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## Scrupulous in Applying the Law: Justice Ruth Bader Ginsburg and Capital Punishment

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# SCRUPULOUS IN APPLYING THE LAW: JUSTICE RUTH BADER GINSBURG AND CAPITAL PUNISHMENT<sup>1</sup>

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## I. INTRODUCTION

Justice Ruth Bader Ginsburg's appointment to the United States Supreme Court in 1993 coincided with rising concerns about the use of the death penalty in the United States. That same year marked the publication of Sister Helen Prejean's *Dead Man Walking*,<sup>2</sup> which has been identified as the beginning of the Death Penalty Moratorium Movement in the United States.<sup>3</sup> During February 1994 of Justice Ginsburg's first term, her colleague, Justice Harry Blackmun, wrote a decision concluding that the death penalty was unconstitutional.<sup>4</sup> In the following years, new discoveries about innocent defendants on death row and the adoption of death penalty moratoriums put the spotlight on systemic problems with capital punishment in the United States.<sup>5</sup>

As she took her seat on the Supreme Court bench, Justice

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<sup>1</sup> The title comes from a Justice Ginsburg quote. When asked during her confirmation hearings how she would decide capital cases, she said she would be "scrupulous in applying law on the basis of legislation and precedent." Mei-Fei Kuo & Kai Wang, *When is an Innovation in Order?: Justice Ruth Bader Ginsburg and Stare Decisis*, 20 U. HAW. L. REV. 835, 863 (1998) (quoting *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearing before the Comm. on the Judiciary, U.S. Senate*, 103d Cong. 51, 53 (1993) (statement of Judge Ruth Bader Ginsburg)).

<sup>2</sup> HELEN PREJEAN, C.S.J., *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993).

<sup>3</sup> See Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 22-25 (2002) (discussing the significance of the publication of Sister Helen Prejean's book) [hereinafter Kirchmeier, *Moratorium*].

<sup>4</sup> *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of petition for writ of certiorari).

<sup>5</sup> See Kirchmeier, *Moratorium*, *supra* note 3, at 39-43.

Ginsburg had never before encountered the death penalty as a jurist, nor had she faced the responsibility of condemning someone to death or of deciding midnight requests for stays of execution. Her only documented encounter with the death penalty came when she co-authored an amicus brief in a capital case as a volunteer attorney for the ACLU while a law professor at Rutgers Law School.<sup>6</sup> One can only speculate about the impact of these responsibilities on a new Supreme Court justice, especially one as complex as Justice Ginsburg. While her experiences as an attorney revealed her to be a defender of individual rights with a concern for oppressed groups,<sup>7</sup> her record as a judge on the Court of Appeals for the District of Columbia Circuit disclosed her embrace of judicial moderation.<sup>8</sup>

Justice Ginsburg has now been on the Supreme Court for more than ten years. She has faced last-minute stay of execution requests and has held the lives of the condemned in her hands. She had these experiences while new concerns about the system have been voiced in the courts and in society. Partly because of the limited number of written opinions in capital cases authored by Justice Ginsburg, the language in her opinions has not yet created a clear picture of her views as a jurist on the ultimate punishment. To a large extent, she has remained true to her approach to judging, as she explained at her confirmation hearings, to be "neither liberal nor conservative."<sup>9</sup> She has also stayed true to her goal of following the law, despite her concerns about the application of

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<sup>6</sup> Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 4 (1994).

<sup>7</sup> *Id.* at 5.

By being female and having been the victim of gender discrimination, Ginsburg should be very sensitive to the claims of the politically powerless who may look to the courts for support. As the first Jewish justice since Abe Fortas left the bench in the early 1970s, Ginsburg's experience as a member of a religious minority might enhance this sensitivity.

*Id.* Also, her role as an attorney in cases advocating equal protection for women led some commentators to refer to her as "the Thurgood Marshall of gender equality law." *Id.* at 4.

<sup>8</sup> *Id.* at 7.

Because of her reputation for judicial moderation through her service on the court of appeals, Ginsburg received endorsements not only from Democrats, but also from key Republican senators, particularly Robert Dole of Kansas, the Senate minority leader, and Orrin Hatch of Utah, the GOP's ranking member on the Judiciary Committee.

*Id.*

<sup>9</sup> *Id.* (quoting *Excerpts from Senate Hearings on the Ginsburg Nomination*, N.Y. TIMES, July 21, 1993, at C27).

the death penalty and her personal support for a moratorium on executions.<sup>10</sup>

Commentators have focused on other areas where Justice Ginsburg's written opinions have had a greater impact and which reflect her specialties, including gender and equality issues.<sup>11</sup> However, all Supreme Court justices play an active role in capital cases, not only in the published opinions, but also in the day-to-day activities in dealing with requests for stays of execution and other motions. As a result, reflection on her limited published work in this area provides insight into how she has dealt with this explosive area of the law since first encountering the death penalty as a jurist a decade ago.

This Article considers the record relating to the death penalty that Justice Ginsburg has created thus far. Section II discusses her appointment to the United States Supreme Court and the role that the death penalty played in her confirmation process. Section III addresses some of her votes and opinions upholding death sentences. Section IV addresses her three majority opinions in capital cases to date. Section V discusses her votes and opinions against the imposition of the death penalty. Then, considering the range of her written opinions, this Article concludes that her views on the death penalty are still developing, but the cases present a tempered and thoughtful approach to genuine concerns about the fairness of the death penalty system in the United States.

## II. JUSTICE GINSBURG'S APPOINTMENT TO THE SUPREME COURT

Ruth Bader Ginsburg was a surprise appointment to the United States Supreme Court in 1993, considering the checkered context of President Clinton's "moderate" jurisprudence.<sup>12</sup> She, along with Justice Stephen Breyer, have been described as moderates and as "techno-judges," highly qualified federal appellate

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<sup>10</sup> Anne Gearan, *Ginsburg Backs Ending Death Penalty*, AP Online, Apr. 10, 2001, available at 2001 WL 18926396.

<sup>11</sup> See, e.g., Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding "We the People": the Disability Rights Cases*, 104 COLUM. L. REV. 49 (2004); Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39 (2004); Melanie K. Morris, *Ruth Bader Ginsburg and Gender Equality: A Reassessment of Her Contribution*, 9 CARDOZO WOMEN'S L.J. 1 (2002).

<sup>12</sup> President Clinton's jurisprudence is not easy to describe, but it was clearly a jurisprudence of both moderation and political expediency. He supported the death penalty as both governor of Arkansas and president of the United States. See Stephen B. Bright, *The Politics of Capital Punishment: The Sacrifice of Fairness for Executions*, in JAMES R. ACKER ET AL., *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 127-46, 130-31 (2d ed. 2003).

judges with long and moderate track records.<sup>13</sup> In an alternate view, Judge Ginsburg was a “judicial restraint liberal,”<sup>14</sup> a liberal judge who carefully followed precedent and avoided the “judicial activism” that characterized the Warren Court and put “liberals” like Clinton on the political defensive since the election of 1968.<sup>15</sup> While Ginsburg was well known as an abortion rights activist and feminist, she was, like Clinton, a moderate on crime and criminal procedure issues. Even after sitting on the D.C. Circuit, she lacked death penalty experience at the time of her confirmation.<sup>16</sup> Despite the fact that she “had made her name as the nation’s leading litigator for women’s equality in the 1970s[. . .] [on] the D.C. Circuit, the cautiously intelligent Ginsburg developed a record of solid conservatism on issues of criminal law.”<sup>17</sup>

Unlike many prior nominees to the United States Supreme Court, Judge Ginsburg could not avoid the woman’s right to privacy constellation of issues because of her prominence in the formulation of that law. She had appeared four times before the Supreme Court in women’s rights cases, the first time winning a “C+” grade in Justice Blackmun’s notes.<sup>18</sup> There can be no question that, as her “handlers” prepared her to appear before the U.S. Senate confirmation hearings, they chose to deal with her women’s rights jurisprudence head-on and to vigorously defend her positions. The Clinton Administration must have calculated—cor-

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<sup>13</sup> Mark Silverstein & William Haltom, *You Can’t Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations*, 12 J.L. & POL. 459, 459-61 (1996).

<sup>14</sup> Linda Greenhouse, *The Supreme Court: A Sense of Judicial Limits*, N.Y. TIMES, July 22, 1994 at A1.

<sup>15</sup> President Clinton was deliberately “moderate” in his judicial nominations, and pro-death penalty on both the Arkansas and national levels. His appointment of Justice Ginsburg, however, raised liberal hopes that she would become an activist judge in the Warren Court model. See Christopher E. Smith, et al., *The First Term Performance of Justice Ruth Bader Ginsburg*, 78 JUDICATURE 74, 74-77 (1994).

<sup>16</sup> The District of Columbia Circuit does not include any jurisdictions with an active death penalty because the District of Columbia does not have the death penalty. See HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 9 (1997). Similarly, Judge Breyer sat on the United States Court of Appeals for the First Circuit, a circuit with no active death penalty. Maine, Massachusetts, Rhode Island, New Hampshire and Puerto Rico are covered by that circuit. See *Iguartua de la Rosa v. United States*, 229 F.3d 80, 85 n.4 (1st Cir. 2000). Of those jurisdictions, only New Hampshire has the death penalty and that state has not had any executions in the modern death penalty era. *States Without the Death Penalty*, Death Penalty Information Center, 2004, available at <http://www.deathpenaltyinfo.org/article.php?did=121&scid=11>; BEDAU, *supra* note 16, at 9; Consequently, both judges faced the Senate confirmation hearings without any record of opinions or votes in death penalty cases.

<sup>17</sup> EDWARD LAZARUS, *CLOSED CHAMBERS* 513-14 (1998).

<sup>18</sup> Linda Greenhouse, *Documents Reveal the Evolution of a Justice: Between Cases, Betting Pools, Kind Notes and Roe v. Wade*, N.Y. TIMES, Mar. 4, 2004, at A1.

rectly—that she would play very well to both women and liberals on those issues, daring conservative Republican senators to block her on these grounds.

Judge Ginsburg’s death penalty strategy at the confirmation hearings was clear. Since she had no record on the issue, she would decline to discuss her views on the death penalty. This strategy, also employed by Justice Kennedy and other nominees, stemmed from the view that judicial nominees should not speculate, in advance, on how they might rule on any particular case or issue.<sup>19</sup> It is fundamental jurisprudence that each case stands on its own facts and on the particular arguments and contexts of that case only—even though any legal scholar will connect lines of cases and show how they are interrelated. Ginsburg did say that as a justice she would uphold the law, but that statement as a position on the death penalty was arguably unclear because the U.S. Constitution, according to some views, prohibits the death penalty even though the current majority of the Court has found otherwise.<sup>20</sup>

The only tense moments at her confirmation hearings occurred when Judge Ginsburg refused several times to answer questions about her position on the death penalty.<sup>21</sup> Senator Grassley of Iowa raised the issue of an American Civil Liberties Union (“ACLU”) amicus brief that Ginsburg had authored, along with a number of other women’s rights organizations, in *Coker v. Georgia*,<sup>22</sup> a 1977 Supreme Court case holding that the punishment of death was disproportionate to the crime of rape in violation of the Eighth Amendment.<sup>23</sup> Unfortunately for Senator Grassley, the position that Ginsburg advocated was the one adopted by the majority by a seven-to-two vote, with the respected and conservative Justice Byron White writing the opinion for a plurality of the Court.<sup>24</sup> Thus,

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<sup>19</sup> See Neil A. Lewis, *Ginsburg Deflects Pressure to Talk on Death Penalty*, N.Y. TIMES, July 23, 1993, at A1.

<sup>20</sup> See *id.*

<sup>21</sup> Baugh et al., *supra* note 6, at 9-10.

<sup>22</sup> 433 U.S. 584 (1977); Brief of Amicus Curiae in Support of Respondent in *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444) [hereinafter ACLU Brief], *microformed on U.S. Supreme Court Records and Briefs*, Fiche 9-10 (Microcard Ed.).

<sup>23</sup> 433 U.S. at 584.

<sup>24</sup> *Id.* White’s failure to gain a majority for his opinion, even though the Court voted seven-to-two to reverse, was consistent with the complexity of the division on the Court on death penalty issues in the modern era of death penalty jurisprudence that developed after *Gregg v. Georgia*. 428 U.S. 153 (1976). Brennan and Marshall concurred, believing that the death penalty violated the Eighth Amendment, and that no proportionality analysis was necessary. *Coker*, 433 U.S. at 600. Justice Powell concurred with White’s opinion, agreeing with his proportionality analysis on the facts of *Coker*—but only to the extent that the victim did not sustain serious or lasting injury, or

there was little political gain in attacking the substance of her argument, which has been the law of the land for almost thirty years.

During the confirmation hearing, Judge Ginsburg pointed out that her argument in the *Coker* brief was not against the death penalty per se, but for the narrower proposition that the death penalty for rape was disproportionate to the offense and therefore impeded the administration of justice in rape cases.<sup>25</sup> For example, the third argument in her amicus brief was that because the death sentence was so severe, it might induce juries to acquit, thereby defeating justice in some rape cases.<sup>26</sup>

The amicus brief had been so narrowly crafted and careful in its argument that it did no damage to her nomination. But, in its context, it was an anti-death penalty document. The leading role of the ACLU in the long march to abolish the death penalty in the 1960s and 1970s is well known.<sup>27</sup> Racism in the administration of justice, particularly in the South, was a key argument in the constitutional battle over the death penalty, and in rape cases the statistics about the race of capital defendants were particularly egregious.<sup>28</sup> Ginsburg's brief cited a wide range of social science data against the death penalty for rape.<sup>29</sup> Yet, the brief was carefully constructed to avoid discussion of the general application of the death penalty in murder cases because this issue was lost the year before in *Gregg v. Georgia*.<sup>30</sup> Ginsburg's brief aimed to limit the scope of the death penalty, which was in its formative stages in post-*Gregg* federal jurisprudence. The brief is also a powerful feminist document, linking the death penalty for rape with the patriarchal foundation of law as primarily protecting the male property interest in women's purity.<sup>31</sup>

As a jurist on the Court of Appeals, Judge Ruth Bader Ginsburg in 1993 was far removed from the law professor she had been in 1977 when she wrote the *Coker* brief. She carefully cultivated a

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that the rape was committed with unusual brutality, thus leaving open the possibility that the death penalty might be appropriate in some future rape case. *Id.* at 601. Only Burger and Rehnquist defended the position that the death penalty was not disproportionate to the crime of rape. *Id.* at 604.

<sup>25</sup> ACLU Brief, *supra* note 22, at 9.

<sup>26</sup> *Id.* at 22-31. This argument also applies to murder cases and has been so argued. See BEDAU, *supra* note 16, at 187.

<sup>27</sup> See WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 16-17 (1984); Kirchmeier, *Moratorium*, *supra* note 3, at 12-15.

<sup>28</sup> ACLU Brief, *supra* note 22, at 9-21.

<sup>29</sup> *Id.* at 25-28.

<sup>30</sup> 428 U.S. 153 (1976).

<sup>31</sup> ACLU Brief, *supra* note 22, at 9-21.

role as a moderate judge—not an activist one—and this role secured her appointment to the Supreme Court.<sup>32</sup> On the D.C. Circuit, she voted more often with President Reagan appointee Kenneth Starr than with her liberal colleagues on the bench.<sup>33</sup> At her Supreme Court confirmation hearing, she emphasized her commitment to judicial restraint, stating that judges were “third in line” in the Constitution, and should “secure a steady, upright and impartial administration of the laws.”<sup>34</sup>

Judges change throughout their lives with respect to the death penalty, as the careers of Justices Powell and Blackmun illustrate.<sup>35</sup> It is impossible to know with certainty what forces moved Judge Ginsburg as a Court of Appeals judge. Perhaps she was influenced by the success of the women’s rights movement, as the middle class reformist roots of the women’s rights movement found a comfortable home on the federal bench, now filled with respected woman judges.

Judge Ginsburg’s outspoken positions as a feminist branded her a liberal in the eyes of some,<sup>36</sup> but the Republican Senators were unable to draw her out on the death penalty or other social issues. Throughout her confirmation hearings, she vigorously defended her work in women’s rights cases, but refused to discuss her views in other areas of the law.<sup>37</sup> When pushed on the issue of the death penalty, she asserted that she would be “scrupulous in applying law on the basis of legislation and precedent.”<sup>38</sup> On August 3, 1993, the Senate confirmed Justice Ginsburg by a vote of ninety-six to three, and she joined the Court for the 1993-94 term.<sup>39</sup>

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<sup>32</sup> See Baugh et al., *supra* note 6, at 4.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 8.

<sup>35</sup> Although Justice Blackmun joined the plurality in upholding the death penalty in *Gregg*, at the end of his career on the bench he concluded that the death penalty was unconstitutional. See *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari). Justice Powell had a similar conversion after he retired from the bench. See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL. RTS. J. 345, 452-53 (1998) [hereinafter Kirchmeier, *Aggravating and Mitigating Factors*].

<sup>36</sup> See Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 629 (2003).

<sup>37</sup> See Baugh et al., *supra* note 6, at 9-10.

<sup>38</sup> Kuo & Wang, *supra* note 1, at 863.

<sup>39</sup> *Senate Confirms Ginsburg*, HOUSTON CHRONICLE, Aug. 3, 1993, at A1.

### III. JUSTICE GINSBURG'S VOTES AND OPINIONS TO UPHOLD DEATH SENTENCES

Like every Supreme Court Justice in the modern death penalty era, with the exception of Justices Brennan and Marshall, Justice Ginsburg has cast votes to uphold the death penalty in certain cases. During her time on the Court so far, however, she has never written a majority opinion to permit a capital defendant to be executed.<sup>40</sup> Further, she has never written a dissenting opinion to object to the Court reversing a death sentence.<sup>41</sup> She has, however, joined the majority in upholding executions.

#### A. *Her Early Death Penalty Decisions as a Justice*

As artfully as Ginsburg avoided discussion of her death penalty jurisprudence in her confirmation hearings, she could not avoid voting on death penalty cases in her every term on the Court. In her first vote on a death penalty case, on September 1, 1993, she voted for a stay of execution in *James v. Collins*,<sup>42</sup> along with Justices Stevens and Blackmun.<sup>43</sup> Justice Ginsburg voted for other stays of execution,<sup>44</sup> though not for all stay requests,<sup>45</sup> before the Court issued its first death penalty opinion with her as a Justice.<sup>46</sup>

Besides her votes on petitions for writ of certiorari and stay requests, and her one dissenting opinion,<sup>47</sup> Justice Ginsburg joined her first majority opinion upholding a death sentence in *Tuilaepa v. California*.<sup>48</sup> Joining Justice Stevens, she concurred in voting to uphold the death penalty.<sup>49</sup>

Justice Ginsburg may have recalled her own brief in *Coker* as she faced the grisly facts of the *Tuilaepa* case. Bonnie Stendal, a fifty-five year-old schoolteacher from northern California was raped

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<sup>40</sup> See *infra* Part IV.

<sup>41</sup> This information is based on reviewing cases from a Westlaw search of the Supreme Court database, conducted on April 10, 2004, using the search terms: "DIS (death w/2 penalty) & OP (ginsburg)." (Source results on file with the New York City Law Review.)

<sup>42</sup> *James v. Collins*, 509 U.S. 947 (1993) (Mem.).

<sup>43</sup> See *id.*

<sup>44</sup> See, e.g., *Campbell v. Wood*, 511 U.S. 1119, 1122 (1994) (involving the issue of the constitutionality of hanging as a method of execution). Ginsburg voted to grant the stay of execution. *Id.*

<sup>45</sup> See, e.g., *Nethery v. Texas*, 511 U.S. 1123 (1994).

<sup>46</sup> See *Tuilaepa v. California*, 512 U.S. 967 (1994).

<sup>47</sup> See *Romano v. Oklahoma*, 512 U.S. 1, 15 (1994) (Ginsburg, J., dissenting). *Romano* was Justice Ginsburg's first death penalty opinion as a Supreme Court Justice. See *infra* Part V(A).

<sup>48</sup> 512 U.S. at 981.

<sup>49</sup> *Id.*

and murdered in the course of a burglary in Long Beach.<sup>50</sup> At issue was California's death penalty statute, rewritten with a list of aggravating and mitigating circumstances to conform to the requirements of modern death penalty statutes, as set out in *Gregg*.<sup>51</sup>

Tuilaepa challenged the application of four of the aggravating factors as they applied to him, arguing that they were unconstitutionally vague.<sup>52</sup> Justice Kennedy, writing for the Court, upheld the decision by methodically concluding that each of the factors was reasonable within the framework of *Gregg*.<sup>53</sup> Given the gruesome facts of the case, it was not difficult to apply the Court's standards for aggravating factors. From the standpoint of stare decisis, *Gregg*, which set forth the modern "aggravating factors-based" structure of most death penalty statutes, controlled.<sup>54</sup>

Justice Ginsburg had a clear chance to stake out her death penalty jurisprudence in this case. However, Justice Harry Blackmun alone dissented.<sup>55</sup> Justice Blackmun reasoned that each aggravator had to be analyzed for clarity, objectivity, and principled guidance.<sup>56</sup> Employing that analysis, Justice Blackmun concluded that the California statute was unconstitutionally vague because it did not provide sufficient guidance for determining whether a given factor was present, and because the factors were so broadly defined, they could be found in any case.<sup>57</sup> Consequently, he reasoned, the statute created the risk of placing "an arbitrary thumb on death's side of the scale."<sup>58</sup> While such factors as age, circumstances of the crime, and prior criminal activity might make sense in the abstract, any juror could view them in any way, "convincing jurors that just about anything is aggravating."<sup>59</sup>

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<sup>50</sup> *Id.* at 970.

<sup>51</sup> *See id.* at 975.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 976.

<sup>54</sup> *See Gregg v. Georgia*, 428 U.S. 153 (1976). The standard for a constitutional death penalty statute after *Gregg v. Georgia* was one that provided for "guided discretion" in the administration of the penalty—for a way to guide juries in deciding which murderers should be subject to the death penalty. *See Kirchmeier, Aggravating and Mitigating Factors*, *supra* note 35, at 353-60. The Georgia statute, approved by the Supreme Court in *Gregg*, was structured around a list of aggravating factors. *Gregg*, 428 U.S. at 197. While several other death penalty structures exist, the formula approved in *Gregg* is the most common. *See* ROBERT M. BOHM, *DEATHQUEST II: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 28-35 (2d ed. 2003).

<sup>55</sup> *Tuilaepa*, 512 U.S. at 984 (Blackmun, J., dissenting).

<sup>56</sup> *Id.* at 986.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

In later cases, Justice Ginsburg became increasingly sensitive to due process and to procedural issues in death penalty cases. Because she did not write in *Tuilaepa*, we have no idea what her view of Justice Blackmun's argument was, but her vote speaks volumes. Whatever the procedural concerns, the California statute was acceptable as a death penalty statute because it met the *Gregg* standard, and thus she followed *stare decisis* in a Court that had long recognized that the death penalty was constitutional. Justice Ginsburg refused to align herself with Justice Blackmun and instead was among the justices who would, as Justice Blackmun later put it, "tinker with the machinery of death."<sup>60</sup> Regardless of her personal views on the death penalty, she was committed to administering the death penalty within the constitutional scheme set out in *Gregg* and subsequent cases. This approach led Justice Ginsburg down a difficult path that challenged her to draw the nebulous line between life and death. Yet, this route was the same course traveled by all of the sitting justices of the Court: Justices Stevens and Souter also joined the opinion in *Tuilaepa* in upholding the death penalty.

B. *Justice Ginsburg's Other Votes and Opinions Upholding the Death Penalty*

To date, Justice Ginsburg has not written a majority opinion upholding a death sentence.<sup>61</sup> One of Justice Ginsburg's first written opinions upholding a death penalty came in a concurring opinion in *Victor v. Nebraska*,<sup>62</sup> where the Court addressed the due

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<sup>60</sup> *Collins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting). Justice Blackmun, one of the *Gregg* majority, ultimately concluded that the death penalty could not be fairly applied:

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

*Id.* at 1145 (citation omitted).

Blackmun's personal evolution on death penalty law was profound: in *Furman v. Georgia*, he had dissented, finding no problem with Georgia's death penalty statute. 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting). Yet, over time, he had become profoundly anti-death penalty in his thinking. See Linda Greenhouse, *Documents Reveal an Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1, A22-23.

<sup>61</sup> See *infra* Part III.

<sup>62</sup> *Victor v. Nebraska*, 511 U.S. 1 (1994). The case was joined with *Sandoval v. California* in the opinion. See *id.*

process issue of the meaning of the “beyond a reasonable doubt” standard of proof in criminal cases, specifically in death penalty cases.<sup>63</sup> The majority, citing *In re Winship*<sup>64</sup> for the proposition that the guilty-beyond-a-reasonable-doubt standard was constitutionally required for criminal convictions, held both that there was no constitutional requirement for any particular language in defining that standard and that the instructions in the cases before the Court were adequate.<sup>65</sup> The majority noted the difficulty of the concept and acknowledged some potential for vagueness and misunderstanding on the part of the jury, but held that these problems did not violate the due process required by the constitution.<sup>66</sup>

Justice Ginsburg concurred in the judgment upholding both death penalty convictions.<sup>67</sup> Perhaps in a nod to her long career as a teacher of civil procedure,<sup>68</sup> she did suggest there was a definition of “reasonable doubt” proposed by the Federal Judicial Center that was “clear, straightforward, and accurate” and gave clear guidance to jurors.<sup>69</sup> After endorsing the proposed definition, she also noted that the Supreme Court had no supervisory power over state courts and that the test was not whether the instruction given at trial was “exemplary” but whether it was reasonable.<sup>70</sup> Her concurrence avoided the issue of whether there was sufficient jury confusion in the cases to produce an erroneous verdict.<sup>71</sup>

In *Bell v. Cone*, Justice Ginsburg joined a majority opinion written by Chief Justice Rehnquist that upheld a Tennessee death penalty by an eight to one vote, with Justice Stevens dissenting.<sup>72</sup> While there was an underlying habeas corpus issue regarding the recent limitations on habeas corpus relief under the Antiterrorism and Effective Death Penalty Act, the main issue in *Bell* concerned the effective assistance of counsel in a death penalty case under the *Strickland v. Washington* test.<sup>73</sup> The facts of *Bell*<sup>74</sup> were not very dif-

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<sup>63</sup> *Id.*

<sup>64</sup> 397 U.S. 358 (1970).

<sup>65</sup> 511 U.S. at 5, 22-23.

<sup>66</sup> *Id.* at 21.

<sup>67</sup> *Id.* at 23-28.

<sup>68</sup> See Herma Hill Kay, *Celebration of the Tenth Anniversary of Justice Ruth Bader Ginsburg's Appointment to the Supreme Court of the United States*, 104 COL. L. REV. 1, 11-17 (2004).

<sup>69</sup> *Victor*, 511 U.S. at 24.

<sup>70</sup> *Id.* at 27.

<sup>71</sup> *Id.* at 1, 23-28. Arguably, this early decision by Justice Ginsburg is inconsistent with her later decisions, which emphasize the importance of the role of juries and the fact that they must receive accurate information. See *infra* Part IV(B) and V(A).

<sup>72</sup> 535 U.S. 685 (2002).

<sup>73</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test is two-pro-

ferent from those of *Strickland*.<sup>75</sup> Cone's lawyer had presented a reasonable defense at trial: although admitting guilt to a string of vicious killings, Cone claimed insanity due to traumatic experiences as a Vietnam veteran as well as drug addiction.<sup>76</sup> Following this defense and a guilty conviction, the lawyer failed to present an effective case at the sentencing hearing.<sup>77</sup>

The *Strickland* test sets a very high standard for reversal of a death penalty case on the grounds of ineffective assistance of counsel, and this high standard has been troubling to many legal scholars.<sup>78</sup> Justice Ginsburg joined the Rehnquist opinion, finding no constitutional violation in Cone's representation.<sup>79</sup> Justice Stevens strongly dissented, pointing out what he saw as the clear inadequacy of Cone's defense.<sup>80</sup>

In sum, Justice Ginsburg's opinions and votes to uphold executions exist, though they are not common. Her opinions and votes in cases to reverse capital sentences or convictions provide greater insight into her capital punishment jurisprudence.

#### IV. JUSTICE GINSBURG'S MAJORITY OPINIONS ON THE DEATH PENALTY

In her first eleven years on the Supreme Court, Justice Ginsburg has written only three majority opinions in death penalty cases. It was not until the 2000-2001 term that she authored the first of her death penalty majority opinions.<sup>81</sup> All three of her opinions were written for cases in which the Court struck down the death penalty, and each of the majority opinions garnered a seven-

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ned, requiring first that the lawyer's conduct be reasonable in the context of the practice of other lawyers, while giving great weight to the range of professional choices lawyers must make in defense work. *Id.* at 690. Second, the test requires that the lawyer's deficient conduct (assuming the first prong is met) prejudice the defendant. *Id.* at 691-92.

<sup>74</sup> 535 U.S. at 689-93.

<sup>75</sup> 466 U.S. at 671-72.

<sup>76</sup> *Bell*, 535 U.S. at 712-13.

<sup>77</sup> *Id.* at 712-15.

<sup>78</sup> See, e.g., Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. RICH. L. REV. 1327, 1353 (1995) (stating, "[a]fter *Strickland*, the courts will rarely, if ever, seriously review cases of substandard lawyering—even in capital cases."); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. SOC. CHANGE 59, 67 (1986) (stating that *Strickland* appears to be "designed to help reviewing courts deal efficiently with these claims rather than seriously address the potential injustice problems caused by incompetent trial counsel").

<sup>79</sup> *Bell*, 535 U.S. at 687.

<sup>80</sup> *Id.* at 707-19.

<sup>81</sup> See *Shafer v. South Carolina*, 532 U.S. 36 (2001).

two majority. As Justice Stevens once noted, a seven-two decision is “virtually unanimous” for the Court in the oft-divided area of death penalty jurisprudence.<sup>82</sup>

None of Justice Ginsburg’s majority opinions were especially divisive to the justices. *Shafer v. South Carolina*,<sup>83</sup> where even the two dissenters conceded the opinion was a “logical extension”<sup>84</sup> of a prior Court decision,<sup>85</sup> addressed the due process rights of capital defendants at sentencing.<sup>86</sup> In *Banks v. Dretke*, the opinion addressed prosecutor misconduct claims and the two dissenters only dissented in part, while noting that the point of dissent was “a very close question.”<sup>87</sup> Finally, even in *Ring v. Arizona*,<sup>88</sup> which addressed the constitutionality of trial judges acting in the role of fact-finder for aggravating circumstances, the two dissenting Justices noted that they “understood” why Justice Ginsburg’s opinion found it necessary to overrule a previous case, even though they would have overruled a different case.<sup>89</sup>

A. *Justice Ginsburg’s First Majority Opinion in a Capital Case: Shafer v. South Carolina*

In early 2001, during her eighth term as a Supreme Court Justice, Justice Ginsburg wrote her first capital case majority opinion in *Shafer v. South Carolina*.<sup>90</sup> The issue in the case was how *Simmons v. South Carolina*<sup>91</sup> applied to the facts in *Shafer*.<sup>92</sup> *Simmons* held that when a capital defendant’s future dangerousness is at issue and the

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<sup>82</sup> *O’Dell v. Netherland*, 521 U.S. 151, 169 (1997) (Stevens, J., dissenting). Justice Stevens noted, “In the years following our decision in *Furman v. Georgia* . . . unanimous Court opinions in capital cases have been virtually nonexistent.” *Id.* at 169 n.2 (citations omitted). Thus, he added, a seven-two decision is almost as close as the Court gets to unanimous death penalty decisions. *See id.* at 169.

<sup>83</sup> *Shafer*, 532 U.S. 36.

<sup>84</sup> *Id.* at 55-56 (Thomas, J., dissenting).

<sup>85</sup> In two separate dissenting opinions, Justices Scalia and Thomas each conceded that the *Shafer* majority decision followed logically from *Simmons v. South Carolina*, 512 U.S. 154 (1994). *See Shafer*, 536 U.S. at 55 (Scalia, J., dissenting); *id.* at 55-56 (Thomas, J., dissenting).

<sup>86</sup> *Shafer*, 532 U.S. at 55.

<sup>87</sup> *Banks v. Dretke*, 124 S. Ct. 1256, 1281 (2004) (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part).

<sup>88</sup> 536 U.S. 584 (2002).

<sup>89</sup> *Id.* at 619 (O’Connor, J., joined by Rehnquist, C.J., dissenting). The dissenters noted the inconsistency between *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Walton v. Arizona*, 497 U.S. 639 (1990), but the dissenters would have overruled the former instead of the latter. *Id.*

<sup>90</sup> *Shafer*, 532 U.S. at 36.

<sup>91</sup> 512 U.S. 154 (1994).

<sup>92</sup> *Shafer*, 532 U.S. at 39-40.

only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the jury to be informed of the defendant's parole ineligibility, either in arguments by counsel or in a jury instruction.<sup>93</sup> Justice Ginsburg had joined the plurality in *Simmons*, and she also had joined in a 1997 dissenting opinion by Justice Stevens that stressed the importance of the *Simmons* rule.<sup>94</sup>

In *Shafer*, Justice Ginsburg focused on the issue of what options were available to the jury. She concluded that once the jury found an aggravating factor, its only options were death or life without parole, even though it would have been possible for the defendant to receive a sentence less than life without parole had the jury not found any aggravating factors.<sup>95</sup> Here, if future dangerousness were raised, the jury instructions were insufficient because the jurors had been instructed not only that "life imprisonment means until death of the offender" but also that "[p]arole eligibility or ineligibility is not for your consideration."<sup>96</sup> Thus, the South Carolina Supreme Court misinterpreted *Simmons* by holding that the case did not apply to the sentencing scheme in *Shafer*.<sup>97</sup>

After concluding that *Simmons* applied to this sentencing scheme, Justice Ginsburg found that the case needed to be remanded to determine whether the *Simmons* instruction should have been given.<sup>98</sup> The *Simmons* instruction needed only to have been given if future dangerousness had been raised at sentencing.<sup>99</sup> In *Shafer*, unlike in *Simmons*, the prosecutor did not specifically argue for, and the jury did not find, the aggravating factor of "future dangerousness" during the sentencing proceedings.<sup>100</sup>

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<sup>93</sup> *Simmons*, 512 U.S. at 171.

<sup>94</sup> See *O'Dell v. Netherland*, 521 U.S. 151, 169 (1997) (Stevens, J., dissenting). The majority in *O'Dell* held that *Simmons* created a "new rule" for *Teague v. Lane* purposes and therefore it did not apply to the petitioner. *Id.* at 166; See also *Teague v. Lane* 489 U.S. 288 (1989). The dissenting opinion, joined by Justice Ginsburg, however, reasoned that the rule created by *Simmons* was too important to fundamental principles not to have retroactive effect:

Even if the rule in *Simmons* could properly be viewed as a "new" rule, it is of such importance to the accuracy and fairness of a capital sentencing proceeding that it should be applied consistently to all prisoners whose death sentences were imposed in violation of the rule, whether they were sentenced before *Simmons* was decided or after.

*Id.* at 173. See also *Simmons*, 512 U.S. 154.

<sup>95</sup> *Shafer*, 532 U.S. at 49-51.

<sup>96</sup> *Id.* at 39-40 (citation omitted).

<sup>97</sup> *Id.* at 51.

<sup>98</sup> *Id.* at 54-55.

<sup>99</sup> *Id.* at 36.

<sup>100</sup> *Id.* at 54.

However, the State introduced evidence of Shafer's criminal record and aggressive conduct.<sup>101</sup> Justice Ginsburg remanded the case for determination of whether "future dangerousness" had been raised in the case.<sup>102</sup>

*Shafer* was an interesting, but not revolutionary, opinion, where Justice Ginsburg built upon the Court's holding in *Simmons*, a case in which Justice Ginsburg had joined the plurality.<sup>103</sup> In effect, *Shafer* did not impose new due process obligations on states, but it clarified when existing rights applied. The opinion is straightforward and focuses on the details of the South Carolina sentencing process, the facts of Shafer's sentencing, and the application of *Simmons* to that process, without much discussion of the policy behind the due process right requiring juries to be informed of the sentencing options. The sentencing process used by South Carolina in *Shafer* had apparently been adopted by the State to get around the requirements of *Simmons*,<sup>104</sup> but the majority opinion was content with correcting the process and did not offer any especially harsh words for the State.

One commentator has noted "the detached tone" of the *Shafer*

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<sup>101</sup> *Id.* at 40-41. Ultimately, the jury found the aggravating factor of "murder while attempting armed robbery." *Id.* at 45.

<sup>102</sup> *Id.* at 54.

<sup>103</sup> *Simmons v. South Carolina*, 512 U.S. 154 (1994). This jurisprudence goes back to Justice Ginsburg's first year on the Court. In 1994, the same year as *Tuilaepa*, she joined Justices Blackmun, Stevens and Souter in reversing the death penalty conviction in *Simmons v. South Carolina*, a case that would later form the foundation of Justice Ginsburg's majority opinion in *Shafer*. *Simmons*, 512 U.S. 154 (1994); *Shafer*, 532 U.S. 36. *Simmons* had beaten an elderly woman to death and, in the week before his death-penalty trial, had pleaded guilty to a number of criminal offenses. *Id.* at 156. As a result of these convictions, *Simmons* was ineligible for parole. *Simmons*, 512 U.S. at 156.

At his death penalty sentencing hearing, *Simmons*'s lawyers requested an instruction that he was never eligible for parole under South Carolina law. *Id.* at 157. The prosecution opposed this instruction, which was upheld by the judge, and then argued to the jury that *Simmons* should be executed because of his future dangerousness. *Id.* The judge forbade the defense to mention his parole ineligibility. *Id.*

Although the main opinion was a plurality decision, the vote on the outcome was seven-to-two because Justice O'Connor wrote a concurring opinion that was joined by Chief Justice Rehnquist and Justice Kennedy. *Id.* at 172 (O'Connor, J., concurring). Justice Blackmun's opinion for the plurality is a bold statement of a broad view of the due process clause: "The Due Process Clause does not allow the execution of a person on the basis of information which he had no opportunity to deny or explain." *Id.* at 161 (quotations omitted). For the plurality, the fundamental core of the place of the jury in death penalty sentencing was that juries get full information on the consequences of their sentence. *See id.*

<sup>104</sup> *See* Craig M. Bradley, *South Carolina's Death Penalty Odyssey Continues*, 38 TRIAL 68 (2002) ("After *Simmons*, South Carolina changed its sentencing law in an apparent effort to avoid the Supreme Court's holding.").

opinion and the way Justice Ginsburg addressed the facts methodically without any rhetoric about the important rights being preserved.<sup>105</sup> The commentator called it a “quintessential Ginsburg opinion.”<sup>106</sup> The opinion strengthened an important right in practice, but it avoided going beyond the facts of the case.

The following year the Supreme Court accepted and reversed another case from South Carolina in a further attempt to clarify the *Simmons* rule for that state.<sup>107</sup> In that case, *Kelly v. South Carolina*, Justice Ginsburg again joined the majority in reversing a South Carolina death sentence on *Simmons* grounds.<sup>108</sup>

*B. Ring v. Arizona and the Application of Apprendi to Death Penalty Sentencing*

In 2002, in *Ring v. Arizona*,<sup>109</sup> Justice Ginsburg wrote her second majority opinion in a death penalty case, a clear opinion applying *Apprendi v. New Jersey*<sup>110</sup> to the sentencing phase of death penalty cases. *Apprendi*'s complex and far-reaching significance is beyond the scope of this Article. However, it essentially held that the Sixth Amendment right to a jury trial forbids using any aggravating factor not found by a jury as an aggravating factor in sentencing.<sup>111</sup> In an era of complex sentencing structures that often turn on prior actions, *Apprendi* and *Ring* had a major impact on sentencing law, returning to the jury a significant part of the sentencing procedure that had been taken over by judges and proba-

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<sup>105</sup> Ray, *supra* note 36, at 646.

<sup>106</sup> *Id.* Professor Ray explained:

Again, there was no mention of the irreversible consequences of a capital sentence or of the particular care that courts must exercise when supervising such momentous determinations. The defendant prevailed and the South Carolina Supreme Court was reversed, but without any lecture or scolding. The opinion was carefully constructed, clearly presented and completely unemotional; it is the quintessential Ginsburg opinion.

*Id.* at 646-47.

<sup>107</sup> The Court further clarified the *Simmons* right and what constitutes putting “future dangerousness” at issue during the following term in *Kelly v. South Carolina*, where the Court again reversed a South Carolina death sentence on *Simmons* grounds. 534 U.S. 246 (2002).

<sup>108</sup> *Kelly*, 534 U.S. at 248.

<sup>109</sup> 536 U.S. 584 (2002).

<sup>110</sup> 530 U.S. 466 (2000). *Apprendi* “held that the Sixth Amendment does not permit a defendant to be expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” *Ring*, 536 U.S. at 588-89 (citing *Apprendi*, 530 U.S. at 483) (emphasis in original).

<sup>111</sup> *Ring*, 536 U.S. at 609.

tion offices.<sup>112</sup>

The application of *Apprendi* to the death penalty had been raised by some of the justices at the time *Apprendi* was decided, but *Ring* clarified the issue.<sup>113</sup> Once *Gregg* began the modern era of death penalty jurisprudence, states were required to have structured death penalty regimes that included specific aggravating and mitigating factors.<sup>114</sup> Some of these considerations were entirely in the hands of the jury and did not violate *Apprendi*. But some states left these matters, entirely or in part, to judges.<sup>115</sup> In 1990, in *Walton v. Arizona*,<sup>116</sup> the Supreme Court upheld Arizona's death penalty sentencing statute that required the trial judge, sitting alone, to determine aggravating and mitigating factors after the jury had decided the question of guilt or innocence. Subsequently, Arizona executed twenty-two individuals who had been sentenced by judges.<sup>117</sup> In 1994, however, Justice Ginsburg's opinion, joined by six other justices, overruled *Walton* and held that Arizona's sentencing procedure was unconstitutional.<sup>118</sup> In effect, *Ring* invalidated the death penalty sentences of defendants in a number of states.<sup>119</sup>

Consistent with her opinion in *Shafer*,<sup>120</sup> the *Ring* decision put the death penalty in the hands of informed jurors, a populist measure.<sup>121</sup> The issue of whether a judge is better able to decide on

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<sup>112</sup> See, e.g., Jason E. Barsanti, *Ring v. Arizona: The Sixth and Eighth Amendments Collide: Out of the Wreckage Emerges a Constitutional Safeguard for Capital Defendants*, 31 PEPP. L. REV. 519, 573 (2004) ("What is apparent is that *Ring* has significantly influenced the sphere of American capital punishment."); Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1477 (2002) ("There is no question that . . . *Ring* will have some significant repercussions on the administration of capital punishment.")

<sup>113</sup> See, e.g., *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). *Ring*, 536 U.S. 584.

<sup>114</sup> For a more general discussion of the history of the modern era of the death penalty, see Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 35, at 349-60.

<sup>115</sup> "Before *Ring*, of the thirty-eight capital punishment states, eleven employed a sentencing procedure providing, to some degree, for judicial findings of fact in capital sentencing." Barsanti, *supra* note 112, at 555. Arizona, Colorado, Idaho, Montana, and Nebraska had statutes that allowed judges to do capital sentencing, and several other states had statutes that gave a significant role to judges in the sentencing process. See Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 35, at 346 n.6.

<sup>116</sup> 497 U.S. 639 (1990).

<sup>117</sup> See David G. Savage, *Executions Becoming Province of the South, Report Finds*, L.A. TIMES, Jan. 2, 2003, at 10.

<sup>118</sup> 497 U.S. 647. Justice O'Connor wrote in dissent, urging that *Apprendi* be overruled rather than *Walton*. *Ring*, 536 U.S. at 619 (O'Connor, J., dissenting).

<sup>119</sup> See Steiker, *supra* note 112, at 1477-82.

<sup>120</sup> *Shafer v. South Carolina*, 532 U.S. 36 (2001). See *supra* Part IV(A).

<sup>121</sup> In fact, though, Justice Breyer noted in his concurring opinion that he would have gone further than the majority opinion. *Ring v. Arizona*, 536 U.S. 584, 613-19

aggravating circumstances was irrelevant in Justice Ginsburg's analysis. The Court held that the Constitution's requirement of trial by jury includes the right to have the jury, in death penalty cases, determine the aggravating factors that made a defendant eligible for the death penalty.<sup>122</sup> Justice Ginsburg reasoned, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both."<sup>123</sup>

Despite the broad impact of the *Ring* decision,<sup>124</sup> as in *Shafer*, Justice Ginsburg emphasized that she was merely applying prior precedent to the issue before the Court. As one commentator noted, "at the level of legal doctrine, the decision [in *Ring*] was merely the application of a distinction—*Apprendi*'s new formulation of the difference between 'elements' of a crime and 'sentencing factors'—that had been developed over a number of years in the noncapital context."<sup>125</sup>

### C. *Banks v. Texas: Due Process and Prosecutorial Misconduct*

*Banks v. Texas*<sup>126</sup> is a recent majority opinion written by Justice Ginsburg. It is also significant in that it is only her third death penalty majority opinion for the Court, again in a case with a seven-to-two vote.<sup>127</sup> Every death penalty case has significance beyond its borders and *Banks* may stand for a range of issues as the jurisprudence of death evolves. As in a number of her earlier opinions, the

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(Breyer, J., concurring). He argued that in addition to the Sixth Amendment requirement that juries find aggravating factors, he would hold that the Eighth Amendment requires jury sentencing in capital cases. *See id.* (Breyer, J., concurring). Justice Ginsburg noted the difference of opinion with Justice Breyer in her majority opinion in a collegial way, noting that she was, "as always, pleased to travel in Justice Breyer's company." *Id.* at 612.

<sup>122</sup> *Id.* at 609.

<sup>123</sup> *Id.*

<sup>124</sup> Although the *Ring* opinion affected some current death penalty prisoners and all future cases, the Supreme Court subsequently limited the number of current death penalty prisoners it affected in *Schiro v. Summerlin*, 124 S. Ct. 2519 (2004). In that five-four decision, the Court held that *Ring* created a "new procedural rule" and did not apply retroactively to death penalty cases already final. *Id.* at 2526. Justice Ginsburg, however, joined Justice Breyer's dissenting opinion that argued, "Ring's requirement that a jury, and not a judge, must apply the death sentence aggravators announces a watershed rule of criminal procedure that should be applied retroactively in habeas proceedings." *Id.* at 2531.

<sup>125</sup> Steiker, *supra* note 112, at 1485.

<sup>126</sup> *Banks v. Dretke*, 124 S. Ct. 1256 (2004).

<sup>127</sup> *See id.*

underlying issue is the reliability of death penalty judgments in a politically charged America.

One core concept of the Supreme Court's death penalty jurisprudence since *Powell v. Alabama*<sup>128</sup> has been the jurisprudence of reliability. Beginning with *Powell's* interpretation of "due process" in the Fourteenth Amendment, the Court started a new jurisprudence of imposing the requirements of the United States Constitution on state criminal procedures that were unfair and unreliable.<sup>129</sup> The Court found the conviction of the innocent and their sentencing to long prison terms—or to death—intolerable in a civilized society and an unfortunate occurrence in American criminal law.<sup>130</sup>

The issue in *Banks* was prosecutorial misconduct. The prosecuting attorney knew that prosecution witnesses lied.<sup>131</sup> In habeas corpus proceedings, *Banks* raised a *Brady v. Maryland*<sup>132</sup> claim, arguing that the state failed to reveal exculpatory evidence.<sup>133</sup> The Court of Appeals for the Fifth Circuit found that *Banks* had not raised the issue in his state post-conviction proceedings and had not been diligent in developing the facts underlying his *Brady* claim.<sup>134</sup> Therefore, the Fifth Circuit reasoned, the evidence uncovered in the federal habeas proceeding was procedurally barred.<sup>135</sup>

Justice Ginsburg's opinion turned on a technical analysis of the scope of review permitted federal courts in habeas cases in the regime in place prior to the Antiterrorism and Effective Death Penalty Act of 1996.<sup>136</sup> The narrow issue was *Banks'* omission in raising

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<sup>128</sup> *Powell v. Alabama*, 287 U.S. 45 (1932). In the famous "Scottsboro" case, the Court held that the defendants' Fourteenth Amendment rights were violated in the Alabama state trial. *Id.* at 73.

<sup>129</sup> See, e.g., WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 553-54 (West Group 2000).

<sup>130</sup> This role of the Supreme Court is the purpose of federalism in criminal procedure jurisprudence. The states, historically, have had difficulties providing basic justice because local factors impede its administration. This is well developed jurisprudence, dating back to *Powell v. Alabama*, the foundation of selective incorporation doctrine in American criminal procedure. While Chief Justice Rehnquist has called for a "new federalism" and for the return of basic criminal law to the states, the states, in turn, have a duty to provide reliable trials. See Sue Davis, *Rehnquist, William Hobbs*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 715-17 (Kermit Hall et al., eds. 1992). This is especially true in death penalty cases.

<sup>131</sup> *Banks*, 124 S. Ct. at 1263.

<sup>132</sup> 373 U.S. 83 (1963).

<sup>133</sup> *Banks*, 124 S. Ct. at 1268.

<sup>134</sup> *Id.* at 1270.

<sup>135</sup> *Id.*

<sup>136</sup> Justice Ginsburg noted that because of the timing of *Banks'* petition, the stan-

the State's failure to provide exculpatory evidence under *Brady*—an omission that occurred because Banks had no idea that Texas prosecutors were engaging in misconduct.<sup>137</sup> The state of Texas wanted to engage in misconduct at trial, hide the issue on appeal, and then argue that the defendant had waived the issue because he had not raised it earlier.

The case raised the question of whether the result of any criminal trial can be reliable if the prosecution engages in misconduct and gets away with it as “harmless error.” Justice Ginsburg weighed in decisively on this point. She concluded, *inter alia*, that Banks did show “cause” for the failure to raise the claim earlier, that the suppressed evidence was material and resulted in prejudice to Banks, and that the elements of *Brady* were satisfied.<sup>138</sup> Finally, she concluded that the District Court and Court of Appeals erred in denying Banks a certificate of appealability.<sup>139</sup>

Again, Justice Ginsburg's opinion is a straightforward application of the law without much rhetorical flourish. As one commentator noted, even in cases raising issues close to Justice Ginsburg's heart, she “refrains from sweeping statements or ringing pronouncements, and she does not provide her readers with a supply of readily quotable passages.”<sup>140</sup> In *Banks*, she did not dwell on the conduct of the prosecutors in the case with adjectives to emphasize the outrageous conduct, but she presented the facts and reasoning in a logical, direct manner. Yet, the former law professor did take the State to task for its poor legal reasoning at oral argument before the Supreme Court, where the State argued, in effect, that “the prosecutor can lie and conceal and the prisoner still has the burden to . . . discover the evidence.”<sup>141</sup> In a subtle way, she chastised the State by asserting that “[a] rule thus declaring ‘prosecutor

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dards of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, 28 U.S.C. § 2254, did not apply. *Id.* at 1270 n.9 (citing *Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997)).

<sup>137</sup> *Banks*, 124 S. Ct. at 1272-74.

<sup>138</sup> *Id.* at 1272-79.

<sup>139</sup> *Id.* at 1279-80. “To obtain a certificate of appealability, a prisoner must ‘demonstrate that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.’” *Id.* at 1280 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

<sup>140</sup> Ray, *supra* note 36, at 680-81. Professor Ray added that Justice Ginsburg's “opinions tend to look inward rather than outward. They are scholarly in tone and likely to contain detailed procedural histories, multiple footnotes and abundant citations to precedent. They are not, however, likely to stake out broad positions that might constrain her options in later cases.” *Id.* at 681.

<sup>141</sup> *Id.* at 1275 (citing Tr. of Oral Arg. 35).

may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."<sup>142</sup>

#### V. JUSTICE GINSBURG'S OTHER OPINIONS AND VOTES TO REVERSE DEATH SENTENCES

Because of the limited number of opinions by Justice Ginsburg upholding the death penalty, her opinions supporting votes to strike down the death penalty are essential to understanding her views about the constitutional requirements of death penalty procedures. As noted above, all three of her majority opinions in death penalty cases have been in cases where the capital sentences were overturned. While she has rarely written concurring opinions in capital cases, she has written several dissenting opinions that argue for reversals of capital sentences or convictions.<sup>143</sup>

##### A. *Speaking to a Future Age: Justice Ginsburg's Dissenting Opinions*

Dissenting opinions serve a unique role in American jurisprudence. As Justice Ginsburg has noted, "Dissents speak to a future age. So that is the dissenter's hope: that they are writing not for today, but for tomorrow."<sup>144</sup> On a broad scale, one commentator has called Justice Ginsburg "a moderate dissenter, willing to voice her disagreement with the majority on a regular basis and unwilling to embrace consensus at any cost."<sup>145</sup>

Most of Justice Ginsburg's writing in death penalty cases has been in dissent, with a focus on procedural fairness and in defense of a broader standard for habeas corpus review of state death penalty cases. While she has made it clear—as in *Cone*—that she will uphold death penalty verdicts, many of her votes have placed her in the minority of the Court on death penalty issues, frequently joining Justices Souter, Breyer, and Stevens either in dissent or carrying one or two additional justices and reversing death penalty convictions.<sup>146</sup>

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<sup>142</sup> *Id.* at 1275.

<sup>143</sup> See, e.g., *Romano v. Oklahoma*, 512 U.S. 1 (1994).

<sup>144</sup> Thomas Adcock, *CUNY Law School Hosts Justice Ginsburg*, N.Y. LAWYER, Mar. 19, 2004, at 16.

<sup>145</sup> Ray, *supra* note 36, at 655. Professor Ray further explained:

[I]ike Justice Brennan, whose defense of dissent she has cited with approval, Ginsburg recognizes that the act of dissenting is not a betrayal of institutional values. Rather, it is an essential part of a Justice's role, an occasion when, in her terms, the tug of individuality properly defeats the rival tug of collegiality.

*Id.*

<sup>146</sup> See, e.g., *Sattazahn v. Pennsylvania*, 537 U.S. 101, 118 (2003) (Ginsburg, J., dis-

### 1. Justice Ginsburg's First Dissenting Opinion in a Capital Case

Justice Ginsburg's belief in the integrity of the jury in death penalty sentencing, illustrated by her majority opinions in *Ring* and *Shafer*, emerged from her dissent in *Romano v. Oklahoma*,<sup>147</sup> another case from her first year on the Court, which was her first writing in a death penalty case. Justices Blackmun, Stevens, and Souter joined her dissenting opinion in a five-to-four decision.<sup>148</sup>

In *Romano*, the jury was told in the penalty phase of the trial that the defendant had already been sentenced to death in another case.<sup>149</sup> While evidence of the defendant's dangerousness was in the purview of the sentencing phase, here the issue was whether or not this information reduced the jury's personal responsibility for the fate of the defendant.<sup>150</sup>

Justice Ginsburg began her analysis in the dissenting opinion with a discussion of *Caldwell v. Mississippi*<sup>151</sup> in which the Court struck down a death sentence because the prosecutor told the jury that the jury's decision was not final because it was reviewable by an appellate court.<sup>152</sup> Basing her reasoning upon *Caldwell*, Justice Ginsburg wrote that the jurors' knowledge that *Romano* would be executed anyway, regardless of their verdict, reduced their responsibility for their verdict.<sup>153</sup> Her opinion also emphasized one of the foundations of her capital punishment jurisprudence: The belief that a carefully structured jury system was critical to death penalty procedure, insuring reliability.<sup>154</sup>

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sentencing in opinion joined by JJ. Stevens, Souter, and Breyer) (reasoning that after a state-mandated entry of a life sentence following a jury deadlock, the double jeopardy clause prevents the imposition of the death penalty at a new sentencing hearing); *Gray v. Netherland*, 518 U.S. 152, 171 (1996) (Ginsburg, J., dissenting in an opinion joined by JJ. Stevens, Souter, and Breyer) (reasoning that a habeas petitioner was denied the right to a full, fair, and effective opportunity to defend himself at the penalty phase and that no new rule was implicated in his habeas petition).

<sup>147</sup> 512 U.S. 1 (1994).

<sup>148</sup> *Id.* at 15.

<sup>149</sup> *Id.* at 15-25.

<sup>150</sup> *Id.* at 3.

<sup>151</sup> 472 U.S. 320 (1985).

<sup>152</sup> *Id.* at 328-33. The Court in *Caldwell* held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29.

<sup>153</sup> *Romano*, 512 U.S. at 16.

<sup>154</sup> *Id.* at 15-25.

## 2. Justice Ginsburg's Dissents from Denials of Requests for Stays of Execution.

Justice Ginsburg's dissents in denials of applications for stays of execution may be seen as embodying a procedural approach. In her view, a criminal defendant can always be executed later, after the courts have carefully considered procedural remedies. For example, in *Republic of Paraguay v. Gilmore*,<sup>155</sup> a case involving the capital trial of a Paraguayan national, the petitioner argued that he was tried, convicted and sentenced to death without notification of the Counsel of Paraguay as required by the Vienna Convention on Consular Relations.<sup>156</sup> Justice Ginsburg's expressed disappointment in the Court's failure to grant a stay of execution, pointing out that it was the condemned's first federal petition for a writ of habeas corpus.<sup>157</sup>

Considering cases without opinions, significantly, Justice Ginsburg so far has voted in the minority to grant stays of executions or deny applications to vacate stays of executions in more than 150 cases while on the Supreme Court.<sup>158</sup> Her voice on these low-profile cases illustrates her concern about the fairness of the death penalty even in these forgotten cases without a Supreme Court opinion.<sup>159</sup>

## 3. Justice Ginsburg and the Writ of Habeas Corpus

No discussion of death penalty jurisprudence is complete without considering habeas corpus, a procedural area of the law that is intertwined with the rights of capital defendants. With roots extending back almost 800 years, the writ of habeas corpus, the "Great Writ," gives every person who is imprisoned access to the courts to force the government to legally justify his or her impris-

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<sup>155</sup> 523 U.S. 371 (2000).

<sup>156</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (1970) [hereinafter Vienna Convention].

<sup>157</sup> See *Gilmore*, 523 U.S. at 381. Justice Ginsburg dissented on the same grounds in a previous case raising a Vienna Convention claim. See *Breard v. Greene*, 523 U.S. 371, 381 (1998) (Ginsburg, J., dissenting).

<sup>158</sup> A Westlaw search of the terms "Ginsburg /100 (stay /5 execution)" in the Supreme Court database reveals 193 results (last checked Oct. 24, 2004). Some of those results were from the beginning of her career, stating she did not participate in the decisions. Also, a few are early decisions where Justice Ginsburg concurred in the decision to deny a stay of execution request. See, e.g., *Guinan v. Delo*, 510 U.S. 909 (1993).

<sup>159</sup> Many of the cases simply mark her vote on the stay applications and do not have opinions by the majority or the dissent. See, e.g., *Stewart v. Mata*, 518 U.S. 1042 (1996).

onment.<sup>160</sup> Over the years, both Congress and the Court have restricted habeas corpus rights and limited access to federal courts of prisoners in state custody.<sup>161</sup> Justice Ginsburg has read the law to be consistent with its purpose of allowing access to the federal courts by state prisoners to protect federal constitutional rights. This reading is important inasmuch as the Supreme Court has become increasingly concerned with both inadequate procedural protections in state courts in death penalty cases and with the failure of state appellate courts to actively police their lower courts' death penalty trials.

Justice Ginsburg's concern about the quality of justice was manifested in her dissenting opinion in *Gray v. Netherland*,<sup>162</sup> a five-to-four case involving a petition for a writ of habeas corpus, where Justices Stevens, Souter, and Breyer again joined her opinion.<sup>163</sup> On the facts, Gray received an unfair trial.<sup>164</sup> He was convicted of murder, largely on the testimony of a co-defendant who was offered a deal in return for his testimony. Gray's lawyers were concerned about a rumor that the prosecution would attempt to introduce evidence that Gray had bragged about two unsolved and particularly vicious murders several years before.<sup>165</sup> At a pre-trial hearing, they raised this concern with the judge and were assured by the prosecutor that he only would introduce the testimony of a jailhouse informer about the prior crime and nothing else.<sup>166</sup> The defense attorney was not prepared for additional evidence about the prior crime, and had been reassured that only the jailhouse testimony would be introduced.<sup>167</sup>

Once the petitioner was convicted, the prosecution, in a surprise move, revealed that it would use other evidence at sentencing, including evidence from the state medical examiner who performed two autopsies, evidence from a detective, and vivid crime scene photos, including ones of the burned body of a child.<sup>168</sup> The defense objected to this new evidence concerning an

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<sup>160</sup> See, e.g., JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.3 (3d ed. 2001).

<sup>161</sup> See, e.g., Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections on 28 U.S.C.); *Rose v. Lundy*, 455 U.S. 509 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

<sup>162</sup> 518 U.S. 152, 171 (1996) (Ginsburg, J., dissenting).

<sup>163</sup> See *id.*

<sup>164</sup> See *id.*

<sup>165</sup> *Id.* at 156.

<sup>166</sup> *Id.* at 157.

<sup>167</sup> *Id.* at 157.

<sup>168</sup> *Id.*

unadjudicated crime being used without notice, but the court allowed the evidence at the sentencing hearing.<sup>169</sup> Gray was given the death sentence, partly upon this evidence of additional murders of which he had not been convicted. An appeal and state habeas corpus petition were denied by the Virginia courts.<sup>170</sup> Subsequently, the United States Court of Appeals for the Fourth Circuit denied habeas corpus relief.<sup>171</sup>

The Supreme Court held, *inter alia*, that the petitioner's *Brady v. Maryland*<sup>172</sup> claim that the prosecutor should have disclosed the evidence was procedurally defaulted because the defendant failed to raise the claim in state court.<sup>173</sup> Because the petitioner did not fully litigate his due process rights in the Virginia state courts, Gray was denied relief.<sup>174</sup>

Further, the Court held that prior case law did not require the prosecutor to disclose the evidence under the Due Process Clause,<sup>175</sup> and for the petitioner to prevail on this due process claim, the Court would have to adopt a new rule.<sup>176</sup> Therefore, the Court reasoned, under *Teague v. Lane*,<sup>177</sup> the petitioner could not obtain habeas relief.<sup>178</sup> Justice Ginsburg's dissent, arguing that there was a due process violation and that no "new rule" was implicated under *Teague*, is an indictment of the quality of justice in the case.<sup>179</sup> The prosecutor lied to Gray and his lawyer, a lie that was upheld by the trial judge.<sup>180</sup> Justice Ginsburg wrote a powerful defense of the need for habeas corpus as a remedy in such cases, pointing out that this situation was exactly the type of violation that the writ was designed to remedy.<sup>181</sup> She reasoned, "[t]here is nothing 'new' in a rule that capital defendants must be afforded a

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 158-60.

<sup>171</sup> *Id.*

<sup>172</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>173</sup> *Gray*, 518 U.S. at 161-62 (citing *Brady*, 373 U.S. 83 (1963)).

<sup>174</sup> *Id.* at 161-62.

<sup>175</sup> *Id.* at 168. Gray made two Due Process claims: (1) the Commonwealth failed to give him adequate notice it would use the evidence; and (2) the Commonwealth misled Gray about the evidence it intended to use. *See id.* at 162.

<sup>176</sup> *Id.* at 169-70.

<sup>177</sup> 489 U.S. 288, 311 (1989).

<sup>178</sup> *Gray*, 518 U.S. at 170.

<sup>179</sup> *Id.* at 171 (Ginsburg, J., dissenting).

<sup>180</sup> *Id.* at 157. Justice Ginsburg noted, "Gray's lawyers were undeniably caught short by the prosecutor's startling announcement, the night before the penalty phase was to begin, that he would in effect put on a 'mini-trial' of the Sorrell murders. . . . Thus, at the penalty trial, defense counsel were reduced nearly to the role of spectators." *Id.* at 184.

<sup>181</sup> *Id.* at 180-86.

meaningful opportunity to defend against the State's penalty phase evidence."<sup>182</sup>

Her dissent is consistent with her belief that procedural fairness is critical in order for the death penalty, or criminal law generally, to be reliable.<sup>183</sup> The fact that she had to dissent, and that her position lost, is a sad indictment of the state of death penalty law in America. While the issue was a narrow technical one—the scope of new laws restricting habeas review by federal courts—the underlying substantive issue is the poor quality of state criminal justice in America, especially in death penalty cases.<sup>184</sup>

*B. Justice Ginsburg's Other Votes to Reverse Death Sentences*

Justice Ginsburg also has joined opinions reversing death sentences where she did not write a separate opinion. For example, she joined in a six-to-three majority, reversing the death penalty in *Penry v. Johnson* (“*Penry II*”).<sup>185</sup> John Paul Penry was convicted of rape and murder in 1979, and his first case was decided by the Supreme Court in 1989, where the Court held, *inter alia*, that the three special questions given to sentencing jurors to consider did not allow for full consideration of the mitigating evidence of Penry's mental impairment.<sup>186</sup> His second appeal to the Supreme Court included the issue of whether the Texas courts had complied with *Penry I* in the jury instructions given at Penry's second

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<sup>182</sup> *Id.* at 181.

<sup>183</sup> Her concern about procedural fairness in habeas corpus cases also is illustrated by her dissenting opinion in the recent non-capital case of *Pliler v. Ford*, 124 S. Ct. 2441 (2004). In that case, she was concerned about the stay-and-abeyance procedure used in the case and whether the *pro se* petitioner was informed of the options. *Id.* at 2448-49 (Ginsburg, J., dissenting).

<sup>184</sup> Not narrow and technical at all, and consistent with Justice Ginsburg's belief that procedural fairness is fundamental in death penalty jurisprudence, is her indictment of the poor quality of defense lawyering in many death penalty cases. In a speech at University of the District of Columbia Law School, she said, “I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.” Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, Joseph L. Rauh Lecture (Apr. 9, 2001), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-09-01a.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-09-01a.html). Good lawyering is obviously a key to fair procedures. Indeed, it is careful adherence to the formal procedures of criminal law that are fundamental to the operation of the entire system of criminal justice.

<sup>185</sup> *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry I*).

<sup>186</sup> See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that the jury had not been properly instructed on mitigation and reversing the death sentence, but also holding that it did not violate the Eighth Amendment to execute mentally retarded defendants), overruled by *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that it violates the Eighth Amendment to execute mentally retarded inmates).

sentencing.<sup>187</sup> Thus, the case included issues of jury responsibility not unrelated to *Simmons*, in that the arguments focused on whether the jury had complete and accurate information.<sup>188</sup>

The standard the Court applied to Penry's habeas petition came from the Antiterrorism and Effective Death Penalty Act of 1996.<sup>189</sup> A federal court can only grant an application for a writ of habeas corpus on a claim adjudicated on the merits in state court if that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."<sup>190</sup> Even applying that high standard, the Court opinion, joined by Justice Ginsburg, found that the jury instructions given at Penry's second sentencing hearing did not satisfy the requirements of *Penry I*,<sup>191</sup> and the state court's conclusion that it did comply was "objectively unreasonable."<sup>192</sup>

*Penry II* reasserted the importance of mitigating evidence, a theme that the Court had stressed in a long line of cases since *Lockett v. Ohio*.<sup>193</sup> Mental retardation, head injuries, childhood trauma, drug and alcohol abuse all are very common in death penalty cases.<sup>194</sup> A clear message that defendants must be allowed to fully

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<sup>187</sup> *Penry II*, 532 U.S. at 796-804.

<sup>188</sup> *See id.* at 796. "Penry also contends that the jury instructions given at his second sentencing hearing did not comport with our holding in *Penry I* because they did not provide the jury with a vehicle for expressing its reasoned moral response to the mitigating evidence of Penry's mental retardation and childhood abuse." *Id.*

<sup>189</sup> 28 U.S.C. § 2254(d)(1).

<sup>190</sup> *See Penry II*, 532 U.S. at 792 (quoting 28 U.S.C. § 2254(d)(1)).

<sup>191</sup> At Penry's second sentencing, the jury had been given a supplemental instruction about mitigation, but the Court concluded the supplemental instruction could be read in a way that did not allow the jurors to give full effect to Penry's mitigating evidence. *Id.* at 797-99. The Court concluded that even reading the instructions the way the State urged was, at best, confusing. *Id.* at 798-99. The Court stated that assuming that the jurors read the instruction the way the State contended, it still "made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation." *Id.* at 799.

<sup>192</sup> *Id.* at 804.

<sup>193</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that a sentencer must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (emphasis in original).

<sup>194</sup> *See, e.g.* Am. Bar Ass'n, *American Bar Association Guidelines for the Appointment of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 956 (2003) (stating, "Neurological and psychiatric impairment, combined with a history of physical abuse are common among persons convicted of violent offenses on death row"); Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 SANTA CLARA L. REV. 101, 142-43 (2003) (noting that "death row in California prisons is disproportionately populated by the poor, the uneducated, those who had poor representation, the mentally ill, the developmen-

present mitigating factors in a way that enables the jury to understand and to act on them is essential to the defense in death penalty cases.

Although Justice Ginsburg merely joined *Penry II*, and did not write an opinion, her vote in the case is consistent with her voice on the death penalty. *Penry II*—like *Ring*, *Simmons*, and *Shafer*—is important because it reasserts the importance of the role of a fully informed jury as the basic foundation of a fair capital sentencing hearing.

Thirty years after *Gregg v. Georgia*, the quality of state criminal procedure, even in death penalty cases, is still poor.<sup>195</sup> Many state appellate courts have become notoriously lax in death penalty cases as the issue has been politicized, especially in the wake of the electoral defeats of judges on death penalty issues.<sup>196</sup> As some commentators have observed, death penalty law embodies a “super due process,” a heightened level of procedural due process because the penalty is final.<sup>197</sup> In her opinions and votes in cases like *Penry II*, Justice Ginsburg has stood behind that ideal in the face of the abandonment of this responsibility by states and an increasingly conservative federal judiciary.<sup>198</sup>

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tally disabled, . . . [and] those who suffered child abuse themselves”); Michael A. Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. SOC. CHANGE 451, 483 (1991) (citations omitted) (stating that “a substantial number of death row inmates suffer from mental illness”); Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55, 80-81 (1990) (citations omitted) (noting that death row inmates suffer disproportionately from illiteracy, mental illness, and mental retardation). See generally DOROTHY OTNOW LEWIS, *GUILTY BY REASON OF INSANITY: A PSYCHIATRIST EXPLORES THE MINDS OF KILLERS* (1998) (discussing observations about brain damage, abuse, and mental illness among the condemned).

<sup>195</sup> See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Jeffrey L. Kirchmeier, *Drinks, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996) [hereinafter Kirchmeier, *Drinks, Drugs, and Drowsiness*].

<sup>196</sup> Bright, *Counsel for the Poor*, *supra* note 195 at 127-35.

<sup>197</sup> Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

<sup>198</sup> For example, even in *Banks*—in which seven Supreme Court justices found serious prosecutorial misconduct violating due process—both the Fifth Circuit and two Supreme Court Justices, Justices Scalia and Thomas, found no reversible error in such serious prosecutorial misconduct in a death penalty case. *Banks v. Dretke*, 124 S. Ct. 1256 (2004) (Thomas, J., with whom Scalia, J., joins concurring in part and dissenting in part); see also *Banks v. Dretke*, 48 Fed. Appx. 104 (5th Cir. 2002).

## VI. CONCLUSION

In her death penalty opinions, Justice Ginsburg has been consistently “scrupulous in applying law on the basis of legislation and precedent,”<sup>199</sup> as she predicted at her confirmation hearings, while also exhibiting a fundamental concern with fairness in capital cases. It is an approach that was embraced by Justice Blackmun for almost two decades of deciding capital cases, until his frustration led him to conclude that “even if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge.”<sup>200</sup>

In Justice Ginsburg’s first eleven years on the Supreme Court, she has not staked out a clear position in written death penalty jurisprudence. She has written only three majority opinions, *Ring*, *Shafer*, and *Banks*, all in safe seven-to-two majorities that included many of the “moderate” or “conservative” justices. She honestly has adhered to her strict judicial philosophy,<sup>201</sup> but she also has joined the other Justices to engage in what Justice Blackmun called “tinker[ing]” with death.<sup>202</sup> Thus, thirty years after *Gregg*, death penalty jurisprudence is arguably stuck in the same place it was at the time of *Furman*: juries, using the various “structured discretion”

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<sup>199</sup> Kuo & Wang, *supra* note 1, at 863 (quoting *Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearing before the Comm. on the Judiciary, U.S. Senate, 103d Cong. 51, 53 (1993)* (testimony of Justice Ruth Bader Ginsburg)).

<sup>200</sup> *Callins*, 510 U.S. at 1156 (Blackmun, J., dissenting).

<sup>201</sup> At least one commentator has argued that Justice Ginsburg’s legal philosophy also has been a restraining force on women’s rights issues:

Justice Ginsburg will not become the liberal, activist champion of women’s rights on the Supreme Court that Justice Marshall was for minority rights. The reason lies not in Justice Ginsburg’s lack of passion for her cause; she is still lecturing and writing about her “grand ideal” that one day men and women will be treated equally by the law. . . . Rather the reason lies in her commitment to a particular judicial philosophy that will prevent her from advocating great doctrinal changes except in small steps; even if designed to advance women’s rights, her support of women sexual harassment plaintiffs will come only when Supreme Court precedent or her interpretation of legislative intent allows it.

Sheila M. Smith, Comment, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court’s Women’s Rights Champion?*, 63 U. CIN. L. REV. 1893, 1945 (1995).

<sup>202</sup> *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). Similarly, it has been argued that “the Supreme Court’s project of constitutional regulation of capital punishment since 1976 has played a role in legitimating and thus stabilizing the practice of capital punishment, primarily by generating an appearance of intensive judicial scrutiny and regulation despite its virtual absence.” Steiker, *supra* note 112, at 1485.

models are applying the death penalty almost as erratically as they did pre-*Furman*.<sup>203</sup>

Justice Ginsburg's death penalty majority decisions are more important for what they do not say than for what they say. Although she has signed onto opinions in cases where the death penalty has been upheld, she has never written a majority opinion upholding the death penalty. The lack of such a written opinion may be a result of the choices of more conservative senior justices, but it gives an indication that she is perhaps more likely than several of her colleagues to conclude that the application of the death penalty is unfair in an individual case.<sup>204</sup>

Justice Ginsburg has frequently written in dissent in death penalty cases, and joined in other dissents, often with Justices Stevens, Souter, Breyer or some combination of these justices.<sup>205</sup> None of these justices has endorsed Justice Blackmun's renunciation of the death penalty, but all have frequently voted to reverse death penalty convictions, or dissented from the Court's judgments upholding convictions.

If a consistent theme emerges, it is Justice Ginsburg's view that death penalty judgments must be highly reliable and that death penalty trials must represent a reasonable level of American justice. Several of her cases taken together illustrate a faith that the most likely way to reach reliable death sentences is through juries who are given reliable information by competent defense attorneys and honest prosecutors.

Justice Ginsburg has not taken a position against the death penalty per se while a justice on the Supreme Court, but considering her dissenting opinions, she, more than several other justices, has staked out the position that procedures must be fair and reliable. She has followed the jurisprudence the Court developed be-

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<sup>203</sup> See, e.g., Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 35 at 360-459; Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 55-83 (James R. Acker et al. eds., 2003).

<sup>204</sup> These cases run the gamut of death penalty and criminal justice issues; at the most basic level, death penalty cases are just extraordinary criminal cases.

<sup>205</sup> See, e.g., *Sattazahn v. Pennsylvania*, 537 U.S. 101, 118 (2003) (Ginsburg, J., dissenting) (reasoning that after a state-mandated entry of a life sentence following a jury deadlock, the double jeopardy clause prevents the imposition of the death penalty at a new sentencing hearing); *Gray v. Netherland*, 518 U.S. 152, 171 (1996) (Ginsburg, J., dissenting in an opinion joined by JJ. Stevens, Souter, and Breyer) (reasoning that a habeas petitioner was denied the right to a full, fair, and effective opportunity to defend himself at the penalty phase and that no new rule was implicated in his habeas petition).

tween *Gregg* and her arrival on the Court about the death penalty being different from other punishments,<sup>206</sup> but she has embraced it more fiercely than have other members. Because Justice Ginsburg arrived on the Court and faced her first death penalty decisions as the United States death penalty “Moratorium Movement” was developing,<sup>207</sup> it is possible that revelations about the dangers of executing the innocent, combined with her background, have heightened her concern for added reliability in capital cases.

The problem with this faith in reliable death sentences is that the quality of all criminal trials at the state level—and death penalty trials in particular—is often poor. Even after *Gregg* and the Warren Court’s revolution in criminal procedure, critics continue to argue that the criminal justice system does a poor job in capital cases.<sup>208</sup> The criminal justice system is often inaccurate and arbitrary, and it magnifies the inequality based on class and race in our society.<sup>209</sup> Such problems are even more pronounced in capital cases.<sup>210</sup>

Still, Justice Ginsburg’s careful approach toward capital cases is consistent with her feminist jurisprudence and general concern with the oppressed and powerless members of society. Historically, women have played an important role in the battle against the use of the death penalty, as well as against the use of the death penalty’s cousin, lynching.<sup>211</sup> Elizabeth Cady Stanton, a leader of the women’s rights movement in the 1800s, once wrote, “As to the gal-

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<sup>206</sup> See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“Because of that qualitative difference [between prison and death], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

<sup>207</sup> See, e.g., Kirchmeier, *Moratorium*, *supra* note 3, at 20-74.

<sup>208</sup> See generally Bright, *Counsel for the Poor*, *supra* note 195; Kirchmeier, *Drinks, Drugs, and Drowsiness*, *supra* note 195.

<sup>209</sup> See generally David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (1999). “The vast majority of those behind bars are poor; 40 percent of state prisoners can’t even read; and 67 percent of prison inmates did not have full-time employment when they were arrested. The per capita incarceration rate among blacks is seven times that among whites.” *Id.* at 4.

<sup>210</sup> See *id.* at 88-92, 132-41. The Court “has stepped in to forestall the starkest inequities [regarding incompetent counsel], but its interventions have been more successful in legitimizing the gaping inequities that remain than in providing anything approaching substantive equality for the poor.” *Id.* at 92.

<sup>211</sup> “In the early 1900s . . . [t]he Association of Southern Women for the Prevention of Lynching, directed by Jessie Daniel Ames, the Women’s International League for Peace and Freedom, the Young Women’s Christian Association (YWCA) and others were key participants in the anti-lynching movement.” Kirchmeier, *Moratorium*, *supra* note 3, at 95-96. See MARY JANE BROWN, *ERADICATING THIS EVIL: WOMEN IN THE AMERICAN ANTI-LYNCHING MOVEMENT 1892-1940* (2000).

lows, it is the torture of my life. . . . Woman knows the cost of life better than man does.”<sup>212</sup> Justice Ginsburg’s experience as a women’s rights advocate may continue to fuel a strong concern about the use of the death penalty.

In many ways, modern death penalty jurisprudence, developed in the United States during the last thirty years, is still in its infancy. During this short time, the pressures of life-and-death decisions and the frustration with imperfect and inconsistent procedures have forced several Justices, including Justice Scalia and Justice Blackmun, to change the foundations of their death penalty jurisprudence over time.<sup>213</sup>

Since Justice Ginsburg’s first term on the Court and Justice Blackmun’s opinion in *Callins*, no Justice has made a radical reassessment of her or his death penalty jurisprudence. Nonetheless, some of the current Justices have exhibited a growing concern about the process.<sup>214</sup> In July 2001, Justice Sandra Day O’Connor stated that there are “serious questions” about whether the death penalty is administered in a fair manner.<sup>215</sup> In April of that year,

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<sup>212</sup> Women’s rights advocate Elizabeth Cady Stanton wrote eloquently about the death penalty:

As to the gallows, it is the torture of my life. Every sentence and every execution I hear of, is a break in the current of my life and thought for days. I make my son the victim. I am with him in the solitude of that last awful night, broken only by the sound of the hammer and the coarse jeers of men, in preparation for the dismal pageant of the coming day. I see the cold sweat of death upon his brow, and weigh the mountain of sorrow that rests upon his soul, with its sad memories of the past and the fearful forebodings of the world to come. I imagine the mortal agony, the death-struggle, and I know ten thousand mothers all over the land weep, and pray, and groan with me over every soul thus lost. Woman knows the cost of life better than man does. There will be no gallows, no dungeons, no needless cruelty in solitude, when mothers make the laws.

Letter from Elizabeth Cady Stanton to Marvin H. Bovee (Aug. 1, 1868) in *VOICES AGAINST DEATH* 121, 121 (Philip English Mackey ed., 1976).

<sup>213</sup> Despite upholding the importance of the consideration of mitigating factors in his majority opinion in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), Justice Scalia eventually rejected previous cases and took the position that the Eighth Amendment did not require the consideration of mitigating factors and that a mandatory death penalty would satisfy the Eighth Amendment. See *Walton v. Arizona*, 497 U.S. at 671-73. For a further discussion of Justice Scalia’s reasoning regarding mitigating circumstances, see Stephen G. Gey, *Justice Scalia’s Death Penalty*, 20 FLA. ST. U. L. REV. 67, 96 (1992); Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 35, at 447-51. As discussed earlier, at the end of Justice Blackmun’s career, he concluded that the death penalty was unconstitutional. See *Callins*, 510 U.S. at 1144-45 (Blackmun, J., dissenting).

<sup>214</sup> Additionally, several other federal and state judges have spoken out against the death penalty. See Kirchmeier, *Moratorium*, *supra* note 3, at 30-36.

<sup>215</sup> *O’Connor Questions Death Penalty*, N.Y. TIMES, July 4, 2001, at A9. In a speech before the Minnesota Women Lawyers Association, Justice O’Connor stated that there

Justice Ginsburg said that she would be happy if Maryland passed a moratorium on executions, asserting that “[p]eople who are well represented at trial do not get the death penalty.”<sup>216</sup> She also noted, “I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial.”<sup>217</sup> It will be interesting to watch Justice Ginsburg struggle with these problems, informed by her own experiences and concern with injustice, while also trying to scrupulously apply the law.

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is a possibility that innocent people have been executed and that Minnesota residents “must breath a big sigh of relief every day” because the state does not have a death penalty. *Id.*

<sup>216</sup> Gearan, *supra* note 10. In addition to the Supreme Court Justices, several federal and state court judges have expressed similar concerns with the fairness of the death penalty. See Kirchmeier, *Moratorium*, *supra* note 3, at 31-36.

<sup>217</sup> *Justice Backs Death Penalty Freeze*, CBSNews.com, Apr. 10, 2001, at <http://www.cbsnews.com/stories/2001/04/10/deathpenalty/main284850.html> (on file with the New York City Law Review).

