In the first 15 years of the twenty-first century, we have seen several indicators that use the death penalty in the United States is in steep decline. According to the Death Penalty Information Center, an annual average of 3.75 new prisoners arrived on America’s death rows between 1996 and 2000; in 2015, there were only 49 new death sentences. The average number of executions per year has dropped nearly 50 percent since the last five years of the twentieth century, from 74 between 1996 and 2000, to 37 in the years 2011–2015. Moreover, there were only 20 executions in 2016, a historic low in the modern death penalty era. Since 2000, seven states have abolished the death penalty, and four more have seen their governors impose moratoria on executions. And, whereas Gallup found that 80 percent of Americans supported capital punishment as recently as 1994, a 2015 Quinnipiac poll indicates that in 2014 only 27 percent of Americans supported capital punishment, with roughly one in five Americans saying they oppose the death penalty and 84 percent expressing the opinion that capital punishment is “too harsh.”

It is the purpose of this Article, therefore, to examine the claim that there is a death penalty decline by considering the data that support and refute this claim. Specifically, this Article focuses on the exercise of executive clemency...
weighed by the appellate courts due to procedural bars and other technical legal constraints. Changing societal and professional views of mental illness, for example, or an evolving understanding of whether 18 is truly old enough to be sentenced to death for a crime, are typically not the types of evidence a court can legally use to overturn (or ever even consider) the sentence. Clemency remains the only nimble vehicle through which evolving perspectives on such crucial issues as culpability and justice can be weighed—but it is almost never used to do so.

Furthermore, the role of the courts today is significantly changed from the 1972 decision in which the Supreme Court explained the wording of the number of clemency. Specifically, the passage of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) significantly limited federal courts’ ability to review state courts’ death penalty opinions. (Indeed, AEDPA was in large part passed with precisely this goal in mind.) Under this statute, federal courts are unable to overturn a state court decision because “there is no possibility [that] fair-minded jurists would disagree that the state court’s decision conflicts with [Supreme Court] precedent.” Harrison v. Richter, 562 U.S. 86, 102 (2011) (emphasis added). As a result, many cases that might have been rooted in judicial beliefs in the years prior to AEDPA are now heavily insulated from federal review. This now 20-year-old change in the law has rendered the clemency power even more important today, because clemency officials can no longer seriously argue that the courts have the power to correct mistakes in capital cases. In recent years, prisoners have been executed despite strong evidence of developmental disabilities (Warren Hill, Georgia, 2015), doubts about guilt (Cameron Todd Willingham, Texas, 2004), unquestioned rehabilitation (Stanley “Tookie” Williams, California, 2005), and sentences imposed on an equally or more culpable co-defendant (Kevin Gillis-Seddan, Georgia, 2015), and a wide array of other factors that make scores of death row inmates like these most likely not among the “worst of the worst.” While federal courts were in fact more free (and willing) to overturn death sentences in the two decades following Gregg, this aspect of the process has now entirely changed. In short, AEDPA has effectively extended an invitation to clemency officials to use their powers where the courts are now prevented from doing so: but, sadly, that invitation has gone unanswered.

Policy risk? Finally, we consider Bedau’s third explanation for decline in clemency: Is it “political suicide” to commute death sentences? The short answer is “no,” and the longer answer is “at least not anymore.” No governor has suffered significant political backlash for any of the 280 commutations that have been granted in the past 43 years. Indeed, the state that saw the most commutations and pardons, Illinois (four pardons and 167 commutations in 2003), went on to see another 15 commutations and completely abolished the death penalty only eight years later. Ohio Governor John R. Kasich commuted five death sentences between 2011 and 2014, and then easily won reelection. None of his rivals for the Republican presidential nomination in 2015–2016 mentioned his commutations as reasons to distrust him or vote against him; they did claim that his use of commutation must mean he opposes the death penalty. One of the more controversial uses of the clemency power in recent memory—the 2013 reprieve granted to Nathan Dunlap, the so-called “Chuck E. Cheese shooter” in Colorado— did not prevent Governor John Hickenlooper from winning reelection in 2014. While political actors considering clemency for death row inmates likely do fear political repercussions for an affirmative clemency grant, the evidence suggests that this fear is not reality. Trends away from the death penalty and recent public opinion polls actually indicate that denial of, clemency, rather than its approval, may today constitute a greater political risk for many than ever before. In today’s political climate, a governor’s use of clemency powers might justifiably be seen as a sign of integrity, rather than weak- ness. There is no question that today’s political environment in terms of our perspectives on crime and punishment is significantly different than it seemed to be from that of the 1980s and 1990s.

One of the most memorable moments of the 1988 presidential race between George H.W. Bush and Michael Dukakis came early in their final debate, when the moderator began asking Dukakis, a lifelong foe of the death penalty, to say “no fear” if his opposition was to be swayed if someone were to murder his wife. Duka- kis’s response, that he would still not favor the death penalty even in that instance, was seen as so unemotional, tepid, and off-the-mark that many attributed his eventual electoral demise in part to his dismal response. Politicians quickly viewed this as showing that publicly opposing the death penalty would spell political disaster. Even if there were once some cred- ence to this view, it is no longer the case. Tough-on-crime policies, now clearly linked to the mass incarceration crisis so troubling to both sides of the political aisle, are steadily declining in popularity. Similarly, the National Academy of Sciences recently dis- missed the claim that the death penalty is a stronger deterrent to homicide than long prison terms, throwing cold water on the idea we need more executions to fight high crime rates. Moreover, public awareness of wrong- ful convictions and concern about the possibility. Unfortunately, that has not happened yet. Many new defendants have been convicted in Colorado, Arkansas, and Texas in the last two decades post-Gregg, due to fears of “backlash amid widespread pub- lic approval of the death penalty,” and to ensure that compelling claims are given adequate moral weight, is to consider the following three questions:

(a) Are they truly the worst of the worst?
(b) Do the offenses for which the death penalty is sought spell political disaster for the defendant?
(c) To conform their conduct to the requirements of the law?

Legislation codifying this principle will be under consideration in several states in 2017, and the ABA has created a Mental Illness Initiative to support this effort. In addition, attorneys for capital defendants and condemned pris- oners have used the above consumer statement as the backbone of an argu- ment that imposing the death penalty on these defendants contravenes evolving standards of decency in a civilized society. Several state appellate judges have expressed interest in this argument, and support for such an exemption is likely to grow. Embracing an exemption for dimin- ishanced responsibility based on serious mental illness could significantly reduce political pressure to curtail the death penalty for juveniles and individuals with intellectual disability. In 2006, the American Bar Association (ABA), American Psychiatric Association, American Psychological Association, and National Alliance on Mental Illness endorsed the principle that a finding of serious mental ill- ness should constitute a bar to execution.

By Richard J. Bonnie

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T he esteemed lawyer Jonathan Rapping, founder and director of the non-profit Gideon’s Promise, has often said that the most obvi-
ous feature of our legal system is the disparate treatment of African Amer-
icans. In no context is this observation more true and profound than in the
administration of capital punishment. Therefore, our evolving appreciation for the adverse effects of automatic, subconscious biases is im-
tremely important to consider in the context of racial disparities in death penalty sen-
tencing—the punishment that should be reserved for the most “threatening” people or horrific crimes. For example,

found that judges with greater implicit anti-black biases met out harsher

punishments. However, where race was a front-and-center issue in the case, judges seemed able to override their biases and come to a fairer sentence. But despite the unquestioned power and authority of prosecutors, we submit that judges are the real engineers of the criminal justice train. Indeed, our brains have been hardwired to try to improve what judges know about this research and to eradicate the insidious effects of implicit bias in the justice system. At

least, we believe it is imperative that judges:

- Attend to their own mindset and be more humble in wanting to learn;
- Slow down the frequent rush to judgments in and out of the courtroom, as speed and urgency heighten the effects of bias; and
- Activate their conscious motivations to be fair and aware.

Beyond these rudimentary but important prescriptions, judges must recall that they are the guardians of the presumption of innocence, the indispensable foundation for our sys-
tem of justice. Thus, judges must truly embody this presumption for the jury in their words, body language, and at-
titudes displayed in the courtroom, as jurors will take their behavioral and attitudinal cues from judges. So unless judges work to recognize the implicit biases first in themselves and then in the other actors critical to the criminal justice system, the goal of fundamen-
tal fairness will be put in jeopardy. This is a moral imperative, particularly when it comes to our use of the most severe punishment.

Confronting Implicit Bias: An Imperative for Judges in Capital Prosecutions

By Gregory S. Parks and Hon. Andre M. Davis

Gregory S. Parks, JD, PhD, is an associate professor of law at Wake Forest University School of Law. The Honorable Andre M. Davis is a senior circuit judge with the United States Court of Appeals for the Fourth Circuit.

Laura Schaefer is a staff attorney for the ABA Death Penalty Representation Project, and coordinator of the Capital and Clemency Resource Initiative, a joint project of the ABA Death Penalty Due Process Review Project, Death Penalty Representation Project, and Commission on Disability Rights. She previously represented capital defendants in their state habeas corpus proceedings, and their Federal Post-Conviction Review Project, Death Penalty Representation Project, and the Institute of Behavioral Science at the University of Colorado—Boulder. Her latest book, The Death Penalty in Colorado: Ambivalence, Inconsistencies, and Expense, will be published in early 2017 by University Press of Colorado.

Misunderstanding of the role of clemency? So, why are there so few commutations? One contention that has not been fully explored is whether con-

mumutations have become so rare in practice that decision makers no longer feel confident that their discre-
tion and independent judgment are intended to serve as a check on the capital punishment system. We sus-
pect that many clemency officials today are simply unaware of the funda-

damental importance of clemency in ensuring fairness and justice in death penalty cases. An assumption appears to have emerged that the clemency decision maker can only act in truly “extraordinary” circumstances, such as when strong exculpatory evidence emerges just prior to an execution. (Clearly, when governors were grant-
ing individual commutations in death penalty cases at a much higher rate pre-Gregg—decades before DNA and forensic testing emerged—this idea was not at play.) The assumption that clemency is designed only to serve as a means of preventing an innocent person from being executed is a mis-

understanding of the significance, role, and rationale of clemency within our criminal justice system.

In 1788, Alexander Hamilton wrote: “Humanity and good policy conspire to oblige the legislature to scrupulously examine all cases of clemency with the most minute detail.” However, political reprisal seems to play a significant role. Some officials may have become reluctant to tinker with death sentences in cases where otherwise warranted. The changing nature of death penalty politics and the courts’ failures to ensure that only the worst of the worst are executed has opened the door for more clemency officials to exercise their power today.

There is no question that there are many individuals currently facing execu-
tion who, if tried for the same crime today, almost certainly would not be sentenced to death. Not to com-

mute the sentences of these individuals ignores the “fail-safe” deliberately built into our capital punishment system.