THE YALE L. ROSENBERG MEMORIAL LECTURE

THE LAST EXECUTION: 
RETHINKING THE FUNDAMENTALS OF 
DEATH PENALTY LAW

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An earlier version of this Lecture was presented as the fifth annual Yale L. Rosenberg Memorial Lecture, delivered at the University of Houston Law Center on February 28, 2008. The Yale L. Rosenberg Memorial Fund was established to recognize and foster excellence at the University of Houston Law Center. Professor Yale Rosenberg was the holder of the A.A. White Professorship, and he exemplified such excellence in his scholarship and teaching. The Yale L. Rosenberg Memorial Lecture showcases academic distinction annually.

Nothing in my professional career has been more meaningful to me than being asked to give this Lecture. I am grateful to Irene Rosenberg for extending the invitation and to Ellen Marrus and Laura Oren for following it up. Yale Rosenberg was my friend. He was a great scholar. But the more important fact about him, in my judgment, is that he was a good and decent man—as thoroughly good a human being as I have known. I discussed his personality, and some of his work, in a prior issue of this journal. See David R. Dow, Our Prophet (In Memoriam: Yale Rosenberg), 39 HOUS. L. REV. 878 (2002).

For many years, my office was next door to Irene's and two doors down from Yale's. Whereas I had to put tissue in my ears not to hear Irene patiently answering students who constantly streamed by her office with questions, I had to lean forward to hear what Yale had to say. Yet it was always worth the effort. Yale and I had overlapping interests. He was interested in how Jewish law's treatment of certain issues illuminated contemporary analyses of those very same issues, and he was an expert on the law of habeas corpus. I do not know in which respect I was luckier: to have had Yale as a friend, or to have had him as a colleague and teacher.

The nervousness I felt giving a lecture named for this great man did not abate until after it was over, when Irene said to me, “Please put some footnotes in it and publish it.” For their willingness to permit me to do so, I am thankful to the editors of the Houston Law Review, especially Stephanie Cecere, the editor in chief. I also want to express my gratitude to Dean Ray Nimmer and Associate Dean Richard Alderman, who have supported this series so generously, and to my colleagues Ron Turner and Joe Sanders, both of whom tried, with uncertain success, to help me avoid major gaffes. Thanks, too, to Lillian Flurry, Lyla Berman, Sam Barker, and especially my friend (and Winona’s) Alex Kopatic.
Late in the morning on Thursday, February 21, 2008, my wife and I held Winona, our dog of nearly thirteen years, as she died. If you have ever been by my office here at the Law Center, you probably met Winona because if I was here, she was here. On a typical day, I suppose she and I spent around twenty hours or so in the same room. If you have ever had to make the decision to euthanize a pet, then you know what a brutally painful decision it is. But you also know that it is a decision inspired by love.

During many of my waking hours, I am a death penalty lawyer. I represent death row inmates in their appeals. Nearly all of my clients get executed, in a manner not altogether different from the way Winona died. In the week since Winona left us, as my wife and son and I have been mourning, I have found myself, from time to time, thinking about the family members my clients leave behind who mourn their loved ones. I do not want to overstate the parallels. My companion Winona was pure goodness. My clients, on the other hand, killed someone.

But that fact—that important distinction—underscores the issue I want to discuss this afternoon: What do executions tell us about ourselves? What does the death penalty reveal about our conception of justice? In Winona’s case, my wife and I may have made the decision a day too early, or a day too late, but if there is a God, I think she will forgive us for being well-meaning. We acted from kindness and from love. When we execute, however, we are not acting from love. Societies that execute do so because they think they are implementing justice. Today I want to examine several killings to see what they tell us about our sense of justice.

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Not quite two years ago, on March 25, 2006, a young mother named Nicole Spiers was bathing late at night with her husband. The fine lawyers I work with daily deserve the greatest thanks. Cassandra Jeu, Karen Dennison, Jared Tyler, and Frances Bourliot have provided immense support. So did Melissa Azadeh, who also managed to provide invaluable research assistance. I suppose I am the person who throws all the balls into the air, but it is these other lawyers who keep them from crashing to the ground.

Finally, as one can infer from the text, the week leading up to the lecture was an unusually difficult one for me personally, and for my family as well: my wife Katya, and our son Lincoln. As someone whose life as a death penalty lawyer involves constant loss, I am an expert in dealing with loss and its effects, and I can say with certainty that, in my case at any rate, it is possible only because of the woman with whom I am blessed to have built my life.
Their twin babies, less than a year old, were sleeping down the hall. To the neighbors and friends who knew them, the newlyweds seemed happy and in love. Nicole tilted her head under the running tap to rinse the shampoo from her hair. When she did, her husband, a veteran of the Iraq War named Walter Smith, pushed her head under the water and held her there until she drowned. He dried himself off, checked on the babies, and drove away. He called her cell phone and left a message. He came home the next day and pretended to find her. He was never suspected of a crime.¹

Twenty years before, fifteen hundred miles away, Marguerite Lucille Dixon, a fifty-three year old mother of seven grown children, was alone at her home in Hockley, Texas. One summer day, she met Michael Richard. Richard was what some people would call a career criminal. He first went to prison in 1978, when he was nineteen years old. After being paroled in 1981, he returned to prison in 1985, with a five-year sentence for theft and forgery. A year and a half later, he was released, and two months after that, he knocked on Marguerite Dixon’s door. He asked if a van parked on the street was for sale. Marguerite Dixon told him it was not, and he walked off, only to return several hours later. Marguerite Dixon died when Michael Richard shot her in the head with a .25 caliber gun. She appeared to have been sexually assaulted. Two televisions and the van Richard had inquired after were missing. Richard later sold them in Houston, to get cash to buy cocaine.²

The question I would like to examine this afternoon is this: Should we execute people like Walter Smith or Michael Richard? Is it moral to kill them? And if a jury of twelve men and women say yes, what are the roles and the responsibilities of the judges who must in time review that decision?

Often in law, the question of what is moral and the question of what is legal diverge. But that divergence is less frequent, and less severe, where the cruel and unusual punishments clause of the Eighth Amendment is concerned, for the clause has long been understood to embody our society’s so-called evolving standards of decency.³ And therefore, the question of whether it would be

¹. Deborah Sontag, *An Iraq Veteran’s Descent: A Prosecutor’s Hard Choice*, N.Y. TIMES, Jan. 20, 2008, at 1. All of the details of this crime and the involved personalities come from this article.
². The state court opinions containing the facts of the crime are unpublished. However, as one of the lawyers who represented Richard, all are within my personal knowledge.
³. *E.g.*, Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (“No static ‘test’ can exist by which courts determine whether conditions of confinement are cruel and unusual, for the
moral to execute Walter Smith or Michael Richard—or, indeed, anyone who commits murder—will be determined by many of the same factors that are germane to deciding whether it would be constitutional to do so.

* * * * *

In 1972, in the case of Furman v. Georgia, the Supreme Court declared the death penalty unconstitutional. As we now know, the Court’s action did not end capital punishment in America. Instead, it inspired legislatures in nearly two-thirds of the states to enact new death penalty laws that would comport with the Constitution. Figuring out exactly what was necessary in order to satisfy the Eighth Amendment was no easy matter following Furman. Nine separate opinions address the subject and, in the aggregate, occupy more than 230 pages in volume 408 of the U.S. Reports. Although there was no obviously perspicuous principle that lay at the core of the five separate concurring opinions, there was a single metaphor that did the work of a principle. That metaphor was contained in the final paragraph of Justice Stewart’s opinion. Voting with the majority to strike the death penalty down, Justice Stewart wrote:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. . . . But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the

Eighth Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’” (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))).

4. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) (“The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”).


6. Furman, 408 U.S. at 240 (Douglas, J., concurring); id. at 257 (Brennan, J., concurring); id. at 306 (Stewart, J., concurring); id. at 310 (White, J., concurring); id. at 314 (Marshall, J., concurring); id. at 375 (Burger, C.J., dissenting); id. at 405 (Blackmun, J., dissenting); id. at 414 (Powell, J., dissenting); id. at 465 (Rehnquist, J., dissenting).
infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.\footnote{Id. at 309–10 (Stewart, J., concurring) (citations omitted).}

In his concurring opinion, Justice Douglas used the word "arbitrary," or some related cognate, a dozen or so times.\footnote{Id. at 242–56 (Douglas, J., concurring).} Justice Stewart did not use the word even once. Yet already at the time of Furman, it was understood that the metaphor Stewart employed—being struck by lightning—was meant to describe the meaning of arbitrariness.\footnote{See, e.g., id. at 295 (Brennan, J. concurring) ("Although it is difficult to imagine what further facts would be necessary in order to prove that death is, as my Brother Stewart puts it, 'wantonly and . . . freakishly' inflicted, I need not conclude that arbitrary infliction is patently obvious. I am not considering this punishment by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.").} Further, when the Court resurrected the death penalty in Gregg v. Georgia, four years after Furman, Justice Stewart’s plurality opinion observed that the Justices who decided Furman regarded the lightning metaphor as containing the central legal principle.\footnote{Gregg v. Georgia, 428 U.S. 153, 188 & n.36 (1976) ("Furman held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").}

Since 1976, therefore, the concept of arbitrariness has resided at the very core of modern death penalty law. Ordinarily, arbitrariness is expressed as a statistical phenomenon, rather than as a feature of a given death sentence. That is, the law is concerned with whether the procedures employed by the state as part of its death penalty machinery create a substantial risk that a given death sentence will be arbitrary, rather than whether a particular sentence is arbitrary. Nevertheless, regardless of whether the concept of arbitrariness is tied to the process according to which the jury operates, or to the jury’s actual verdict, my thesis today is that this focus on arbitrariness is both misleading and obfuscatory. It is misleading because it misrepresents what juries in capital cases actually do; it is obfuscatory because it distracts from what courts of appeals in capital cases ought to do.

I will argue that capital juries may make mistakes, but they do not act arbitrarily, as that term is understood in law in general, and in capital punishment law in particular. I will argue further, however, that the system is indeed rife with arbitrariness. Yet the arbitrariness that so permeates the death
penalty regime is not the result of juries, but instead the result of legislatures and, especially, judges. I will argue, in short, that jurors in capital cases may err, but their mistakes are, typically, honest ones. When judges err, however, their errors exhibit profound and consistent arbitrariness. Consequently, insofar as the Supreme Court has held that an arbitrary sentence is an unconstitutional sentence, the implication of my thesis is that the appellate courts are, where the death penalty is concerned, routinely lawless.

* * * * *

My starting point, therefore, is the doctrinal core of the Eighth Amendment: the concept of arbitrariness.

The dictionary defines arbitrary as “based on . . . random choice”¹¹ or as “based on chance rather than . . . reason.”¹² Justice White’s opinion in Furman evoked this meaning when he explained that a constitutional death penalty law would be one that provides a meaningful basis for explaining why the death penalty is imposed in certain cases but not in others.¹³ When no such basis is apparent, the sentence is, as a matter of definition, arbitrary and capricious.¹⁴ One could cite literally scores of death penalty cases for this proposition. Typical is Lewis v. Jeffers, where the Court held that the state must “channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’”¹⁵ Or, as Justice Brennan observed in McCleskey v. Kemp:

[C]oncern for arbitrariness focuses on the rationality of the system as a whole, and . . . a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational.¹⁶

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11. OXFORD ENGLISH REFERENCE DICTIONARY 67 (2d ed. 1995).
13. Furman, 408 U.S. at 313 (White, J., concurring).
14. See, e.g., Gregg, 428 U.S. at 189 (stating that a sentencing body’s discretion must be “suitably directed and limited” to avoid arbitrary sentences).
Thus, the early death penalty cases embraced the notion that if a basis for an action is not apparent, the action is arbitrary. Put differently, the core principle of Eighth Amendment doctrine holds that if we cannot tell why someone was sent to death row, his sentence is arbitrary. The centrality of this concept of arbitrariness to contemporary death penalty doctrine is unfortunate, for the cases imply a definition of arbitrary that is not, in fact, what arbitrary actually means. Apples fell from trees to earth before Newton linked the action to gravity. Although the force of gravity had not been defined, the actions gravity caused were not arbitrary. More generally, that we lack a theory to explain an occurrence does not dictate that the occurrence is arbitrary. There is, in short, much we do not know.

Arbitrary does not mean the process that leads to a consequence is opaque; rather, it means the process that leads to a consequence is irrational. This understanding of the meaning of arbitrary is reflected in dozens of cases, and it is perhaps best captured by a metaphor suggested by Justice Souter in *Nixon v. United States*. Walter Nixon, a federal district court judge in Mississippi, was convicted of lying to a grand jury that was investigating allegations that he had taken money from a businessman in exchange for asking a district attorney to drop

17. *See, e.g.*, id. The attention in the cases to “system[s]” suggests that if the sentencing regime does not allow us to know the basis for a sentence, then the sentence is arbitrary. But, under all the statutes upheld in *Gregg* and since, habeas petitioners who prevail on claims of arbitrariness do so in an as-applied context (as opposed to prevailing by virtue of a facial challenge). This fact entails that the courts that struck down the inmates’ sentences (whether the Supreme Court, a lower federal court, or a state court) did so out of a concern about the reason the death sentence was imposed in that particular case.

18. It is bad enough that many, even most, of the cases use “arbitrary” in a peculiar, if not erroneous, way. It is worse still that the cases reflect various uses of the word. For example, arbitrary sometimes refers to a particular sentence that is inaccurate or unreliable. *See, e.g.*, Beard v. Banks, 542 U.S. 406, 419–20 (2004) (describing two “troubling situations” in which the sentences given were probably inaccurate or unreliable, and labeling them arbitrary). This use of the term approaches what I suggest should be the central judicial inquiry when death sentences are reviewed on appeal.

19. *E.g.*, Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 364 (1998) (stating that an NLRB decision regarding polling of union members was “puzzling” but not irrational; because the decision was not irrational, it was not arbitrary). Similarly, in *Pacific Mutual Life Insurance Co. v. Haslip*, the Court examined the constitutionality of a jury instruction relating to the imposition of punitive damages. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 44–45 (1991) (O’Connor, J., dissenting). Justice O’Connor found the instruction impermissible because it told the jury to exercise discretion without identifying any criteria on which the exercise of that discretion had to be based. *Id.* As a result, according to Justice O’Connor, the instruction “invite[d] individual jurors to rely upon emotion, bias, and personal predilections of every sort.” *Id.* at 45.

charges against the businessman’s son. Nixon refused to resign, even after being sentenced to prison. He continued to draw his federal salary while serving his sentence. Congress came to the rescue. The House of Representatives returned three articles of impeachment, and the Senate convicted him. Nixon sued, arguing that although the Constitution gave the Senate the power to try him, the procedure used by the Senate was not in fact a trial, principally because the evidence was heard before a committee rather than before the Senate as a whole. The Supreme Court eventually ruled that the issue was a nonjusticiable political question. Justice Souter concurred separately. He agreed with the majority’s basic premise that the Senate’s power to “try” Judge Nixon did not require the Senate to conform to any specified procedure; that is, a broad range of procedures could constitute a trial. Justice Souter wrote separately, however, to emphasize that the Senate’s discretion was not infinite. If, he concluded, the Senate were to determine the fate of someone like Judge Nixon by tossing a coin, judicial intervention would be warranted.

The metaphor of flipping a coin captures the true meaning of arbitrary in a way that Justice Stewart’s lightning metaphor does not. A sentence is arbitrary if it is based on a coin flip or on no reason at all—if it is based on chance. Consequently, if jurors were flipping coins in the pre-\textit{Furman} era, or sentencing defendants to death for no reason, then those death sentences were arbitrary. But is there any reason to suspect that is what jurors were doing? Such a view is inconsistent with everything we know about jury behavior.

\begin{itemize}
\item \textbf{21.} See U.S. CONST. art. I, § 3, cl. 6. (“The Senate shall have the sole Power to try all Impeachments.”).
\item \textbf{22.} Nixon, 506 U.S. at 226–30.
\item \textbf{23.} Id. at 253–54 (Souter, J., concurring).
\item \textbf{24.} We might not immediately know why one golfer rather than another gets struck by lightning while teeing off during a thunderstorm, but there is in fact a physical explanation. See MIIRIAM RORIG ET AL., PREDICTING LIGHTNING RISK (2005), http://jfsp.nifc.gov/projects/01-1-6-08/01-1-6-08_final_report.pdf (providing scientific analysis to predict where lightning may strike). Not so for whether the coin lands heads up. Further, the coin metaphor has been invoked in at least one capital case. See Zant v. Stephens, 462 U.S. 862, 918 n.8 (1983) (Marshall, J., dissenting).
\item \textbf{25.} See generally NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 141–45 (2007) (explaining the different decision processes that juries go through to reach a verdict). I should add that my colleague Joe Sanders has stressed to me that, so far as he is aware, every study of jury behavior has assumed jurors (as distinguished from “the jury”) do in fact have reasons for acting (whether good or bad), and so, in this sense, whether jurors ever act with no reasons has not been examined as a particular phenomenon. That’s a fair point. Still, it seems to me a social scientist studying juror behavior would have noticed if the subjects were acting without reasons; so, I suppose the
commonly unconstitutional not because they are based on no reason, but because they are based on an impermissible, or illegitimate, reason. At the time of Furman, the various state laws were so broad in the discretion they allowed the sentencer that it is highly probable that there was in fact no single principle that could explain all the cases—i.e., why some cases resulted in a death sentence while others did not. But the absence of a unifying principle is more likely the result of the influence of impermissible factors than coin flips. For example, it is highly probable, as Justice Marshall stressed, that the value of equality was routinely violated in the pre-Furman era, with blacks being disproportionately sentenced to death as compared to whites. Ironically, though, once we can identify race as explaining much of the “freakish” distribution that Justice Stewart apprehended, the distribution ceases to be arbitrary—for it was based on a reason. It is just that the reason was abhorrent.

Juries can have good reasons, bad reasons, or no reasons for their actions. If they have no reasons, their action is arbitrary. Yet, as I have said, there is not a single comprehensive study of jury behavior that supports the conclusion that juries act without reasons. Rather, they act on the basis of misapprehensions, and—like all the rest of us—on the basis of insidious, unchallenged, even unconscious, assumptions. But these latter factors are bad reasons, not no reasons, and the role of the courts should be ferreting out those impermissible motivations, rather than looking for coin flips that never took place.26

I want to say a few words about the men who murdered Nicole Spiers and Marguerite Dixon. Then I am going to ask you to go through a mental exercise with me.

Let me begin with the man who drowned Nicole. His name, as I said, was Walter Rollo Smith. He hailed from Utah, where he grew up a devout Mormon. In high school, he played in the band, sang in the choir, and was active in the math and chess clubs. He

more accurate way to articulate the point I am trying to make is no one studying juror behavior has reported that jurors sometimes act without reasons.

26. Consistent with my observation above that the term “arbitrary” is used to describe a broad range of phenomena, the word is also used at times to describe death sentences that are imposed for bad reasons (as distinguished from no reasons). See, e.g., Ring v. Arizona, 536 U.S. 584, 617 (2002) (Breyer, J., concurring) (suggesting that where race of victim or socioeconomic status of offender influences imposition of death sentence, sentence is therefore arbitrary). Of course, this is not the only, or even the most common, use of the term in death penalty law.
neither drank nor smoked. His goal was to go abroad to serve a mission for the Mormon Church. But for some reason, on career day at his high school, Smith gravitated toward the Marine Corps recruiting booth, and in early 2000—before the surge of patriotism after 9/11 made it popular to do so—Smith headed off to boot camp. He scored in the ninety-ninth percentile of the aptitude tests administered by the armed forces. He told his bunkmate, a young man named Christopher Quinones, that he wanted to marry his high school sweetheart and go on a mission.

Instead, Smith ended up in one of the fiercest firefights of the Iraq War. It was April 8, 2003. Smith and his battalion, nicknamed the Saints and Sinners, entered Baghdad on the opening days of the war. Setting up a blockade near the headquarters of the Republican Guard, they were caught in a fusillade of machine gun fire and rocket propelled grenades. As Walter Smith acknowledged, he and his cohorts were firing on women and children because, in Smith’s words, “it was them or us.”

Later that year, Smith returned home. At the time, no one knew precisely what effect the dizzying combat had on Smith. Like all returning veterans, Smith filled out a questionnaire about his mental health, but no officers or doctors followed up. The Marine Corps sent him to Quantico, Virginia, for a marksmanship training course. There one day, shooting at paper targets on the rifle range, Smith began to sob. Recalling the moment, he said he was seeing images from Baghdad: cars rushing toward the checkpoint, dust and chaos, dead and wounded comrades, women and children screaming and dying. He cried harder and harder until, again in Smith’s words, he was “bawling on the rifle range, which marines just do not do.”

All these facts would be secrets known only to Smith, and perhaps to his friends and loved ones, except for what happened next. The Marines discharged him. Smith returned to Pleasant Grove, Utah, bought a small house in need of repair, and went to work at Wal-Mart. In the fall of 2004, he met Nicole Spiers. The first time they slept together, Nicole got pregnant. Smith simply moved on. Nicole gave birth to twins in May 2005, and Smith had no clue that he was now a father.

When the twins were seven months old, Smith visited Nicole’s page on MySpace, to see how she was doing. For the first time, he saw pictures of his kids. He called her, the two got back together, and moved into an apartment. They both worked at Wal-Mart. Their friends said that they never fought.
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Then, late at night on that dreadful day, Smith pushed his wife under the water and held her there until she drowned. When police arrived the next day, after Smith had dialed 9-1-1, pretending to have just found Nicole’s dead body, no one asked him whether he had killed Nicole. There was a bottle of painkillers nearby. Nicole had undergone a root canal two months before. Authorities concluded that she had committed suicide or accidentally drowned.

The following September, Smith became engaged to a single mother named Michelle Zeller. The two moved in together. In December, he left home to run an errand and never returned. He called Zeller to say that he could not endure the thoughts in his head. She told him to find help. He drove to the V.A. hospital and told a counselor that he had killed Nicole.

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If you believe, as I do, that murder is the ugliest of crimes, that murders range from heinous and cruel to unspeakably detestable and vile, then you may also believe, as I do, that these facts about Walter Smith do not excuse what he did. There is no excuse for murder. Yet these facts help us understand the etiology of what happened, they help us understand how a young man who was literally a choirboy ended up one night committing the most brutal of all crimes. It is easy for us to see Walter Smith as a human being who somehow became broken and did a horrible thing, rather than seeing him simply as an inhuman monster, because we got to see him as a human being first, before he did something monstrous. Thankfully not every Iraq War veteran suffering from PTSD kills someone, but some do.27 And, although nothing can justify the senseless, brutal killing of Nicole Spiers, we think somehow we can explain it, how it happened. The judge and prosecutor saw it that way, too. They accepted Walter Smith’s plea of manslaughter, which resulted in a sentence of one to fifteen years.

But what if the murderer never has a chance to develop as a human being? What if there is not even a single characteristic in the murderer to which we can personally relate? I want to turn in a moment to the biography of our other murderer, Michael

27. See Deborah Sontag & Lizette Alvarez, Across America, Deadly Echoes of Foreign Battles, N.Y. TIMES, Jan. 13, 2008, at 1. Indeed, many do. A New York Times investigation identified 121 cases where veterans of Iraq or Afghanistan have been charged with or have committed homicides after returning from war due to posttraumatic stress disorder (PTSD). Id.
Richard. But before I do, I would like all of us here to perform a mental exercise.

Close your eyes. Now, if you are a parent, I want you to concentrate on a wonderful moment with your child or children. It can be anything. Your daughter’s first bath. Your son’s graduation from college. A first haircut or first steps, or a wedding. Anything at all that makes you smile and that captures your love. If you are not a parent, then concentrate on a wonderful moment with either your mom or your dad, or your dog or your cat, or your closest friend. Once you have visualized the image, open your eyes. On the table in front of you is a piece of paper. Please draw the image that you imagined—the mental picture you conjured up as signifying love. What did you draw? I drew a picture of my son, Lincoln, sleeping. My wife and I like to stand arm in arm, late at night, and watch him sleep.28

Here is the key fact I want you to know about the man who murdered Marguerite Dixon: Whatever it was you envisioned, whatever you have drawn on that piece of paper in front of you, that image never formed a part of Michael Richard’s life. We intuitively understand what happened to Walter Smith. A choir boy goes off to war and comes home broken, and eventually he snaps. Michael Richard was broken, too, but he was broken before we knew him. He was broken at home, almost as soon as he was born. He was broken because our society, which is so willing to execute, is also so reluctant to remove children from these environments that break them. In her compelling novel Helpless, Barbara Gowdy talks about human beings whose lives, as she puts it, “hang . . . by the thread of a single human attachment.”29 Michael Richard’s life had zero threads. His case exemplifies the biographies of the men we execute in the U.S., and the way the judicial system treats them.

Michael Richard was born prematurely, the youngest of four children. He was hospitalized at least once a year for the first six years of his life. His father abused alcohol and drugs and routinely beat his mother. Richard’s father broke his mother’s nose, her ribs, and her foot. He smashed her skull with the butt of a gun. Michael Richard would try to protect his mother, to stand between his abusive father and her, and his father would

28. It came as no surprise to me that my wife and I drew the same image—albeit with dramatically different levels of artistic skill. After the Rosenberg Lecture, Alex Kopatic collected the drawings for me. Nearly all of them are conventional scenes: parents watching a child play little league baseball; a parent and child riding a bike, or fishing, or sitting on swings. Several of the drawings are shown on the following pages.
29. BARBARA GOWDY, HELPLESS 222 (2007).
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beat him—with leather belts, bullwhips, and a cattle prod. When Richard was only five, his mother had a nervous breakdown and was hospitalized for three months. She has been under psychiatric care ever since. Richard’s father accused him of having sex with his mother. He sexually abused Richard’s sisters, once firing a shotgun at one of the young girls when she attempted to refuse his advances. When he turned fourteen, Richard left home, never to return. His brother and two sisters had already run away. The brother was an unemployed alcoholic; the two girls were under psychiatric care.

Our society abandoned Michael Richard and forced him to run away to try to save himself, just as we abandon thousands of Michael Richards every year. Somewhere between all and nearly all of my own clients have been similarly abandoned. I do not believe that a civilized society ought to execute. I do believe that any society, one that executes or one that does not, has an obligation to take children away from people like those Michael Richard was unfortunate enough to have as parents.

In 2002, in the case of Atkins v. Virginia, the Supreme Court held that the Eighth Amendment prohibits the states from executing offenders who are mentally retarded. The Court embraced the definition of mental retardation as promulgated by the organization then known as the AAMR, the American Association on Mental Retardation. Under AAMR guidelines, an IQ of seventy or below, plus or minus five points, is a major indicator of mental retardation.

Michael Richard made it to ninth grade, earning Ds and Fs. He could read words, but without comprehension. His IQ, as measured by both defense experts and experts for the prosecution, was sixty-four. But Richard’s trial took place in 1987, fifteen years before the Supreme Court decided Atkins. If his lawyers were going to argue that Richard’s mental retardation prevented the state from executing him, they were going to have to make that argument on appeal.

I will spare you most of the details of that appeal and cut straight to the bottom line: The well-meaning lawyer appointed to represent Richard in his federal appeal neglected to include in his court pleadings any mention of Richard’s IQ—the most

31. Id. at 308 n.3, 309 n.5, 313 n.8 (explaining the AAMR guidelines for determining mental retardation based on IQ).
salient indicator of his mental retardation. It was no ordinary oversight. The lawyer representing Richard had developed Parkinson’s disease. He was aware of the impact the ailment was having on his ability to practice law, so he asked the district court for permission to withdraw. The court believed it lacked authority to permit him to do so, and thus, it transferred the motion to the court of appeals. After some time had passed and the court of appeals had not ruled, the lawyer called the clerk’s office. He learned that the motion had been lost, either in transit or in the court of appeals. But the statute of limitations for raising the claim of mental retardation was by this point about to expire.\(^{33}\) The lawyer hurriedly filed the motion that neglected to include the IQ score. The court later allowed the lawyer to withdraw, but not until after he filed the papers without mentioning the IQ score. The court declined to appoint replacement counsel, and volunteer lawyers took up Richard’s appeal.

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In his opinion in *Furman*, Justice Stewart referred to the opinions of several of his colleagues—including, most prominently, the opinion of Justice Marshall that demonstrated the role race plays in capital sentencing.\(^{34}\) Justice Marshall apprehended clearly in 1972 what it took another decade and a half to prove: race matters, and matters a lot. Justice Marshall focused primarily on the overrepresentation of blacks among the people actually executed:

A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro... 455 persons, including 48 whites and 405 Negroes, were executed for rape... Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.\(^{35}\)

We now know the evidence of racial discrimination is substantial, and we also know the race of the victim matters even more than the race of the assailant. Blacks and whites are the

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34. *Furman* v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (noting his “concurring Brothers’” determination that race governed who would and who would not receive the death penalty).
35. *Id.* at 364 (Marshall, J., concurring) (citations omitted).
victims of murder in roughly equal number, but more than 80% of the people who have been executed in the U.S. were executed for killing someone white. The inescapable fact is this: If you are a prosecutor who seeks the death penalty, if you are a judge who upholds death sentences, if you are simply someone who supports the death penalty, then you are participating in perpetuating a regime that values white life more than it values nonwhite life. You are helping to maintain a racist institution. In every jurisdiction where data have been collected, someone who kills a white victim is approximately four times more likely to get sentenced to death than someone who kills a nonwhite. And, when a white murderer kills a black victim, he will almost never be sentenced to death. Since executions resumed in 1977, when a Utah firing squad shot Gary Gilmore, there have been 1,119 executions in the U.S. Of those, 22 involve a white murderer with a black victim: 22 out of 1,119. But even that figure is inflated by more than 30% because it includes people like Timothy McVeigh, who happened to kill some blacks, but as part of a crime that also included victims who were white. Once we subtract from the 22 the murderers who killed a black victim and at least one white victim during the same crime, we are left with 15 white murderers who have been executed for killing a black victim.

Closer to home, Texas has executed 413 murderers since the death penalty resumed. Exactly one—Larry Hayes, who was executed in September 2003—was a white murderer whose

38. Deborah Fins, NAACP Legal Def. & Educ. Fund, Inc., Death Row U.S.A. 11 (Winter 2008). Of all death row inmates since 1976, only 15 have been put to death for killing a black person without killing another person of another race. Id. That makes up 1.36% of the executed prisoners. Id.
victim was black. And, Hayes deserves to have an asterisk next to his name because he actually murdered two people during the course of his crime, one of whom was white. Of all the people executed in Texas—black, white, yellow, and brown—308 of them killed someone white and only 44 killed someone black. To date, the nation's leading execution chamber has not had even one white murderer who killed a black victim alone. As astonishing, in addition to the 413 executions Texas has carried out, and an additional 362 still awaiting execution, and another 255 who have been removed from death row after being sentenced to death, Texas's death row did not have on it even a single white person who was sent there for murdering a black victim until 2 of the 3 white men who chained James Byrd to the back of a pickup truck in Jasper, Texas, and dragged him to death were sentenced to death themselves. Those two white men arrived on death row in 1999.

Michael Richard's case fell into this category where racism is most pronounced: a black man kills a white woman after sexually abusing her. Data like these are often cited to support the common assertion that the death penalty is arbitrary. But arbitrariness, strictly speaking, is not the problem. We cannot infer racism from examining only the behavior of Richard's jury. He murdered someone, and a rational juror could have nonracist reasons for sentencing him to death. It is only when we take into consideration the entire spectrum of cases where the death penalty has been applied that we can begin to understand the role of racism in the system.

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43. Searchable Database of Executions, supra note 40 (retrieve data by inputting “white” in “Race of Person Executed” field, “black” in “Race of Victim” field, “Texas” in “state” field, and clicking “Get Info” button).

44. James Kimberly, Killer Who Dropped Appeals Set to Die Tonight, HOUSTON CHRON., Sept. 10, 2003, at 19A (discussing Hayes's crimes, which took the lives of two victims); see also Searchable Database of Executions, supra note 40 (retrieve data by inputting “white” in “Race of Person Executed” field, “black” in “Race of Victim” field, and “Texas” in “State” field, and clicking “Get Info” button) (showing that Hayes had two victims: one black and one white).

45. Searchable Database of Executions, supra note 40 (retrieve data by inputting “black” in “Race of Victim” field and clicking “Get Info” button); Id. (retrieve data by inputting “white” in “Race of Victim” field and clicking “Get Info” button).


47. Dow, supra note 37, at 194. A third defendant was sentenced to life after a psychologist testified that he would not be dangerous in the future in part because he is white. See Joyce King, Hate Crime: The Story of a Dragging in Jasper, Texas 180–81, 198 (2002) (stating the defendant will be eligible for parole when he is sixty-four years old).
sentence is available, and where death sentences are returned, that the racist effects of our death penalty regime become apparent. The responsibility for addressing this phenomenon therefore falls to the federal courts, especially the courts of appeals. Those courts, alas, do not do their job of setting aside death sentences where it appears that an impermissible or illegitimate factor has influenced the sentencing decision. There is stark evidence of illegitimacy in the legal system, but it results primarily from judicial indifference, rather than juror malice.

To underscore my claim that juries do not ordinarily act arbitrarily, I want to say a few words about what jurors in a capital case do. Having found the defendant guilty of a death-eligible offense at the so-called guilt phase of the capital trial, the jurors at the sentencing phase hear two kinds of evidence: aggravating evidence, which is introduced by the state to support a death penalty, and mitigating evidence, which is introduced by the defense to support a lesser sentence. All sorts of bogus aggravating evidence goes to the jury. For example, in Texas, the determinative aggravating factor is whether the jury believes that the defendant will be dangerous in the future. More than two decades ago, the Supreme Court ruled that it is permissible for prosecutors to call as expert witnesses psychologists or psychiatrists who will opine about whether a defendant is likely to be a future danger. Yet, we now know that these predictions are wrong somewhere between 90% and 99% of the time. In Texas, in other words, juries send defendants to death not only on the basis of something they have not yet done, but something the data indicate they will never do. These jurors are not flipping coins; they are simply radically misinformed.

One of the problems with not knowing something, however, is often we also do not know what we do not know. The good news for you is that if you are called upon to serve on a capital jury, it is the only time you will be so called. The reason is simple. If you are on a capital jury panel a second time, the prosecutor and the defense lawyer are going to find out what happened to the first defendant you sat in judgment over. If you sentenced him to death, the defense lawyer is going to remove you; if you sentenced him to life, the prosecutor will strike you. Jurors in a capital case learn a great deal about one murder, but that is probably the only murder they know very much about. If the

49. TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b)(1) (Vernon 2006).
51. Dow, supra note 37, at 184–85.
central objective of the modern capital punishment system is to reserve the death penalty for the so-called “worst of the worst,” it is hard to achieve the goal when the only murder and the only murderer the jurors know about is the one in front of them.

Instead of thinking about arbitrariness, therefore, we ought to focus on whether the jury paid sufficient attention to relevant evidence, and properly ignored irrelevant facts. We ought to ask whether, measured against our evolved standards of decency, this particular murderer ought to be executed. Whether a defendant is mentally retarded, whether his moral sensibilities were damaged, whether he had mental illness, whether he is remorseful—all these are facts the jury must consider. If the court of appeals believes that the jury did not do so, or that it improperly weighed evidence in any of these categories, then the court of appeals ought to fix it. In contrast, whether the defendant is white or black, whether the victim was white or black, whether the defendant is homosexual or homophobic, whether the victim was rich or poor, are all irrelevant, and if a court of appeals believes any illegitimate factors, like these, have influenced the jury’s verdict, then again, the court of appeals ought to fix it.

Juries make mistakes, but they are not arbitrary. They may neglect to consider evidence that they are required to consider, or they may give weight to evidence that they are supposed to ignore. But they do not flip coins. The function of judicial review, therefore, ought to be, at least in part, insuring that juries considered appropriate evidence and ignored inappropriate evidence. But that is not what they do. They ask whether the jury flipped a coin, or whether the system allows coin flipping, because they are focused narrowly on arbitrariness. Yet because juries do not flip coins, death sentences like Michael Richard’s—even if consistent with the demonstration of the effect of racism, even if in violation of the prohibition against executing the mentally retarded, even if utterly at odds with our contemporary sense of decency—are routinely upheld on appeal.

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I am confident that no coin flipping took place among the twelve jurors who sent Michael Richard to death row. The same cannot be said for the federal court that permitted his execution.

to proceed. What other than flipping a coin is it when whether an inmate’s compelling evidence of mental retardation is placed before the federal court depends on whether the inmate’s lawyer is plagued by Parkinson’s disease? And there was one coin flip more.\footnote{The fact that coin flips are a regular phenomenon in the courts of appeals does not make them more acceptable. I have elsewhere written at length about an especially egregious coin flip, when the court of appeals elected to take no action in the case of a death row inmate whose execution was scheduled for that very evening. See David R. Dow et al., The Extraordinary Execution of Billy Vickers, The Banality of Death, and the Demise of Post-Conviction Review, 13 WM. & MARY BILL RTS. J. 521, 529–30 (2004) (discussing Vickers’s case, in which the Fifth Circuit took no action on a motion for en banc review in the case of a looming execution).}

On the morning of September 25, 2007, the Supreme Court agreed to hear the case of \textit{Baze v. Rees}.\footnote{Baze v. Rees, 128 S. Ct. 34, 34 (2007) (mem.).} Baze is a death row inmate in Kentucky who argued that the three-drug lethal injection cocktail the state intends to use to execute him constitutes cruel and unusual punishment by creating a significant risk that the inmate will experience excruciating pain during the course of the execution.\footnote{Baze v. Rees, 128 S. Ct. 1520, 1528–29 (2008). In his opinion (one of seven issued), Chief Justice Roberts announced the judgment of the Court that “petitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment.” \textit{Id.} at 1526.} The details of the lethal injection litigation are beyond the scope of my present talk. There are, however, two details I want to mention. The first is that the Eighth Amendment, while allowing the states to execute its citizens, forbids them from inflicting torture.\footnote{See, e.g., Nelson v. Campbell, 541 U.S. 637, 644–45 (2004) (comparing an unnecessarily painful execution to other instances of “unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment” (quoting \textit{Estelle v. Gamble}, 429 U.S. 97, 104 (1976))).} The State of Texas may kill my clients, but it cannot kill them by chopping off a limb at a time. The second is that challenges to lethal injection have been part of a death penalty lawyer’s arsenal for many years. Up until last September, however, the Supreme Court had shown no interest in these challenges, so the Court’s decision to hear the Kentucky case caught many of us in the death penalty community by surprise.

September 25 was a Tuesday. Michael Richard was one of two people scheduled to be executed in Texas that week. The other was Carlton Turner, who was set to die on Thursday the 27th. In addition, a Honduran national named Heliberto Chi was scheduled for execution in Texas the following Wednesday, October 3. It was going to be a busy week in the Texas death
As many of you probably already know, we were unable to get an appeal filed for Michael Richard before the state court closed at 5 o’clock. Although our documents were ready by 5:20, the court declined to stay open late so that we could file them. As a result, Richard was executed at around 7:45 that evening.

I said “as a result.” That locution implies that had we gotten an appeal filed for him, Michael Richard would still be alive today. The basis for my saying that is the following: On Thursday the 27th, we got a stay from the Supreme Court for Carlton Turner. That same day, the Governor of Alabama stayed the execution of Thomas Arthur. On Tuesday, October 2, a day before the scheduled execution, we got a stay from the state court for Heliberto Chi. On October 11, the Arizona Supreme Court stayed the execution of Jeffrey Landrigan. That same day, the Eighth Circuit stayed the execution of Arkansas murderer Jack Jones, and the Supreme Court declined to lift it. On October 15, the Nevada Supreme Court stayed the execution of William Castillo, who had attempted to waive his appeals. On October 17, the Supreme Court stayed the execution of Virginia death row inmate Christopher Emmet, after the U.S. Court of Appeals for the Fourth Circuit refused to do so. On October 18, the Georgia Supreme Court stayed the execution of Jack Alderman, the nation’s longest serving death row inmate (Alderman has resided on death row since 1974, when he killed his wife). On

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57. I direct the litigation at an organization called the Texas Defender Service (TDS), which provides direct representation and consulting in death penalty cases. Lawyers at TDS were representing all three death row inmates: Richard, Turner, and Chi.


October 22, the Georgia Supreme Court stayed the execution of Curtis Osborne.\(^\text{67}\) On October 24, the Eleventh Circuit stayed the execution of Daniel Siebert, a serial killer on death row in Alabama, who was convicted of three murders and has confessed to five more.\(^\text{68}\) On October 30, the Supreme Court stayed the execution of Mississippi death row inmate Earl Berry.\(^\text{69}\) The same day, a federal district judge stayed the execution of Arkansas death row inmate Don Davis.\(^\text{70}\) On October 31, the Sixth Circuit stayed the execution of Edward Harbison, on death row in Tennessee.\(^\text{71}\) On November 15, the Supreme Court stayed the execution of Florida death row inmate Mark Schwab, after the Eleventh Circuit had lifted a stay entered by the federal district court.\(^\text{72}\) The Supreme Court heard oral argument in \textit{Baze} on Monday, January 7, 2008.\(^\text{73}\) On January 31, the Court issued a stay of execution for Alabama death row inmate James Callahan.\(^\text{74}\)

Between the execution of Michael Richard on September 25, and today, February 28, approximately one death row inmate per week has had his execution stayed or his execution date withdrawn.\(^\text{75}\) Michael Richard was the last execution.

Last Term, dissenting from the Court’s grant of relief to a death row inmate from Texas, Justice Scalia expressed the view that the “Court’s vacillating pronouncements have produced grossly inequitable treatment of those on death row.”\(^\text{76}\) I do not agree with very much of what Justice Scalia has to say, especially in death penalty cases, but I could hardly agree more


\(^{69}\) Berry v. Epps, 128 S. Ct. 531, 531 (2007) (mem.).


\(^{75}\) Death Penalty Information Center, \textit{supra} note 74.

with this statement. Reflecting on the fact that certain death row inmates win while others, identically situated, go to their deaths, Justice Scalia said: “This is not justice. It is caprice.”

Michael Richard, a deeply broken, mentally retarded death row inmate, whose lawyers tried and failed to get either a state court or a federal court to stay his execution by challenging the legality of the state’s lethal injection cocktail after those same courts ignored the overwhelming evidence of his mental retardation, was executed approximately ten hours after the Supreme Court agreed to review the very protocol that was used to inflict his death. Justice Scalia is the Circuit Justice for Texas. When we filed a stay motion for Michael Richard at six o’clock on September 25 as Richard sat in the holding cell outside the execution chamber, it went first to Justice Scalia. I think he is right to complain about caprice. There is plenty of caprice to go around.

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Executions have now resumed in America. We have resumed executing people like Michael Richard: people who killed whites, people who received inadequate representation, people whose legal claims have been brushed aside by the courts, people who have been broken at home by parents who inflict unimaginable abuse—people whom we literally cannot understand because, thankfully, our own lives, unlike theirs, do not hang by the merest single thread.

There is no excuse for murder, whether it is Michael Richard’s murder of Marguerite Dixon, or Walter Smith’s murder of Nicole Spiers, or the murders committed by any of the more than fifteen murderers whose lives were extended by the Supreme Court’s decision to examine the constitutionality of lethal injection. But we do not bring back innocent victims or make society safer; we do not occupy the moral high ground when we execute men to whose lives our society has been utterly indifferent up until the very moment that those same men enter the neighborhoods where we live and commit an unforgivable offense that proves just how broken they are.

77. Id.
78. I have suggested above that our society ought to remove children from abusive homes. In addition, the criminal justice system should establish what is essentially a behind-bars community college system, including technical schools, for all inmates sentenced to any term less than life. The way to reduce all types of crime, including murder, is for inmates to be employable upon release.