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THE REVOLUTION ENTERS THE COURT: THE CONSTITUTIONAL SIGNIFICANCE OF WRONGFUL CONVICTIONS IN CONTEMPORARY CONSTITUTIONAL REGULATION OF THE DEATH PENALTY

*Jordan Steiker** †

Over the last decade, the most important events in American death penalty law have occurred outside the courts. The discovery of numerous wrongfully convicted death-sentenced inmates in Illinois led to the most substantial reflection on the American death penalty system since the late 1960s and early 1970s. Former Illinois Governor George Ryan, a Republican, first declared a moratorium on executions in 2000 and eventually commuted all 167 inmates on Illinois's death row in 2003.

The events in Illinois reverberated nationwide. Almost overnight, state legislative agendas shifted from expanding or maintaining the prevailing reach of the death penalty to studying its operation and limiting its reach. Unlike the issues of racial and economic disparities, the issue of wrongful convictions has had real public and political traction. Of course, the prospect of executing innocents has always lurked as a potential concern for the death penalty, but the apparent breadth of the problem in Illinois, coupled with the increased sophistication of DNA testing as a potential means of identifying innocents, pushed the issue to the social and political fore.

The emerging question in the legal world is whether the concern about wrongful convictions has any jurisprudential significance. Over a decade ago, in *Herrera v. Collins*, the Supreme Court was not particularly welcoming of the claim that the Constitution forbids the execution of innocents. Several justices, led by Chief Justice Rehnquist, insisted that post-conviction proof of innocence did not establish a cognizable claim on federal *habeas* and that executive clemency has been and should remain the safety valve for convictions undermined by new evidence. Although the defendant lost that case, a majority of justices suggested that some post-conviction judicial forum must be available in capital cases where a death-sentenced inmate makes a "truly persuasive" showing of actual innocence.

But how else is the prospect of wrongful convictions significant to death penalty law? So far, the courts have said very little. Most of the action is in state legislatures, which have considered (and in some cases adopted) new

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protections in capital cases designed to prevent wrongful convictions, including alteration of the “beyond a reasonable doubt” standard to a “beyond any doubt” standard, increased funding for capital defense lawyers, and greater access to DNA testing in capital cases.

Enter the Supreme Court’s decision last term in *Kansas v. Marsh*. At first glance the case appears relatively mundane. Kansas’s death penalty statute requires imposition of death if the jury finds beyond a reasonable doubt that the “aggravating circumstances [are] not outweighed by any mitigating circumstances.” The defendant argued, and managed to persuade the Kansas Supreme Court, that the Constitution forbids requiring the death penalty in cases of “equipoise,” where aggravating and mitigating circumstances are evenly balanced. From a doctrinal standpoint, the Kansas Supreme Court’s decision was a bit of a stretch, because the United States Supreme Court had already sustained Pennsylvania and Arizona provisions that likewise appeared to require jurors to impose death without independently requiring jurors to determine that death was the appropriate punishment.

That the Supreme Court granted *certiorari* is somewhat of a puzzle. Kansas isn’t exactly a death penalty powerhouse (with a death row of eight and no executions in over 40 years, dating back to the era of the murders detailed in Truman Capote’s “In Cold Blood”), and there are few cases in which the Supreme Court has reversed a state high court decision finding federal constitutional error within a state death penalty scheme. Indeed, Justices Stevens and Scalia engage in a lengthy colloquy with Justice Stevens asserting that no substantial federal interest justifies reviewing state court *over-enforcement* of federal rights and Justice Scalia maintaining that the Kansas Supreme Court deprived the people of Kansas of their legitimate desire to implement the death penalty through their chosen approach.

The majority opinion, written by Justice Thomas, seems to miss the boat. The defendant’s complaint was that the statute was “mandatory,” and the majority concluded that the Court’s decisions rejecting the mandatory imposition of the death penalty did not apply, because the jurors in Kansas were allowed to consider fully and give adequate effect to mitigating evidence. But the real objection is that the statute is mandatory in a different sense. The equipoise provision “mandates” that ties go to the State in capital sentencing and that jurors must deliver death verdicts when aggravating and mitigating considerations are of equal strength. This sort of “mandatory” provision dictates a rule of decision (not necessarily a rule of exclusion with respect to mitigating evidence), and such a rule of decision runs counter to the Court’s overall effort to ensure that state schemes reliably sort out the worst-of-the-worst offenders.

Death sentences remain a notable exception, even for death-eligible offenses. The number of capital sentences has dropped precipitously over the past decade, from a national average of over 300 per year in the mid-1990s to an average of less than 150 per year in 2003–04, the most recent two years for which data is available. The Court’s constitutional regulatory enterprise regarding the death penalty has always been motivated by the vast

divide between death-eligibility under state law and states' actual implementation of the death penalty. Given this animating concern and the recent exacerbation of this divide, it seems very odd (if not unconstitutional) for states to permit imposition of the death penalty in what are, by definition, "close" cases. Given that states have accomplished little in terms of narrowing the reach of the death penalty via statutory definition (most states have been promiscuous in their enumeration of aggravating factors), they should at least require jurors to conclude that the circumstances of the offense and the offender overwhelmingly justify the imposition of the death penalty. At a minimum, capital instructions should directly ask jurors whether the death penalty is appropriate in light of all aggravating and mitigating factors. The problem with the Kansas statute is that it does neither, and permits—in fact requires—jurors to choose death when mitigation and aggravation are in balance.

But the majority opinion is of little interest or significance. Even a decision favoring the Respondent would have resulted in a slight alteration of the statute so that aggravation would have to outweigh mitigation instead of allowing ties to go to the State. The real action and the true significance can be found in Justice Souter's dissent and Justice Scalia's concurrence. Justice Souter's dissent concludes with something of a Brandeis brief. He argues that "a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate," and the new body of "fact" to which he refers is the discovery of wrongfully convicted death-sentenced inmates. His dissent discusses the experience in Illinois, exalts the role of DNA in uncovering innocents on death row, and cites statistics about the number of "exonerated" inmates in recent years. Justice Souter concludes by saying that we are in a "period of new empirical argument about how 'death is different'" and he seems to suggest that death penalty doctrine should take account of the "cautionary lesson of recent experience" with wrongful convictions. Although he disclaims any interest in revisiting the constitutionality of the death penalty as a whole ("it is far too soon for any generalization about the soundness of capital sentencing across the country"), he suggests that we should be chastened by recent experience and reject state death penalty rules, such as the one in Kansas, that might generate additional error in our capital punishment systems.

Justice Souter's dissent is remarkable. It is joined by three other Justices and it seems to travel the same path, though not as far, as Justice Blackmun's dissent from denial of *certiorari* more than a decade earlier, in *Callins v. Collins*, declaring that he will no longer tinker with the machinery of death. Instead of adopting Justice Brennan and Justice Marshall's more general claim that the death penalty is inconsistent with prevailing standards of decency and serves no justifiable penological goal, Justice Souter and his fellow dissenters seem to be setting up the possibility that the death penalty's implementation is flawed in a way that might constitutionally compel courts to cabin its reach. In many respects, this dissent carries forward the same theme of Justice Breyer's concurring opinion in *Ring v. Arizona*. In that opinion, Justice Breyer defended the essential role of juries in capital

decisionmaking by detailing the many emerging failures of the American death penalty system. In his view, the jury sentencing right in capital cases emerges not from any general Sixth Amendment interest in juror decision-making, but because doubts about the death penalty's deterrence value, as well as concerns about its arbitrary, discriminatory, and wrongful imposition, require states to preserve the link between the community (via jurors) and death sentences.

Justice Scalia, who had mildly and light-heartedly chastised Justice Breyer in *Ring* for joining the Court's judgment despite his opposition to *Apprendi v. New Jersey* (suggesting that Justice Breyer "buy a ticket to *Apprendi-land*"), reacts much more vehemently and acerbically to this dissent. First, Justice Scalia, relying on the work of others, challenges the empirical claim about the extensiveness of error in capital cases. According to Justice Scalia, the number of "true" exonerations (for "innocent" defendants, as opposed to those later deemed "not guilty," or freed by legal error) is much smaller than Justice Souter's sources claim. Second, Justice Scalia views the exoneration of many innocents before execution, coupled with the absence of any demonstrable wrongful execution in the modern era, as indicative of the health rather than the pathology of the current system.

But Justice Scalia's broader concern is that he regards Justice Souter and his fellow dissenters as grandstanding for an international stage. Justice Scalia takes a direct swipe at international opponents of the American death penalty, accusing them of "sanctimonious criticism" because "most of the countries to which these finger-waggers belong had the death penalty themselves until recently—and indeed, many of them would still have it if the democratic will prevailed." Justice Scalia's reaction seems peculiar given that the dissent makes no mention of world opinion or practice. But on the heels of *Roper v. Simmons*'s rejection of the death penalty for juveniles, in part based on overwhelming international condemnation of the practice, Justice Scalia apparently views the dissenters' criticisms of the operation of state death penalty schemes as essentially designed "to impugn" the American death penalty "before the world." This is a new angle, and readers of Justice Scalia's opinion might be surprised to find that his comments are a response to a dissent in the U.S. Reports rather than to a speech delivered to the European Union.

His fear of foreign influence aside, Justice Scalia rightly appreciates the significance of Justice Souter's opinion. Like Justice Blackmun's and Justice Breyer's preceding global attacks on the death penalty, this opinion seems to contain a gratuitous assault on the death penalty—gratuitous because of its generality and seeming unrelatedness to the doctrinal issues presented (Justice Scalia accuses the dissent of nailing its complaint to the door of the wrong church because this case involved a challenge to sentencing instructions and not to the guilt-innocence determination). Even Justice Souter's comment that "it is far too soon" to consider the general soundness of American capital punishment, seems self-consciously aimed to raise the possibility of some future global empirical attack on the actual operation of the American death penalty system. When the Court chose to review the

Kansas Supreme Court decision, no one would have remotely thought that this technical case about Kansas's statute would call into question the overall operation of the American death penalty system, and yet the four dissenters seem determined to at least raise the prospect.

Justice Scalia's contempt and anger thus stem from his (perhaps justifiable) belief that the dissenters are lying in wait for the opportunity to attack the death penalty as a whole, and his view that the dissenters are motivated or supported by international elites. Whatever the truth of the international connection (it was after all, Justice Kennedy—who votes with the majority in this case—who enthusiastically embraced international opinion in his opinion invalidating the death penalty for juveniles), the real prospect for wrongful convictions affecting death penalty jurisprudence will be whether the fear of executing innocents shifts public opinion at home. Both Justice Souter's and Justice Scalia's opinions are clearly attempting to inform this debate by appealing to the facts on the ground (none of which could be found in the parties' briefs), and perhaps portend the movement toward a new era of empirically-informed death penalty jurisprudence.