effects of bias; and
- Activate their conscious motivations to be fair and aware.

Beyond these rudimentary but important prescriptions, judges must recall that they are the guardians of the presumption of innocence, the indispensable foundation for our system of justice. Thus, judges must truly embody this presumption for the jury in their words, body language, and attitudes displayed in the courtroom, as jurors often take their behavioral and attitudinal cues from judges. So unless judges work to recognize the implicit biases first in themselves and then in the other actors critical to the criminal justice system, the goal of fundamental fairness will be put in jeopardy. This is a risk we cannot afford, particularly when it comes to our use of the most severe punishment.

Gregory S. Parks, JD, PhD, is an associate professor of law at Wake Forest University School of Law. The Honorable Andre M. Davis is a senior circuit judge with the United States Court of Appeals for the Fourth Circuit.

Have Mercy, from page 20

Misunderstanding of the role of clemency? So, why are there so few commutations? One contention that has not been fully explored is whether commutations have become so rare in practice that decision makers no longer feel confident that their discretion and independent judgment are intended to serve as a check on the capital punishment system. We suspect that many clemency officials today are simply unaware of the fundamental importance of clemency in ensuring fairness and justice in death penalty cases. An assumption appears to have emerged that the clemency decision maker can only act in truly "extraordinary" circumstances, such as when strong exculpatory evidence emerges just prior to an execution. (Clearly, when governors were granting individual commutations in death penalty cases at a much higher rate pre-*Gregg*—decades before DNA and forensic testing emerged—this idea was not at play.) The assumption that clemency is designed *only* to serve as a means of preventing an innocent person from being executed is a misunderstanding of the significance, role, and rationale of clemency within our criminal justice system.

In 1788, Alexander Hamilton wrote: "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." The Federalist No. 74. More than two centuries later, the clemency power has remained broad in both the state and federal death penalty systems, and is still intended to operate as a check on justice "too sanguinary and cruel." Today's clemency authorities who feel reluctant to tinker with death sentences that have already passed the scrutiny of jurors and some judges are failing to recognize the importance—and indeed centrality—that their prerogative of granting clemency plays in ensuring overall fairness in our criminal justice system.

Conclusion

Political considerations are an inevitable reality whenever the executive acts. However, political reprisal seems today an unrealistic ground to refuse clemency in cases where otherwise warranted. The changing nature of death penalty politics and the courts' failures to ensure that only the worst of the worst are executed have opened the door for more clemency officials to exercise their power today.

There is no question that there are many individuals currently facing execution who, if tried for the same crime today, almost certainly would not be sentenced to death. Not to commute the sentences of these individuals ignores the "fail-safe" deliberately built into our capital punishment system.

Laura Schaefer is a staff attorney for the ABA Death Penalty Representation Project, and counsel for the Capital Clemency Resource Initiative, a joint project of the ABA Death Penalty Due Process Review Project, Death Penalty Representation Project, and Commission on Disability Rights. She previously represented capital defendants in their state habeas appeals with the Office of Capital and Forensic Writs in Austin, Texas. Michael L. Radelet is a professor in the Institute of Behavioral Science and the Department of Sociology at the University of Colorado–Boulder. His latest book, The Death Penalty in Colorado: Ambivalence, Inconsistencies, and Expense*, will be published in early 2017 by University Press of Colorado.*