2017]

abolish the death penalty.[24] In words as passionate, powerful, true, and damning today as they were fifty-seven years ago, Brown said:

> I believe the death penalty constitutes an affront to human dignity and brutalizes and degrades society. I have reached this momentous resolution after sixteen years of careful, intimate and personal experience with the application of the death penalty in this state. . . .
>
> [T]he naked, simple fact is that the death penalty has been a gross failure. Beyond its horror and incivility, it has neither protected the innocent nor deterred the wicked. The recurrent spectacle of publicly sanctioned killing has cheapened human life and dignity without the redeeming grace which comes from justice meted out swiftly, evenly, humanely.
>
> The death penalty is invoked too randomly, too irregularly, too unpredictably and too tardily to be defended as an effective example or warning against wrongdoers. . . .
>
> I believe the entire history of our civilization is a struggle to bring about a greater measure of humanity, compassion and dignity among us. I believe those qualities will be the greater when the action proposed here is achieved not just for the wretches whose execution is changed to life imprisonment, but for each of us.[25]

f.[41] In other words, the death penalty is just as arbitrary, capricious, and discriminatory now as it was when the Supreme Court deemed it unconstitutional in 1972.

It took Justice Harry A. Blackmun almost two decades to agree with fellow Justices Brennan and Marshall, but he was still way ahead of his time. In 1994, in *Callins v. Collins*, he wrote,

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.[42]
>
> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored

to abolish the death penalty.[48] It proved very effective in organizing various

of faith, and exonerees.[49] DPF was building the foundation of a movement to end state killing.

IN THE TRENCHES

Until 1994, I had put all my efforts to end the death penalty into organizing, advocacy, public speaking, and writing. I was a civil lawyer, not

fied to represent a

defendant charged with jaywalking.

But in 1994, I read an article in a legal publication by Ed Medvene, pleading with civil litigators to get involved in death penalty cases. I took note because I was acquainted with Ed and knew him to be a courageous

pointed out that after all direct appeals are exhausted, a death row inmate had the right to file a petition for writ of habeas corpus, first in state court and then in federal court. Habeas corpus, known as the Great Writ, had been borrowed from English law and written into the U.S. Constitution.[50] Habeas corpus guaranteed that even after a person was convicted and had lost all appeals, he or she could come back into court to introduce new evidence or

penalty case. Eventually, I was assigned to the case of Charlie McDowell and was introduced to his lead attorney, Andrea Asaro. I learned that Andy, as I came to know her, was a very experienced death penalty attorney in private practice in San Francisco. She was brilliant, hardworking, and tenacious. She was conversant with all aspects of death penalty law and habeas corpus proceedings. In short order, I would learn a lot from her.

Charlie McDowell had been convicted in 1984 of committing one count of murder and one count of attempted murder in Los Angeles two years earlier.[52] In 1988, his conviction was affirmed by the California Supreme Court, and his subsequent state habeas corpus petition was denied.[53] Next, he filed his federal habeas corpus petition in U.S. District Court in Los Angeles.[54]

for a case to work on, the attorney who was assisting her left the McDowell

I had a steep learning curve to familiarize myself with all aspects of the McDowell case and complex habeas corpus procedures. Andy was a great teacher, and I studied the major legal and constitutional issues she was raising

to San Francisco and met with Andy and Charlie at San Quentin Prison. It was a very disturbing experience. We went through heavy security and entered the inmate meeting room. I was surprised it was a large, open space with a bunch of tables rather than the series of glass enclosed cubicles I had expected. Inmates were sitting and chatting w9 Tm 0 g 0sbfrmiliy11(and) tiencd(f)-3re W* n e7at

had no freedom and, worse yet, were facing execution at the hands of the State of California. While prosecutors routinely dese these men and

moment in their lives, I had had the chance to witness the simple humanity of these inmates as I watched them engaging with their family and friends. The obscenity of the death penalty is that the state kills people to show that killing is wrong. Before anyone in California, as a juror or a voter, takes it

time. All of those I have met, and with rare exception those I have read about, are conscientious, hardworking lawyers who do their best to defend their

reopen the case. The ACLU of Northern California submitted a petition signed by 175,000 people seeking a stay from the Governor.[76]

On December 8, 2005, Governor Schwarzenegger held a clemency [77] Tough or not, four days later Governor Schwarzenegger denied clemency. The next day, December 13, 2005, Williams was executed.[78] CNN reported that the officials had trouble twenty minutes.[79] Shortly before he was killed, Williams told a radio station, and continue to tell you, your audience, and the world [80]

loss for far more than Williams himself.[81] When the governor took office, he changed the name of the Department of Corrections to the Department of Corrections and Rehabilitation.[82]

commission spent the day hearing testimony from experts and comments from the public.

For years, abolitionists in California had dreamed of the day when the system of state killing would be subjected to a searching and comprehensive investigation comparable to the 2002 Illinois commission appointed by former governor George Ryan.[83] That commission found eighty-five serious

Commission also conducted independent research, received sixty-six written submissions.[93]

While abolitionists often speak out against the death penalty on deeply moral grounds, we rarely rely on pragmatic reasons. But for the wider community, the astronomical cost of capital punishment may prove to be

[94]

by these cases on our justice system, in terms of the time and attention taken away from other business that the courts must conduct for our citizens, is

[95]

Yet, to reduce the average lapse of time from sentence to execution by half, to the national average of twelve years, the Commission estimated that taxpayers would have to spend nearly twice what we are spending now.[96]

Critics of the death penalty had warned for decades that we are sending innocent people to death row. Although the Commission stated that it had

homicide trials that California counties provide adequate funding for the appointment and performance of trial counsel in death penalty cases in full compliance with ABA Guidelines.[105]

Without taking sides, a majority of the Commission presented detailed

> life in the court system, but it is like no one wants to admit the system made another grave mistake. Am I to be made an example of to save face? Does anyone care about my family who has been victimized by this death sentence for over 21 years? Does anyone care that my family has the fate of knowing the time and manner by which I may be killed by the state of Georgia? . . . Where is the justice for me?[118]

On March 17, 2008 in a narrow 4-3 decision, the Georgia Supreme Court rejected Davis[119] finding that the evidence of his innocence came

types, recantations by trial witnesses, statements recounting alleged admissions of guilt by Coles, statements that Coles disposed of a handgun[120]

As the Chief Justice noted in his dissent:

> extraordinary motions for new trials based on new evidence is overly rigid and fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, as in this case, might be put to death.
>
> We have noted that recantations by trial witnesses are inherently suspect, because there is almost always more reason to credit trial testimony over later recantations. However, it is unwise and unnecessary to make a categorical rule that recantations may never be considered in support of an extraordinary motion for new trial. The majority cites case law stating that
>
> phrase cautions that trial testimony should not be lightly disregarded, it has obvious merit. However, it should not be corrupted into a categorical rule that new evidence in the form of recanted testimony can never be considered, no matter how trustworthy it might appear. If recantation testimony, either alone or supported by other evidence, shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically.[121]

ies all

to a parent, c

According to Carol S. Steiker and Jonathan M. Steiker, who have studied on an extensive and ultimately failed effort to reform and rationalize the practice of capital punishment in the United States through top-down,[147] But while all other Western democracies have

Breyer began by pointing out that in 1976, the Supreme Court reinstated the death penalty under state statutes that attempted to set forth safeguards to ensure the penalty would be applied reliably and not arbitrarily.[170] But

[171]

The court thought that the constitutional infirmities in the death penalty could be healed.[172]
surveys, and experience strongly indicate

procedures; and they suggest that, in a significant number of cases, the death [183]

Cruel: Arbitrariness.

punishment is the antithesis of the rule of law.[184] In 1976, the Supreme [185]

legally necessary to reconcile its use wit [186]

research indicating that irrelevant or improper factors such as race, gender, local geography, and resources do significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors do not determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed [187] Breyer concludes [188]

Cruel: Excessive Delays

unfairness lead to a third independent constitutional problem: excessively [189] In 2014, thirty-five individuals were executed.[190] Those inmates spent an average of eighteen years on death row.[191] At present rates, it would take more than seventy-five years to carry out the death sentences of the 3,000 inmates on death row; thus, the average person on death row would spend an additional 37.5 years there before being executed.[192]

These lengthy delays create two special constitutional diffi

193

penological rationale.[194]

98 people were executed.[207] In 2014, just 73 people were sentenced to death and 35 were executed.[208] The number of death penalty states has fallen, too. In 1972, the death penalty was lawful in 41 states.[209] As of today, 18 states and the District of Columbia have abolished the death penalty.[210] In 11 other states where the death penalty is on the books, no execution has taken place in over eight years.[211] Of the 20 states that have conducted at least one execution in the past eight years, 9 have conducted fewer than five in that time,[212] making an execution

standards of decency that mark the progress of a
to engage in state killing? Can such a society tolerate the risk of executing innocent people? Can such a society execute those who are without doubt guilty (if such certainty exists), at the risk of torturing them as Brandon Jones was tortured last year?[220]

In a 1994 dissent in *Callins v. Collins* Justice Harry Blackmun wrote,

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death
>
> the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.[221]

In courtrooms and voting booths, judges and voters have the power to stop tinkering with the machinery of death and to end the death penalty experiment once and for all.

SAVING MY PEN PAL

twenty years ago, it got very personal. By means I have long forgotten, I

become very close friends over the years. Bill is a bright, generous, funny, and very caring man. We have written each other or spoken every week or so since we met. Bill

hopes his work will be produced.

Bill spent twenty years on death row until the California Supreme Court finally ruled in his case. On June 27, 2016, the court vacated a portion of his conviction, but otherwise affirmed his death sentence.[222] Bill now joins the over 350 inmates waiting for the appointment of habeas corpus counsel to pursue his rights in state and federal habeas corpus proceedings.[223]

220. Rhonda Cook, *Georgia Executes Brandon Astor Jones*, ATLANTA JOURNAL-CONSTITUTION (Feb. 3, 2016), http://www.ajc.com/news/local/georgia-executes-brandon-astor-jones/jDioe9hdPGv2oj7mhVehnM.

221. Callins v. Collins, 510 U.S. 1141, 1145 (1994).

222. People v. Clark, 372 P.3d 811, 902 (2016).

223. *See* Finz et al., *supra* note 71

I intend to continue to be as good a friend to Bill as I can. Meanwhile, undaunted by the defeat of Proposition 62, I will continue to do all I can to end the barbarism of state killing and remove once and for all the risk that Bill Clark and Charlie McDowell and the other 744 men and women on