Oregon Law Review
Spring 2002, Volume 81, Number 1
Cite as: 81 OR. L. REV. 161 (2002)

Wayne Morse Center for Law and Politics Symposium:
The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform?

***161** Innocence Abroad: The Extradition Cases and the Future of Capital Litigation

Daniel Givelber [FNa1]

Copyright © 2002 University of Oregon; Daniel Givelber

On July 10, 2001, a jury sitting in New York concluded that it was incapable of reaching a unanimous verdict for a life or death sentence, and it understood, consequently, that the defendant Khalfan Khamis Mohamed would be sentenced to life imprisonment without parole for his role in the bombing of the United States Embassy in Dar es Salaam, Tanzania. [FN1] Eleven of the jurors indicated that they found as a mitigating circumstance that "[o]thers of equal or greater culpability in the murders [would] not be sentenced to death." [FN2] The jurors had been told that they could consider, as a mitigating factor, that the "highest Court of the Republic of South Africa, overruling a lower court decision, held that Khalfan Khamis Mohamed should not have been released to American authorities . . . without obtaining an agreement from the United States that he would not face the death penalty in the United States." [FN3] The jury was also informed that four others charged in the bombing who either had been or were going to be extradited from Germany and Great Britain would, as a term of their extradition, not face the death penalty. [FN4]

The verdict in Mohamed's case represents perhaps the most significant domestic response yet to the consensus among the courts of democracies that American capital justice offends core ***162** notions of human dignity. [FN5] Gregg v. Georgia [FN6] notwithstanding, the United States Government has been unable to persuade the court of any abolitionist state that the American brand of capital justice is sufficiently accurate and fair to justify extradition without an assurance that the death penalty will not be sought. [FN7] As the United States seeks to extradite suspected terrorists for trial purposes in this country, the same pattern emerges: the regime of capital punishment to which we appear addicted strikes the rest of the democratic world as an affront to human dignity. [FN8]

I The Extradition Cases

Most countries that deny extradition to the United States in potentially capital cases do so based upon their understanding of treaty commitments or other international obligations, as well as their domestic response to capital punishment. Occasionally, ***163** however, an extradition question presents itself in a form that requires courts to assess whether or not the act of surrendering an individual to American-style capital punishment violates rights embedded in their domestic charters or constitutions. The two most prominent of these decisions proceed on rather different theories. The European Court of Human Rights held that the experience of being on death row itself violates Article 3 of the Convention for the

Protection of Human Rights and Fundamental Freedoms that prohibits torture or inhuman or degrading treatment. [FN9] In contrast, the Canadian Supreme Court [FN10] concluded that it was the administration of capital punishment itself, and not simply the extended incarceration preceding it, that required its respective governments to refuse to extradite those charged with capital crimes to the United States absent an assurance that the death penalty would not be sought in all but exceptional cases.

In Soering v. United Kingdom, [FN11] the European Court of Human Rights, focused on what has become known as the "death row phenomenon" in concluding that extradition to the United States, without assurances that Virginia would not seek the death penalty, violated Article 3 of the European Convention of Human Rights prohibiting "inhuman or degrading treatment of punishment." In the Court's view, the predictable extended stay on death row, when combined with the defendant's youth and mental condition, constituted a violation of Article 3 even if the death penalty per se did not. [FN12]

The Supreme Court of Canada focused on the inevitability of error. In doing so, it reversed its then ten-year-old ruling in Kindler v. Crosbie [FN13] upholding the discretion of the minister to extradite without assurances. [FN14] In United States v. Burns, the ***164** Supreme Court of Canada described the basis for the change as follows:

> The outcome of this appeal turns on an appreciation of the principles of fundamental justice, which in turn are derived from the basic tenets of our legal system. These basic tenets have not changed since 1991 when Kindler and Ng were decided, but their application in particular cases (the "balancing process") must take note of factual developments in Canada and in relevant foreign jurisdictions. When principles of fundamental justice as established and understood in Canada are applied to these factual developments, many of which are of far-reaching importance in death penalty cases, a balance which tilted in favor of extradition without assurances in Kindler and Ng now tilts against the constitutionality of such an outcome. [FN15]

The first paragraph of its opinion makes clear exactly the developments the Court had in mind:

> Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. . . . Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution. [FN16]

The results in these cases owe a great deal to the legal struggle in the United States concerning capital punishment. Our willingness to tolerate extended stays on death row is the very basis for the European Community's refusal to extradite. While American courts seem prepared to attribute the "death row" phenomenon to the defendant's understandable challenges to a death sentence, [FN17] foreign observers identify any extended wait for execution ***165** as problematic regardless of its source. [FN18]

Defendants may be responsible for insisting that their claims be heard, but they play no role in how long it takes courts to decide those claims nor how eager prosecutors are to insist upon a rapid resolution

of collateral proceedings. We are, of course, not alone in taking our time before executing an individual. [FN19] We appear to be alone in refusing to acknowledge that the state has an obligation to resolve a condemned prisoner's appeals in a reasonably expeditious fashion. [FN20]

The innocence concern is not ours alone, either. The Canadian Supreme Court in Burns pointed to Canadian cases first in arriving at its ultimate conclusion that, except in extraordinary cases, extradition without assurances was a violation of the requirement of fundamental justice embedded in section 7 of the Canadian Charter of Rights and Freedoms. [FN21] The Court emphasized:

> The possibility of miscarriages of justice in murder cases has long been recognized as a legitimate objection to the death penalty, but our state of knowledge of the scope of this potential problem has grown to unanticipated and unprecedented proportions in [the past ten years]. This expanding awareness compels increased recognition of the fact that the extradition decision of a Canadian Minister could pave the way, however unintentionally, to sending an innocent individual to his or her death in a foreign jurisdiction. [FN22]

After discussing some Canadian cases in detail, the court turned to the American experience, one that it was required to paint with a far broader brush, given the frequency of the occurrence here. [FN23]

While the two rationales leading to a refusal to extradite--that ***166** both the process employed by and the result of our capital punishment regime are at odds with core notions of human rights--have not commended themselves to American courts, [FN24] the extradition decisions deserve careful examination for a number of reasons. First, they provide us with a mirror in which we can see reflected the image of our system of capital punishment. Given the natural (and appropriate) tendency of American lawyers and legal scholars working in capital punishment to narrow their focus to those issues that appear to interest our courts, these cases provide an important reminder that, for much of the democratic world, the fundamental moral questions surrounding capital punishment are also fundamental legal questions. They also suggest that rational jurists, sensitive to the need for comity among nations, see a contradiction between a commitment to fundamental human rights and capital punishment.

***167** As the Supreme Court of the United States continues to undertake Eighth Amendment analysis under the rubric of evolving standards of human decency, [FN25] an emerging consensus among nations with mature legal systems that capital punishment offends basic norms of human rights may, at some future point, become a significant consideration in that analysis. While the Court has treated the relevance of the views of other legal systems inconsistently, [FN26] the matter is hardly settled. Arguments that failed to move American courts in their original form, may yet, in the garb of the justifications driving judicial decisions by foreign courts, have an influence over the domestic legal debate about capital punishment.

Most significantly, perhaps, the extradition decisions represent judgments about our system of capital punishment based upon claims about our system that have not been presented in any depth to American courts. The extradition cases have become the forum in which it is both feasible and appropriate to raise systemic attacks on the American system of capital justice. It is premature to conclude that these challenges cannot ultimately prove persuasive here. [FN27] It is worth remembering that the argument that prevailed in Furman v. Georgia [FN28] had never persuaded a single court and had been rejected when presented as a due ***168** process rather than Eighth Amendment claim by the Supreme Court itself

two years earlier in McGautha v. California. [FN29] Thus it is worth examining the extradition decisions to see what, if anything, they tell us about the future of American capital litigation.

II Differences Between Extradition and Domestic Cases

In order to see the potential reach of the extradition decisions, it is first necessary to consider the many differences between those cases and the typical domestic death penalty case. The first distinction between cases like Burns and Soering and any domestic death penalty case is that the defendants in Burns and Soering were accused of crimes, but had not yet been convicted. [FN30] The typical defendant in a domestic capital case has already been found guilty of a capital murder and sentenced to death. Whereas these foreign courts evaluate the fairness and accuracy of the United States' capital justice system in the abstract, a domestic court, armed with the doctrine of harmless error, need only evaluate whether an individual defendant's case was resolved in a manner that appears substantially correct. The difference between a systemic attack in extradition cases and the same kind of attack in a domestic case becomes apparent when one considers McCleskey's [FN31] claim that race operated as an unacknowledged aggravating circumstance in our system of capital punishment with Soering's claim about the horrors of death row or Burns' argument that guilt determination is unreliable.

McCleskey made a much more powerful showing that our system of capital justice offends core notions of human dignity than did either Soering or Burns. Neither Soering's claims about the effect of death row nor Burns' assertions about inaccuracy flowed from evidence introduced in open court and subject to ***169** cross-examination and counter-proofs. While one might well believe in the accuracy of what Soering said about death row and Burns about inaccurate convictions, McCleskey was the one who presented the results of a rigorous social science investigation of the very criminal justice system which placed him on death row. Despite the power of his demonstration that race is the unacknowledged "aggravating factor" that determines the result in many capital cases, McCleskey lost.

He lost for reasons that would simply not arise in an extradition case. First, he could not satisfy any court, much less the Supreme Court, that racial considerations influenced the prosecutor's decision to seek the death penalty or the jury's decision to impose it. Since Soering and Burns dealt with individuals not yet subjected to the infirmities that arguably characterize the United States' justice system, the defendant needed only demonstrate the possibility that extradition would subject him to the system's deficiencies. Because the claim is hypothetical--the defendant has neither run the risk of false conviction or faced brutalization on death row--there are no facts particular to the defendant's experience to temper the extradition court's ability to arrive at sweeping conclusions about our capital punishment system.

Second, McCleskey lost because his evidence proved too much. His data challenged the entire criminal justice system. Given that there is no reason to suspect that race operates more perniciously in the relatively high profile area of capital cases, accepting McCleskey's argument that race was an arbitrary factor affecting the disposition of capital cases would open Pandora's box. When it comes to the role of race, whatever might be demonstrated about capital punishment is also applicable (probably even more conclusively) to other types of punishment. It is difficult to justify an approach that acknowledges and attempts to defeat racism for the most serious form of punishment while leaving it to fulminate for all others. Justice Powell cast this point in terms of the essential and unavoidable role of

discretion in the criminal justice system. He believed that acknowledging McCleskey's argument would have repercussions throughout the criminal justice system.

The court would have to live with the consequences of acknowledging that racism pervades the criminal justice system, and the majority was unwilling to do so. The decisions whether ***170** to extradite do not carry comparable baggage. Indeed, the issues on which the courts have focused are readily distinguishable from those encountered by criminal justice systems that do not embrace capital punishment. The European Community has no death row. The European Court of Human Rights can speculate about the horror of lengthy imprisonment while awaiting execution without the worry that the principles it adopts may have consequences for the cases of those imprisoned to a term of years within the European Union. The Canadian Supreme Court can express genuine concern for the accuracy of criminal adjudication but limit the implications of that concern to the one situation in which error cannot be remedied: the executed defendant.

This is not to suggest that either of these courts would not have reacted similarly if their respective states embraced capital punishment; as to that, one can only speculate. What it does suggest is that, unlike American courts confronting these arguments, the European Court of Human Rights and the Supreme Court of Canada needed to concern themselves with the implications of the decision for the relationship between sovereign states, but not the implications for their domestic criminal law.

The extradition decisions do not directly contradict a position taken by the United States Supreme Court. [FN32] The arguments accepted by the decisions in Soering and Burns are arguments that have never been made to or resolved by the United States Supreme Court. Contrast the bases upon which these courts relied--the death row effect and the inevitability of error--with the claim that our system works in a manner that favors white life over the life of people of color. To choose this as a basis for a refusal to extradite would involve both an express rejection of the McCleskey decision that race did not operate unlawfully within our capital punishment system and would articulate a principle that might well have ramifications for Europe and Canada. It would be an invitation to revisit the arbitrariness argument, one that has not commended itself to other courts as a basis for eliminating capital punishment.

In sum, the arguments embraced by the extradition cases are ***171** arguments against capital punishment that have existed long before our current experiment with guided discretion. It has always been true that capital punishment eliminates the possibility of correcting error and that there is a particular cruelty in awaiting one's own death at the hands of the state. The more modern arguments arising directly out of the American experience--e.g., race as an aggravating factor and the pervasive inadequacy of representation for poor people--were not the basis for the decision. The institution of capital punishment, not our society's treatment of the disadvantaged, received condemnation.

While these features of extradition cases may explain why domestic courts may chose to ignore them, one can suggest that these are the very features suggesting that American courts should pay attention to them. Since Zant v. Stephens [FN33] in 1983 and McCleskey in 1987, systemic attacks on the institution of capital punishment have disappeared from capital punishment litigation. [FN34] We have come to accept a world of standardless capital decision-making in which race is an aggravating factor. Much more energy goes into demonstrating that individual defendants are poorly represented than into claims that the system as a whole risks affronting significant constitutional values.

The extradition decisions remind us that there are systemic problems with capital punishment that the Supreme Court has yet to address, and that it may well be worth the effort to get American courts to confront those issues. The extradition decisions may not figure in Justice Scalia's calculus of the punishments that are both cruel and unusual, [FN35] but they are reasoned decisions of prestigious courts grappling with serious issues. As such, they command notice and respect. Indeed, Soering has already legitimized the argument that death row itself represents unacceptable punishment.

III The Death Row Effect

At least two Justices of the United States Supreme Court have encouraged the development of the argument that very lengthy incarceration on death row may itself be a violation of the Eighth ***172** Amendment. [FN36] This is an argument that was presented to and ruled upon by the European Court of Human Rights before it had been presented to the United States Supreme Court. Indeed, pre-Soering mention of this argument is difficult to find. When Justice Stevens, in Lackey v. Texas, called for further development of the "death row" argument, it was to decisions of the Privy Council (Jamaica) that he adverted. [FN37] Of these cases, Soering involved a direct commentary on our practice as opposed to that of Jamaica.

Why should the first airing of the death row argument occur before the European Court of Human Rights as opposed, for instance, to the Pennsylvania Supreme Court? A couple of reasons present themselves. First, death row had started afresh in 1973 at the earliest so that the longest any person could have spent on the row as of 1989 was sixteen years. This is hardly an insubstantial period of time, but it is not quite as long as the defendant in Lackey (seventeen years) or nearly as long as the defendant in Knight (twenty- four years). [FN38] The more fundamental problem, however, resides in the nature of capital litigation and the wise advice to be careful what one prays for.

A basic principle of capital defense is that "where there is life, there is hope," and it is tricky business to insist on the one hand that a defendant needs a full airing of all of his claims and on the other hand to suggest that if courts take too long in resolving those claims, the state loses the power to execute the defendant. Moreover, any claim of extended delay raised by a prisoner subject to that delay would inevitably involve the reviewing court in the business of allocating blame for the delay. While Justice Breyer certainly makes a powerful point in Knight that one cannot hold the accused responsible for delay resulting from errors made by the state which necessitate his retrial, cases in which the delay is overwhelmingly attributable to state error may be sufficiently rare that the doctrine, even if adopted, provides relief in relatively few cases.

The classic rationale for rejecting the claim was put forth by the Ninth Circuit in Richmond v. Lewis:

> ***173** It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates--less successful in their attempts to delay--would be forced to face their sentences. Such differential treatment would be far more "arbitrary and unfair" and "cruel and unusual" than the

current system of fulfilling sentences when the last in the line of appeals fails on the merits. [FN39]

The European Court of Human Rights was not confronted with the need to weigh these competing interests. It had only to observe that people spent considerable time on death row prior to the final disposition of their case, and that death row was a terrible place to spend any extended incarceration. The holding has the virtue of providing a rationale against extradition without directly challenging the quality of American capital justice. Whatever one might think of the reasoning of Soering, the fact of its existence has been of unquestioned importance.

As noted, Justice Breyer cited to Soering in his discussions of denial of certiorari in appeals brought by defendants raising the fact of lengthy incarceration while awaiting execution as an independent violation of the Constitution. Although Justice Thomas wishes to declare the issue definitively resolved against the argument, [FN40] Florida has recognized a version of the argument when it held, in Jones v. State, that the twelve year delay in holding a hearing to determine whether the defendant had been competent to stand trial was a denial of due process. [FN41] The Florida court quoted extensively from Justice Breyer's dissent from the denial of certiorari in Elledge v. Florida, [FN42] in which Justice Breyer identified the need to respond to decisions such as Soering. [FN43] Finally, in Burns, the Canadian Supreme Court could point to the dissents of both Justices Stevens and Breyer (both of which cited Soering) as indication of the vitality of the death row argument. In Burns, this was combined with the observation of the Chief Justice of the Supreme Court of Washington that the people who ***174** had been executed in Washington were those who fundamentally "gave up" in their struggle against capital punishment. [FN44]

There are now two international precedents commenting upon our death row as well as numerous citations to Supreme Court dissents that support the proposition that life on death row is itself inhumane punishment. While this is not the same thing as an affirmative ruling from an authoritative American court, the argument has far better support today than it did thirteen years ago when the European Court of Human Rights performed the high wire act of finding a ground for refusing to extradite without also concluding that capital punishment violated the European Convention.

IV The Inevitability of Error

The Supreme Court of the United States has never confronted the argument, standing alone, that the possibility of error in the determination of guilt or innocence represents an independent reason why capital punishment is unconstitutional. [FN45] This may seem surprising given the logic of the Burns court's position that a system which has an irreducible level of error built into it ought to be one which leaves open the possibility of correcting those errors. Constitutional capital litigation, however, has not gone in this direction.

The litigation that led up to the Court's decision in Furman was undertaken by lawyers from the NAACP Legal Defense Fund as part of its campaign to address racial discrimination in America. Lawyers for the Fund developed a strategy designed to attack the institution of capital punishment on constitutional grounds. The most prominent of these were the claims that capital punishment was racially discriminatory in violation of the Fourteenth Amendment and that the standardless imposition of

the death penalty was in violation of the Fourteenth and, ultimately, ***175** the Eighth Amendment. [FN46]

Given that the text of the Constitution contemplates capital punishment, litigation focused on the constitutional implications of who was being subjected to capital punishment and why, rather than the institution per se. These are the arguments to which the Court responded in Furman. States then went about the business of crafting death penalty statutes in response to Furman, addressing the arbitrary nature of the process of selecting those who would die. The accuracy of guilt determination had not been an issue and was not addressed by either the Court or the legislatures.

Legal activity in the post-Furman era of capital punishment has focused on whether the states' various approaches solve the problem of creating a rational method for selecting among those whose crimes make them candidates for capital punishment. There had been important voices pointing to the inaccuracy of the guilt determination process prior to the Furman era--Edwin Borchard [FN47] and Jerome Frank [FN48] being the most prominent--but the lawyers seeking to end capital punishment employed what appeared to be more immediately relevant legal tools. Whether the Gregg statutes drained arbitrariness and racism from the system is debatable, but we can be certain that they did nothing about the problem of executing innocent people.

This argument that inaccuracy in guilt determination renders capital punishment constitutionally unacceptable is more compelling today than it would have been thirty years ago when the Court was struggling with McGautha, Furman, and Gregg. There are at least two reasons for this. First, the work of Bedau and Radelet [FN49] and then Scheck and Neufeld [FN50] has made apparent what has always been logically true--we mistakenly sentence people to death and execute them. The Liebman studies [FN51] only confirm that error permeates capital sentencing. Second, a prestigious ***176** court--the Canadian Supreme Court--has analyzed the available data and concluded that the inevitability of error renders the institution of capital punishment inconsistent with fundamental human dignity. [FN52] In so doing, it overturned its decision of a decade earlier in a unanimous opinion joined by the Chief Justice who had previously written the majority opinion coming to the contrary conclusion. [FN53] While the Court's opinion canvassed a broad range of issues, [FN54] the significant change between 1991 and 2001 was the emerging data on erroneous convictions.

The Canadian Supreme Court undertook its analysis by considering cases from Canada, the United States, and the United Kingdom. With respect to both the Canadian and U.K. experience, there were well known cases in which the provincial or national government took the formal position that errors had been made, errors that led to the execution of innocent people in the U.K. [FN55] The American situation is, of course, more muddled, given federalism and the local nature of criminal prosecutions. The federal government has not concerned itself with injustice at either the local or federal level.

The Illinois moratorium is the most authoritative governmental acknowledgment of the problem, and that was undertaken by direction of the governor and not as a result of an official commission of inquiry. [FN56] The thirteen cases of wrongful convictions occurring in Illinois since the 1970s considerably outnumber the cases identified in Canada and the U.K. combined. The Canadian Supreme Court noted the moratorium as well as looking to the position of the ABA, the Justice Department report on the federal death penalty statute, and legislative action both in Nebraska ***177** and New Hampshire. [FN57] The court concluded that this level of activity, combined with the more open acknowledgement of the

problem by the national governments of both Canada and the U.K., put it beyond dispute that neither human nature nor human institutions had evolved to the point of arriving at error free decisions concerning criminal guilt in capital cases. [FN58] From this conclusion, it was but a short step to the conclusion that extraditing a defendant to a legal system employing capital punishment was denying that extradited person the fundamental justice called for by the Canadian Charter.

Can the same argument be made here? Are we at the point of acknowledging that the execution of innocents has and will continue to occur, and if so, does it necessarily follow that capital punishment violates our constitution? As to the factual question of whether our system systematically risks the execution of the innocent, the answer is yes. Everything we know about how the innocent are convicted suggests that this will happen more often in a capital case than in the typical criminal case. [FN59]

Virtually everyone on death row is there as a result of trial rather than plea. Whatever comfort one might draw as to accuracy from the defendant's admission of guilt in open court [FN60] is simply not available in the overwhelming majority of capital cases. In comparison with the general population of murderers, those defendants sentenced to death were more likely convicted for killing a stranger. The crimes that land people on death row are also more likely to involve some form of barbarity than the average murder. Heinousness is, after all, a ubiquitous aggravating circumstance.

Barbarous crimes scream out for solution, and both investigators and prosecutors are under pressure to identify, charge, and convict those whose crimes appear monstrous. In many cases, the state is forced to rely upon uncertain eye witness identification and statements of intimates who claim the defendant admitted guilt. Sometimes testimony based on what is now recognized as "junk science" supplements this dubious evidence.

***178** By definition, the fact-finder can ignore unreasonable doubts in arriving at the conclusion that the defendant is guilty. As much as courts oppose the notion that one ought to assign a percentage to the reasonable doubt standard, even if we believe that juries ought to be ninety-five percent certain before convicting and we believe that juries actually achieve this level of certainty, there is still a five percent margin of doubt. If ninety- five percent certainty translates into ninety-five percent accuracy, then in five percent of the cases the unreasonable doubt is accurate.

Indeed, it is difficult to see how a system that considers ninety-five percent certainty to be sufficient to convict could possibly achieve 100% accuracy. This would only be true if one believed that everyone charged with a capital crime is guilty so that every conviction is accurate and every acquittal inaccurate. Given the pressure to "solve" capital cases, there is little reason to suppose that prosecutors are more demanding of strong proof before they bring such cases than they are in the normal criminal case. This is particularly true in those counties that strive to turn every homicide into a capital case.

Would American courts be receptive to an argument that capital punishment demands a level of accuracy that we cannot achieve? One has already found that the inevitability of error renders capital punishment unconstitutional. [FN61] To the extent that the Eighth Amendment analysis includes an inquiry into the penal justification for the practice, executing the innocent weighs heavily against the view that capital punishment resonates with evolving standards of decency.

There is no moral view of capital punishment that would justify executing an innocent person. There may be an instrumental argument that would justify executing the innocent as a price that needed to be paid to achieve the greater good of executing the guilty, but this argument assumes that executing the guilty increases utility. A utilitarian justification would have to proceed along the line that the institution of capital punishment saves so many lives that it justifies the occasional life taken in error as well as the costs associated with the public recognition that this occurs. Yet, there is no persuasive demonstration that capital punishment saves any lives, [FN62] much less enough lives to counterbalance the cost of the state taking life in error.

***179** The problem here is not doctrinal. [FN63] In re Winship [FN64] tells us that the consequences of a judicial determination of fact dictate how convincing the proof of that fact must be. Because the consequence of a criminal conviction can be so dire, proof beyond a reasonable doubt is required in criminal cases even though we assume that it permits some guilty to go free. Since capital punishment represents a qualitative difference in the severity of the state's response to crime, at a minimum we ought to eliminate all doubts, not just reasonable ones, before taking life. [FN65] Appellate courts, reviewing capital cases, would be required to pass on the question of whether the evidence justified the jury in achieving absolute certainty as to guilt. This would be a challenge, given the view that credibility is a question for the jury.

This is not a suggestion that the Court simply overturn Franklin v. Lynaugh, which held that a capital defendant did not have an Eighth Amendment right to a residual doubt instruction, and require states to allow arguments about residual doubt as a mitigating factor. [FN66] Rather, consistent with the notion that we value life even more than liberty, the argument is that the criterion for taking life must be absolute certainty that the defendant committed the murder. [FN67]

There is something a bit odd about a system that finds a Constitutional mandate that we employ special proceedings to determine whether a guilty person should be executed but demands nothing out of the ordinary in terms of assuring ourselves that the person is in fact guilty. Whether or not this made sense when it was common currency that only the guilty were convicted, it does not make sense today. This is particularly the case when one realizes that despite the courts' attempt to create a jurisprudence of death worthiness, where one commits a murder is a far ***180** greater predictor of whether the defendant will receive death than any particular feature of the crime. And this "where" is county specific--what is a capital crime in Philadelphia is not in Pittsburgh; what is a capital crime in Houston is not in Dallas. [FN68] In some counties there is little pretense of careful selectivity and therefore no argument that all of the possibly innocent have been effectively saved from a possible death sentence.

Can an absolute certainty standard be developed and administered? Since we have outlawed torture as a method of juridical proof, [FN69] we have no method of even creating the appearance of absolute certainty since we cannot force the defendant to tell us that he committed the crime. We can attempt to achieve perfect accuracy by insisting that the jury be told that it must be absolutely certain before sentencing a defendant to death, but we have ample reason to doubt that insisting upon perfect accuracy will in fact produce it.

The history of the law of homicide is one of the eventual dilution of standards developed in the hope that it would limit capital punishment to only the most appropriate cases. This was the fate of the premeditation and deliberation formula [FN70] and it is certainly the fate of the aggravated-

circumstances regime identified in Gregg. We know from a series of psychological studies, not to mention human experience, that we are capable of being absolutely certain about something that is not true. The DNA exoneration cases teach that there is nothing apparent at the time of conviction that differentiates the cases of those who are in fact innocent from the cases of those who are guilty. We simply cannot know for certain. The correct response to this irreducible uncertainty is to put the sanction of death aside.

There is the difficulty that "[w]e still have no proven instance, not one, of a mistaken execution during the modern era of American capital punishment." [FN71] Time will solve this difficulty, ***181** assuming that it is one. There is nothing about the modern era that distinguishes it from the pre-Furman era when it comes to the question of guilt or innocence.

It is difficult to believe that we have achieved 100% accuracy in the 313 executions over the last twenty-five or so years, even though no jury was ever asked to do more than put aside reasonable (as opposed to all) doubt in arriving at guilt. The jury research suggests that jurors who entertain residual (as opposed to reasonable) doubts about guilt are more likely to vote for life than other jurors, but this is not a claim that every juror who has any doubt then votes for life. [FN72] Even if it were, this assumes that the cases in which jurors entertain doubt include all the cases in which, as it turns out, doubt is appropriate.

If the argument has a chance, one might ask, why has it not been raised earlier in domestic capital litigation? Many reasons suggest themselves. One might assume that the argument had been made and rejected thirty years ago. The disappearance of federally funded Resource Centers has robbed capital litigation in many states of an indispensable source of large ideas that ought to be raised in every capital case.

The claim that capital punishment is unconstitutional because our system inevitably errs is one that needs to be made pre-trial [FN73] and repeated when the issues of instructions to the jury arises. Once the defendant has been convicted, the argument is very hard to raise for the first time. This is because of the effect of waiver rules, and because a court's natural response will be to consider the possible innocence of the defendant rather than possible errors in the system. While it will be useful to remind the court that virtually none of the courts hearing appeals in the DNA exoneration cases expressed any concern about the reliability ***182** of the verdict, [FN74] nonetheless it may be expecting too much of an appellate court to consider an "inevitability of error" argument that had not been properly preserved below.

The Canadian Supreme Court's decision in Burns suggests that the inevitability of error remains one of the most powerful arguments against capital punishment. Rather than centering the issue of whether we should have capital punishment on problems inherent in a multi-racial society in which criminal justice is administered on the local level, there is much to be said for returning, as the Burns court did, to an argument about capital punishment that is as old as the institution itself. More than one-hundred and fifty years ago, a report to the Massachusetts legislature urging a ban on capital punishment noted that the institution:

> [C]auses the death of the innocent. Centuries ago, when human life was regarded of little value, it was laid down as a maxim, that it were better ten guilty should escape than that one innocent should be punished. Now, we carry with us universal assent, when we

> affirm that it were better that a hundred guilty should escape than that one innocent man should die. But it is not necessary to allow one to escape. Substitute, for death, imprisonment, and, the suffering being reparable, there is infinitely less objection to its infliction, lest the innocent should suffer. [FN75]

More than a century and one half after these words were written, a prestigious court, after rigorous review of the available data, has acknowledged the power of this argument. The inevitability of executing the innocent offends fundamental notions of human dignity. Capital punishment should end.

[FNa1]. Professor of Law, Northeastern University School of Law. The author wishes to acknowledge the extremely valuable research assistance provided by Jennifer Barmon and Jason Benzaken, both members of the Northeastern Law School Class of 2003.

[FN1]. United States v. Bin Laden, 156 F. Supp. 2d. 359, 361 n.2 (S.D.N.Y. 2001).

[FN2]. Id. at 371 (citing KKM Penalty Phase Special Verdict Form at 13).

[FN3]. Id. The case in question was Mohamed v. President of Republic of South Africa, 2001 (3) SA 893 (CC) (Constitutional Court of South Africa), available at http://www.concourt.gov.za/judgments/2001/mohamed.pdf.

[FN4]. See Bin Laden, 156 F. Supp. 2d. at 370.

[FN5]. United States v. Burns, [2001] 1 S.C.R. 283. In all but the most exceptional cases, § 7 of the Canadian Charter of Rights and Freedoms – "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"--forbids extradition without assurances that capital punishment will not be sought. Id. at 307-08. Article 3 of the European Convention, "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment," is violated by the "death row phenomenon" so that extradition is not permitted without an assurance that the death penalty will not be sought. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439, 475 (Eur. Ct. H.R. 1989).

[FN6]. In Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court upheld the death penalty statute which had been enacted by the Georgia legislature in response to the decision in Furman v. Georgia, 408 U.S. 238 (1972), that held the death penalty unconstitutional as applied. The Gregg majority held that the Georgia statute had cured the problem of arbitrariness inherent in the standardless death penalty statutes in effect prior to 1972. Gregg, 428 U.S. at 207. The new statute demanded that a jury find the existence of an aggravating circumstance in addition to finding the defendant guilty of murder before the defendant became eligible for the death penalty. Id. at 197-98. In addition, the statute separated the trial on guilt from the trial on sentence and called for appellate review that assured that the death sentences actually imposed were proportionate to one another. Id. The Georgia statute was based upon the Model Penal Code. Id. at 193-96. These features, along with others, were thought to drain the arbitrariness out of the imposition of capital punishment. See Daniel Givelber, The New Law of Murder, 69 Ind. L.J. 375, 398-99 (1994).

[FN7]. Even the courts of democracies employing capital punishment--e.g., India--express skepticism that the Gregg formulae has alleviated the problems of arbitrariness. Bachan Singh v. State of Punjab, A.I.R. 1980 S.C. 898, 937-42.

[FN8]. The most recent notable success American prosecutors have had in persuading a court to extradite despite the possibility of a death sentence was Kindler v. Crosbie, [1991] 2 S.C.R. 779, a Canadian case decided about ten years ago. The view expressed in Kindler was rejected in Burns.

[FN9]. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (Eur. Ct. H.R. 1989). The Privy Council of the House of Lords in Pratt v. Attorney General of Jamaica (involving prisoners held on death row in Jamaica for nearly fourteen years) subsequently concluded that "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment."' [1994] 2 A.C. 1, [1993] 4 All E.R. 769.

[FN10]. Burns, 1 S.C.R. 287, 289-90.

[FN11]. 11 Eur. H.R. Rep. at 439 (Eur. Ct. H.R.).

[FN12]. Id. at 472-73.

[FN13]. [1991] 2 S.C.R. 779.

[FN14]. Burns, 1 S.C.R. at 361.

[FN15]. Id.

[FN16]. Id. at 295. The Constitutional Court of South Africa went further than the Canadian Court, declaring that under its constitution there was no difference between the government's deportation of a fugitive alien or extradition of someone legally within the country. Mohamed v. President of Republic of South Africa, 2001 (3) SA 893 PP 29-37 (CC). The American version of capital punishment was sufficiently repellent that the Government of South Africa should have no role in turning fugitives over to the United States authorities in the absence of assurance that capital punishment would not be imposed. Id. at P 59.

[FN17]. E.g., McKenzie v. Day, 57 F.3d 1461, 1466 (9th Cir. 1995). But see, Knight v. Florida, 520 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari).

[FN18]. In Soering, the European Court of Human Rights found the prospect of six to eight years on death row constituted "inhuman or degrading treatment" in violation of Article 3 of the European Convention on Human Rights. 11 Eur. H.R. Rep. 439 (Eur. Ct. H.R. 1989). This was the average wait for a Virginia prisoner from conviction until execution. Id.

[FN19]. In Pratt v. Attorney General of Jamaica, [1994] 2 A.C. 1, 9, the prisoners had been awaiting execution for nearly fourteen years. In Catholic Commission for Justice and Peace in Zimbabwe v.

Attorney-General, No. S.C. 73/93 (Zimb. June 24, 1993) (reported in 14 Hum. Rts. L.J. 323 (1993)), the court considered delays of five to six years.

[FN20]. Knight, 520 U.S. at 993-94 (Breyer, J., dissenting from denial of certiorari) (regarding case where prisoner spent nearly twenty years on death row).

[FN21]. 1 S.C.R. at 296.

[FN22]. Id. at 338.

[FN23]. As one example, when Burns was written in February of 2001, the opinion pointed to forty-three cases in which the Innocence Project had a role in securing innocence through DNA testing. 1 S.C.R. at 343. As of April 29, 2002, the figure had grown to 107. Innocence Project Website, at http://www.innocenceproject.org.

[FN24]. Even this statement may be too strong. On April 25, 2002, Federal District Judge Jed Rakoff of the Southern District of New York issued a ruling indicating that if he were forced to enter a final decision as of that date, he would hold the federal death penalty statute unconstitutional due to the inevitability of error in the imposition of capital punishment. United States v. Quinones, 196 F. Supp. 2d 416 (S.D.N.Y. 2002) [hereinafter Quinones I]. Judge Rakoff explained:

> The issue--not addressed by Herrera or, so far as appears, anywhere else-- boils down to this. We now know, in a way almost unthinkable even a decade ago, that our system of criminal justice, for all its protections, is sufficiently fallible that innocent people are convicted of capital crimes with some frequency. Fortunately, as DNA testing illustrates, scientific developments and other innovative measures (including some not yet even known) may enable us not only to prevent future mistakes but also to rectify past ones by releasing wrongfully-convicted persons--but only if such persons are still alive to be released. If, instead, we sanction execution, with full recognition that the probable result will be the state-sponsored death of a meaningful number of innocent people, have we not thereby deprived these people of the process that is their due? Unless we accept--as seemingly a majority of the Supreme Court in Herrera was unwilling to accept--that considerations of deterrence and retribution can constitutionally justify the knowing execution of innocent persons, the answer must be that the federal death penalty statute is unconstitutional.

Id. at 420.

When he issued this ruling, Judge Rakoff permitted the government to file an additional brief relating to the question of the unconstitutionality of the federal death penalty statute. The government did so. In a subsequent opinion, United States v. Quinones, 205 F. Supp. 2d. 256 (S.D.N.Y. 2002) [hereinafter Quinones II], the court reaffirmed its original holding that, by eliminating through execution the opportunity for a wrongfully convicted individual to establish his innocence at a later point, the federal death penalty act violated both procedural and substantive due process rights.

[FN25]. The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the

> Western European community. Thus, the American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles. Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand, in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988) (holding that the death penalty for a fifteen-year-old offender violates Eighth and Fourteenth Amendments).

[FN26]. Compare id. with Stanford v. Kentucky, 492 U.S. 361, 370 n.1 (1989) (upholding death sentences for sixteen and seventeen-year-old offenders).

[FN27]. As noted supra, note 24, the inevitability of error inherent in criminal adjudication has already persuaded one federal court that the federal death penalty statute is unconstitutional.

[FN28]. 408 U.S. 238 (1972). The lack of any majority opinion in Furman undercuts the claim that any single argument moved the Court. Nonetheless, it seems a fair conclusion that all of the justices would have agreed that capital punishment was arbitrarily and capriciously imposed, even if not all of them focused upon arbitrariness in rendering their opinions.

[FN29]. 402 U.S. 183 (1971).

[FN30]. Although the Canadian Supreme Court did not base its decision on this point, it is worth noting that the Kindler case, upholding the Minister's discretion to extradite without assurances, involved a convicted murderer who had escaped from death row, see Kindler v. Crosbie, [1991] 2 S.C.R. 779, 794, whereas Burns involved two young men who had only been accused of capital murder, see United States v. Burns, [2001] 1 S.C.R. 283, 297.

[FN31]. McCleskey v. Kemp, 481 U.S. 279 (1987).

[FN32]. The litigants in both cases identified a whole panoply of concerns about the quality of capital justice in the United States. Neither the Canadian Supreme Court nor the European Court of Human Rights chose to base their decision upon a complaint about capital punishment that had already been resolved by the United States Supreme Court.

[FN33]. 462 U.S. 862 (1983).

[FN34]. United States v. Quinones, 196 F. Supp. 2d 416 (S.D.N.Y. 2002), may indicate that this is about to change.

[FN35]. Stanford v. Kentucky, 492 U.S. 361, 370 n.1 (1989).

[FN36]. Lackey v. Texas, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari); Knight v. Florida, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari).

[FN37]. Lackey, 514 U.S. at 1045.

[FN38]. See McCleskey v. Kemp, 481 U.S. 279 (1987).

[FN39]. Richmond v. Lewis, 948 F.2d 1473, 1492 (9th Cir. 1990), rev'd on other grounds, 506 U.S. 40 (1992).

[FN40]. Knight, 528 U.S. at 990.

[FN41]. 740 So. 2d 520, 525 (Fla. 1999).

[FN42]. 525 U.S. 944 (1998).

[FN43]. Jones, 740 So. 2d at 524-25.

[FN44]. See United States v. Burns, [2001] 1 S.C.R. 283, 353.

[FN45]. Neither the McGautha nor the Furman briefs pursued this line of argument. It was mentioned but not emphasized by the Court in Furman. E.g., 408 U.S. at 366 (Marshall J. concurring) ("Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our 'beyond a reasonable doubt' burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.").

[FN46]. Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment 30-44 (1973).

[FN47]. Edwin M. Borchard, Convicting the Innocent (1932).

[FN48]. Jerome Frank & Barbara Frank, Not Guilty (Da Capo Press 1971) (1957).

[FN49]. Hugo A. Bedau & Michael Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21 (1987).

[FN50]. Jim Dwyer et al., Actual Innocence (2000).

[FN51]. James S. Liebman et al., A Broken System: Error Rates in Capital Cases, 1973-1995 i, 4-5 (2000), available at http://207.153.244.129/; James S. Liebman et al., A Broken System, Part II: Why there Is So Much Error in Capital Cases, and What Can Be Done About It ii-iii (2002) [hereinafter Broken System, Part II], at http://www.law.columbia.edu/brokensystem2/.

[FN52]. United States v. Burns, [2001] 1 S.C.R. 283. As noted, supra note 24, the Burns court is no longer alone in the undertaking. The Quinones II court also examined the available evidence carefully in determining that the federal death penalty is unconstitutional.

[FN53]. See Burns, 1 S.C.R. at 283.

[FN54]. Indeed, it now embraced the possibility that the "death-row phenomenon" provided was a factor leading to the conclusion that in the typical case there could be no extradition without assurances, id. at 336-37, a view it had rejected in Kindler a decade earlier. Kindler v. Crosbie, [1991] 2 S.C.R. 779, 838-39 (citing Richmond v. Lewis, 948 F.2d 1473 (1991)).

[FN55]. Burns, 1 S.C.R. at 337-341, 347-350.

[FN56]. See Exec. Order No. 2000-4, 24 Ill. Reg. 7439 (May 12, 2000), available at http://www.idoc.state.il.us/ccp/ccp/executive_order/executive_order.html.

[FN57]. Burns, 1 S.C.R. at 342-47.

[FN58]. Id. at 350.

[FN59]. Samuel R. Gross, The Risks of Death: Why Erroneous Convictions are Common in Capital Cases, 44 Buff. L. Rev. 469 (1996).

[FN60]. For the argument that the comfort involved is limited in scope, see Daniel Givelber, Punishing Protestations of Innocence: Denying Responsibility and Its Consequences, 37 Am. Crim. L. Rev. 1363 (2000).

[FN61]. United States v. Quinones, 205 F. Supp. 2d 256 (S.D.N.Y. 2002).

[FN62]. Ring v. Arizona, 122 S. Ct. 2428, 2446-48 (2002) (Breyer, J., concurring).

[FN63]. In addition to the argument advanced within the text, one could take the approach of Judge Rakoff in Quinones I and suggest that capital punishment violates due process because it robs a wrongfully convicted person of any possibility of establishing error. See United States v. Quinones, 196 F. Supp. 2d 416 (S.D.N.Y. 2002).

[FN64]. 397 U.S. 358 (1970).

[FN65]. Craig M. Bradley, A (Genuinely) Modest Proposal Concerning the Death Penalty, 72 Ind. L.J. 25 (1996); Broken System, Part II 427, supra note 51.

[FN66]. 487 U.S. 164 (1988); but see Margery Malkin Koosed, Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt, 21 N. Ill. U. L. Rev. 41 (2001) (arguing that the jury should be required to make a finding of no residual doubt at the guilt phase of a capital trial).

[FN67]. Bradley, supra note 65, at 28; Broken System, Part II 427, supra note 51; Koosed, supra note 66.

[FN68]. Philadelphia County generated 27.03 death sentences per 1000 homicides (127 in all) whereas Allegheny County (Pittsburgh) produced 12.23 per 1000 homicides (14 in all). Harris County, Texas (Houston) produced 19.33 death verdicts per 1000 homicides (190 in all) whereas Dallas County produced 10.74 per 1000 homicides (61 in all). The most striking intrastate contrast is in Missouri. Of those counties with five or more death sentences, Cole County Missouri has the highest rate per homicide--266.67 per 1000 homicides--and St. Louis has the lowest at 3.04 per 1000. Broken System, Part II app. B, tbl. 11A at B-1 to B-5, supra note 51.

[FN69]. John H. Langbein, Torture and the Law of Proof 3-12 (1977).

[FN70]. Givelber, supra note 6, at 381.

[FN71]. Joseph L. Hoffman, Violence and the Truth, 76 Ind. L.J. 939, 941 (2001).

[FN72]. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1559 (1998) (explaining that although jurors admitting residual doubt are more likely to vote for life than those who express no doubt, fewer than half the jurors in a South Carolina study who had residual doubt indicated that this would lead them to vote for life).

[FN73]. In United States v. Quinones, 205 F. Supp. 2d 256 (S.D.N.Y. 2002). The government insisted that the defendant's pre-trial attack on the federal death sentence statute on the grounds of the inevitability of error was premature. The court rejected the claim, noting that the existence of a capital charge had a significant impact on how the jury was selected. It affected the number and parity of peremptory challenges as well as the grounds upon which jurors could be struck for cause. The court concluded: "... the constitutionality of the death penalty on the ground [irreducible error] under consideration is not only 'ripe' for adjudication at this time, it cannot be postponed without material prejudice to the defendants." Id. at 259.

[FN74]. Daniel Givelber, Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?, 49 Rutgers L. Rev. 1317, 1346-58 (1997).

[FN75]. Commonwealth of Mass., H.R. 196, at 31 (1848), reprinted in Capital Punishment, Nineteenth-Century Arguments (1974).