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Matthew Tokson

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SUPREME COURT CLERKS AND THE DEATH PENALTY

Matthew Tokson[†]

My first weeks as a Supreme Court clerk were, in many ways, shocking. I was shocked to be sitting in Ruth Bader Ginsburg's office, listening to her discuss the upcoming term. I was awestruck as I wandered the Court's red-carpeted halls, taking in every detail, memorizing the location of each chambers. Occasionally one of the Justices would walk past and say a polite "hello." It was surreal.

The work, however, was mostly what I expected. The clerks reviewed petitions and drafted memos. Our work on granted cases was similar to that of an appeals court clerk. There was only one part of the job about which I had not been warned.

The Supreme Court is involved, directly or otherwise, with virtually every execution carried out in the United States. Most executions are appealed to the Court, and inmates commonly request a stay of execution a few days or hours before their scheduled death.¹ The clerks review these requests and recommend a ruling.²

A few days after I arrived at the Court, I got my first death penalty assignment. As the date drew near, the defendant asked the Court to stay his execution. I opened his file and began to read.

* * *

The Supreme Court rarely grants applications for stays of

[†] Associate Professor, University of Utah S.J. Quinney College of Law. Thanks to Susan Bandes, Paul Cassell, Eve Hanen, Cathy Hwang, Leah Litman, and special thanks to Shenelle Salcido for her excellent research assistance.

¹ David O. Stewart, *Dealing with Death: The Court Cannot Escape the Issue of Capital Punishment*, A.B.A. J., Nov. 1994, at 50; William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Liberty 1, 8 (2015). These "appeals" generally include habeas petitions and other forms of post-conviction relief.

² The clerks also often relay the Justice's decisions to the Office of the Clerk.

execution.³ Each application is first directed to a single Justice.⁴ The Justice may refer a stay request to the entire Court for review, which they often do for applications filed immediately before a scheduled execution. To facilitate the Court's oversight, the Office of the Supreme Court Clerk periodically distributes a list of scheduled executions to each of the Justices.⁵ A clerk from every chambers is assigned to monitor each case.

Typically, the clerks unanimously recommend that these last-minute applications be denied. The Justices usually vote unanimously to deny these applications. And the executions generally proceed on schedule. Executions are only delayed in cases when the stay is granted or when the lower courts fail to decide a last-minute appeal before the scheduled execution time.

Through this review, the Justices and their clerks become involved, in some partial way, in the process of execution. Justice Powell's biographer noted that Powell struggled with his own involvement in death penalty appeals and his inability to achieve the emotional distance of some of his colleagues.⁶ Justice Powell "came to believe that the system as a whole would always be plagued by doubt and that doubting itself it would inspire resentment and contempt."⁷

Justice Blackmun famously declared his opposition to the death penalty in a dissent from the Court's denial of a death penalty appeal, writing that "[f]rom this day forward, I no longer shall tinker with the machinery of death."⁸ He concluded, "[i]t seems that the decision whether a human being should live or die is so inherently subjective—rife with all of life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution."⁹

Working on death penalty appeals was disturbing, for a variety of

³ See, e.g., Stewart, *supra* note 1, at 53.

⁴ The Justices divide up the country based on the boundaries of the federal circuits. *Id.*; *Circuit Assignments*, SUPREMECOURT.GOV, <https://www.supremecourt.gov/about/circuitAssignments.aspx>.

⁵ See Stewart, *supra* note 1, at 53.

⁶ JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL JR.: A BIOGRAPHY (2001).

⁷ *Id.* at 453.

⁸ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

⁹ *Id.* at 1153.

reasons. The appeals and the government's responses detailed the defendants' crimes in graphic detail. These crimes were horrific. They were typically murders accompanied by aggravating circumstances, often involving rape. In the classic retributivist, eye-for-an-eye sense, the perpetrators of such crimes were deserving of execution.¹⁰

Under a variety of other theories, the morality of execution is far from clear.¹¹ Nor was it guaranteed that every one of the men scheduled for execution had actually committed the crime for which he had been convicted.

Since 1973, 166 death row inmates have been exonerated.¹² This compares to roughly 1,499 inmates who have been executed and 2,673 inmates currently on death row.¹³ Given the frequency with which innocent persons are sentenced to death and the uncertain nature of several death penalty cases that eventually led to execution, it is overwhelmingly likely that innocent persons have been executed.¹⁴

¹⁰ See generally IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor ed., trans., 1996).

¹¹ E.g., Dan Markel, *State Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 457-80 (2005) (arguing that adherence to retributivist punishment theory does not require the death penalty); Hugo Adam Bedau, *Bentham's Utilitarian Critique of the Death Penalty*, 74 J. CRIM. L. & CRIMINOLOGY 1033 (1983) (outlining Bentham's view that a Utilitarian must favor imprisonment over the death penalty).

¹² *Description of Innocence Cases*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases?scid=6&did=110> (last visited Oct. 10, 2019). These inmates were either acquitted, had all charges against them dismissed, or were pardoned based on evidence of innocence. *Criteria for Inclusion on DPIC's Innocence List*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/stories/criteria-for-inclusion-on-dpics-innocence-list> (last visited Oct. 10, 2019).

¹³ *Death Penalty Fast Facts*, CNN (July 26, 2019, 2:20 PM), <https://www.cnn.com/2013/07/19/us/death-penalty-fast-facts/index.html>.

¹⁴ E.g., *Callins*, 510 U.S. at 1145-46 (Blackmun, J., dissenting from denial of certiorari) (noting "the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution"); Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 72 (2006). For examples of potentially wrongful executions, see, e.g., *id.* at 71; David Grann, *Trial by Fire*, THE NEW YORKER (Aug. 31, 2009), <https://www.newyorker.com/magazine/2009/09/07/trial-by-fire; Executed but Possibly Innocent>, DEATH PENALTY INFORMATION CENTER,

Exonerations of innocent death row inmates are relatively common in part because courts consider execution by the state an extraordinary and rare punishment, deserving of the most thorough scrutiny.¹⁵ Scholars and Justices have pointed out the high costs of such review and the arbitrariness of the current death penalty system.¹⁶ The costs of bringing a capital case and incarcerating a prisoner on death row greatly exceed those of trying similar non-capital cases and incarcerating prisoners for life.¹⁷ There are also costs that are difficult to quantify but nonetheless profound—costs imposed by the rare, arbitrary, and racially disparate application of the death penalty by the state.¹⁸ Executions likewise take a toll on the prisoners slated to die, those who supervise them, and any member of the polity who fears the risk of wrongful execution or does not want the state to kill in their name.¹⁹

An accounting of the effects of the death penalty must also include

<https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent> (last visited Oct. 10, 2019). Even Justice Scalia, in his fiery defense of the death penalty, ultimately argues that wrongful executions are minimal rather than nonexistent. *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring).

¹⁵ *E.g.*, *Kyles v. Whitney*, 514 U.S. 419, 422 (1995) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 92–96 (1991).

¹⁶ *E.g.*, *Callins v. Collins*, 510 U.S. 1141, 1148–49 (1994) (Blackmun, J., dissenting from denial of certiorari); Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Roles in the Death Penalty*, 63 *VAND. L. REV.* 307 (2010); Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 *OHIO N.U. L. REV.* 861, 875–81 (2008). Relatedly, Rachel Barkow has questioned the extreme procedural dichotomy between capital and non-capital cases, arguing that it is unjustified by doctrinal or policy considerations. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing and the Case for Uniformity*, 107 *Mich. L. Rev.* 1145, 1149 (2009).

¹⁷ *See, e.g.*, THE OKLA. DEATH PENALTY REVIEW COMM'N, THE REPORT OF THE OKLAHOMA DEATH PENALTY REVIEW COMMISSION 225-26, 265-66 (2017).

¹⁸ Maxine Goodman, *A Death Penalty Wake Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 *BERKELEY J. CRIM. L.* 29, 34-39 (2007) (summarizing nationwide and statewide death penalty statistics related to race and the death penalty); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 *NEB. L. REV.* 486, 562-623 (2002).

¹⁹ For a discussion of the toll of executions on the executioners, see Susan A. Bandes, *What Executioners Can—and Cannot—Teach Us About the Death Penalty*, 35 *Crim. J. Ethics* 183 (2016).

its potential deterrent effects.²⁰ There is anecdotal data suggesting that the death penalty, a relatively high-salience punishment, may deter potential criminals from committing murder.²¹ Empirical support for this premise is contested, and different analyses have reached different conclusions.²² It may ultimately be difficult to determine a statistical relationship between homicides and executions, in part because executions are relatively rare²³ and homicide rates typically show substantial volatility from year to year.²⁴

What is clear is that the number of executions in the United States has dropped substantially in recent years. In 2011, the year my clerkship began, there were 43 U.S. executions. That number dropped

²⁰ Paul G. Cassell, *In Defense of the Death Penalty*, in DEBATING THE DEATH PENALTY 189–90 (Hugo Bedau & Paul Cassell eds., 2004). Related benefits include the permanent incapacitation of convicted murderers, some of whom have been released or escaped and gone on to commit additional murders. *Id.* at 188.

²¹ *Id.* at 190–92.

²² Franklin Zimring et al., *Executions, Deterrence and Homicide: A Tale of Two Cities*, 7 J. OF EMPIRICAL LEGAL STUD. 1 (2010) (reporting that divergent death penalty policies in two similar cities appeared to have no effect on homicide deterrence); Bijou Yang & David Lester, *The Deterrent Effect of Executions: A Meta-Analysis Thirty Years After Ehrlich*, 36 J. CRIM. JUST. 453, 458 (2008) (applying a meta-analysis to 104 studies on the death penalty and concluding that time-series and panel studies generally demonstrate a deterrent effect while cross-sectional studies did not); Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death*, 84 TEX. L. REV. 1803 (2006) (concluding that death-eligible homicides are not deterred by the death penalty); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 706 (2005) (arguing that because empirical evidence demonstrates a deterrent effect of the death penalty, the government has a moral obligation to impose the death penalty in order to prevent future killings); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163 (2004) (analyzing U.S. state-level death penalty data from 1978-97 demonstrating a deterrent effect preventing 14 murders per year); Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003) (providing empirical evidence that each execution results in 18 fewer murders).

²³ Casey Stubbs, *The Death Penalty Deterrence Myth: No Solid Evidence That Killing Stops the Killing*, HUFFINGTON POST (May 25, 2011), https://www.huffpost.com/entry/the-death-penalty-deterre_b_52622.

²⁴ John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 836 (2005).

substantially a few years later, and there were only 25 executions nationwide in 2018. Whether due to their cost, their controversial nature, the lowered homicide rate, the difficulty of securing lethal drugs, or other factors, executions are increasingly rare in this country.²⁵ It remains to be seen whether this is a temporary effect, a long-term trend, or the beginnings of a functional abolition of the penalty.

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Staring at the list of scheduled executions, I and the other clerks had been surprised by several things. There were far more scheduled executions than we had expected—generally several per month. It seemed as though nearly all of the executions were taking place in Texas and Louisiana, with a few from Alabama and other states sprinkled in.²⁶ We were assigned the cases on a rotating basis, our names written down in the margins across from the names of the inmates.

As the first execution drew near, the Clerk's office informed me of the prisoner's petition and sent me his application for a stay of execution. He did not claim innocence; the petition was based on procedural issues. There was no valid legal ground for granting it. There was no doctrinal reason to stay the execution. If it were up to her, Justice Ginsburg would abolish the death penalty, but she follows the law of the Court in resolving individual cases.²⁷ I made my recommendation accordingly.

²⁵ This trend may be partially offset in future years by an anticipated increase in federal executions. The Department of Justice recently reinstated the federal death penalty and set execution dates for five inmates on federal death row. Pete Williams & Daniel Arkin, *AG Barr orders reinstatement of the federal death penalty*, NBC News, July 25, 2019, <https://www.nbcnews.com/politics/justice-department/ag-barr-orders-reinstatement-federal-death-penalty-n1034451>. Still, the overall number of death sentences is likely to continue to decline. Federal executions are rare, with only three occurring since 1963. Public support for the death penalty is also on a long-term downward trajectory, albeit with an increase in recent years. See *id.*; J. Baxter Oliphant, *Public support for the death penalty ticks up*, Pew Research Center, June 11, 2018, <https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/>.

²⁶ Indeed, executions are regionally limited, and a large portion of them occur in Texas. Berman, *supra* note 16, at 877.

²⁷ *If I were queen, no death penalty*, CNN (Sept. 21, 2018),

The vote to deny the stay was unanimous. I relayed the Justice's vote to the Office of the Clerk and returned to my other work. The Court's involvement in the process was at an end. As the day wore on, I reminded myself that nothing I could have said or done would have changed the outcome of the case. I repeated this to myself many times.

The next morning, I came in through the employee's entrance and walked to my office. I reviewed cert petitions and drafted memos recommending that cases be denied or granted. Eventually, I got up to get some coffee from the cafeteria and to check my mailbox. The everyday stuff of working at the Court. I returned to my office and resumed working on a memo. A notification popped up on the screen. The execution was starting.

<https://www.cnn.com/videos/us/2018/09/21/ruth-bader-ginsburg-columbia-law-sot-vpx.cnn>.