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## Death Penalty Keynote: Why Mitigation Matters, Now and for the Future

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## DEATH PENALTY KEYNOTE: WHY MITIGATION MATTERS, NOW AND FOR THE FUTURE

Russell Stetler\*

*This Article examines the current state of the death penalty in California and nationally through the lens of mitigation—the empathy-evoking evidence that has been a constitutional requirement to ensure individualized sentencing in the era of the modern American death penalty. It situates the discussion in the context of the extraordinary events of 2020: the Covid-19 pandemic, the heightened awareness of racial inequities reflected in the Black Lives Matter movement, and the federal execution spree in the final six months of the Trump administration.*

*The Article began as the keynote address at California’s annual Capital Case Defense Seminar on February 13, 2021. In the spring of 2020, when the author was invited to give this keynote, no one knew what an unprecedented year was unfolding. No one anticipated that the keynote and the seminar would be virtual. While the keynote kept its focus on the author’s area of expertise (mitigation evidence in death penalty cases), it expanded to reflect on the pandemic, the emergence of Black Lives Matter, and the federal execution spree. The months of research that went into the keynote made it relatively straightforward for the author to transform a speech into a carefully documented Article. Nonetheless, the author has kept some of the colloquial tone of the original address in order to capture the unique framework for understanding the death penalty in California and nationally in 2021.*

*For more than four decades, capital defense training in California and across the country has stressed the importance of developing humanizing evidence based on the diverse frailties of humankind, evidence that at once provides to the accused the effective representation*

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\* Russell Stetler served as the National Mitigation Coordinator for the federal death penalty projects from 2005 until his retirement from full-time work in 2020. He continues to consult and train on mitigation issues throughout the country. He has worked on capital cases since 1980 and now serves as an expert witness on mitigation and the prevailing norms of capital defense.

*guaranteed by the Sixth Amendment and to jurors the evidence that they need to make the reasoned moral decision they are asked to render in capital cases and without which there cannot be reliable results.*

*Capital punishment had its ascendancy in the 1990s when executions resumed in California. Annual death sentences and executions reached their highest numbers both in California and across the country. However, the trends reversed around the turn of the century. The requirement of mitigating evidence to ensure fairness and individualized sentencing was a built-in, self-destructive part of the modern American death penalty.*

*The thirteen federal executions in the final six months of the Trump administration and in the midst of the pandemic were arbitrary and lawless, as prisoners were executed in spite of intellectual disability, mental illness, meritorious legal claims, and powerful evidence of remorse and rehabilitation. Some had spotless or near spotless records during their years on death row. In recent years, we have also seen many other examples of prisoners who were sentenced to death, or to die in prison without hope of parole, who have led exemplary lives after securing their release.*

*The Supreme Court of the United States enabled the federal execution spree, overturning stays issued by numerous federal courts below and suggesting that, at least for now, we have lost the legal battle over the death penalty. However, the death penalty has become a damaged brand, increasingly abandoned by state after state, prosecutors, juries, and the American public. I submit that we are winning the narrative battle.*

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## I. INTRODUCTION

This Article, like the keynote that inspired it, addresses the mysterious power of mitigation,<sup>1</sup> why death sentences have become “vanishingly rare,”<sup>2</sup> and why the mitigation function will endure<sup>3</sup> in the continuing struggles against mass incarceration,<sup>4</sup> death by incarceration,<sup>5</sup> and racial injustice.<sup>6</sup> I must begin with some history, including the role California’s Capital Case Defense Seminar has played in establishing the importance of mitigation and helping to define the national norms of capital defense representation.<sup>7</sup> And I cannot ignore

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1. The author has previously addressed some aspects of this theme in *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237 (2008). See also John H. Blume & Russell Stetler, *Mitigation Matters*, in TELL THE CLIENT’S STORY: MITIGATION IN CRIMINAL AND DEATH PENALTY CASES (Edward Monahan & James Clark eds., 2017).

2. See Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 HOFSTRA L. REV. 1161, 1186 (2018). Appendices 1 to 4 discuss how rare death sentences have always been and how they are “vanishingly rare” today. *Id.* at 1213-56.

3. *Id.* at 1201-03 (discussing use of mitigation in non-death penalty contexts).

4. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* (2010).

5. See generally Rachel Lopez et al., *Redeeming Justice*, 116 NW. U. L. REV. (forthcoming 2021), <https://dx.doi.org/10.2139/ssrn.3728752>; see also POPE FRANCIS, ENCYCLICAL LETTER FRATELLI TUTTI OF THE HOLY FATHER FRANCIS ON FRATERNITY AND SOCIAL FRIENDSHIP para. 268 (2020), [https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20201003\\_enciclica-fratelli-tutti.pdf](https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.pdf). Pope Francis condemned the death penalty and called life sentences a “secret death penalty.” *Id.*

6. See Erika D. Smith, *2020 was the year America embraced Black Lives Matter as a movement, not just a moment*, L.A. TIMES (Dec. 16, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-12-16/black-lives-matter-protests-george-floyd-coronavirus-covid-2020>.

7. The two organizations of the California defense bar, the California Public Defenders Association and California Attorneys for Criminal Justice (its private bar counterpart), have sponsored an annual capital case defense seminar for over forty years. CAP. CASE DEF. SEMINAR, [www.ccdseminar.com](http://www.ccdseminar.com) (last visited Apr. 18, 2021). Beginning with a strategy session held on consecutive weekends in San Francisco and Los Angeles in 1978, CPDA and CACJ have held annual training programs first at the Asilomar Conference Center in Pacific Grove, California, accommodating only a few hundred attendees, and then at large venues in Monterey and San Diego as attendance exceeded one thousand registrants. See, for example, seminar at Asilomar advertisement in 10 FORUM, Oct.-Nov.-Dec. (1983), at 12. The 2021 virtual program was its largest, with over 1,560 lawyers and allied professionals in attendance. The author has regularly served on the seminar faculty and its planning committee since the 1990s (including six years as co-chair of the planning committee), and on the faculty of the related Bryan R. Schechmeister Death Penalty College held annually at the Santa Clara University School of Law since 1992. *Death Penalty College*, SANTA CLARA U. SCH. L., <https://law.scu.edu/dpc> (last visited Apr. 18, 2021); see also e-mail from Prof. Ellen Kreitzberg, Founder, Bryan R. Schechmeister Death Penalty Coll. (Apr. 25, 2021, 9:08 AM PDT) (confirming college has been held annually since 1992) (on file with the author and the law review). For virtual attendance in 2021, see e-mail from Tara Da Re, CACJ project developer, to the Capital Case Defense Seminar planning committee, confirming that 1560

the context of the unprecedented past year—including the events of January 2021 that we have all just experienced.<sup>8</sup>

This is a unique moment in the history of the modern American death penalty.<sup>9</sup> We have just been through what Justice Sonia Sotomayor called an “expedited spree of executions”<sup>10</sup> and the January 6 insurrectionist attack aimed at preventing the inauguration of a new president who is committed to ending the federal death penalty and incentivizing death penalty abolition in the states.<sup>11</sup>

## II. COVID, BLACK LIVES MATTER, AND RACIAL INJUSTICE

I hope that we have turned a corner with mass vaccinations, but we are still in the death throes of the Corona-19 virus. Figure 1 shows the seven-day average deaths over the past year. There are now more than

attendees registered for the seminar in 2021. E-mail from Tara Da Re, Project Developer, Cal. Attorneys for Criminal Justice, to Planning Comm., Capital Case Def. Seminar (Feb. 14, 2021, 1:24 PM) (on file with author and the Santa Clara Law Review). For an example of a state post-conviction court outside California citing the seminar and the college in assessing deficient counsel performance, see order granting sentencing relief in *Gutierrez v. State*, CR94-1795B, slip op. at 29 (Nev. 2nd Dist. Washoe Cty. filed Aug. 21, 2017), aff’d, 477 P.3d 342 (2020) (“There existed criminal defense associations’ training in the defense of capital cases prior to 1994 in California. The annual Capital Case Defense Seminar in Monterey CA put on by the California Attorneys for Criminal Justice and the California Public Defenders Association since 1980. Also, the Death Penalty College at Santa Clara Law School was extant annually since 1992.”).

8. See Peter Baker & Sabrina Tavernise, *One Legacy of Impeachment: The Most Complete Account So Far of Jan. 6*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/us/politics/capitol-riots-impeachment-trial.html>.

9. The modern American death penalty is defined by the statutes that were enacted in an attempt to remedy the arbitrariness and unfettered discretion that the Supreme Court of the United States found unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (holding that prior statutes as applied violated the Eighth and Fourteenth Amendments). In 1976, the highest court approved the new statutes that provided for individualized sentencing determinations. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). For a thorough analysis of the evolution of the Court’s jurisprudence in this period, see generally EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* (2013).

10. *United States v. Higgs*, 592 U.S. \_\_\_, slip op. at 2 (2021) (Sotomayor, J., dissenting). Throughout this expedited spree of executions, this Court has consistently rejected inmates’ credible claims for relief. The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners’ challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale. This is not justice.

*Id.*

11. *The Biden Plan for Strengthening America’s Commitment to Justice*, BIDEN HARRIS DEMOCRATS, <https://joebiden.com/justice/> (last visited Feb. 16, 2021). Biden promised to “work to pass legislation to eliminate the death penalty at the federal level, and incentivize states to follow the federal government’s example.” *Id.*

500,000 Americans dead and over 28 million infected, including nearly 400,000 inmates and over 100,000 staff in our jails and prisons.<sup>12</sup> Daily infections spiked at over 300,000 the week after New Year's.<sup>13</sup> Fortunately, that daily rate has been drastically reduced since then, thanks to tougher public health measures.<sup>14</sup> The developments this year have been encouraging, especially the rollout of the vaccines, and I hope we are finally on our way to ending the pandemic in this country.

### U.S. COVID-19 Deaths: 7-Day Running Average 03/01/20 to Present

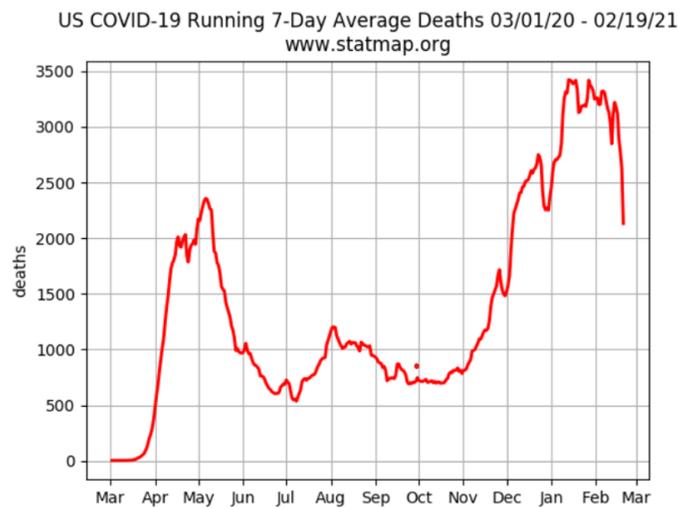


Figure 1<sup>15</sup>

12. *COVID-19 Data in Motion*, JOHNS HOPKINS U. MED., <https://coronavirus.jhu.edu> (last visited Apr. 18, 2021); Beth Schwartzapfel et al., *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19>. The latest statistics are from The Marshall Project: 395,915 prisoners and 110,136 staff. *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last visited Apr. 27, 2021).

13. *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CDC, [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendscases](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases) (last visited Apr. 18, 2021).

14. *Id.*; see, e.g., Alan Levin & Keith Laing, *Biden Team Vows Tough Enforcement of Anti-Virus Travel Steps*, BLOOMBERG (Jan. 21, 2021, 2:00 AM), <https://www.bloomberg.com/news/articles/2021-01-21/biden-to-order-masks-quarantine-for-travelers-in-covid-fight>.

15. *U.S. Pandemic Tracker*, STATMAP.ORG, <https://www.statmap.org> (last visited Feb. 19, 2021) (reporting COVID-19 running seven-day average deaths from March 1, 2020 to February 19, 2021).

The virus has affected us all, short term and long term. It has most profoundly affected the same vulnerable poor populations as our capital clients. People of color have been disproportionately affected, with hospitalization rates nationally about five times higher for Latinx, Blacks, Native Americans, and indigenous Alaskans.<sup>16</sup> The impact on Latinx families has been even worse in Los Angeles and elsewhere in California.<sup>17</sup> These rates are not higher because of any innate characteristics of these populations, but because of the inequities that our society continues to inflict on them in the twenty-first century—higher housing density in more toxic neighborhoods, poorer nutrition and access to health care, plus more dangerous jobs as “essential workers” inadequately protected from the ravages of the disease.<sup>18</sup> These health inequities represent further divisions between ourselves and our clients’ families, both immediately and long term. They are new obstacles to building the trust and rapport that have always been essential elements of effective mitigation investigation.<sup>19</sup>

Our clients themselves are the most vulnerable of all in the jails and prisons that have been Covid super-spreaders across the country—overcrowded, notoriously unsanitary, and built to deny even the most fundamental element of good health, fresh air.<sup>20</sup> Staff bring the disease

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16. Henri Garrison-Desany, Epidemiologist, Johns Hopkins Dep’t of Epidemiology, Lecture at Virtual Seminar on Mitigation in the Time of Covid Under the Auspices of the Nat’l Mitigation Coordinator (Dec. 10, 2020). This presentation was not recorded or transcribed. See also William F. Marshall, III M.D., *Why are people of color more at risk for coronavirus complications?*, Mayo Clinic (Aug. 13, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/expert-answers/coronavirus-infection-by-race/faq-20488802>.

17. See Associated Press, *California enacts measures to reduce Covid rates in Latino, Black, Pacific Islander communities*, NBC NEWS (Oct. 2, 2020, 6:34 AM), <https://www.nbcnews.com/news/latino/california-enacts-measures-reduce-covid-rates-latino-black-pacific-islander-n1241802> (reporting that Latinx make up forty percent of state’s population but sixty percent of infections and almost half of deaths).

18. See Marshall, *Why are people of color more at risk*, *supra* note 16.

19. See discussion of rapport in Blume & Stetler, *Mitigation Matters*, *supra* note 1, at 19 (quoting *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 682 (2008) (guideline 5.1.C)).

20. Cassandra Stubbs, Dir., ACLU Capital Punishment Project, Lecture at Virtual Seminar on Mitigation in the Time of Covid (Dec. 10, 2020). There is no transcript of this presentation, but Stubbs confirmed the accuracy of the author’s summary. E-mail from Cassandra Stubbs, Dir. of Capital Punishment Project, ACLU, to author (Apr. 26, 2021, 5:51 PM) (on file with author and the Santa Clara Law Review). Stubbs was also counsel of record in successful state and federal lawsuits on the impact of Covid on the county jail in Orange County, California. *Campbell v. Barnes*, No. 30-2020-114-1117 (Cal. Super. Ct. 2020) (Order on Writ of Habeas Corpus and Writ of Mandate) (relying in part on an expert in carceral settings, Joe Goldenson, M.D). Declaration of Joe Goldenson, *Ahlman v. Barnes*, No. 8:20-cv-00835 (C.D. Cal. Apr. 30, 2020) (Exhibit H). The order and declaration are also on file with the author and the law review.

to and from the jails and prisons.<sup>21</sup> When there are no more ICU beds, makeshift isolation units are improvised.<sup>22</sup> Personal protective equipment has been in short supply; even soap can be a luxury item.<sup>23</sup> Historic understaffing is aggravated by “sick-outs” that only worsen conditions in terms of access to the yard, showers, or hot meals.<sup>24</sup> The disease brought as much death in a year to San Quentin’s death row as all the executions in the modern era.<sup>25</sup> We have seen across the country how the virus took the lives of death row prisoners. One of the first was Alfonso Salazar in Arizona<sup>26</sup> who died before the judge could rule on the powerful evidence of ineffective representation presented at his federal habeas hearing.<sup>27</sup> More recently, we learned of Romell Broom in Ohio, who survived a botched lethal injection in 2009 only to succumb to the virus.<sup>28</sup>

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Since 1978, the CDCR reports thirteen executions in California. The exact number of Covid-related deaths is unclear. The website of the California Dept. of Corr. & Rehabilitation lists only twelve death row deaths as probable/possible Covid-related. See *Condemned Inmates Who Have Died Since 1978*, Cal. Dep’t Corrections & Rehabilitation, <https://www.cdcr.ca.gov/capital-punishment/condemned-inmates-who-have-died-since-1978/> (last visited Feb. 21, 2021). However, at least one prisoner who died in an outside hospital in December had been sent there because of Covid, even though CDCR officially attributed his death to “natural causes[.]” Press Release, Cal. Dep’t of Corrections & Rehabilitation, *Condemned Inmate James Odle Dies*, (Dec. 18, 2020), <https://www.cdcr.ca.gov/news/2020/12/18/condemned-inmate-james-odle-dies/>. However, see also e-mail from the lawyer representing Odle explaining how he was sent to a San Francisco hospital because of Covid and then transferred to the nursing wing at Corcoran State Prison, where he died. Although CDCR does not count his death as Covid-related, his lethal deterioration began with the Covid infection. E-mail from Jonathan Laba, Counsel for James Odle, to author and others who had worked on Odle’s case (Dec. 18, 2020, 7:43 PM) (on file with author and the Santa Clara Law Review). Nineteen death row prisoners at San Quentin died in 2020, more than twice as many as in any previous year. *Condemned Inmates Who Have Died Since 1976*, *supra*.

26. Danielle Haynes, *Arizona death row inmates dies from COVID-19*, UNITED PRESS INT’L (May 1, 2020, 4:01 PM), [https://www.upi.com/Top\\_News/US/2020/05/01/Arizona-death-row-inmate-dies-from-COVID-19/4431588361411/](https://www.upi.com/Top_News/US/2020/05/01/Arizona-death-row-inmate-dies-from-COVID-19/4431588361411/); see also Jessica Constant & Annika Russell, *COVID-19 on Death Row*, ABA (Oct. 30, 2020), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/publications/project\\_blog/covid-19-on-death-row/](https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/covid-19-on-death-row/).

27. Transcript of Testimony of Russell Stetler at 79-110, *Salazar v. Ryan*, No. CV-96-00085-TUC-FRZ (D. Ariz. Aug. 15, 2017) (covering prevailing norms); Declaration of Russell Stetler (filed as Doc. 201, Feb. 6, 2015) at 30-45 (citing specific deficiencies).

28. Kate Feldman, *Ohio death row inmate who survived 2009 execution dies of COVID-19*, N.Y. DAILY NEWS (Dec. 30, 2020, 11:20 AM), <https://www.nydailynews.com/coronavirus/ny-covid-romell-broom-inmate-dead-execution-20201230-c4p5ebnhvngkvfevzuuo2btlka-story.html>.

This was also the year of George Floyd, and an insistent public cry that Black Lives Matter.<sup>29</sup> Video evidence from mobile phones and body cameras has made some racist realities undeniable. Capital defense practitioners have seen these realities in our courtrooms and the explicit and implicit racism at work throughout the criminal justice system.<sup>30</sup> However, in 2020, the whole world was watching. We can only hope that the fervor for change has a lasting institutional impact— particularly through the election of progressive prosecutors, passage of California’s Racial Justice Act,<sup>31</sup> and other criminal justice reforms.<sup>32</sup> Racism infects capital cases at every decision point, from clearance rates and arrests to prosecutorial charging, pleas versus trials, jury selection, appeals, and executions. Chief Justice Roberts wrote in *Buck v. Davis* that some toxins, like racism, can be deadly even in small doses.<sup>33</sup> The events of 2020 remind us that we are not talking about small doses, but systemic overdoses.

This was also the year when scholars revisited the data from the case of Warren McCleskey in Georgia.<sup>34</sup> Three and a half decades ago, the late Professor David Baldus established statistical proof that those

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29. See Smith, *supra* note 6.

30. See, e.g., JENNIFER L. EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* (2019).

31. The Racial Justice Act prohibits the use of race, ethnicity or national origin to obtain convictions or impose sentences. *Governor Newsom Signs Landmark Legislation to Advance Racial Justice and California’s Fight Against Systemic Racism & Bias in Our Legal System*, OFF. GOVERNOR GAVIN NEWSOM (Sept. 30, 2020), <https://www.gov.ca.gov/2020/09/30/governor-newsom-signs-landmark-legislation-to-advance-racial-justice-and-californias-fight-against-systemic-racism-bias-in-our-legal-system/>.

32. *Id.* Most importantly, California also passed AB 3070 to eliminate discrimination in jury selection, widely viewed as a measure to enhance the protections in previous case law. On July 31, 2020, for example, the Ninth Circuit Court of Appeals found that the capital murder trial of Marvin Walker was infected by unconstitutional racial bias in the selection of a jury in Santa Clara County. See *Walker v. Davis*, No. 19-15087, slip op. at 16 (9th Cir. July 31, 2020). Walker is now entitled to a new trial with a fairly selected jury of his peers. *Id.*; see also Bob Egelko, *Death penalty restored for San Jose man*, SFGATE (Mar. 7, 2013, 5:53 PM), <https://www.sfgate.com/crime/article/Death-penalty-restored-for-San-Jose-man-4337814.php>. One might be tempted to applaud this decision as evidence that the current system works. The flaw in that argument is that Walker went to trial forty years ago, at age twenty, and has already spent two thirds of his life on death row at San Quentin. *Id.*

33. *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

34. *McCleskey v. Kemp*, 481 U.S. 279 (1987) (requiring a showing of intentional racial discrimination in individual case, rather than general evidence of racially disproportionate impact). Decades later, Michelle Alexander commented that the *McCleskey* opinion “immunized the criminal justice system from judicial scrutiny for racial bias. It has made it virtually impossible to challenge any aspect [of the] criminal justice process for racial bias in the absence of proof of intentional discrimination, conscious, deliberate bias.” *Transcript*, PBS: BILL MOYERS J. (Apr. 2, 2010), <https://www.pbs.org/moyers/journal/04022010/transcript1.html>.

who killed white victims were four times as likely to receive a death sentence.<sup>35</sup> Examining the same dataset, Professors Scott Phillips and Justin Marceau found that those who killed white victims were **seventeen times** as likely to be executed.<sup>36</sup> Tony Amsterdam has called the Supreme Court's decision in *McCleskey v. Kemp* the Dred Scott case of the twentieth century.<sup>37</sup> Justice Brennan famously wrote in dissent that when the majority refused to acknowledge the significance of David Baldus's empirical evidence and dismissed racist effects as inevitable, they did so out of a "fear of too much justice."<sup>38</sup>

Two recent studies by the Death Penalty Information Center make related points. An analysis of death row exonerees found more prosecutorial misconduct in the cases of Black defendants, as well as more time on death row before their wrongful convictions were exposed.<sup>39</sup> DPIC also found that 80 percent of the death sentences vacated because of intellectual disability involved people of color, and two-thirds involved African Americans.<sup>40</sup>

### III. MITIGATION AND PREVAILING NORMS: IN CALIFORNIA AND IN NATIONAL STANDARDS

This keynote has been a special privilege because this seminar has meant so much to me personally. I have attended it for four decades, and it is humbling to admit that it was my capital defense kindergarten. I barely knew my ABCs of capital defense and mitigation when I first attended the seminar at the Asilomar conference center, that beautiful

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35. *McCleskey*, 481 U.S. at 286-87.

36. Scott Phillips & Justin F. Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 587 (2020).

37. Interview by Myron A. Farber with Anthony G. Amsterdam, Professor of Law, N.Y. Univ. Law Sch., in N.Y.C., N.Y. (2010) (interview conducted as part of the Rule of Law Oral History Project).

38. *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

39. NGOZI NDULUE, *ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY* 48 (Robert Dunham ed., 2020).

Defendants of color are over-represented among those wrongly convicted of capital murder, and they spend on average four years longer on death row than white defendants before being exonerated. Several factors make defendants of color more vulnerable to wrongful capital prosecution. The long history of over-policing in African-American communities affects who will be looked at with suspicion for unsolved murder cases. Exonerations of African Americans for murder convictions are 22% more likely to involve police misconduct.

*Id.*

40. *Reversals Under Atkins*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/intellectual-disability/reversals-under-atkins> (last visited Apr. 17, 2021) (analyzing 130 cases involving defendants whose death sentences have been overturned because of intellectual disability and finding eighty-seven were African-Americans and eighteen were Latinx).

and austere campus where just a few hundred of us used to meet in the early years of the modern death penalty to share our experiences. The seminar has always been fortunate to assemble a faculty who come from all over the country, a recognition from the beginning that we are part of a national community of capital defenders. The faculty for this seminar has always generously donated its time. The organizations sponsoring the seminar (the California Public Defenders Association, CPDA, and California Attorneys for Criminal Justice, CACJ) cover their travel and hotel, but nothing more.

California's Capital Case Defense Seminar was also one of the first to recognize the necessity of multidisciplinary teamwork in capital defense, the importance of the investigative functions in both phases of a capital case, and the value that nonlawyers add to capital defense. Before the term "mitigation specialist" had even been coined, attorney Tom Nolan hired an ex-*New York Times* reporter from the Berkeley journalism school, the late Lacey Fosburgh, to give the life history of his client Robert Anthony Nelson her undivided attention.<sup>41</sup> In southern California, attorney Leslie Abramson and others asked a former probation officer, the late Casey Cohen, to play a similar role,<sup>42</sup> and Cohen frequently lectured about it at the annual California seminar. CACJ's magazine *Forum* published Lacey Fosburgh's account of her work<sup>43</sup> and an interview with Casey Cohen.<sup>44</sup> *Forum* also publicized the late Millard Farmer's pioneering multidisciplinary concept of Team Defense<sup>45</sup> and interviewed an early East Coast mitigation specialist, Cessie Alfonso.<sup>46</sup> And during her relocation to California, this seminar presented the late and legendary Scharlette Holdman, the best known of all the mitigation strategists.<sup>47</sup> Professor Craig Haney of the University

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41. Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, FORUM 31 (July 1982) (on file with the author and the law review).

42. Terry Pristin, *He Tries to Prove There's a Little Good in Everyone: Prober's Job Is to Keep Killers Off Death Row*, L.A. TIMES (Dec. 27, 1988, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1988-12-27-me-1027-story.html>.

43. Fosburgh, *supra* note 41.

44. Anne E. Fragasso, *Interview: Casey Cohen*, FORUM 22 (Jan.-Feb. 1987) (on file with the author and the law review).

45. Michael G. Millman, *Interview: Millard Farmer*, 11 FORUM 31 (Nov.-Dec. 1984) (on file with the author and the law review).

46. Leslie H. Abramson, *Interview: Cessie Alfonso*, 15 FORUM 24 (Mar.-Apr. 1988) (on file with the author and the law review).

47. Maurice Chammah, *We Saw Monsters. She Saw Humans.*, MARSHALL PROJECT (July 13, 2017, 5:58 PM), <https://www.themarshallproject.org/2017/07/13/we-saw-monsters-she-saw-humans>. Holdman and the author were colleagues at the California Appellate Project from 1990 to 1995. The project was a nonprofit law office established by the State Bar of California in 1983 as a resource center to assist appointed counsel representing death-sentenced prisoners on direct appeal and in post-conviction proceedings throughout the state.

of California, Santa Cruz, taught the mitigation lessons of social psychology at this seminar from its earliest days—how social history and social context explain capital crimes, rather than what he calls the master crime narrative employed relentlessly by prosecutors.<sup>48</sup>

The importance of nonlawyers in capital defense teams was recognized by the American Bar Association in the 2003 revision of its death penalty guidelines<sup>49</sup> and by the Supreme Court of the United States in *Wiggins v. Smith*.<sup>50</sup> That decision spelled out the details of the mitigation function that was embedded in the prevailing norms for effective representation guaranteed by the Sixth Amendment.<sup>51</sup>

The author of the *Wiggins* decision was Justice Sandra Day O'Connor, who—two decades earlier—had written *Strickland v. Washington*,<sup>52</sup> a terrible decision that defined effective capital representation as basically a lawyer with a heartbeat and an unexpired bar card.<sup>53</sup> David Washington's lawyer in Florida did no investigation

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48. See generally CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* (2005); CRAIG HANEY, *CRIMINALITY IN CONTEXT: THE PSYCHOLOGICAL FOUNDATIONS OF CRIMINAL JUSTICE REFORM* (2020). See also Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447 (1997); Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557 (2004); Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835 (2008); Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689 (2009); Craig Haney, *On Mitigation As Counter-Narrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911 (2009).

49. See generally Am. Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003) [hereinafter *ABA Guidelines for the Appointment and Performance*]. For the history of these guidelines, see Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Representation*, 41 HOFSTRA L. REV. 635 (2013); Russell Stetler & Aurélie Tabuteau, *The ABA Guidelines: A Historical Perspective*, 43 HOFSTRA L. REV. 731 (2015). Guidelines 4.1 and 10.4 defined the minimal defense team as requiring at least two lawyers, a fact investigator, and a mitigation specialist, with at least one member "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." *Supra*, at 952, 999-1000.

50. *Wiggins v. Smith*, 539 U.S. 510 (2003). The *Wiggins* opinion also noted the role of the nonlawyer in developing mitigation evidence. *Id.* at 516-17, 524.

51. See *id.* at 524.

52. *Strickland v. Washington*, 466 U.S. 668, 669 (1984) (establishing two-prong test for ineffective assistance of counsel: deficient performance as measured by prevailing professional norms and prejudice, requiring a reasonable likelihood of a different outcome but for the deficient performance).

53. Justice O'Connor required "a heavy measure of deference" to counsel's judgment. *Id.* at 691. Almost anything could be excused as "strategy" if counsel had a plausible reason for it.

whatsoever and called no penalty phase witnesses.<sup>54</sup> That sounded to Justice O'Connor like a reasonable strategy in a triple murder case.<sup>55</sup> Mr. Washington was electrocuted shortly after her decision,<sup>56</sup> and it would not be until the dawn of the twenty-first century, sixteen years later, that the Supreme Court reversed *any* capital case for ineffective representation.<sup>57</sup> In her *Wiggins v. Smith* opinion in 2003, Justice O'Connor showed that, like most of our clients, she had the capacity to change. She was more than the worst opinion she had ever written.<sup>58</sup>

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54. *Id.* at 672-73.

55. Washington was convicted of “three brutal stabbing murders.” *Id.* at 671-72. In fairness, the one case that Justice O'Connor cited as precedent involved a lawyer who had barely gotten out of bed and failed to file anything. In *Michel v. Louisiana*, 350 U.S. 91 (1955), the effectiveness of trial counsel E. I. Mahoney was challenged for his failure to file a standard motion challenging the composition of the nearly all-white grand jury in New Orleans. In fact, Mahoney, who was seventy-six or seventy-seven at the time of his appointment did not work at all on Michel's case. Mahoney was appointed on January 5, 1951. The next docket entry was a year later (January 29, 1952) when he asked to withdraw. He had been ill and bedridden for several months in between. The Supreme Court agreed with the Louisiana courts that Mahoney was experienced and therefore presumed effective: “There is no evidence of incompetence. The mere fact that a timely motion to quash was not filed does not overcome the presumption of effectiveness. The delay might be considered sound trial strategy . . . .” *Michel*, 350 U.S. at 92, 100-01. I have discussed the details of the *Michel* case and Justice O'Connor's reliance on it in *Strickland* in Stetler & Wendel, *supra* note 49, at 653-55.

56. David Washington was executed on July 13, 1984. *David Washington*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/22/david-washington> (last visited Feb. 17, 2017). *Strickland v. Washington* was decided on May 14, 1984. *Strickland*, 466 U.S. at 668.

57. The first capital case reversed for ineffective assistance of counsel was *Williams v. Taylor*, 529 U.S. 362 (2000). Four more cases followed in the first decade of the twenty-first century: *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009); *Sears v. Upton*, 561 U.S. 945 (2010). Nonetheless, many appellate courts continued to deny ineffectiveness claims through reliance on *Strickland*. See generally Christopher Seeds, *Strategy's Refuge*, 99 J. CRIM. L. & CRIMINOLOGY 987 (2009).

58. In the world of mitigation, it is an axiom that if you kill someone, you are not *just* a killer. Bryan Stevenson has reformulated this proposition in multiple ways—for example, “Each of us is more than the worst thing we've ever done.” BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17 (2014). Similarly, members of the High Court who wrote or joined in majority opinions creating seemingly insurmountable obstacles to successful constitutional claims have sometimes been the leaders in establishing new pathways to relief. In *Wiggins*, Justice O'Connor quoted heavily from the original 1989 edition of the ABA Guidelines:

The ABA Guidelines provide that investigations into mitigating evidence “should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional

I have charted this evolving respect for mitigation in multiple ways: the U.S. Supreme Court decisions establishing the breadth of mitigation evidence under the Eighth Amendment, and then the duty to investigate mitigation thoroughly as an essential requirement of the Sixth Amendment (Fig. 2); the dates of the trials in the 1980s when lawyers were found to be ineffective for failing to develop mitigation (Figs. 3 and 4); the major efforts to summarize and codify the prevailing norms of the capital defense community that established the importance of mitigation (Fig. 5); the dates of the major conferences that made mitigation central to their curriculum (Fig. 6); and the dates of some of the landmark publications that reflected our standards (Fig 7).<sup>59</sup>

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experience, and religious and cultural influences (emphasis added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1982) (“The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing . . . . Investigation is essential to fulfillment of these functions”).

*Wiggins*, 539 U.S. at 524-25.

59. I have discussed the evolution of the Eighth and Sixth Amendment law relating to mitigation elsewhere. Blume & Stetler, *Mitigation Matters*, *supra* note 1, 8-11; Russell Stetler, *The History of Mitigation in Death Penalty Cases*, in *SOCIAL WORK, CRIMINAL JUSTICE, AND THE DEATH PENALTY: A SOCIAL JUSTICE PERSPECTIVE* 34, 35-37 (Lauren A. Ricciardelli ed., 2020); *see generally* Stetler & Wendel, *supra* note 49; Stetler, *The Past, Present, and Future of the Mitigation Profession*, *supra* note 2, at 1164. These charts simply condense into visual representations the major court cases and the materials on which courts rely to determine prevailing norms (ABA standards and the like, law review articles and defense bar publications, training programs, etc.). *See* *Padilla v. Kentucky*, 559 U.S. 356, 365-68 (2010) (outlining objective criteria for evaluating prevailing professional norms when assessing deficient counsel performance, including “ABA standards and the like,” defense bar publications, law review articles and books).

**Evolution of mitigation standards:  
Supreme Court decisions**



Figure 2<sup>60</sup>

60. Decisions of United States Supreme Court defining breadth of mitigation under Eighth Amendment and counsel's obligation to investigate mitigation thoroughly under Sixth Amendment. See *supra* note 59 (providing explanation for Figures 2-7). Figure 2 was created for my use by Maria McLaughlin & Alex Roberts. For a discussion on each of the Supreme Court cases identified in Figure 2, see Stetler, *The History of Mitigation in Death Penalty Cases*, *supra* note 59.

**Evolution of mitigation standards:  
Supreme Court decisions  
(with trial dates)**

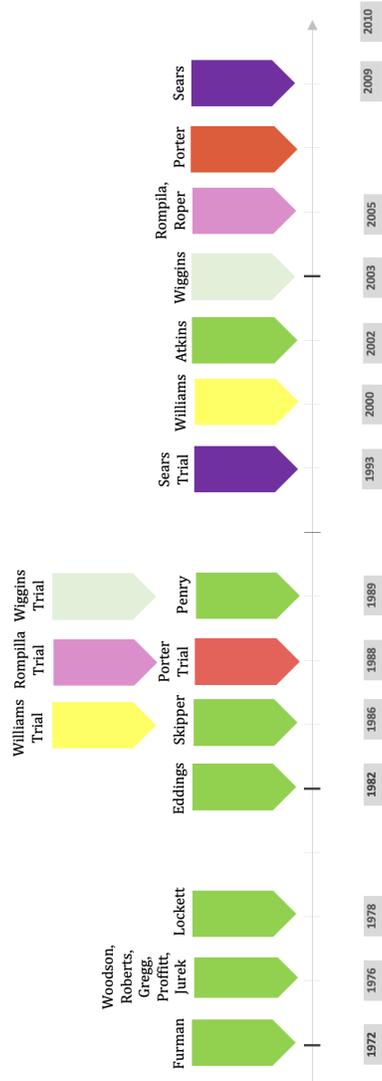


Figure 3<sup>61</sup>

61. Decisions of United States Supreme Court defining counsel’s obligation to investigate mitigation thoroughly under Sixth Amendment with dates of original trials where counsel’s performance fell below prevailing professional norms. *See supra* note 59 (providing explanation for Figures 2-7). Figure 3 was created for my use by Maria McLaughlin & Alex Roberts. For a discussion on each of the Supreme Court cases identified in Figure 3, see Stetler, *The History of Mitigation in Death Penalty Cases*, *supra* note 59.

**Evolution of mitigation standards:  
Supreme Court decisions  
(with trial dates)**

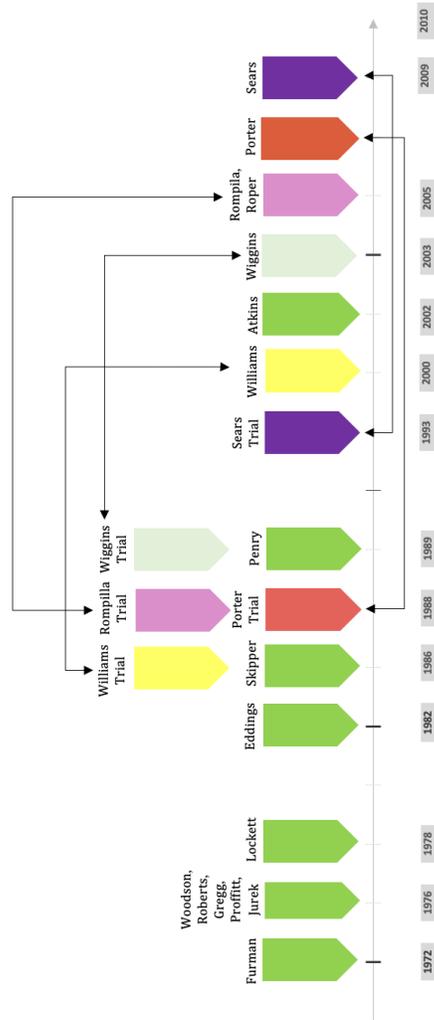


Figure 4<sup>62</sup>

62. Decisions of United States Supreme Court defining counsel’s obligation to investigate mitigation thoroughly under Sixth Amendment with dates of original trials where counsel’s performance fell below prevailing professional norms. *See supra* note 59 (providing explanation for Figures 2-7). Figure 4 was created for my use by Maria McLaughlin & Alex Roberts. For a discussion on each of the Supreme Court cases identified in Figure 4, see Stetler, *The History of Mitigation in Death Penalty Cases*, *supra* note 59.

Evolution of mitigation standards

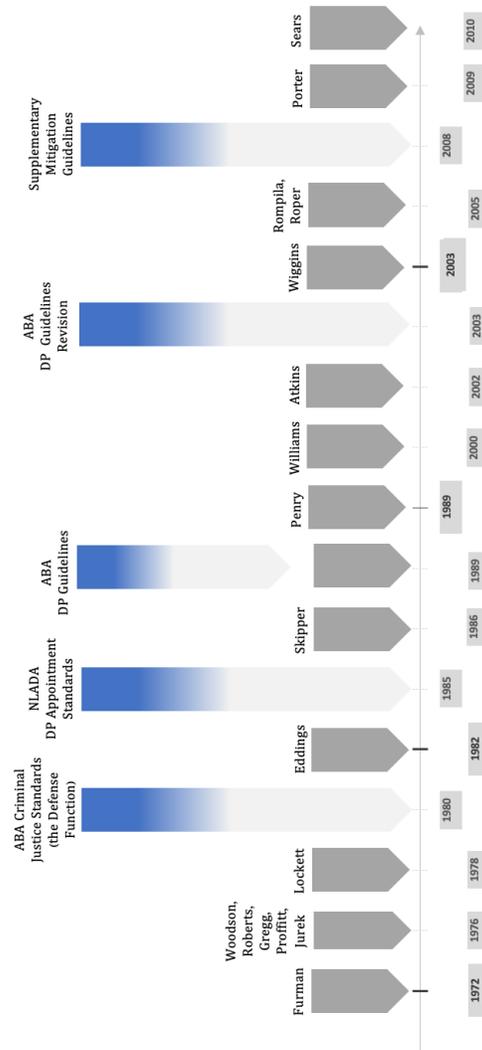


Figure 5<sup>63</sup>

63. Evolution of mitigation standards juxtaposing relevant court decisions and multiple codifications of professional norms. See *supra* note 59 (providing explanation for Figures 2-7). Figure 5 was created for my use by Maria McLaughlin & Alex Roberts. For a discussion on the standards identified in Figure 5, see Stetler & Wendel, *supra* note 49.

**Evolution of mitigation standards:  
annual conferences (year first held)**

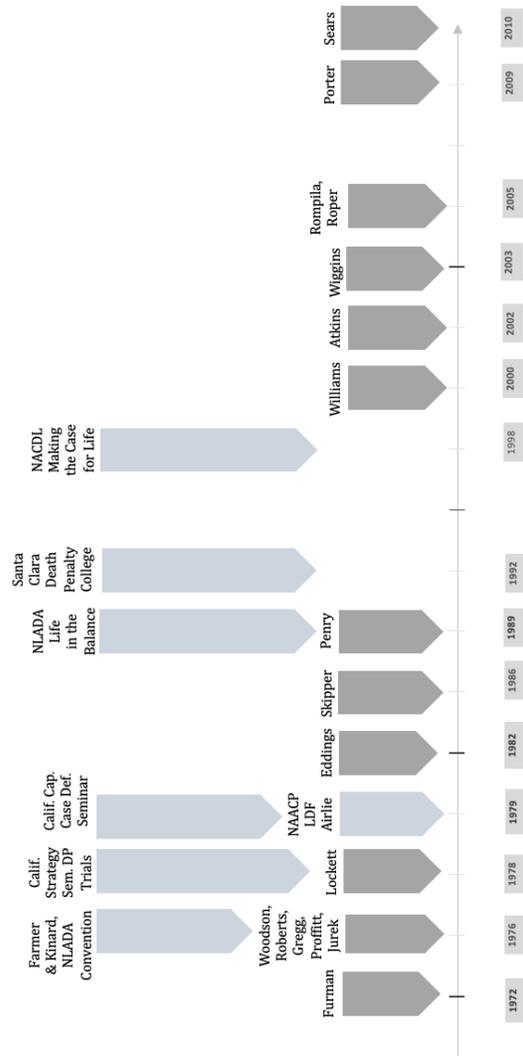


Figure 6<sup>64</sup>

64. Evolution of mitigation standards juxtaposing relevant court decisions and the years when major annual conferences were first held. *See supra* note 59 (providing explanation for Figures 2-7). Figure 6 was created for my use by Maria McLaughlin & Alex Roberts. For a discussion on the standards identified in Figure 6, see Stetler & Wendel, *supra* note 49.

Evolution of mitigation standards:  
significant publications

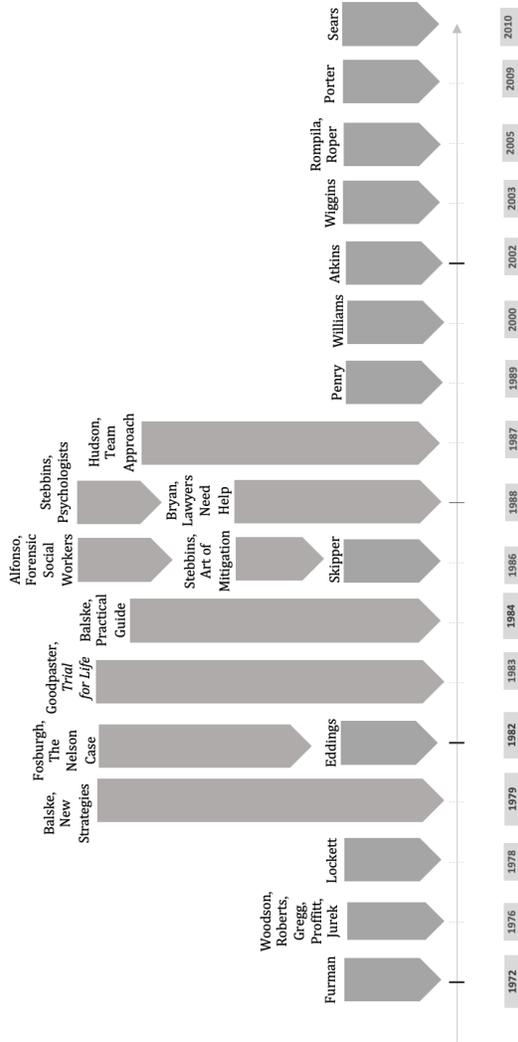


Figure 7<sup>65</sup>

65. Evolution of mitigation standards juxtaposing relevant court decisions and dates of significant publications relating to mitigation. See *supra* note 59 (providing explanation for Figures 2-7). Figure 7 was created for my use by Maria McLaughlin & Alex Roberts. For a discussion on the standards identified in Figure 7, see Stetler & Wendel, *supra* note 49, at 672-75.

In 2020, our colleagues in Texas won a case in the Supreme Court—*Andrus v. Texas*—reaffirming that the performance prong of the Sixth Amendment requires thorough mitigation investigation in capital cases.<sup>66</sup> It had been more than a decade since the High Court addressed this issue, and its personnel had changed. Nonetheless, the per curiam opinion had only Justices Alito, Thomas, and Gorsuch dissenting.<sup>67</sup> The opinion, implicitly endorsed by Chief Justice Roberts and/or Justice Kavanaugh, quoted approvingly from all the prior opinions recognizing the duty to conduct thorough mitigation investigation.<sup>68</sup>

#### IV. CALIFORNIA'S EXECUTION YEARS, 1992 TO 2006

California's Capital Case Defense Seminar guided the capital defense bar through the terrible years of the 1990s, when capital punishment was in its ascendancy. California averaged nearly three

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66. *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam). The case reached the High Court on appeal from a denial of relief in state post-conviction proceedings, and the Court sent it back to the Texas Court of Criminal Appeals to address prejudice, the second prong of Strickland.

67. Mark Joseph Stern, *Congress Finally Scrutinizes One of SCOTUS's Most Disturbing Practices*, SLATE (Feb. 18, 2021, 6:53 PM), <https://slate.com/news-and-politics/2021/02/supreme-court-shadow-docket-house-hearing.html> (discussing how the so-called “shadow docket” of unsigned merits opinions, decided without oral argument or full briefing, increased roughly tenfold from 2017 to 2020). In *Andrus*, three justices (Justices Alito, Thomas, and Gorsuch) signed the dissent by Justice Alito. However, there is no way to know whether the other six Justices agreed with the unsigned majority opinion. One of them may have silently disagreed, on grounds different from Alito's. *See Andrus*, 140 S. Ct. at 1875.

68. The Court affirmed trial counsel's obligation to conduct a thorough investigation of a defendant's background, and reiterated that the failure to uncover “voluminous mitigating evidence” could not be a tactical decision, citing *Williams*. *Andrus*, 140 S. Ct. at 1881-83. Noting that the “scope of mitigation investigation” in *Andrus* approached nonexistent, and the Court cited *Wiggins* to affirm that counsel needs more than “rudimentary knowledge from a narrow set of sources.” *Id.* at 1882-83. It echoed the language of *Rompilla* about the importance of investigating the State's case in aggravation. *Id.* at 1884. Just as the mitigation in *Porter* included what happened to his regiment and company in combat during the Korean War, the scope of the mitigation in *Andrus* needed to include the effects of his toxic neighborhood and the detrimental impact of his juvenile incarceration. *Id.* at 1879-80; *see also Porter v. McCollum*, 558 U.S. 30, 33-34 (2009). In *Sears*, seven mitigation witnesses had testified, and in *Andrus* there were testifying mitigation witnesses, as well as a pretrial mitigation specialist and consulting mental health expert. *Id.* at 1882-84; *see also Sears v. Upton*, 561 U.S. 945, 947-48 (2010). The reviewing court needs to “speculate” on the effect of new mitigating evidence, “regardless of how much or little” was presented at trial. *Andrus*, 140 S. Ct. at 1887. Although some of the mitigation in *Porter* relates directly to his combat experience in Korea, in some cases we know only the trauma to which his regiment or company was exposed. The analogy in *Andrus* was to his traumatic neighborhood, even if the direct effects of the neighborhood were not documented. In *Sears*, seven witnesses testified in the penalty phase that the defendant came from a loving family that would be impacted by his execution. However, post-conviction investigation disclosed that this was a false picture and that no pretrial mitigation investigation had been done. *Andrus* likewise had witnesses in his penalty phase but there had been no investigation and the testimony was unreliable.

dozen death sentences a year, peaking at forty-three in 1999.<sup>69</sup> California mirrored the national trends: annual death sentences nationally reached 315 in 1996.<sup>70</sup> Executions likewise returned to San Quentin. California had eight executions between 1992 and 2000: two in the gas chamber, Robert Harris (April 21, 1992) and David Mason (August 24, 1993);<sup>71</sup> the rest by lethal injection, William Bonin (February 23, 1996),<sup>72</sup> Keith Williams (May 3, 1996),<sup>73</sup> Thomas Thompson (July 14, 1998),<sup>74</sup> Jaturun Siripongs (February 9, 1999),<sup>75</sup> Manuel Babbitt (May 4, 1999),<sup>76</sup> and Darrell Rich,<sup>77</sup> by then known as Young Elk (March 15, 2000).<sup>78</sup> Across the country, executions soared to ninety-eight in 1999,<sup>79</sup> seemingly on course to break a hundred. But they never did. Figure 8 charts the rise and steep decline of executions nationally.<sup>80</sup>

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69. *Death Sentences in the United States Since 1977*, DEATH PENALTY INFO CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year> (last visited Apr. 18, 2021).

70. *Id.*

71. See SCOTT CHRISTIANSON, *THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER* 217-20 (2010) (discussing successful lawsuit by the ACLU of Northern California challenging lethal gas as an unconstitutional method of execution and passage of law authorizing lethal injection as an alternative); see also Peter S. Adolf, *Killing Me Softly: Is the Gas Chamber, or Any Other Method of Execution, "Cruel and Unusual Punishment?"*, 22 HASTINGS CON. L.Q. 815 (1995).

72. *William Bonin*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/322/william-bonin> (last visited Apr. 18, 2021).

73. *Keith Williams*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/329/keith-williams> (last visited Apr. 18, 2021).

74. *Thomas Thompson*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/470/thomas-thompson> (last visited Apr. 18, 2021).

75. *Jaturun Siripongs*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/514/jaturun-siripongs> (last visited Apr. 18, 2021).

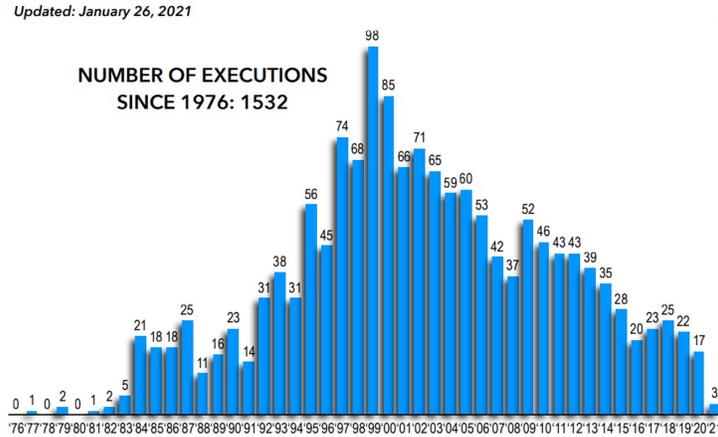
76. *Manuel Babbitt*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/541/manuel-babbitt> (last visited Apr. 18, 2021).

77. *Darrell Rich*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/620/darrell-rich> (last visited Apr. 18, 2021).

78. See Jim Herron Zamora, *End of a serial killer*, SFGATE, <https://www.sfgate.com/news/article/End-of-a-serial-killer-3069546.php> (last updated Feb. 6, 2021, 6:14 AM).

79. *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Byear%5D=1999> (last visited Apr. 18, 2021).

80. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR., <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> (last visited Apr. 18, 2021).

Figure 8<sup>81</sup>

California had five more executions from 2001 to 2006: Robert Massie (March 27, 2001),<sup>82</sup> Stephen Anderson (January 29, 2002),<sup>83</sup> Donald Beardslee (January 19, 2005),<sup>84</sup> Stanley Williams (December 13, 2005),<sup>85</sup> and Clarence Allen (January 17, 2006),<sup>86</sup> but then they stopped—I hope, forever. Annual death sentences also plummeted here in California and nationally.<sup>87</sup>

81. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR., <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> (last visited Aug. 18, 2021) (illustrating executions in the United States from 1977 through January 26, 2021 (inauguration of President Biden)).

82. *Robert Massie*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/703/robert-massie> (last visited Apr. 18, 2021).

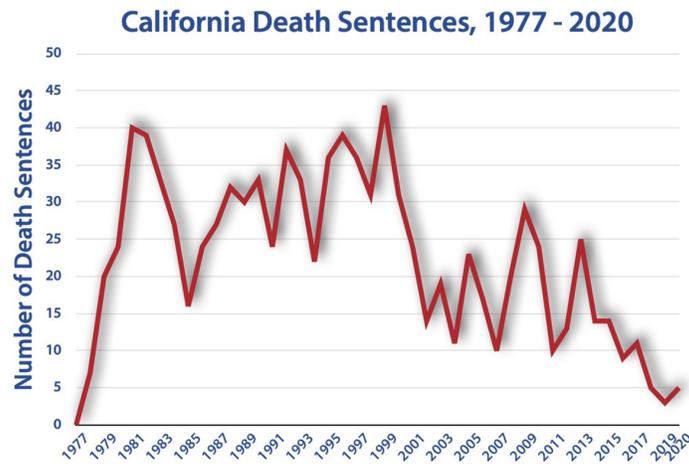
83. *Stephen Anderson*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/754/stephen-anderson> (last visited Apr. 18, 2021).

84. *Donald Beardslee*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/946/donald-beardslee> (last visited Apr. 18, 2021).

85. *Stanley Williams*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1003/stanley-williams> (last visited Apr. 18, 2021).

86. *Clarence Allen*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1005/clarence-allen> (last visited Apr. 18, 2021).

87. *Death Sentencing Graphs By State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/state-death-sentences-by-year> (last visited Apr. 18, 2021).

Figure 9<sup>88</sup>

#### V. AMERICA'S SELF-DESTRUCTIVE DEATH PENALTY

We now have abundant empirical evidence that mitigation works. We all know the high-profile cases in which juries rejected death: Zacarias Moussaoui, one of the hijackers of September 11, tried federally in Virginia;<sup>89</sup> Juan Quintero, an undocumented Mexican national tried in Harris County, the buckle of the Texas Death Belt;<sup>90</sup> Brian Nichols, who went to court in Atlanta on a rape charge, wrestled a gun from a bailiff, and killed multiple people in the courtroom and a federal agent once he had left the courthouse;<sup>91</sup> and James Holmes, whose sensational mass killings in a movie theater in Aurora, Colorado, also made national headlines.<sup>92</sup> All went to trial before death-qualified juries that returned life verdicts.

88. *Famous Cases*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/california> (last visited June 15, 2021).

89. Renee Montagne & Larry Abramson, *Judge Sends Moussaoui to Prison for Life*, NPR (May 4, 2006, 11:05 AM), <https://www.npr.org/templates/story/story.php?storyId=5382402>.

90. See Jeffrey Toobin, *The Mitigator*, NEW YORKER (May 2, 2011), <https://www.newyorker.com/magazine/2011/05/09/the-mitigator?irclickid=zCv3TqScLxyOUQ%3AwUx0Mo36FUkETNyUVyQeyWs0&irgwc>.

91. Associated Press, *Judge Sentences Atlanta Courthouse Shooter Brian Nichols to Life Without Parole*, FOX NEWS, <https://www.foxnews.com/story/judge-sentences-atlanta-courthouse-shooter-brian-nichols-to-life-without-parole> (last updated Jan. 13, 2015).

92. Jack Healy, *Life Sentence for James Holmes, Aurora Theater Gunman*, N.Y. TIMES (Aug. 7, 2015), <https://www.nytimes.com/2015/08/08/us/jury-decides-fate-of-james-holmes-aurora-theater-gunman.html>.

In the final years of my full-time work, I began to compile examples of highly aggravated cases in which jurors rejected death. Because aggravation often involves subjective judgments, I chose three clearly defined categories: child victims, cop killings, and multiple murders. In 2018, I published an article identifying nearly two hundred cases in those highly aggravated categories where jurors had rejected the death penalty.<sup>93</sup> These were cases that I happened to know about anecdotally—not the product of exhaustive research. And these do not include cases where sentences less than death resulted from plea agreements or appellate reversals. Working with my colleagues from the Habeas Assistance and Training Counsel Project,<sup>94</sup> I have subsequently identified over 150 additional cases for eventual inclusion in an updated article.

The modern American death penalty has always been self-destructive. I do not mean to suggest that the designers deliberately and cleverly caused it to self-destruct, as engineers now do with land mines and rocket boosters to prevent malfunctions that endanger large numbers of innocent lives. No, in the case of capital punishment, after *Furman v. Georgia*,<sup>95</sup> the United States Supreme Court simply tried, in vain, to make the American death penalty fair. Death is different, said the Court,<sup>96</sup> but the *American* death penalty is different from capital punishment throughout the rest of the world,<sup>97</sup> where our peer nations were abandoning it one after another as a violation of human rights.<sup>98</sup> Instead, we tried to narrow the category of eligible cases and require individualized sentencing based on “the diverse frailties of humankind,”<sup>99</sup> the broadest possible scope for choosing life over

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93. Stetler, *The Past, Present, and Future of the Mitigation Profession*, *supra* note 2, at apps. 2-4, 1229-56.

94. HABEAS ASSISTANCE & TRAINING, <https://hat.capdefnet.org> (last visited Apr. 18, 2021).

95. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

96. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”).

97. See, e.g., Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002) (claiming American exceptionalism); Carol S. Steiker & Jordan M. Steiker, *The Rise, Fall, and Afterlife of the Death Penalty in the United States*, 3 ANN. REV. CRIMINOLOGY 299 (2020).

98. See, e.g., FRANKLIN E. ZIMRING, *CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003) (tracing death penalty abolition in Italy, 1944; West Germany, 1949; Great Britain, 1969; Spain, 1976; Portugal, 1978; and France, 1981).

99. *Woodson*, 428 U.S. at 304.

death,<sup>100</sup> empathy over anger, dignity over callous dehumanization, fairness over arbitrary indifference, equality over racism, justice and mercy over lawless cruelty.

This tension, this self-destructive, built-in flaw, did not automatically end capital punishment. Only the extraordinary efforts of our community of public defenders and court-appointed lawyers throughout California and across the country, with their full teams of investigators, mitigation specialists, IT-savvy paralegals, and a wide variety of mental health experts, brought about the remarkable reversal in death sentencing and execution trends at the turn of this century. I salute the capital defense teams throughout California's fifty-eight counties for bringing down our numbers from forty-three death sentences in 1999 to five last year,<sup>101</sup> and for ending executions in 2006.<sup>102</sup> Governor Newsom's moratorium was only possible because we had already brought executions to an end.

#### VI. GOVERNOR NEWSOM'S MORATORIUM AND ITS WIDER IMPACT

Governor Gavin Newsom's explanation for declaring a moratorium was simple. "We're better than that."<sup>103</sup> He said the death penalty is unjust, unfair, and unevenly applied based on race, wealth, and mental disability.<sup>104</sup> He referred to the risk of executing the innocent, the discriminatory impact of California's death penalty on people of color in a minority-majority state, the tremendous cost (\$5 billion since capital

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100. Professors Carol and Jordan Steiker have characterized this opposition (narrowing death eligibility and broadening the basis for rejecting death) as the "central tension" of American death penalty law:

The irony, of course, was that the Court seemed to be protecting as a matter of constitutional law the very discretion *Furman* had identified as constitutionally problematic. But according to the Court, the discretion to *withhold* the death penalty based on mitigating factors is categorically different from the discretion to *impose* the death penalty based on amorphous perceptions of the aggravating aspects of the offense. So was born the central tension in American death penalty law: its simultaneous command that states cabin discretion of who shall die while facilitating discretion of who shall live.

CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 165 (2016).

101. *Death Sentences in the U.S. Since 1977*, *supra* note 69.

102. *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=California> (last visited Feb. 23, 2021) (California).

103. KPIX CBS SF Bay Area, *RAW: Gov. Newsom Announces Death Penalty Moratorium*, YOUTUBE (Mar. 13, 2019), <https://youtu.be/wX4IFvIk8nA>.

104. Press Release, Office of Governor Gavin Newsom, *Governor Gavin Newsom Orders a Halt to the Death Penalty in California* (Mar. 13, 2019), <https://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california/>.

punishment was restored decades ago), and a desire not to be associated with human-rights-violating regimes that continue to execute their citizens.<sup>105</sup> It was more than a year before President Trump and Attorney General Barr were unashamed to associate themselves with these human rights violators. In a sense, Governor Newsom had foreseen how most of the world and our own posterity, future American generations, will view executions. The death penalty has become a damaged brand, damaged even further by the recent lawless federal spree.

The arguments for the death penalty have lost their power. There is no credible evidence that capital punishment has a deterrent effect.<sup>106</sup> Our prisons adequately incapacitate those who pose a real threat of future danger. The most popular remaining rationale has been that the death penalty somehow serves victims' surviving families. Some years ago, Professor Frank Zimring at Berkeley sat at his desk and did an economical study—a simple LexisNexis search—tracing the use of the term “closure” in association with print coverage of the “death penalty.”<sup>107</sup> He found a single instance beginning around 1989 and nearly five hundred by the year 2000.<sup>108</sup> Of course, when we compare the annual number of executions and death sentences to the total number of homicides, we see that any benefit obtained affects a minuscule fraction of the victims' families. Figure 10 provides a graphic comparison of the number of homicides to death sentences and executions at their peak, and in 2019 (since the statistics for 2020 may be influenced by the pandemic). We also know that these are overwhelmingly families of white victims.<sup>109</sup> Closure is another false promise.

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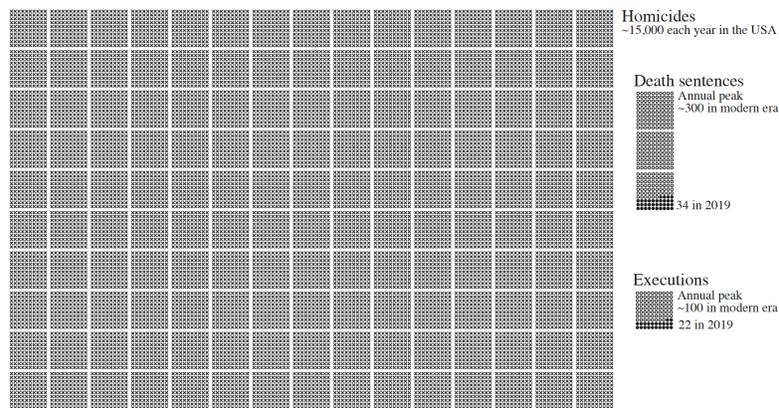
105. *Id.*

106. See NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 2 (Daniel S. Nagin & John V. Pepper eds., 2012) (surveying three decades of studies and finding flaws in those that claimed death penalty had deterrent effect on murder rates).

107. ZIMRING, *supra* note 98, at 112-15.

108. *Id.* at 113-14.

109. See Phillips & Marceau, *supra* note 36, at 587.

Figure 10<sup>110</sup>

I commend Gov. Newsom not only for his moratorium and for dismantling the death chamber,<sup>111</sup> but for all the criminal justice reform bills he signed in 2020<sup>112</sup> and for filing his amicus curiae brief in the *McDaniel* appeal.<sup>113</sup> Let us give Gov. Newsom the credit he deserves for his leadership. Who imagined a decade ago that a governor would provide welcoming remarks for this seminar,<sup>114</sup> or file an amicus with the state supreme court in a capital case?<sup>115</sup> It is his leadership that helped to inspire the death-penalty-abolition plank in the Democratic Party platform in 2020,<sup>116</sup> and to point another Democratic governor, Ralph Northam of the Commonwealth of Virginia, toward repeal.<sup>117</sup>

110. Comparison of annual homicides with death sentences and executions in peak years, and in 2019 (assuming these may be more representative than the numbers during Covid in 2020). *Crime Data Explorer*, FEDERAL BUREAU OF INV., <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/shr> (last visited July 25, 2021). Figure 10 was created for my use by Morgan Stetler.

111. Cal. Exec. Order N-09-19 (Mar. 13, 2019), <https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf>.

112. See *supra* notes 31-32.

113. Proposed Brief of Amicus Curiae the Honorable Gavin Newsom in Support of Defendant and Appellant *McDaniel*, *People v. McDaniel*, 359 U.S. 932 (1959) (No. S171393), <https://www.gov.ca.gov/wp-content/uploads/2020/10/10.26.20-Governor-Newsom-McDaniel-Amicus-Brief.pdf> (brief filed on Oct. 26, 2020 (Capital Case) (addressing issues of racial bias in jury deliberation and sentencing decisions).

114. Governor Newsom delivered welcoming remarks at the California Capital Case Defense Seminar on Feb. 12, 2021.

115. See Proposed Brief of Amicus Curiae, *supra* note 113.

116. Tim Arango, *Democrats Rethink the Death Penalty, and Its Politics*, N.Y. TIMES (Apr. 7, 2019), <https://www.nytimes.com/2019/04/07/us/politics/death-penalty-democrats.html>.

117. Whitney Evans, *Virginia Governor Signs Law Abolishing The Death Penalty, A 1st In The South*, NPR (Mar. 24, 2021, 2:50 PM),

In his State of the Commonwealth address on January 13, 2021, Governor Northam opened the legislative session by saying it was time to end the death penalty in Virginia.<sup>118</sup> Virginia's attorney general and twelve county prosecutors, representing about forty percent of the commonwealth's population, joined a coalition of African American faith leaders in calling for abolition.<sup>119</sup> They called the death penalty an "antiquated practice" that is "unjust, racially biased, and ineffective at deterring crime."<sup>120</sup> The top prosecutor in Richmond added her support a few days later.<sup>121</sup>

Not only did we have the symbolism of Virginia, the capital of the Confederacy, repealing capital punishment, but a relentless execution machine coming to an abrupt halt.<sup>122</sup> In the modern era, Virginia has been the most efficient execution system in the country, with severe time constraints in post-conviction litigation that have sped cases from imposition of sentence in the trial courts to execution in record time.<sup>123</sup> Only Texas has executed more people in the modern era, and the racist roots of the death penalty in Virginia are stunning.<sup>124</sup> In the pre-*Furman* era, four times as many Black prisoners were executed for murder than whites.<sup>125</sup> In addition, seventy-three Black prisoners were executed for rape, attempted rape, or robbery unaccompanied by murder—while no white person was executed for any crime but murder.<sup>126</sup>

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<https://www.npr.org/2021/03/24/971866086/virginia-governor-signs-law-abolishing-the-death-penalty-a-1st-in-the-south>.

118. *Id.*; *Virginia Legislators Poised to Attempt Death Penalty Repeal as Governor Sponsors Abolition Bill*, DEATH PENALTY INFO. CTR. (Jan. 15, 2021), <https://deathpenaltyinfo.org/news/virginia-legislators-poised-to-attempt-death-penalty-repeal-as-governor-sponsors-abolition-bill>.

119. *Id.*

120. *Id.*

121. Frank Green, *Richmond's top prosecutor favors abolition of death penalty*, RICHMOND TIMES-DISPATCH (Jan. 22, 2021), [https://richmond.com/news/state-and-regional/richmonds-top-prosecutor-favors-abolition-of-death-penalty/article\\_4c75df76-ddc0-5ae0-be25-530e91f20022.html](https://richmond.com/news/state-and-regional/richmonds-top-prosecutor-favors-abolition-of-death-penalty/article_4c75df76-ddc0-5ae0-be25-530e91f20022.html).

122. Once Virginia seceded from the Union, the Confederacy moved its capital to Richmond, the South's second largest city. *Why Richmond?*, VA. MUSEUM HIST. & CULTURE, <https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/american-turning-point-civil-war-virginia-1/wh-1> (last visited Feb. 21, 2121).

123. *STUDIES: Virginia Leads the Country in Death Sentences Resulting in Executions*, DEATH PENALTY INFO. CTR. (Dec. 6, 2011), <https://deathpenaltyinfo.org/news/studies-virginia-leads-the-country-in-death-sentences-resulting-in-executions>.

124. *Virginia Legislators Poised*, *supra* note 118.

125. NDULUE, *supra* note 39, at 19.

126. *Id.*

Virginia also illustrates the impact of effective representation.<sup>127</sup> Regional Capital Defender Offices were established in 2004, mainly to save money.<sup>128</sup> These offices were never generously funded, but they guaranteed that everyone facing the death penalty had at least two lawyers who specialized in capital defense, along with full teams including in-house fact investigators and mitigation specialists. It is now ten years since anyone has been sentenced to death in Virginia, and only two people remained on its death row when abolition converted their sentences to life without parole.<sup>129</sup> The opportunity for abolition exists only because of the outstanding work of these dedicated capital defense teams.

## VII. THE FEDERAL EXECUTION SPREE

### *A. The Federal Death Penalty, 1988-2020*

At the same time, we cannot be complacent. The federal government had a de facto moratorium for seventeen years.<sup>130</sup> In California, we had twenty-five years between the execution of Aaron Mitchell in 1967 and Robert Harris in 1992.<sup>131</sup> We saw recall elections strip Rose Bird and two colleagues of their positions on the California Supreme Court<sup>132</sup> and put Arnold Schwarzenegger in the governor's mansion not so long ago.<sup>133</sup> The federal execution rampage under President Trump and Attorney General Barr has shown that our highest

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127. See BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* 122-25 (2017); Stetler, *The Past, Present, and Future of the Mitigation Profession*, *supra* note 2, at 1192.

128. The author assisted in training when these offices were first established, and the heads of the regional offices constantly reminded him of the limited resources available.

129. *Virginia Legislators Poised*, *supra* note 118.

130. *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bfederal%5D=Yes> (last visited Apr. 14, 2021) (federal).

131. Aaron Mitchell was executed on April 12, 1967. See Miles Corwin, *Last Man Executed in California: Furor Over Mitchell Case Resounds 18 Years Later*, L.A. TIMES (Aug. 23, 1985, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1985-08-23-mn-24365-story.html>. Robert Harris was executed April 21, 1992. See *supra* note 71 and accompanying text.

132. See Maura Dolan, *Ex-Chief Justice Rose Bird Dies of Cancer at 63*, L.A. TIMES (Dec. 5, 1999), <https://www.latimes.com/archives/la-xpm-1999-dec-05-mn-40743-story.html> (“Bird lost a retention election in 1986 largely because she had voted to overturn every death penalty case she reviewed.”); Lloyd Billingsley, *When voters cleaned house at the state Supreme Court*, ORANGE COUNTY REG. (Oct. 28, 2016, 12:00 AM), <https://www.ocregister.com/2016/10/28/when-voters-cleaned-house-at-the-state-supreme-court/>.

133. Michael Finnegan, *Gov. Davis Is Recalled; Schwarzenegger Wins*, L.A. TIMES (Oct. 8, 2003, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2003-oct-08-me-recall8-story.html>.

courts are not about to block executions when the executive branch decides to carry them out.<sup>134</sup> Multiple separate stays issued by many different federal courts were overturned in this rush to end lives before a new administration took office.<sup>135</sup> Executions were carried out while appeals were pending or despite court rulings that the execution protocol or process was unconstitutional.<sup>136</sup> Four federal prisoners were executed after midnight.<sup>137</sup> Their execution dates had passed, and the new notices were of questionable legal validity.<sup>138</sup>

The history of the federal death penalty is also a somber reminder of the ever-present threat of executions, even when they have not happened in a long time. We are all heartened by the election of district attorneys like George Gascón<sup>139</sup> and Chesa Boudin,<sup>140</sup> who are taking giant steps toward ending the death penalty in Los Angeles and San Francisco; the courage of Governor Gavin Newsom; and the commitment of Joe Biden to use his presidency to end the federal death penalty. We must all work hard to see that the president fulfills his

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134. Adam Liptak, *'Expedited Spree of Executions' Faced Little Supreme Court Scrutiny*, N.Y. TIMES (Jan. 18, 2021), <https://www.nytimes.com/2021/01/18/us/executions-death-penalty-supreme-court.html> (noting that executions resumed after a long hiatus gave rise to substantial and novel legal questions, but terse rulings allowed executions to proceed).

135. See David Cole, *A Rush to Execute*, N.Y. REV. (Feb. 25, 2021), [https://www.nybooks.com/articles/2021/02/25/trump-supreme-court-execution-spree/?lp\\_txn\\_id=1235038](https://www.nybooks.com/articles/2021/02/25/trump-supreme-court-execution-spree/?lp_txn_id=1235038).

136. See *id.*

137. Ariane de Vogue et al., *Daniel Lewis Lee executed after Supreme Court clears the way for first federal execution in 17 years*, CNN POLITICS (July 14, 2020, 12:11 PM), <https://www.cnn.com/2020/07/14/politics/daniel-lewis-lee-supreme-court-rule-execution/index.html> (pronouncing Lee dead at 8:07 AM on July 14, 2020); Hailey Fuchs, *Government Executes Second Federal Death Row Prisoner in a Week*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/16/us/politics/wesley-ira-purkey-executed.html> (pronouncing Purkey dead at 8:19 AM on July 16, 2020); Hailey Fuchs, *U.S. Executes Lisa Montgomery for 2004 Murder*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/politics/lisa-montgomery-execution.html> (pronouncing Montgomery dead at 1:31 AM on Jan. 13, 2021); Barbara Campbell & Suzanne Nuyen, *U.S. Executed Dustin Higgs In 13<sup>th</sup> And Final Execution Under Trump Administration*, NPR (Jan. 16, 2021, 1:56 AM), <https://www.npr.org/2021/01/16/957559566/u-s-executes-dustin-higgs-in-13th-and-final-execution-under-trump-administration> (pronouncing Higgs dead at 1:23 AM on Jan. 16, 2021).

138. See e.g., Rebecca E. Woodman, *Wesley Purkey's Execution Should Shock America's Conscience*, ACS: EXPERT F. (July 23, 2020), <https://www.acslaw.org/expertforum/wesley-purkeys-execution-should-shock-americas-conscience/>.

139. Jerry Iannelli, *Los Angeles D.A. George Gascón Leaves California's Powerful D.A. Association*, APPEAL (Feb. 16, 2021), <https://theappeal.org/politicalreport/george-gascon-leaves-californias-district-attorney-association/>.

140. David Greenwald, *Boudin and Other DAs Join Governor's Declaration That Death Penalty Is Applied in Racially Biased Manner*, DAVIS VANGUARD (Oct. 27, 2020), <https://www.davisvanguard.org/2020/10/boudin-and-other-das-join-governors-declaration-that-death-penalty-is-applied-in-racial-biased-manner/>.

promise. We must be vigilant about avoiding death sentences and executions as long as the death penalty law remains on the books in California and federally.<sup>141</sup>

Congress did not rush to enact a federal death penalty after *Furman*. It was not until 1988 that capital punishment returned as a federal sentencing option, as the new algorithm for so many other federal sentences made them equivalent to death by incarceration.<sup>142</sup> The death penalty was supposed to be reserved for the drug kingpins whose empires stretched across multiple states. What has happened in most states then also happened in the federal system: Congress expanded the reach of the death penalty law, kingpins were forgotten, and many ordinary murders were targeted federally. Even so, for a long time, the federal death penalty received little attention. Ninety-eight percent of death sentences continued to originate in state court.<sup>143</sup>

The overall federal system was chaotic, the targeted defendants were mostly people of color,<sup>144</sup> and most of the death sentences came in the same states that were already predisposed to capital punishment. However, the federal cases had a shorter path to execution. If you lost at trial, you appealed to your circuit court. If you lost there, you brought a habeas corpus motion in the original trial court, usually before the same judge.<sup>145</sup> If you lost again, you returned mainly to the Fourth, Fifth,

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141. See Patrick J. Egan, Opinion, *Pa. could enforce death penalty when Gov. Wolf leaves office*, PHILA. INQUIRER (Feb. 1, 2021), <https://www.inquirer.com/opinion/commentary/death-penalty-moratorium-pennsylvania-governor-wolf-capital-punishment-20210201.html> (warning that without legislative repeal of the death penalty, a new governor could initiate a spree of executions comparable to what happened federally).

142. The death penalty under 21 U.S.C. § 848(e)(1)(A)-(B) (2006) was enacted as part of the Anti-Drug Abuse Act of 1988 and became effective on November 18, 1988. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181. The Sentencing Reform Act of 1984 created a Sentencing Commission that reduced judicial discretion and mandated high mandatory sentencing ranges, later overturned in *United States v. Booker*, 543 U.S. 220, 222 (2005).

143. According to a quarterly census of the death row population published by the NAACP Legal Defense Fund, as of July 1, 2020, there were 2,591 prisoners under sentence of death, of whom sixty-two (two percent) had received their sentences in federal court. DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW USA 1, 59 (2020), <https://www.naacpldf.org/death-row-usa/quarterly-reports-2020/attachment/drusasummer2020/>. The remaining ninety-eight percent of death row prisoners were sentenced in state court.

144. As of July 1, 2020, the sixty-two prisoners on the federal death row included one Asian, one Native American, seven Latinx, twenty-six Black, and twenty-seven white inmates. Lisa Montgomery was the only woman. FINS, *supra* note 143, at 59.

145. 28 U.S.C. § 2255 (2008) (Motion to Vacate/Set Aside Sentence). By contrast, cases that originate in state court have additional post-conviction proceedings before bringing constitutional claims in federal court under the traditional habeas corpus procedures provided by 28 U.S.C. § 2254 (1996). Federal courts, in turn, often require habeas petitions from state

Eighth, or Eleventh Circuit courts that rarely granted any relief.<sup>146</sup> There were only three executions in the first decade and a half,<sup>147</sup> but the size of the modest federal death row slowly increased to over fifty—and ultimately to sixty-two.<sup>148</sup> Over time, the number who had exhausted their appeals steadily grew. For seventeen years, there were no federal executions. Then came the rampage that began in the summer of 2020 and ended 186 days later in the early hours of January 16, 2021.<sup>149</sup>

*B. The Execution Spree, 2020-2021*

In federal habeas, I had a personal connection to some of the cases of federal prisoners who were put to death. Many of the colleagues who handled the cases in the final months are also my friends. Some represented more than one client executed during this spree. I will not try to name them because I could never name them all. However, they represented the best of our community in every variety—federal public defender offices, court appointed lawyers, resource counsel, pro bono firms, law professors, lawyers and nonlawyers, experts, media consultants, etc. Some were visible, others entirely behind the scenes. They all went through hell, and somehow seemed to follow the advice attributed to Winston Churchill, “If you’re going through hell, keep going.”<sup>150</sup>

We in California had thirteen executions in a decade and a half, spreading out the pain and loss, not thirteen in half a year in the middle of a pandemic. We should also remember that some states have had even worse periods: in 2000, for example, our colleagues in Texas had forty executions in a single year—and thirty-five the year before.<sup>151</sup>

The thirteen federal executions represented arbitrariness at its worst—the stunning reappearance nearly half a century later of what

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death sentences to return to the state courts to “exhaust” claims if the factual predicates have not been previously presented in state court. The result may be years of additional litigation.

146. Twelve of the thirteen recent federal executions (all but Lezmond Mitchell) came from these four circuits. *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bfederal%5D=Yes> (last visited Feb. 21, 2021) (federal).

147. *Id.*; Timothy McVeigh (June 11, 2001), Juan Garza (June 19, 2001) and Louis Jones (March 18, 2003). *Id.*

148. FINS, *supra* note 143, at 59.

149. Cole, *supra* note 135.

150. Jodie Cook, *If You’re Going through Hell, Keep Going*, FORBES (Jan. 9, 2020, 3:30 AM), <https://www.forbes.com/sites/jodiecook/2020/01/09/going-through-hell/?sh=f28b40c3a941>.

151. *State and Federal Info: Texas*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/texas> (last visited Apr. 14, 2021).

Justice Potter Stewart had characterized in *Furman* as “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>152</sup>

I read the penalty phase record of Danny Lee’s trial in Arkansas and provided a declaration when his habeas lawyers were trying to keep the case open.<sup>153</sup> Danny Lee and his more culpable co-defendant Chevie Kehoe had a joint trial, with consecutive penalty phases in front of the same jurors.<sup>154</sup> The co-defendant went first and received a life sentence.<sup>155</sup> Everyone said, “I think we’re done,” but Main Justice said, “No, keep going.” The trial court viewed Danny Lee as the less culpable co-defendant.<sup>156</sup> Nonetheless, the jury gave Danny Lee death, and now he is dead. Litigation was ongoing when his execution warrant expired, and he lay on the gurney for hours as the government set a new execution date and ultimately carried out the execution a little after 8:00 AM.<sup>157</sup>

I did not work on Wes Purkey’s case, but I looked closely at the ABA formal ethics opinion, number 10-456, disapproving his trial lawyer’s ardent cooperation with the prosecution when the case was in habeas.<sup>158</sup> The lawyer volunteered a 117-page affidavit to help the government refute the claim that he had been ineffective.<sup>159</sup> I testified in two other cases in Missouri where that same lawyer’s indifference to mitigation showed through.<sup>160</sup> One client died before his habeas petition

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152. *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (per curiam).

153. Lee’s § 2255 motion had already been denied. *United States v. Lee*, No. 4:97-CR-00243-(2)-GTE (E.D. Ark. Aug. 28, 2008) (mem.). Based on my review of the trial sentencing transcripts and pretrial work product, I found deficiencies in four broad areas: records obtained from only a narrow set of sources; failure to interview the witnesses identified in the records that the defense did obtain; interviews with only a handful of witnesses, who provided only unreliable, superficial, conclusory statements; and failure to provide the psychologist who testified with the data needed to corroborate his opinions. As a result, the defense overly relied on an expert who backfired as an uncorroborated hired gun. Declaration of Russell Stetler, *United States v. Lee*, No. 4:97-CR-00243-(2)-GTE, Doc. 1165-8 (E.D. Ark. Sept. 18, 2008).

154. *Lee*, No. 4:97-CR-00243-(2)-GTE, at 3.

155. *Id.* at 3-4.

156. *See id.* at 110-18.

157. Lauren Gill, *U.S. Government Carries Out The First Execution Of A Federal Prisoner In 17 Years*, APPEAL (July 14, 2020), <https://theappeal.org/u-s-government-carries-out-the-first-execution-of-a-federal-prisoner-in-17-years/>.

158. ABA STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY, FORMAL OPINION 10-456 DISCLOSURE OF INFORMATION TO PROSECUTOR WHEN LAWYER’S FORMER CLIENT BRINGS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM (2010).

159. *Id.* at 1 n.5. In 2016, shortly after President Donald J. Trump’s election, this lawyer was profiled in *The Guardian*, midway between the ethics opinion and the execution of two of the lawyer’s federal clients. David Rose, *Death Row: the lawyer who keeps losing*, *GUARDIAN* (Nov. 24, 2016, 1:00 PM), <https://www.theguardian.com/world/2016/nov/24/death-row-the-lawyer-who-keeps-losing>.

160. Testimony of Russell Stetler at 197-246, *Sinisterra v. United States*, No. 04-CV-08003-GAF (W.D. Mo. Jan. 23, 2013); Testimony of Russell Stetler at 55-159, *Montgomery v. United States*, No. 12-CV-08001-GAF (W.D. Mo. Oct. 31, 2016).

was decided,<sup>161</sup> but two others, Wes Purkey and Lisa Montgomery, were hand-picked by William Barr for execution.<sup>162</sup> Both Purkey and Montgomery were seriously mentally ill, but there was no judicial review of their competency to be executed or the mitigation that had never been discovered or presented at trial.<sup>163</sup> Purkey had severe dementia, Montgomery a nightmarish childhood of sexual trauma.<sup>164</sup>

I was familiar with another case in Barr's top ten list because I testified in the successful habeas proceeding of the co-defendant.<sup>165</sup> The case on which I worked was litigated in Iowa by three California lawyers who have all served on the faculty of this seminar.<sup>166</sup> They won relief for their client,<sup>167</sup> but the co-defendant, Dustin Honken, with equally meritorious claims and excellent habeas representation, nonetheless lost his habeas case before a different judge and was executed.<sup>168</sup>

Because these federal executions happened in such rapid succession, we had a rare glimpse from inside death row in Terre Haute about how these individuals faced their death. Christopher Vialva, executed a little later, described how Keith Nelson vomited uncontrollably when the guards came to take him to his death, vomited until his eyes were red.<sup>169</sup> I knew Keith's case well and testified at a habeas hearing about the failure to investigate mitigation at his trial.<sup>170</sup> The trial lawyers hired a mitigation specialist, but she met Keith only

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161. Mark Morris, *Colombian hit man convicted in Kansas City dies in prison*, KAN. CITY STAR (Mar. 27, 2013, 3:53 PM), <https://www.kansascity.com/news/local/article316801.html>.

162. Press Release, Dep't of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>; Press Release, Dep't of Justice, Executions Scheduled for Two Federal Inmates Convicted of Heinous Murders (Oct. 16, 2020), <https://www.justice.gov/opa/pr/executions-scheduled-two-federal-inmates-convicted-heinous-murders>.

163. Cole, *supra* note 135; Jordan S. Rubin, *U.S. Executes Second Inmates in Days After Appeals Rejected (4)*, BLOOMBERG L. (July 16, 2020, 5:43 AM), [https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XFCT8OA4000000?bna\\_news\\_filter=us-law-week#jcite](https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XFCT8OA4000000?bna_news_filter=us-law-week#jcite).

164. *Id.*

165. Testimony of Russell Stetler at 1663-1835, *Johnson v. United States*, No. C09-3064-MWB (N.D. Iowa Mar. 12, 2011).

166. Section 2255 counsel were Michael N. Burt, Marcia A. Morrissey, & Nancy S. Pemberton.

167. *Johnson v. U.S.*, 860 F. Supp. 2d 663 (2012).

168. See generally *id.* Lauren Gill, *US Executes Dustin Lee Honkin, The Third Federal Execution In A Week*, APPEAL (July 17, 2020), <https://theappeal.org/u-s-executes-dustin-lee-honken-the-third-federal-execution-in-a-week/>.

169. Liliana Segura, *Trump Prepares To Execute Christopher Vialva For A Crime He Committed as a Teenager*, INTERCEPT (Sept. 20, 2020, 5:55 AM), <https://theintercept.com/2020/09/20/federal-executions-christopher-vialva>.

170. Testimony of Russell Stetler at 273-334, *Nelson v. United States*, No. 04-8005-CV-W-FJG (W.D. Mo. Apr. 15, 2014).

once.<sup>171</sup> There were multiple changes in the legal team, and they ultimately went to trial unprepared.<sup>172</sup>

The executions under the regime of Donald Trump and William Barr were not just arbitrary, but cruel. Because of Covid, many of the lawyers could not even be there for their clients at the end. One lawyer from Georgia, who had leukemia and did not feel safe traveling to be with his client, pled all the Covid public health issues, to no avail, as his client William LeCroy was killed.<sup>173</sup> Two lawyers from Nashville who battled indefatigably for Lisa Montgomery became infected with the virus when they traveled to visit her at Carswell in Texas and became immobilized, but the rush to execute Montgomery would not be stopped.<sup>174</sup> The virus spread to the prison at Terre Haute, and the last two prisoners to be executed, Corey Johnson and Dustin Higgs, were themselves infected and exposed to more painful deaths.<sup>175</sup> We continue to learn of prison staff and reporters infected when they attended executions.<sup>176</sup>

Lezmond Mitchell was the only Navajo citizen on the federal death row.<sup>177</sup> He was the first Native American in U.S. history to be “executed by the federal government for a crime committed against a member of his own tribe on tribal land.”<sup>178</sup> The government used a carjacking provision to assert jurisdiction in Arizona, and the execution went

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171. Declaration of Russell Stetler at 67, *Nelson v. United States*, No. 04-8005-CV-W-FJG (W.D. Mo. Apr. 8, 2014) (28 U.S.C. § 2255 proceeding). The declaration was provided to the court and the government.

172. *Id.* at 66-68.

173. Adam Pinsker, *Lawyer For Death Row Inmate Requesting Stay Over COVID-19 Concerns*, WFYI INDIANAPOLIS (Sept. 21, 2020), <https://www.wfyi.org/news/articles/lawyer-for-death-row-inmate-requesting-stay-over-covid-19-concerns>; Michael Tarm, *William LeCroy execution: US government kills ex-soldier who claimed witchcraft led him to murder*, LEDGER (Sept. 23, 2020, 8:07 AM), <https://www.theledger.com/story/news/2020/09/23/william-lecroy-execution-us-government-kills-ex-soldier-who-claimed-witchcraft-led-murder/3501369001/>. See also Petition for Writ of Certiorari at 5, Supreme Court of the United States, No. 20A52, *LeCroy v. United States*, at 5 (Sept. 22, 2020) (explaining Covid’s impact on counsel John R. Martin, who was diagnosed in 2010 with a form of leukemia that is believed to be caused by his exposure to Agent Orange during his service in Vietnam).

174. Jonathan Allen, *Lawyers for only woman on federal death row have COVID-19, ask U.S. judge to delay execution*, REUTERS (Nov. 12, 2020, 3:06 PM), <https://www.reuters.com/article/us-usa-executions-idUSKBN27S3CN>.

175. George Hale, *Our Reporters Who’ve Been Covering The Federal Executions Now Have COVID*, WTIU/WFIU (Jan. 29, 2021), <https://indianapublicmedia.org/news/u.s.-leaves-journalists-in-the-dark-after-our-reporters-test-positive-for-covid-19.php>.

176. *Id.*

177. FINS, *supra* note 143, at 59; *Ignoring Tribal Sovereignty, Federal Government Executes Native American Death-Row Prisoner Lezmond Mitchell*, DEATH PENALTY INFO. CTR. (Aug. 27, 2020), <https://deathpenaltyinfo.org/news/ignoring-tribal-sovereignty-federal-government-executes-native-american-death-row-prisoner-lezmond-mitchell>.

178. *Ignoring Tribal Sovereignty*, *supra* note 177.

forward over the objection of the Navajo nation and Native American leaders across the country.<sup>179</sup>

Brandon Bernard and Christopher Vialva were teenage co-defendants, eighteen and nineteen respectively at the time of their capital offense in Texas.<sup>180</sup> We know that their brains were not fully developed, and the men who were executed were nothing like the teenagers who committed the crime.<sup>181</sup> At trial, the government also withheld *Brady* material that showed the eighteen-year-old Bernard was a follower, not a shot-caller.<sup>182</sup>

One of Orlando Hall's lawyers had represented him since she was just a couple of years out of law school.<sup>183</sup> She stepped up as lead counsel when her former mentor was disabled by a nearly fatal car accident.<sup>184</sup> She represented Orlando Hall for nearly two and a half decades and wrote about his remorse and redemption after the execution.<sup>185</sup>

Alfred Bourgeois was intellectually disabled, but the federal courts in Texas dismissed the claim based on the so-called *Briseño*<sup>186</sup> factors later rejected by the Supreme Court twice in the cases of Bobby Moore.<sup>187</sup> The late Justice Ginsburg scolded the Texas courts for using the stereotypes of popular fiction instead of science and the clinical opinions of intellectual disability professionals.<sup>188</sup> Justice Kennedy, in *Hall v. Florida*,<sup>189</sup> had moved intellectual disability determinations away from mechanical IQ scores, pointedly writing that intellectual disability is a condition, not a number.<sup>190</sup> Justice Ginsburg took the next step and wrote repeatedly in *Moore v. Texas* that intellectual functioning had to

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179. *Id.*

180. Cole, *supra* note 135; Segura, *supra* note 169.

181. See *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“[P]arts of the brain involved in behavior control continue to mature through late adolescence.”) (citing Brief for American Medical Association et al. as Amici Curiae in Support of Neither Party at 16-24, *Florida*, 560 U.S. 48 (Nos. 08-7412, 08-7621), 2009 WL 2247127; Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners at 22-27, *Florida*, 560 U.S. 48 (Nos. 08-7412, 08-7621), 2009 WL 2236778)).

182. Cole, *supra* note 135.

183. Marcy Widder, *My client atoned for his sin. The Trump administration had him killed anyway.*, WASH. POST (Dec. 14, 2020, 10:58 AM), <https://washingtonpost.com/outlook/2020/12/14/trump-death-penalty-cruelty>.

184. *Id.*

185. *Id.*

186. *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

187. *Moore v. Texas (Moore I)*, 137 S. Ct. 1039 (2017); *Moore v. Texas (Moore II)*, 139 S. Ct. 666, 669-70 (2019) (per curiam).

188. *Moore I*, 137 S. Ct. at 1052.

189. *Hall v. Florida*, 572 U.S. 701 (2014).

190. *Id.* at 723.

be judged by medical and scientific knowledge,<sup>191</sup> not the stereotype of the fictitious Lenny Small from John Steinbeck's novel, *Of Mice and Men*. A federal judge outside Texas found that Bourgeois had made a "strong showing" of disability, but a court of appeals ruling denied him an opportunity for a full presentation of that evidence.<sup>192</sup>

The pro bono firm that successfully litigated *Moore v. Texas* also represented federal prisoner Corey Johnson.<sup>193</sup> Despite all the resources and brain power that the firm committed to his case, they found that all the courthouse doors were shut when they tried to obtain judicial review of his overwhelming evidence of intellectual disability.<sup>194</sup> Corey "remained in the second grade for three years, and also repeated third and fourth grades."<sup>195</sup> "When asked his birthday at age eight, while in second grade, he thought it was in March, though he was actually born in November."<sup>196</sup> At thirteen, "he could barely write his own name."<sup>197</sup> He knew there were twelve months in the year but could only recite them up to August.<sup>198</sup> He could not tell time or do arithmetic beyond a third-grade level.<sup>199</sup> Even at age forty-five, he was tested at an elementary school level of academic functioning.<sup>200</sup>

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191. *Moore I*, 137 S. Ct. at 1052. The High Court subsequently issued a per curiam reversal when the Texas Court of Criminal Appeals obstinately ignored the clear guidance of the 2017 opinion. *Id. Moore II*, 139 S. Ct. at 667.

192. See Laura Burstein (@LauraBurstein1), TWITTER (Dec. 2, 2020, 8:33 AM), <https://twitter.com/LauraBurstein1/status/1334173817028087810> (summarizing basis for Bourgeois's request for Supreme Court Review: "failing third grade, repeating fourth grade, being placed in special education classes, receiving poor grades," and at age forty-five scoring at the elementary school level in eleven of thirteen areas in an achievement test); see also Cole, *supra* note 135.

193. Reply in Support of Emergency Application of Corey Johnson for a Stay of Execution, *Johnson v. United States*, 576 U.S. 591 (2015) (No. 20A130), [https://www.supremecourt.gov/DocketPDF/20/20A130/166401/20210114210343891\\_Corey%20Johnson%20Reply%20in%20Support%20of%20His%20Emergency%20Application%20for%20a%20Stay%20of%20Execution.pdf](https://www.supremecourt.gov/DocketPDF/20/20A130/166401/20210114210343891_Corey%20Johnson%20Reply%20in%20Support%20of%20His%20Emergency%20Application%20for%20a%20Stay%20of%20Execution.pdf) (establishing that both Bobby Moore and Corey Johnson were represented pro bono by Skadden, Arps, Slate, Meagher, & Flom); SKADDEN, PRO BONO AND SOCIAL IMPACT REPORT 2 (2017), [https://www.skadden.com/-/media/files/publications/2017/10/probonoreport\\_fall2017\\_100317\\_web.pdf](https://www.skadden.com/-/media/files/publications/2017/10/probonoreport_fall2017_100317_web.pdf).

194. See Cole, *supra* note 135.

195. *Federal Government Executes Corey Johnson, Who was Likely Intellectually Disabled, Without Any Judicial Review of His Eligibility for the Death Penalty*, DEATH PENALTY INFO. CTR. (Jan. 14, 2021), <https://deathpenaltyinfo.org/news/federal-government-prepares-to-execute-corey-johnson-who-is-likely-intellectually-disabled-without-any-judicial-review-of-his-eligibility-for-the-death-penalty> [hereinafter *Federal Government Executes Corey Johnson*].

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

A district court judge rejected Johnson's habeas petition without granting a hearing, and the Fourth Circuit en banc narrowly affirmed the decision.<sup>201</sup> On the day before Johnson's execution, the Fourth Circuit court of appeals judges voted eight to seven not to reconsider.<sup>202</sup> A dissenting judge wrote in bold type that "Corey Johnson is an **intellectually disabled death row inmate** . . . under current diagnostic standards. But no court has ever considered such evidence."<sup>203</sup> Johnson was the next-to-last person executed in January 2021.<sup>204</sup>

Dustin Higgs, the last prisoner to be executed, did not shoot anyone.<sup>205</sup> The shooter in his case received a sentence of life without parole.<sup>206</sup> Another co-defendant testified against Higgs to avoid the death penalty.<sup>207</sup> The warrant for Dustin Higgs's execution was for the actual birthday of Martin Luther King, January 15.<sup>208</sup> It expired at midnight, but Higgs was executed anyway, at 1:23 AM on January 16.<sup>209</sup>

#### VIII. THE CAPACITY TO CHANGE

After over forty years of the modern death penalty experiment, we have seen what death-sentenced prisoners can become. Among the executed, Brandon Bernard had done twenty years in prison without an infraction.<sup>210</sup> Corey Johnson had a single misstep in over two decades of incarceration in the federal Bureau of Prisons—for using a staff restroom without permission.<sup>211</sup> Levi Pace in Alabama has had a single

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201. *Federal Government Executes Corey Johnson*, *supra* note 195.

202. *Id.*

203. *Id.*

204. *Federal execution updates*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/federal-execution-updates> (last updated Jan. 16, 2021, 1:35 AM).

205. 'This Is Not Justice' – *Federal Execution Spree Ends with Planned Execution of African-American on Martin Luther King Jr's Birthday*, DEATH PENALTY INFO. CTR. (Jan. 18, 2021), <https://deathpenaltyinfo.org/news/this-is-not-justice-federal-execution-spree-ends-with-planned-execution-of-african-american-on-martin-luther-king-jr-s-birthday> [hereinafter 'This Is Not Justice'].

206. *See* *United States v. Higgs*, 193 F. Supp. 3d 495, 497 (D. Md. 2016).

207. *Id.* at 497 n.1.

208. *Federal execution updates*, *supra* note 204.

209. *Id.*

210. Cole, *supra* note 135.

211. E-mail from Johnson's counsel, Donald P. Salzman to the author (Feb. 22, 2021, 2:25 P.M.) (copy on file with the author and the law review) (summarizing memorandum in support of First Step Act motion and 2020 confidential clemency petition to the Pardon Attorney). When Johnson was a child, he was placed in the care of the Pleasantville Cottage School, "a residential center for children with difficult backgrounds," which, in turn, placed him in Mt. Pleasant School, "which focused on children with special needs." A career special educator at that facility recalled having to assign a chaperone to accompany Corey to the bathroom "because he would frequently wander or become lost." *Id.* Elizabeth Bruenig, Opinion, *When*

write-up since 1994—for failing to tuck in his shirt.<sup>212</sup> Conscientious lawyers managed to overturn his death sentence and gain him parole eligibility, but with a record like that, he remains in prison.<sup>213</sup> If I had ever been in their shoes, I know that I would have occasionally had to use a toilet urgently, I might have forgotten to tuck in my shirt afterward in my haste. These are the technical infractions that prisons strain to document for young Black men under sentence of death. Shame on the officers who even wrote them up.

We saw repeatedly as the federal executions unfolded how the prisoners had changed. Despite his intellectual limitations, Corey Johnson had the insight to say among his last words that he had been “blind and stupid” at the time of the crime.<sup>214</sup> Several lawyers represented these people long enough to see the redemptive changes, sometimes spiritual, sometimes in the depth of their connections to their loved ones, often in their remorse.

Such changes are not new, but they have been obliterated in this era without parole. So many people have been forgotten as they live out their days in cages. It was not always so.

In the pre-*Furman* era, the most sensational death penalty trial was in Chicago in 1924, when Clarence Darrow gave his celebrated twelve-hour closing argument on behalf of two wealthy young white men, Nathan Leopold and Richard Loeb, whose lives were spared.<sup>215</sup> Loeb was subsequently killed in prison, but Nate Leopold was quietly released in 1958.<sup>216</sup> His sponsor in the free world was a small Christian

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an *I.Q. Score Is a Death Sentence*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/opinion/death-penalty-mental-disability.html>.

212. Pace’s sole infraction for failing to tuck in his shirt was documented in a letter to the Alabama Board of Pardons and Parole by attorney Tanya Greene (Dec. 3, 2018) (copy on file with the author and the law review).

213. Pace’s original death sentence was overturned. *Pace v. State*, 714 So. 2d 320 (Ala. Crim. App. 1996). He was later convicted of less than capital murder and resented to a parole-eligible term. *Pace v. State*, 904 So. 2d 331, 336-37 (Ala. Crim. App. 2003) (Wise, J., concurring).

214. Hailey Fuchs, *U.S. Executes Corey Johnson for 7 Murders in 1992*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/15/us/corey-johnson-execution.html>.

215. See generally HAL HIGDON, *LEOPOLD AND LOEB: THE CRIME OF THE CENTURY* (1975); Douglas O. Linder, *The Leopold And Loeb Trial: An Account*, FAMOUS TRIALS, <https://famous-trials.com/leopoldandloeb/1741-home> (last visited Apr. 21, 2021).

216. Author’s interviews at Pennsylvania training programs in December 12-13, 2019 and January 13-14, 2021 with Samuel G. Encarnación, a lawyer in Lancaster County, Pa., whose father worked with Leopold at the Castañer Hospital as a member of the Church of the Brethren. Encarnación confirmed the accuracy of my account. E-mail from Samuel G. Encarnación, Attorney, Haggerty & Silverman, to the author (Apr. 28, 2021, 6:35 PM) (on file with author and Santa Clara Law Review; see also Haley Steinhilber, *A Second Chance: From Convicted Murderer to Brethren Service Volunteer*, Church of the Brethren (Aug. 16, 1924), <https://www.brethren.org/bhla/hiddengems/a-second-chance-at-life-from-convicted-murderer-to-brethren-service-volunteer/>.

denomination, the Church of the Brethren, that ran Castañer Hospital in the tiny mountain village of Adjuntas, Puerto Rico.<sup>217</sup> Leopold became an X-ray technician.<sup>218</sup> He had always had a facility for languages, and he went to graduate school in Spanish, earning a master's degree at the University of Puerto Rico.<sup>219</sup> He worked in public health and wrote the definitive book on the birds of Puerto Rico and the Virgin Islands.<sup>220</sup>

When Sandra Lockett was tried in 1975 (three months after the crime in which she was alleged to be only a getaway driver),<sup>221</sup> Ohio's alternatives to the death penalty did not include life without parole. After the Supreme Court overturned her death sentence, she received a parole-eligible life sentence.<sup>222</sup> She was released in 1993, married, raised a son, worked, and in her later years often spoke at law school discussions of the death penalty.<sup>223</sup> I met her virtually in 2018 when the University of Akron Law School had a symposium on the fortieth anniversary of her case.<sup>224</sup> She subsequently had a stroke and died in 2020, having lived productively for more than a quarter century outside the prison walls.<sup>225</sup>

When Bobby Moore's death sentence was overturned, he became eligible for parole because Texas did not have life without parole sentences at the time of his prosecution. Bobby Moore is free now and campaigning on behalf of those he left behind on death row.<sup>226</sup>

Ray Hinton spoke at the California seminar a few years after his exoneration.<sup>227</sup> Alabama electrocuted a dozen of Mr. Hinton's death row

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217. Steinhilber, *supra* note 216.

218. *Id.*

219. *Id.*

220. N. F. LEOPOLD, CHECKLIST OF BIRDS OF PUERTO RICO AND THE VIRGIN ISLANDS (1963). The book was published by the University of Puerto Rico Press. *Id.*

221. *Lockett v. Ohio*, 438 U.S. 586, 590-91 (1978).

222. *Sandra Lockett-Young, Whose Case Established a Capital Defendant's Right to Present Mitigating Evidence, Has Died*, DEATH PENALTY INFO. CTR. (Mar. 3, 2020), <https://deathpenaltyinfo.org/news/sandra-lockett-young-whose-case-established-a-capital-defendants-right-to-present-mitigating-evidence-has-died> [hereinafter *Lockett-Young Has Died*].

223. *Id.*; *Sandra M. Lockett-Young*, AKRON BEACON J. (Mar. 13, 2020), <https://www.legacy.com/obituaries/ohio/obituary.aspx?n=sandra-m-lockett-young&pid=195681564&fhid=3169>.

224. Margery B. Koosed, *Introduction to the "Lockett v. Ohio at 40 Symposium": Rethinking the Death Penalty 40 Years After the U.S. Supreme Court Decision*, 10 CONLAWNOW 1 (2018), <https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1078&context=conlawnow>.

225. *See Lockett-Young Has Died*, *supra* note 222.

226. For example, Moore was briefly interviewed at a live virtual panel event, "40 Years to Freedom," organized by the London charity Amicus on Dec. 8, 2020, along with lawyers who had represented him over many years. *Champions of Justice*, AMICUS, <https://www.amicus-alj.org/what-we-do/champions-justice> (last visited Apr. 12, 2021).

227. Hinton's conviction and death sentence were overturned because his trial lawyer did not know what funds were available to consult a qualified firearms expert. *See Hinton v.*

neighbors in the 1990s.<sup>228</sup> He said he will never forget the nauseating smell of burnt human flesh.<sup>229</sup> When he gagged the first time he experienced the sickening smell, a guard told him, “You’ll get used to it.”<sup>230</sup> Regardless of the method, no one gets used to executions.

Albert Woodfox wrote a remarkable memoir about his four decades in solitary at Angola.<sup>231</sup> He always maintained his innocence and had lawyers who did not forget him.<sup>232</sup> His book is about transformation and hope.<sup>233</sup>

Wilbert Rideau has also spoken at the California seminar.<sup>234</sup> He went to Angola’s death row at age twenty and spent forty-four years behind bars.<sup>235</sup> He educated himself, won journalistic prizes as editor of *The Angolite*, and had multiple retrials.<sup>236</sup> In the last one, he was convicted of a lesser included homicide charge, for which he had already served twice the maximum sentence.<sup>237</sup> He called his book “a story of punishment and deliverance.”<sup>238</sup> He now counsels people who face the death penalty about the lives they can make in prison.<sup>239</sup>

Kempis “Ghani” Songster was never sentenced to death, but in 1987 he was tried as an adult at age fifteen and sentenced to what he

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Alabama, 571 U.S. 263 (2014). When his case returned to the trial court, the prosecution eventually agreed to his release. His whole saga is recounted in a memoir, ANTHONY RAY HINTON WITH LARA LOVE HARDIN, *THE SUN DOES SHINE: HOW I FOUND LIFE AND FREEDOM ON DEATH ROW* (2018). He spoke on “Race, Wrongful Convictions, and the Death Penalty” at the California seminar on February 18, 2018. E-mail from Tara Da Re, Project Developer, Cal. Attorneys for Criminal Justice, to the author (Apr. 27, 2021, 9:32 AM) (on file with the author and the Santa Clara Law Review).

228. Hinton discussed the electrocutions in a documentary on the Equal Justice Initiative of Alabama, the nonprofit that overturned his conviction and secured his release. TRUE JUSTICE: BRYAN STEVENSON’S FIGHT FOR EQUALITY (HBO & Kunhardt Films 2019), <https://eji.org/projects/true-justice/> [hereinafter TRUE JUSTICE]. Hinton now works with the nonprofit as a community educator. *Id.*; *Anthony Ray Hinton*, EQUAL JUST. INITIATIVE, <https://eji.org/cases/anthony-ray-hinton/> (last visited Apr. 21, 2021).

229. TRUE JUSTICE, *supra* note 228.

230. *Id.*

231. *See generally* ALBERT WOODFOX WITH LESLIE GEORGE, *SOLITARY: UNBROKEN BY FOUR DECADES IN SOLITARY CONFINEMENT. MY STORY OF TRANSFORMATION AND HOPE* (2019).

232. *Id.*

233. *Id.*

234. Wilbert Rideau and Denise LeBoeuf, attorney and Director of the ACLU’s John Adams Project, gave a joint keynote address at the California Capital Case Defense Seminar on Feb. 12, 2010.

235. WILBERT RIDEAU, *IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE* 8, 35, 328 (2011).

236. *Id. passim.*

237. *Id.* at 328.

238. *Id.* (subtitle of book).

239. The author has had the opportunity to work with Rideau on federal death penalty cases where his counsel played a critical role.

calls Death By Incarceration.<sup>240</sup> When the Supreme Court declared in *Miller v. Alabama*<sup>241</sup> and *Montgomery v. Louisiana*<sup>242</sup> that mandatory sentences of life without parole for juveniles violated the Eighth Amendment, the largest concentration of those so-called Juvenile Lifers was in Pennsylvania, where lawyers and mitigation specialists immediately began using the skills they had honed in capital cases to win new sentences for some five hundred prisoners, most of whom are now middle-aged.<sup>243</sup> Ghani is one of the most articulate of the people who won release. The first time that I heard him speak, I was struck when he said how glad he was that he did not get away with murder. He recently elaborated on that thought in a presentation in 2020:

Over the years spent in the dark recesses of tombs called prisons, and in coffins called cells, I traveled along the walls of my consciousness in search of the truth of myself . . . . One conclusion was that nothing kills the soul more quickly and absolutely than a secret about a murder. And, if the murder is known, the denial of it. What if I had gone a month, or six months, or a year, with the secret of what I had done? What would I have had to tell myself, and how would I have had to act, in order to make myself appear normal? What would I have become the longer I wore that mask?<sup>244</sup>

Ghani kept his hopes alive with the goals of becoming, in his words, “something, someone, worthy of being called community member, citizen, brother, friend, neighbor, advocate, husband, and now father.”<sup>245</sup>

I am just as touched by what some former clients have become as they matured and straightened themselves out in prison, even though they remain incarcerated. In the early days of New York’s brief death penalty experiment, the office where I worked had a client accused in a

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240. Kempis “Ghani” Songster, BEYOND PRISONS (Oct. 4, 2018), <https://beyondprison.libsyn.com/episode-29-kempis-ghani-songster>.

241. *Miller v. Alabama*, 567 U.S. 460 (2012) (stating that mandatory sentences of life without parole violate Eighth Amendment for defendants whose crimes were committed prior to age eighteen).

242. *Montgomery v. Louisiana*, 577 U.S. 190 (2016) (finding *Miller* retroactive).

243. See Dana L. Cook et al., *Miller, Montgomery, and Mitigation: Incorporating Life-History Investigations and Reentry Planning Into Effective Representation of ‘Juvenile Lifers’*, CHAMPION (Apr. 2017) 44, 44; see also YOUTH SENTENCING & REENTRY PROJECT, <https://ysrp.org> (last visited Apr. 27, 2021) (confirming that 500 of the 2000 “Juvenile Lifers” nationwide were sentenced in Pennsylvania, including 300 in Philadelphia). Accord Tarika Dartary-Kapur & Tina M. Zottoli, *Resentencing of Juvenile Lifers: The Philadelphia Experience*, Montclair St. U., 2020, at 3 (“Pennsylvania, which had incarcerated more juvenile lifers than any other state (521 individuals, with 325 in Philadelphia), has become the nation’s leader in releasing them.”) <https://www.docdroid.net/HE33BuF/resentencing-of-juvenile-lifers-the-philadelphia-experience-pdf>.

244. Lopez et al., *supra* note 5, at 16.

245. *Id.*

particularly gruesome case in a small upstate county.<sup>246</sup> The pretrial litigation and the uncertainty about how the higher courts would view the new statute eventually persuaded the district attorney to offer a plea to life without parole. There was a deadline, like a thirty-day sale at Macy's. I saw this client every day for thirty days. The jail was so small that there was no room for legal visits. They would lock us in the laundry closet for hours at a time, or else outside in the yard in freezing temperatures to shoot hoops all day. I was never any good at basketball and worse in a business suit, overcoat, and leather-soled shoes. We spent every day going over the same pros and cons, usually ending with the client agreeing that a plea made sense, only to find the next morning that he had changed his mind after further discussions with jailhouse lawyers. In the end, he took the plea.

About a year ago, he called me out of the blue. I had long been back in California, but my resourceful former client tracked me down. It was great to hear from him, and he asked if he could send me something. A couple of weeks later, I received a packet that was several inches thick documenting everything he'd done to make a life for himself. On top was a photocopy of a page I had scribbled one afternoon when we were talking about what he would have to do if he had any hope of ever being released. On the one hand, he had to know that life without parole means exactly what it says. On the other, he recognized that with or without parole, everything would depend on politics in the future that neither of us could foresee. He kept that handwritten page, and it guided him through more than twenty years of keeping hope alive. These spontaneous ideas were simple, not even carefully thought out: just keep a clean record, continue your significant relationships, take advantage of educational and work opportunities, develop community support, etc. He not only followed the advice but documented every step.

Herb Baker (eighteen at the time of his offense) went to death row in Pennsylvania in 1985 but won eventual parole.<sup>247</sup> He put his goal

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246. Because this former client remains incarcerated, I must respect his anonymity, privacy, and expectation of confidentiality in both the pretrial and posttrial communications discussed here. I served as Director of Investigation and Mitigation at the New York Capital Defender Office from 1995 to 2005. That office, created by the statute that reinstated the death penalty in New York, had a mandate to ensure that every indigent defendant facing the death penalty received effective representation. There were more than eight hundred death-eligible cases but only seven death sentences before the statute were found to violate the state constitution in *State v. Lavallo*, 817 N.E. 2d 341, 344, 367 (N.Y. 2004). For more details on the effectiveness of the New York CDO model, see GARRETT, *supra* note 127, at 113-15 (2017); Stetler & Tabuteau, *supra* note 49, at 744-45.

247. *Commonwealth v. Baker*, 614 A.2d 663 (Pa. 1992) (affirming conviction and death sentence); *Baker v. Horn*, 383 F. Supp. 2d 720, 780 (E.D. Pa. 2005) (overturning conviction and death sentence); *Commonwealth v. Baker*, 614 A.2d 663 (No. CP-51-CR0405062-1984)

succinctly: If there was ever a chance to be released, I just wanted to be first in line.<sup>248</sup> He now works in a public defender's office outside Philadelphia.<sup>249</sup>

#### IX. CONCLUSION: WINNING THE NARRATIVE BATTLE

Five months before his assassination, Martin Luther King had a weeklong retreat in Frogmore, South Carolina, with the staff of the Southern Christian Leadership Conference to plan what he called a Poor People's Campaign—envisioned as a campaign for human rights, not just civil rights.<sup>250</sup> He told the staff that they were the custodians of hope.<sup>251</sup> That is what we in the capital defense community are today, the custodians of hope for people facing the death penalty, dying by incarceration, enduring mass incarceration with all its inequities.

Bryan Stevenson has lamented with regard to racial justice that we won the legal battle with *Brown v. Board of Education*,<sup>252</sup> the Civil Rights Act of 1964,<sup>253</sup> the Voting Rights Act of 1965,<sup>254</sup> and the Fair

(Court of Common Pleas Philadelphia County Criminal Docket) (negotiated disposition with parole eligibility).

248. Herb Baker, Remarks at a Virtual Capital Defense Training Program Sponsored by the Atlantic Center for Capital Representation and the Public Defender Association of Pennsylvania (Jan. 13, 2021). There is no recording or transcript of the remarks, but Baker confirmed the accuracy of the quotation by e-mail. E-mails from Herb Baker to the author (Apr. 27, 2021, 02:41, 3:24 PDT) (confirming accuracy of the quotation and permission to quote him) (on file with the author and the law review).

249. *Herbert Baker*, MONTGOMERY COUNTY PA. PUB. DEFENDER'S OFF., <https://www.montcopa.org/directory.aspx?eid=708> (last visited Feb. 18, 2021).

250. PENIEL E JOSEPH, *THE SWORD AND THE SHIELD: THE REVOLUTIONARY LIVES OF MALCOLM X AND MARTIN LUTHER KING JR.* 290-92 (2020).

251. *Id.* at 291.

252. *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding as a unanimous decision that separate but equal segregated schools are unconstitutional).

253.

The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex or national origin. Provisions of this civil rights act forbade discrimination on the basis of sex, as well as, race in hiring, promoting, and firing.

The Act prohibited discrimination in public accommodations and federally funded programs. It also strengthened the enforcement of voting rights and the desegregation of schools.

*Legal Highlight: The Civil Rights Act of 1964*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964> (last visited Feb. 17, 2021).

254. The Voting Rights Act of 1965

aimed to increase the number of people registered to vote in areas where there was a record of previous discrimination. The legislation outlawed literacy tests and provided for the appointment of Federal examiners (with the power to register qualified citizens to vote) in certain jurisdictions with a history of voting discrimination.

*Congress and the Voting Rights Act of 1965*, NAT'L ARCHIVES, <https://archives.gov/legislative/features/voting-rights-1965> (last visited Feb. 18, 2021).

Housing Act of 1968,<sup>255</sup> but we lost the narrative battle because the ideology of white supremacy persists.<sup>256</sup> I want to suggest that with regard to the death penalty, we have lost the legal battle (with the impact of President Trump on the whole federal judiciary, especially on the Supreme Court),<sup>257</sup> but we are winning the narrative battle. We are succeeding in telling mitigating, humanizing stories about capital clients not just in court but in the realm of public opinion. In the six months of federal warrant litigation, our community indicted the president and his Justice Department for the executions, and, once again, the world was watching.

Mitigation in death penalty cases serves a threefold purpose. It provides the potential humanizing, life-saving evidence to which every capital charged defendant is entitled under the Sixth Amendment. It provides the evidence that jurors need to make the reasoned moral decision they are asked to render in capital cases and without which there cannot be reliable results. And it is an archive for succeeding generations—the collective compilation of individual stories that help us to understand a seemingly senseless and horrific murder. When the social scientists of the next century look back at this one, the mitigation archives will be a robust treasure trove for those examining homicide through the lenses of public health and social policy aiming to reduce and even to prevent the level of violence that has set this country apart from its peer nations. With or without the death penalty, the work of mitigation will continue, serving all these purposes and, one can hope, making empathy and human dignity central elements of a more enlightened criminal justice system.

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255. The Fair Housing Act, also called Title VIII of the Civil Rights Act of 1968, “protects individuals and families from discrimination in the sale, rental, financing, or advertising of housing . . . [A]s amended in 1988, [it] prohibits discrimination on the basis of race, colour, religion, sex, disability, family status, and national origin.” *Fair Housing Act*, BRITANNICA, <https://www.britannica.com/topic/fair-housing-act> (last updated Apr. 4, 2021).

256. TRUE JUSTICE, *supra* note 228.

257. President Trump appointed three justices to the Supreme Court, fifty-four judges to the federal courts of appeal, and 174 judges to United States district courts. *See* John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RES. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> (analyzing data from Federal Judicial Center).