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Brookings Cafeteria Podcast:  
Economic issues in the presidential election

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DEWS: Welcome to the Brookings Cafeteria, A podcast about ideas and the experts who have them. I'm Fred Dews. The number of weeks until the presidential election is now in the single digits. The major party candidates, Donald Trump and Hillary Clinton, are trading fierce rhetoric but also policy ideas on a range of issues including taxes, childcare, and trade. Here to talk about the issues is David Wessel, senior fellow and director of the Hutchins center on fiscal and monetary policy here at Brookings and also a regular contributor of economic policy ideas to this podcast. Stay tuned in this episode for a general election update from John Hudak and also a discussion with law professor John Bessler who is the editor of a new book from the Brookings Institution press that presents Justice Stephen Breyer's passionate dissent in a noted death penalty case David, thanks for joining me today.

WESSEL: It's a pleasure Fred.

DEWS: Let's start with some of the specific policy issues that both of the major party candidates have offered positions on. for example, we've heard from both campaigns a lot in recent weeks about paid family leave policies, especially the importance of paternity and/or maternity leave. What do you make of the candidates' positions on these issues?

WESSEL: I think the most interesting thing is that each of the candidates feels that responding to this need, is politically important. We've seen a lot of pressure on middle-class families, we have many two earner couples, childcare expenses appear to be a big concern of the working class voters who both candidates are courting. The two plans are a little bit vague. Hillary Clinton has said that she wants to use a variety of approaches to limit the amount of income that people have to spend on childcare.

Donald Trump came up with a plan, apparently greatly influenced by his daughter Ivanka, that had some specific tax proposals but we won't really know how these things would work. I think the most important point is that this is now risen to the level of a presidential debate and we're likely no matter who wins the election to see some effort to move towards more paid family leave, which after all is something that most other advanced economies already offer.

DEWS: Can you explain how these kinds of proposals work in terms of tax policy; you call them tax proposals so everyone's talking about how do you finance this.

WESSEL: Well there're different ways to do it. I mean, Hillary Clinton, for instance, says that she would partly do this by creating more federally funded pre-k programs that would then relieve parents of the need to spend their own money for these things. There are other proposals floating around that would actually add a payroll tax the way that we pay payroll taxes for Medicare and Social Security that would finance such a thing and Donald Trump has shown a little bit of interest in that.

DEWS: Let's move on are real quick to economic growth. What do you make of Trump's recent pledge that his policies would achieve four percent economic growth? Is that realistic?

Wessel: Unfortunately I don't think it is realistic. Look, the economy is growing painfully slowly; we all wish it were growing more rapidly and there is a lively debate about what government policies might leave the economy to grow faster. Donald Trump is relying on, I think, a discredited view that if you cut taxes enough, it will somehow unleash a burst of economic activity and that will mean more tax revenues coming to the government so you can then have a smaller deficit but that didn't work very well in

the Reagan years and also even economist who were sympathetic to this view think that aiming for four percent, while certainly an admirable aspiration, is not something that we should be counting on and that's for two reasons: one is the labor force is growing more slowly than it used to; that's because of the aging of the baby boom among other things but also the rate of productivity growth has been disappointingly slow and we don't really know if we can make that rise faster, we should try but assuming that we will and then spending the money in advance, especially when we have as much debt as we have, seems imprudent to me.

DEWS: A big part of economic growth, the conversation on economic growth is jobs, I'd like to hear from you about your thoughts on the candidates' proposals about job creation but specifically Donald Trump often says to African American audiences especially that there is a fifty-eight percent unemployment rate amongst black youth. How do you unpack that particular statistic?

WESSEL: Well I think you're asking two questions: one is, can a president really do things that increase the number of jobs in the economy and the short answer is yes but not as much as you'd think from the way they talk about things. One thing we've learned is that when you get a lot of employment, when unemployment comes down, whoever the president gets the credit whether or not he or she really had much to do about it. We've created an extraordinary number of jobs in the past couple of years after losing an extraordinary number of jobs in the years before that. And Donald Trump has talked about creating some incredible number of jobs without any sort of idea of where we would get the people to fill them so I don't think what he's talking about really makes much sense to me but then that's true of many of the things that he says.

On the question of youth unemployment among African-Americans, what Trump seems to be doing is adding up all the young African-Americans who are not working and assuming that all of them are quote “unemployed” and that's really not the right way to look at the numbers but that's not to say that he hasn't identified a big problem. When the government talks about unemployment, they generally mean people who are not working and looking for work.

In 2015 the annual averages to smooth out the month fluctuation show us that about twenty-eight percent of African American teenagers wanted jobs and couldn't find them and about sixteen percent of African-Americans between 20 and 24 wanted jobs and couldn't find them; those are very high and disturbing numbers what Donald Trump is doing is looking at the total number of people who aren't working and calling them all unemployed and that's a bit of a problem because some not all but some of those young people are in school and we don't really worry that they're not working, others may not be looking for work and are not counted in the official statistics and that's a much bigger problem. So bottom line, he's exaggerating the size of the problem but he's calling attention to something really disturbing, that a very large fraction of young African-American men don't have jobs even among those who say they want to work.

DEWS: Let's move on to taxes. broadly speaking on Tax Policy, Democrats in general and Hillary Clinton favor increasing taxes on the rich and Republicans and Donald Trump favor cutting taxes so what effects on physical policy have occurred in the past and could occur with policies on either raising or lowering taxes on the wealthiest Americans?

WESSEL: Well I think that the first thing to remember is that Donald Trump is proposing very big tax cuts. You're right -there- it would, according to the analysis of our colleagues at the tax policy center, benefit upper income taxpayers a lot more. He doesn't have any well-articulated plan for offsetting those tax cuts with tax increases somewhere else or with spending cuts so to the extent that anybody can objectively evaluate Trump's ever-changing tax plan, it would seem to involve a huge increase in federal borrowing. Hillary Clinton in contrast has been very careful to try and balance every cut with an increase somewhere else, every spending cut with an increase spending somewhere else, so her thing would, if taken at face value, neither increase or decrease the federal debt from what it would otherwise be so it's an unfair comparison because he doesn't worry about paying things and she's scrupulously trying to pay for things because she apparently believes although she's not interested in reducing the debt from what it would otherwise be, she doesn't want to make it worse. You're absolutely right that Hillary Clinton's tax increases would be targeted primarily on upper income taxpayers, that's why she can't do much to reduce the debt because it would be very hard to reduce the debt from projected levels- taxing -increasing taxes only on the rich. What we know is that Republicans often claim that if you increase taxes on the rich you'll hurt the economy because the upper income taxpayers are the most productive ones, are likely to be the entrepreneurs and they'll invest less and the economy will suffer.

Well both Bill Clinton and Barack Obama raised taxes on upper income taxpayers and we actually had a pretty good run of job creation during those periods, which tells me that taxes are important but they're not the only thing and often not the

major factor in how many jobs we have. Another big difference between the two candidates is that Hillary Clinton believes that the gap between the rich and poor, between the winners and losers in our economy has gotten too big and she wants to use the tax system to reduce that inequality, not eliminate it but restrain what the market is doing to produce this big inequality gap. Donald Trump doesn't seem to think that's very important his tax policy, again referring to the analysis by our colleagues at the tax policy center, would actually widen the gap between rich and poor.

DEWS: A question about taxes, it's a very specific kind of question, they seem to have a somewhat similar approach to it and it has to do with companies that relocate overseas so Hillary Clinton called for an exit tax on companies that leave the US so that the government can recoup their foreign, untaxed foreign earnings. Donald Trump said he'd impose a tariff on US companies that relocate but then try to import their products back in to the United States. What do you- are these viable tax policies?

WESSEL: Well, the problem is we have a very old and complicated international tax system that is not working very well and is not compatible with the policies of other countries and it's causing lots of problems, one of which is it seems to encourage companies, big multinationals, to park their profits overseas whether or not they really earned them overseas. Neither candidate is proposing, in my view, a very thoughtful reform of international corporate tax. What Hillary Clinton is saying is that, you're right, she wants to oppose this exit tax which is to say in the very specific circumstance an American company shifts its headquarters overseas, say to Ireland or Switzerland or someplace in order to save money on taxes, she wants to charge them a fee basically on the taxes on the profits they've parked overseas in order to discourage that. She's

been noticeably silent on how she would reform the international tax code or actually the business tax code in general; she's got lots of little things but she hasn't showed us much of an overarching architecture.

Trump has quite an architecture, which basically involves two things: one is cutting business taxes here, a lot, so that there would be fewer incentives for multinationals are American based companies to book their taxes overseas and as you point out to use the trade system tariffs to basically punish companies in other countries. Most economists, most thoughtful observers think this approach to tariffs is not going to work, that it would actually hurt us partly because it would raise the price of imports here and as bad as imports are if you're a production worker, many more of us are consumers and it would raise the price of the things we buy but also because it's almost certain to provoke a nasty reaction from our trading partners and we'd end up in one of these you tariffs on me, I tariff on you, counterproductive battles that could really hurt global growth so unfortunately they both identified a problem; our international corporate tax code is broken, it has some perverse incentives. In my opinion, neither of them has articulated much of a solution.

One little thing about Hillary Clinton not articulating a solution is sometimes people, like me, criticize the candidates for not spelling out their proposals. We kinda would like to see everything you're gonna do. Sometimes, savvy political observers say that's a mistake, that if you're silent on something, that gives you a lot of freedom to come up with some proposal that might be a good idea but might be politically unpopular during the heat of the campaign.



DEWS: Time here for a quick break to get another update from senior fellow John Hudak on the Clinton and Trump campaigns and a look ahead to the first presidential debate.

HUDAK: Over the past week Hillary Clinton returned to the campaign trail after taking several days off because of pneumonia. Her return was fierce, launching repeated attacks against Donald Trump, discussing a host of policy proposals to outline her vision as president, and dispatching surrogates like Elizabeth Warren, Bernie Sanders, and President Obama to connect with younger voters and voters of color. Donald Trump largely continued to campaign pivot toward being more scripted, talking a bit more about policy, and trying to capitalize on what polls have indicated over the past two weeks that the race is getting tighter both nationally and in swing states. Despite Trump's efforts to remain scripted, a series of unforced errors and comments became distractions for the campaign. Off-color comments by his son Donald Trump Jr. about gas chambers and comparing Syrian refugees to pieces of candy dominated multiple news cycles. The candidate's own words about disarming Hillary Clinton Secret Service detail also made undesirable waves for the campaign.

The candidates have clearly been sharpening their attacks on each other and discussing their policies and each other candidates temperament all while crisscrossing the country and prepping for the first presidential debate. That debate will be held on September 26<sup>th</sup> at Hofstra University. As polls have tightened, this event has the chance of being a game-changer for either candidate and the media is billing it as such. Both candidates will face each other on stage for the first time in what will surely be an engaging and fiery exchange. Each has proven to be an effective debater but in

different ways. Trump's brash and off-the-cuff approach helped him build momentum and dispense with 16 other primary opponents. Clinton's discipline and knowledge of the issues seem to frequently revive her 2008 campaign and showed her to be more prepared to be President than her 2016 Democratic rivals.

Both campaigns are, as expected, managing expectations and each candidate hopes their debate performance will propel him or her to a comfortable lead. While history suggests the individual debates rarely change the presidential race in a fundamental way, it does happen from time to time and Monday night's event has a real chance of doing just that as two very different candidates with dramatically different styles go head-to-head in an effort to convince the average American voter who should become the next president. I'm John Hudak and that's what's happening on the campaign trail.

DEWS: And now back to the discussion with David Wessel. So you've brought up trade, you brought up tariffs, a possible tariff war, we know that Trump is more or less a protectionist, Hillary Clinton not so much although she's recently criticized the trans-pacific partnership. What can the candidates do as president let's say either one of them was president, in the realm of trade to achieve their policies. I mean can Trump just renegotiate every trade deal he wants to?

WESSEL: Well it's hard to renegotiate trade deals, you need willing partners and of course you need the approval of the US Senate to change treaties but when it comes to international trade, presidents do have quite a bit of authority. They can- a lot of the things like tariffs are controlled by the US Trade Representative in the US Commerce Department and the president has a certain amount of leeway in how he interprets the

law and how they handle cases of when they think countries are playing unfair so he could he could really do a lot he can't really change the world trading system unilaterally but the president has an extraordinary amount of power in international trade relative to say spending where he can't spend a nickel without the approval of Congress.

DEWS: So let's look at China for just a second. I mean, Trump criticizes NAFTA and Hillary Clinton has kind of walked back on the trans-pacific partnership, China's not even party to either of those but we hear about China a lot. Clinton says China abuses global trade rules, Trump criticizes China for joining the world- for being allowed to join the World Trade Organization. Why is there so much focus on China as a particular problem in trade?

WESSEL: Well, I think that now both candidates recognize that there are a lot of Americans who are worried about their livelihoods and the livelihoods of their kids. They sense that something is going wrong in the American economy or the global economy and it's hurting them and some of this actually does have to do with globalization, some has to do with technology which changes the employers demands for workers and makes possible factories that have very few workers. People in general don't want to blame technology, it's hard to blame your iPhone for ruining your kids prospects of earning a wage, it's always easy to blame foreigners; there's a long tradition of that here and in another country so I think that the candidates recognize that people are upset about globalization and China has become the current manifestation of that. Not so long ago, we worried about Japan being the kind of big evil trading partner that was gonna eat our lunch but it's- there is some foundation to this.

There's a couple of economists, David Autor at MIT and Jordan Hansen at the University of California in San Diego who have- who are basically free traders and basically share the economic professions belief that trade has- does more good than harm who say that China is a special case. China has risen so rapidly, such a big flood of imports to the US, much more quickly than we've seen in the past and it's been very concentrated on particular industries and communities so that the people who are hurt from trade, and we've always known that some people get hurt from trade, are really hurt badly and they're very concentrated and it turns out they vote so I think that's one reason. The second reason is, let's face it, the Chinese don't always play fair. The Chinese do try and steal intellectual property from American and other multinational companies. The Chinese have, actually more in the past than the present, used their currency as a way to get what reasonable observers, like those of the IMF have considered unfair trading practices. I think on that one, Trump's a little bit behind the curve, actually the Chinese have been behaving pretty well on the currency manipulation front but he knows it's a good talking point and he's taken advantage of that.

DEWS: I just wanna encourage listeners to check out a recent episode of the Brookings Cafeteria Podcast in which I interviewed Maria Solis on the issues of trade and the trans-pacific partnership and also Japan specifically. David, looking ahead we know that either Donald Trump or Hillary Clinton will be the next president of the United States. In a recent segments for this podcast, you described three big economic issues that he or she will face. What are those?

WESSEL: Right, so what I was trying to do was step back from the campaign where we're very often doing, as we have today, so how does Hillary Clinton's child care proposal differ from Donald Trump's childcare proposal and so forth and say what is it that in my opinion the next president should worry about when he or she sits in the Oval Office on the twentieth of January, 2017 and as you may remember I had three things on my list: one, we've referred to already, the pace of economic growth in the United States is distressingly slow and that reflects the fact largely that the growth of productivity, amount of stuff we make for every hour of work, has been growing much more slowly than it did just a decade or two ago and I think that the next president ought to think about what policies might lead us to be more optimistic about that even if we can't be sure it means doing things to increase public investment and things like infrastructure, which both candidates favor.

It means coming up with policies that encourage companies to invest, which they have not been doing very much of; it means rethinking the way we regulate the economy, how we set patents, how we set occupational license rules so that we have more competition because we believe when there's more competition, companies are more on their toes and they work harder to improve technology and the way they produce things but also the benefits that one company realizes more quickly spread throughout the economy so job number one to get the economy growing faster and that probably means worrying a little bit less about the near-term budget deficit than you might otherwise.

Number two, we have learned, unfortunately over the last quarter century, that when you get more economic growth, it's not widely shared. The benefits have gone

much more to people at the top than people at the middle and I think that the next president needs to think about what government policies can reduce the tendency of the market to produce inequality without interfering with the good incentives that are created when people want to create companies because they can get rich and those companies go on to be companies like Google and Facebook and Microsoft. And then third is climate change. Our political system is very bad at dealing with long-term problems that don't have immediate short-term consequences. I'm convinced, as I think most scientists are, that we are facing a rather serious threat of global climate change, that we can't be sure what's going to happen in the future but we can take some steps now that will reduce the risk that we're going to completely screw up the planet and have more storms and more floods and more droughts and more human misery. And I think only a president can make that speech and convince Congress to actually do something more than ring its hands about this. It's fascinating to me that in the last couple of months, Barack Obama has talked about this far more than he did earlier in his presidency even though he hasn't actually proposed much of consequence to do with it. I think it's incumbent on the next president to layout for the people why he or she thinks climate change is an issue.

Donald Trump may not think it is an issue, you never know with him, and what policies might be best equipped to deal with it without strangling economic growth. As you know, many of our colleagues here at Brookings think that only when we get some kind of a price on carbon, whether it's a carbon tax or a system known as cap-and-trade where we have marketable permits to pollute, will we be able to make the changes in our economy and encourage the technology that'll help us solve this problem so my

three issues is more economic growth, less inequality, and do something about climate change

DEWS: Well David, let's wrap up this discussion by remembering that famous slogan from the 1992 Bill Clinton presidential campaign, coined by James Carville apparently, "the economy stupid." 24 years later, it's hard to believe it's 24 years since then, is it still, say in the minds of the American electorate, is it still the economy stupid?

WESSEL: I don't think it is entirely. I think the economy is a big part of what's going on now, the angst about people's wages not going up and whether their kids are going to look better than they are but when you listen to the campaigns and what seems to motivate the voters, a couple of other things seem equally as important. One is I think there's a great deal of fear, legitimately, about terrorism and frustration that our foreign policies, particularly in the Middle East, seem so unsuccessful. Secondly, the issues of immigration seem to go far beyond anything that you can explain by economics. There's a great deal of fear of the other, this overt racism, hostility to people who are not white in the Trump campaign that seems to go much more to the issues of identity and racism than anything you can explain by the economics of immigration or globalization.

DEWS: Well David, I want to thank you for your time and insight today.

WESSEL: You're welcome. I look forward to doing this again after the election when we might have a chance to see what the next president actually does as opposed to what he or she said during the campaign.

DEWS: You can get more election analysis and commentary from Brookings experts on our website [brookings.edu/election2016](http://brookings.edu/election2016) and follow David Wessel on twitter @DavidmWessel. Our final part of this episode is Bill Finan's interview with John

Bessler, editor of a new volume from Brookings, titled “Against the Death Penalty.” It is Supreme Court Justice Stephen Breyer’s dissent in the court’s 2015 *Glossip v. Gross* decision. Bessler is a professor of law at the University of Baltimore School of Law and an adjunct professor at the Georgetown University Law Center. Here’s Bill and John.

FINAN: Thanks Fred. John, thank you for coming today to talk about Justice Stephen Breyer’s new book, and yours too, “Against the Death Penalty.”

BESSLER: You bet; happy to be here.

FINAN: Thanks also for your introduction to the book; we have the descent fully explained historically thanks to your introduction and we also have this incredible job on the footnotes that you’ve done in the original descent making them far more accessible to people like me.

BESSLER: Yeah it was a- legal opinions often have a lot of citations buried within them and so it’s nice to kind of pull the citations out, put those in endnotes and so you can just read through his dissent directly without having all the citations or if you want to see them you can go look in the end notes.

FINAN: And there’s also a lot of context added to them too. A lot of historical depth too so you can get a better sense of the evolution of the death penalty through history in the United States, not just in the footnotes but also in your introduction. Breyer’s dissent is based on the case of *Glossip v. Gross*, can you tell us about that case?

BESSLER: Yes that case came- it was argued before the Supreme Court in 2015 and essentially the case was about whether or not Oklahoma’s use of a drug, a lethal injection a drug, called midazolam would be constitutional. The majority of the court, in



an opinion written by Justice Alito, concluded that it was constitutional but Justice Breyer joined by Justice Ginsburg wrote a dissent in that case and announced for the first time that they believe that the death penalty is likely unconstitutional and so they- the dissent is very important for that reason.

FINAN: Could you tell us a little bit about Richard Glossip himself and the actual case that led to this death penalty being imposed because what was interesting to me, and in your discussion about this is that, as in most cases, it's not a open-shut case, it's not a black/white issue and just know- just know definitively that someone is guilty of having done something it's-

BESSLER: Sure, there's a lot of questions about this case. Richard Glossip worked at a motel in Oklahoma and there was a murder that occurred there in 1997 and after the murder, Justin Sneed who was working at the hotel, kind of as a maintenance person, was immediately arrested; he had a black eye and he confessed actually to killing the owner of the motel, a man named Barry Van Treese with a baseball bat and striking him 10 to 15 times and so Justin Sneed then claimed that Richard Glossip asked him to kill the motel owner. Richard Glossip was the manager of the motel and so there was a conviction of Richard Glossip for basically a murder-for-hire situation and the case was- he was convicted initially, that conviction was thrown out because of ineffective assistance of counsel of failure to use the videotaped confession of Justin Sneed in that case and then he was retried, convicted again and so now he's been on death row almost 20 years at this point, has still not been executed.

FINAN: The issue that brought this before the court, as you said, was the issue of lethal injection. Can you tell us a little bit about the history of lethal injection?

BESSLER: Sure, lethal injection really started out in Oklahoma actually where this case was based. It came out of Oklahoma in 1977; Texas and some of the southern states were the first to use lethal injection as a method of execution and what's happened is that a lot of the drug manufacturers have actually stopped supplying drugs to correctional facilities and so we now have the Europeans who are all against the death penalty who consider it a human rights violation. They've stopped the export of lethal injection drugs to the United States and now you have Pfizer in May of this year, 2016 announcing that they will not supply lethal injection drugs for use in executions either and so what you have is a situation where there's been a shortage of lethal injection drugs, the state correctional institutions have been trying to substitute new drugs when the other drugs either expire or they can't find them and so we've gone through several drugs; they first went through sodium thiopental, and then pentobarbital, and then the case that involved Richard Glossip was using the drug midazolam. Midazolam is a drug that- there was testimony that while it may be able to render you unconscious prior to the administration of the other two drugs that're going to be used to paralyze you and stop your heart, because of the nature of midazolam, it may not actually keep you unconscious during the administration of the other two drugs and so that was the subject of a lot of testimony in this- in this case involving Richard Glossip.

FINAN: You mentioned in your introduction that Justice Scalia says that there's been a guerrilla war on the death penalty and he claims that these attacks on the use of the drugs is an example of that, and he also says that Justice Breyer's dissent is a case of trying to totally overturn the death penalty and that's one of the reasons why this is a very important dissent.

BESSLER: Yeah, actually it was Samuel Alito that used those words “guerrilla warfare” at the- at the actual real argument, which was in 2015 but Justice Scalia has also taken very similar position to Justice Alito when he was on the court, before his death, he was probably the most vocal proponent of using the death penalty and was constantly criticizing those on the other side who felt that it was undemocratic for the court to strike down various applications of the death penalty

FINAN: You have a quote from Justice Scalia saying it was a case of trying to kill the death penalty outright rather than pecking it to death. In the dissent, Justice Breyer cites three fundamental constitutional defects with the death penalty; he does this to make the case that the death penalty is cruel and unusual punishment and I wanted to ask you about those three. The first is, what he calls, serious and unreliability, what does he mean by that?

BESSLER: Yeah, what he means by that is that there's been a lot of cases and we know this now through DNA testing in cases in which people have been wrongfully convicted and sent to death row. Justice Breyer brings up a number of different individuals in his dissenting opinion in which he points to. One, for example, is a guy named Cameron Todd Willingham who was in Texas, who was sentenced to death and there was a lot of information in that case that the- he was an arson, his own children were killed in the fire, and arson investigators looked back at that fire later and said that the testimony that convicted him was basically junk science and it was not reliable information that they were using; they were using outdated techniques, they had more modern fire investigators actually look at that case and so that's one case the Justice Breyer talks about in his opinion.

FINAN: He makes that point quite often, it seems that there's a lot of, I guess, junk science that creates problems with death penalty cases.

BESSLER: Yeah, one of the things that he raises a concern with is faulty forensic evidence in his dissent and there's other cases as well that he raises. One is the case of Glen Ford, Glen Ford is somebody who spent about three decades on death row in Louisiana, was later exonerated and within a year of his release he actually died of lung cancer and the prosecutor in that case admitted that he was not after justice at the time, that he tried to prosecute him- he was just trying to win and there's other cases as well that that Justice Breyer points to where you've had situations where people had been convicted and then later on DNA evidence shows that they're not the person that committed the crime and in fact he points to one case in which Justice Scalia sort of held out the individual, sort of the poster child for getting the death penalty, and then 30 years later that person was exonerated, it was a horrible rape and it turns out that the person who was convicted actually did not commit that crime and so had that execution going forward, the person never would have been exonerated.

FINAN: Does- I think Justice Breyer, in his dissent, also points out that there's a percentage of people who are unjustly accused and dies at four percent is that the number that was in the dissent?

BESSLER: I forget the actual percentage but there's quite a number of people that- wrongful convictions there's a couple things: you've got- number one, you've got people who have been sent to death row- we now have documented evidences of over a hundred people who have been sent to death row who were later exonerated or where it was found that there was not sufficient evidence to keep them in prison and so

they've been released from prison. People quibble about the numbers; there's different groups that come up with different numbers but both groups that I'm familiar with say it's over a hundred people and then you have the legal errors that take place in death penalty cases and so Justice Breyer cites to a study that James Liebman at Columbia did, which found a sixty-eight percent error rate in capital cases where there's- the convictions are either overturned or sent back for retrial and so that's a very high percentage.

FINAN: A second effect he points to in his dissent is what he calls arbitrary application; what does that mean?

BESSLER: Yeah, back at the time of the founding fathers and back in England, we had what was called the mandatory death penalty; if you were convicted of a certain crime that was made death eligible, you were automatically sentenced to death. In the United States we've moved to discretionary sentencing for the death penalty and so what that means is that somebody's convicted of a, let's say, a first-degree murder in a death penalty state, the jury still has to decide whether or not to actually sentence that person to death and so what we're seeing over time is that there's very few counties where you actually see executions coming out of; there is very few states, I think Justice Breyer says in 2014, I believe, there was only seven states that actually carried out an execution and there was less than 60 counties that he points to that had carried out an execution in recent, you know, in that period of time he was looking at, and so there's just a much smaller percentage of states that are using the death penalty actively and there's a smaller percentage of counties that are using it and there doesn't seem to be a rhyme or reason as to why someone's getting the death penalty or not so Justice Breyer

looks at some evidence to say “no that doesn't- we can't really say that the worst of the worst offenders are getting the death penalty, it's kind of a random application of the death penalty.

FINAN: Yeah it was those very small percentages of counties that account for so much; that wasn't clear to me from looking at the map just exactly where those counties are. They're not necessarily clustered in any one state, they're spread across the United States but it seemed to be in the South. Is that correct geographical?

BESSLER: Yeah it's mostly the South. Justice Breyer points to a statistic that showed that just three states accounted for over eighty percent of executions, Texas, Missouri, and Florida, and if you look nationally at the Statistics, what we're seeing is we're seeing a decline in the use of the death penalty so whereas that in the mid-nineteen ninety's, you used to see about 300 death sentences per year; we're now under 100 death sentences per year that are handed out by juries and we're also seeing a decline in the number of executions, so in 1999 was sort of the peak for executions; we got 98 executions that year and we're seeing less than 50 executions per year now and so we've really seen a decline both in death sentences and in executions.

FINAN: The third defect he points to in his dissent as to why the death penalty is unconstitutional is the extremely long delays and you have touched on this a little bit, especially in the case of wrong prosecutions, what are some of the examples- other examples? BESSLER: yeah there's an example- one of the examples he uses actually for the wrongful convictions is a guy named Henry McCollum who was the case I talked about who was wrongfully convicted of the rape, a horrible rape, and Justice Breyer points out in his dissent that, you know, if these kind of cases, these individuals were-

had been executed in a very speedy manner, they would never been exaggerated because it takes time to find these errors. There's actually some- there's been a project at the Northwestern University, Rob Warden was involved in that project who was a journalist who was working with these students and actually, undergraduate students went out and were able to find evidence that proved that people were not guilty of the crime and therefore exonerated them so it wasn't even the lawyers in those cases or the judges that found the evidence, it was undergraduate students, journalism students who found that evidence and so what we're seeing now in this long delays is we're seeing sometimes inmates spend 20, sometimes to even 30 years on death row before they're executed. Actually, when Justice Breyer looked at this he found that the average time between sentencing and execution was almost 18 years for the period that he looked at.

FINAN: Your introduction takes us on a history of the death penalty, takes us through the history, especially in the early years of the American Republic, and I got the sense from reading it that you showed that America has always been a case of trying to evolve its understanding of what the death penalty is, how to impose it, it went from the mandatory imposition of death for certain crimes early on some of those that you mentioned too in the introduction like blasphemy, adultery seem absolutely monstrous now, but is that the case that you do want to show that this dissent fits in with an evolution over time?

BESSLER: Yeah, I wanted to contextualize this dissent because it's- I think it's a very important dissent; it represents, I think, maybe, perhaps, a tipping point on the death penalty at the Supreme Court level. We're now without one of the justices after Justice Scalia's death and so we're at, we're actually at a four-four divide on some of

these issues relating to the Eighth Amendment, which is what prohibits cruel and unusual punishment, but if you look back at the- at the founding era, even go back to colonial times; in colonial times, as you mentioned, all sorts of things were punishable by death. You had in most colonies even like 13 Offenses, some of those were religious related offenses, and then what happened is the founding fathers really did not like what I- what I would call the bloody code, that's what a lot of scholars call the English blood code, which made over a hundred offenses punishable by death; things like disturbing a fishpond, you know, it's a- it's a long catalog of things that were punishable by death back in England and so the Founding Fathers embraced the- the writings of this Italian philosopher, Beccaria, who was the first writer who wrote against the death penalty in a comprehensive way in 1764. His writings were translated into a book in 1767 called "On Crimes and Punishments," so this was- came out of it at a time right before the Americans declared their independence and they were reading this book, John Adams was quoting from the book at the Boston Massacre trial to save some British soldiers that were- had been accused of murder.

There was a sense that the Founders wanted to move away from what were called sanguinary punishments; that's a word you don't really see much today but it means bloody punishments and so they simply did not have a developed penitentiary system at that time, they were very fascinated by the promise of the penitentiary system, in fact, Thomas Jefferson worked on some drawings for a penitentiary in Virginia, which was not built until around 1800 so they simply did not have a place to put offenders but they were really believing in the promise of the penitentiary, both Madison and Jefferson and people like Dr. Benjamin Rush who was a big proponent of



Beccaria's writings in Philadelphia and is sort of considered the American Beccaria because he was also called for the complete abolition of the death penalty in March of 1787, right before the constitutional convention in Philadelphia.

FINAN: It was amazing to me to see how widely Beccaria's writing was traveled, how widely it traveled and also how important it was and what an impact it had and that- you mentioned that Jefferson had volumes of his work in Greek, in French, and Jefferson himself read him in original Italian and had annotations and-

BESSLER: Yes I wrote- I actually wrote a- the last book I wrote before this book was a book called "The Birth of American Law," in which I- it's about a 700-page book which details the enormous influence that Beccaria had and so I've tried to summarize some of that work in this book so people can get a sense of it without having to read through a full 700 pages but it had an enormous influence on American law. He also was supportive of the idea of clear and precise laws; so the idea of written, law that you couldn't be punished until you were made aware of the prospect that there was a punishment for certain action and so that was also an important principle the Founders were looking to.

FINAN: What was interesting also to me is there's this attention between Scalia and Breyer in terms of understanding the death penalty; Scalia, a firm proponent of it, and Breyer, a firm dissenter. And Scalia and his opinions is scathing in his critiques Breyer. What was the relationship like between those two men though?

BESSLER: Well, I think that, you know that the court is a small- there's only a small number of people on it so I think you have to make an effort to really get along in the court and I think they were friends, actually after Justice Scalia died, Justice Breyer

called Justice Scalia a Titan of the law, so he had respect for Justice Scalia, he just disagreed with his worldview about the law and I think what I've tried to do in the book is I've tried to illustrate both Justice Scalia's approach and Justice Breyer's approach. I've always felt with the death penalty it's improper to sort of lecture somebody on the death penalty; they're going to have to come to their own conclusions so I've laid out both Justice Scalia's views and Justice Breyer's views and of course Justice Breyer's dissent, which reprinted in the book will allow people to come to come to their own conclusions about the death penalty but I think it's a- it's an important conversation that Americans need to have about the death penalty because what were- what we've seen in Europe already is that the Europeans have already gotten rid of the death penalty, they do view it as a human right's issue.

In the broader world we're now seeing that there's fewer than 25 countries that actively use the death penalty each year now, and if you look at the list of countries that still use the death penalty, there are countries like Saudi Arabia, Yemen, China, Iran, Iraq, Somalia, they're countries that don't share our same shared history that we have with European countries in a lot of cases in terms of Western ideas and so we're really the last Western democracy to still use the death penalty. Japan still uses- but they have a different tradition than we do and then there- in that case they use it fairly infrequently as well.

FINAN: You mentioned that this is a pivotal dissent and it comes at a pivotal moment and although nothing can really be decided until there's a new ninth justice named to the court, what is your sense of the future? Is there- are there cases that can

come forward that you think will lead to the overturning of the death penalty by the court, by a full court?

BESSLER: Well, Justice Breyer in his dissent that Justice Ginsburg joined, they called for a full briefing on the issue to address all these issues that we've talked about. Remember in the opinion itself, Justice Breyer said it's likely the death penalty is unconstitutional so he wants to have a full-throated debate at the Supreme Court level about this issue. Interestingly, if you look at the history of the Supreme Court, a lot of the judges, once they either get close to retirement or they actually retire from the court, they usually don't have very good things to say about the death penalty and in fact we've got some people on the court who are, I think are fairly skeptical about the death penalty's efficacy.

Even Justice Kennedy has said the use the death penalty risks the, you know, the descent into the kind of violence we're trying to prevent in our society and so even though he's voted to uphold death sentences in cases, you know, he's not sort of all in on the death penalty and if you look back at the founding era, the Founding Fathers themselves were very skeptical of the death penalty. In fact, James Madison said he would welcome an experiment trying to see what would happen if we abolish the death penalty in the states and so you know that's a long time ago and we're still kind of wrestling with the death penalty but there's a lot of- I think if you look at the justices who used to hold Justice Breyer's seat actually, Justice Arthur Goldberg is a figure that I talked about in the introduction who Justice Breyer actually clerked for, Justice Goldberg concluded back in 1963 that he thought that the death penalty was unconstitutional and he wrote a dissent in which the death penalty was being used for

rapists and the Supreme Court later in a case called Coker Vs. Georgia, actually struck down the use of the death penalty for rape cases where murder had not occurred along with the rape.

FINAN: Well we're poised to see what the future brings, especially with this book and thank you for taking the time to come in today to talk about the your work on the book with Justice Breyer.

BESSLER: You bet. Happy to be here.

DEWS: "Against the Death Penalty" is available on our website and that's all for this edition of the Brookings Cafeteria. A warm welcome to our new producer Gaston Reboredo who's audio engineering work you may have heard over at WAMU. My thanks to Mark Hoelscher for producing the last few episodes, and to producer Vanessa Sauter for keeping the show on track. Bill Finan does the book interviews and design and web support comes from Jessica Pavone, Eric Abalahin, and Rebecca Visor. And thanks to David Nassar and Richard Fawal for support and leadership. You can subscribe to the Brookings Cafeteria on iTunes and listen to it in all the usual places. Want to ask a scholar a question? Send an email to [BCP@brookings.edu](mailto:BCP@brookings.edu) and I'll get an answer for you. Until next time; I'm Fred Dews.