Professors Carol and Jordan Steiker,
No More Tinkering

Special Feature

No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code

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"From this day forward, I no longer shall tinker with the machinery of death."[1]

I. Introduction

Justice Harry Blackmun was new to the Supreme Court in 1972 when the Court declared prevailing capital punishment statutes unconstitutional in the landmark case of *Furman v. Georgia*.[2] He dissented from that decision, along with the three other Justices recently appointed by President Richard Nixon. Justice Blackmun wrote separately to explain that he believed that the death penalty was an issue for the legislative and executive spheres: "The authority [to abolish capital punishment] should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue."[3] After the Court reauthorized the death penalty by upholding a new generation of capital statutes in 1976, Justice Blackmun worked for most of the next two decades with the center of the Court to apply the Court's increasingly convoluted capital jurisprudence—neither dissenting from the left (as Justices Brennan and Marshall did, voting against every execution that came before the Court[4]) nor from the right (as Justices Scalia and Thomas now do in rejecting the Court's constitutional requirement of individualized capital sentencing[5]). Near the end of his career on the bench, however, Justice

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1. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

2. 408 U.S. 238 (1972).

3. *Id.* at 410 (Blackmun, J., dissenting).

4. *See, e.g.*, Boggs v. Muncy, 497 U.S. 1043, 1043 (1990) (Brennan & Marshall, JJ., dissenting from denial of application for stay of execution) ("Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, . . . we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case." (citation omitted)).

5. *See, e.g.*, Johnson v. Texas, 509 U.S. 350, 373 (1993) (Scalia, J., concurring) ("In my view the *Lockett-Eddings* principle that the sentencer must be allowed to consider 'all relevant mitigating evidence' is quite incompatible with the *Furman* principle that the sentencer's discretion must be channeled."); *id.* at 374 (Thomas, J., concurring) ("Although *Penry* v. *Lynaugh*, 492 U.S. 302

Blackmun abandoned the enterprise of attempting to regulate the practice of capital punishment under the Constitution. After cataloging the incoherence and inefficacy of the Court's death penalty doctrine since 1976, Blackmun declared that "the death penalty experiment has failed"[6] and announced his refusal to further engage in it: "From this day forward, I no longer shall tinker with the machinery of death."[7]

The decision of the American Law Institute (ALI) in October of 2009 to withdraw the death penalty provisions (§ 210.6) of the venerable Model Penal Code (MPC) "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment"[8] represents a similar recognition of the futility of further regulatory efforts. Although the ALI voted neither to endorse nor oppose the abolition of capital punishment as a general matter, its withdrawal of MPC § 210.6 was accompanied not only by a statement recognizing the "intractable" problems in the capital justice process but also by a deliberate refusal to undertake any further attempts at law reform in the area of capital punishment "either to revise or replace § 210.6 or to draft a separate model statutory provision."[9] Thus, it is clear that the ALI's decision to forgo further reform efforts was based not on its own resource constraints or other pragmatic concerns, but rather, like Justice Blackmun's renunciation of constitutional regulation, on the impossible—"intractable"—nature of the task.

Justice Blackmun's repudiation of the Court's death penalty jurisprudence and the ALI's withdrawal of the MPC's death penalty provisions are linked by more than their joint acknowledgement of the intractability of the problems in the capital justice process. Rather, the MPC's death penalty provisions provided the template for the modern death penalty statutes that the Supreme Court approved in 1976, and the failures of the Supreme Court's regulatory role in the post-1976 era provided the foundation for the ALI's withdrawal of the MPC's death penalty provisions. In the remainder of this introduction (Part I), we describe the origins of the MPC's death penalty provisions, the role they played in the Supreme Court's death penalty jurisprudence, the events leading up to the ALI's withdrawal of MPC § 210.6, and the potential implications of the ALI's decision. Part II consists of the paper commissioned from us by the ALI, which, while not adopted by the ALI as its own publication, informed the ALI's decision to withdraw

(1989), 'remains the law,' . . . in the sense that it has not been expressly overruled, I adhere to my view that it was wrongly decided." (citations omitted)).

6. *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of certiorari).

7. *Id.*

8. Message from Lance Liebman, Dir., Am. Law Inst. (Oct. 23, 2009), http://www.ali.org/_news/10232009.htm.

9. AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 4 (2009), *available at* http://www.ali.org/doc/Capital%20Punishment_web.pdf.

§ 210.6.[10] This paper highlights "the major concerns regarding the state of the death-penalty systems in the United States today"[11] and thus should be of interest not only to those seeking to understand the decision of the ALI but also to those interested in the fairness and efficacy of the capital justice process more generally.

The ALI's Model Penal Code project arose from the ALI's general mission as an independent, nonprofit, nonpartisan, expert organization to "produc[e] scholarly work to clarify, modernize, and otherwise improve the law."[12] The ALI is perhaps best known for its "Restatement" projects, in which the ALI has sought to address uncertainty in the law through restatements of basic legal subjects that serve as authoritative sources for judges and lawyers.[13] When the ALI turned its hand to a project on American criminal law, however, "it judged the existing law too chaotic and irrational to merit 'restatement.'"[14] Instead, the ALI decided to draft a model penal code that could serve as a template for state legislative reform. The ALI's enormously influential Model Penal Code project—"far and away the most successful attempt to codify American criminal law"[15]—was launched in 1951, and the MPC was finally adopted by the ALI in 1962. While the MPC was under preparation, the Advisory Committee to the MPC Project, which was headed by Professor Herbert Wechsler of Columbia Law School as Chief Reporter, voted 18 to 2 to recommend the abolition of capital punishment.[16] But the ALI's Council held the view "that the Institute could not be influential" on the issue of abolition or retention of the death penalty and thus should not take a position either way.[17] The body of the Institute agreed with the Council, and thus the MPC took no position on the issue but rather promulgated model procedures for administering capital punishment for adoption by states that retained the death penalty.[18]

The death penalty procedures promulgated by MPC § 210.6 differed from prevailing capital statutes in several key provisions. First, the MPC allowed the death penalty only for the crime of murder, not for crimes such as kidnapping, treason, and rape (among others) as many state statutes permitted.[19] Second, the MPC categorically exempted juveniles from the

10. *Id.* at 1.

11. *Id.*

12. *ALI Overview*, AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=about.overview.

13. *Id.*

14. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323 (2007).

15. *Id.* at 320.

16. MODEL PENAL CODE § 210.6 cmt. at 111 (1980) (repealed 2009).

17. *Id.*

18. *Id.*

19. *See id.* at 117 ("Although the Model Code neither endorses nor rejects capital punishment for murder, it does disallow the death penalty for all other offenses."); THE DEATH PENALTY IN AMERICA 36–38 (Hugo Adam Bedau ed., 1997) (listing the different crimes eligible for capital punishment in thirty-six states).

death penalty and gave the trial judge discretion to exempt defendants if "the defendant's physical or mental condition calls for leniency."[20] Moreover, the MPC precluded a sentence of death in cases in which "the evidence suffices to sustain the verdict, [but] does not foreclose all doubt respecting the defendant's guilt."[21] As for which murders should be punished with death, the MPC did not confine capital punishment to "first-degree" murder (generally defined by state statutes as either premeditated and deliberate murder or felony murder); rather, the MPC made eligibility for the death penalty for any murder turn on the finding, in a separate penalty phase, of one of eight "aggravating circumstances" that ranged from the more objective and clear-cut ("The murder was committed by a convict under sentence of imprisonment."[22]) to the more subjective and qualitative ("The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."[23]). The MPC's innovation was not only the list of aggravating circumstances but also the requirement of a bifurcated procedure in which the determination of guilt and the determination of the appropriate penalty were to be considered in two separate proceedings. The MPC required the finding of at least one aggravating circumstance at the penalty phase for a defendant to be eligible for the death penalty but also required the consideration of "mitigating circumstances" and authorized the death penalty only when "there are no mitigating circumstances sufficiently substantial to call for leniency."[24] Mitigation consisted of eight statutorily defined mitigating circumstances (such as "[t]he defendant has no significant history of prior criminal activity"[25] and "[t]he youth of the defendant at the time of the crime"[26]), but the sentencer was also instructed to consider other evidence "including but not limited to the nature and circumstances of the crime [and] the defendant's character, background, history, mental and physical condition."[27] The MPC's structuring of the penalty phase, with its lists of aggravating and mitigating circumstances, was a significant departure from prevailing practice, which gave sentencing juries essentially unfettered

20. MODEL PENAL CODE § 210.6(1)(e); *see also id.* § 210.6 cmt. at 134 (rationalizing the "leniency" language as cognizant of the possibility that in some unusual instances, such as a defendant with a terminal illness, "it may be thought that fate's judgment on the defendant is punishment enough"); THE DEATH PENALTY, *supra* note 19, at 41 (listing the "Minimum Age Authorized for Capital Punishment, by Jurisdiction" in 1994).

21. MODEL PENAL CODE § 210.6(1)(f); *see also id.* § 210.6 cmt. at 134 (describing the provision as "an accommodation to the irrevocability of the capital sanction" that preserves the possibility of new exculpatory evidence at a later time); Alan Berlow, *The Wrong Man*, ATLANTIC ONLINE, Nov. 1999, http://www.theatlantic.com/past/docs/issues/99nov/9911wrongman.htm (decrying the fact that "[t]o date no state has adopted this 'residual doubt' provision").

22. MODEL PENAL CODE § 210.6(3)(a).

23. *Id.* § 210.6(3)(h).

24. *Id.* § 210.6(2).

25. *Id.* § 210.6(4)(a).

26. *Id.* § 210.6(4)(h).

27. *Id.* § 210.6(2).

discretion in capital trials to impose life or death (and for a much wider range of crimes than simply murder) without any statutory standards or guidance.[28]

For a decade after their adoption, the MPC death penalty provisions had virtually no impact on state procedures.[29] But after the Supreme Court constitutionally invalidated prevailing death penalty statutes in 1972 in *Furman*, a large majority of states sought to draft new capital statutes that would meet the *Furman* Court's apparent concern with standardless sentencing discretion. Although a significant number of states sought to address the problem of standardless discretion through the enactment of mandatory capital statutes,[30] a substantial number of states modeled their new statutory endeavors on the Model Penal Code.[31] In 1976, the Supreme Court struck down mandatory capital statutes as unconstitutional under the Eighth Amendment,[32] but upheld the "guided discretion" statutes enacted by Georgia, Florida, and Texas.[33] In doing so, the Court made a point of referencing the ALI's efforts to guide capital sentencing discretion through the Model Penal Code and the similarity, either textual or functional, of each of the state statutes before it to the MPC's death penalty provisions.[34]

Two years after the 1976 cases reinstating the death penalty, the Supreme Court invalidated a conviction obtained under Ohio's capital statute on the ground that the statute's narrowly drawn list of mitigating circumstances unconstitutionally constrained the sentencer's consideration of mitigating evidence that might call for a sentence less than death.[35] In doing so, the Court adopted as a constitutional requirement an approach virtually identical to the MPC provision that capital sentencers must consider "the nature and circumstances of the crime [and] the defendant's character,

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28. *See id.* § 210.6 cmt. at 129–32 (discussing the history of capital sentencing and contrasting it with the procedures expounded in the Model Penal Code).

29. While "[p]rior to 1972, no American jurisdiction had followed the Model Code in adopting statutory criteria for the discretionary imposition of the death penalty . . . the only discernible effect of the Model Code proposal was introduction of a bifurcated capital trial procedure in six states." *Id.* at 167–68 (citing Comment, *Jury Discretion and the Unitary Trial Procedure in Capital Cases*, 26 ARK. L. REV. 33, 39 n.9 (1972) (listing states)).

30. *See id.* at 168 ("Following *Furman* the legislative response was diverse, with the majority of retentionist jurisdictions enacting mandatory capital punishment for certain offenses.").

31. *See id.* at 169 ("Each of the 19 new statutes examined when this comment was prepared resembles the Model Code provision and provides for bifurcation and consideration of specified aggravating circumstances.").

32. *See* Roberts v. Louisiana, 428 U.S. 325, 336 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

33. *See* Gregg v. Georgia, 428 U.S. 153, 207 (1976); Proffitt v. Florida, 428 U.S. 242, 259 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976).

34. *See Gregg*, 428 U.S. at 193 (citing the Model Penal Code to reject the claim that standards to guide a capital jury's sentencing deliberations are impossible to formulate); *Proffitt*, 428 U.S. at 247–48 (noting that the Florida statute in question was patterned after the Model Penal Code); *Jurek*, 428 U.S. at 270 (recognizing that Texas's action in statutorily narrowing the categories of murder for which the death penalty may be imposed serves essentially the same purpose as the list of aggravating circumstances expounded by the Model Penal Code).

35. Lockett v. Ohio, 438 U.S. 586, 608 (1978).

background, history, mental and physical condition."[36] As the ALI itself recognized, the Court's cases from 1976 to 1978 outlining the constitutional preconditions for a valid capital punishment scheme "confirm what the 1976 plurality several times implied—that Section 210.6 of the Model Code is a model for constitutional adjudication as well as for state legislation."[37]

Shortly after the new generation of MPC-inspired, guided-discretion statutes were approved by the Court in 1976, executions resumed in the United States after a decade-long hiatus. Over the next quarter century, the national execution rate soared, reaching levels that the country had not seen since the early 1950s (though the execution rate has declined substantially in the first decade of the new century).[38] Many observers, us among them, lamented that the new generation of capital statutes failed to fulfill their promise of rationalizing the administration of capital punishment and ameliorating the problems that the ALI and the Supreme Court had sought to address.[39] Observers within the ALI were especially concerned about the shortcomings of the new capital statutes in light of the role that the ALI's reform efforts and institutional prestige had played in the constitutional reinstatement of capital punishment. Thus, when the ALI approved the undertaking of a law reform project that would reconsider the provisions of the MPC relating to criminal sentencing in general, internal critics of the administration of capital punishment viewed the new project as an opportunity to reconsider the ALI's contribution to the new status quo. In particular, law professor Frank Zimring, an Adviser to the new ALI Sentencing Project, called upon the Project to address (and call for the abolition of) capital punishment.[40] When the ALI set aside the question of capital punishment as beyond the scope of the Project, Professor Zimring resigned in protest as an Adviser and later published an article criticizing the ALI's failure to address capital punishment.[41]

Zimring's call for abolition within the ALI was taken up by members Roger Clark and Ellen Podgor, both law professors as well, who moved at the ALI's annual meeting in 2007: "That the Institute is opposed to capital

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36. MODEL PENAL CODE § 210.6(2); *see also Lockett*, 438 U.S. at 604 ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . 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.").

37. MODEL PENAL CODE § 210.6 cmt. at 167.

38. *See* DEATH PENALTY INFO. CTR., EXECUTIONS IN THE U.S. 1608–2002: THE ESPY FILE (2010), http://www.deathpenaltyinfo.org/documents/ESPYyear.pdf (listing executions in the United States from 1608–2002); DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2010), http://deathpenaltyinfo.org/documents/FactSheet.pdf (tallying executions yearly from 1976–2010).

39. *See generally* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (analyzing the Supreme Court's doctrinal approach to capital punishment regulation).

40. AM. LAW INST., *supra* note 9, at 15 annex C.

41. *Id.* at 15 n.6 (citing Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396 (2005)).

punishment."[42] The President of the ALI responded by assigning the Institute's Program Committee the task of deciding whether the ALI should study and make recommendations about the death penalty.[43] The President also appointed an Ad Hoc Committee on the Death Penalty "to advise the Program Committee, the Council, and the Director about alternative ways in which the Institute might respond to the concerns underlying the motion."[44] The Director of the ALI, Lance Liebman, engaged us, Carol Steiker and Jordan Steiker, to write a paper in which we would,

> [R]eview the literature, the case law, and reliable data concerning the most important contemporary issues posed by the ultimate question of retention or abolition of the death penalty and, if retained, what limitations should be placed on its use and what procedures should be required before that sentence is imposed. Another way of asking the question is this: Is fair administration of a system of capital punishment possible?[45]

Part II of this Article is the paper that we eventually submitted to the ALI, after detailed discussions of an earlier draft with an advisory committee assembled by the ALI consisting of prosecutors, defense lawyers, judges, and academics. The paper reviewed the history and current state of the administration of capital punishment in the United States and recommended that the ALI withdraw § 210.6 with the following statement: "[I]n light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option."[46]

The Council of the ALI, its chief governing board, submitted a report to the body in advance of the ALI's annual meeting in 2009. The Council recommended that the Institute withdraw the death penalty provisions of the MPC and not undertake any further project to revise or replace those provisions.[47] Although the Council's report acknowledged "reasons for concern about whether death-penalty systems in the United States can be made fair,"[48] it did not endorse the statement that we proposed in the paper and instead recommended that the body take no position to either endorse or oppose the abolition of capital punishment.[49] At the ALI's 2009 annual meeting, the body voted as the Council had recommended on the withdrawal of the MPC's death penalty provisions and the decision not to undertake further reform efforts regarding capital punishment, but it also added, after several hours of vigorous discussion, the following statement: "For reasons

42. *Id.* at 11 annex 3.
43. *Id.*
44. *Id.*
45. *Id.* at 46.
46. *See infra*.
47. AM. LAW INST., *supra* note 9, at 1.
48. *Id.* at 5 (capitalization omitted).
49. *Id.* at 6.

stated in Part V of the Council's report to the membership, the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."[50]

In essence, the body split the baby in half: it adopted the Council's report and thus rejected an explicit call for the abolition of capital punishment, but it also adopted the language from our report recognizing "current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." As Adam Liptak, who reported the ALI's decision for the *New York Times*, translated, "What the [I]nstitute was saying is that the capital justice system in the United States is irretrievably broken."[51] The body's resolution went back to the Council, which must approve any action of the body before it becomes official policy of the ALI. In October 2009, the Council approved of the body's vote and statement, and the ALI's withdrawal of the death penalty provisions, and its reasons for that withdrawal, became official.[52]

The ALI decision comes at a time of significant uncertainty for the American death penalty. Fifteen years ago, capital punishment in this country seemed firmly entrenched both politically and legally. Death sentencing (both in absolute numbers and as a function of homicides) peaked in the mid-1990s (averaging about 325 per year nationwide)[53] and executions climbed to their modern-era highs by the late 1990s (averaging close to 100 per year nationwide).[54] Reversal rates in capital cases dipped dramatically by the end of the 1990s as state and federal courts finished sorting through the bulk of challenges to the new state statutes adopted in the wake of *Furman*.[55] Moreover, in the late 1980s, the U.S. Supreme Court had rejected several prominent attacks on the administration of the death penalty, signaling a greater degree of deference toward state policies. In 1989, the Court declined to impose an Eighth Amendment bar against the execution of juveniles or persons with mental retardation.[56] And, perhaps more importantly, the

50. Message from Lance Liebman, *supra* note 8.

51. Adam Liptak, *Shapers of Death Penalty Give Up on Their Work*, N.Y. TIMES, Jan. 5, 2010, at A11.

52. Message from Lance Liebman, *supra* note 8.

53. *Death Sentences by Year: 1977-2008*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-year-1977-2008 (tallying death sentences yearly from 1977–2008).

54. *Executions by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year (tallying executions yearly from 1977–2010).

55. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II 60 fig.3A (2000) (showing a regular decrease in post-conviction reversals from the early 1990s to 2000).

56. *See* Stanford v. Kentucky, 492 U.S. 361, 372–73 (1989) (rejecting the claim that an emerging national consensus precluded the imposition of the death penalty for offenders who were sixteen or seventeen years old at the time of the offense); Penry v. Lynaugh, 492 U.S. 302, 333–35 (1989) (rejecting the claim that an emerging national consensus precluded the imposition of the death penalty for offenders with mental retardation).

Court rejected in 1987 what appeared to be the last potentially comprehensive challenge to capital punishment—the claim that significant racial disparities in the imposition of the death penalty require judicial intervention (and perhaps abolition).[57] In the early 1990s, the Court also expressed skepticism that the Constitution affords any special protection against the execution of the innocent, emphasizing that collateral review of state criminal convictions has traditionally focused on constitutional rather than merely factual error.[58] On the legislative side, three states reenacted death penalty statutes in the 1990s (New Hampshire, New York, and Kansas),[59] and most of the state legislative efforts during this period were designed to expand rather than contract the availability of the punishment. At the federal level, the bombing of the federal courthouse in Oklahoma City culminated in the most significant comprehensive reform of federal habeas corpus law in the twentieth century, with Congress imposing unprecedented limits on the availability of federal habeas review of state capital convictions.[60]

After this period of expansion during the 1990s, however, the most recent decade has witnessed a sea change in the political and legal status of the death penalty. The discovery of numerous wrongfully convicted and death-sentenced inmates (many of whom were exonerated via emerging sophisticated techniques for evaluating DNA evidence) appears to have weakened public support for capital punishment (especially in light of the nearly universal embrace of life-without-possibility-of-parole as the sentencing alternative to the death penalty). In addition, the economic crisis of 2008 has amplified growing concerns about the financial cost of capital punishment. Whereas twenty-five years ago many people attributed their *support* of the death penalty to the perceived financial savings relative to lifetime imprisonment,[61] over the past decade it has become clear that the death penalty imposes substantial financial costs above and beyond ordinary imprisonment.[62] Indeed, a new framework for calculating capital costs focuses on the cost of a capital prosecution actually culminating in an execution. In states where executions remain very rare events (and the costs of death-row incarceration are quite high), the results are staggering. In California, for example, estimates suggest that the cost of each execution obtained in the modern era (dividing total capital costs incurred during this

57. McCleskey v. Kemp, 481 U.S. 279, 297 (1987).

58. *See* Herrera v. Collins, 506 U.S. 390, 400–02 (1993) (holding in a plurality opinion that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation").

59. *See, e.g.*, Act of Jan. 4, 1995, ch. 1, 1995 N.Y. Laws 1; Act of Apr. 22, 1994, ch. 252, 1994 Kan. Sess. Laws 1069; Act of Apr. 27, 1990, ch. 199, 1990 N.H. Laws 304.

60. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.).

61. THE GALLUP REPORT, NOS. 232, 233, THE DEATH PENALTY: SUPPORT FOR DEATH PENALTY HIGHEST IN HALF-CENTURY 3 (1985).

62. *See infra* at __.

period by the thirteen executions carried out) is about a quarter of a billion dollars.[63]

Innocence and cost concerns have contributed to the remarkable decline in capital sentencing over the past decade. The past four years have produced about 115 death sentences per year, a greater than sixty percent decline from the highs of the mid-1990s;[64] each of the last four years produced fewer death sentences nationwide than any other year since reinstatement in 1976.[65] Executions have also dropped significantly, to an average of about forty-four per year over the past three years (compared to an average of about seventy per year over the preceding decade).[66] Some of this decline is attributable to concerns about whether the prevailing protocol for administering lethal injection sufficiently protects against unnecessary pain; such concerns led to the first judicially imposed moratorium on executions (lasting about seven months) in the post-*Furman* era.[67]

Politically, the direction of the last decade has decisively favored reform and restriction. New Jersey (2007) and New Mexico (2009) repealed their death penalty laws, and New York chose not to reinstate the death penalty after its capital statute was found to violate state law.[68] Maryland flirted with abolition and instead chose to drastically limit the cases in which death could be imposed.[69] Several other states, including Kansas, Montana, New Hampshire, and Colorado, have seen repeal bills advance in the legislature without ultimate success.[70] North Carolina enacted a broad provision safeguarding against the racially discriminatory imposition of the death

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63. Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. (forthcoming 2010).

64. *Death Sentences by Year*, *supra* note 53.

65. *Id.*

66. *Executions by Year*, *supra* note 54.

67. *See* Adam Liptak, *Challenges Remain for Lethal Injection*, N.Y. TIMES, Apr. 17, 2008, http://www.nytimes.com/2008/04/17/washington/17lethal.html (analyzing how state lethal injection protocols might be affected after the Supreme Court's decision in *Baze* effectively ended "the informal moratorium of the last seven months").

68. *See* Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3 (describing the repeal of New Jersey's death penalty); *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16 (reporting the repeal of New Mexico's death penalty); Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment*, WASH. POST, Apr. 13, 2005, at A3 (chronicling the committee vote not to reinstate the death penalty in New York).

69. *See* John Wagner, *Md. Likely to Pass Death Penalty Bill*, WASH. POST, Mar. 26, 2009, at B1 (explaining the limits placed on the use of the death penalty in Maryland).

70. *See* Kirk Johnson, *Death Penalty Repeal Fails in Colorado*, N.Y. TIMES, May 5, 2009, at A16; Raja Mishra, *N.H. Bill to Repeal Death Penalty Fails: Officer's Slaying Fuels Debate*, BOSTON GLOBE, Mar. 28, 2007, *available at* 2007 WLNR 5870704; Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3 (noting that the Montana state legislature had debated repeal of the death penalty but did not adopt any repeal); Scott Rothschild, *Bill to Abolish the Death Penalty Fails in Kansas Senate*, LJWORLD (Feb. 19, 2010), http://www2.ljworld.com/news/2010/feb/19/death-penalty-ban-debate-kansas-senate-today/?city_local.

penalty,[71] and many other states have established commissions to study various aspects of the administration of the death penalty within their jurisdictions.[72]

On the legal side, the U.S. Supreme Court has increasingly imposed constitutional restraints on state capital practices. A trio of decisions in the early 2000s marked the first Supreme Court cases finding ineffective assistance of counsel in the capital context;[73] they appear to call for more searching review of counsel performance in capital litigation. The Court also embraced significant proportionality restrictions on the imposition of the death penalty, reversing its 1989 rulings permitting the execution of juveniles[74] and persons with mental retardation,[75] and invalidating an emerging effort to punish child rape with the death penalty.[76] Apart from the practical significance of these decisions in narrowing death eligibility, the Court's opinions provided a more solicitous methodological framework for challenging state capital practices as violative of "evolving standards of decency."[77] Whereas previous decisions privileged the raw count of state laws permitting or prohibiting the challenged practice, the Court's decisions invalidated the death penalty for juveniles and persons with mental retardation despite the fact that a majority of death penalty states authorized these practices.[78] The Court emphasized the role of nonlegislative indicia in gauging evolving standards, including expert opinion, international opinion, and polling data.[79] Moreover, in its decision invalidating the death penalty for child rape, the Court went beyond the facts of the case to proscribe the imposition of the death penalty for any nonhomicidal, ordinary crime on the grounds that prevailing death penalty law already invited an excessive risk of

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71. North Carolina Racial Justice Act, ch. 464, 2009 N.C. Sess. Laws, *available at* http://www.ncga.state.nc.us/Sessions/2009/Bills/Senate/PDF/S461v7.pdf.

72. *See, e.g.*, Act of July 29, 2009, ch. 284, 2009 N.H. Laws 544 (establishing a commission to study the death penalty in New Hampshire); Act of Jan. 12, 2006, ch. 321, 2005 N.J. Laws 2165 (establishing the New Jersey Death Penalty Study Commission).

73. *See* Rompilla v. Beard, 545 U.S. 374, 389 (2005) (holding that sentencing-phase investigation was inadequate in light of the norms for capital representation); Wiggins v. Smith, 539 U.S. 510, 533–34 (2003) (holding that investigation supporting counsel's decision not to introduce mitigating evidence was itself unreasonable); Williams v. Taylor, 529 U.S. 362, 398–99 (2000) (determining that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision).

74. Roper v. Simmons, 543 U.S. 551, 574 (2005).

75. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

76. Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008).

77. *See, e.g.*, *Atkins*, 536 U.S. at 321.

78. *See* Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 180–83 (2008) (discussing the transition in the Court's proportionality methodology).

79. *See, e.g.*, *Atkins*, 536 U.S. at 316 n.21 (listing factors that support the finding of a national consensus against executing offenders with mental retardation).

arbitrary decision making.[80] Along these same lines, the last decade has seen an increased willingness of members of the Court to echo Justice Blackmun's reservations about the American capital system. In an obscure Kansas case adjudicating a technical flaw in the Kansas statute, four dissenting Justices insisted that the risk of error in capital cases called for a new capital jurisprudence informed by the lessons of wrongful convictions.[81] In his concurring opinion in the lethal injection case, Justice Stevens expressed his view that the death penalty no longer serves societal purposes sufficient to justify its imposition, essentially joining Justice Blackmun in his unwillingness to continue the post-*Furman* experiment with capital punishment, though agreeing to abide by the Court's precedents as a matter of stare decisis.[82]

In what ways might the ALI decision interact with these legal and political developments? Given the Supreme Court's invocation of the MPC in its foundational death penalty decisions, the Court has already accorded some significance to the ALI's views regarding the administration of capital punishment. The ALI's withdrawal of the MPC provisions—and its accompanying language recognizing "intractable" problems—straightforwardly undercuts the Court's reliance on the MPC—and the expertise reflected in the ALI's endorsement of a model approach to capital sentencing. In addition, the Court's newly crafted proportionality analysis (developed in its decisions invalidating the death penalty for juveniles and persons with mental retardation) enhances the constitutional significance of the ALI's action. Given the increased role of "expert" opinion in gauging evolving standards of decency, the ALI's doubts about the prevailing administration of the American death penalty are relevant to the Court's own determination whether current deficiencies are constitutionally tolerable. Equally important, the ALI's action will likely inform political debate about whether and how to reform the death penalty. As political actors increasingly ask whether the administration of the death penalty in their jurisdictions is sufficiently reliable and fair, the ALI's own assessment along these dimensions might well affect legislative outcomes.

The ALI's decision is also likely to be significant because it dovetails with the particular nature of contemporary concerns about capital punishment. The increased fragility of the American death penalty, both politically and legally, is rooted less in abstract moral dissatisfaction with the punishment than in pragmatic concerns about its administration. There does not appear to be markedly greater concern within the courts, legislatures, or the public at large about whether the death penalty denies human dignity or

80. *Kennedy*, 128 S. Ct. at 2661 ("[T]he resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred.").

81. Kansas v. Marsh, 548 U.S. 163, 207–10 (2006) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

82. Baze v. Rees, 128 S. Ct. 1520 (2008) (Stevens, J., concurring).

creates an inappropriate relation between state and citizen. Rather, the momentum toward restriction and restraint has been propelled by perceptions about the inability of states to implement the death penalty in an accurate, nonarbitrary, and efficacious manner. In this respect, the ALI decision proceeds along the same path. As our report indicates, the ALI did not endeavor to address the broad moral question of whether the death penalty is a just practice. Our report assumed, for the sake of argument, that states might have compelling reasons in the abstract for choosing to impose such a severe punishment, and we then turned to the question more suited to the expertise of the ALI—whether the system that the MPC capital provisions have helped to produce and sustain has successfully redressed the flaws in American capital practice that inspired states to turn to the MPC in the wake of *Furman*.

The ALI's decision to withdraw the MPC capital provisions—and to decline to investigate further reform—reflects skepticism about the capacity of sentencing instructions to ensure accurate, evenhanded capital decision making. The past ten years have seen similar expressions of skepticism from lawmakers and judges confronted with concrete evidence about the administration of the American death penalty. But even though the skepticism is not new, it likely carries distinctive weight when voiced by the very body that invested its labor and prestige in the effort to craft such instructions.

Part II: Report to the ALI Concerning Capital Punishment*

Prepared at the Request of ALI Director Lance Liebman by Professors Carol S. Steiker (Harvard Law School) & Jordan M. Steiker (University of Texas)

Introduction and Overview

We have been asked by Director Lance Liebman to write a paper for the Institute to help it assess the appropriate course of action with regard to Model Penal Code § 210.6 (adopted in 1962 to prescribe procedures for the imposition of capital punishment). This request stems from two recent developments. First, the Institute has already undertaken a project revisiting the MPC sentencing provisions, but that project has not included any consideration of capital punishment. Second, at the Institute's Annual Meeting in May of 2007, Roger Clark and Ellen Podgor moved "That the Institute is opposed to capital punishment." In response to the motion, an Ad Hoc Committee on the Death Penalty was convened, and in light of that committee's deliberations, Director Liebman gave us the following charge: "to review the literature, the case law, and reliable data concerning the most important contemporary issues posed by the ultimate question of retention or abolition of the death penalty and, if retained, what limitations should be placed on its use and what procedures should be required before that sentence is imposed. Another way of asking the question is this: Is fair administration of a system of capital punishment possible?" (Program Committee Recommendation Regarding the Death Penalty, Dec. 3, 2007).

The possible approaches that the Institute might take with regard to § 210.6 at the present time were identified in Dan Meltzer's memorandum on behalf of the Ad Hoc Committee on the Death Penalty (Report on ALI Consideration of Issues Relating to the Death Penalty, Oct. 2, 2007): 1) revise § 210.6, 2) call for abolition, or 3) withdraw § 210.6. Although each of these options obviously allows for various permutations, we agree that these three options mark the Institute's primary choices of action. In light of the difficulties, elaborated below, that would be raised by either the Institute's attempt to revise § 210.6 or the Institute's embrace of an unadorned call for abolition, we believe that the soundest course of action for the Institute would be withdrawal of § 210.6 with an accompanying statement to the effect that, in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for

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administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option.

This choice comes at a time of widespread reflection about American capital punishment. On the one hand, popular political support for the death penalty appears to remain relatively high, with opinion polls reporting stable majorities (about 70%) embracing the death penalty on a question that asks "Are you in favor of the death penalty for a person convicted of murder?" Thirty-six states presently authorize the death penalty (as well as the federal government), twenty-four of those states have at least ten inmates on death row, and nineteen of those states have conducted at least ten executions over the past forty years. At the same time, however, use of the death penalty (in terms of executions and especially death sentences) has declined significantly in recent years. Nationwide executions reached a modern-era (post-1976) high of 98 in 1998; the past three years have seen significantly lower totals – 53 (2006), 42 (2007), and 34 (2008 – as of Nov. 20). Nationwide death sentences have dropped even more precipitously, from modern-era highs of around 300 in the mid-1990s (315 (1994), 326 (1995), 323 (1996)), to modern-era lows in each of the past four years (140 (2004), 138 (2005), 115 (2006), 110 (2007)). In addition, executions during the modern era have been heavily concentrated in a small number of states, with five states (Texas (422), Virginia (102), Oklahoma (88), Florida (66) and Missouri (66)) accounting for about two-thirds of the executions nationwide (744/1133). Several states, including California and Pennsylvania, have large death-row populations (CA = 667, PA = 228) but very few executions in the modern era (CA = 13, PA = 3). This snapshot captures both the continuing political support for the death penalty as an available punishment but also significant ambivalence about its use in practice. Although different in its particulars, this snapshot shares some similarities to the state of the American death penalty almost a half century ago when the Institute last addressed capital punishment.

The Institute's initial involvement in American capital punishment resulted in its promulgation of § 210.6 of the Model Penal Code in 1962. As the Meltzer memorandum recounts, the drafters of the MPC considered the problems plaguing the then-prevailing death penalty practices. The provision sought to ameliorate concerns about the arbitrary administration of the punishment and the absence of meaningful guidance in state capital statutes. The MPC provision was essentially ignored until the Supreme Court invalidated all existing capital statutes in *Furman v. Georgia*[1] in 1972. *Furman* raised concerns about the arbitrary and discriminatory administration of the death penalty. These concerns stemmed from the interplay of extremely broad death eligibility in state schemes, the fact of its rare imposition, and the absence of any standards guiding charging or

1. 408 U.S. 238 (1972).

sentencer discretion. After *Furman*, states sought to resuscitate their capital statutes by revising them to address the concerns raised in *Furman*; many of the states turned to § 210.6 as a template for their revised statutes, hoping in part that the prestige of the Institute would help to validate these new efforts. In the 1976 cases addressing five of the revised statutes, state advocates drew particular attention to the fact that many of their provisions were modeled on § 210.6. The Court in turn relied on the expertise of the Institute – particularly its view that guided discretion could improve capital decisionmaking – when it upheld the Georgia, Florida, and Texas statutes.[2] Those statutes, and the decisions upholding them, provided the blueprint for the modern American death penalty.

The stance that the Court took in 1976 was provisional; it then adopted a role of continuing constitutional oversight of the administration of capital punishment. Each year the Court has granted review in a substantial number of capital cases, and the Court has continually adjusted its regulatory approach to prevailing capital practices. It is clear that the Court's attempt to regulate capital punishment – largely on the model provided by the MPC – has been unsuccessful on its own terms. The guided discretion experiment has not solved the problems of arbitrariness and discrimination that figured so prominently in *Furman*; nor has the Court's regulation proven able to ensure the reliability of verdicts or the protection of fundamental due process in capital cases. An abundant literature, reviewed below, reveals the continuing influence of arbitrary factors (such as geography and quality of representation) and invidious factors (most prominently race) on the distribution of capital verdicts. Most disturbing is the evidence of numerous wrongful convictions of the innocent, many of whom were only fortuitously exonerated before execution, and the continuing concern about the likelihood of similar miscarriages of justice in the future. These failures of constitutional regulation are due in part to the inherent difficulty and complexity of the task of rationalizing the death penalty decision, given the competing demands of even-handed administration and individualized consideration. Moreover, such a difficult task is compounded by deeply

2. Gregg v. Georgia, 428 U.S. 153, 193 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded 'that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case.'") (emphasis in original) (quoting ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959)) (footnote omitted) (the citation to "§ 2.01.6" rather than to "§ 2.10.6" reflects the change in numbering from the 1959 draft to the 1962 Code); Proffitt v. Florida, 428 U.S. 242, 247-48 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (describing Florida statute as "patterned in large part on the Model Penal Code"); Jurek v. Texas, 428 U.S. 262, 270 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (citing Model Penal Code to support its conclusion that the narrowing of capital murder in the Texas statute serves much the same purpose as the use of aggravating factors in Florida and Georgia).

rooted institutional and structural obstacles to an adequate capital justice process. Such obstacles include the intense politicization of the capital justice process, the inadequacy of resources for capital defense services, and the lack of meaningful independent federal review of capital convictions.

In many legal contexts, the identification of problems in the administration of justice and obstacles to reform would counsel in favor of the Institute's undertaking a reform project in order to promote needed improvement. The administration of capital punishment, however, presents a context highly unfavorable for a successful law reform project, for several related reasons.

First, numerous other organizations have already undertaken to study the administration of capital punishment, both at the state and the national level. These studies have generated an enormous amount of raw data and a large body of proposed reforms (about which there is a substantial degree of agreement from a variety of sources). A large number of diverse states have undertaken systematic self-studies of the administration of their systems of capital punishment in the recent past. For example, in 2001, Governor George Ryan of Illinois appointed a blue-ribbon, bi-partisan commission to conduct a comprehensive study his state's administration of capital punishment after 13 exonerations from Illinois' death row.[3] In 2004, a task force of the New Mexico State Bar undertook a comprehensive study of capital punishment in that state.[4] The legislatures of a number of other states have also undertaken systematic studies of their death penalty systems, including Connecticut in 2001,[5] North Carolina in 2005,[6] New Jersey in 2006,[7] Tennessee in 2007,[8] and Maryland in 2008.[9] In addition to these comprehensive studies, virtually every death penalty state has undertaken one or more smaller investigations into various aspects of their capital justice system (such as cost, racial disparities, forensic evidence processing, etc.).

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3. *See* http://www.idoc.state.il.us/ccp/index.html for a copy of the Executive Order, a list of Commission Members, and the Commission's final report. Two years later, Governor Mitt Romney of Massachusetts (an abolitionist state) took a similar step in appointing a blue-ribbon commission; the Massachusetts Commission was charged with determining how to create a "fool proof" death penalty statute that would avoid the erroneous conviction and execution of murderers. *See* http://www.cjpc.org/dp_govs_commission.htm.

4. *See* http://www.nmbar.org/Attorneys/lawpubs/TskfrcDthPnltyrpt.pdf for a copy of the Task Force's final report.

5. *See* http://www.ct.gov/…/commission_on_the_death_penalty_final_report_2003.pdf for a copy of the Connecticut Commission's final report.

6. *See* http://www.deathpenaltyinfo.org/node/1557 (20 members of the North Carolina House of Representatives appointed to undertake study the administration of the death penalty).

7. *See* http://www.njleg.state.nj.us/committees/njdeath_penalty.asp. New Jersey abolished the death penalty in 2007.

8. *See* http://www.thejusticeproject.org/press/tn-death-penalty-study-bill-passed/ (16 member expert committee appointed in Tennessee).

9. *See* http://www.deathpenaltyinfo.org/node/2336 (commission appointed to study racial, socio-economic, and geographical disparities, the execution of the innocent, and cost issues relating to the death penalty in Maryland).

The most wide-ranging studies to date are those conducted by the American Bar Association in conjunction with its call for a nationwide moratorium on capital punishment in 1997. In the wake of the adoption of its moratorium resolution, the ABA developed a publication entitled *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, which was intended to serve as "Protocols" for jurisdictions undertaking reviews of death penalty-related laws and processes. The ABA, as part of its Death Penalty Moratorium Implementation Project, has recently completed a three-year study of eight states to determine the extent to which their capital punishment systems achieve fairness and provide due process.[10] A review of the ABA's research and the state self-studies together strongly suggests that the death penalty is not an area in which the Institute can measurably contribute by conducting new research or compiling or explicating existing research.

Second, there is also reason to be skeptical that the Institute will be able to promote needed death penalty reform by adding its voice, with the expertise and prestige that is associated with it, to influence political actors. Capital punishment has remained an issue strongly resistant to reform through the political process in most jurisdictions. Consider first the reforms contained in § 210.6 itself. Although adopted by the Institute in 1962, § 210.6 was ignored in the political realm for a decade, until the Supreme Court constitutionally invalidated capital punishment in 1972, at which point § 210.6 was pressed into service by state legislatures in order to revive the moribund penalty. The ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, originally adopted in 1989 and revised in 2003, have likewise failed to succeed in the political realm; indeed, the ABA's Death Penalty Moratorium Implementation Project found in 2007 that not a single one of the eight states that it studied were fully in compliance with any aspect of the ABA *Guidelines* studied. (See discussion in section on "Inadequacy of Resources, *infra*.) Perhaps most telling is the view of Professor Joseph Hoffman, someone who has devoted enormous time and energy to death penalty reform, spearheading death penalty reform efforts in both Illinois and Indiana and serving as Co-Chair and Reporter for the Massachusetts Governor's Council on Capital Punishment. Hoffman served as a member of an advisory group to discuss an earlier draft of this paper, and he strongly expressed the view that seeking reform of capital punishment in the political realm is futile. This is a striking position to take by one who is not morally opposed to the death penalty and who has worked on numerous reform projects. But Hoffman cited as grounds for his change of heart the example of Illinois, in which there were confirmed wrongful convictions in capital cases, a sympathetic Governor, and a bi-partisan reform commission, but still strong resistance in the state

10. *See* http://www.abanet.org/moratorium/ for the full reports of the ABA Moratorium Implementation Project.

legislature to reforms specifically targeted at capital punishment. In short, serious concerns about efficacy in the political realm militate against the undertaking of a new reform effort by the Institute.

Moreover, some of the structural problems in the administration of capital punishment are not the sort of problems that the Institute can address with its legal expertise. While standards for defense counsel, for example, might be considered within the purview of the Institute's expertise, the problem of the intense politicization of the capital process – arising from the decentralization of criminal justice authority within states, the political accountability of many of the key actors in the capital justice system, and the sensationalism of death cases in the media – is a problem largely beyond the reach of legal reform.

Finally, were the Institute to take on a death penalty reform project despite the likelihood of ineffectiveness in the political realm and the fact that some of the underlying problems are not amenable to legal reform, it would run the risk not merely of failing to improve the death penalty, but also of helping to entrench or legitimate it. The undertaking of a reform project, despite its impetus in the flaws of current practice, might be understood as an indication that "the fundamentals" of the capital justice process are sound, or at least remediable. If the Institute upon reflection concludes, as this report suggests, that the administration of capital punishment is beset by problems that cannot be remedied by even an ambitious reform project, the Institute should say so, rather than invest its own time and resources and the hopes of reformers, in a project that will not succeed but may delay the recognition of failure.

We also recommend against the Institute's adoption of the Clark-Podgor motion declaring "[t]hat the Institute is opposed to capital punishment." As this report reflects, our study of capital punishment focuses on its contemporary administration in the United States and the prevailing obstacles to institutional reform. We did not understand our charge from the Institute to encompass review of moral and political arguments supporting or opposing the death penalty as a legitimate form of punishment. Obviously there is deep disagreement along these dimensions regarding the basic justice of the death penalty. Some supporters view the death penalty as retributively justified (or indeed required). Other supporters maintain that the death penalty deters violent offenses and should be embraced on utilitarian grounds, especially in light of some recent empirical work purporting to establish its deterrent value.[11] Opponents generally reject the retributive argument and insist that capital punishment violates human dignity or vests an intolerable power in the State over the individual. Some opponents reject the empirical claims of deterrence and advance contrary claims of a

11. *See generally* Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 Ann. Rev. L. & Soc. Sci. 151 (2005) (reviewing recent empirical studies and their critics).

"brutalization effect" in which executions actually reduce inhibitions toward violent crime.

Resolution of these competing claims falls outside the expertise of the Institute. The Institute is well-positioned to evaluate the contemporary administration and legal regulation of the death penalty. Moreover, the Institute is well-suited to evaluate the success, or lack thereof, of the MPC death penalty provisions in light of their subsequent adoption (in whole or part) by many jurisdictions. If, in its review of the prevailing system and of the prospects for securing a minimally adequate capital process, the Institute were to conclude that the death penalty should not be a penal option, the Institute should frame its conclusion to reflect the basis for its judgment. Endorsement of the Clark-Podgor motion might well be understood to reflect a moral or philosophical judgment rather than a judgment about the inadequacy of prevailing or prospective institutional arrangements to satisfy basic requirements of fairness and accuracy. That perception of the Institute's position would be inconsistent with the focus of this report (and the questions propounded by the Program Committee Recommendation Regarding the Death Penalty) and could possibly undermine the authority of the Institute's voice on this issue.

The remaining question for the Institute is whether to withdraw § 210.6, and if so, whether to include an accompanying statement regarding the withdrawal. The case for withdrawal is compelling and reflects a consensus among the Institute's members who have spoken to the issue thus far. At the outset, it should be noted that several provisions in § 210.6 have been rendered unconstitutional by rulings of the U.S. Supreme Court in the years since 1962. For example, section 210.6's failure to require a jury determination of death eligibility conflicts with the Supreme Court's recognition of a Sixth Amendment right to such a determination;[12] one of § 210.6's aggravating factors ("the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity") has been deemed to be impermissibly vague;[13] and section 210.6's failure to identify mental retardation as a basis for exemption from capital punishment violates the Court's recent Eighth Amendment proportionality jurisprudence.[14] These specific defects could be corrected, but more fundamentally § 210.6 is simply inadequate to address the endemic flaws of the current system. Section 210.6, which in many respects provided the template for contemporary state capital schemes, represents a failed attempt to rationalize the administration of the death penalty and, for the reasons we discuss in greater detail below, its adoption rested on the false assumption that carefully-worded guidance to capital sentencers would meaningfully limit arbitrariness and discrimination in the administration of the American death penalty.

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12. Ring v. Arizona, 536 U.S. 584 (2002).
13. Godfrey v. Georgia, 446 U.S. 420 (1980).
14. Atkins v. Virginia, 536 U.S. 304 (2002).

Given the prevailing problems in the administration of the death penalty and the discouraging prospects for successful reform, we recommend that the Institute issue a statement accompanying the withdrawal of § 210.6 calling for the rejection of capital punishment as a penal option under current circumstances ("In light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option."). Such a statement would reflect the view that the death penalty should not be imposed unless its administration can satisfy a reasonable threshold of fairness and reliability.

Mere withdrawal of § 210.6, without such an accompanying statement, would pose two problems. First, the absence of any explanation might suggest that the Institute is simply acknowledging specific defects in the section, or that the Institute believes that the problems afflicting the administration of the death penalty are discrete and amenable to adequate amelioration. Second, and more importantly, the Institute's role is to speak directly and forthrightly on policy questions within its expertise. If the Institute is persuaded that the death penalty cannot be fairly and reliably administered in the current structural and institutional setting, it should say so.

Of course, many of the problems in the capital justice system exist to some degree in the broader criminal justice system as well. Why should these problems call for the rejection of the death penalty as a penal option if such problems could not justify elimination of criminal punishment altogether? Four considerations suggest the distinctiveness of the capital context. First, unlike incarceration, capital punishment is not an essential part of a functioning criminal justice system (as reflected by its absence in many localities, states and, indeed, many countries). While many of the same problems that afflict the prevailing capital system are also present in the non-capital system, the deficiencies of the non-capital system must be tolerated because the social purposes served by incarceration cannot otherwise be achieved. Second, many of the problems undermining the fair and accurate administration of criminal punishment are more pronounced in capital cases. For example, the distorting pressures of politicization exist in both capital and non-capital cases, but the high visibility and symbolic salience of the death penalty heightens these pressures in capital litigation. The inadequacy of resources and the absence of meaningful supervision of counsel are also prevalent throughout the criminal justice system, but these problems appear with greater regularity and severity on the capital side as a consequence the special training, experience, and funding necessary to ensure even minimally competent capital representation. Third, the irrevocability of the death penalty counsels against accepting a system with a demonstrably significant rate of error. Evidence suggests a higher rate of erroneous convictions in capital versus non-capital cases, and there is little reason to believe that the problem of wrongful convictions and executions

will be solved in the foreseeable future. Fourth, deficiencies within the capital system impose significant and disproportionate costs on the broader legitimacy of the criminal justice system. In light of the high visibility and high political salience of capital cases, the arbitrary or inaccurate imposition of the death penalty undermines public confidence in our institutions and generates a distinctive and more damaging type of disrepute than similar problems in non-capital cases.

What follows below is a more thorough account of the existing problems in capital practice, the various efforts to address those problems, and the prospects for meaningful reform. Part I evaluates the course of constitutional regulation over the past three decades. The remaining sections examine the underlying problems and structural barriers that have undermined regulatory efforts (Part II: The Politicization of Capital Punishment; Part III: Race Discrimination; Part IV: Juror Confusion; Part V: The Inadequacy of Resources, Especially Defense Counsel Services, in Capital Cases; Part VI: Erroneous Conviction of the Innocent; Part VII: Inadequate Enforcement of Federal Rights; Part VIII: The Death Penalty's Effect on the Administration of Criminal Justice). Of course, it is possible to improve discrete aspects of the capital justice process through incremental reform. But achieving the degree of improvement that would be necessary to secure a minimally adequate system for administering capital punishment in the United States today faces insurmountable institutional and structural obstacles. Those obstacles counsel against the Institute's undertaking a reform project and in favor of the Institute's recognition of the inappropriateness of retaining capital punishment as a penal option.

I. The Inadequacies of Constitutional Regulation

The Supreme Court's constitutional regulation of capital punishment, which commenced in earnest with the Court's temporary invalidation of capital punishment in *Furman v. Georgia* in 1972[15] and its reauthorization of capital punishment in *Gregg v. Georgia* in 1976,[16] has produced some significant advances, both substantively and procedurally, in the administration of the death penalty. Indeed, most of these advances track the requirements of § 210.6, which served as a template for many states in reforming their capital schemes to avoid constitutional invalidation. For example, like the MPC, most states try to guide capital sentencing discretion through consideration of "aggravating" and "mitigating" factors in response to the *Furman* Court's rejection of "standardless" capital sentencing discretion and the *Gregg* Court's approval of "guided discretion." Such guidance seeks to avoid the arbitrariness that was guaranteed by the pre-

15. 408 U.S. 238.

16. 428 U.S. 153. *See also Gregg*'s four accompanying cases: *Proffitt*, 428 U.S. 242; *Jurek*, 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976).

Furman practice of instructing juries merely that the sentencing decision was to be made according to their conscience, or in their sole discretion, without any further elaboration. By invalidating the death penalty for rape in 1977[17] and extending that invalidation to the crime of child rape this past Term,[18] the Supreme Court, again like the MPC, has limited capital punishment to the crime of murder,[19] in comparison to the pre-*Furman* world in which death sentences for rape, armed robbery, burglary and kidnapping were authorized and more than occasionally imposed. The Court recently has categorically excluded juveniles and offenders with mental retardation from the ambit of the death penalty.[20] Although the Court has never held that bifurcated proceedings (separate guilt and sentencing phases) are constitutionally required,[21] post-*Furman* statutes have made bifurcation the norm, and it would likely be held to be a constitutional essential today, should the issue ever arise.

Despite these genuine improvements to the administration of capital punishment, constitutional regulation has proven inadequate to address the concerns about arbitrariness, discrimination, and error in the capital justice process that led to the Court's intervention in the first place. At its worst, constitutional regulation is part of the problem. When the Court requires irreconcilable procedures, its own conflicting doctrines doom its efforts to failure. Such conflicts have led several Justices to reject the Court's regulatory efforts as unsustainable. In many more instances, the Court's doctrine, though it may recognize serious threats to fairness in the process or recognize important rights, fails to provide adequate mechanisms to address the threats or vindicate the rights. Some of these inadequacies have led additional Justices to defect in various ways from the Court's death penalty doctrine. Finally, the existence of an extensive web of constitutional regulation with minimal regulatory effect stands in the way of *non*-constitutional legislative reform of the administration of capital punishment – not only because such reform is generally extremely unpopular politically, but also because political actors and the general public assume that constitutional oversight by the federal courts is the proper locus for ensuring the fairness in capital sentencing and that the lengthy appeals process in capital cases demonstrates that the courts are doing their job (indeed, maybe even *over*-doing their job, considering how long cases take to get through the

17. Coker v. Georgia, 433 U.S. 584 (1977).

18. Kennedy v. Louisiana, 128 S. Ct. 2651 (2008).

19. The Court limited its holding to crimes against persons, and put to one side crimes against the state such as treason or terrorism. *See id.* at 2659.

20. Atkins v. Virginia, 536 U.S. 304 (2002) (offenders with mental retardation); Roper v. Simmons, 543 U.S. 551 (2005) (juvenile offenders). The MPC categorically excludes juvenile offenders, and addresses mental retardation by requiring a life sentence when the court is satisfied that "the defendant's physical or mental condition calls for leniency." § 211.6(1)(e).

21. McGautha v. California, 402 U.S. 183 (1971). The MPC requires bifurcated proceedings. § 210.6(2).

entire review process). What follows is a discussion of the four most serious inadequacies in the constitutional regulation of capital punishment and their implications for reform efforts.

1. The central tension between guided discretion and individualized sentencing.—The two central pillars of the Court's Eighth Amendment regulation of capital punishment are the twin requirements that capital sentencers be afforded sufficient guidance in the exercise of their discretion and that sentencers at the same time not be restricted in any way in their consideration of potentially mitigating evidence. The first requirement led the Court to reject aggravating factors that rendered capital defendants death eligible but failed to furnish sufficient guidance to sentencers – most notably, factors similar to MPC § 210.6(3)(h): "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." The Court rejected such vague factors as insufficient either to narrow the class of those eligible for capital punishment or to channel the exercise of sentencing discretion.[22] The second requirement led the Court to reject statutory schemes that limited sentencers' consideration of any potentially mitigating evidence, either by restricting mitigating circumstances to a statutory list,[23] or by excluding full consideration of some potentially relevant mitigating evidence.[24]

From the start, the tension between the demands of consistency and individualization were apparent. As early as a year prior to *Furman*, the lawyers who litigated *Furman* and *Gregg* argued that unregulated mercy was essentially equivalent to unregulated selection: "'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language."[25] After more than a decade of attempting to administer both requirements, several members of the Court with widely divergent perspectives came to see the incoherence of the foundations of their Eighth Amendment doctrine. In 1990, Justice Scalia argued that the second doctrine – or "counterdoctrine" – of individualized sentencing "exploded whatever coherence the notion of 'guided discretion' once had."[26] Justice Scalia rejected the view that the two doctrines were merely in tension rather than flatly contradictory: "To acknowledge that 'there perhaps is an inherent tension' [between the two doctrines] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing 'twin objectives' is rather like referring to the twin objectives of good and evil. They cannot be

22. *See, e.g.,* Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988).

23. *See* Lockett v. Ohio, 438 U.S. 586 (1978).

24. *See* Penry v. Lynaugh, 492 U.S. 303 (1989).

25. *See* Brief Amici Curiae of the NAACP Legal Defense and Education Fund, Inc., and the National Office for the Rights of the Indigent at 69, McGautha v. California, 402 U.S. 183 (1971) (No. 71-203).

26. Walton v. Arizona, 497 U.S. 639, 661 (1990) (Scalia, J., concurring)

reconciled."[27] As a result, Justice Scalia (later joined by Justice Thomas), has chosen between the two commands and rejected the requirement of individualized sentencing as without constitutional pedigree: "Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted."[28]

Four years later, Justice Blackmun came to same recognition of the essential conflict between the doctrines, but reached a different conclusion. Justice Blackmun found himself at a loss to imagine any sort of reform that could mediate between the two conflicting commands: "Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would 'thro[w] open the back door to arbitrary and irrational sentencing.'"[29] Unlike Justices Scalia and Thomas, however, Justice Blackmun did not resolve to jettison either constitutional command – not merely because of the demands of *stare decisis*, but "because there is a heightened need for both in the administration of death."[30] Consequently, Justice Blackmun concluded that "the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution."[31]

One Justice's response to the conflict between the need for guidance and the need for individualization was to call for limiting eligibility for capital punishment to a very small group of the worst of the worst – "the tip of the pyramid" of all murderers, in the words of Justice Stevens.[32] If unguided mercy reprieves some from this group, there will still be arbitrariness in choosing among the death eligible, but it will operate on a much smaller scale, and with greater assurance that those who make it to the "tip" belong in the group of the death eligible. However, even if it were agreed that limiting arbitrariness to a smaller arena is sufficient to mediate the conflict between guidance and discretion, this solution is neither constitutionally prescribed nor politically feasible. The Court's "narrowing" requirement is formal rather than quantitative; there is no requirement that

27. *Id.* at 664 (citations omitted).

28. *Id.* at 673.

29. Callins v. Collins, 510 U.S. 1141, 1155 (1994) (Blackmun, J., dissenting from denial of certiorari) (citation omitted).

30. *Id.*

31. *Id.* at 1157.

32. *See Walton*, 497 U.S. at 716-18 (Stevens, J., dissenting).

any state restrict the ambit of the death penalty to a group of any particular size or with any particular aggravating attributes. And in the absence of a constitutional command, the scope of most capital statutes remains extraordinarily broad. One study, for example, of the Georgia statute upheld in *Gregg* as a model of guided discretion, found that 86% of all persons convicted of murder in Georgia over a five-year period after the adoption of Georgia's new statute were death-eligible under that scheme,[33] and that over 90% of persons sentenced to death before *Furman* would also be deemed death-eligible under the post-*Furman* Georgia statute.[34] The widespread authorization of the death penalty for felony murder, murder for pecuniary gain, and murders that could be described as "cold-blooded," "pitiless," and the like[35] have ensured a wide scope of death eligibility, and capital statutes have tended to grow rather than shrink over time, for reasons that we discuss in greater detail below. (See section on "Politicization.")

The conflict between guidance and individualization thus has been resolved by the Court not by Justice Stevens' suggestion of strict narrowing, but rather by reducing the requirement of guidance to a mere formality. States must craft statutes that narrow the class of the death eligible to some subset – however large and however defined – of the entire class of those convicted of the crime of murder. In contrast, the Court has enforced the requirement of individualization with greater zeal and demandingness. Consequently, the structure of capital sentencing today is surprisingly similar to the pre-*Furman* structure (bifurcation aside). The sentencer must determine whether the defendant is death eligible – today not merely by conviction of a capital offense by also by the additional finding of an aggravating factor. These factors can be numerous, broad in scope, and still quite vague; indeed, the Court has held that the aggravator can duplicate an element of the offense of capital murder (in which case the aggravator adds nothing to the conviction).[36] After this fairly undemanding finding, the inquiry opens up into pre-*Furman* sentencing according to conscience: the sentencer is asked whether any mitigating circumstances of any type, statutory or non-statutory, call for a sentence less than death. This sentencing structure, which dominates the post-*Furman* world, is not accidental, nor is it the product of deliberate undermining of constitutional norms by states; rather, it is the *product* of constitutional regulation and thus fairly impervious to all but constitutional reform.

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33. David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 268 n.31(1990).

34. *Id.* at 102.

35. Although the Court initially invalidated vague aggravators like "heinous, atrocious or cruel," it later permitted judicially imposed "narrowing constructions" of such aggravators to save them from unconstitutionality. For example, in Arave v. Creech, 507 U.S. 463 (1993), the Court upheld Idaho's aggravator of "utter disregard for human life" by a narrowing construction that asked sentencers whether the defendant acted as a "cold-blooded, pitiless slayer."

36. *See* Lowenfield v. Phelps, 484 U.S. 231 (1988).

We share Justice Blackmun's skepticism about the possibility of adequate constitutional mediation of the needs for heightened guidance and individualization in the capital context. As for Justice Steven's suggestion of the possibility of sharply narrowing the scope of capital punishment, Justice Harlan said it best in 1971, in explaining the Court's rejection of challenges to standardless capital sentencing under the Due Process clause:

> To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need.[37]

As for Justice Scalia's suggestion of abandoning the individualization requirement as a constitutional essential, we think the 1976 *Woodson* plurality explanation for why individualization is required remains compelling:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[38]

In the absence of a constitutional solution, states (and Congress) will continue to operate capital sentencing schemes that fail to adequately address the concerns about arbitrariness and discrimination that led to constitutional intervention in the first instance.

2. Racial disparities and constitutional remedies.—The failure of constitutionally mandated guided discretion to offer much in the way of guidance might be less worrisome if there were other constitutional avenues to address discriminatory outcomes. After all, the challenge to standardless capital sentencing that led to the constitutional requirement of guided discretion was premised in large part on the concern that the absence of guidance gave too much play to racial discrimination. The NAACP Legal Defense Fund, the organization that spearheaded the constitutional litigation

37. *McGautha*, 402 U.S. at 204, 208.

38. 428 U.S., 304 (plurality opinion of Stewart, Stevens, and Powell, JJ.).

challenging the death penalty that culminated in *Furman* and *Gregg*, was also involved in litigation under the Equal Protection clause directly challenging racial disparities in the distribution of death sentences. For the first few decades of constitutional regulation of capital punishment, however, the Court avoided this issue, deciding cases that raised it on entirely non-racial grounds.[39] Finally, in 1987, the Court took up the issue directly in *McCleskey v. Kemp*.[40]

McCleskey involved a constitutional challenge to the imposition of the death penalty based on an empirical study conducted by Professor David Baldus and his associates (the Baldus study) using multiple regression statistical analysis to study the effect of the race of defendants and the race of victims in capital sentencing proceedings in Georgia. The study examined over 2,000 murder cases that occurred in Georgia during the 1970's. The researchers used a number of different models that took account of numerous variables that could have explained the apparent racial disparities on nonracial grounds. The study found a very strong race-of-the-victim effect and a weaker race-of-the-defendant effect: after controlling for the nonracial variables, the study concluded that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks, and that black defendants who killed white victims had the greatest likelihood of receiving the death penalty.

The Court rejected McCleskey's challenge to his death sentence on both Equal Protection and Eighth Amendment grounds. The Court assumed for the sake of argument the validity of the Baldus study's statistical findings, but held that proof of racial disparities in the distribution of capital sentencing outcomes in a geographic area in the past was insufficient to prove racial discrimination in a later case. Proof of unconstitutional discrimination, held the Court, requires proof of discriminatory *purpose* on the part of the decisionmakers in a particular case. Moreover, in light of the importance of discretion in the administration of criminal justice, proof of such purpose must be "exceptionally clear."[41] In light of this heavy burden, the Court found the Baldus study's results "clearly insufficient" to prove discriminatory purpose under the Equal Protection clause.[42] As for the Eighth Amendment challenge, the Court held that the "discrepancy indicated by the Baldus study is a far cry from the major systemic defects identified in *Furman*."[43] The Court concluded that the "risk of racial bias" demonstrated by the Baldus study was not "constitutionally significant."[44]

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39. *See, e.g.,* Coker v. Georgia, 433 U.S. 584 (1977); Maxwell v. Bishop, 398 U.S. 362 (1970).
40. 481 U.S. 279 (1987).
41. *Id.* at 297.
42. *Id.*
43. *Id.* at 313.
44. *Id.*

In part, the Court's rejection of McCleskey's claim was informed by its concern that there might be no plausible constitutional remedy short of abolition: "McCleskey's claim . . . would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black."[45] (We discuss further the difficult problem of remedies for racial discrimination below in the section on "Race Discrimination.") But the Court's requirement of exceptionally clear proof of discriminatory purpose on the part of a particular sentencer makes constitutional challenges to intentional discrimination essentially impossible to mount. Not surprisingly, there have been no successful constitutional challenges to racial disparities in capital sentencing in the more than two decades since *McCleskey*, despite continued findings by many researchers in many different jurisdictions of strong racial effects. By rendering racial disparities in sentencing outcomes constitutionally irrelevant in the absence of more direct proof of discrimination, the Court has dispatched the problem of racial discrimination in capital sentencing from the constitutional sphere to the legislative one, where it has not fared well. (See "Race Discrimination," below.) Notably, Justice Powell, the author of the 5-4 majority opinion in *McCleskey*, repudiated his own vote only a few years later, when a biographer asked him upon his retirement if there were any votes that he would change, and he replied, "Yes, *McCleskey v. Kemp*."[46]

In rejecting McCleskey's Eighth Amendment claim that the Baldus study demonstrated an unacceptable "risk" of discrimination, the Court relied in part on other "safeguards designed to minimize racial bias in the process."[47] Primary among these safeguards is the Court's *Batson* doctrine. In *Batson v. Kentucky*[48] – decided just one year prior to *McCleskey* – the Court eased the requirement for proving intentional discrimination in the exercise of peremptory strikes by shifting the burden to the prosecution to provide race neutral explanations for strikes when the nature or pattern of strikes in an individual case gave rise to a *prima facie* inference of discriminatory intent. *Batson* did in fact permit the litigation of many more claims of discrimination in the use of peremptory strikes than the earlier, more demanding *Swain* doctrine,[49] and the Court has been more vigorous in overseeing the enforcement of the *Batson* right in capital cases in recent years.[50]

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45. *Id.* at 293.

46. David Von Drehle, *Retired Justice Changes Stand on Death Penalty: Powell Is Said to Favor Ending Executions*, Wash. Post, June 10, 1994 (based on interview with John C. Jeffries, Jr., Justice Powell's official biographer).

47. *McCleskey*, 481 U.S. at 313.

48. 476 U.S. 79 (1986).

49. *See* Swain v. Alabama, 380 U.S. 202 (1965).

50. *See* Snyder v. Louisiana, 128 S. Ct. 1203 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005); Miller-El v. Cockrell, 534 U.S. 1122 (2002).

But the Court's reliance on *Batson* as a means of preventing racial discrimination in capital jury selection is profoundly misplaced. Studies of the effectiveness of *Batson* in reducing the race-based used of peremptory strikes have demonstrated only an extremely modest effect.[51] This is not surprising in light of the incentives that exist to base peremptory strikes at least in part upon the race of prospective jurors and the ease with which "race neutral" explanations for strikes can be offered.

If the race-based use of peremptory strikes depended on racial hatred or the belief in the intrinsic inferiority of minority jurors, then there would undoubtedly be much less race-based use of peremptories than is evident today. However, there is clearly a great deal of what economists call "rational discrimination" in jury selection. Counsel on both sides make decisions about the desirability of jurors from particular demographic groups based on generalizations about attitudes that the group as a whole tends to hold. There is good reason, based on polling data, to believe that blacks as a group are more sympathetic to criminal defendants and less trusting of law enforcement than whites, and that blacks as a group are less supportive of capital punishment than whites. Moreover, in cases involving black defendants, there is reason to believe that black jurors may be more personally sympathetic to the defendant than white jurors and more likely to perceive "remorse" on the part of the defendant, a perception crucial to obtaining life verdicts in capital sentencings.[52] Under such circumstances, capital prosecutors who harbor no personal racial animosity may well see strong reasons to use race as a proxy for viewpoint in using peremptory challenges, especially when they often have little other information to go on.

In implementing *Batson*, the Court has held that a prosecutor's race neutral explanation need not be "persuasive, or even plausible" – it must simply be sincerely non-racial.[53] It can be perilous for a prosecutor to offer as an explanation some aspect of a struck minority juror that is also true of white jurors whom the prosecutor failed to strike.[54] But one sort of explanation remains a virtually guaranteed race neutral explanation – an objection to a prospective juror's demeanor (e.g., the juror appeared hostile, nervous, bored, made poor eye contact, made too much eye contact, smiled or laughed inappropriately, frowned). Because no lawyer or judge can simultaneously monitor all of the prospective jurors' demeanors throughout all of voir dire, and because perceptions about the meaning of demeanor can vary, there is no way to disprove a prosecutor's claim that a particular juror

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51. *See, e.g.*, William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171 (2001).

52. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 Colum. L. Rev. 1538 (1998).

53. Purkett v. Elem, 514 U.S. 765, 768 (1995) (accepting the prosecutor's professed objection to the struck jurors' hairstyle and facial hair as an acceptable non-racial reason).

54. These sorts of comparisons formed the basis for the reversals in *Miller-El v. Dretke* and *Snyder*, *supra* note 50.

appeared more "hostile" to him than the others. To reject such an explanation, a trial judge would have to make a credibility determination against a prosecutor – something judges are not prone to do lightly and in the absence of any hard evidence. Moreover, prosecutors may offer such explanations not only from a calculated attempt to preserve a dubious strike, but also in some cases from an honest perception built on the foundations of "rational discrimination." Starting from a belief that black jurors are more hostile to law enforcement or less supportive of the death penalty, a prosecutor in a capital case may genuinely believe that he or she is perceiving hostility from prospective minority jurors.

In short, there is little reason to put much faith in *Batson* as a strong protection against the racial skewing of capital juries. This skewing should concern us not merely because it inevitably affects perceptions about the fairness of the capital justice system, but because there is strong reason to believe that the race of capital jurors affects the outcomes of capital trials (just as there is reason to believe that the race of victims and defendants does).[55]

3. Innocence.—Just as *McCleskey* effectively precludes challenges to racial discrimination in capital sentencing (at least challenges based on patterns of outcomes over time), the Court's doctrine also makes virtually no place for constitutional consideration of claims of innocence. In *Herrera v. Collins*,[56] the Court rejected petitioner's claim of actual innocence as a cognizable constitutional claim in federal habeas review. The Court held that while claims of actual innocence may in some circumstances open federal habeas review to other constitutional claims that would otherwise be barred from consideration, the innocence claims themselves are not generally cognizable on habeas. The Court assumed – without deciding – that a "truly persuasive" showing of innocence would constitute a constitutional claim and warrant habeas relief *if* no state forum were available to process such a claim.[57] But, the Court found that Herrera's claim failed to meet this standard. More recently, the Court has suggested just how high a threshold its (still hypothetical) requirement of a "truly persuasive" showing of innocence would prove to be. In *House v. Bell*,[58] the petitioner sought federal review with substantial new evidence challenging the accuracy of his murder conviction, including DNA evidence conclusively establishing that semen recovered from the victim's body that had been portrayed at trial as "consistent" with the defendant actually came from the victim's husband, as well as evidence of a confession to the murder by the husband and evidence of a history of spousal abuse. The Court held that this strong showing of

55. *See* Bowers, et al., *Death Sentencing in Black and White*, supra note 51.
56. 506 U.S. 390 (1993).
57. *Id.* at 417.
58. 547 U.S. 518 (2006).

actual innocence was the rare case sufficient to obtain federal habeas review for petitioner's *other* constitutional claims that would otherwise have been barred, because no reasonable juror viewing the record as a whole would lack reasonable doubt. But even this high showing was inadequate, concluded the Court, to meet the "extraordinarily high" standard of proof hypothetically posited in *Herrera*.[59]

This daunting standard of proof suggests that even if the Court does eventually hold that some innocence claims may be cognizable on habeas, such review will be extraordinarily rare. Thus, the problem of dealing with the possibility of wrongful convictions in the capital context (like the problem of dealing with patterns of racial disparity) has been placed in the legislative rather than the constitutional arena. The reliance on the political realm to deal with the issue of wrongful convictions is less troubling than such reliance on the issue of racial disparities, because there is far more public outcry about the former rather than the latter issue. But the problem of wrongful convictions in the capital context has proven to be larger and more intractable than might have been predicted. The large numbers of exonerations in capital cases may be due in part to the fact that many of the systemic failures that lead to wrongful convictions are likely to be more common in capital than other cases. Moreover, courts have been resistant both to providing convicted defendants with plausible claims of innocence the resources (including access to DNA evidence) necessary to make out their innocence claims, and to granting relief even when strong cases have been made. Finally, larger-scale reforms that might eliminate or ameliorate the problem of wrongful convictions are often politically unpopular, expensive, or of uncertain efficacy. (See section on "Erroneous Conviction of the Innocent," below.)

4. Counsel.—Unlike innocence, the problem of inadequate counsel has been squarely held to undermine the constitutional validity of a conviction. Despite the fact that "effective assistance of counsel" is a recognized constitutional right, the scope of the right and the nature of the remedy have precluded the courts from being able to ensure the adequacy of representation in capital cases. Perhaps in response to repeated accounts of extraordinarily poor lawyering in capital cases,[60] the Court recently has granted review and ordered relief in a series of capital cases raising ineffectiveness of counsel claims regarding defense attorneys' failure to investigate and present mitigating evidence with sufficient thoroughness[61] – a development that

59. *Id.* at 555 (quoting *Herrera*).

60. *See, e.g.,* James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2103-10 (2000); 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); Marcia Coyle, et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, Nat'l L. J., June 11, 1990, at 30.

61. *See* Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

might be viewed as raising the constitutional bar for attorney performance, at least in the sentencing phase of capital trials.[62] Nonetheless, constitutional review and reversal remain an inadequate means of ensuring adequate representation, both because the constitutional standard for ineffectiveness remains too difficult to establish in most cases, and because the remedy of reversal is too limited to induce the systemic changes that are necessary to raise the level of defense services.

One of the hurdles to regulating attorney competence through constitutional review is the legal standard for ineffective assistance of counsel. In crafting the governing standard in *Strickland v. Washington*,[63] the Court maintained that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system."[64] In light of the Sixth Amendment's more modest goal of ensuring that the outcome of a particular legal proceeding crosses the constitutional threshold of reliability, the Court established a strong presumption in favor of finding attorney conduct reasonable under the Sixth Amendment, in order to prevent a flood of frivolous litigation, to protect against the distorting effects of hindsight, and to preserve the defense bar's creativity and autonomy. This general deference was amplified for "strategic choices," which the *Strickland* Court described as "virtually unchallengeable."[65] Moreover, the Court declined to enumerate in any but the most general way the duties of defense counsel, instead deferring to general professional norms. Finally, the requirement that a defendant also prove "prejudice" from attorney error (a reasonable probability that the outcome of the trial would be different) necessarily immunizes many incompetent legal performances from reversal, if the guilt of the defendant is sufficiently clear.

The difficulty of meeting the legal standard, even in cases of manifestly incompetent counsel, is amplified by the procedural context in which such claims are made. Although there is often no legal bar to raising claims of ineffective assistance on direct appeal (when indigent defendants still have a constitutional right to appointed counsel), appellate review is appropriate only for record claims, where the basis for asserting ineffective assistance is a trial error evident from the transcript (such as failure to object to the

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62. Compare the outcomes and analysis in *Williams*, *Wiggins*, and *Rompilla* to the Court's earlier rejections of claims of ineffective representation in capital sentencing proceedings in Strickland v. Washington, 466 U.S. 668 (1984), and Burger v. Kemp, 483 U.S. 776 (1987).

63. 466 U.S. 668.

64. *Id.* at 689.

65. *Id.* at 690. Note that often the primary source of information in ineffective assistance litigation is trial counsel him- or herself, who will often have obvious reasons to resist the implication of ineffectiveness and testify accordingly. Hence, the enormous deference to "strategic choices" allows attorneys who wish to justify their decisions at a later date an obvious means to do so, though the Court did qualify its deference by noting that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

introduction of prejudicial evidence by the state). Claims of ineffective assistance, however, routinely involve the presentation of factual evidence beyond the record – e.g., evidence about information that the defense attorney failed to discover or to introduce, evidence about the likely answers to questions that the defense attorney failed to pursue at trial, or evidence about the defense attorney's interaction with the defendant. Such evidence must be developed in collateral proceedings, where the constitutional right to counsel runs out.[66] Although almost all states formally provide for counsel for indigent defendants in capital post-conviction proceedings,[67] there is virtually no monitoring of the performance of such counsel.[68] Moreover, should post-conviction counsel fail to perform adequately, *their* ineffectiveness does not preserve the claims that they are seeking to raise from state procedural bars, because there is no constitutional right to counsel in such proceedings.[69] The inadequacy of postconviction representation is compounded by the deferential review of state court decisions under the 1996 habeas statute (AEDPA), which seeks to ensure that state post-conviction proceedings are the primary venue for the litigation of non-record claims. The decline in the number of federal habeas grants of relief in the post-AEDPA era demonstrates the impact that AEDPA has had – an impact necessarily greatest on claims, like those of ineffective counsel, that will rarely see direct review.[70]

The constitutional review and reversal of individual capital convictions is by its nature an inadequate tool for achieving the institutional changes that are necessary in the provision of indigent defense services in capital cases. On the same day that the Court announced the constitutional standard in *Strickland*, it decided a companion case, *United States v. Cronic*,[71] which rejected a claim of ineffectiveness based on the circumstances faced by the

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66. *See* Murray v. Giarratano, 492 U.S. 1 (1989) (rejecting constitutional right to representation for indigent prisoners seeking postconviction relief in capital cases).

67. Alabama is a notable exception.

68. *See* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31, 66 (although some states have informal means of monitoring the performance of postconviction counsel, only Florida requires such monitoring).

69. In Coleman v. Thompson, 501 U.S. 722 (1991), post-conviction counsel's failure to file a timely appeal from the denial of post-conviction relief barred federal habeas review of petitioner's claim regarding the ineffectiveness of his trial counsel. The Court did, however, note without deciding the question whether "there must be an exception [to *Giarratano*] in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* at 755. The Court avoided the question by noting that the default in Coleman's case happened on appeal from a merits denial of post-conviction relief, and thus he had been afforded a forum for litigating his ineffectiveness claim.

70. *Compare* James Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-95* (2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/ (40% federal habeas reversal rate in capital cases during pre-AEDPA period), with Nancy King, et al., *Habeas Litigation in U.S. District Courts* (2007) (12.5% federal habeas reversal rate in capital cases during post-AEDPA period).

71. 466 U.S. 648 (1984).

defense attorney in litigating the case (lack of time to prepare, inexperience, seriousness of the charges, etc.). The Court insisted that a defendant must identify particular prejudicial errors made by counsel, rather than merely identify circumstances that suggest that errors would likely be made. *Cronic* has widely been held by courts to preclude Sixth Amendment challenges to the institutional arrangements (fee structures, caseloads, availability of investigative or expert services, lack of training and experience, etc.) that lead to incompetent representation, except in the most extraordinary of circumstances.[72] Without any ability to directly control fees, caseloads, resources, or training, courts conducting Sixth Amendment review of convictions can only reverse individual convictions based on individual errors. And even an extended period of substantial numbers of reversals on ineffectiveness grounds has failed to produce substantial reform in the provision of capital defense services. Despite the fact that "egregiously incompetent defense lawyering" was the most common reversible error in capital cases (39%) in a more than two-decade period (1973-1995) with an overall reversible error rate of 68%,[73] there is no reason to believe that these reversals promoted systemic reform. Indeed, the absence of systemic assurance of adequate counsel in capital cases formed a cornerstone of the American Bar Association's call for a moratorium on executions in 1997, two years after the end of the studied period.[74]

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The best evidence of the inadequacies of constitutional regulation of capital punishment is the sheer number of Justices who have either abandoned the enterprise, in whole or in part, or raised serious questions about its feasibility. The attempt to regulate the capital justice process through constitutional supervision is not in its infancy; the Court has had nearly four decades of experience in implementing it. Notably, two of the four Justices who dissented in *Furman* in 1972 eventually came full circle and repudiated the constitutional permissibility of the death penalty. Justice Blackmun did so in a long and carefully reasoned dissent from denial of certiorari, concluding twenty-two years after *Furman*, that "the death penalty experiment has failed."[75] Justice Powell did so in reviewing his career in an interview with his official biographer after his retirement. Justice Stevens, one of the three-Justice plurality that reinstituted the death penalty in the 1976 cases, this past Term has concluded that the death penalty should be ruled unconstitutional, though he has committed himself to *stare decisis* in

72. *See* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 Md. L. Rev. 1433 (1999).

73. Liebman, et al., *A Broken System*, *supra* note 70.

74. The text of the ABA moratorium and a copy of the supporting report are available at http://www.abanet.org/moratorium/resolution.html.

75. *Callins*, 510 U.S, at 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

applying the Court's precedents.[76] In explaining his own change in constitutional judgment, Justice Stevens offers a long list of concerns about the administration of the death penalty and notes that the Court's 1976 decisions relied heavily on the now untenable belief "that adequate procedures were in place that would avoid the [dangers noted in *Furman*] of discriminatory application . . . arbitrary application . . . and excessiveness."[77] Justices Scalia and Thomas have repudiated the Court's Eighth Amendment jurisprudence as hopelessly contradictory and unable to promote guided discretion. Justices Kennedy, Souter, and Breyer each have authored opinions raising a variety of serious concerns about the administration of capital punishment and the ability of constitutional regulation to prevent injustice.[78] Finally, Justices Sandra Day O'Connor and Ruth Bader Ginsburg have both given speeches questioning the soundness of the capital justice process on the ground of inadequate provision of capital defense services.[79] We can think of no other constitutional doctrine that has been so seriously questioned both by its initial supporters and later generations of Justices who have tried in good faith to implement it. Such reservations strongly suggest that the constitutional regulation of capital punishment has not succeeded on its own terms.

The question remains whether the Institute should undertake a new law reform project to ameliorate the consequences of the Supreme Court's unsuccessful regime of constitutional regulation of capital punishment, given that the Institute's prior law reform project in this area (MPC § 210.6) played a role in initiating and shaping the Court's current approach. Militating against such a course of action is the fact that the problems currently afflicting the capital justice process are not addressable in the absence of larger scale political or institutional changes that are either impossible or

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76. *See* Baze v. Rees, 128 S. Ct. 1520, 1552 (2008) (Stevens, J., concurring).

77. *Id.* at 1550.

78. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2661 (2008) (emphasizing "the imprecision [in the definition of capital murder] and the tension between evaluating the individual circumstances and consistency of treatment" that plague the administration of the death penalty as a reason for not extending the penalty to cases in which the victim does not die) (majority opinion joined by Stevens, Souter, Ginsburg, and Breyer); Kansas v. Marsh, 548 U.S. 163, 207-11 (2006) (emphasizing the risk of erroneous conviction in the current capital justice process as a reason to reject a capital scheme that required a death sentence when aggravating and mitigating evidence were in equipoise) (Souter dissent, joined by Stevens, Ginsburg, and Breyer); Ring v. Arizona, 536 U.S 584, 616 (2002) (emphasizing the continued division of opinion as to whether capital punishment is in all circumstances "cruel and unusual punishment" as currently administered as grounds for requiring jury sentencing in all capital cases) (Breyer concurrence for himself alone).

79. In 2001, Justice O'Connor criticized the administration of capital punishment on the grounds of wrongful conviction and inadequate provision of defense services. *See* Associated Press, *O'Connor Questions Death Penalty*, N.Y. Times, July 4, 2001. The same year, Justice Ginsburg told a public audience that she supported a state moratorium on the death penalty, noting that she had "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." Associated Press, *Ginsburg Backs Ending Death Penalty*, Apr. 9, 2001, available at http://www.truthinjustice.org/ginsburg.htm.

beyond the scope of an ALI-style law reform project. The scope of these problems – which we survey below – demonstrates that a more appropriate response by the Institute would be the withdrawal of § 210.6 with a statement calling for the rejection of capital punishment as a penal option.

II. The Politicization of Capital Punishment

Perhaps the most important feature of the landscape of capital punishment administration that imperils the success of any discrete law reform project is the intense politicization of the death penalty. Capital punishment (like the rest of criminal justice in the United States) is politicized *institutionally*, in that some or all of the most important actors in the administration of capital punishment are elected (with the exception of lay jurors). At the same time, capital punishment is politicized *symbolically*, in that it looms much larger than it plausibly should in public discourse because of its power as a focus for fears of violent crime and as political shorthand for support for "law and order" policies generally. These two aspects of politicization ensure that the institutional actors responsible for the administration of the capital justice process are routinely subject to intense pressures, which in turn contribute to the array of problems that we review below – e.g., inadequate representation, wrongful convictions, and disparate racial impact. There is little hope of successfully addressing these problems in the absence of profound change on the politicization front.

The vast majority of death penalty jurisdictions within the United States have elected rather than appointed prosecutors, and these prosecutors are usually autonomous decisionmakers in their own small locales (counties). Rarely is there any state or regional review of local decisionmaking or coordination of capital prosecutions. These simple facts of institutional organization generate enormous geographic disparities within most death penalty jurisdictions. In Texas, for example, Dallas County (Dallas) and Harris County (Houston), two counties with similar demographics and crime rates, have had very different death sentencing rates, with Dallas County returning 11 death verdicts per thousand homicides, while Harris County returns 19. One sees an even greater disjunction in Pennsylvania between Allegheny County (Pittsburgh) and Philadelphia County (Philadelphia), which have death verdict rates of 12 and 27 per thousand homicides, respectively. In Georgia, another significant death penalty state, the death sentencing rate ranges from 4 death verdicts per thousand homicides in Fulton County (Atlanta) to 33 in rural Muscogee County – a difference of more than 700%. Large geographic variations exist within many other states that are similarly uncorrelated with differences in homicide rates.[80] These

80. *See generally* James S. Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), available at http://www2.law.columbia.edu/brokensystem2/index2.html.

geographic disparities are troubling in themselves because they suggest that state death penalty legislation is unable to standardize the considerations that are brought to bear in capital prosecutions so as to limit major fluctuations in its application across the state. But these geographic disparities are also troubling because they may be one of the sources of the persistent racial disparities in the administration of capital punishment in many states. (See section on "Race Discrimination" below.)

In addition, the symbolic politics of capital punishment is very much at play in the election of local prosecutors. Candidates for local district attorney and state attorney general in a wide variety of jurisdictions have run campaigns touting their capital conviction records, even going so far as listing individual defendants sentenced to death.[81] As a practical matter, an elected prosecutor's capital conviction record should be a relatively small part of any prosecutor's portfolio, given the limited number of capital cases that any prosecutorial office will handle – a small fraction of all homicide cases, and an even smaller fraction of all serious crimes. (Remember that even Harris County, Texas, has a death verdict rate of only 1.9% of all homicides). Clearly, many prosecutorial candidates perceive that the voting public has a special interest in capital cases, both because of the fear generated by the underlying crimes that give rise to capital prosecution and because a prosecutor's support for capital punishment represents in powerful shorthand a prosecutor's "toughness" on crime. These general incentives are troubling in themselves, because they suggest that political incentives may exist to bring capital charges and to win death verdicts, quite apart from the underlying merits of the cases.[82] Even more troubling is the incentives that may exist to favor those in a position to provide campaign contributions or votes. The racial disparities in capital charging decisions favoring cases with white victims mirror the racial disparities in political influence in the vast majority of communities.[83]

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81. *See* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465, 474-75 (1999); Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 Geo. J. Legal Ethics 941 (1994).

82. The federal system presents a different picture with regard to the problem of political pressures on prosecutors, because federal prosecutors are appointed rather than elected. Moreover, unlike most local district attorneys, federal prosecutors must subject their decisions to seek the death penalty to centralized review by Main Justice. While federal cases may be different in important respects from state cases (in degree of politicization, among other things), the MPC was designed as a state penal code. Thus, any such differences are not relevant to the question of how the Institute should address the capacity of § 210.6 to address the problems common to most state death penalty systems.

83. The Baldus study on racial disparities in capital sentencing, see *supra* note 33, also found evidence that charging decisions were strongly correlated with the race of murder victims. These statistical findings parallel anecdotal evidence from lawyers in the field. Stephen Bright, Director of the Southern Center for Human Rights in Atlanta, Georgia, describes an incident in a Georgia county: "In a case involving the murder of the daughter of a prominent white contractor, the prosecutor contacted the contractor and asked him if he wanted to seek the death penalty. When the

Judges as well as prosecutors must face the intense politicization that surrounds the administration of capital punishment. Almost 90% of state judges face some kind of popular election.[84] Politicization of capital punishment in judicial elections has famously ousted Chief Justice Rose Bird and colleagues Cruz Reynoso and Joseph Grodin from the California Supreme Court,[85] as well as Justice Penny White from the Tennessee Supreme Court.[86] These high-profile examples are only the tip of the iceberg of political pressure, as no judge facing election could be unaware of the high salience of capital punishment in the minds of voters, especially in times of rising crime rates or especially high-profile murders. The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, after an official visit to the United States, reported that many of those with whom he spoke in Alabama and Texas, which both have partisan judicial elections, suggested that "judges in both states consider themselves to be under popular pressure to impose and uphold death sentences whenever possible and that decisions to the contrary would lead to electoral defeat."[87]

Of course, there is every hope and reason to expect that most judges will conscientiously endeavor to resist such pressures and decide cases without regard to political influences. Despite the fact that there is good reason to have confidence in the personal integrity of the individual men and women who comprise the elected judiciary, several statistical studies suggest that, in the aggregate, judicial behavior in criminal cases generally and capital cases in particular appears to be influenced by election cycles.[88] Moreover, in

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contractor replied in the affirmative, the prosecutor said that was all he needed to know. He obtained the death penalty at trial. He was rewarded with a contribution of $5,000 from the contractor when he successfully ran for judge in the next election. The contribution was the largest received by the District Attorney." Stephen B. Bright, *Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 453-54 (1995). This case was part of a larger pattern of prosecutors meeting the families of white murder victims to discuss the bringing of capital charges, but not with the families of black murder victims. *See id.*

84. Matthew Streb, *Running for Judge: The Rising Political, Financial and Legal Stakes of Judicial Elections* 7 (2007).

85. *See* Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 Judicature 365, 367 (1987) (describing television spot that encouraged voters to vote "three times for the death penalty; vote no on Bird, Reynoso, Grodin").

86. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 N.Y.U. L. Rev. 308, 314 (1997) (describing opposing party's political add "Vote for Capital Punishment by Voting NO on August 1 for Supreme Court Justice Penny White").

87. Press Statement, Professor Philip Alston, United Nations Human Rights Council Special Rapporteur on extrajudicial, summary or arbitrary executions, June 30, 2008. A recent political advertisement by a Texas trial court judge reflects the influence of public pressure to return death verdicts. Judge Elizabeth Coker's advertisement offers as the first reason to re-elect her the fact that she "cleared the way for the jury to issue a death sentence" in John Paul Penry's capital murder trial after it had been reversed by the U.S. Supreme Court for a second time. (A copy of the advertisement is on file with the authors.)

88. *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?* 48 Am. J. Pol. Sci. 247 (2004) (finding that trial judges standing for re-election tend to impose harsher sentences as elections approach); Melinda Gann Hall, *Electoral*

many jurisdictions, judges not only preside over and review capital trials, they also appoint lawyers, approve legal fees, and approve funding for mitigation and other expert services. These decisions, which are crucial to the capital justice process, are less visible but no less likely to be subject to political pressures.[89] Finally, in a few capital jurisdictions, elected judges actually impose sentences in capital cases through their power to override jury verdicts, and a comparison among these states strongly suggests that the degree of electoral accountability influences the direction of such overrides.[90] One potential avenue for mitigating the effect of political pressure on elected judges was foreclosed when the Supreme Court struck down, on First Amendment grounds, a state law barring a judicial candidate from announcing his or her views on disputed legal or political issues.[91] The Court's decision invalidated laws in nine states, and it has been interpreted broadly by lower courts, who have struck down other limitations on judicial candidates, including those on both fundraising and campaign promises, that were part of the law in many more states.[92]

Governors, too, are influenced by the intense politicization of capital punishment. Like prosecutors and judges, Governors have often campaigned on their support for the death penalty, emphasizing their willingness to sign

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Politics and Strategic Voting in State Supreme Courts, 54 J. Pol. 427 (1992) (finding that district-based elections influence justices in state supreme courts to join conservative majorities in death penalty cases in Texas, North Carolina, Louisiana, and Kentucky); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am. J. Pol. Sci. 360 (2008) (finding that judicial behavior in affirming death sentences is correlated with public opinion about the death penalty only in states where judges face election and not in states where judges are appointed); *but cf.* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465 (1999) (finding no system-wide evidence of the effect of state judicial election methods on capital case outcomes, but finding other evidence confirming the politically charged character of the death penalty in state courts).

89. For example, defense lawyers in the pool of those seeking appointments to capital cases contributed money to the election and re-election campaigns of judges in Harris County, Texas – the county responsible for the largest number of executions in the United States. *See* Amnesty International, *One County, 100 Executions: Harris County and Texas – A Lethal Combination* 10 (2007), available at http://www.amnesty.org/en/library/info/AMR51/125/2007.

90. Elected judges in Alabama and Florida have been far more likely to use their power to override jury verdicts to impose death when the jury has sentenced the convicted person to life in prison than to replace a jury verdict of death with one of life. In contrast, judges in Delaware, who do not stand for election, are far less likely to override in favor of death than to override in favor of life. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 793-94 (1995). Moreover, in Alabama, overrides in favor of death have appeared to be more frequent in election years. *See* Ronald J. Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urb. L. J. 239, 255-56 (1994).

91. Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

92. *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L. J. 1077, 1095-96 (2007).

death warrants.[93] While Governors are less implicated in the day-to-day workings of the capital justice process than prosecutors and judges, they play a crucial role in the exercise of clemency powers, which the Supreme Court has recognized as an important defense against conviction and execution of the innocent.[94] Some Governors, like George Ryan of Illinois, have not been afraid to use the clemency power to respond to concerns about wrongful conviction. However, the trend in the use of the clemency power in capital cases has been sharply downward in the decades since the reinstatement of capital punishment in 1976, at the same time that the trend in death sentencing and executions has been sharply upward.[95] The persistent high political salience of capital punishment, as reflected by its prominence at all levels of political discourse,[96] has no doubt affected the willingness of Governors to set aside death sentences.[97]

Finally, the politicization of the issue of capital punishment in the legislative sphere limits the capacity of legislatures to promote and maintain statutory reform. The kind of statutory reform that many regard as the most promising for ameliorating arbitrariness and discrimination in the application of the death penalty is strict narrowing of the category of those eligible for capital crimes. Justice Stevens argued that unfettered discretion to grant mercy based on open-ended consideration of mitigating evidence (which is commanded by the constitution) is not fundamentally inconsistent with guided discretion (which is also commanded by the constitution), provided that the category of the death eligible is truly limited to the "tip of the pyramid."[98] And the Baldus study reported that racial disparities were not evident in the distribution of death sentences for the category of the most aggravated murders, because death sentences were so common in this category.[99] A few states, like New York, have managed to maintain a

93. *See* Carol S. Steiker, *Capital Punishment and American Exceptionalism*, in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* 71 (2005) (noting examples of John K. Van de Kamp in California, Jim Mattox in Texas, and Bob Martinez in Florida).

94. See the discussion of Herrera v. Collins, 506 U.S. 390 (1993), in the "Constitutional Regulation" section, *supra* notes 55-59 and accompanying text.

95. *See* Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. Rev. 349 (2003).

96. Even presidential politics is profoundly marked by capital punishment, though the federal government in general, and the President in particular, plays a very small role in the administration of capital punishment, other than through the appointment of Justices to the Supreme Court.

97. One dramatic example of the political costs of clemency is the 1994 Pennsylvania gubernatorial race between Republican Tom Ridge and Democrat Mark Singel. Singel had been chairman of the state's Board of Pardons, which had released an inmate who was arrested on murder charges a month before the election. Overnight, Singel went from leading Ridge by 4 points to trailing him by 12: Singel's commutation recommendation lost him the election. *See* Tina Rosenberg, *The Deadliest D.A.*, N.Y. Times, July 16, 1995.

98. See the discussion of Stevens' opinion in Walton v. Arizona, 497 U.S. 639 (1990), in the "Constitutional Regulation" section, *supra* notes 32-36 and accompanying text.

99. See the discussion of the Baldus study in the section on "Race Discrimination," *infra* at 27-28.

relatively narrow death penalty.[100] However, most states have been unwilling to restrict the scope of the death penalty, and the continued inclusion of broad aggravators like felony murder, pecuniary gain, future dangerousness, and heinousness (or its equivalent) preclude the strict narrowing approach in most jurisdictions.

Moreover, even if a jurisdiction were able to pass a truly narrow death penalty (something more likely in an abolitionist jurisdiction reinstating the death penalty than in a retentionist jurisdiction sharply curtailing a current statute), the political pressure to expand the ambit of the death penalty over time will likely prove politically irresistible. The tendency of existing statutes, even already broad ones, to expand over time through the addition of new aggravating factors has been well documented.[101] When former Governor Mitt Romney introduced legislation drafted by a blue-ribbon commission to reinstitute capital punishment in Massachusetts, supporters of the draft emphasized the very narrow ambit of proposed statute. However, a symposium of experts organized to discuss the proposed statute noted the problem of what one of them called "aggravator creep" (an analogy to "mission creep" referred to in military contexts), in which "[a] statute is passed with a list of aggravating factors, and then structural impulses often push that list to become longer and longer as new aggravators are added."[102] The most eloquent case for the inevitability of "aggravator creep" has been made by lawyer and novelist Scott Turow. Turow, a former federal prosecutor who supported the death penalty for most of his life, wrote a (nonfiction) book describing how his later pro bono work on the capital appeal of a wrongfully convicted man and his service on the Illinois Governor's Commission to reform the death penalty convinced him to vote as a Commission member for abolition rather than reform. As a moral matter, Turow remains persuaded that a narrow death penalty is both morally permissible and desirable. But he has come to see that expansion is inevitable, with the arbitrariness and potential for error that expansive capital statutes necessarily entail:

> The furious heat of grief and rage the worst cases inspire will inevitably short-circuit our judgment and always be a snare for the innocent. And the fundamental equality of each survivor's loss, and

100. Indeed, New York even refused to re-authorize the penalty after its highest court invalidated the state's death penalty statute on easily remediable state constitutional grounds. But states like New York and New Jersey (the only state to legislatively abolish capital punishment since its reinstatement in 1976) are outliers. They did not participate significantly in the practice of capital punishment in the modern era even while formally retaining the death penalty.

101. Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in Austin Sarat, ed., *The Killing State: Capital Punishment in Law, Politics, and Culture* (1999); Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 Pepperdine L. Rev. 1 (2006).

102. *See Symposium: Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report. Panel One – The Capital Crime*, 80 Ind. L. J. 35, 35 (2005) (statement of Edwin Colfax).

> the manner in which the wayward imaginations of criminals continue to surprise us, will inevitably cause the categories for death eligibility to expand, a slippery slope of what-about-hims.[103]

The foregoing suggests that politicization of the death penalty, both within the capital justice process and more broadly in the realm of public policy and discourse, threatens both the integrity of individual cases and the prospects for reform. This politicization is the most far-reaching, important, and intractable reason to be dubious of the prospects for success of an ALI reform project in this area.

III. Race Discrimination

Race discrimination has cast a long shadow over the history of the American death penalty. During the antebellum period, race discrimination was not merely a matter of practice but a matter of law, as many Southern jurisdictions made the availability of the death penalty turn on the race of the defendant or victim.[104] After the Civil War, the discriminatory Black Codes were largely abandoned, but discrimination in the administration of capital punishment persisted. Discrimination permeated both the selection of those to die as well as the selection of those who could participate in the criminal justice process. African Americans were more frequently executed for non-homicidal crimes, were more likely to be executed without appeals, and were more likely to be executed at young ages.[105] Discrimination was most pronounced in Southern jurisdictions. The most obvious discrimination occurred in capital rape prosecutions, as such prosecutions almost uniformly targeted minority offenders alleged to have assaulted white victims, and the numerous executions for rape post-1930 (455) were entirely confined to Southern jurisdictions, border states, and the District of Columbia.[106] Until the early 1960s, the differential treatment of both African-American offenders and African-American victims was attributable in part to the exclusion of African-Americans from jury service, again largely (although not exclusively) concentrated in Southern and border-state jurisdictions.

When the Supreme Court first signaled its interest in constitutionally regulating capital punishment in the early 1960s, several Justices issued a dissent from denial of certiorari indicating their willingness to address whether the death penalty is disproportionate for the crime of rape.[107]

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103. Scott Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* 114 (2003).

104. Stuart Banner, *The Death Penalty: An American History* (2002).

105. William J. Bowers, *Legal Homicide: Death as Punishment in America*, 1864-1982, 67-87 (1984).

106. Marvin E. Wolfgang, *Race Discrimination in the Death Sentence for Rape*, in William J. Bowers, *Executions in America* 113 (1974).

107. Rudolph v. Alabama, 375 U.S. 889, 889-91 (1963) (Goldberg, J., joined by Douglas and Brennan, JJ., dissenting from denial of certiorari).

Although these Justices did not mention race in their brief statement, they were undoubtedly aware of the racially-skewed use of the death penalty to punish rape. The NAACP Legal Defense Fund thereafter sought to document empirically race discrimination in capital race prosecutions with an eye toward challenging such discrimination in particular cases. The first significant study, produced by Professor Marvin Wolfgang and others at the University of Pennsylvania, found both race-of-the-defendant and race-of-the-victim discrimination in the administration of the death penalty for rape (after controlling for non-racial variables); African-American defendants convicted of raping white females faced a greater than one-third chance of receiving a death sentence whereas all other racial combinations yielded death sentences in about two percent of cases.[108]

The Wolfgang study did not ultimately lead to success in litigation, and the Eighth Circuit's rejection of the study as a basis for constitutional relief, authored by then-Judge Blackmun – foreshadowed the Supreme Court's subsequent denial of relief in *McCleskey*, discussed above.[109] In particular, the judicial response to the statistical demonstration of discrimination was to insist on a showing by the defendant of improper racial motivation in *his* case, a requirement that insulates widespread discriminatory practices from meaningful judicial intervention. But the Wolfgang study did contribute to the accurate perception that the prevailing administration of the death penalty was both arbitrary and discriminatory, and thus contributed to *Furman*'s invalidation of existing statutes and the "unguided" discretion they entailed.

The central question today is whether efforts to guide sentencer discretion – such as the one embodied in the MPC death-sentencing provision – successfully combat the sort of discrimination reflected in the Wolfgang study. The current empirical assessment is "no" – that race discrimination still plagues the administration of the death penalty, though the evidence suggests that race-of-the-victim discrimination is of a much greater magnitude than race-of-the defendant discrimination. The more difficult question is whether the persistent role of race in capital decisionmaking can be significantly reduced or eradicated, whether through statutory efforts to narrow the reach of the death penalty or other means.

The Baldus study, described above, found that defendants charged in white-victim cases, on average, faced odds of receiving a death sentence that were 4.3 times higher than the odds faced by similarly situated defendants in black-victim cases.[110] Other studies have similarly pointed to a robust relationship between the race of the victim and the decision to seek death and to obtain death sentences (also controlling for non-racial variables). Leigh Bienen produced a study of the New Jersey death penalty that reflected

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108. Wolfgang, *supra* note 106, at 117 (Table 4-2).
109. Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).
110. *See* Part I, *supra*, at p. 13-14.

greater prosecutorial willingness to seek death in white victim cases.[111] Baldus, et al, studied capital sentences in Philadelphia and found both race-of-the-victim and race-of-the-defendant discrimination.[112] Given the remarkably different histories and demographics of Philadelphia and Georgia, it is surprising that the Philadelphia study found a magnitude of race-of-the-victim effects quite similar to the magnitude found in the Georgia study addressed in *McCleskey*. A federal report issued in 1990, which summarized the then-available empirical work on the effects of race in capital sentencing (28 studies), likewise found consistent race-of-the-victim effects (in 82% of the studies reviewed), particularly in prosecutorial charging decisions.[113]

Apart from these statistical studies, a broad scholarly literature often highlights American racial discord as an important explanatory variable of American exceptionalism with respect to capital punishment – the fact that the United States is alone among Western democracies in retaining and actively implementing the death penalty.[114] Such works point to the fact that executions are overwhelmingly confined to the South (and states bordering the South), the very same jurisdictions that were last to abandon slavery and segregation, and that were most resistant to the federal enforcement of civil rights norms.

Professor Frank Zimring, in his recent broad assessment of the American death penalty, argued that the regional persistence of "vigilante values" strongly contributes to American retention of capital punishment.[115] Many scholars have speculated that contemporary state-imposed executions might serve a role similar to extralegal executions of a previous era, and Zimring observes that "the substantive core of the support for death as a penalty seems to be an ideology of capital punishment as community justice that appears most intensely today in these areas where extreme forms of vigilante justice thrived in earlier times."[116] A recent article in the American Sociological Review presents empirical data supporting the claim that current death sentences might be linked to such vigilante values.[117] The authors report a positive relationship between death sentences, "current racial threat" (reflected in the size of a jurisdiction's African-American population), and

111. Leigh Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 Rutgers L. Rev. 27 (1988).

112. David Baldus, et al., *Race Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Finding from Philadelphia*, 83 Cornell L. Rev. 1638 (1998).

113. U.S. General Accounting Office, Death Penalty Sentencing (Feb. 1990).

114. Carol S. Steiker, *Capital Punishment and American Exceptionalism, in American Exceptionalism and Human Rights*, ed. Michael Ignatieff (2005).

115. Franklin E. Zimring, *The Contradictions of American Capital Punishment* (2003).

116. *Id.* at 136.

117. David Jacobs, et al., *Vigilantism, Current Racial Threat, and Death Sentences*, 70 Amer. Soc. Rev. 656 (2005).

"past vigilantism" (reflected in past lynching activity). The authors conclude that: "our repeated findings that this relationship is present support claims that a prior tradition of lethal vigilantism enhances recent attempts to use the death penalty as long as the threat posed by current black populations is sufficient to trigger this legal but lethal control mechanism."[118]

Supporters of the death penalty would certainly resist the claim that the death penalty remains in place *because of* underlying conscious or unconscious racial prejudice. Moreover, the high level of executions in Southern jurisdictions correlates not only with racial factors (such as past race discrimination and contemporary racial tensions) but also with other potential explanatory factors such as high rates of violent crime and the prevalence of fundamentalist religious beliefs. Some empirical literature, though, modestly supports the claim that racially discriminatory attitudes may account for some of the contemporary support for the death penalty.[119]

The most significant efforts to reduce the effect of race in capital proceedings have focused on narrowing the class of death eligible offenses and guiding sentencer discretion at the punishment phase of capital trials. The first solution – restricting the death penalty to the most aggravated cases – appears promising, because the Baldus study found that race effects essentially disappear in such cases given the very high frequency of death sentences in that range (in the eighth category of cases within the study, with the most aggravation, jurors imposed the death penalty 88% of the time[120]). Indeed, the MPC death sentencing provision could be viewed as one such effort to narrow the death penalty because it requires a finding of an aggravated factor (beyond conviction for murder) to support the imposition of death.

The problem, though, played out over the past thirty years, is that no state has successfully confined the death penalty to a narrow band of the most aggravated cases. Death eligibility in prevailing statutes remains breathtakingly broad, as aggravating factors or their functional equivalent often cover the spectrum of many if not most murders. The MPC provision is representative in this regard, allowing the imposition of death based on any of eight aggravating factors, including murders in the course of several enumerated felonies,[121] and any murder deemed "especially heinous,

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118. *Id.* at 672

119. Several empirical studies have explored the subtle role of race discrimination in death penalty attitudes. *See, e.g.,* Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. of Research in Crime & Delinquency 202 (1994) (reporting empirical study in which two indexes of racial prejudice were significantly linked to greater support for the death penalty among whites, even after controlling for relevant demographic and attitudinal variables); Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 Social Psychology Quarterly 67 (1991) (empirical analysis finding that racial prejudice significantly predicts both support for the death penalty and tougher crime control policies).

120. *McCleskey*, 481 U.S. at 325 n.2 (Brennan, J., dissenting).

121. § 210.6(3)(e).

atrocious or cruel, manifesting exceptional depravity."[122] One reading of the MPC provision is that it excludes only those murders of "ordinary" heinousness, atrociousness, cruelty, or depravity, and prosecutors and especially jurors might be reluctant to deem any intentional deprivation of human life as "ordinary" along those dimensions.

The failure to achieve genuine narrowing is partly a matter of political will in light of the constant political pressure to expand rather than restrict death eligibility in response to high-profile offenses (consider the expansion of the death penalty for the crime of the rape of a child). But the failure also stems from the deeper problem identified by Justice Harlan (discussed above), that it remains an elusive task to specify the "worst of the worst" murders in advance. Any rule-like approach to narrowing death eligibility will require jettisoning factors such as MPC's "especially heinous" provision; but those factors often capture prevailing moral commitments – some offenses are appropriately regarded as among the very worst by virtue of their atrociousness, cruelty, or exceptional depravity. At the same time, many objective factors taken in isolation seem appropriately narrow (such as MPC § 210.6(3)(c), the commission of an additional murder at the time of the offense), but collectively these factors establish a broad net of death eligibility. The breadth of death eligibility in turn invites and requires substantial discretion, particularly in prosecutorial charging decisions, which permits racial considerations to infect the process.

The prospect of a meaningful legislative remedy to address race discrimination seems quite remote. After *McCleskey*, legislative energies were directed toward fashioning a response to the discrimination reflected in the Baldus study. At the federal level, the Racial Justice Act, which would have permitted courts to consider statistical data as evidence in support of a claim of race discrimination within a particular jurisdiction, repeatedly failed to find support in the U.S. Senate. Many state legislatures have considered similar legislation (including Georgia, Illinois, and North Carolina), but to date only Kentucky has enacted such a provision. The Kentucky provision, like the failed federal bill, allows a defendant to use statistical data to establish racial bias in the decision to seek death, though the question remains whether racial bias likely contributed to the decision to seek death *in the defendant's case*.[123] To date, no death-sentenced inmate in Kentucky or elsewhere has had his death sentence reversed on such grounds.

Apart from its lack of political appeal, racial justice legislation seems inadequately suited to address the problems reflected in the empirical data.

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122. § 210.6(3)(h).

123. The Kentucky provision states: "No person shall be subject to or given a sentence of death that was sought on the basis of race. . . . A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought." Ky. Rev. Stat. Ann. § 252.3 (2001).

On a practical level, the numerous variables involved in particular cases make it difficult to demonstrate racial motivation or bias at the individual level, even if such discrimination is evident in the jurisdiction as a whole. Introducing evidence of system-wide bias might cause a court to look more closely at the facts surrounding a particular prosecution (especially with a burden-shifting provision), but the sheer "thickness" of the facts in a particular prosecution will likely permit courts to find inadequate proof of bias in case after case. Indeed, racial justice legislation risks legitimating capital systems that are demonstrably discriminatory by ostensibly providing a remedy when in fact none is forthcoming. More broadly, the litigation focus of racial justice acts fails to address the underlying problems. Many of the most troublesome cases in which race influenced prosecutorial or jury decisionmaking are those in which no death sentence was sought or obtained because of the minority status of the victim. Courts are (appropriately) powerless to compel decisionmakers to produce death sentences in such cases, and the troubling differential treatment is irremediable. Notwithstanding their increased political participation generally, minorities remain significantly underrepresented in the two roles that might make a difference: as capital jurors[124] and as elected district attorneys.[125] The combined influences of discretion, underrepresentation, historical practice, and conscious or unconscious bias, make it extraordinarily difficult to disentangle race from the administration of the American death penalty.

IV. Jury Confusion

Another significant post-*Furman* effort to solve the problem of arbitrariness and discrimination has been to impose structure and order on the ultimate life-death decision. The universal adoption of bifurcated proceedings – with a punishment phase focused solely on whether the defendant deserves to die – was embraced in hopes of producing reasoned moral decisions rather than impulsive, arbitrary, or discriminatory ones. In this respect, the post-*Furman* experiment has been focused on rationalizing the death sentencing process through a combination of statutory precision and focused jury instructions. Such provisions would precisely enumerate relevant aggravating and mitigating factors and carefully explain burdens of proof, the role of mitigation, inappropriate bases for decision (e.g., "mere sympathy"), and the process for reaching a final decision.

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124. Empirical research has found a strong association between life verdicts and the presence of at least one African-American male on the jury in capital cases involving African-American defendants and white victims. William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 192 Table 1 (2001) (asserting "black male presence effects").

125. *See* Jeffrey Pokorak, *Probing the Capital Prosecutor's Perspective: Race and Gender of the Discretionary Actors,* 83 Cornell L. Rev. 1811 (1998) (discussing significance of underrepresentation of racial minorities as District Attorneys).

As noted above, the *constitutional* requirements respecting states' efforts to channel sentencer discretion are quite minimal. Indeed, once states have ostensibly "narrowed" the class of death-eligible defendants via aggravating circumstances, states need not provide any additional guidance to sentencers as they make their life-or-death decision.[126] The central question as a matter of policy and practice is whether the post-*Furman* experiment with guided discretion has resulted in improved and more principled decisionmaking. The available empirical evidence – largely developed by the Capital Jury Project (CJP) – is discouraging along these lines.

Over the past eighteen years, the CJP has collected data from over a thousand jurors who served in capital cases with the goal of understanding the decision-making process in capital cases. CJP interviewers spent hours with individual jurors exploring the factors contributing to their decisions and their comprehension of the capital instructions in their cases. The CJP designed its questions to determine whether the intricate state capital schemes adopted post-*Furman* actually reduce arbitrariness in capital sentencing by controlling sentence discretion. Dozens of scholarly articles have been published based on the CJP data, and much of the research has documented the failure of jurors to understand the guidance embodied in the sentencing instructions and verdict forms they receive.[127] By collecting data from numerous jurisdictions (fourteen states), the CJP project has been able to identify not only idiosyncratic defects in particular state statutes but endemic flaws in jury decisionmaking, such as the propensity of jurors to decide punishment during the guilt-innocence phase of the trial,[128] their frequent misapprehension of the standards governing their consideration of mitigating evidence,[129] and their general moral disengagement from the death penalty decision.[130] Jurors tend to misunderstand the consequences of a life-without-possibility-of-parole verdict, and, in jurisdictions that permit the alternative of a life-with-parole verdict, jurors consistently underestimate the

126. *See, e.g.,* Zant v. Stephens, 462 U.S. 862 (1983).

127. *See, e.g.*, Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 Brooklyn L. Rev. 1011 (2001); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); William J. Bowers, Marla Sandys, & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

128. *See, e.g.*, William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043, 1089-90 (1995).

129. *See, e.g.,* Bentele & Bowers, *supra* note 127, at 1041 (suggesting that mitigating evidence plays a "disturbingly minor role" in jurors' deliberations in capital cases across jurisdictions).

130. *See, e.g.,* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 Stan. L. Rev. 1447 (1997) (describing how prevailing capital sentencing practices assist jurors in overcoming their resistance to imposing the death penalty in part by diminishing their sense of responsibility for their verdict).

length of time a defendant will remain in prison if not sentenced to death.[131] A significant number of jurors serve in capital cases notwithstanding their unwillingness to consider a life verdict,[132] and many jurors who have served on capital trials simply are unable to grasp the concept of mitigating evidence.[133] Other findings of the CJP point to the skewing of capital juries through death-qualification,[134] the significance of the racial composition of the jury in capital decisionmaking,[135] and the particular problems posed in jurisdictions (such as Florida and Alabama) where juries and judges share responsibility for capital verdicts.[136]

The empirical findings of the CJP are disheartening because they reflect widespread, fundamental misunderstanding on the part of capital jurors. Perhaps some of the findings can be discounted by the fact that the jurors' explanations of their role and the governing law were offered well after their actual jury service (and perhaps the jurors' understanding of their sentencing instructions at the time of interviews did not correspond perfectly to their understanding of the instructions at the time of their deliberations). But even a superficial review of instructions given in capital cases today reveals the unnecessary technical complexity of prevailing practice.[137] Jurors are told about the role of aggravating factors, their ability (in many jurisdictions) to consider non-statutory aggravators, the role of mitigation, and so on. They are then asked to weigh or balance aggravation against mitigation or to decide whether mitigating factors are sufficiently substantial to call for a sentence less than death.

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131. John H. Blume, et al., *Lessons from the Capital Jury Project*, in *Beyond Repair? America's Death Penalty* 167 (Stephen Garvey, ed. 2003); *see also* Theodore Eisenberg, et al., *The Deadly Paradox of Capital Jurors*, 74 S. Cal. L. Rev. 371 (2001) (discussing jurors' misperceptions about the meaning of life sentences).

132. Blume, et al*., supra* note 131, at 174.

133. Craig Haney, *Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223, 1229 (1995) (reporting that "less than one-half of our subjects could provide even a partially correct definition of the term 'mitigation,' almost one-third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in 10 was still so mystified by the concept that he or she was unable to venture a guess about its meaning") (citing Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 Law & Hum. Behav. 411, 420-21 (1994)).

134. *See, e.g.*, Marla Sandys and Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in *America's Experiment with Capital Punishment***,** James Acker, et al., ed.(2nd ed. 2003).

135. Bowers, et al., *supra* note 124.

136. Wanda D. Foglia and William J. Bowers, *Shared Sentencing Responsibility: How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision-Making*, 42 Crim. L. Bulletin 663 (2006).

137. In Alabama, for example, the allocation of burden regarding proof of mitigating circumstances is explained as follows: "[w]hen the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence." Ala. Code § 13A-5-45(g).

These sorts of efforts to tame the death penalty decision do not necessarily ensure more principled or less arbitrary decisionmaking. Casting the decision in terms of "aggravation" and "mitigation" and requiring jurors to "balance" or "weigh" these considerations might falsely convey to the jurors that their decision is a mechanical or mathematical one, rather than one requiring moral judgment. As one commentator lamented, "giv[ing] a 'little' guidance to a death penalty jury" poses the risk that "jurors [will] mistakenly conclude[] that they are getting a 'lot' of guidance" thus diminishing "their personal moral responsibility for the sentencing decision."[138]

More fundamentally, the problem identified by Justice Harlan in *McGautha* casts a shadow over any effort to rationalize the decision whether to impose death. In many jurisdictions, jurors are permitted to consider both statutory and non-statutory aggravating factors (including victim impact evidence), making the grounds for their ultimate decision virtually limitless. At the same time, every jurisdiction – responding to the Supreme Court's direction – currently permits unbridled consideration of mitigating factors, which likewise undercuts any effort to structure the death penalty decision. In the thirty-five or so years of constitutional regulation since *Furman*, states have reproduced the open-ended discretion of the pre-*Furman* era, but have packaged it in the guise of structure and guidance. In the absence of *substantive* limits on sentencer discretion, the complicated and confusing *procedural* means of implementing that discretion cannot reduce arbitrary or discriminatory decisionmaking. It can only obscure the jury's current responsibility for deciding, essentially on any criteria, whether a defendant should live or die. In this respect, reform of contemporary capital statutes should focus on reducing complexity and communicating clearly the sentencer's awesome obligation to make an irreducible moral judgment about the defendant's fate. The states' failure to make such reforms is largely attributable to their misguided belief that the complicated overlay of instructions is somehow constitutionally compelled. It is also partly attributable to the fact that such reform efforts – and the return to the pre-*Furman* world that they would represent – would amount to a concession that Justice Harlan was right: that statutory efforts (like the MPC death-sentencing provision) are likely unable to reduce the arbitrary imposition of the death penalty.

V. The Inadequacy of Resources, Especially Defense Counsel Services, in Capital Cases

Capital prosecutions are expensive. A number of studies have tried to ascertain the relative expense of capital prosecutions vis-a-vis non-capital

138. Joseph L. Hoffman, *Where's the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137, 1159 (1995).

prosecutions, using a variety of methodologies.[139] What emerges from these studies is a consensus that capital prosecutions generate higher costs at every stage of the proceedings, and that the total costs of processing capital cases are considerably greater than those of processing non-capital cases that result in sentences of life imprisonment (or other lengthy prison terms), even when the costs of incarceration are included. Although the data are often incomplete or difficult to disaggregate, it appears that the lion's share of additional expenses occur during the trial phase of capital litigation, as a result of a longer pre-trial period, a longer and more intensive voir dire process, longer trials, more time spent by more attorneys preparing cases, more investigative and expert services, and an expensive penalty phase trial that does not occur at all in non-death penalty cases. Appellate and especially post-conviction costs are also considerably greater than in non-capital cases, though they tend to make up a smaller share of the total expense of capital litigation.

Despite the very large costs that are currently incurred in the administration of capital punishment, there is also good reason to believe that the capital process remains substantially under-funded, especially in the area of defense counsel services. The best reference point for what constitutes minimally adequate defense counsel services in capital cases has been provided by the American Bar Association. The ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, originally adopted in 1989 and revised in 2003, offer specific guidance on such matters as the number and qualifications of counsel necessary in capital cases, the nature of investigative and mitigation services necessary to the defense team, and the performance standards to which the defense team should be held. The *Guidelines* also instruct about the need for a "responsible agency" (such as a Public Defender organization or its equivalent) to recruit, certify, train and monitor capital defense counsel. In addition, there are separate Guidelines regarding the appropriate training for capital counsel, the need to control capital defense caseloads, and the need to ensure compensation at a level "commensurate with the provision of high quality legal representation."[140] The Supreme Court has repeatedly endorsed the ABA's performance standards for capital defense counsel as a key

139. *See, e.g.,* 2008 study of "The Cost of the Death Penalty in Maryland" by the Urban Institute; 2008 study of "The Hidden Death Tax: The Secret Costs of Seeking Execution in California," by the ACLU of Northern California; 2006 study by the Death Penalty Subcommittee of the Committee on Public Defense of the Washington State Bar Association (no title); 2004 study of "Tennessee's Death Penalty: Costs and Consequences," by Comptroller of the Treasury; 2003 Study of "Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections" by the Legislative Division of Post Audit, State of Kansas; 2003 "Study of the Imposition of the Death Penalty in Connecticut" by the Connecticut Commission on the Death Penalty; 2002 study of "The Application of Indiana's Capital Sentencing Law," by the Indiana Criminal Law Study Commission; 2001 "Case Study on State and County Costs Associated with Capital Adjudication in Arizona" by the Williams Institute.

140. Guideline 9.1B

benchmark for assessing the reasonableness of attorney performance in a series of recent cases addressing claims of ineffective assistance of counsel in capital cases.[141]

Nonetheless, it is obvious that the vast majority of states do not comply with the ABA *Guidelines*, and many do not come even close. In response to concerns about the lack of fairness and accuracy in the capital justice process, the ABA called in 1997 for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. In 2001, the ABA created the Death Penalty Moratorium Implementation Project, which in 2003 decided to examine several states' death penalty systems to determine the extent to which they achieve fairness and provide due process. Among other things, the Project specifically investigated the extent to which the states were in compliance with the ABA *Guidelines* for capital defense counsel services. The first set of assessments were published near the end of 2007, and the record of compliance with the ABA *Guidelines* was extremely low: of the 8 states studied,[142] not a single state was found to be fully "in compliance" with any aspect of the ABA *Guidelines* studied. For the 5 guidelines that were studied over the 8 states, there were 15 findings of complete noncompliance and 23 findings of only partial compliance (in 2 cases, there was insufficient information to make an assessment).

For example, the assessment described Alabama's indigent defense system as "failing" due to the lack of a statewide indigent defense commission, the minimal qualifications and lack of training of capital defense counsel, the failure to ensure the staffing required by the Guidelines (2 lawyers, an investigator, and a mitigation specialist), the failure to provide death-sentenced inmates with appointed counsel in state post-conviction proceedings, and the very low caps on compensation for defense services.[143] While Alabama had the worst record of compliance among the states studied, Indiana had the best record. Nonetheless, the Project founded that Indiana, too, "falls far short of the requirements set out in the ABA *Guidelines*." In particular, the report pointed to inadequate attorney qualification and monitoring procedures, unacceptable workloads, insufficient case staffing, and lack of an independent appointing authority (such as a Public Defender office). Indiana is not alone in this latter failing, as fewer than 1/3 of the 36

141. *See Williams*, 529 U.S. at 396 (citing ABA Standards for Criminal Justice); *Wiggins*, 539 U.S. 510 (citing 1989 ABA death penalty Guidelines); *Rompilla*, 545 U.S. 374 (citing 1989 and 2003 death penalty Guidelines).

142. The 8 states assessed by the ABA Moratorium Implementation Project were Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. The reports are available at http://www.abanet.org/moratorium/.

143. The caps for capital defense services in Alabama are $2,000 for direct appeal, and $1,000 for state post-conviction proceedings.

states that currently retain the death penalty have statewide capital defense systems as called for by the ABA.[144]

The 2003 revisions to the ABA *Guidelines* insist that the Guidelines are not "aspirational" but rather are the minimum necessary conditions for the operation of the capital justice process in a fashion that adequately guarantees fairness and due process. Unfortunately, the record of compliance with the Guidelines even among the states most committed to providing adequate defense services remains poor. New York, which provided for generous levels of capital defense funding when it reinstated capital punishment in 1995, slashed that allocation by almost a third three years later, and then maintained funding at the reduced rate until its capital statute was judicially invalidated in 2004.[145] When the New York State Assembly held hearings that year on whether to again reinstate the death penalty, experts warned that the invalidated statute failed to comply with the ABA *Guidelines* for the appointment of counsel in postconviction proceedings.[146] The record of state compliance with the *Guidelines* overall suggests that the states agree with the ABA that the *Guidelines* are not aspirational – not because the states believe that they are required, but rather because they simply do not aspire to meet them.

Failure to meet (or even to aspire to meet) the ABA *Guidelines* should not necessarily be written off as simple intransigence. The costs involved in providing the resources necessary for a minimally fair capital justice process can be staggering. Instructive in this regard is the Brian Nichols prosecution in Atlanta. Nichols was charged in a 54-count indictment for an infamous courthouse shooting and escape that killed a judge, a court reporter, a sheriff's deputy, and a federal agent. In the investigative stage of the case, Nichols' appointed counsel quickly generated costs totaling $1.2 million, wiping out Georgia's entire indigent defense budget and requiring the postponement of the trial.[147] Note that this price tag covered only the early investigative costs and did not include the costs of Nichols' trial or the years of appellate and post-conviction costs that will follow if a death sentence is imposed (note: Nichols has been convicted and the sentencing phase is ongoing as of this writing, Nov. 20, 2008). The provision of the resources necessary for fair capital trials and appeals may simply not be possible, or at least not possible without substantial diversion of public funds from other sources – something state legislatures have shown themselves again and again unwilling to do in the context of providing indigent defense services. Moreover, when excellent defense services are provided to capital defendants

144. *See* Shaila Dewan, *Executions Resume, as Do Questions of Fairness*, N.Y. Times, May 7, 2008.

145. James R. Acker, *Be Careful What You Ask For: Lessons from New York's Recent Experience with Capital Punishment*, 32 Vermont L. Rev. 683, 752 (2008).

146. *Id.*

147. *See* Shaila Dewan & Brenda Goodman, *Capital Cases Stalling as Costs Grow Daunting*, N.Y. Times, Nov. 4, 2007.

at every stage of the criminal process, the process may become endlessly protracted. As Frank Zimring has most aptly observed, "A nation can have full and fair criminal procedures, or it can have [a] regularly functioning process of executing prisoners; but the evidence suggests it cannot have both."[148]

The ABA's Moratorium Implementation Project should sound two significant cautionary notes for the ALI. First, the ABA has already done the important work of promulgating norms and standards for the capital justice process. After a great deal of study, reflection, and consultation with experts, the ABA has made comprehensive and sensible recommendations for the reform of capital sentencing proceedings, and there seems little that an ALI study could usefully add. Second, even if the ALI came up with different or additional reform proposals, the lack of resources or the political will to generate the necessary resources stands in the way of any substantial reform of the capital justice process. The widespread failures to adequately fund defense counsel services, which are foundational for the implementation of most other reforms, should make the ALI dubious of the prospects for success of a large-scale law reform project in this area.

VI. Erroneous Conviction of the Innocent

Although there is debate about what constitutes a full "exoneration," it is beyond question that public confidence in the death penalty has been shaken in recent years by the number of people who have been released from death row with evidence of their innocence. The Death Penalty Information Center, an anti-death penalty organization, keeps a list of exonerated capital defendants that now totals 129 for the years since 1973.[149] While it is difficult to extrapolate from the number of known exonerations to the "real" rate of wrongful convictions in capital cases (for the same reason that it is difficult to extrapolate from the number of professional athletes who test positive for steroids to the rate of steroid use among athletes), reasonable estimates range from 2.3% to 5%.[150]

Because exonerations of death-sentenced prisoners are such dramatic events, they have generated extensive study of the causes of wrongful convictions, in capital cases and more generally. There is widespread

148. Franklin E. Zimring, *Postscript: The Peculiar Present of American Capital Punishment*, in Stephen P. Garvey, ed., *Beyond Repair? America's Death Penalty* 228 (2003).

149. For inclusion on DPIC's innocence list, a defendant must have been convicted and sentenced to death, and subsequently either: a) their conviction was overturned AND i) they were acquitted at retrial or ii) all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence. *See* http://deathpenaltyinfo.org/node/70.

150. *See* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases* (forthcoming 2008 J. Empirical Legal Stud.); Samuel R. Gross, *Convicting the Innocent* (forthcoming 2008 Ann. Rev. L. & Soc. Sci.); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate* 97 J. Crim. L. & Criminology 761 (2007).

consensus about the primary contributors to wrongful convictions: eyewitness misidentification; false confessions; perjured testimony by jailhouse informants; unreliable scientific evidence; suppression of exculpatory evidence; and inadequate lawyering by the defense.[151] Professor Samuel Gross of Michigan has studied wrongful convictions in both capital and non-capital cases, and he has made a convincing case that erroneous convictions occur disproportionately in capital cases because of special circumstances that affect the investigation and prosecution of capital murder. These circumstances include pressure on the police to clear homicides, the absence of live witnesses in homicide cases, greater incentives for the real killers and others to offer perjured testimony, greater use of coercive or manipulative interrogation techniques, greater publicity and public outrage around capital trials, the "death qualification" of capital juries which makes such juries more likely to convict, greater willingness by defense counsel to compromise the guilt phase to avoid death during the sentencing phase, and the lessening of the perceived burden of proof because of the heinousness of the offense.[152]

In light of the well-known causes of wrongful convictions and the great public concern that exonerations generate, especially in capital cases, one might expect that this would be an area in which remedies should be relatively easy to formulate and achieve without much resistance in the judicial or legislative arenas. In fact, remedies have proven remarkably elusive, despite the clarity of the issues and degree of public sympathy. First, it did not prove easy for those who were eventually exonerated by DNA to get access to DNA evidence or to get relief even *after* the DNA evidence excluded them as the perpetrators of the crimes for which they were convicted. A recent study of the first 200 people exonerated by post-conviction DNA testing revealed that approximately half of them were refused access to DNA testing by law enforcement, often necessitating a court order. After being exonerated by DNA evidence, 41 of the 200 required a pardon, usually because they lacked any judicial forum for relief, and at least 12 who made it into a judicial forum were denied relief from the courts despite their favorable DNA evidence.[153]

Second, these early difficulties cannot be written off as preliminary kinks that have been worked out of the system. While the vast majority of states have now passed legislation requiring greater preservation of and access to DNA evidence, the ABA Moratorium Implementation Project's recent assessment of 8 death penalty states included an assessment of how well these states were complying with the ABA's recommendations

151. The Innocence Project at Cardozo Law School tracks the causes of wrongful conviction in cases of DNA exonerations. *See* http://www.innocenceproject.org/understand/.

152. *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 Buff. L. Rev. 469 (1996).

153. *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008).

regarding preservation of and access to biological evidence, and the provision of written procedures, training and disciplinary procedures for investigative personnel. As in the context of the provision of defense counsel services, findings of complete non-compliance or only partial compliance with the ABA's recommendations were commonplace, while full compliance was rare. Similar resistance can be found to implementing reforms aimed at preventing some of the most common causes of wrongful conviction, such as videotaping police interrogations to prevent false confessions, changing photo identification procedures to avoid misidentification, subjecting jailhouse snitch testimony to greater pretrial scrutiny, and performing external independent audits of crime labs. Resistance to providing adequate funding for capital defense services has already been documented above,[154] and the failure of defense lawyers to challenge misidentifications, false confessions, and unreliable scientific evidence has been an important element in the generation of wrongful convictions.

This resistance has a variety of causes. Some law enforcement groups resist changes in investigative procedures with which they have been comfortable, such as interrogations and identification procedures. Moreover, they may oppose proposals for greater monitoring and disciplining of investigative personnel because they fear that misunderstandings may lead to misuse of such procedures. Some reforms are expensive, such as investing in the infrastructure for reliable preservation of biological material, while others promise to be too open-ended in the resources that they might require, such as improving defense counsel services.

Once again, as in the provision of adequate defense counsel services, there is not very much question about the general types of improvements that would be helpful in reducing wrongful convictions; rather, there appears to be an absence of political will to implement them (or to do so in an expeditious fashion). Moreover, a number of the factors catalogued by Samuel Gross that render capital prosecutions more prone to error are simply inherent in the nature of capital crimes and not obviously subject to amelioration by changing the capital justice process. These circumstances militate against the undertaking of a reform project by the ALI and support the suggestion that the ALI instead call for the rejection of capital punishment as a penal option.

VII. Inadequate Enforcement of Federal Rights

The preceding sections discuss the limits of constitutional regulation of the death penalty to counter many of the institutional and structural challenges of the American death penalty. Some of the challenges are simply beyond the reach of courts and "law," such as the difficulties described above in guiding sentencer discretion and combating the influence of race in

154. See discussion in "Resources" section, *supra* at 34-37.

discretionary decisionmaking; other institutional problems, such as the inadequate level of resources at capital trials and the failure to safeguard against wrongful convictions, require the involvement and leadership of political branches. The constitutional edifice that remains secures only limited benefits, and, regrettably, those limited benefits are frequently undermined by inadequate enforcement mechanisms, particularly the stringent limitations on the availability of federal habeas review of state capital convictions.

Over the past three decades, coinciding with the Court's inauguration of constitutional regulation of the death penalty, the availability of federal habeas review has been sharply curtailed. The initial limitations were Court-crafted, but they were followed by the most significant statutory revision of federal habeas in American history, the adoption of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The net effect of these judicial and statutory refinements has been to dilute the limited constitutional protections that the Court has developed.

The case for strong federal habeas review of state criminal convictions is rooted in experience. During the early part of the 20th century, state trial courts, especially in the South, often made little pretense of ensuring basic fairness, and state appellate courts appeared more than willing to ratify those truncated proceedings. After the infamous denial of habeas relief to Leo Frank,[155] whose mob-dominated murder trial led to his death sentence despite his likely innocence, the Court granted habeas relief to five African Americans who had been convicted of murder and sentenced to death following a race riot in Arkansas.[156] The Arkansas case illustrated the potential for state hostility to federal rights: the five defendants were represented by a single lawyer who never consulted with them, and the forty-five minute trial before an all-white jury, in front of an angry white mob, included no defense motions, witnesses, or defendant testimony.[157] As the Court extended most of the constitutional criminal protections in the Bill of Rights to state criminal defendants in the 1950s and 1960s, the Court adjusted the scope of federal habeas as well. Perceived state court hostility to federal constitutional protections, especially those rights newly-recognized and extended to state proceedings, led the Court to expand the federal habeas forum and to relax procedural barriers to federal review of federal claims.

Beginning in the1970s, though, the availability of federal habeas review was significantly limited. Most importantly, the Court tightened the federal enforcement of defaults imposed in state court, so that the failure of state inmates to preserve federal claims within state court forecloses later consideration of those claims in federal court as well – with extremely

155. Frank v. Mangum, 237 U.S. 309 (1915).

156. Moore v. Dempsey, 261 U.S. 86 (1923).

157. Larry W. Yackle, *Capital Punishment, Federal Courts, and the Writ of Habeas Corpus*, in *Beyond Repair? America's Death Penalty* 65 (Stephen Garvey, ed. 2003).

narrow exceptions.[158] Strict enforcement of state procedural default rules has significantly limited the effectiveness of the federal forum. Indeed, some courts have even applied stringent default rules against fundamental claims of excessive punishment – including the prohibition against executing persons with mental retardation.[159] The enforcement of procedural defaults in this context means, as a practical matter, that the execution of all persons with mental retardation is not constitutionally prohibited; the prohibition extends only to those persons with mental retardation who have successfully navigated state procedural rules and preserved their claim for state or federal review. In this respect, limitations on the availability of federal habeas review promote misconceptions about prevailing capital practices; the public is likely to believe that the Court's decisions announcing absolute prohibitions – such as the *Atkins* exemption – effectively end the challenged executions, whereas the reality is more qualified and complicated.

The near blanket prohibition against litigating claims defaulted in state proceedings encourages state courts to resolve claims on procedural grounds, and state courts have occasionally imposed defaults opportunistically to deny enforcement of the federal right. Moreover, strict enforcement of defaults in federal courts is particularly troublesome in cases involving claims defaulted on state postconviction review (typically claims alleging ineffective assistance of counsel at trial or prosecutorial misconduct). As noted above, because state inmates have no constitutional right to counsel on state habeas, they have no right to *effective* assistance of counsel in that forum. Ordinarily, in cases involving attorney error at trial, the one avenue for reviving a procedural defaulted claim is for the inmate to demonstrate that he had been denied constitutionally adequate representation; but if the attorney error occurs on state habeas, the inmate is held to his attorney's mistakes and cannot seek relief under the Sixth Amendment. Given the inadequate resources and monitoring of state postconviction counsel, it is not uncommon for death-sentenced inmates to forfeit substantial claims on state habeas, and the current regime of federal habeas review permanently forecloses consideration of such claims. The strict enforcement of procedural defaults ensures that many death-sentenced inmates will be executed notwithstanding constitutional error in their cases.

The Court has also crafted limitations on the ability of inmates to benefit from "new" law on federal habeas. The Court's nonretroactivity doctrine, set forth in *Teague v. Lane*,[160] is ostensibly designed to prevent excessive dislocation whenever the Court identifies a new constitutional rule; its roots are traceable to the Warren Court era, when the Court's vast expansion of constitutional criminal procedure threatened to throw open the

158. *See* Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).

159. *See, e.g.,* Hedrick v. True, 443 F.3d 342 (4th Cir. 2006) (defaulting defendant's claim of ineligibility for the death penalty based on mental retardation).

160. 489 U.S. 288 (1989).

jailhouse doors. But in its more recent incarnation, the nonretroactivity doctrine has blocked retroactive application of many decisions far less dramatic or path-breaking than the Warren Court rulings which had given rise to the doctrine. The Supreme Court, as well as lower federal courts, have rejected as impermissibly "novel" claims that are barely distinguishable from previously decided cases.[161] Apart from generating extraordinary time-consuming and complex litigation, *Teague* has thwarted the development and evolution of constitutional principles surrounding the administration of capital punishment. Federal habeas courts are discouraged from modestly extending or refining established precedents, so all constitutional realignment must come from the Supreme Court itself (on direct review of state criminal convictions). This institutional arrangement is a built-in headwind against adaptation to changing circumstances, and given the Eighth Amendment's focus on "evolving standards of decency," the *Teague* doctrine is at cross-purposes with the underlying substantive law of the death penalty.

The most significant reform of federal habeas is embodied in AEDPA's unprecedented limitations on the availability and scope of federal review. AEDPA imposes a strict statute of limitations for filing in federal court,[162] stringent limitations on successive petitions,[163] and restrictions on the availability of evidentiary hearings to develop facts relating to an inmate's underlying claims.[164] These procedural barriers have proven formidable, and many inmates have lost their opportunity for federal review of their federal claims on these grounds. The most far-reaching of AEDPA's provisions, though, has been the elimination of de novo review for federal claims addressed on their merits in state court. In its place, AEDPA requires, as a condition for relief, that the state court 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."[165] This statutory revision essentially requires federal courts to defer to wrong but "reasonable" decisions by state courts. It insulates from review all decisions but those that demonstrably flout established rules. In many areas of constitutional doctrine, this "reasonableness" standard of review amounts to "double deference" on federal habeas. Numerous constitutional doctrines, including the Court's standards for reviewing the effectiveness of counsel or a prosecutor's alleged discriminatory use of peremptory challenges, already require deferential review of the underlying conduct; state courts are not expected to grant relief unless trial counsel's performance

161. *See, e.g.,* Butler v. McKellar, 494 U.S. 407 (1990) (holding that the rule prohibiting police-initiated interrogation concerning a separate offense in the absence of counsel, Arizona v. Roberson, 486 U.S. 675 (1988), was novel notwithstanding an earlier decision that had addressed a virtually identical Fifth Amendment violation, Edwards v. Arizona, 451 U.S. 477 (1981)).

162. 28 U.S.C. § 2244(d)(1).

163. 28 U.S.C. § 2244(b).

164. 28 U.S.C. § 2254(e)(2).

165. 28 U.S.C. § 2254(d)(1).

wildly departed from established norms or a prosecutor's race-neutral explanation defies belief. When these cases get to federal habeas, AEDPA imposes an *additional* level of deference. For Sixth Amendment claims concerning the right to effective counsel, the question is not whether trial counsel's performance was unreasonably deficient – it is whether the state court's determination of reasonableness was *itself* unreasonable. This relaxation of federal review of state decisionmaking essentially insulates all but the most egregious denials of rights in state court.

AEDPA's significance in curtailing federal enforcement of federal rights is reflected in the substantial decline in habeas relief since AEDPA's enactment.[166] It is also reflected in numerous federal habeas decisions that explicitly recognize that relief might be required under de novo review. For example, the Fifth Circuit Court of Appeals recently reversed a District Court grant of relief on a claim of impermissible judicial bias.[167] The state court judge, at petitioner's capital trial, had indicated in open court that he was "doing God's work to see that [Petitioner] gets executed;" the judge also taped a postcard to the bench depicting the infamous "hanging judge" Roy Bean, altering it to include his own name and self-bestowed moniker, "The Law West of the Pedernales;" and the judge engaged in extensive ex parte contacts with the prosecution, threatened to remove petitioner's attorneys, and laughed out loud during the defense presentation of mitigating evidence at the punishment phase. The panel opinion recognized that such conduct might require relief under de novo review, but reversed the District Court because it could not find the state court's rejection of the bias claim unreasonable.[168] AEDPA's mandated deference, which ratifies unconstitutionally obtained death-sentences absent gross negligence on the part of the state court, removes the strongest incentive for state courts to toe the constitutional mark and allows executions to go forward despite acknowledged constitutional error.

Unlike several of the institutional and structural obstacles to the fair and accurate implementation of the death penalty described above, the scope of federal habeas is subject to legislative and judicial revision. But it seems unlikely that meaningful reform or restoration of federal habeas will be forthcoming. The politicization of criminal justice issues makes it extraordinarily difficult to expand review, and all of the pressures run in the other direction. In the absence of reform, though, the Court's minimalist constitutional regulation becomes virtually irrelevant; though enormous resources are expended in federal habeas, and the litigation results in delayed executions, most of the energies are directed toward overcoming procedural

166. *See supra*, note 70.

167. Buntion v. Quarterman, 524 F.3d 664 (5th Cir. 2008).

168. *Id.* at 67 ("Although we might decide this case differently if considering it on direct appeal, given our limited scope of review under AEDPA, we are limited to determining whether the state court's decision was objectively unreasonable.").

barriers rather than enforcing the underlying substantive rights of death-sentenced inmates.[169] Despite the articulation of many constitutional protections, the enforcement is relegated to state courts, and at least some of those courts, particularly in active executing states, are notably unsympathetic to the Court's regulatory efforts. Indeed, in a Texas case recently twice reversed by the Court, Texas judges repeatedly voiced their prerogative to disagree with the Court's constitutional conclusion.[170]

The inadequacy of federal habeas review to enforce federal rights is lamentable in itself; but it also generates the same legitimation problem described above. Despite the Court's seeming regulation of the American death penalty via its declaration of substantive rights, the procedural mechanisms currently in place under-enforce those protections. Casual observers of the death penalty will likely regard the death sentences and executions that emerge from the current process to be the product of careful, extensive review by many courts. The reality, though, is much different. States have essentially the first and last opportunity to focus on the constitutional merits of inmates' claims. After that review, the many years of legal wrangling is primarily spent navigating the procedural maze and deferential forum that federal habeas has become. Thus, even if increased constitutional regulation of the death penalty could solve many of the deficiencies of the prevailing system, which appears unlikely, the inadequate mechanisms for enforcing that regulation would in any case undermine the effort.

VIII. The Death Penalty's Effect on the Administration of Criminal Justice

The preceding sections highlight the constitutional, institutional, and structural obstacles to the fair and accurate administration of the death penalty. But the problems with the American death penalty are not confined to the capital system. The current battles over the scope of the death penalty may have consequences for the broader American criminal justice scheme. In particular, the presence of the death penalty may tend to normalize and stabilize the extremely punitive sanctions prevailing on the non-capital side; the constitutional regulation of the death penalty – with its explicit death-is-

169. Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. L. Forum 315.

170. Ex parte Smith, 132 S.W.3d 407, 427 (Tex. Crim. App. 2004) (Hervey, J., concurring) ("[H]aving decided that no federal constitutional error occurred in this case, we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case.") (summarily reversed in Smith v. Texas, 543 U.S. 37 (2004)); Ex parte Smith, 185 S.W.3d 455, 474 (Tex. Crim. App. 2006) (Hervey, J., concurring) ("[W]e are not bound by the view expressed in *Penry II* that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case.") (on remand from summary reversal) (reversed in Smith v. Texas, 127 S. Ct. 1686 (2007)).

different caveat – has further insulated non-capital practices from significant scrutiny; concerns about inefficiencies in the capital system – particularly delays between trial and sentence – have led to significant restrictions on the habeas rights of non-capital inmates; and the demands of the capital system drain resources from the non-capital defense system and the state and federal judiciaries more generally. A decision about the Institute's stance on capital punishment must take account of these spillover costs imposed by the current capital regime.

Capital punishment constitutes only a tiny part of the criminal justice system. Fewer than 50 people were executed and slightly over 100 people were sentenced to death nationwide in 2007, while considerably over two million people remain incarcerated in the non-capital criminal justice system. The death penalty does not even constitute a substantial part of our system for punishing *homicide*. In a country that has experienced between 15,000 and 20,000 homicides per year nationwide over the past decade, the number of capital sentences and executions last year looks particularly trivial. The relative paucity of death sentences and executions does not disappear if we focus on the high-water marks for death-sentencing and executions in the modern era, with highs for death sentences in the 300s (per year, nationwide) and executions hovering close to 100 (per year, nationwide).

At the same time, the non-capital system has experienced extraordinary growth. Over the past three decades, the country has embarked on an unprecedented experiment with mass incarceration. The jail and prison population of the United States has grown eight-fold over the past 35 years. In addition to imprisoning the most inmates in absolute terms worldwide, the United States also has an incarceration rate that is five to eight times higher than other Western industrialized nations; the United States has recently achieved the dubious distinction of imprisoning more than one out of every hundred of its adults. Much of the expansion of the prison population is attributable to more punitive sentencing regimes, especially for non-violent offenders. National spending on incarceration has reached unprecedented levels, with estimates that states and the federal government spend over $65 billion annually to house the more than 2.3 million inmates held nationwide. Moreover, the rate of incarceration in minority populations is particularly high, with one in nine black males between the ages of 20 and 34 behind bars.

Despite the enormous social and political costs of our mass incarceration policies, reform efforts have been unable to reverse the remarkable trends. The presence of the death penalty, especially the recent focus on the possibility of executing innocents, might well undermine the prospects for non-capital reform. First, the very existence of the death penalty blunts arguments about the excessive punitiveness of non-capital sanctions. Indeed, death penalty opponents approvingly argue in *favor* of harsh incarceration sanctions (including life without parole) as a way of undermining support for the death penalty. In this respect, the death penalty

deflects arguments about the ways in which lengthy incarceration (and the absence of alternative sanctions) imposes substantial costs and undermines human dignity: lengthy incarceration is viewed as a "lesser" evil instead of as an evil in itself. Second, the innocence focus wrought by the death penalty and projected on to the rest of the criminal justice system tends to emphasize the *selection* of those to be incarcerated rather than on the normative underpinnings of our incarceration policy. Tinkering with the investigation and prosecution of crime will leave untouched the prevailing punitive framework. The one important link between wrongful convictions and excessive punitiveness is frequently missed in public and professional debate: the presence of extremely harsh sanctions encourages plea-bargaining, and when the plea-bargain discount is sufficiently high, excessive punishments encourage false confessions. But few advocates of reform have sought to attack the problem of wrongful convictions by reducing the harshness of our current sanctions. The focus on innocence in contemporary death penalty discourse also tends to legitimate and entrench the justice of harshly punishing the guilty. The more precariously-held values of fairness, non-discrimination, adequate representation, and procedural regularity are endangered by equating injustice with inaccuracy.

The death penalty's deflection of policy-based criticisms of our extraordinarily punitive non-capital system is exacerbated by the Court's highly-visible constitutional regulation of the death penalty. Over the past decade, the Court has issued three landmark decisions limiting the reach of the death penalty. Two of the decisions, *Atkins v. Virginia*[171] and *Roper v. Simmons*,[172] held that the death penalty was disproportionate as applied to particular offenders – juveniles and persons with mental retardation. The third decision, *Kennedy v Louisiana*,[173] held that the death penalty was constitutionally disproportionate as applied to a particular offense – the rape of a child – though the Court's reasoning was considerably broader, indicating that the death penalty is disproportionate as applied to any non-homicidal ordinary crime (distinguishing offenses against the State such as espionage and treason). Together, these decisions reflect a considerable broadening of the criteria available to discern evolving standards of decency, including evidence of elite, professional, and world opinion. Two of the cases – *Atkins* and *Simmons* – overruled relatively recent decisions, and, along with *Kennedy*, the decisions signal an unprecedented willingness of the Court to rein in capital practices deemed excessive.

But at the same time the Court has demonstrated a willingness to protect against disproportionate punishment on the capital side, it has wholly deferred to states in their imposition of harsh terms of incarceration. In between its pronouncements in *Atkins* and *Simmons*, the Court upheld the

171. 536 U.S. 304 (2002).
172. 543 U.S. 551 (2005).
173. 128 S. Ct. 2641 (2008).

operation of California's "three-strikes-you're-out" law that resulted in a 25-years-to-life sentence for a repeat offender convicted of attempting to steal three golf clubs from a golf course pro shop.[174] In a choice of quotation that reveals just how difficult the non-capital proportionality test is meant to be, the Court reached back to repeat its observation from an earlier case that the proportionality principle might "come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment."[175]

There may be strong institutional and practical reasons for providing robust proportionality review in capital cases while deferring to extremely punitive and rare non-capital sentences. But the death-is-different principle might contribute to a false sense of judicial oversight, especially in light of the enormous visibility and salience of the death penalty both within the United States as a symbol of crime policy and in the broader world as a symbol of American punitiveness. In this respect, the Court's capital jurisprudence offers a means to legitimate American penal policy by ameliorating some of its harshest aspects and portraying the Court as a counter-majoritarian scrutinizer of state penal policy, while leaving the fundamental pillars of America's true penal exceptionalism intact. The United States' status as the world's leading incarcerator remains untouched by the constitutional regulation of capital punishment, yet such regulation gets a disproportionate degree of attention because of the power of the death penalty as a symbol in numerous different arenas. As a result, constitutional regulation of capital punishment both obscures and normalizes the excesses of American penal policy. The problems of mass incarceration, racial disparities in punishment, and the endless war on drugs are obscured because they inevitably fall into the shadows when the spotlight of national and world attention are focused by the Court on highly dramatic issues regarding American death penalty practices. Moreover, extremely lengthy sentences are normalized by capital litigation: successful capital litigants, after all, are almost always "rewarded" with sentences of life without possibility of parole. Even the lengthiest sentences lose their horror when they are so avidly sought and so victoriously celebrated by the (rarely) successful capital litigant. In these ways, the narrow successes of capital litigants under the Eighth Amendment offer little comfort to and indeed likely limit the chances of successful challenges by the vastly larger group of non-capital litigants. Of course, a proponent of our severe non-capital policies would not find worrisome any reinforcement of such policies. But the many critics of our current trend toward mass incarceration should pay attention to the ways in

174. Ewing v. California, 538 U.S. 11 (2003).

175. *Id.* at 21 (internal quotation marks omitted) (quoting Rummel v. Estelle, 445 U.S. 263 (1980) (upholding a life sentence with possibility of parole for a repeat offender convicted of obtaining $120.75 by false pretences)).

which the retention of capital punishment may entrench and legitimate that trend.

As noted above, concerns about the administration of the death penalty – particularly the length of time between the imposition of death sentences and executions – led to stringent procedural and substantive limits on the availability of federal habeas for state prisoners. Although the title of the legislation – the Antiterrorism and Effective Death Penalty Act – suggests a purpose unrelated to the status of non-capital inmates, the restrictions were made to apply globally. In addition, many of the restrictions imposed by AEDPA – its one-year statute of limitations, its absolute ban on same-claim successive petitions, its higher bar for filing new-claim successive petitions, its onerous exhaustion provisions, and its restrictions on the availability of federal evidentiary hearings – actually impose special hardships on non-capital inmates; unlike those sentenced to death, indigent non-capital inmates have no statutory right to counsel in state or federal habeas proceedings. As difficult as it is for death-sentenced inmates to navigate AEDPA's procedural maze, the burdens on non-capital inmates are virtually insurmountable. The already low-rate of relief for non-capital inmates pre-AEDPA (1 in 100) has apparently dropped considerably post-AEDPA (1 in 341) according to a recent study.[176] Thus, concerns about the skewed incentives on the capital side – in which inmates have every reason to delay seeking relief in federal court – have generated restrictions for the vastly larger group of non-capital inmates whose incentives are quite different. More generally, this example illustrates the risk of capital litigation driving broader criminal justice policy, and the peculiar dynamic of a small subset of American prisoners framing the debate over the appropriate operation of larger institutional frameworks.

Although death penalty inmates are a small fraction of the overall prison population, the death penalty extracts a disproportionately large share of resources at every stage of the proceedings. As discussed above, capital trials are enormously more expensive than their non-capital counterparts, and the decision to pursue a capital sentence often has significant financial consequences for the local jurisdiction. Indigent defense is notoriously underfunded in both capital and non-capital cases, and the resources devoted to the capital side often come directly at the expense of the rest of the indigent defense budget. In this respect, death penalty prosecutions threaten to compromise an already over-burdened and under-funded indigent defense bar, in addition to imposing daunting costs on local prosecutors and their county budgets. The political pressures and high emotions in capital cases can sometimes overwhelm sober assessments. The famous Texas litigation involving John Paul Penry reflects this dynamic, as his three capital trials

176. *See* Nancy J. King, Fred L. Cheesman II, & Brian J. Ostrom, *Habeas Litigation in U.S. District Courts: An empirical study of habeas corpus cases filed by state prisoners under the Antiterrorism and Effective Death Penalty Act of 1996*, National Center for State Courts, Aug. 21, 2007, at p. 9.

generated millions in county expenses before he pled to a life sentence (after three reversals of his death sentences). Following the Supreme Court's invalidation of his first sentence, the local District Attorney declared to the press, "if I have to bankrupt this county, we're going to bow up and see that justice is served."[177] More recently, the Chair of the Florida Assessment Team for the ABA Death Penalty Moratorium Implementation Project reported that "all members of the Assessment Team, including those representing the state, were deeply worried that the expenditure of resources on capital cases significantly detracts from Florida's ability to render justice in *non*-capital cases."[178]

In addition to these financial costs, the death penalty places enormous burdens on state and federal judicial resources. In some states, such as California, the burdens imposed by capital cases on appellate courts compromise the ability of those courts to manage their competing commitments on the civil and non-capital side. The burdens imposed are not merely a function of the sheer time required for capital litigation; the frenetic, last-minute litigation in active executing states exacts its own toll on judges and court personnel and likely negatively affects the courts' fulfillment of their non-capital obligations. The possibility of even greater disruption along these lines looms with the increased likelihood that AEDPA's "opt-in" provisions[179] will become operative. Those provisions give fast-track status to death-sentenced inmates from states that create a system for the appointment and compensation of competent counsel in state postconviction. Under the opt-in provisions, once a state has satisfied the opt-in requirements, the state receives the benefit of a shorter statute of limitations for death-sentenced inmates filing in federal habeas (six months instead of one year) and the federal courts are under strict deadlines for ruling on claims, including the congressionally-imposed requirement that capital cases take priority over the rest of the federal docket. A literal reading of the opt-in provisions would require federal courts to halt on-going proceedings (trials, hearings, etc.) until capital habeas petitions are resolved ("The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters."[180]). In this respect, the death penalty makes extraordinary demands on the American courts and threatens the quality of justice for all litigants, including those outside the capital process.

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177. Steve Brewer, *Penry likely to face retrial, officials say*, The Huntsville Item, Jul. 1, 1989, p.3A.

178. Christopher Slobogin, *The Death Penalty in Florida*, Vanderbilt University Law School Public Law and Legal Theory Working Paper 08-51 (November, 2008).

179. 28 U.S.C. § 2261.

180. 28 U.S.C. § 2266(a).

Conclusion

The foregoing review of the unsuccessful efforts to constitutionally regulate the death penalty, the difficulties that continue to undermine its administration, and the structural and institutional obstacles to curing those ills forms the basis of our recommendation to the Institute. The longstanding recognition of these underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment, either in the form of a new draft of § 210.6 or a more extensive set of proposals. Rather, these conditions strongly suggest that the Institute recognize that the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.

Professors Carol and Jordan Steiker,
The Beginning of the End

4

The Beginning of the End?

Carol S. Steiker and Jordan M. Steiker

Is nationwide abolition of capital punishment a realistic prospect in the United States? This question has taken on new urgency as the United States has become increasingly isolated in its retention and use of the death penalty. Most nations of the world—including many third-world countries—have abolished the death penalty, leaving the United States as the *only* Western industrialized nation in the world to formally retain the practice. Moreover, our retention is not merely formal: even recently, after death sentences and executions have declined for several years in a row, we have witnessed, on average, approximately one execution each week in the United States. The continued willingness of the United States to reject the growing consensus of the West that capital punishment constitutes a violation of human rights has transformed the death penalty from a dramatic but nonetheless tiny aspect of domestic criminal justice policy into a highly charged symbol of America's respect for its peer nations and for international human rights.

This new significance of America's death penalty practices is mirrored in recent decisions of the U.S. Supreme Court. In constitutionally outlawing the execution of offenders with mental retardation, the Court made pointed and controversial reference (albeit in a footnote) to the amicus brief filed on behalf of the European Union.[1] In its decision a few years later, outlawing the execution of juvenile offenders, the Court expanded on the significance of the actions of other constitutional democracies with respect to the death penalty.[2] Moreover, the Court noted that in the dozen years preceding its opinion, only six other countries had acknowledged executing juvenile offenders (the Democratic Republic of the Congo, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen) and that even *these* countries

(hardly exemplars of constitutional democracy) had formally abandoned the practice, leaving the United States completely alone in the world.[3] The Court's legal analysis in these cases reflects what can no longer be denied as a political matter: our capital punishment practices now reach far beyond death row, affecting America's self-representation and moral authority in the world, at a time when that authority is already tarnished.

Perhaps in part because of these developments, the prospects for nationwide abolition have recently changed, looking brighter than they have at any time since the Supreme Court reinstated capital punishment in 1976,[4] after outlawing it (temporarily) in 1972 in its landmark decision in *Furman v. Georgia*.[5] A decade ago, in the waning years of the 1990s, had we been asked what the prospects were for nationwide abolition of the death penalty, our answer would have been clear and firm: not a chance. Not in our lifetimes or our children's lifetimes. Now, approaching 2010, our answer is different. We would not say that abolition is inevitable, but we *would* say that it is possible. In what follows, we explain our newfound cautious optimism about the prospects for nationwide abolition. We explain why abolition, if it occurs, will not follow the pattern that has been most common in the rest of the West. We then map what we believe is the most likely course that abolition would take in the United States. We conclude with consideration of the implications of our views for abolitionist lawyers and activists, including some reasons for trepidation about the possible road ahead.

The Road Less Traveled: Why American Abolition Must Follow a Different Path

European abolition of capital punishment has been neither fast nor monolithic. Portugual and the Netherlands initiated nationwide abolition of the death penalty for ordinary crimes in the mid-nineteenth century, and the Scandinavian countries followed in the first few decades of the twentieth. Germany and Italy abolished capital punishment for ordinary crimes in their postwar constitutions after surrendering to the Allied powers in 1945. Most of Europe, however, had capital punishment on the books well into the second half of the twentieth century, though executions were generally on the decline. The phenomenon that we refer to as "European abolition" has largely been an accomplishment of the past 30–40 years, since the late 1960s. While there was often a gap between abolition for

"ordinary" crimes and abolition for all crimes (including military crimes, treason, and the like), by the early 2000s virtually all of Europe had completely abolished the death penalty in all forms, and this abolition was almost always the consequence of legislative action (either through the passage or ordinary legislation or the legislature's approval of constitutional provisions). To be sure, in the vast majority of these moments of legislative abolition, there appeared to be strong popular support for *retention* of capital punishment, as there is in the United States today. How did Europe manage to abolish and retain its abolition in the face of such popular support for the death penalty? Perhaps there are lessons here for the United States to follow.

Unfortunately, the likely explanations for European abolition in the face of popular support for the death penalty offer few applicable lessons for the United States. First, European political institutions and political culture are more oriented toward technocratic expertise and less oriented toward populism than their American counterparts. European parliamentary democracies are more insulated against single-issue voters, and European leaders are more likely to view themselves as leading rather than following public opinion. The United States has both more populist political institutions (the primary system, as well as the tools of direct democracy such as referenda and initiatives) and more of a populist political culture, in which the duty of political representatives to be responsive to the electorate is beyond question, especially in the arena of criminal justice.

Second, Europe has created a regional method of preventing backsliding on the issue of capital punishment. The European Union (E.U.) requires all member states to adhere to Protocol No. 6 of the European Convention on Human Rights, abolishing the use of the death penalty in peacetime. This requirement has proven a powerful incentive for otherwise reluctant nations to abolish (Turkey, for example) and a powerful force against reinstatement. The rebuff by the E.U. of the Polish president's call for reinstatement of capital punishment is a recent case in point.[6]

In contrast, in the United States, the death penalty is often in play on the local, state, and even national level as a potent symbol of a candidate's "tough on crime" stance. In the late 1980s and early 1990s, candidates and potential candidates for president, especially Democrats, had to pay close attention to how their position on capital punishment would be perceived by the electorate (consider Michael Dukakis, Mario Cuomo, and Bill Clinton). Although recent presidential races have not emphasized capital punishment quite as much, it still remains a powerful symbol: in the most

recent Republican primaries, Mike Huckabee ran an attack ad about Mitt Romney criticizing the Massachusetts governor for "new taxes" and "no executions."[7] The death penalty has been an equally or even more powerful issue in gubernatorial races, district attorney races, and the appointment of judges. Capital punishment has taken center stage in these various political arenas because of the high political salience that crime has had in American politics since at least 1968. The combination of the central importance of crime as a political issue and America's populist political culture has firmly established the death penalty as easily read shorthand for crime policy. Nothing even comes close to being as potent a symbol in this area.

To be sure, there are more than a handful of staunchly abolitionist states, which have mostly remained so during this more than three-decade period of law and order politics. Indeed, New York and New Jersey have recently joined the abolitionist club, bringing the total number of abolitionist states to 14—New York by failing to reinstate its death penalty after its highest court struck it down on (remediable) constitutional grounds and New Jersey by legislative abolition (the first since 1976). But it is clear that the very close votes that led to these results in New York and New Jersey would not be remotely close in states like Texas or Alabama (or many others); bills to abolish the death penalty in such jurisdictions are simply non-starters and will remain so for the foreseeable future.

It is this feature of American politics—our commitment to federalism, especially in the area of criminal justice—that most precludes the European path of legislative abolition. Other "federal" states, like Canada, Germany, and Australia, have abolished capital punishment, but the United States is unique in its ceding of complete sovereignty over local criminal justice matters to individual federal units. Moreover, within each state, local law enforcement officials—district attorneys popularly elected by county—exercise virtually complete autonomy in the bringing of capital charges. This diffusion of responsibility ensures that some local and state units will vociferously oppose abolition of capital punishment, essentially precluding *nationwide* abolition by legislation.

This is not to say that the use of capital punishment might not significantly diminish and become substantially more geographically marginalized, limited largely to a few active states or even to a few counties within those states. The strong regionalization of abolition and retention in the United States suggests that the abolitionist regions of the Northeast and West might influence the retentionist states within and near those regions

to move toward abolition. But without a carrot or stick akin to membership in the European Union, regional influence will necessarily remain weak and always subject to the possibility that a high-profile murder will turn the tide the other way. Even staunchly abolitionist Massachusetts came within a single vote of reinstating the death penalty in 1997 when a 10-year-old boy was brutally sexually assaulted and murdered.[8] One need not believe that there is anything unique about American "violence" or "wild west culture" to see that European-style abolition—in which national political elites abolished the death penalty for entire countries in one fell swoop, with the European Union serving as a backstop—is simply a road foreclosed by American politics.

Judicial Abolition Revisited: Emerging Prospects for Constitutional Abolition of the Death Penalty in the Modern Era

As argued in the preceding section, we believe that nationwide abolition of capital punishment in the United States is more likely to occur through constitutional litigation than through legislative decision. This is not to say that we regard judicial abolition as either imminent or inevitable. But the prospects for judicial abolition of the death penalty have increased enormously since the late 1990s. Recent Eighth Amendment decisions have substantially altered the Court's proportionality doctrine, and the newly emerging approach is more hospitable to a global assault against the death penalty than the relatively deferential framework that it replaced.

The shift in doctrine is attributable in part to substantial changes in practice and attitudes on the ground. In the wake of the "wrongful-conviction" experience in Illinois, in which more than a dozen death-row inmates were exonerated, the American death penalty has been subject to increased public scrutiny and criticism. Legislative energies have focused on preventing error in capital cases, and politicians and prosecutors have shown little enthusiasm for broadening the death penalty's reach. At the same time, the widespread (near-universal) adoption of life without possibility of parole as an available punishment for murder has contributed to substantially fewer capital prosecutions and sentences. Executions have declined as well, as a result of a complicated interplay between judicial and political actors (a decline accelerated by the recent challenges to the prevailing protocol for lethal injections). Moreover, executions have been

increasingly confined to a few outlier jurisdictions, notwithstanding large death-row populations throughout the country.

These changes on the ground have not gone unnoticed by the Supreme Court, and its recent decisions limiting the availability of the death penalty for persons with mental retardation and juveniles reflect a newfound skepticism about whether current capital statutes capture prevailing public attitudes.[9] Indeed, in both of those cases, the Court embraced the constitutional claim, despite the fact that more death penalty jurisdictions authorized than prohibited the challenged practice.[10] Moreover, the jurisprudential changes inspired by facts on the ground, in turn, give increased weight to those facts in assessing the constitutionality of the death penalty. In particular, the Court's emerging jurisprudence gives substantial and potentially decisive weight to nonlegislative indicia of contemporary support for the death penalty, including contemporary sentencing practices, elite opinion, and public polling data.[11] Recourse to such measures makes it plausible to argue that the death penalty is inconsistent with prevailing standards of decency, notwithstanding its widespread legislative authorization.

The increased prospects for judicial abolition of the death penalty are reflected not only in the Court's decisions altering its proportionality methodology but also in other recent opinions (though not majority decisions). Several Justices have voiced skepticism about the reliability of state death penalty practices—particularly in avoiding wrongful convictions[12]—as well as fear that current sentencing procedures do not ensure that the resulting death sentences reflect prevailing community values. These opinions show an unusual willingness to broaden the lens of scrutiny beyond the particular issues before the Court to the American death penalty itself. Several Justices have also indicated their willingness to address whether prolonged and seemingly indefinite incarceration on death row might separately violate the prohibition of cruel and unusual punishment.[13] Taken together, these opinions suggest that the prospect of judicial abolition is not solely a topic for academic journals but part of an ongoing conversation in the Court about the constitutional sustainability of capital punishment in the United States.

In this section, we discuss the "first-generation" global challenges to the death penalty advanced in *Furman* and rejected in subsequent cases. We then detail the stabilization of the death penalty as a constitutional matter in the quarter-century following *Furman* and turn to the current period of increased public and judicial scrutiny of capital punishment. In

the following section, we look to the future and highlight the variables most salient to the possibility of judicial abolition.

First Generation of Constitutional Attacks on the American Death Penalty

The legal effort to end the death penalty began in the 1960s, as execution rates dropped and public support for the death penalty (as measured in public opinion polls) reached its all time low. Before the 1960s, judicial regulation of the death penalty was extraordinarily minimal. Apart from the Court's insistence in the Scottsboro cases that indigent capital defendants receive the benefit of counsel,[14] the Supreme Court had rarely found fault with state death penalty schemes. The Court's limited role in capital litigation was largely attributable to its limited role generally in policing state criminal processes. Before the Warren Court revolution constitutionalizing criminal procedure (by "incorporating" virtually all of the provisions in the Bill of Rights protecting criminal defendants and extending them to state criminal proceedings), federal judicial regulation of state criminal systems was limited to review of egregious due process violations, such as mob-dominated trials.[15]

Immediately after the Court incorporated and applied against the states the Eighth Amendment's prohibition against cruel and unusual punishment in 1962,[16] several Justices indicated their interest in addressing whether the penalty of death was excessive for the crime of rape.[17] Although the Court rejected the call for review, the dissent from denial of certiorari signaled an unprecedented willingness to view questions surrounding states' death penalty systems as *constitutional* ones.[18]

In part motivated by this signal, civil rights lawyers (there were few full-time death penalty lawyers at the time) began to attack the death penalty on multiple grounds. The center of activity was within the NAACP's Legal Defense Fund (LDF), which both represented death-sentenced inmates directly and provided resources and advice to local attorneys. For the LDF, a core concern about the death penalty was its racially discriminatory administration, particularly for the crime of rape (African Americans accounted for about 90 percent of the defendants executed nationwide for rape during the period 1930–1967, but for less than 50 percent of those executed for murder).[19] As part of its strategy, the LDF funded empirical research to document the influence of race in capital sentencing for rape. But the LDF also sought to attack the death penalty itself

and launched a moratorium strategy to end executions in the country. As Michael Meltsner reflected in his account of LDF's larger strategy:

> The politics of abolition boiled down to this: for each year the United States went without executions, the more hollow would ring claims that the American people could not do without them; the longer death-row inmates waited, the greater their numbers, the more difficult it would be for the courts to permit the first execution. A successful moratorium strategy would create a death-row logjam.[20]

The most astonishing aspect of the moratorium strategy was that it worked—at least, measured against its goal of preventing executions. Just five years before the moratorium strategy was adopted, Alexander Bickel had lamented that the Court had not provided any foundation for invalidating the death penalty and that, as of the time of his writing, "barring spectacular extraneous events," the prospect of judicial abolition was "a generation or more away."[21] But in 1967, the moratorium strategy brought a temporary end to executions in the United States, inaugurating the longest period in American history (five months short of a decade) without state-sanctioned killings. As part of its moratorium strategy, LDF focused on inmates nearing execution (including white inmates) and raised all conceivable bases for challenging the underlying convictions and sentences. The Warren Court revolution provided ample ammunition for procedural claims unrelated to the death penalty, including the vast new reservoir of rights under the Fourth, Fifth, and Sixth Amendments now applicable against the states. But the LDF also pressed several distinctive claims relating solely to the implementation of the death penalty.

Those distinctive claims centered on the arbitrary and discriminatory application of the death penalty, as well as the absence of state safeguards to ensure even-handed and proportionate sentencing in capital cases. By the 1960s, only a fraction of persons convicted of death-eligible crimes (which often included murder, armed robbery, kidnapping, and rape) were sentenced to death. Moreover, virtually every state statute left the decision between death and imprisonment to the unbridled discretion of jurors. Despite the recommendation of the American Law Institute (via the Model Penal Code) to guide sentencer discretion in capital cases, typical capital jury instructions throughout the country simply invited jurors to decide whether to extend "mercy" in cases of conviction, without specifying the relevant considerations that either aggravated or mitigated

the offense. Worse still, in most jurisdictions, the sentencing decision was made at the same time as the guilt-innocence verdict in a "unitary" proceeding. As a result, defendants were not able to make specific arguments going solely to the appropriate punishment, and jurors were often unaware of substantial mitigating facts at the time they determined the defendant's fate.

LDF lawyers argued that the rarity of death sentences and executions in light of broad death-eligibility under state statutes amounted to arbitrary punishment, especially given that there was no reason to believe—in the absence of any guidelines—that those sentenced to death and executed were truly the "worst" offenders. Along the same lines, LDF lawyers insisted that unitary proceedings prevented defendants from offering, and jurors from hearing, essential mitigating evidence that would make proportionate sentencing possible. Moreover, in jurisdictions where minority offenders were disproportionately represented on death row—the old South—the LDF sought to demonstrate that unbridled discretion was used in practice to punish African American defendants more severely. The LDF commissioned a study by Marvin Wolfgang and others to determine whether nonracial variables could account for the striking disparity in sentences between white and African American defendants convicted of rape in Arkansas over a 20-year period. On the basis of Wolfgang's finding that race almost certainly accounted for the disparity, the LDF challenged death sentences of African Americans sentenced to death for rape throughout the state.[22]

Two other legal challenges emerged from these same facts. First, death penalty opponents argued that prevailing death-qualification practices for capital jurors inappropriately skewed capital juries. In many states, jurors harboring any conscientious reservations about the death penalty could be struck for cause, with the result that jurors who served in capital cases were uncommonly pro-prosecution and pro-death penalty. This practice of culling jurors with reservations about the death penalty, it was argued, allowed for the death penalty to continue to be imposed even as public opinion drifted in the other direction. Second, more broadly and more fundamentally, the combined facts of death qualification and dwindling death sentences and executions offered a basis for arguing that the American death penalty no longer enjoyed popular support. Despite statutes authorizing imposition of the death penalty in most American states, and despite large (and growing) numbers of offenders eligible for it, few offenders were sentenced to death (or executed), and those few sentences

were obtained by a selection process that insulated death verdicts from community values opposed to the punishment.

Within five years of the effective moratorium on the death penalty, all of these issues had made their way to the U.S. Supreme Court. In *Witherspoon v. Illinois*, the Court rejected stringent death-qualification rules, insisting that jurors with reservations about the death penalty could be struck for cause only if they were wholly unwilling to consider the death penalty as an available punishment.[23] In so doing, the Court left open whether death-qualification rules impermissibly bias determinations of guilt or innocence (on the ground that jurors without reservations about the death penalty are more prone to convict).

At the same time, in *Maxwell v. Bishop*, the Court declined to address the substantial claim of race discrimination based on Wolfgang's Arkansas study, even though it granted review in the case on other claims (relating to unguided discretion and the unitary determination of guilt and sentence) and despite an extensive opinion on the race discrimination issue in the Court of Appeals (authored by then-Circuit Judge Harry Blackmun).[24] The Court's refusal to address the race discrimination claim in *Maxwell* reflected the odd discord between the legal framework for evaluating the American death penalty and the political and cultural one. From LDF's perspective, the continuing availability of the death penalty for rape was unquestionably the product of racial discrimination. And yet when the dissent from denial in *Rudolph v. Alabama*[25] had raised the possibility that death was excessive punishment for rape (and thereby triggered federal constitutional regulation of the death penalty), it failed to mention race at all. Now, seven years later, the Court was willing to address the procedural defects of the death penalty—the absence of standards and the lack of bifurcated proceedings—but again was unwilling to confront its racial legacy, this time in the form of a statistical demonstration that the death penalty was available not for rape generally but only for the rape of a white victim by an African American defendant.

Thus, the LDF, dedicated to eradicating race-based inequality, was put in the position of attacking death penalty *procedures* instead of racially disproportionate outcomes, the existence of which no one seriously doubted. Indeed, six years after *Maxwell*, when the Court reviewed the new capital statutes enacted in the wake of *Furman*, the solicitor general of the United States, as it defended those statutes as an amicus, conceded that the Wolfgang study was "careful and comprehensive" and indicated that the U.S.

government did "not question its conclusion that during the 20 years in question, in southern states, there was discrimination in rape cases."[26]

Not only did the Court narrow the issues it would review in *Maxwell*, it ultimately refused to decide the standardless discretion and bifurcation claims in the case, even though fully briefed and argued, and, instead, reversed on *Witherspoon* grounds. The narrow basis of decision in *Maxwell* (the *Witherspoon* issue had not even been raised) suggested that the Court might be unwilling to insist on sweeping changes in states' administration of the death penalty. The Court avoided deciding yet another potentially broad issue when, in a case challenging the death penalty as disproportionate for armed robbery, the Court again reversed on a narrower ground (the failure of the trial court to inform the defendant of the consequences of his guilty plea).[27]

But the Court ultimately heard and decided the broader challenges to the American death penalty. The first results were not encouraging to the advocates of reform and abolition. In 1971, in *McGautha v. California*, the Court rejected the arguments (heard previously in *Maxwell*) that standardless discretion and unitary proceedings violated the Due Process Clause.[28] Surprisingly, though, the Court almost immediately agreed to rehear the standardless discretion claim under the Eighth Amendment's prohibition against cruel and unusual punishments. More fundamentally, the Court would also address the ultimate challenge—the claim that the death penalty was no longer consistent with American standards of decency and could therefore not be imposed under any circumstances. Both of these claims were captured by the common question in the four cases before the Court (all involving African American defendants and white victims): "Does the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"[29]

As it addressed these claims in *Furman v. Georgia*, the Court was venturing into uncharted territory. As Bickel had observed a decade before, the Court had no significant body of doctrine supporting substantial restrictions on (much less abolition of) the American death penalty.[30] As radical as *Brown v. Board of Education* might have seemed when it was decided,[31] numerous decisions undermining the lawfulness of race-based decision-making in general and segregation in education in particular had been issued over several decades before the Court decisively rejected segregation in the public schools. As the Court approached these global challenges to the death penalty, it had never found the death penalty (or any term of

incarceration) disproportionate for a particular offense; it had never suggested that broadly embraced sentencing practices might be deemed cruel or unusual; it had never questioned the power of states to include the death penalty in their sentencing arsenals; and it had just rejected the notion that due process requires standards in capital cases or bifurcated proceedings to reduce the possibility of arbitrary sentencing. In the wake of the Court's manifest reluctance to address substantial challenges to the death penalty, its subsequent rejection of two such challenges in *McGautha* (a 6–3 decision) and changes to the composition of the Court that seemed unlikely to advance the abolitionist cause (the replacement of Justices John Marshall Harlan and Hugo Black by Justices William Rehnquist and Lewis Powell), the prospects for judicial abolition of the death penalty seemed relatively slim, notwithstanding the fact that the issue was on the Court's docket.

The resulting per curiam decision tersely offered an affirmative answer to the question presented, concluding that "the imposition and carrying out of the death penalty under the present statutes" constituted cruel and unusual punishment.[32] The minimalism of the per curiam language reflected the absence of a consensus among the five Justices who joined the result. All five wrote opinions explaining their rationale, and all seemed to agree that the prevailing system was unconstitutionally arbitrary.[33] In light of the breadth of death-eligibility in state capital schemes, the rarity of death sentences and executions, and the lack of guidance to capital decisionmakers, the Court believed that the few offenders caught in the death penalty net were not fairly selected but, instead, unfortunate winners in a "ghoulish national lottery."[34] The Court did not find the punishment itself constitutionally problematic but, rather, its rare and indiscriminate use (indeed, few pages of the massive decision addressed fears of its *discriminatory*, or race-based, use).

That conclusion, though, presented a significant puzzle. If the Due Process Clause did not require states to provide standards in capital cases, how could the resulting (perhaps arbitrary) distribution or rare imposition of the death penalty violate the Eighth Amendment? Equally puzzling was the reluctance of any of the Justices in the majority (even the two who had joined *McGautha*) to clarify the relation between *McGautha* and *Furman*. In some respects, *Furman* seemed to suggest that the Eighth Amendment demanded nonarbitrary *results* even though the Due Process Clause commanded no particular set of capital *procedures*.

Viewed in this way, *Furman* could well have been the final word on capital punishment. At the time of decision, the death penalty appeared

to be a dwindling practice. By invalidating virtually all then-existing schemes—which cast the death penalty net widely and afforded unbridled discretion to capital decisionmakers—the Court seemed to write the last chapter on the American death penalty. The Justices in the majority did not take the additional step of declaring the death penalty inconsistent with prevailing standards of decency; only Justices William Brennan and Thurgood Marshall were willing to defend that proposition in the face of widespread legislative authorization for the punishment.[35] But the Court seemed to adopt a narrow basis for decision that would have the broadest possible effect: it would disrupt the status quo, cast aside prevailing capital statutes, and shift to those states committed to the punishment the burden of solving a constitutional violation whose contours were difficult to discern in light of the lengthy, conflicting opinions of the Court.

Stabilization of American Death Penalty Law and Practice

When 35 states responded with new capital statutes, the Court was forced to clarify the reach of *Furman*. States had sought to resolve the problem of standardless discretion in two ways—either by removing sentencer discretion entirely (mandatory statutes) or by providing guidelines in the form of aggravating and mitigating circumstances. In some respects, the mandatory statutes held out greater promise of solving the problems *Furman* had identified, because they promised to increase the number of death sentences and executions, thus removing the concern that the sheer rarity of death sentences and executions rendered its few applications unnecessary and therefore cruel. Justice Byron White had made this argument most forcefully in *Furman*, stating that the death penalty could not be retained if it was used so rarely that it could not possibly achieve any of the penological purposes (deterrence or retribution) it purported to serve.[36]

The Court, though, rejected the mandatory statutes on the ground that they denied offenders individualized treatment, precluded sentencers from considering relevant mitigating factors, and departed significantly from long-standing American practices.[37] Having rejected prevailing death penalty schemes in the belief that the death penalty had essentially run its course in the United States, the Court was not willing to approve a "solution" to the problems it had identified that would radically expand the death penalty's scope and diminish protections for capital defendants. At the same time, in *Gregg v. Georgia*, the Court upheld the "guided

discretion" statutes on the ground that they held out the possibility of reducing arbitrariness in the administration of the death penalty.[38]

Gregg transformed *Furman* from a substantive decision to a procedural one. At the time *Gregg* was decided, the Court had little empirical basis for concluding that the death penalty was being administered in a nonarbitrary manner (in the intervening four years between *Furman* and *Gregg*) or that sufficient death sentences and executions would be imposed to ensure that those sentenced to death were not among a freakishly small group. Instead, the intervening period had demolished the assumption in *Furman* that prevailing death penalty statutes were the byproduct of an outdated morality (and that the American people, if put to the choice, were ready to abandon the punishment). Now that the states had adopted the standards that had been sought (but rejected) in *McGautha*, the Court was willing to allow state capital schemes to go forward. Whereas *Furman* had condemned a *system* of capital punishment in light of its indefensible structure and results, *Gregg* treated the constitutional question as relating to the facial constitutionality of several statutes.

The Court's shift in focus is likely attributable to its miscalculation of public sentiment at the time of *Furman*. The decline in public support for the death penalty that had been captured in the 1966 Gallup Poll turned out to be a short-lived phenomenon, and the rise in violent crime rates and the resulting politicization of criminal justice issues over the next decade triggered a backlash to the Court's intervention. Rather than abolishing the death penalty, *Furman* in the end merely required a firm declaration of purpose and a revamping of sentencing instructions as preconditions to the resumption of death sentencing and executions.

Over the next quarter-century, the American death penalty expanded and its legal regulation stabilized. Executions resumed in 1977, and, despite extensive litigation surrounding state capital procedures, the Court gave little indication that the practice of capital punishment was itself in any constitutional jeopardy. Indeed, the Court seemed particularly skeptical of claims that specific capital practices were contrary to evolving standards of decency. In its first proportionality decision, the Court rejected the death penalty for the crime of raping an adult women, but it did so only because, at the time of the decision, Georgia was the sole jurisdiction in the country that continued to permit such punishment for that crime.[39] The Court made clear that its own role in proportionality cases should be limited, emphasizing that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices" and

that "judgment should be informed by objective factors to the maximum possible extent."[40] Even though Georgia stood alone in permitting death for the crime of raping an adult woman, three Justices still would have rejected a blanket proportionality rule finding such punishment excessive.[41] Interestingly, the Court again said nothing about the racial taint of capital rape prosecutions and chose a case involving a white defendant to declare the practice unconstitutional.

Subsequent decisions confirmed the narrowness of proportionality protections. In the realm of noncapital offenses, the Court upheld a sentence of life imprisonment imposed against a nonviolent recidivist who had promised but failed to repair a refrigerator and had thereby obtained $120.75 by "false pretenses."[42] The Court also summarily reversed a lower court decision that had found constitutionally excessive a 40-year sentence imposed for possession with intent to distribute nine ounces of marijuana.[43] Although the Court found a life sentence without possibility of parole excessive as applied to a nonviolent recidivist who had written a "no account check,"[44] that decision turned out to be the sole noncapital case in which the Court has ever found a term of imprisonment to be constitutionally excessive. Indeed, the Court came close to adopting a blanket rule eliminating proportionality review of noncapital sentencing and, instead, adopted a highly deferential approach that will not even examine and compare state practices if, as a threshold matter, the Court does not regard the challenged punishment as "grossly excessive" in relation to the crime.[45]

On the capital side, the Court briefly extended constitutional protection to nontriggermen, holding that the death penalty could not be applied to a defendant who had neither killed, nor attempted to kill, nor intended to kill.[46] But the Court retreated from the holding only five years later, permitting nontriggermen to be eligible for death as long as they could be deemed substantial participants in a dangerous felony.[47] As a result, despite the Court's professed commitment to ensuring that the death penalty is reserved for the most culpable offenders, the Court refused to curtail states' efforts to hold offenders vicariously liable for killings they neither directly caused nor intended.

The most significant proportionality decisions, though, issued simultaneously in 1989, rejected limits on the execution of juveniles and persons with mental retardation. At the time of *Stanford v. Kentucky*, the decision involving juveniles, only 30 offenders were on death row for crimes committed under the age of 18 (just over 1 percent of the death

row population), despite the large number of minors who commit homicides, including capital murder.[48] Elite, professional, and religious opinion overwhelmingly opposed the death penalty for juveniles, and dozens of political and social organizations filed briefs opposing the practice. Given the relatively low number of capital verdicts in relation to capital crimes, a strong argument supported the claim that prosecutors and juries rejected the punishment in practice, despite its statutory availability in 25 of the 37 death penalty states.

Justice Antonin Scalia's majority opinion, though, adopted a quite narrow approach to proportionality. In deciding whether the practice was so marginalized as to be deemed contrary to prevailing standards of decency, the Court conducted its "head count" of the states and suggested that no national consensus against a capital practice should be found where a majority of death penalty states embrace it statutorily.[49] The Court refused to include in its count of states opposed to the practice the 13 states without the death penalty on the ground that their opposition to the death penalty said nothing about their views concerning the *juvenile* death penalty.[50] The majority opinion also placed little weight on the infrequency of juvenile death sentences, suggesting that such infrequency reflected at most a societal consensus that the juvenile death penalty should *rarely* be imposed—not that it was in all cases excessive. Finally, the majority dismissed as irrelevant the sentencing practices of other countries, insisting that "it is *American* conceptions of decency that are dispositive" to constitutional analysis.[51]

In other parts of his opinion, writing for only a plurality, Scalia rejected the notion that Eighth Amendment analysis should include consideration of public opinion polls or professional and elite opinion.[52] According to him, recourse to such factors pulled the Court away from "objective" indicia of evolving standards, which he viewed as limited to statutes and jury determinations. Moreover, Scalia emphatically rejected that the Court had any independent role, apart from assessing objective criteria, in bringing its own judgment to bear on the proportionality of executing particular classes of offenders based on their reduced culpability. In his view, either "society has set its face against" a practice or it has not, and "[t]he audience for these arguments . . . is not this Court but the citizenry of the United States."[53]

In Justice Sandra Day O'Connor's decision upholding the death penalty for persons with mental retardation, *Penry v. Lynaugh*, the Court was wary of creating a bright-line exemption because of the varying degrees

of mental retardation and "the diverse capacities and life experiences of mentally retarded persons."[54] The legislative support for the exemption was much weaker than in *Stanford*, because only two death penalty states (and the federal government) forbade the practice at the time.[55]

Taken together, these opinions represented a dramatic rejection of significant federal judicial regulation of the death penalty. The decisions upheld marginal practices and refused to connect the Court's proportionality doctrine to the larger concerns of its regulation of the death penalty—particularly its goal of narrowing the class of death-eligible offenders to ensure that the few offenders sentenced to death are truly more deserving than the much larger group of offenders who are spared. The Court also embraced a methodological approach to proportionality that requires enormous deference to state statutes, even in the absence of other evidence of broad popular support for the challenged practices.

The Court's reluctance to impose substantive limits on the death penalty was equally evident in its rejection of the most serious challenge to the death penalty post-*Furman*—the claim in *McCleskey v. Kemp* that the racially discriminatory imposition of the death penalty violated both the Eighth Amendment and the guarantee of equal protection.[56] Revisiting the strategy it had taken pre-*Furman* with the Wolfgang study, the LDF had commissioned a new study of capital cases in Georgia during the post-*Furman* period. The goal was to demonstrate that the statutory changes wrought by *Furman* had not removed the influence of race in capital decisionmaking. The resulting Baldus study, employing a rigorous multivariate regression analysis, concluded that race—particularly the race of the victim—played a powerful role in capital sentencing. Indeed, according to the study, cases involving white victims were over four times more likely to generate death sentences than ones with minority victims, and cases involving minority offenders and white victims were treated much more severely than any other racial combinations (controlling for nonracial variables).[57]

Warren McCleskey, an African American defendant in Georgia who had been convicted and sentenced to death for the murder of a white police officer, sought postconviction relief based on the Baldus study's finding of pervasive race discrimination in the administration of Georgia's death penalty. The Court assumed for purposes of the decision that the Baldus study was methodologically sound and that race appeared to influence some outcomes in capital cases. But the Court denied that such statistical evidence could support a finding of constitutional error or provide a basis for a constitutional remedy.

The Court rejected the equal protection claim on the ground that McCleskey was required to show that the decisionmakers in his case had acted with a racially discriminatory purpose, and it refused to shift the burden to the state on the basis of the Baldus findings.[58] More significantly, on the Eighth Amendment side, the Court appeared to reject McCleskey's claim precisely because it called into question the sustainability of the death penalty.[59] According to the Court, discretionary sentencing in capital cases is constitutionally required, and one possible, perhaps inevitable, consequence of such discretion is race-based decisionmaking.[60] But the Court was not prepared to insist that states eliminate any demonstrable influence of race, because to do so would doom capital punishment. Quoting from *Gregg*, the Court insisted that, as it interpreted the Eighth Amendment obligations of states regarding the death penalty, it must be guided by the principle that the "Constitution does not place totally unrealistic conditions on its use."[61] Whereas *Furman* had invalidated prevailing schemes because of its fear of arbitrary sentencing, *McCleskey* rejected the Eighth Amendment claim despite seeming proof of something worse—invidious race-based discrimination.

McCleskey seemed like the death knell to global challenges to the death penalty, particularly challenges rooted in claims of its arbitrary or discriminatory administration. Like *Gregg*, *McCleskey* read *Furman* to require *procedural* safeguards aimed at preventing arbitrary outcomes but not to prohibit those outcomes themselves. Moreover, *McCleskey* made clear that if a constitutional claim and the continued implementation of the death penalty could not be reconciled, it was the claim and not the death penalty that must be rejected.

In the decade after *McCleskey*, the death penalty became increasingly entrenched as a national practice. Executions climbed from about 20 per year (nationwide) in the late 1980s to about 80 per year in the late 1990s. Notwithstanding the increase in executions, the national death-row population doubled between the years 1985 (1,591) and 1996 (3,219). Death-sentencing rates increased as well, as the per capita rate for death sentences reached its modern-era high in the mid-1990s. There were few signs of popular discontent with capital punishment, and the most significant legislative development during this period was federal statutory reform of federal habeas corpus. In response to the bombing in Oklahoma City, Congress coupled antiterrorism initiatives with unprecedented restrictions on the right of state prisoners to litigate federal constitutional claims in federal court.[62] Although the legislation applied to inmates convicted of both capital and

noncapital crimes, federal habeas litigation had become increasingly focused on capital cases, in part because only death-sentenced inmates are entitled to counsel as a matter of right. The avowed goal of the legislation, reflected in its title "The Antiterrorism and Effective Death Penalty Act," was to reduce the time between capital sentences and executions, and death penalty opponents feared that executions would accelerate considerably over the ensuing decade. Moreover, with the retirements of Justices Brennan, Marshall, and Blackmun, the Court lost its three most reliable opponents to the death penalty (with Justice Blackmun announcing, just before his retirement, that he would no longer "tinker with the machinery of death" and thus would follow the practice of Justices Brennan and Marshall in voting to reverse all death sentences coming to the Court).[63]

At this moment in U.S. history, the prospect of abolition of the death penalty, either politically or constitutionally, seemed extraordinarily remote. The last global challenges to the punishment appeared to have been set aside, death sentences and executions were on the rise, and the political climate favored less rather than more regulation of the death penalty process. Like Bickel 35 years earlier, informed observers would have looked at this landscape and undoubtedly concluded that judicial abolition was at least a generation or more away—with Bickel's prescient caveat—"barring spectacular extraneous events."[64]

A New Era of Public and Judicial Scrutiny of Capital Punishment

The second reformist moment in the modern era was triggered by just the sort of spectacular extraneous event Bickel might have imagined: the discovery of numerous wrongfully convicted inmates on a state's death row. The issue emerged as the efforts of defense lawyers and journalists uncovered numerous innocents who had been erroneously sentenced to death in Illinois. The sheer number of innocent inmates discovered—13—was striking enough, especially in light of the fact that Illinois had executed only 12 inmates in the modern era. But as the story unfolded, it became apparent that the Illinois death penalty system was seriously malfunctioning. Prosecutors had engaged in misconduct in several of the cases, and the trial representation afforded many of the inmates had been abysmal. In one case, the death-sentenced inmate (Anthony Porter) had come perilously close to execution before he received a stay of execution unrelated to his claim of actual innocence; journalism students from Northwestern University subsequently discovered the actual perpetrator, who confessed to the crime.[65]

Governor George Ryan of Illinois, a Republican who had long supported the death penalty, became a national figure as he insisted that these events required exhaustive scrutiny of the Illinois capital system. Ryan issued a moratorium on executions pending the outcome of such study, and ultimately he commuted the sentences of all 167 death-row inmates.[66] At the same time, more sophisticated techniques for analyzing DNA evidence were employed to review convictions in many capital and noncapital cases throughout the country.[67] These efforts led to numerous exonerations and to a greater appreciation of the fallibility of our criminal justice system. Although the public was likely aware in the abstract of the imperfections of human institutions of justice, the experience in Illinois and the DNA revolution attached scores of faces and stories to the underlying problems.

As the number of exonerated death-sentenced inmates both within and outside Illinois grew, the public mood toward capital punishment palpably shifted. Legislative energies shifted from expanding the death penalty and speeding executions to avoiding error. In many death penalty states, particularly outside of the South, the death penalty had served a primarily symbolic function, and even as the death penalty stabilized during the 1980s and 1990s, these jurisdictions appeared to have little appetite for actual executions.[68] In light of the events in Illinois and nationally, many of these jurisdictions began to critically examine their death penalty practices, and issues which had long disappeared from national dialogue—such as race discrimination, quality of counsel in capital cases, the need for moratoria on executions pending further study, and even abolition—emerged as genuine topics of discussion.

Two years after Ryan imposed a moratorium on executions in Illinois, a major proportionality challenge returned to the Court—whether the Eighth Amendment forbids the execution of persons with mental retardation.[69] The decision of the Court in *Atkins* to revisit its 1989 *Penry* decision within such a relatively short period (13 years) seemed unusual, but the case was strengthened by the flurry of legislative activity in the wake of that decision. Sixteen additional states banned the execution of persons with mental retardation. Together with Georgia and Maryland, which had banned the practice just before the decision in *Penry*, now 18 states statutorily prohibited executing persons with mental retardation.[70] The legislative activity pre- and post-*Penry* gave the strong impression that when legislators focused on the issue, they were unwilling to endorse the practice. No statutes explicitly authorized the practice, and few states

or politicians seemed adamant in their support. Indeed, in Texas, the governor had even denied that the state allowed the practice, despite the fact that Texas led the nation in the number of persons with mental retardation it had executed in the modern era (his quote appeared in a footnote to the Court's opinion).[71] The fact that many of the prohibiting states were active death penalty states—including Georgia, Arkansas, Florida, and Missouri—further suggested that there was little genuine support for the practice, as well as the fact that only five such executions had occurred nationwide since *Penry*.[72]

In light of these unusual circumstances, the resulting 6–3 decision invalidating the death penalty for persons with mental retardation might seem relatively modest. Although a majority of death penalty states had not yet abolished the practice, the Court emphasized that it was not relying on the sheer number of prohibiting states (18) as much as the "consistency of the direction of change."[73] The Court also explicitly cast doubt on whether its reversal of *Penry* justified revisiting its decision upholding the death penalty for juveniles. Although the number of prohibiting states was almost identical in each context, the "shift" apparent with respect to mental retardation was not evident with juveniles, because only two states had raised the threshold age for execution during the same 13-year period.[74]

But the opinion seemed to collide with the Court's prior methodological approach in proportionality cases, particularly the approach announced and defended by Justice Scalia in *Stanford*. In a lengthy footnote supporting its conclusion of a national consensus, the Court referred to expert opinion (citing amicus briefs filed by the American Psychological Association and the American Association for Mental Retardation), religious opinion (citing an amicus brief filed on behalf of diverse religious communities), and world opinion (citing an amicus brief filed by the European Union).[75] The Court also cited polling data showing "a widespread consensus among Americans" rejecting the practice.[76]

Without the footnote, the decision could have been viewed as an unusual but perhaps defensible read of legislative opinion, in which the Court was unwilling to defer to a majority of death penalty states because there was little to suggest that they had truly considered the issue. On this view, the recent prohibiting states, though a numerical minority, counted more than the permissive states, given that few of the permissive states had actually engaged in the practice or explicitly endorsed it.

The footnote, though, suggested something far more radical: that state statutes might not provide the best window into prevailing standards of

decency. Such an approach would give the Court more latitude to reject practices that are widely authorized by states as unconstitutional under the Eighth Amendment. Public, elite, and world opinion will not always prevail in state legislative chambers, and the Court's willingness to treat such opinions as probative or perhaps dispositive in gauging emerging values would considerably broaden the Court's Eighth Amendment enforcement role. Indeed, by privileging elite, world, and public opinion over prevailing statutes, it is not difficult to construct a decision abolishing the death penalty altogether (especially if public opinion is gauged in part by willingness to sentence offenders to death and to carry out executions).

The dissenting Justices immediately recognized the potential importance of the footnote and chastised the majority for consulting such sources in its proportionality analysis. Chief Justice Rehnquist, although dissatisfied with the Court's reading of the state statutes, wrote separately "to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion."[77] Justice Scalia likewise rejected the Court's analysis of state legislation (particularly the decision to elevate a recent trend into a permanent rule)[78] but also devoted his most pointed responses to the potential shift in methodology. Scalia had previously argued that the Eighth Amendment does not contain a proportionality guarantee at all and that Eighth Amendment analysis should be limited to whether particular punishments are invariably cruel rather than whether a permissible punishment is inappropriate for certain offenses or offenders. On this ground, he would have dissented from the two decisions, *Coker v. Georgia* and *Enmund v. Florida*,[79] finding the death penalty disproportionate for rapists and nontriggermen. But he regarded the Court's reasoning in *Atkins* as beyond the pale, to the point of bestowing a new award for the analysis in the footnote: "[T]he Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called 'world community,' and respondents to opinion polls."[80] Looking at the Court's death penalty jurisprudence more broadly, Scalia lamented the increased role for the Court in policing its reach, even as he distanced himself somewhat from the death penalty itself: "There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court."[81]

By itself, *Atkins* seemed a modest decision with potentially destabilizing language. But several other opinions have suggested a new level of

critical scrutiny of the American death penalty. Just four days after *Atkins*, the Court held in *Ring v. Arizona* that jurors—not judges—must find the facts that render defendants eligible for death.[82] The ruling itself was unsurprising—it was the logical consequence of the Court's newfound dedication to jury-sentencing rights under the Sixth Amendment inaugurated by *Apprendi v. New Jersey*.[83] Although *Apprendi* had caused extraordinary disruption in the noncapital context by calling into question judge-administered sentencing guideline schemes, *Ring* would affect only a small number of death penalty jurisdictions. The surprise in *Ring* was Justice Stephen Breyer's concurring opinion. Breyer, who had helped draft the Federal Sentencing Guidelines and dissented in *Apprendi*, wrote separately in support of a broader jury right in capital cases—a right not only to a jury determination of facts relating to death-eligibility crimes but also to a jury determination of the ultimate question whether an offender lives or dies.[84]

Breyer's little-noted opinion offers an encompassing critique of the American death penalty. He notes at the outset that deterrence and incapacitation rationales for the death penalty are difficult to support in light of available empirical evidence.[85] He then observes the "continued division of opinion as to whether capital punishment is in all circumstances, as currently administered, 'cruel and unusual.'"[86] In light of these substantial doubts about the appropriateness of the death penalty, Breyer insists that there must be a continuing connection between public values and death verdicts. In his view, a process that permits "a single governmental official"—a judge—to make the ultimate death penalty decision inappropriately severs that connection.[87]

The most striking aspect of Breyer's opinion is his catalogue of the perceived flaws of the American death penalty—its lack of reliability (citing the events in Illinois), its arbitrary and discriminatory imposition (citing the Baldus study), its cruelty in the delays between sentence and execution, and the inadequacy of defense counsel in capital cases.[88] He also notes that other nations increasingly have abandoned the death penalty altogether.[89]

Breyer's effort to connect the Sixth Amendment jury question to the broader sustainability of capital punishment undermines the stability of the death penalty under the Court's Eighth Amendment jurisprudence. It treats the Eighth Amendment question regarding the constitutionality of the American death penalty as an open and contingent one—depending on its "current administration"—and it provides reasons to believe that

the prevailing implementation is deeply flawed. Together with *Atkins*, Breyer's opinion strongly suggests that the constitutionality of the death penalty will not turn solely on whether the punishment remains available on the books.

Despite the footnote in *Atkins* distinguishing the controversy surrounding the execution of juvenile offenders, just three Terms later, in *Roper v. Simmons*, the Court decided to revisit *Stanford*.[90] As that footnote had suggested, the problem for the claim was that little had changed legislatively during the intervening 15 years. At the time of *Stanford*, 12 states and the federal government rejected the death penalty for persons under the age of 18. By 2005, only five of the permissive states had since prohibited the practice (four by legislation, one through judicial decision). Thus, a majority of death penalty jurisdictions still authorized the execution of juveniles, and there was no overwhelming or impressive shift toward prohibition comparable to *Atkins*.

Nonetheless, the Court in *Simmons* invalidated the death penalty for juveniles and in so doing prominently embraced the methodological changes to proportionality analysis that been relegated to a footnote in *Atkins*. Whereas *Stanford* had insisted on a limited role for the Court in discerning evolving standards of decency, in *Simmons* the Court affirmed the importance of exercising its "own independent judgment" as to proportionality.[91] As it exercised this judgment, the Court relied heavily on expert opinion regarding the mental and emotional development of juveniles, including their underdeveloped sense of responsibility, their vulnerability to negative influences, and their fluid personality traits.[92] This science supported the Court's view of the invariably diminished culpability of juvenile offenders. The Court also found "confirmation" for its judgment in the fact that the United States was alone among nations in the world in giving official sanction to the execution of juveniles.[93] The offhand reference to world opinion (within a footnote) in *Atkins* became a separate full section of the opinion in *Simmons*—equal in length to its discussion of state legislative and sentencing practice. The Court also explicitly defended its canvassing of international opinion and practice, on the ground that "the express affirmation of certain fundamental rights by other nations and peoples" underscores the "centrality" of those rights within our own culture.[94]

Like *Atkins*, *Simmons* invalidated a death penalty practice notwithstanding its authorization by a majority of death penalty states. It focused less on what states declared legislatively and more on what states actually did; the Court highlighted the infrequency of the practice—with only six

states executing juveniles during the post-*Stanford* interval and only three states doing so in the 10 years before its decision.[95]

More generally, *Simmons*'s amplification of *Atkins* provides a blueprint for the judicial abolition of capital punishment in the United States. It privileges nonlegislative criteria that overwhelmingly cut against the continued use of the death penalty. The increasing rarity of death sentences and executions supports the claim that the statutes on the books do not reflect genuine public support for the punishment (especially in light of the broad net of death-eligibility crimes cast in the post-*Furman* statutes). Elite and professional opinion—from prominent religious groups, the American Bar Association, criminologists, and others—generally rejects the notion that the death penalty serves any important penological purposes, especially compared with the alternative of lengthy incarceration. World opinion increasingly condemns the death penalty as contrary to basic human rights.

Like all blueprints, though, the one in *Simmons* does not ensure that the (abolitionist) house will be built. *Simmons* was decided by the narrowest of margins, and its own author, Justice Anthony Kennedy, surely did not regard his opinion as casting doubt on the death penalty generally. The execution of juveniles, like the execution of individuals with mental retardation, was a more marginal practice than the American death penalty as a whole. Popular support for capital punishment as a general practice still remains strong, though perhaps not as strong or unconflicted as it was a decade ago.

But the fact that Justice Kennedy did not intend to initiate a discussion of the broader constitutionality of the death penalty does not mean that all of his colleagues are similarly disinclined. The most recent judicial attention to the death penalty emerged in the most unlikely of cases. In 2006, in *Kansas v. Marsh*,[96] the Court agreed to decide a highly technical issue from a relatively unimportant death penalty state—whether Kansas's death penalty statute inappropriately required the jury to impose death when aggravating and mitigating factors were in equipoise (instead of requiring aggravating factors to affirmatively "outweigh" mitigating ones).[97] At the time the case reached the Court, Kansas had a death-row population less than 10 and had not executed any inmates in over 40 years. Moreover, given that the Kansas Supreme Court had ruled in favor of the death-sentenced inmate, the Court was in the unusual position of deciding whether a state court was unnecessarily stringent in restricting the state's own death penalty apparatus.

The Court's resulting majority opinion was unremarkable. Justice Clarence Thomas, writing for the Court, relied on previous cases that permit the death penalty to be imposed absent an affirmative declaration by the jury that the defendant deserves to die. But Justice David Souter's dissent, joined by three other Justices, offers a remarkable and sustained critique of the American death penalty[98]—a critique only tangentially related to the narrow doctrinal issue presented in the case. Souter argues that the uncovering of pervasive error in capital cases—particularly in Illinois—amounts to "a new body of fact [that] must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate."[99] His dissent recounts the experience in Illinois, discusses the role of DNA in identifying innocents on death row, and offers statistics about the number of "exonerated" inmates in recent years.[100] In light of this newfound error in the nation's system of capital punishment, Souter urges the Court to reject state capital procedures, such as the Kansas rule permitting the imposition of death in close cases, which unnecessarily increase the risk of error in capital cases. According to Souter, the events in Illinois and elsewhere have ushered in a "period of new empirical argument about how 'death is different.'"[101]

Souter's opinion seems self-consciously designed to bring the public debate about the reliability of the U.S. death penalty into the Court's jurisprudence. Along with three other Justices, Souter appears to travel down the same path, though not as far, that led Blackmun to declare that he would no longer tinker with the machinery of death. Instead of declaring the American death penalty doomed, these four Justices would shift the burden of proof to the states, requiring states to abandon procedures (previously embraced) that could potentially lead to additional wrongful convictions.

Perhaps most tellingly, Justice Souter's opinion declares, in Mark Anthony fashion, that "it is far too soon for any generalization about the soundness of capital sentencing across the country."[102] The need to disclaim any *immediate* need for this larger inquiry serves to highlight that such an inquiry could well become necessary at some future time. In this respect, the *Marsh* dissent is no less an invitation to future global challenges to the death penalty than the opinion of three Justices, more than 40 years before, lamenting the Court's refusal to decide whether the death penalty was disproportionate for the crime of rape. It signals that a substantial portion of the Court has increasingly grave doubts about the constitutionality of the death penalty and that they are willing—indeed, inclined—to evaluate specific claims identifying defects in state schemes in

light of the broader goals and commitments of the federal constitutional regulation of the death penalty.

Like the footnote from *Atkins*, the dissenting opinion in *Marsh* received considerable attention from Justice Scalia, who recognized its far-reaching implications and wrote separately in response. Relying on the work of others, Scalia challenges the empirical claim about the extensiveness of error in capital cases. In his view, the number of "true" exonerations (where the defendant was actually "innocent" as opposed to "not guilty" or freed by legal error) is much smaller than Justice Souter's sources claim.[103] Moreover, Justice Scalia finds comfort in the exoneration of many innocents *before* execution, suggesting that the discovery of error coupled with the absence of any demonstrable wrongful execution in the modern era indicates the health rather than the pathology of the current system.[104]

But Scalia's main concern is that the *Marsh* dissent is part of a larger project to impugn the American death penalty before the world. Despite the absence of any citation to world opinion or practice in the dissent, Scalia uses his response to criticize international opponents of the death penalty in the United States, accusing them of "sanctimonious criticism" because "most of the countries to which these finger-waggers belong had the death penalty themselves until recently—and indeed, many of them would still have it if the democratic will prevailed."[105] Justice Scalia's opinion, with its gratuitous reference to international opponents of the death penalty, suggests that the members of the Court view themselves as caught in a larger debate about the wisdom and sustainability of capital punishment. In the wake of *Atkins* and *Simmons*, Scalia is also acutely aware that the fate of the U.S. death penalty might turn on U.S. responsiveness to international (particularly European) pressure. More fundamentally, that the Court could erupt so violently in a case about a mundane Kansas sentencing instruction indicates that the period of stabilization has ended and that the future chapters of the federal constitutional regulation of the death penalty remain to be written.

The most recent call for global reconsideration of the death penalty in the United States emerged in response to litigation over the administration of lethal injection. Starting in the early 2000s, numerous defendants in more than a dozen states challenged prevailing lethal injection protocols on the ground that they entailed an unnecessary risk of pain. Virtually every state adopted lethal injection as the central mode of execution since the early 1980s, and most of these states unreflectively embraced the three-drug protocol developed in Oklahoma in 1977. The major objection

to the protocol concerns the possibility that a defendant will be insufficiently sedated, a concern heightened by the unwillingness of medical professionals to participate in executions; moreover, the frequency of insufficient sedation is hard to establish because the second drug in the standard protocol—pancuronium bromide—paralyzes the muscles of the condemned and thereby masks any symptoms of pain. Over the past five years, lower state and federal courts had responded quite differently to the federal constitutional challenges spawned by these concerns, with the result that executions halted in some states but continued without interruption in others. The Supreme Court agreed to hear the challenge and effectively imposed a nationwide moratorium on executions during the almost seven-month interval between its grant of certiorari in September 2007 and its decision in *Baze v. Rees* rejecting the claim in the context of a challenge to Kentucky's execution protocol.

Although the execution-method challenge in *Baze* appeared modest in its own terms—the petitioners sought not the end of lethal injection but additional safeguards in the administration of lethal injection—the case attracted widespread attention because of its broader practical and symbolic importance. On the practical level, the Court's decision to hear the claim ushered in the longest period without executions in more than two decades, and this moratorium naturally invited reflections about the current status and future prospects of the U.S. death penalty, especially given the noticeable decline in death sentences and executions since 1999. The case also brought to light some of the prevailing, though often obscured, contradictions surrounding American capital punishment. In particular, the case highlighted the difficulty of retaining the retributivist roots of the death penalty—which tolerate and may even celebrate significant suffering on the part of the offender to fulfill the penalty's retributivist purpose—while also embracing a more modern aversion to the visible destruction of the body or the purposeful infliction of physical pain.

The Court's rejection of the claim was as modest as the claim itself. Writing for a plurality, Chief Justice Roberts did not disclaim any right of inmates to avoid severe pain but concluded only that the petitioners had not carried their burden of establishing an intolerable risk of serious harm or the availability of a feasible, readily implementable alternative to the challenged protocol that substantially decreased the prevailing risk.

Justice Stevens, in a stunning concurrence, declared that "instead of ending the controversy" over lethal injection methods, the case "will

generate debate not only about the constitutionality of the three-drug protocol . . . but also about the justification for the death penalty itself." Stevens, who had coauthored the opinion reviving the death penalty in *Gregg* 22 years before, then declared his opposition to the death penalty as currently administered in the United States. Like Breyer in *Ring*, Stevens pointed to the troubling persistence of discrimination and arbitrariness in the implementation of the death penalty. Like Souter in *Marsh*, Stevens emphasized the risk of wrongful convictions. Stevens also found few social gains achieved under our current system. He found the retributive value weakened by our countervailing societal commitment to reducing pain; he cited the absence of any compelling proof of a deterrent effect (above and beyond the threat of lengthy imprisonment); and he saw little incapacitation value given the widespread availability of life without possibility of parole as an alternative to death. Ultimately, Stevens borrowed the words of White, who had declared in *Furman* that the death penalty was unconstitutional because it had ceased to serve the social purposes it was designed to achieve:

> I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State is patently excessive and cruel and unusual punishment violative of the Eighth Amendment."[106]

Notwithstanding this conclusion, Stevens did not believe his newly declared view regarding the constitutionality of the death penalty justified a "refusal to respect precedents that remain part of our law."[107] But he also indicated his belief that the current embrace of the death penalty by states, Congress, and the Court, is attributable to "habit and inattention" rather than a thorough assessment of its true costs and benefits.[108] In this respect he has obviously left open the door to joining a decision revisiting the constitutionality of the death penalty. And while Blackmun declared his opposition to the death penalty at a time when it had become constitutionally stable, Stevens has done so at a time of increasing public scrutiny and while sitting on a Court that includes three other Justices who have voiced comparable, though not as emphatic, concerns about the sustainability of capital punishment.

Implications and Anxieties

The recent changes detailed in this chapter—in the Supreme Court's Eighth Amendment jurisprudence, the views of a substantial minority of the Justices, and public attitudes more generally—create a moment of possibility for constitutional change in the status of capital punishment. This moment bears some resemblance to the period preceding *Furman*: public attitudes about the death penalty are more skeptical than they have been in years, the use of capital punishment has been steadily declining for close to a decade, international attitudes are turning against the practice, and the Supreme Court seems willing to at least consider sweeping constitutional challenges. "Similar" is not the same as "identical": public support for the death penalty in the abstract remains stronger today than it was in the 1960s, and it seems unlikely that executions will reach the zero mark maintained for more than five years by the moratorium strategy of the LDF lawyers in the late 1960s and early 1970s. But today, international attitudes and practices are much more heavily weighted and passionately aligned against capital punishment, and the Supreme Court has more clearly marked the criteria relevant to its constitutional methodology.

The breadth of these criteria suggests that a much wider array of data is now relevant to the death penalty's constitutional future and that some combination of various forms of movement toward abolition might be held to constitute a new consensus against the practice, even while a majority of states still officially authorize it. On the most "objective" end of the scale—which used to include only legislative enactments and jury verdicts—the Court now will consider legislative "movement" that does not result in formal law-making. For example, in support of its finding of a new consensus, the *Atkins* Court noted one state in which the legislature had acted to exempt those with mental retardation from execution even though the bill was vetoed by the governor, and two other states in which such bills passed a single house of a bicameral legislature.[109] Similar activity has occurred in recent years on the abolitionist front: the New Hampshire legislature passed legislation to abolish the death penalty in 2000, only to have it vetoed by Governor Jeanne Shaheen,[110] and the New York legislature failed to reinstate the death penalty after it was invalidated (on technical, easily rectified grounds) by the state's highest court.[111] Other possible measures of legislative "movement" toward abolition are surely possible, such as the approval of abolitionist legislation by a legislative

committee (or rejection of reinstatement). One could count how close legislative votes are (and compare the relative counts over time). A recent news article stressed that an abolitionist bill in (retentionist) Maryland failed by a single vote in a key legislative committee,[112] while in (abolitionist) Massachusetts the full legislative vote against reinstating the death moved from being as close as a single vote in 1997 to an overwhelming majority (99–53) against Governor Romney's "foolproof" death penalty bill in 2005.[113]

Moreover, formal legislative enactments or partial legislative movement (of the kinds described above) toward limitations on the scope of the death penalty, short of total abolition, might also count as evidence of an emerging consensus against capital punishment. So might legislative calls for studies or moratoria on various aspects of the death penalty. Such scaling back of the scope of the death penalty or other "reform" movements by legislatures may be less persuasive evidence of an emerging consensus than more wholesale abolitionist initiatives because limitations on scope, studies, and moratoria are often proposed or passed with an eye toward ameliorating—and thus preserving—capital punishment. Nonetheless, such actions do reflect a discomfort with current practices and might identify or call greater attention to problems (such as disparate racial impacts, inadequate defense representation, unreliable forensic practices, or questionable execution protocols) that the proposed "reforms" may fail to correct.

Similar refinements can be made to the second, "jury verdicts" leg of the Court's traditional analysis. In capital cases, the Court has traditionally looked not only to actual jury verdicts returned but also to the number of capital prosecutions actually brought and to the number of executions actually carried out. All three of these indicia (charges, sentences, and executions) are currently consistently falling, and a prolonged period of such decline may make up for a paucity of formal legislative abolition. Moreover, there is reason to believe that federal capital juries are becoming more reluctant to return death sentences, especially juries in traditionally abolitionist jurisdictions, [114] so much so that some federal judges in New York have deemed pursuing federal capital sentences there a waste of time and money.[115] It is also possible to offer a qualitative, as well as a quantitative, account of capital jury verdicts. When "slam dunk" capital trials result in life sentences, the collective head scratching that is reported in the local media is also evidence of changing times. In Harris County, Texas—the most active death penalty jurisdiction in the United States—a

jury's recent rejection of a death sentence for an illegal immigrant with a prior criminal record who shot a police officer in the back stunned the local community, leading to a sub-headline reading: "Was it result of good lawyering or a change in political climate?"[116]

To be sure, "the numbers"—that is, the rates of capital charges, sentences, and executions—may themselves be further influenced by continuing constitutional refinement of the scope of capital punishment, short of total abolition. Although the constitutional invalidation of capital punishment for juvenile offenders has likely had little effect on overall charging, sentencing, or execution rates (given the small numbers of juveniles involved in capital processes beforehand), the invalidation of capital punishment for offenders with mental retardation has probably played a more substantial role in recent declines, given the degree of post-*Atkins* litigation that has ensued, challenging individual executions and generally driving up the cost (in both time and resources) of capital prosecutions. Should the Supreme Court (or a substantial number of state or lower federal courts) conclude that the *Atkins* methodology calls for the invalidation of capital punishment for those with severe mental illness (as distinct from mental retardation), the ensuing litigation and limitation of the scope of the death penalty would be even more substantial, given both the possible breadth of the category of "mental illness" and the high incidence of some sort of mental illness among potentially capital offenders.[117]

Beyond the Court's traditional consideration of "the numbers" (even in the expansive sense outlined here) lies the vast terrain opened up by the Court's more controversial and qualitative factors—expert opinion, religious opinion, world opinion, and general public opinion. On the "expert" front, the list of possibly relevant views include the American Bar Association (ABA) and individual state bar associations, the American Law Institute, sitting and former judges in the federal and state systems, acting and former capital prosecutors, acting and former capital defense lawyers, wardens of federal and state prisons, prison guards, and police officers. Signs of movement here are ubiquitous, ranging from the obvious—the ABA's call for a nationwide moratorium[118]—to more discrete data points, such as the constitutional invalidation of state death penalty schemes by particular state supreme courts,[119] or the reflections of long-time wardens who have overseen decades of executions.[120]

The convergence of the views of various religious communities against the death penalty is a well-known and long-standing constant (religious organizations have long been active players in abolitionist efforts).

Moreover, there may be continuing expressions of this opposition in the theological statements of religious leaders and through the filing of amicus briefs such as those referenced by the Court in *Atkins*. The convergence of the industrialized West against capital punishment is a much more recent phenomenon, and it frequently generates new expressions of world disapproval (led by Europe) of the death penalty practices of the United States and elsewhere. For example, at the end of 2007, the United Nations passed a resolution calling for a worldwide moratorium on capital punishment, over the opposition of the United States, China, and Iran, among others.[121] This event was commemorated in Italy by the illumination in gold light of the coliseum in Rome—as was the state of New Jersey's legislative abolition of the capital punishment the same month.[122] Future expressions of world disapproval may range from the largely symbolic to the more tangible, especially in the likelihood that U.S. allies in the global "war on terror" will refuse in growing numbers of cases to extradite suspects to the United States without assurances that capital punishment will not be imposed.[123]

Finally, it seems possible, though not inevitable, that general public opinion within the United States on the issue of capital punishment will continue to drift downward. First, concerns about wrongful convictions clearly played a role in recent falling rates of public support for capital punishment, as reported by public opinion polls.[124] These concerns have yet to be laid to rest and could be exacerbated if further exonerations from death row take place or if it is conclusively proven that an innocent person has been executed in the modern (post-*Furman*) era. Moreover, the enormous recent increase in the authorization and usage of LWOP (life without parole) as a punishment for murder is also likely to decrease support for capital punishment (and decrease capital verdicts from juries). Polling data from many individual states and nationwide indicate substantial decreases in support for capital punishment when LWOP is offered as an alternative.[125] Given the *Atkins* Court's positive reference to public opinion polling data, it seems likely that abolitionist activists and litigators will continue to promote polling with the LWOP alternative question.

The extensive menu sketched above suggests the breadth of potential sources of support for a claim that a new national consensus is emerging, or will emerge in the foreseeable future, against the practice of capital punishment. There is, of course, no guarantee that such a claim will ever be accepted by any court, much less the Supreme Court. But it seems

virtually certain that the claim will be made and will take its place among other wholesale constitutional challenges to capital punishment in the modern era. Indeed, we think that the Court's recent decisions suggest that a claim based on "emerging consensus" under the Court's new Eighth Amendment methodology has more hope of success as a wholesale challenge than the others that have been pursued in recent years (such as the *Furman* claim of arbitrariness, the *McCleskey* claim of racial discrimination, the claim that the system is too error-prone, or the claim that the length of time spent on death row awaiting execution is too lengthy).[126]

Is this new possibility a development to be celebrated? From a retentionist perspective, surely not. But even from an abolitionist perspective, there are reasons to be wary of these new, albeit faint, prospects for judicial nationwide abolition. First and foremost is the now-familiar fear of popular backlash prompted by overreaching "judicial activism." The Supreme Court's famous interventions in the arenas of civil rights and abortion legalization generated furious and sustained backlash from entrenched opposition, leading many to question later whether a wholly nonjudicial avenue to promoting these changes would have been preferable, even to those who most supported the changes. But one needn't turn to analogies to see the relevance of concerns about potential backlash in the context of capital punishment. The post-*Furman* experience of furious popular and legislative backlash provides ample reason to be cautious about judicial fiat in this highly charged area. At a time when there had been no executions for almost a decade and when popular support for capital punishment seemed even lower than it is today, a full 35 states redrafted capital statutes in the first few years in the immediate aftermath of the *Furman* Court's decision. In the absence of Supreme Court involvement, would support for capital punishment have galvanized so quickly and decisively?

It is possible, of course, that the answer to the question is "yes"—capital punishment is actually only a small part of the nation's sharply punitive swing since the late 1960s, an era that has seen a tidal swell of mass incarceration as a result of vastly more punitive penal policies across the board, in response to several decades (1960s through 1980s) of rising violent crime rates and a nationwide commitment to a "war on drugs." The revitalization of capital punishment in this period might well have been inevitable, even in the absence of the Court's intervention (which surely had a short-term galvanizing effect). But today, in an era of falling crime rates and falling interest in the pursuit of capital cases, might it be better

to wait and hope that capital punishment will become increasingly marginalized as an outlier practice in a few jurisdictions rather than attempt to stamp it out altogether, thus inviting mobilization around this potently symbolic issue?

There are some good reasons for answering this question in the affirmative. Actual executions in the United States are already exceedingly geographically "lumpy"—that is, highly concentrated in a small number of states (and even within those states, concentrated in a small number of counties). So a substantial degree of marginalization or containment of the actual practice of capital punishment is already occurring. The imposition of capital sentences is somewhat less concentrated than executions, with many states (California being the prime example) producing a large number of death sentences but only a negligible number of executions.[127] If states like California never actually ramp up their execution rates but, rather, continue to use the death penalty largely symbolically, it is possible that such states, over time, may morph into wholly abolitionist states (as New York and New Jersey did, in different ways, over the past few years). And even if such states never muster the political will to abolish capital punishment formally, they may still continue to moderate its use so as to generate a state of de facto abolition. In such a scenario, nationwide abolition may never occur, but the practice of capital punishment may become more exotic—more like rare flora and fauna (or, more pejoratively, like rare diseases) that flourish only in isolated locales under particular circumstances.

Moreover, constitutional litigation runs a more serious risk of spectacular failure than does a slower process of marginalization. If constitutional challenges are brought and *rejected*, especially by the Supreme Court, the challenged capital punishment practices are insulated by constitutional imprimatur against reform and resistance that might otherwise slow or stop them in jurisdictions most skeptical of capital punishment (future New Yorks and New Jerseys potentially poised on the cusp of de facto or formal abolition). The country's recent experience of constitutional litigation that went all the way to the Supreme Court surrounding execution protocols is a cautionary case in point.

Before the Court's grant of certiorari and the nationwide moratorium on executions that resulted, the lethal injection issue presented something like a Rorschach test for state and federal actors across the country, particularly lower courts considering stays of execution and governors considering the issuance of death warrants. In some jurisdictions,

the relevant institutional actors were troubled by the prospect of the infliction of excessive or unnecessary pain during lethal injections, and in these states, executions slowed significantly or came to a halt.[128] In other states, notably Texas, the lethal injection issue was rejected quickly and decisively, and executions continued at the regular pace (until the Supreme Court intervened). The lethal injection issue thus allowed "symbolic states" like California and even some "executing states" (like Florida, which had an embarrassing history of "botched" executions) to conduct few or no executions, further marginalizing the practice of capital punishment to a small handful of states. In the year 2007, before the moratorium imposed by the Supreme Court after its grant of certiorari, Texas conducted more than half of the country's executions, up from its 35 percent or so share during the preceding decade. Without the intervention of the Supreme Court, this process of marginalization would likely have continued for several years, as different jurisdictions spent varying amounts of time analyzing and litigating alternatives to the challenged lethal injection protocols.

The Supreme Court's intervention, however, seemed to galvanize supporters of the death penalty, as political actors spoke out disparagingly about the Court's intervention and sought to avoid the moratorium created by its liberal granting of stays of execution in the wake of its grant of certiorari.[129] The resulting Supreme Court decision upholding the challenged Kentucky protocol, though it did not definitively block all future lethal injection challenges, appears to have removed a significant roadblock to executions. The Court's decision makes it more difficult for local actors to restrict capital practices in the name of caution about concerns regarding lethal injection protocols. The overarching lesson of the lethal injection litigation may be that the absence of Supreme Court review of global death penalty challenges at this point in time might facilitate local limitations on the practice, as there is clearly a risk that *failed* constitutional challenges in the high Court paradoxically may move the country further from restriction and restraint than no constitutional challenges at all.

Alternatively, reliance on local resistance and restraint to produce a slow process of desuetude (perhaps punctuated by occasional formal abolition) creates no backstop to prevent revitalization of capital punishment in times of rising public fear of crime and rising homicide rates (similar to the role that the European Union plays today in Europe). As many abolitionist states within the United States (and countries within Europe)

are aware, a popular surge to reinstate capital punishment is always just one gruesome crime away. For example, Massachusetts, though solidly abolitionist at present, was brought within a single vote of reinstatement of the death penalty in 1997 in the wake of the horrible rape/murder of a 10-year-old boy.[130] Constitutional abolition, in contrast to marginalization, can create just such a backstop in the federal courts, though at the cost of generating potential political backlash in the states.

Perhaps both extremes can be avoided by continuing with vigor on the present relatively new path—one of continuing *substantive* regulation of capital processes.[131] If *Atkins* and *Simmons* are followed by further constitutionally imposed substantive limitations (such as on the imposition of capital punishment on those with mental illness), the practice of capital punishment may simply become too constricted and too costly to survive in any robust way—much the way a tree that is hollowed out can no longer survive. States or localities may conclude that the game is simply not worth the candle—that the likelihood of generating and defending death sentences in the cases that call for them the most is too difficult or costly.

For the time being, all three paths toward some form of abolition—marginalization, wholesale constitutional abolition, and constitutional "hollowing out"—are substantially congruent. In these early days of faint possibility, each step toward one of the three outcomes might also be seen as a step toward the two others. At some point in the future, however, the paths will diverge—either because all three are rejected in a revitalization of capital punishment like that of the mid-1970s or because one or two of the possibilities are decisively rejected. Our goal here is to try to illuminate the road ahead, so that the moments of decision are recognized and self-consciously weighed by the legal actors involved rather than recognized only after they have passed.

NOTES

1. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).
2. *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005).
3. Ibid., at 577.
4. *Gregg v. Georgia*, 428 U.S. 153 (1976).
5. *Furman v. Georgia*, 408 U.S. 238 (1972).
6. "E.U. Rebuffs Poland on Death Penalty," *International Herald Tribune*, Aug. 2, 2006, available at http://www.iht.com/articles/2006/08/02/news/death.php.

7. "Huckabee Attack Ad Runs Anyway," *Newsweek*, Jan. 3, 2008, available at http://www.newsweek.com/id/83514/output/print.

8. Adrian Walker and Doris Sue Wong, "No Death Penalty by One Vote," *Boston Globe*, Nov. 7, 1997, available at http://www.nodp.org/ma/stacks/globe_110797.html.

9. *Atkins*, at 304; *Roper*, at 551.

10. *Atkins*, at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change."); *Roper*, at 565–66 (same).

11. See, e.g., *Atkins*, at 316 n.21 (recognizing public opinion poll data and "organizations with germane expertise" as reflecting "a much broader social and professional consensus"); ibid., at 316 and n.20 (noting the sentencing practices of several states).

12. See, e.g., *Kansas v. Marsh*, 126 S. Ct. 2516, 2544–46 (2006) (Souter, J., dissenting); *Ring v. Arizona*, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring); *Atkins v. Virginia*, at 320 n.25 (Stevens, J., writing for the majority).

13. See, e.g., *Knight v. Florida*, 528 U.S. 990, 993–99 (1999) (Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045 (Stevens, J., respecting the denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari).

14. *Powell v. Alabama*, 287 U.S 45 (1932).

15. *Moore v. Dempsey*, 261 U.S. 86 (1923).

16. *Robinson v. California*, 370 U.S. 660 (1962).

17. See, e.g., *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, Douglas, and Brennan, JJ., dissenting from denial of certiorari).

18. Ibid.

19. Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (New York: Random House, 1973), 75.

20. Ibid., 107.

21. Alexander M. Bickel, *The Least Dangerous Branch* (New York: Bobbs-Merrill, 1962), 242.

22. Marvin E. Wolfgang and Marc Riedel, "Rape, Racial Discrimination, and the Death Penalty," in *Capital Punishment in the United States*, pp. 99–121, ed. Hugo Adam Bedau and Chester M. Pierce (New York: AMS Press, 1976). See also *Maxwell v. Bishop*, 398 F.2d 138, 141–43 (6th Cir. 1968) (describing the results of the Wolfgang study).

23. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

24. *Maxwell v. Bishop*, 398 U.S. 262 (1969).

25. *Rudolph*, at 889.

26. Hans Ziesel, "Race Bias in the Administration of the Death Penalty: The Florida Experience," *Harvard Law Review* 95 (1981): 458 (quoting *Brief for the United States as Amicus Curiae* app. A at 5A, *Gregg v. Georgia*, 428 U.S. 153 (1976)).

27. *Boykin v. Alabama*, 395 U.S. 238 (1969).

28. *McGautha v. California*, 402 U.S. 183 (1971).
29. *Furman,* at 238 (and companion cases *Branch v. Texas* and *Jackson v. Georgia*).
30. Bickel, *Least Dangerous Branch*, 240–43.
31. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
32. *Furman*, at 238.
33. Ibid., at 240 (Douglas, J., concurring); ibid., at 257 (Brennan, J., concurring); ibid., at 306 (Stewart, J., concurring); ibid., at 310 (White, J., concurring); ibid., at 314 (Marshall, J., concurring).
34. Meltsner, *Cruel and Unusual*, 66.
35. *Furman*, at 257 (Brennan, J., concurring); ibid., at 314 (Marshall, J., concurring).
36. Ibid., at 310 (White, J., concurring).
37. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).
38. *Gregg v. Georgia*, at 153.
39. *Coker v. Georgia*, 433 U.S. 584 (1977).
40. Ibid., at 592.
41. Ibid., at 601 (Powell, J., concurring in part); ibid., at 604 (Burger, C.J., and Rehnquist, J., dissenting).
42. *Rummel v. Estelle*, 445 U.S. 263 (1980).
43. *Hutto v. Davis*, 454 U.S. 370 (1982).
44. *Solem v. Helm*, 463 U.S. 277 (1983).
45. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991).
46. *Enmund v. Florida*, 458 U.S. 782 (1982).
47. *Tison v. Arizona*, 481 U.S. 137 (1986).
48. *Stanford v. Kentucky*, 492 U.S. 361 (1989).
49. Ibid.,. at 30–71.
50. Ibid., at 370 n.2.
51. Ibid., at 369 n.1 (emphasis added).
52. Ibid., at 377.
53. Ibid., at 378.
54. *Penry v. Lyaugh*, 492 U.S. 302, 339 (1989).
55. Ibid., at 334.
56. *McCleskey v. Kemp*, 481 U.S. 279 (1987).
57. Ibid., at 285–87 (describing design and findings of the Baldus study).
58. Ibid., at 291–300.
59. Ibid., at 314–15 ("McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system").
60. Ibid., at 312 ("Apparent disparities in sentencing are an inevitable part of our criminal justice sytem").

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62. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.) ("Antiterrorism and Effective Death Penalty Act" (AEDPA)).
63. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).
64. Bickel, *Least Dangerous Branch*, 242.
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71. Ibid., at 315 n.16.
72. Ibid., at 316.
73. Ibid., at 315.
74. Ibid., at 315 n.18.
75. Ibid., at n.21.
76. Ibid.
77. Ibid., at 322.
78. Ibid., at 343–45.
79. *Coker*, at 584; *Enmund*, at 782.
80. *Atkins*, at 347.
81. Ibid., at 353.
82. *Ring*, at 584.
83. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
84. *Ring*, at 613–19.
85. Ibid., at 614–15.
86. Ibid., at 616.
87. Ibid., at 618.
88. Ibid., at 616–18.
89. Ibid., at 618.
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93. Ibid., at 573.
94. Ibid., at 578.
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96. *Kansas v. Marsh*, 548 U.S. 163 (2006).

97. Ibid.
98. Ibid., at 2544–46 (Souter, J., dissenting).
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100. Ibid., at 2544–45.
101. Ibid., at 2528.
102. Ibid., at 2545.
103. Ibid., at 2535–39 (Scalia, J., concurring).
104. Ibid., at 2535–36 (noting that exonerations demonstrate "not the failure of the system but its success").
105. Ibid., at 2532.
106. *Baze v. Rees*, 128 S. Ct. 1520, 1551 (2008) (Stevens, concurring in judgment).
107. Ibid., at 1552.
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109. *Atkins*, at 315.
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121. "UN Votes for Death Penalty Freeze," *BBC News*, Dec. 18, 2007, available at http://news.bbc.co.uk/2/hi/in_depth/7151031.stm.

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125. See, e.g., Jennifer McMenamin, "In Maryland, Most Want Option of Execution," *Baltimore Sun,* June 2, 2008 (majority ceases to favor death penalty when LWOP offered as option); Frank Newport, "Sixty-Nine Percent of Americans Support Death Penalty," Oct. 12, 2007, available at http://www.gallup.com/poll/101863/Sixtynine-Percent-Americans-Support-Death-Penalty.aspx (support for death penalty typically fall to the 47–54 percent range when LWOP is offered as an option).

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128. Peter Whoriskey and Sonia Geis, "Lethal Injection Is on Hold in Two States," *Washington Post*, Dec. 16, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/12/15/AR2006121501499.html (describing reforms, moratoria, and delays in a variety of states long before the Supreme Court granted review).

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130. LeBlanc, "Death Penalty Bill Facing Stiff Opposition."

131. Most recently, in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), the Court rejected states' efforts to revive the death penalty for the nonhomicidal offense of child rape. The court's expansive decision prohibits the imposition of capital punishment for any ordinary crimes not resulting in death.

Professors Carol and Jordan Steiker,
The American Death Penalty & the (In)Visibility of Race

The American Death Penalty and the (In)Visibility of Race

Carol S. Steiker† *& Jordan M. Steiker*††

Racial injustice has always cast a shadow over American criminal justice. In the context of capital punishment, racial disparities have been evident since colonial times. Black people have suffered not only disparate treatment as alleged perpetrators and victims of capital crimes under facially neutral capital statutes, but also explicit racial discrimination under antebellum capital statutes that varied in their application based on the racial status of victims and perpetrators. Following the Civil War, blacks suffered a lengthy era in which lynchings were common, followed by an era of so-called legal lynchings in the South, in which legal protections were minimal at best. Against this backdrop, it is unsurprising that the NAACP Legal Defense and Education Fund led the constitutional-litigation campaign against the death penalty in the 1960s and 1970s. What is surprising, however, is the Supreme Court's avoidance of the race issue in its foundational constitutional cases. Despite the centrality of racial discrimination in litigants' arguments, the Court consistently avoided direct engagement with the issue of racial discrimination in capital punishment. After surveying the centrality of race both to the history of capital punishment in America and to the litigants' constitutional strategy, we document the Court's strategies of avoidance. We then consider possible explanations for the Court's silence and note some unanticipated consequences of the Court's race-neutral approach to its constitutional regulation of capital punishment.

INTRODUCTION

Sometimes the historical context in which important constitutional doctrines are born or elaborated may influence deciding judges in subtle, perhaps even unconscious, ways. Consider, for example, how the Cold War imperative for the recognition of the civil rights of black Americans may have affected midcentury court rulings on racial equality[1] or how the intrusive policing of

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[1] See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 210 (Oxford 2004) ("The justices' unanimity in all three

gay men in public lavatories may have influenced consideration of the constitutionality of the bugging of phone booths and other forms of surveillance.[2] Arguments that these background events influenced constitutional law are necessarily speculative given that the salience of the events may have lurked below the level of consciousness.

The racial context informing the foundational constitutional challenges to capital punishment is different. The justices who "constitutionalized" the death penalty in the 1960s and 1970s could not have avoided consciously reflecting on the racial history of capital punishment in America, given that the constitutional campaign against the death penalty was led by the nation's preeminent racial-justice organization, the NAACP Legal Defense and Education Fund (LDF). During this time, the litigants and their amici consistently thrust the issue of race to the forefront, and nobody with even a modicum of historical awareness could have missed the salience of race to the American practice of capital punishment.

Strangely, though, the birth of the Supreme Court's constitutional regulation of capital punishment was largely devoid of mention of the racially inflected history of the law and practice of the death penalty, despite how central the issue of race was to the litigation effort that forced the Court's hand. One can read the entire canon of the Court's pathbreaking cases on capital punishment during the 1960s and 1970s without getting the impression that the death penalty was an issue of major racial significance in American society.

In what follows, we highlight how inextricably race and the death penalty have been entwined in American history, survey the near absence of discussions of race in the Supreme Court's formative Eighth Amendment cases of the 1960s and 1970s, and contemplate the possible causes and costs of this strange strategy of willful silence.

1950 race cases—an impressive accomplishment for this ordinarily splintered Court—is most plausibly attributable to the Cold War imperative.").

[2] See David Alan Sklansky, *"One Train May Hide Another":* Katz*, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 UC Davis L Rev 875, 880, 897–900 (2008) (contending that the Court's landmark decision in *Katz v United States*, 389 US 347 (1967), and the Fourth Amendment jurisprudence that flowed from it were influenced by the justices' anxieties, perhaps unconscious, about the use of peepholes and undercover decoys to police gay men's encounters in public lavatories).

I. VISIBILITY

It is impossible to find a time in American history, even well before the birth of the Republic, when the use of the death penalty was not racially inflected. Even in seventeenth-century colonial America, a frontier society in which overall populations were small and black inhabitants few, the rate of execution of blacks still far exceeded that of whites on a per capita basis (though the majority of those executed were white).[3] Moreover, although the white execution rate declined over the course of the seventeenth century, the black execution rate did not experience a similar consistently downward trend.[4]

During the eighteenth century, the colonial population grew more than tenfold, including a large influx of African slaves mostly to the South.[5] Whereas in the seventeenth century the majority of executions occurred in New England and the majority of those executed were white,[6] in the eighteenth century the majority of executions occurred in the South and the majority of those executed were black.[7] This substantial shift in the use of the death penalty seems clearly linked to the expansion of the South's slave-labor economy and the demand by slave owners for state assistance in disciplining the growing enslaved population, a demand motivated by both economic-productivity concerns and the perceived need to protect the increasingly outnumbered white population.[8]

Not only did the number of blacks executed surpass the number of whites executed during the eighteenth century (a trend that continued until the Civil War), but blacks were often executed for different crimes.[9] Whereas the vast majority of whites sentenced to death were executed for murder, substantial numbers of blacks were executed for nonhomicidal crimes.[10] From the late eighteenth century to the Civil War, the rate of execution for nonlethal crimes varied considerably by race, with

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3 Howard W. Allen and Jerome M. Clubb, *Race, Class, and the Death Penalty: Capital Punishment in American History* 29–31 (SUNY 2008).

4 Id at 31.

5 Id at 31–32.

6 Id at 29.

7 Allen and Clubb, *Race, Class, and the Death Penalty* at 33 (cited in note 3).

8 See Stuart Banner, *The Death Penalty: An American History* 142 (Harvard 2003) ("From the perspective of slaveowners, harsh punishments were necessary to manage such large captive populations.").

9 Allen and Clubb, *Race, Class, and the Death Penalty* at 33–34 (cited in note 3).

10 See id at 60–64.

many more blacks being "executed for non-lethal and unknown" offenses than whites across all regions of the country.[11] In the South, where the majority of executions of blacks occurred, the nonlethal crimes that most frequently led to executions were slave revolt, rape, attempted rape, and attempted murder.[12]

Moreover, blacks were much more likely than whites to be subject to the most extreme modes of execution. Although the majority of executions of both whites and blacks were by hanging until the twentieth century, much more terrifying and torturous methods were occasionally employed during the colonial era and into the early nineteenth century.[13] In the British colonies, burning at the stake was a common torturous punishment, whereas in Louisiana (a colony ruled by France, then Spain), breaking on the wheel was more common.[14] In addition, gibbeting (hanging in a cage or in chains) was sometimes employed as a method for displaying the body of the executed convict after death.[15] Sometimes the bodies of executed convicts were decapitated or otherwise dismembered and the heads or body parts publicly displayed.[16] These more terrifying and torturous execution practices were uncommon, but when they were employed, it was disproportionately in the execution of blacks, especially slaves convicted of revolt or serious crimes against whites.[17] Slave revolt was considered a form of "petit treason" on the basis of an analogy between the household and the state; such crimes were thus subject to a form of "super-capital punishment" in light of the perceived enormity and treachery of the underlying offense.[18]

At the time of the Founding, capital punishment was an entrenched legal and social practice, explicitly acknowledged

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11 Id at 60–62. See also Michael A. Powell, *The Death Penalty in the South*, in Gordon Morris Bakken, ed, *Invitation to an Execution: A History of the Death Penalty in the United States* 203, 204–05 (New Mexico 2010) (noting that the overwhelming majority of executions of whites in both the North and the South in the period stretching from the early Republic to the Civil War were for the crime of murder).

12 See Allen and Clubb, *Race, Class, and the Death Penalty* at 63–64, 74 (cited in note 3).

13 See id at 42.

14 Id at 36, 45.

15 Banner, *The Death Penalty* at 72–74 (cited in note 8).

16 Id at 74–75.

17 Allen and Clubb, *Race, Class, and the Death Penalty* at 45 (cited in note 3).

18 Banner, *The Death Penalty* at 71 (cited in note 8).

several times in the Constitution.[19] Despite this apparent acceptance of the practice of capital punishment, many of the Founders and important thinkers of the time had begun to question it in light of the influential critique by Italian jurist Cesare Beccaria.[20] Initiatives to restrict the death penalty escalated in the new Republic, in contrast to Mother England, where expansive capital statutes continued to flourish at the turn of the nineteenth century.[21] This rethinking and restriction of the death penalty, however, was regionally variable within the United States. While the North progressively narrowed the ambit of capital punishment, and the Midwest inaugurated the mid-nineteenth-century movement toward full-scale abolition, the South restricted the death penalty only for whites, simultaneously *expanding* its ambit in an explicitly racial fashion.[22]

In the North, the use of capital punishment for nonlethal offenses fell sharply from the end of the eighteenth to the middle of the nineteenth century, such that by 1860, no Northern state authorized execution for any offense other than murder or treason.[23] Indeed, the North began to restrict the use of capital punishment even for the crime of murder. In 1794, Pennsylvania promulgated legislation dividing murder into degrees and restricting the death penalty to murders in the first degree.[24] This innovation eventually spread widely, but the only Southern states to quickly adopt it did so with the explicit provision that the new limitation did not apply to slaves.[25]

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19 The Fifth Amendment presumes the availability of the death penalty in three separate clauses—the guarantee of a grand jury in "capital" cases, the protection against being placed twice in jeopardy "of life or limb," and the guarantee of due process of law prior to deprivation of "life." US Const Amend V.

20 See Carol S. Steiker and Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U Chi Legal F 117, 126–27.

21 See Douglas Hay, *Property, Authority, and the Criminal Law*, in Douglas Hay, et al, eds, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* 17, 18 (Pantheon 1975).

22 See Allen and Clubb, *Race, Class, and the Death Penalty* at 63 (cited in note 3) ("The number of capital offenses was reduced for whites, but if anything the number was increased where African Americans were concerned."); Powell, *The Death Penalty in the South* at 204 (cited in note 11) ("Although the offenses for which capital punishment applied to whites diminished in the South, the same was not true for blacks; the list of crimes for which they could be punished by death became more extensive rather than less.").

23 Banner, *The Death Penalty* at 131 (cited in note 8).

24 Id at 98.

25 See id at 99.

This exception reflected the widespread practice throughout the South prior to the Civil War of maintaining separate capital offenses on the basis of slave status and on the basis of race, regardless of slave status. For example, in antebellum Virginia, "free African Americans (but not whites) could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault—all provided the victim was white; slaves in Virginia were eligible for death for commission of a mind-boggling sixty-six crimes."[26] At the same time, whites in Virginia could face the death penalty for just four crimes.[27] While Virginia had the most lopsided ratio of black-to-white capital crimes, the other Southern states also promulgated racially skewed capital codes. For example:

> [S]laves in Texas (but not whites) were subject to capital punishment for insurrection, arson, and—if the victim were white—attempted murder, rape, attempted rape, robbery, attempted robbery, and assault with a deadly weapon. Free blacks were subject to capital punishment for all these offenses plus that of kidnapping a white woman.[28]

The explicitly race- and slave-based capital codes prevalent in the South, as well as the especially torturous modes of execution used for slave revolts and other serious crimes by blacks, not only reflected prevailing racist attitudes and institutions but also helped produce those attitudes by using the fearsome spectacle of public executions to imbue race and slave status with the utmost significance. From early colonial times through the Civil War, racial attitudes were hardened and entrenched "by mobilizing race-encoding categories of punishment: Who is whipped, who is hanged, and who is burned at the stake?"[29] As a result, in effect if not in explicit intent, "one of the functions of the death penalty . . . was *to create race*: to segregate the myriad

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[26] Sheri Lynn Johnson, Coker v. Georgia*: Of Rape, Race, and Burying the Past*, in John H. Blume and Jordan M. Steiker, eds, *Death Penalty Stories* 171, 191 (Foundation 2009).

[27] George M. Stroud, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America* 75 (Longstreth 2d ed 1856).

[28] Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in Charles J. Ogletree Jr and Austin Sarat, eds, *From Lynch Mobs to the Killing State: Race and the Death Penalty in America* 96, 99 (NYU 2006).

[29] Stephen John Hartnett, 1 *Executing Democracy: Capital Punishment & the Making of America, 1683–1807* 20 (Michigan State 2010).

social positions of the New World into hard and fast categories of white and black, free and enslaved."[30]

While the South was robustly enforcing its many capital statutes against slaves and free blacks in the first half of the nineteenth century, a movement to abolish capital punishment was gathering momentum in the North and Midwest. Five Northeastern states enacted so-called Maine laws, which were named after a Maine statute passed in 1837 that required a one-year waiting period between conviction and execution and that resulted in a de facto moratorium on executions.[31] In 1846, Michigan became the first state to abolish the death penalty for murder, followed by Rhode Island in 1852 and Wisconsin in 1853.[32] The abolition movement lost steam in the 1850s, as the issue of slavery and the impending Civil War took precedence over other issues.[33] Despite several decades of death-penalty-abolition discussion, debate, and legal reform in the North and Midwest, abolition was simply a nonstarter in the South. In large part, abolition was inconceivable because of the widely held belief that capital punishment was needed to maintain the South's slave economy and society.[34] But the death-penalty-abolition movement's failure even to develop a toehold in the South doubtless also reflected the close connection in both people and ideology between the death-penalty-abolition movement and the slavery-abolition movement.[35]

An ironic result of the split between the North and the South on capital punishment is that the United States now holds the odd position of being in *both* the vanguard and the rearguard of worldwide death-penalty abolition. The state of Michigan has the much-vaunted distinction of being "the first government in the English-speaking world to abolish capital punishment for murder and lesser crimes."[36] It has unwaveringly maintained its 1846 abolitionist stance to the present day. At the same time, the United States as a nation is currently the

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30 Id.

31 Banner, *The Death Penalty* at 134 (cited in note 8).

32 Id.

33 Id.

34 See id at 142.

35 See Banner, *The Death Penalty* at 142–43 (cited in note 8). See also Philip English Mackey, ed, *Voices against Death: American Opposition to Capital Punishment, 1787–1975* xxviii (Burt Franklin 1976).

36 Eugene G. Wanger, *Michigan & Capital Punishment*, 81 Mich Bar J 38, 38 (2002).

only Western democracy that still maintains the death penalty; indeed, the United States has one of the top five execution rates in the world today, along with China, Iran, Iraq, and Saudi Arabia.[37] This schizophrenic posture is a direct result of regional division on the issue within the United States, which was born of differing attitudes regarding the race-based practice of chattel slavery.

With the South's defeat in the Civil War and the subsequent passage of the Fourteenth Amendment, explicitly race-based capital codes could no longer be maintained. But race continued to influence the application of facially neutral capital statutes through prosecutorial discretion, all-white sentencing juries, and the practice of extrajudicial executions by lynch mobs.[38] In the aftermath of the Civil War, the death penalty offered "an alternative form[ ] of racial subjugation," necessary in the eyes of some white Southerners "to restrain a primitive, animalistic black population."[39] White Southerners feared violent revenge and property crimes by the impoverished freed population,[40] but above all, they seemed to fear sexual aggression by black men against white women.[41] These attitudes not only supported the use of capital punishment but also prompted rampant private violence against the newly freed black population, resulting in what one historian called a "reign of terror" and an "orgy of racial violence" in the postbellum South.[42] The practice of lynching, which reached its peak in the late nineteenth and early twentieth centuries, constituted "a form of unofficial capital punishment" that, in its heyday, was even more common than the official kind.[43] Whether one considers only legal executions or includes extralegal lynchings, a substantial majority of executions in the second half of the nineteenth century took place in

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37 Laura Smith-Spark, *China, U.S. in Top 5 for Executions Worldwide*, (CNN, Apr 10, 2013), archived at http://perma.cc/9MDK-FZBP.

38 See Allen and Clubb, *Race, Class, and the Death Penalty* at 81 (cited at note 3).

39 Banner, *The Death Penalty* at 228 (cited in note 8).

40 See Allen and Clubb, *Race, Class, and the Death Penalty* at 68 (cited in note 3).

41 See William D. Carrigan, *The Making of a Lynching Culture: Violence and Vigilantism in Central Texas, 1836–1916* 153 (Illinois 2004) ("Especially in the South, the late nineteenth century was beset with white paranoia on the topic [of the rape of white women by black men].").

42 Id at 112–13. See also Randall Kennedy, *Race, Crime, and the Law* 45 (Pantheon 1997) (describing the charge of rape by a black man of a white woman as "the most emotionally potent excuse" for lynchings).

43 Banner, *The Death Penalty* at 229 (cited in note 8).

the South, and the vast majority (more than 75 percent) of Southern executions were of blacks.[44]

Even during the country's most active period of death-penalty abolition—the Progressive Era at the turn of the twentieth century, when ten states abolished the death penalty for murder—race played a highly salient role.[45] Although none of the abolishing states were in the Deep South, their abolitions proved tenuous, with eight of the ten states ultimately reinstating the death penalty, often within only a few years of abolition.[46] During the abolition and reinstatement debates, two arguments with potent racial overtones were powerfully present—the need to retain capital punishment both to prevent lynchings and to promote a program of eugenics.[47] The surprising prominence and salience of these death-penalty arguments in the early twentieth century "reveal how much the debates about capital punishment at that time were debates about race and how much the death penalty itself, as it was practiced on the ground, was racially inflected."[48]

Although the first half of the twentieth century saw a substantial decline in lynch-mob violence, the death penalty continued to serve as a means of racial subjugation, especially in the South. The breadth of Southern capital statutes persisted into the twentieth century: "[M]ost of the southern states' capital crimes on the eve of the Civil War were still capital nearly a century later."[49] Moreover, the need to forestall lynch-mob violence led Southern reformers to urge expediting the criminal process to allow for immediate trials followed by instant executions—pressures that created the practice known derogatorily as "legal lynching."[50] The South's distinctive racial history thus left its mark not only on the substance of capital statutes, but also on procedure in capital trials (and criminal justice more generally). Indeed, the Supreme Court's criminal procedure revolution of the 1960s, in which the Court recognized and expanded many

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44 See Allen and Clubb, *Race, Class, and the Death Penalty* at 70, 76, 97, 101, 105, 121, 133 (cited in note 3).

45 See Carol S. Steiker and Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J Crim L & Crimin 643, 646–61 (2010).

46 Id at 649.

47 See id at 646.

48 Id at 661.

49 Banner, *The Death Penalty* at 228 (cited in note 8).

50 See Michael J. Klarman, Powell v. Alabama*: The Supreme Court Confronts "Legal Lynchings"*, in Carol S. Steiker, ed, *Criminal Procedure Stories* 1, 2–3, 5, 11 (Foundation 2006).

constitutional protections for criminal defendants, itself had an unstated racial subtext in light of the substantial "intersection of the criminal procedure revolution and the struggle for racial equality, especially in the South."[51]

The lack of adequate legal process in capital trials in the South, especially in cases involving black men accused of raping white women, brought the NAACP and other civil rights organizations repeatedly to the South to defend the accused, who often faced dubious charges on the flimsiest of evidence.[52] The participation of Thurgood Marshall in one such effort in Groveland, Florida, is the subject of Gilbert King's Pulitzer Prize–winning book, *Devil in the Grove*, in which King suggests that the case "became the impetus behind the NAACP's capital punishment program, which eventually led to the Supreme Court ruling [in *Furman v Georgia*[53]] that capital punishment was unconstitutional."[54]

The straight line that King draws from Groveland to *Furman* is supported by the staggering statistics regarding the racial use of rape prosecutions in the South long after lynching's heyday. The overwhelming majority of convicted rapists executed in the South in the twentieth century were black.[55] Racial disparities for murder, though less striking, were evident in the South as well.[56] Although racial disparities in execution rates were less obviously stunning outside the South, blacks were still executed in disproportion to their numbers everywhere in the United States.[57] Indeed, over the broad sweep of American history from 1608 to 1945, blacks, along with other minority groups, constituted a majority of those executed.[58] Blacks alone constituted almost half of those executed in that long timeframe—and

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51 Carol S. Steiker, *Introduction*, in Steiker, ed, *Criminal Procedure Stories* vii, viii (cited in note 50).

52 For examples of these cases of alleged rape, see generally *Irvin v State*, 66 S2d 288 (Fla 1953); *Irvin v Chapman*, 75 S2d 591 (Fla 1954); *Sims v Balkcom*, 136 SE2d 766 (Ga 1964). For an example of the NAACP's involvement in civil actions, see generally *Earle v Greenville County*, 56 SE2d 348 (SC 1949) (seeking damages for a lynching).

53 408 US 238 (1972).

54 Gilbert King, *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* 5 (HarperCollins 2012).

55 See Barrett J. Foerster, *Race, Rape, and Injustice: Documenting and Challenging Death Penalty Cases in the Civil Rights Era* 9–10 (Tennessee 2012); Banner, *Traces of Slavery* at 107 (cited in note 28).

56 Banner, *Traces of Slavery* at 107 (cited in note 28).

57 Allen and Clubb, *Race, Class, and the Death Penalty* at 168 (cited in note 3).

58 Id at 148.

they would constitute a much larger proportion if lynch-mob executions were included in the count.[59]

The dry statistics on the use of capital punishment were a lived reality for the civil rights activists of the mid-twentieth century, especially for Thurgood Marshall, who risked his life in Groveland and throughout his work on other capital trials in the South. The extent to which the history of the American death penalty was "soaked in racism" was not news to the NAACP.[60] Just as the nineteenth-century movement for legislative death-penalty abolition was tied to the slavery-abolition movement in personnel and ideology, the twentieth-century movement for judicial death-penalty abolition was tied to the civil rights movement. Unsurprisingly, the impetus and focus of the ensuing litigation strategy were race based in ways that could not possibly have been overlooked or misunderstood by the courts.

II. INVISIBILITY

The salience of race in American capital punishment law and practice prior to the 1960s contrasts sharply with its relative invisibility in the judicial opinions issued in the foundational cases of the modern era. Concerns about racial discrimination clearly motivated judicial interest in subjecting the death penalty to constitutional regulation. The LDF, the preeminent civil rights organization devoted to eradicating racial discrimination, was the public face of the legal assault on capital punishment. The legal claims that it advanced in the Supreme Court, as well as the evidence offered in support of those claims, focused on the persistence of racial discrimination. The emphasis on racial discrimination in the briefs was evident not only in the briefs filed by the LDF but also in those prepared by a variety of amici. And yet a cursory—indeed, even a careful—reading of the Court's opinions in the defining era (from roughly 1963 to the late 1970s) reveals little attention to racial discrimination. This Part will document the odd dialogue between death-penalty litigants and the Court during this era, in which litigants repeatedly urged the Court to limit or abolish the death penalty because of its racially discriminatory administration and the Court consistently declined to use race as the lens for understanding or regulating the American death penalty.

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59 Id at 148–49.

60 Banner, *Traces of Slavery* at 97 (cited in note 28).

Before the 1960s, defense lawyers challenged various aspects of capital convictions but rarely challenged the constitutionality of the death penalty itself. The Supreme Court heard some challenges to execution methods,[61] including a challenge to Louisiana's effort to try again after the infamous botched electrocution of Willie Francis in 1946.[62] The Scottsboro Boys case yielded a decision establishing the right to counsel in capital cases,[63] making it the first case to suggest that capital trials demand greater procedural protections than noncapital trials. But for the most part, lawyers representing death-sentenced inmates raised generic claims available to all criminal defendants, challenging discrimination in jury selection, coercive interrogation techniques, improper venue, and so forth. The constitutionality of capital punishment qua punishment went unquestioned in part because of its long-standing pedigree (it was a continuous practice in most states from the colonial and Founding eras through the 1950s) and in part because of the textual acknowledgements of the practice in the Constitution itself.[64]

But the same concerns about racial injustice that had produced *Brown v Board of Education of Topeka*[65] and the broader criminal procedure revolution led the Supreme Court to invite constitutional scrutiny of the death penalty. "Invite" is the appropriate word because Justice Arthur Goldberg decided to scrutinize the death penalty as an available punishment before any litigants had advanced that argument. In the summer of 1963, he directed his law clerk, Alan Dershowitz, to analyze whether the death penalty remained consistent with constitutional standards.[66] Dershowitz was skeptical about the plausibility of rejecting the death penalty as unconstitutional, and his resulting memorandum instead emphasized two related aspects of its administration: its use in nonhomicidal cases such as rape, and its racially discriminatory application.[67] Goldberg was unable to

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61 See, for example, *Wilkerson v Utah*, 99 US 130, 132–33 (1878) (rejecting a constitutional challenge to execution via firing squad); *In re Kemmler*, 136 US 436, 441, 447 (1890) (rejecting a constitutional challenge to death by electrocution).

62 See *Louisiana v Resweber*, 329 US 459, 460–61 (1947).

63 See *Powell v Alabama*, 287 US 45, 71 (1932).

64 See note 19 and accompanying text.

65 347 US 483 (1954).

66 For a discussion of the origins and development of Goldberg's memo on capital punishment and his subsequent dissent from the denial of certiorari in *Rudolph v Alabama*, 375 US 889 (1963), see Evan J. Mandery, *A Wild Justice: The Death and Resurrection of Capital Punishment in America* 3–30 (Norton 2013).

67 See Mandery, *A Wild Justice* at 21–22 (cited in note 66).

convince his colleagues to grant review in the death-penalty cases that came to the Court, so he chose to publish his "dissent from the denial" of certiorari, joined by Justices William Brennan and William Douglas, in two cases involving black inmates sentenced to death for the rape of white victims.[68] At Chief Justice Earl Warren's urging, Goldberg omitted any reference to race in his published opinion,[69] instead announcing his view that several questions surrounding the availability of the death penalty for rape were "relevant and worthy of argument and consideration," including whether such a practice violates "evolving standards of decency," whether taking life to protect a value other than life constitutes excessive punishment, and whether the permissible aims of punishment could be achieved in such cases with punishments less than death.[70]

Despite the absence of any overt arguments about race, *Rudolph v Alabama*[71] immediately caught the attention of the LDF. In the preceding decades, the LDF had taken an interest in a limited number of capital cases, focusing primarily on cases involving black defendants who had a plausible claim of actual innocence, as well as cases involving some systemic issues like racial discrimination in grand jury selection.[72] Now, though, three members of the Court had revealed their discomfort with the one aspect of the American death penalty—its availability for rape—that was undeniably linked to racial prejudice. LDF lawyers responded by pursuing an ambitious empirical study of rape cases in the South in order to document its racially discriminatory dimensions. They engaged Professor Marvin Wolfgang, a leading criminologist at the University of Pennsylvania, to design the study, and they sent a cohort of law students to courthouses throughout the Deep South during the summer of 1965 to gather the raw data needed to show disparate treatment.[73] The nature of the project and the manner of its

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68 Id at 27–28.

69 Id at 28–29. Warren permitted Goldberg to retain a footnote to the *United Nations Report on Capital Punishment*, which itself included data on the death penalty's racially discriminatory use; both "Dershowitz and Goldberg hoped that this oblique reference would be enough" to reflect discomfort about the death penalty's racist administration. Id at 29.

70 *Rudolph*, 375 US at 889–91.

71 375 US 889 (1963).

72 See Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* 56–57 (Oxford 1994).

73 Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 78, 86–88 (Random House 1973).

execution—young liberals traveling to the Deep South in order to uncover racial discrimination—made clear that the LDF's work on the death penalty was of a piece with its other civil rights work of the same era.

The resulting litigation in *Maxwell v Bishop*[74] challenged discriminatory patterns in Arkansas capital-rape cases. Wolfgang had concluded that black-on-white-rape cases in Arkansas were more likely to yield capital sentences than any other racial combinations, controlling for twenty-nine nonracial variables.[75] On federal habeas, the district court resisted the claim of racial discrimination by faulting the study's methodology.[76] The Eighth Circuit (then-judge Harry Blackmun writing for the panel) affirmed, holding that Maxwell had failed to establish discrimination in his case and expressing skepticism about his ever prevailing on the basis of statistical showings of statewide discrimination.[77]

By the time that Maxwell lost in the Eighth Circuit, the LDF approach to capital cases had expanded dramatically. Instead of focusing solely on black defendants or largely on issues of racial discrimination, the LDF embarked on a more encompassing effort to bring the American death penalty to a halt. The LDF's "moratorium" strategy was to prevent any executions—regardless of the inmate's race—by raising all available procedural claims.[78] Some of those claims were garden-variety challenges to illegal searches, questionable confessions, and the like, relying on the Warren Court's dramatic extension of criminal procedural protections to state inmates.[79] But many of the claims focused specifically on defects in capital litigation, including the ubiquitous practice of excluding potential jurors who had any qualms about the death penalty; the use of "unitary" trials, in which defendants had no separate opportunity to seek mercy apart from the adjudication of guilt or innocence; and the failure of state capital schemes to provide any guidance as to who should receive the death penalty.[80]

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74 398 F2d 138 (8th Cir 1968).

75 Mandery, *A Wild Justice* at 38–39 (cited in note 66).

76 See *Maxwell*, 398 F2d at 145.

77 Id at 148 ("We are not certain that, for Maxwell, statistics will ever be his redemption.").

78 See Meltsner, *Cruel and Unusual* at 71, 106–07 (cited in note 73).

79 See David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* 222–23 (Belknap 2010).

80 Id at 67–70.

The decision to attack the death penalty itself implicated complicated judgments that were both pragmatic and principled. LDF lawyers realized that the Court might not embrace its claims of racial discrimination and understood that the best hope for many death-sentenced black inmates might rest on broader reforms—perhaps even abolition—of the capital system. In addition, LDF lawyers were themselves opposed to the death penalty even apart from its racially discriminatory administration, and when they realized that their strategies could benefit a broader swath of inmates, they felt obligated to expand their charge. Tony Amsterdam, the brilliant architect of the LDF effort, explained that "[w]e could no more let men die that we had the power to save . . . than we could have passed by a dying accident victim sprawled bloody and writhing on the road without stopping to render such aid as we could."[81]

Importantly, many of the LDF's new capital-specific claims drew on and reinforced concerns about racial discrimination. Death qualification of jurors[82] was a common means of excluding minorities from capital juries.[83] Standardless discretion in state capital statutes allowed prosecutors and juries to reach different results in similar cases and insulated racial disparities from judicial review.

When the LDF sought review of Maxwell's case before the US Supreme Court, it focused primarily on the extensive evidence of racial discrimination in Arkansas rape cases and the ways that standardless discretion facilitated that discrimination. The petition for certiorari declared that the "detailed and exhaustive examination" of the cases "graphically demonstrates the grim consequences of leaving unfettered and uninformed discretion to juries to choose between death and lesser penalties for rape in a state which has historically practiced racial discrimination."[84] The petition evocatively compared the sort of

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81 Id at 108 (quotation marks omitted).

82 See Nancy J. King, *Silencing Nullification Advocacy inside the Jury Room and outside the Courtroom*, 65 U Chi L Rev 433, 483 (1998) (defining "death qualification" as "authorizing the disqualification of only those jurors who are unable to exercise the discretion required by law").

83 See Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc, and the National Office for the Rights of the Indigent, *Witherspoon v Illinois*, No 1015, *33–34 (US filed Mar 12, 1968) (available on Westlaw at 1968 WL 129362) ("Witherspoon LDF Brief").

84 Petition for a Writ of Certiorari to the United States Court of Appeals for the Eight Circuit, *Maxwell v Bishop*, No 622-13, *35–36 (US filed Oct 9, 1968) ("Maxwell Certiorari Petition").

discrimination evident in the Arkansas system to the practice of lynching in an earlier era: "Decisions of this Court have long recognized that violence may emanate from the state as well as from the mob, and that violence under color of law is as dangerous to the social fabric as that not cloaked with legitimate authority."[85]

Ultimately, the Court granted certiorari on Maxwell's claims regarding standardless discretion and Arkansas's unitary structure but declined to review the claim of racial discrimination.[86] Notwithstanding the Court's limited grant of certiorari, both Maxwell's lawyers and amici continued to press the issue of racial discrimination. An amicus brief filed on behalf of various Jewish organizations argued extensively that the death penalty for rape constituted a "badge of slavery," offering an elaborate chart demonstrating the near-perfect overlap between states that practiced racial segregation and those that authorized the death penalty for rape.[87] An amicus brief filed on behalf of various civil rights advocates (including William Coleman, Burke Marshall, and Cyrus Vance) argued that the Arkansas procedure for selecting jurors—which tied eligibility to payment of a poll tax—likely contributed to the jurors' understanding of their charge "as authorizing them to take race into account in deciding [Maxwell's] fate."[88]

While *Maxwell* was pending, the Court ruled in *Witherspoon v Illinois*[89] against Illinois's overbroad approach to death-qualifying jurors.[90] In light of this development, Maxwell's LDF lawyers filed a supplemental pleading with the Court. Maxwell's lawyers realized that he was entitled to relief under *Witherspoon* but urged the Court to nonetheless address the issues on which

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85 Id at *42.

86 See *Maxwell v Bishop*, 393 US 997, 997–98 (1968) (granting certiorari).

87 Brief Amici Curiae of the Synagogue Council of America and Its Constituents (The Central Conference of American Rabbis, the Rabbinical Assembly of America, the Rabbinical Council of America, the Union of American Hebrew Congregations, the Union of Orthodox Jewish Congregations of America, the United Synagogue of America) and the American Jewish Congress, *Maxwell v Bishop*, No 622-13, *26–30 (US filed Sept 15, 1969) (available on Westlaw at 1969 WL 136886).

88 Brief Amici Curiae of Berl I. Bernhard, William Coleman, Samuel Dash, John W. Douglas, Steven Duke, William T. Gossett, John Griffiths, Rita Hauser, George N. Lindsay, Burke Marshall, Monrad S. Paulsen, Steven R. Rivkin, Whitney North Seymour, Jerome J. Shestack, and Cyrus R. Vance, Urging Reversal, *Maxwell v Bishop*, No 622-13, *6 (US filed Oct 24, 1969) (available on Westlaw at 1989 WL 1184278).

89 391 US 510 (1968).

90 Id at 521–23.

certiorari had been granted.[91] In their view, if the Court were to grant Maxwell relief on narrow grounds and decline to address the broader questions of standardless discretion and unitary proceedings in other cases, those choices "could only be characterized as incredibly heedless of human life" given the number of inmates potentially affected by the broader claims.[92] Indeed, Maxwell's lawyers used the opportunity presented by the supplemental brief to ask the Court to *broaden* the scope of its consideration and revisit its decision not to grant certiorari on the underlying claim of racial discrimination.[93]

The Court subsequently reversed Maxwell's sentence based on *Witherspoon* in a brief opinion that did not mention race.[94] In describing the procedural posture of the case, the Court indicated that Maxwell's federal habeas petition had claimed, "among other things,"[95] that the Constitution prohibited the standardless discretion and unitary procedure of the Arkansas capital scheme, conspicuously omitting the empirical challenge to Arkansas's use of the death penalty to punish almost exclusively interracial rapes involving black defendants and white victims. The Court then concluded that the wholesale exclusion of jurors with any conscientious reservations about the death penalty required reversal.[96] At the end of the opinion, the Court noted that it had granted certiorari in two other cases presenting the standardless-discretion and unitary-proceeding challenges.[97]

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91 See Supplemental Brief for Petitioner, *Maxwell v Bishop*, No 622-13, *5–6 (US filed Sept 17, 1969) (available on Westlaw at 1969 WL 120077).

92 Id at *31.

93 See id at *1 n 1.

94 See generally *Maxwell v Bishop*, 398 US 262 (1970).

95 Id at 264.

96 See id at 265–66.

97 Id at 267 & n 4. Prior to the decision to reverse Maxwell's conviction on *Witherspoon* grounds, both Douglas and Brennan drafted opinions (neither of which were ever published) addressing the claims regarding Arkansas's unitary proceeding and the jury's standardless discretion in imposing death. See generally *Maxwell v Bishop*, No 622-13 (1970) (draft concurrence of Brennan), on file with the Library of Congress ("Brennan Draft Concurrence"); *Maxwell v Bishop*, No 622-13 (1970) (draft opinion of Douglas), on file with the Library of Congress ("Douglas Draft Opinion"). Douglas's opinion, denominated the "opinion of the Court," rejected the unitary proceeding because it discouraged defendants from presenting important mitigating evidence relevant to the sentencing decision. Douglas Draft Opinion at 4–5. Douglas's draft would have found standardless discretion intolerable because of the unfairness of a procedure that afforded absolute discretion with respect to such an important interest. See id at 6. Both Douglas and Brennan highlighted the possibility that such discretion could result in racially discriminatory decisionmaking, though neither ventured an opinion on the racial distribution of capital verdicts in Arkansas rape cases. Id at 8; Brennan Draft Concurrence at 5. Interestingly,

Rudolph and *Maxwell* were missed opportunities in the sense that the Court flagged troublesome capital-rape cases involving black men sentenced to death for raping white victims in the Deep South and ultimately chose not to comment on—much less address or remedy—the widely appreciated fact of racial discrimination inseparable from the practice. But the Court's silence about race extended to the other foundational cases in which litigants highlighted the ubiquitous risk of racial discrimination. In *Witherspoon* itself, Witherspoon's lawyers argued that the exclusion of scrupled jurors—those who harbored doubts about the death penalty—would undermine a defendant's right to a fair cross section of the community in capital cases, explicitly noting the disproportionate exclusion of blacks in the operation of Illinois's death-qualification process.[98] Likewise, the LDF's amicus brief insisted that the death-qualification process in many states allowed prosecutors to do indirectly what they could not do directly—prevent blacks from sitting on capital juries.[99] Even though Witherspoon had been convicted of murder rather than rape, the LDF highlighted in its statement of interest its particular concern about racial discrimination in the operation of capital punishment; the statement observed that Wolfgang's recent empirical work confirmed the LDF's view "that the death penalty is administered in the United States in a fashion that makes racial minorities, the deprived and

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both justices cited *Yick Wo v Hopkins*, 118 US 356 (1886), as the lead case against the exercise of "naked and arbitrary power" over a significant interest, even though *Yick Wo* involved discretion exercised by a licensing board outside of the criminal justice system. Douglas Draft Opinion at 6; Brennan Draft Concurrence at 5–6. The "real" reason to cite *Yick Wo*, though neither Douglas nor Brennan made the point explicitly, is that the result of the discretion exercised in *Yick Wo*—like the distribution of the Arkansas death penalty in rape cases—was inexplicable except on racial grounds: virtually every person of Chinese descent seeking a laundry license was denied, whereas virtually all other applicants were approved. *Yick Wo*, 118 US at 373–74. In the constitutional canon, *Yick Wo* stands for the proposition that intentional racial discrimination can be demonstrated even absent a facially discriminatory statute. See generally, for example, David E. Bernstein, *Revisiting* Yick Wo v. Hopkins, 2008 U Ill L Rev 1393 (acknowledging the influence of racial considerations on the justices). In their respective opinions, Douglas and Brennan seem to transform *Yick Wo* into a procedural decision about unbridled discretion rather than a substantive showing of undisguised racism. They both avoid commenting on the empirical evidence that race did play a role in Arkansas cases, though they make explicit (indeed, in some respects, more explicit than the Court in *Furman*) the connection between standardless discretion and the risk of racially discriminatory outcomes.

[98] Petitioner's Brief, *Witherspoon v Illinois*, No 1015, *17–20 (US filed Mar 11, 1968) (available on Westlaw at 1968 WL 112521).

[99] Witherspoon LDF Brief at *38–39 (cited in note 83).

downtrodden, the peculiar objects of capital charges, capital convictions, and sentences of death."[100] The LDF also noted in the body of its brief that the risk of death qualification disproportionately excluding blacks was particularly high "when persons opposed only to the death penalty for rape are excluded as scrupled."[101] The ACLU also emphasized in its amicus brief the discriminatory application of the death penalty, which itself might cause blacks to harbor greater doubts about the punishment than other groups (citing evidence that 78 percent of blacks opposed the death penalty).[102] The various briefs together suggested the possibility of a troubling dynamic, in which blacks experienced the death penalty as racially discriminatory, thereby enabling their disproportionate exclusion from capital juries based on their "scruples," which in turn would contribute to discriminatory results.

Despite the numerous references to race in the pleadings, the justices' resulting opinions made no mention of race. Justice Potter Stewart's majority opinion in *Witherspoon* emphasized that the issue before the Court was a "narrow one," declining to address whether death qualification undermined a defendant's right to a fair trial at the guilt stage and affirming that states retained the power to exclude prospective jurors who clearly indicated their refusal to vote for death.[103] Though the Court cited a recent Gallup Poll indicating relatively low support for the death penalty nationwide,[104] it declined to report the much larger number of blacks who opposed the death penalty and the corresponding disproportionate exclusion of black jurors that Illinois's death-qualification practices entailed; it likewise failed to confront the continuing disproportionate exclusion of blacks that would result from *permissible* death-qualification measures untouched by the decision.

The standardless-discretion question avoided in *Maxwell* resurfaced first in *McGautha v California*[105] as a due process

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[100] Id at *3-M.

[101] Id at *28.

[102] Brief of the Illinois Division, American Civil Liberties Union, as Amicus Curiae, *Witherspoon v Illinois*, No 1015, *17 (US filed Mar 1, 1968) (available on Westlaw at 1968 WL 112520).

[103] *Witherspoon*, 391 US at 513–14.

[104] Id at 520 n 16 (citing a 1966 Gallup Poll in which only 42 percent of Americans expressed that they favored capital punishment for convicted murderers).

[105] 402 US 183 (1971).

claim[106] and then again in *Furman* under the Eighth Amendment.[107] The *McGautha* briefing makes less of race than did the similar briefing in *Maxwell*, perhaps in part because the litigation strategy in *Maxwell* emphasized the connection between standardless discretion and the discriminatory results contained in the Wolfgang study.[108] By the time of *McGautha*, the stock language framing the standardless-discretion claim denounced the "arbitrariness," "discrimination," and "irrationality" wrought by the absence of standards, and virtually all the briefs use these terms frequently and interchangeably.[109] Both the brief for McGautha and some of the amicus briefs in his case explicitly claimed that standardless discretion produced racially discriminatory outcomes,[110] though the briefs as a whole did not make this their primary point. In response, California offered empirical data supporting its claim that "all indications are that a defendant's race plays no part" in capital-jury decisionmaking in California, with the raw data showing that black offenders constituted a smaller percentage of death-sentenced inmates (23 percent) than non-death-sentenced inmates (39 percent) convicted of first-degree murder.[111]

When the Court rejected the standardless-discretion claim in *McGautha* (as well as the companion claim regarding unitary trials), many observers thought that global challenges to capital punishment were essentially exhausted.[112] But the Court immediately granted certiorari in four new cases—collected in *Furman*—that asked whether the death penalty could be imposed in those cases consistent with the Eighth Amendment's

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106 Id at 196.

107 *Furman*, 408 US at 239.

108 See text accompanying notes 82–88.

109 See, for example, Brief for Petitioner, *McGautha v California*, No 203, *18 (US filed Aug 4, 1970) (available on Westlaw at 1970 WL 122021) ("McGautha Petitioner's Brief"); Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae, *McGautha v California*, No 203, *7, 13 (US filed Nov 3, 1970) (available on Westlaw at 1970 WL 122024) ("McGautha Amicus Motion"). See also Brief for the United States as Amicus Curiae, *McGautha v California*, No 203, *82, 109 (US filed Oct 15, 1970) (available on Westlaw at 1970 WL 122193).

110 See McGautha Petitioner's Brief at *20 (cited in note 109). See also, for example, McGautha Amicus Motion at *30–31 (cited in note 109).

111 Respondent's Brief, *McGautha v California*, No 203, *74 (US filed Sept 25, 1970) (available on Westlaw at 1970 WL 122022).

112 See, for example, Mandery, *A Wild Justice* at 111–12, 114 (cited in note 66) (describing the LDF's disappointment with the *McGautha* decision); Banner, *The Death Penalty* at 257 (cited in note 8) (noting that, after *McGautha*, "[t]he movement to use the courts to abolish capital punishment seemed to have come to an end").

prohibition of cruel and unusual punishment.[113] Like McGautha, the defendants in all four cases were black.[114] But the *Furman* briefing emphasized to a greater extent the ways in which racial discrimination permeated state capital systems. The inventive LDF strategy did not directly encourage the Court to invalidate the death penalty because of racial discrimination. Rather, the litigants argued that the fact of racial discrimination accounted for capital statutes staying on the books despite dwindling popular support.[115] That is, the standardless discretion in state schemes permitted the application of capital punishment solely against despised, marginal groups—particularly blacks—and the broader public's concerns about the death penalty were likely muted by the knowledge of its limited reach. In *Aikens v California*,[116] which was later mooted by the invalidation of a statute under state law, the petitioner's brief captured this argument poignantly: "A legislator may not scruple to put a law on the books (still less, to maintain an old law on the books) whose general, even-handed, non-arbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily."[117] More directly, Aikens's brief stated that "[t]hose who are selected to die are the poor and powerless, personally ugly and socially unacceptable . . . [and disproportionately] black."[118]

Furman's own brief also intimated that the absence of standards could produce discriminatory outcomes. Furman argued that the jury that had sentenced him to die (for a minimally aggravated crime[119]) knew very little about him or his circumstances—apart from the facts of his crime, his age, and his race.[120] Georgia responded that it could "hardly be presumed that the juries in this country have conspired to sentence only certain classes of persons within our society, or that the juries

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113 *Furman*, 408 US at 239.

114 Corinna Barrett Lain, Furman *Fundamentals*, 82 Wash L Rev 1, 16, 31 (2007).

115 Brief for Petitioner, *Aikens v California*, No 68-5027, *39–43, 50–53 (US filed Sept 10, 1971) (available on Westlaw at 1971 WL 134168) ("Aikens Petitioner's Brief").

116 406 US 813 (1972).

117 Aikens Petitioner's Brief at *22 (cited in note 115).

118 Id at *51.

119 See Carol S. Steiker, Furman v. Georgia*: Not an End, but a Beginning*, in Blume and Steiker, eds, *Death Penalty Stories* 95, 95–96 (cited in note 26) (describing Furman as a "thwarted burglar who shot—quite possibly accidentally—toward a closed door while fleeing").

120 See Brief for Petitioner, *Furman v Georgia*, No 69-5003, *8, 12 (US filed Sept 9, 1971) (available on Westlaw at 1971 WL 134167).

responsible for the death penalties now outstanding were infected with an impermissible discrimination."[121] Georgia, like California in *McGautha*, maintained that the evidence did not support an inference of "rampant" discrimination and that the high concentration of blacks on death row in Georgia was likely attributable to the high offending rates of blacks.[122]

The amicus briefs in *Furman* extensively documented the role of race in American capital punishment. A coalition of Jewish organizations again drew the Court's attention to the connection between segregation and retention of the death penalty.[123] A brief filed on behalf of several civil rights organizations (including the NAACP and the Southern Christian Leadership Conference) broadly outlined race's shadow over the American death penalty. The brief declared that "[t]he total history of the administration of capital punishment in America, both through formal authority, and informally, is persuasive evidence, that racial discrimination was, and still is, an impermissible factor in the disproportionate imposition of the death penalty upon non-white American citizens."[124] The brief recounted racial discrimination in the administration of the death penalty during slavery and the experience of lynching and vigilantism stretching from the post-Reconstruction era through the mid-1930s, explicitly arguing that "the disproportionate numbers of non-white persons executed by formal capital punishment" violated the Eighth Amendment.[125] Another amicus brief, filed on behalf of various churches, argued that the death penalty denies condemned persons their religious freedom by depriving them of the

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[121] Brief for Respondent, *Furman v Georgia*, No 69-5003, *79 (US filed Sept 24, 1971) (available on Westlaw at 1971 WL 126674) ("Furman Respondent's Brief").

[122] Id at *80 (citing 1970 Atlanta Police Department statistics indicating that 187 murders were committed by black offenders compared to 55 murders committed by white offenders).

[123] See Brief Amici Curiae and Motion for Leave to File Brief Amici Curiae of the Synagogue Council of America and Its Constituents (The Central Conference of American Rabbis, the Rabbinical Assembly of America, the Rabbinical Council of America, the Union of American Hebrew Congregations, the Union of Orthodox Jewish Congregations of America, the United Synagogue of America) and the American Jewish Congress, *Furman v Georgia*, No 69-6003, *29–34 (US filed Sept 9, 1971) (available on Westlaw at 1971 WL 134169).

[124] Motion for Leave to File Brief as Amici Curiae and Brief Amici Curiae of the National Association for the Advancement of Colored People, National Urban League, Southern Christian Leadership Conference, Mexican-American Legal Defense and Educational Fund, and the National Council of Negro Women, *Furman v Georgia*, No 69-5003, *7 (US filed Aug 31, 1971) (available on Westlaw at 1971 WL 134376).

[125] Id at *8–13 (capitalization altered).

opportunity to seek salvation.[126] It further argued that the disproportionate application of the death penalty to men who are from "less-favored ethnic and socio-economic groups" compounds the violation by adding to the mental suffering of offenders who are aware of the invidious discrimination directed at their groups.[127]

Five justices in *Furman* agreed that the prevailing administration of the death penalty violated the Eighth Amendment, though each wrote separately to explain the grounds for his support of the one-paragraph, per curiam opinion. Notwithstanding the briefs' sustained and evocative references to the role of racial discrimination in the American death penalty, the various opinions supporting the judgment are relatively sparse in their references to the problem of race, especially in light of their extraordinary collective length (about 135 pages in the US Reports).[128] Justices Brennan and Byron White made no arguments whatsoever about racial discrimination. Douglas alone offered a sustained critique of the discriminatory administration of the death penalty, quoting a presidential study that had observed that "[t]he death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups."[129] Douglas discussed the race and crimes of the offenders before the Court; the offenders were two black men convicted of raping white women and one black man convicted of murder in the commission of a burglary.[130] He then added that he could not conclude, based on the records before the Court, "that these defendants were sentenced to death because they were black."[131] Instead, he criticized the unbridled discretion afforded judges and juries in such cases, concluding that the "discretionary statutes are unconstitutional in their operation" because they are "pregnant with discrimination."[132] Stewart likewise indicated that "racial discrimination ha[d] not been proved"[133] but concluded that the administration of the death

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[126] See Brief Amici Curiae of the West Virginia Council of Churches, Christian Church (Disciples) in West Virginia, and United Methodist Church, West Virginia Conference, *Furman v Georgia*, No 69-5003, *4 (US filed Aug 26, 1971).

[127] Id at *11.

[128] See *Furman*, 408 US at 240–374.

[129] Id at 249–50 (Douglas concurring) (quotation marks omitted).

[130] Id at 252 (Douglas concurring).

[131] Id at 253 (Douglas concurring).

[132] *Furman*, 408 US at 256–57 (Douglas concurring).

[133] Id at 310 (Stewart concurring).

penalty was unconstitutional because it had been "wantonly and [ ] freakishly inflicted."[134]

Justice Marshall offered an extensive history of capital punishment in the United States, moving from the early and late colonial periods to the Founding era and then through the nineteenth and twentieth centuries.[135] None of this history references race or racial discrimination. Marshall then focused on whether capital punishment was necessary to achieve various possible goals of punishment, such as retribution, deterrence, incapacitation, encouragement of pleas, eugenics, and efficiency.[136] Finally, Marshall asked whether the death penalty remained consistent with prevailing morality, focusing not on polling data (which he argued was of limited value) but instead on whether American citizens would support the death penalty if they were aware "of all information presently available."[137] The "facts" developed by Marshall included the absence of any proven deterrent effect beyond that obtained through life imprisonment, the rarity of death sentences relative to convictions for murder, the low recidivism rate for convicted murderers released from prison, and their generally good behavior while incarcerated.[138] In Marshall's view, these facts alone would be sufficient to persuade "the great mass of citizens . . . that the death penalty is immoral and therefore unconstitutional."[139] He then added three "supplement[al]" facts that would likely "convince even the most hesitant of citizens to condemn death as a sanction"—its discriminatory administration, its application against innocent persons, and its dislocating effects on the rest of the criminal-justice system.[140] On the discrimination point, Marshall cited studies providing evidence of racial discrimination, as well as evidence of discrimination on the basis of sex, class, intelligence, and privilege.[141] His entire treatment of discrimination occupies three paragraphs in his sixty-page concurrence, and only one of

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134 Id (Stewart concurring) (quotation marks omitted).

135 Id at 316–22 (Marshall concurring).

136 *Furman*, 408 US at 342–59 (Marshall concurring).

137 Id at 362 (Marshall concurring).

138 Id at 362–63 (Marshall concurring).

139 Id at 363 (Marshall concurring).

140 *Furman*, 408 US at 363–64 (Marshall concurring).

141 Id at 364–66 (Marshall concurring), citing, among others, US Department of Justice Bureau of Prisons, *National Prisoner Statistics Bulletin No 45*, in *Capital Punishment 1930–1968* 7, 28 (1969); Martin E. Wolfgang, *A Sociological Analysis of Criminal Homicide*, in Hugo Adam Bedau, ed, 1 *The Death Penalty in America* 405, 411–14 (Oxford rev ed 1967).

those paragraphs focuses on race.[142] Notably absent in his lengthy history of the American death penalty, and in his discussion of the "purposes" of capital punishment, is any indication that the death penalty was used to oppress minorities; like Douglas, Marshall appeared as troubled by the seeming *under*enforcement of the death penalty against the privileged as he was by the application of capital punishment against minorities and the poor.[143]

As a whole, the five concurrences convey the impression that the majority justices were extremely reluctant to assert that the defendants before them (even the two defendants condemned for rape) might have been victims of racial discrimination. Despite ample ammunition in the amicus briefs—particularly the civil rights organizations' brief—none of the justices seemed willing to offer a detailed history of the role of race in shaping capital statutes and practices for over two hundred years. Douglas and Marshall—the only two justices who addressed race at all—seemed content to suggest that relatively recent outcomes were discriminatory (that is, dating from the early twentieth century), along both racial and nonracial lines.[144] Perhaps most tellingly, none of the justices seemed willing to describe, much less embrace, the thrust of the LDF's argument—that the death penalty remained on the books largely *because of* its racially discriminatory administration.[145] Indeed, Marshall's hypothesis that most American citizens would reject the death penalty if they only knew about its discriminatory administration seemed in considerable tension with the LDF's claim that most Americans (and legislatures) tolerated the retention of the death penalty precisely *because* they were aware of its exclusive application against societal outcasts, including racial minorities.[146]

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[142] See *Furman*, 408 US at 364–66 (Marshall concurring).

[143] Compare id at 366 (Marshall concurring) ("Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape."), with id at 256 (Douglas concurring):

> A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed.

[144] See id at 248–52 (Douglas concurring); id at 364–65 (Marshall concurring).

[145] See text accompanying notes 115–17.

[146] See Aikens Petitioner's Brief at *54 (cited in note 115) ("Whether it happen by accident or design that penalties of this sort fall most furiously upon the poor and

When *Furman* invalidated prevailing capital statutes, many participants and observers believed that they had witnessed the end of the American death penalty. Had *Furman* stuck—with states choosing to forgo redrafting their statutes or the Court invalidating any such efforts—claims regarding the American death penalty's racially discriminatory administration would have been buried alongside the death penalty itself. The LDF would have known, at some level, that concerns about racial justice informed the Court's decisions, but the record of opinions would have reflected a sort of euphemistic code, with repeated condemnations of "arbitrariness," "wantonness," and "freakishness," rather than many forthright condemnations of racial prejudice.[147]

But just as Warren had underestimated the backlash that would follow the Court's nonaccusatory opinion in *Brown*, which had whitewashed the long-standing connections between chattel slavery, white-supremacist ideology, and state segregation of schools,[148] the *Furman* Court misread public attitudes toward capital punishment and the willingness of states to acquiesce in judicial abolition, even if framed in a similarly nonaccusatory manner. In the four years following *Furman*, thirty-five states reenacted capital statutes, and the Court agreed to address whether death sentences obtained under five of the new capital schemes could be imposed consistent with the Eighth Amendment.[149]

In many ways, the litigation before the Court was a reprise of *Furman*. The LDF controlled the litigation (although its lawyers were not named as lead counsel on the petitioners' briefs). The LDF strategy was again to emphasize the unreviewable discretion to impose or withhold the death penalty, despite the promulgation of aggravating factors to guide sentencing discretion in many of the new statutes and the mandatory

friendless and upon racial minorities, the supposed 'acceptance' of the penalty is nonetheless a product of the outcast nature of those who bear the brunt of it.").

147 In his discussion of *Furman*, Professor Evan Mandery argues that, "whatever the justices may have intended, everyone understood *Furman* as having been about race." Mandery, *A Wild Justice* at 276 (cited in note 66).

148 See Jordan Steiker, Book Review, *American Icon: Does It Matter What the Court Said in* Brown*?*, 81 Tex L Rev 305, 312–15 (2002) (discussing the mild tone of *Brown* and the Court's failure to speak more clearly and forthrightly about the "true" meaning of segregation).

149 See generally *Gregg v Georgia*, 428 US 153 (1976); *Proffitt v Florida*, 428 US 242 (1976); *Jurek v Texas*, 428 US 262 (1976); *Woodson v North Carolina*, 428 US 280 (1976); *Roberts v Louisiana*, 428 US 325 (1976).

requirement of death upon conviction of first-degree murder in others. Whereas the *Furman* briefs emphasized the absence of standards within the capital statutes themselves, the 1976 briefs pointed toward the numerous opportunities for unconstrained police, prosecutorial, and juror discretion to withhold the death penalty prior to sentencing, even under North Carolina's and Louisiana's purportedly mandatory statutes.[150]

As in *Furman*, the petitioners' briefs sought to document the role of racial discrimination in capital litigation. Though none of the five cases involved a capital conviction for rape, each petitioner's brief indicated that "[r]acial discrimination in the application of the death penalty for rape ha[d] been sufficiently blatant to allow of overwhelming statistical proof."[151] Having worked so extensively with Wolfgang to produce the rape study, the LDF was aware of the empirical challenges involved in producing a comparable study for murder, especially given the rarity of death sentences and the costs of designing and implementing an empirically sound study.[152] That recognition prompted the petitioners' concession that a "similarly overwhelming comprehensive demonstration of racial discrimination ha[d] concededly not yet been made in connection with the death penalty for murder."[153] But the petitioners nonetheless insisted that the "frequently discriminatory infliction of death can decently be viewed only as an enduring cause of national shame"[154] and that "very strong evidence" of such continuing discrimination in murder cases could be inferred from a variety of empirical studies, informed observation of the capital systems, and "the intuitive implausibility of the hypothesis that the same people,

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[150] See, for example, Brief for Petitioner, *Gregg v Georgia*, No 74-6257, *13 (US filed Feb 26, 1976) (available on Westlaw at 1976 WL 194055) ("Gregg Petitioner's Brief") ("[T]he sentencing stage is only one of the many stages in the criminal process subject to unrestrained and arbitrary discretion."); Brief for Petitioner, *Roberts v Louisiana*, No 75-5844, *37 (US filed Feb 25, 1976) ("Roberts Petitioner's Brief"):

> The notion that the death penalty is mandatory "if the jury brings in a verdict of guilty" of first degree murder depends (in the vernacular) upon a very big "if"; and, even then, death is not by any means the inevitable or predictable outcome of the case. For "[d]iscretion permeates the entire criminal justice system, from police detection and arrest, through prosecutorial charging and plea negotiation, to jury deliberation, appellate reconsideration, and executive pardon."

[151] See, for example, Gregg Petitioner's Brief at *25a n 50 (cited in note 150).

[152] See Meltsner, *Cruel and Unusual* at 76–78 (cited in note 73).

[153] Gregg Petitioner's Brief at *25a n 50 (cited in note 150).

[154] Id at *25a–27a.

operating through the same procedures in rape and murder cases, have practiced racial discrimination in the rape cases but risen scrupulously above its influence when the charge is murder."[155] The petitioners also noted the "sobering" fact that the percentage of nonwhites on death row post-*Furman* was not significantly different than pre-*Furman*.[156] Despite the fact that the death-sentenced inmates in three of the five cases were white—Gregg (Georgia), Proffitt (Florida), and Jurek (Texas)—several of the briefs included appendices listing the race of the defendants in all post-*Furman* cases within the state yielding capital verdicts.[157] In addition, the petitioners alluded to recent findings that blacks faced harsher punishment in cases involving white victims,[158] representing a shift from the focus on the race of the defendant in earlier cases. The overall message of the petitioners' briefs regarding racial discrimination was clear. The petitioners' briefs in both *Gregg* and *Jurek* concluded their passages regarding racial discrimination with the following evocative plea: "The time is too late now to rectify the errors of the past; such, of course, is the nature of capital punishment. It is not too late—nor is it too early—to prevent the repetition of those errors in the future."[159]

The issue of race was particularly salient in the amicus briefs. The LDF filed a brief in *Gregg* on its own behalf, indicating in its statement of interest that its experience "in handling capital cases over a period of many years convinced [it] that the death penalty is customarily applied in a discriminatory manner against racial minorities and the economically underprivileged."[160] The LDF went further, arguing that "the evil of discrimination was not merely adventitious, but was rooted in the very nature of capital punishment."[161] Amnesty International filed an amicus brief in each of the five cases, making a similar

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155 Id at *25a n 50.

156 Id at *28a n 51.

157 See, for example, Brief for Petitioner, *Jurek v Texas*, No 75-5394, Appendix 1 (US filed Feb 26, 1976) (available on Westlaw at 1976 WL 181478) ("Jurek Petitioner's Brief"); Roberts Petitioner's Brief at Appendix A (cited in note 150); Brief for Petitioners, *Woodson v North Carolina*, No 75-5491, Appendix A (US filed Feb 26, 1976) (available on Westlaw at 1976 WL 181483).

158 Gregg Petitioner's Brief at *25a n 50 (cited in note 150).

159 Id at *27a–28a; Jurek Petitioner's Brief at *82–83 (cited in note 157).

160 Brief for the NAACP Legal Defense and Educational Fund, Inc as Amicus Curiae, *Gregg v Georgia*, No 74-6257, *1 (US filed Feb 25, 1967) (available on Westlaw at 1976 WL 178715).

161 Id at *1–2.

point by explaining that it "is the worldwide experience of Amnesty International that the death penalty is applied in a highly discriminatory fashion against ethnic and religious minorities, against political prisoners, [and] against the disadvantaged."[162] On the other side, in an extensive amicus brief rejecting the proposition that the death penalty is unconstitutional per se, the United States devoted an entire section to the proposition that "capital punishment is not imposed on the basis of race."[163] The brief, filed by then–solicitor general Robert Bork, is best known for its claim of empirical support for deterrence,[164] an argument that appeared central to the Court's ultimate embrace of the death penalty as a permissible punishment in three of the cases.[165] But the brief also engaged the empirical studies that the petitioners had cited to support claims of racial bias.[166] According to the United States, those studies did not support a claim of continuing racial discrimination in murder cases, as they focused primarily on discrimination in cases litigated at a time when blacks were excluded from jury service.[167] Similarly, the United States "[did] not question" the conclusion of Wolfgang's study of racial discrimination in rape cases in the South from 1945 to 1965 but rather argued that the study neither proved continuing discrimination in such cases nor similar discrimination in murder cases.[168] The brief also foreshadowed some vulnerabilities of framing the constitutional claim against the death penalty on racial grounds, arguing that none of the defendants offered evidence of racial discrimination in their individual cases and noting that "the possibility that racial discrimination exists upon occasion in the criminal justice

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[162] Motion for Leave to File Brief of Amicus Curiae and Brief of Amnesty International as Amicus Curiae, *Gregg v Georgia*, No 74-6257, *3 (US filed Feb 25, 1976) (available on Westlaw at 1976 WL 178716).

[163] Brief for the United States as Amicus Curiae, *Gregg v Georgia*, No 74-6257, *65 (US filed Mar 25, 1976) (available on Westlaw at 1976 WL 194056) ("Gregg US Brief") (capitalization altered).

[164] See id at *34.

[165] See *Gregg*, 428 US at 184 (concluding that, although statistical evidence regarding the deterrent effects of the death penalty are "inconclusive," the "death penalty is undoubtedly a significant deterrent" for some); *Furman*, 408 US at 301 (supporting the argument that marginal deterrence is a justification for the death penalty despite the lack of conclusive statistical findings of its effectiveness); *Roberts*, 428 US at 354–55 (same).

[166] See Gregg US Brief at Appendix A (cited in note 163).

[167] Id at *66.

[168] Id at *4a–5a, Appendix A.

system is not an argument against the penalty imposed upon petitioners."[169]

The Court subsequently upheld the "guided discretion" statutes and invalidated the "mandatory" ones.[170] Given the widespread reauthorization of the death penalty in many states, the Court could not credit the view that the death penalty was inconsistent with prevailing standards of decency.[171] Nor was the Court prepared to conclude that the newly designed means of guiding sentencing discretion were incapable of ameliorating the "arbitrariness" and "caprice" of the old standardless-discretion schemes.[172] More broadly, the Court maintained that states could validly invoke deterrence and retribution as grounds for retaining the death penalty.[173] Strikingly absent from the decisions is any mention of the problem of racial discrimination. Douglas was no longer on the Court, and Marshall's dissent focused on the weakness of the deterrence claim and the inadequacy of retribution to justify capital punishment.[174] Brennan, the only other dissenter, wrote in abstract terms about how the death penalty denies human dignity.[175] Though the opinions collectively occupied slightly fewer pages than those in *Furman* and its companion cases, it is nonetheless remarkable that concerns about racial discrimination were never voiced or addressed in the 210 or so pages of analysis that would answer, for the first (and, to date, only) time, the question whether the American death penalty is a constitutional form of punishment. The absence of race is especially notable given that the Court chose several states from the Deep South as the locus of the five cases (Georgia, Louisiana, North Carolina, Florida, and Texas).[176]

The Court's decisions endorsing three of the new capital schemes and the death penalty as a permissible punishment

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169 Id at *68.

170 Banner, *The Death Penalty* at 274–75 (cited in note 8). Compare *Woodson*, 428 US at 305 (declaring a mandatory-death-penalty statute unconstitutional); *Roberts*, 428 US at 336 (same), with *Gregg*, 428 US at 206–07 (upholding a statute that guided the jury's discretion with aggravating or mitigating circumstances).

171 See *Gregg*, 428 US at 179 (Stewart) (plurality) (noting that statutory developments "undercut substantially the assumptions upon which [the standards-of-decency argument] rested").

172 Id at 203 (Stewart) (plurality).

173 See id at 182–86.

174 See id at 231–41 (Marshall dissenting).

175 See *Gregg*, 428 US at 227–31 (Brennan dissenting).

176 See generally id; *Roberts*, 428 US 325; *Woodson*, 428 US 280; *Proffitt*, 428 US 242; *Jurek*, 428 US 262.

were issued in July 1976, at the end of the 1975 Term. When the Court returned to begin the 1976 Term, it immediately agreed to address the question that Goldberg had broached more than a decade earlier—whether the death penalty was permissible as applied to rape.[177] The grant was encouraging to the LDF; with the Court's invalidation of the mandatory schemes, Georgia alone authorized capital punishment for the rape of an adult woman,[178] and it seemed unlikely that the Court would engage with the issue if it were inclined to uphold the practice. Interestingly, the Court selected a white inmate's case as the vehicle to address the issue. Throughout the 1960s and 1970s, the Court paid close attention to the varying facts and procedural postures of the underlying cases as it decided which inmates raising common claims would be the face of the claims, as opposed to those whose cases would simply be held pending resolution of the issue. Chief Justice Warren Burger, for example, unsuccessfully sought to include an extremely aggravated Georgia case in the 1976 litigation because he thought that the high level of aggravation would convince the Court to resurrect capital punishment.[179] Justice Lewis Powell, on the other hand, wanted to exclude Woodson from the 1976 cases[180] because Woodson was black and his victim was white.[181]

That the Court chose Coker, a white rapist, as the face of the claim strongly suggested that the Court wanted to avoid racial bias as the primary or even a significant ground for the decision. If the Court had believed the underlying practice to be racially discriminatory and had wanted to invoke that fact as a basis for relief, the presence of a white defendant would complicate the decision because it would require the Court to explain why discrimination in *other* cases justified overturning Coker's death sentence (exactly the sort of problem that Bork highlighted in his amicus brief in *Gregg*[182]). Moreover, as Professor Sheri Lynn Johnson notes in her account of the *Coker* litigation, at the time that Coker sought certiorari, the Court had petitions for certiorari pending in two other Georgia rape cases with black defendants raising the same claim; her review of the records in

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177 See *Coker v Georgia*, 429 US 815 (1976) (granting certiorari).

178 See *Coker v Georgia*, 433 US 584, 584, 615 (1976).

179 See Mandery, *A Wild Justice* at 345 (cited in note 66).

180 See note 149.

181 See Mandery, *A Wild Justice* at 344 (cited in note 66).

182 See Gregg US Brief at *68 (cited in note 163).

those cases led her to conclude that the race of the defendant was the only significant ground of distinction.[183]

Despite the signal reflected in the Court's choice of Coker, the LDF emphasized racial discrimination in its brief. The LDF documented in a chart the declining use of the death penalty to punish rape, identifying the number of executions for rape per year since 1946 and separating white and black offenders.[184] The LDF discussed historical evidence supporting the claim that, "in Georgia, the death penalty[ ] for rape was specifically devised as a punishment for the rape of white women by black men."[185] Citing the Wolfgang study, the LDF argued that "[r]ecent statistical studies have proved the fact of discrimination conclusively."[186] Ultimately, the LDF argued that acceptance of the death penalty for rape rested on "racial, not penal, considerations,"[187] and that, "where race does not enter the picture, its acceptance is positively aberrational."[188] Hence, just as in *Furman*, the LDF insisted that racial prejudice and discriminatory enforcement facilitated the continued retention of a practice that society otherwise would already have rejected.[189]

An amicus brief filed on behalf of the leading advocacy groups for women's equality—including the National Organization for Women's Legal Defense and Education Fund and the Women's Law Project—reinforced the claim of racial bias by asserting that the practice of punishing rape with death was tied to Southern traditions that "valued white women according to their purity and chastity and assigned them exclusively to white men."[190] The brief, authored by Ruth Bader Ginsburg, powerfully exposed the ways in which the death penalty for rape fundamentally rested on both sexist and racist beliefs. The brief detailed

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183 See Johnson, *Of Rape, Race, and Burying the Past* at 195 (cited in note 26).

184 Brief for Petitioner, *Coker v Georgia*, No 75-5444, *52 (US filed Dec 9, 1976) (available on Westlaw at 1976 WL 181481) ("Coker Petitioner's Brief").

185 Id at *54 (citation omitted).

186 Id at *55–56.

187 Id at *56.

188 Coker Petitioner's Brief at *56 (cited in note 184).

189 See id ("This freakishly rare and racially disproportionate imposition of the death penalty for the crime of rape in Georgia has insulated an excessive punishment from the scrutiny of enlightened public conscience.").

190 Brief Amicus Curiae of the American Civil Liberties Union, the Center for Constitutional Rights, the National Organization for Women Legal Defense and Education Fund, the Women's Law Project, the Center for Women Policy Studies, the Women's Legal Defense Fund, and Equal Rights Advocates, Inc, *Coker v Georgia*, No 75-5444, *6 (US filed Dec 3, 1976) (available on Westlaw at 1976 WL 181482) ("Coker NOW Brief").

how the crime of rape was long regarded as a crime against the property of a woman's husband or father.[191] It described efforts by women in the 1930s to bring an end to lynching by mobs that "commit acts of violence and lawlessness in the name of women."[192] It also described the racially discriminatory laws (noted above) that treated black-on-white rapes differently than other rapes in antebellum Georgia.[193] It concluded that "the death penalty for rape is an outgrowth of both male patriarchal views of women no longer seriously maintained by society[ ] and gross racial injustice created in part out of that patriarchal foundation."[194] On the state's side, the respondent's brief omitted any reference to rape in its lukewarm defense of its practice, conceding that "Georgia, of course, has no interest in executing all rapists" (exactly the point made by the LDF) and suggesting that "at some future date" the practice might be deemed excessive.[195] The state's nonresponsiveness to claims of racial discrimination was exacerbated by its unexplored declaration at the end of the brief that "[t]radition and history support the retention of the death penalty for rape."[196] Indeed.

The Court declared the death penalty "grossly disproportionate and excessive punishment for the crime of rape" and "therefore forbidden by the Eighth Amendment."[197] The plurality devised a new methodology for gauging excessiveness, looking first at the current judgment reflected in state statutes and jury decisionmaking.[198] The plurality observed that the decline in state capital-rape statutes (which Georgia attributed to the Court's intervention in *Furman*) signaled declining societal support for the punishment, as did the relatively few capital verdicts obtained in Georgia post-*Furman*.[199] The plurality then brought its own judgment "to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[200] Borrowing from a theme in Ginsburg's amicus brief, the

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191 See id at *11.

192 Id at *10 (citation omitted).

193 See id at *16–19.

194 Coker NOW Brief at *19 (cited in note 190).

195 Brief for Respondent, *Coker v Georgia*, No 75-5444, *12, 23 (US filed Jan 14, 1977) (available on Westlaw at 1977 WL 189754).

196 Id at *23.

197 *Coker*, 433 US at 592 (White) (plurality).

198 See id at 594–97 (White) (plurality).

199 Id at 595–96 (White) (plurality) (noting only six death sentences in the sixty-three rape convictions reviewed by the Georgia Supreme Court since 1973).

200 Id at 597 (White) (plurality).

plurality concluded that the crime of rape "does not compare with murder" in terms of "moral depravity and of the injury to the person and to the public."[201] Brennan and Marshall concurred in the result, but they did so based on their categorical rejection of the death penalty as a permissible punishment.[202]

Neither the plurality nor the dissenting opinions made any reference to race. Given the long-standing historical connection between race and capital punishment for rape,[203] the role of the LDF in developing empirical evidence of racial discrimination in the Wolfgang study of rape cases,[204] the acknowledgement of the persuasiveness of that study in Bork's brief in the 1976 cases,[205] and the continued emphasis on racial bias by the litigants in *Coker*,[206] it is astonishing that concerns about race did not merit even a passing reference in the ultimate *Coker* opinions. *Coker* represents the height of the Court's avoidance of race, because Georgia's continued authorization of death for rape was simply impossible to explain or understand without examining the racial history surrounding that practice.

Coker is, in many respects, the appropriate bookend to *Rudolph*. In the fourteen years between those two decisions, the Court embarked on a remarkable project to engage with the constitutionality of the American death penalty. The Court initiated the conversation and ultimately produced the first moratorium on executions in the United States, followed by the first—and only—brief period of judicial abolition.[207] Even as it initiated the conversation, the Court took great pains to separate the questions of race and capital punishment. Goldberg and his colleagues declined to mention race in their initial inquiry into the appropriateness of death for rape. The Court refused to grant certiorari in *Maxwell* on the issue of the racially discriminatory administration of capital punishment for rape in the South and declined to respond to claims of racial discrimination in several of its foundational cases, including *Witherspoon*. And when the Court finally invalidated prevailing statutes in *Furman*, the justices who supported that result were reluctant to suggest that

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201 *Coker*, 433 US at 598 (White) (plurality).

202 See id at 600 (Brennan concurring); id at 601 (Marshall concurring).

203 See text accompanying notes 26–28.

204 See text accompanying notes 73–78.

205 See text accompanying notes 164–68.

206 See text accompanying notes 184–88.

207 See generally *Furman*, 408 US 238 (resulting in a de facto moratorium on the death penalty in America).

the black petitioners (two of whom had been sentenced to death for raping white women) might have been victims of racial discrimination and instead highlighted the generally "wanton" and "freakish" nature of American death sentences.[208] When the death penalty was resurrected in 1976, the Court selected three white inmates to serve as the face of the constitutional challenges to the Georgia, Florida, and Texas schemes and ultimately upheld the new schemes without addressing the lingering question of racial discrimination. *Coker* followed quickly on the heels of the 1976 cases, as the Court wanted to excise the most obviously objectionable part of what was now going to be an ongoing practice. But, in shoring up the death penalty against continuing fears of racial discrimination, the Court managed to say nothing about the racial discrimination that the justices—and everybody else—knew that they were addressing.

III. EXPLAINING THE GAP

The Court's deafening silence on the subject of race in its foundational capital punishment cases is striking but, on reflection, perhaps not altogether surprising. Ample reasons of various kinds—strategic, institutional, ideological, and psychological—help explain what otherwise might appear to be a baffling obtuseness. Not every consideration applies to every justice in every case, though more than one explanation might be at work at any given time, even with regard to the work of individual justices. Moreover, not every consideration necessarily operated at a conscious level. Rather, what follows is an attempt to consider why a "race-neutral" constitutional approach to the issue of capital punishment may have been appealing to the Supreme Court even—perhaps especially—in the racially charged era of the 1960s and 1970s.

First, as a strategic matter, the Court had already committed itself to a challenging racial-justice agenda with regard to school desegregation in *Brown* in 1954. Though the Court bought time with its 1955 decision in *Brown v Board of Education of Topeka*[209] ("Brown II"), which promoted a gradualist "all deliberate speed" approach to the enforcement of its desegregation mandate,[210] the Court returned to school desegregation in

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[208] Id at 310.

[209] 349 US 294 (1955).

[210] Id at 301.

the late 1960s and early 1970s at exactly the same time that it took on capital punishment. In 1968, the same year as the Court's death-penalty decision in *Witherspoon*, the Court decided *Green v County School Board*,[211] holding that a Virginia school board's "freedom of choice" plan was not adequate to promote compliance with *Brown*'s desegregation mandate.[212] And in 1971, just one year prior to *Furman*, the Court decided *Swann v Charlotte-Mecklenburg Board of Education*,[213] upholding court-ordered busing as an equitable remedy to achieve integration in a large public school system in North Carolina.[214] These controversial rulings, though more publicly palatable at that time than they would have been in the 1950s,[215] embroiled the Court, the public, and the NAACP (which litigated both cases) in controversy, in the South and beyond.

In light of the Court's ongoing role in the school-desegregation battle, it is no wonder that Chief Justice Warren, the architect of the Court's unanimous opinion in *Brown*, hesitated to add capital punishment to the simmering pot of racial issues. Black murderers and rapists presented a much less sympathetic face for civil rights enforcement than schoolchildren. Not only did Warren refuse to be a fourth vote for certiorari in *Rudolph*, but he also insisted that Justice Goldberg cut the race argument out of his dissent from denial, despite the prominence of that argument in the memorandum that Goldberg had circulated to the Court.[216] Warren explained to Goldberg that the public would not accept any softening of the punishment for rape given widespread white fears of sexual violence by blacks.[217] The same concern for public sensibilities led Warren to delay confronting the constitutionality of laws prohibiting interracial marriage, which were finally invalidated in 1967 in *Loving v Virginia*.[218]

In addition to protecting its ongoing project of school desegregation from controversial entanglements, the Court doubtless sought (unsuccessfully, as it turned out) to move on the issue of capital punishment in a way that would avoid generating a new

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211 391 US 430 (1968).
212 Id at 441.
213 402 US 1 (1971).
214 Id at 30.
215 See Klarman, *From Jim Crow to Civil Rights* at 341–43 (cited in note 1).
216 See Mandery, *A Wild Justice* at 28 (cited in note 66).
217 See id.
218 388 US 1 (1967). See also Mandery, *A Wild Justice* at 28 (cited in note 66).

version of the backlash that had greeted its handiwork in the school-desegregation context. There was good reason for the Court to worry that constitutional limitation or abolition of capital punishment for explicitly racial reasons would inspire more-spirited public resistance than apparently race-neutral interventions. First, the death penalty was more popular, widely authorized, and vigorously employed in the South than in any other region of the country.[219] The Warren Court's desegregation rulings and its criminal procedure revolution already seemed to target Southern institutions, and these decisions engendered substantial backlash in that region.[220] The Court might well have feared that a ruling against capital punishment that focused on its racial aspects would further stoke fires that were already burning, especially given that the only non-Southern respondent (California) in *Furman* dropped out before the Court's decision when the case was mooted by a state constitutional ruling on the death penalty.[221]

Moreover, throughout the 1960s and 1970s, crime rates were rising across the country, especially in inner-city, minority communities.[222] The race riots of the late 1960s and the increasingly militant stance of black radicals also fed growing fears of black violence.[223] Indeed, the Republican Party sought to capitalize on these fears by using crime as a racially coded wedge issue to appeal to Southern white Democrats as part of its "Southern strategy" to convince "Dixiecrats" to switch party affiliation.[224] Rising crime rates and fear of black crime not only increased the likelihood of political backlash to a race-based judicial curtailment of capital punishment, but they also may have engendered ambivalence among some of the justices about the underlying racial discrimination claim. While the LDF had very strong evidence—based both on raw numbers and on Wolfgang's statistical analysis—of racial discrimination in the use of the death

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219 See Banner, *The Death Penalty* at 228–30 (cited in note 8).

220 See Garland, *Peculiar Institution* at 222–23, 234–36 (cited in note 79).

221 See *Aikens v California*, 406 US 813, 814 (1972) (dismissing the case as moot in light of the California Supreme Court's decision striking down the California death penalty in *People v Anderson*, 493 P2d 880 (Cal 1972)).

222 See Garland, *Peculiar Institution* at 239 (cited in note 79); Mandery, *A Wild Justice* at 264–65 (cited in note 66).

223 See Yohuru Williams, *"A Red, Black and Green Liberation Jumpsuit": Roy Wilkins, the Black Panthers, and the Conundrum of Black Power*, in Peniel E. Joseph, ed, *The Black Power Movement: Rethinking the Civil Rights–Black Power Era* 167, 175–76 (Routledge 2006).

224 See Garland, *Peculiar Institution* at 238–44 (cited in note 79).

penalty for rape, the same was not true for murder, which comprised the majority of capital prosecutions.[225] The raw numbers on the race of capital-murder defendants did not present the same striking prima facie case for an inference of discrimination as the rape numbers did—a point that California made in its brief in the *McGautha* litigation[226] and that then–solicitor general Bork noted in his brief for the United States in *Gregg*.[227] Nor did the LDF have the resources to undertake the expansive—and expensive—statistical analysis of capital murder necessary to prove its discrimination case, as the LDF acknowledged in its own brief.[228] Consequently, the Court may have entertained the alternative inference explicitly urged by Georgia in *Furman*—that the overrepresentation of blacks on death row was attributable to their overrepresentation among murderers.[229]

Given the difference in the strength of the discrimination inference with regard to capital prosecutions for rape and those for murder, the Court may well have preferred to deal with the issue by eliminating the most obviously problematic cases on some other ground, thus avoiding the need to dig deep into the statistical morass. This explanation fits perfectly with what the Court in fact did: only a year after *Gregg*, the Court constitutionally invalidated the death penalty for rape on proportionality grounds in *Coker*—a case with a white defendant and a decision devoid of any discussion of race.[230] A Court sympathetic to the racial discrimination claim in capital-rape cases but skeptical of it in its broader form could thus solve the most obviously troubling racial aspects of capital punishment without committing

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225 See Powell, *The Death Penalty in the South* at 204 (cited in note 11).

226 See McGautha Respondents Brief at *74 (cited in note 111) (stating that "all indications are that a defendant's race plays no part" in jury decisionmaking in California based on raw first-degree murder statistics).

227 See Gregg US Brief at *66–67 (cited in note 163).

228 See Gregg Petitioner's Brief at *25a n 50 (cited in note 150) (recognizing that a "similarly overwhelming comprehensive demonstration of racial discrimination ha[d] concededly not yet been made in connection with the death penalty for murder"). To make its argument regarding racial discrimination in murder cases, the LDF was left to extrapolate from Wolfgang's rape analysis and to suggest what would become apparent only a decade later, after David Baldus's statistical analysis of capital murder—that the lack of strikingly apparent discrimination in the murder context was largely attributable to a strong race-of-the-*victim* bias. See Garland, *Peculiar Institution* at 282 (cited in note 79). The bias toward capital prosecutions when murder victims were white tended to counterbalance the bias toward prosecutions of black murder defendants, given the intraracial nature of most homicides.

229 See note 122 and accompanying text.

230 *Coker*, 433 US at 592.

itself on the larger, technically fraught issue of what constitutes adequate proof of racial discrimination in sentencing outcomes.

The technical expertise needed to evaluate claims of racial discrimination may also have made avoidance of the issue more attractive to the Court. As the more sophisticated litigants recognized, raw numerical disparities (of the kind referenced by Justice Douglas in his solo concurrence in *Furman*[231]) are insufficient to prove discrimination; rather, further analysis is necessary to demonstrate that the disparities are caused by racial discrimination as opposed to other, nonracial factors—such as differences in crime rates, differences in the severity of the crimes committed, or differences in the records or other characteristics of the offenders. The best tool to sort through these possibilities—multiple-regression analysis—is difficult for nonstatisticians to use or understand, and the justices may have appropriately doubted their capacity to evaluate the reliability of such evidence. Justice Lewis Powell, the author of the majority opinion in *McCleskey v Kemp*,[232] upholding a death sentence against a statistical claim of racial discrimination,[233] acknowledged in a memorandum to one of his law clerks that his "understanding of statistical analysis—particularly what is called regression analysis—range[d] from limited to zero."[234] The move that Powell ultimately made in *McCleskey*—raising questions about the methodological soundness of the statistical study but ultimately deciding the case on legal grounds, assuming without deciding the validity of the study—is a move that recurs in the Court's constitutional decisionmaking.[235] Powell, who joined the

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231 See *Furman*, 408 US at 249–51 (Douglas concurring).

232 481 US 279 (1987).

233 See Garland, *Peculiar Institution* at 282 (cited in note 79).

234 Justice Lewis Powell, Memorandum to Law Clerk *27 (Sept 16, 1986), archived at http://perma.cc/2F2T-DBQZ.

235 For example, in *Witherspoon*, the Court put off until another day whether there was sufficient statistical proof that death-qualified juries were skewed toward conviction, declaring the data that the petitioners offered on the matter "too tentative and fragmentary." *Witherspoon*, 391 US at 517. When the Court finally reached the issue, it assumed for the sake of argument that the statistical proof was valid but decided the case on legal rather than statistical grounds. See *Lockhart v McCree*, 476 US 162, 173 (1986):

> Having identified some of the more serious problems with McCree's studies, however, we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death-qualified" juries. We hold, nonetheless, that the Constitution does not prohibit the States from "death qualifying" juries in capital cases.

Court just in time for the *Furman* litigation, was certainly not alone among the justices in his uneasiness with statistical proof. As a result, many of the justices may have felt that their personal legitimacy as jurists was threatened in cases involving statistical proof,[236] and thus they may have preferred to render decisions on purely legal rather than statistical grounds. This dynamic may also have informed the Court's ultimate conclusion in *McCleskey* that judging in general—and with regard to claims of racial discrimination in particular—requires evaluating proof in individual cases rather than examining broader statistical evidence.[237]

In addition to concerns about the legitimacy of their judicial role, the justices may have avoided the racial aspects of the capital punishment litigation in part because of concerns about the legitimacy of the Court as an institution. Addressing a controversial topic like capital punishment through the lens of procedural justice, as illustrated most clearly by the decisions of swing justices Stewart and White in *Furman*, may have seemed less socially divisive than applying the lens of racial justice. Moreover, the procedural-justice focus may have seemed more distinctively judicial and less potentially legislative than a focus on racial equality. The workings (and failings) of the judicial process are well within the special expertise of courts, in contrast to the evaluation of expert, technical proof of racial discrimination in outcomes, which may seem more suited to the legislative venue. The Court's timing of its entrance into the capital punishment fray was important with respect to this consideration. The Warren Court had faced frequent and vociferous criticism for stepping beyond the appropriate boundaries of what was supposed to be the "least dangerous branch" of government, given that the judiciary controls neither army nor purse.[238] The Court's foundational capital punishment cases came on the heels of this criticism, in the waning days of the Warren Court and the early days of the Burger Court. Thus, the swing justices may

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[236] See Sundby, 10 Ohio St J Crim L at 14 (cited in note 234) (describing Justice Powell's "aversion" to evaluating the statistical analysis presented in *McCleskey*, which was exacerbated by a clerk's memorandum criticizing the lower courts for failing to understand the Baldus study).

[237] See id at 13. See also *McCleskey*, 481 US at 297.

[238] See generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale 2d ed 1986) (mounting one of the most rigorous criticisms of the Warren Court's judicial activism and arguing for a policy of judicial restraint).

have sought to dispose of the death-penalty issue in the way least likely to feed into this critique—once again unsuccessfully, given that the dissenting justices repeatedly sounded the theme that the Court was inappropriately intruding into the legislative sphere.[239]

Interestingly, the South African Constitutional Court's 1995 decision invalidating capital punishment under the postapartheid constitution,[240] in the very first case presented to it for review, also largely eschewed race-based argumentation[241]—a silence perhaps even more surprising than that of the US Supreme Court, given the overt and extreme racism of the apartheid regime. In an exploration of the reasons for the South African Court's apparent avoidance of race in its ruling on capital punishment, one commentator suggests a similar motivation to that posited above—that is, to establish the Court as the appropriate adjudicator of the issue (in contrast to Parliament), a motivation especially strong in the context of establishing an inaugural constitutional court with the power of judicial review.[242] "In this setting, the Justices may have sought to elevate purely legal decisionmaking over considerations that require the pragmatic, fact-based wisdom of legislators."[243] Under this view, the South African Court sought "a lens that privileged the expertise and position of the judiciary" so as to "legitimize[ ] that body's elevation over its parliamentary rival."[244]

On a broader ideological level, the US Supreme Court's relative silence on the issue of race in capital punishment was of a piece with its approaches in the two most closely related constitutional areas—the regulation of criminal justice and the promotion of racial equality. In the broader criminal justice area, the Court presaged its approach to capital punishment by largely avoiding explicit discussion of race, even in cases in which the racial context was undeniably significant.[245] More generally,

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239 See, for example, *Furman*, 408 US at 403–05 (Burger dissenting).

240 *State v Makwanyane and Another*, 1995 (3) SA 391 (CC) (S Afr).

241 See Owen Roberts, *Race-Blind Abolition:* Makwanyane*'s Unused Inequality Argument* *1 (unpublished manuscript, Apr 2014) (on file with authors).

242 See id at *24–25.

243 Id at *24.

244 Id at *24–26.

245 The best example of this avoidance is the Court's decision in *Duncan v Louisiana*, 391 US 145 (1968), the case that incorporated the right to trial by jury. The opinion talks in broad terms about the abstract value of juries, even while the accused was a black teenager charged with assault for "slap[ping]" the arm of one of a group of four white boys who were harassing two black boys; this altercation took place in the midst of

instead of focusing on *outcomes* in the criminal justice context—the kinds of punishments imposed, the length of criminal sentences, or the distribution of criminal penalties—the Court focused on the *procedures* by which punishment was imposed.[246] The Warren Court viewed the most significant constitutional problems with the American criminal-justice system as procedural ones and hoped to ameliorate them by extending the rights to counsel and trial by jury and by regulating police interrogations and lineups. Consequently, it must have seemed natural, or at least plausible, to focus on procedural deficiencies in the capital punishment system, even under the more outcome-oriented Eighth Amendment, which forbids cruel and unusual punishments rather than mandating any special procedural protections.

In the context of constitutional litigation regarding racial equality, the Court obviously did not eschew discussions of race, but it did consistently express the hope that race-based remedies were merely stopgap measures necessary to achieve a race-blind future. For example, in the school-busing context, the Court referred to the court-ordered busing plan that it approved in 1971 as an "interim corrective measure" that would not necessarily require yearly judicial monitoring or updating once desegregation was achieved.[247] Similarly, in the affirmative action context, the Court struck down the use of racial quotas in university admissions but upheld the voluntary use of race for the promotion of diversity,[248] a remedial measure that Justice Sandra Day O'Connor later explicitly maintained should be "limited in time"—specifically, to 25 years—before evolving into constitutionally favored "race-neutral" policies.[249] This aspiration toward a race-blind future, present even in the era in which the Court most endorsed race-conscious remedial measures to effect the constitutional guarantee of equality, made a race-neutral

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a highly contested school-desegregation fight in one of the most racially divided parishes in Louisiana. Id at 147, 151–58. See also generally Nancy J. King, Duncan v. Louisiana*: How Bigotry in the Bayou Led to the Federal Regulation of State Juries* in Steiker, ed, *Criminal Procedure Stories* 261 (cited in note 50) (describing the racial context of the *Duncan* litigation).

[246] See William J. Stuntz, *The Collapse of American Criminal Justice* 74–85 (Belknap 2011) (describing and critiquing the procedural focus of the Bill of Rights).

[247] *Swann*, 402 US at 27.

[248] *Regents of the University of California v Bakke*, 438 US 265, 369 (1978).

[249] *Grutter v Bollinger*, 539 US 306, 342–43 (2003).

approach to the constitutionality of capital punishment that much more appealing.

Indeed, both the Court's commitment to procedural justice and its aspiration toward a color-blind ideal reflect a larger and deeper commitment, one more rooted in the 1960s and 1970s than in the present—that is, the Court's deeply optimistic faith in the constitutional perfectibility of social and legal institutions. To have invalidated the death penalty on the ground of racial disparities in its administration would have betrayed this faith by giving up hope that such disparities could be remedied by the right procedural interventions or "interim corrective measures."[250] A race-based abolition of the death penalty would have constituted an acknowledgement that the effects of institutionalized racism could not be erased by constitutional intervention—the very last message that the Supreme Court wanted to send in the era of constitutionally mandated school desegregation and criminal procedure reform. The LDF's opponents cleverly and powerfully appealed to this reluctance by arguing that evidence of past disparities should be discounted in light of the Court's own constitutional interventions. For example, Georgia argued that inferences of current racial discrimination from past disparities were not justified because "safeguards against arbitrariness or other lack of due process for disadvantaged persons have increased substantially in the last several decades . . . [including] the right to effective assistance of counsel for the indigent."[251] And Bork argued that "[t]he only studies that even inferentially suggest a possibility of racial discrimination were conducted in the South during a time when blacks were often excluded from grand and petit juries. They do not demonstrate that discrimination persists now that blacks sit in judgment on other blacks."[252] Once again, the South African context offers a similar dynamic—the new justices acted with the hope that conditions would improve with the official end of apartheid and the

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[250] *Swann*, 402 US at 27.

[251] Furman Respondent's Brief at *80 (cited in note 121). See also Supplemental Brief for Respondent, *Furman v Georgia*, No 69-5003, *14–15 (US filed Mar 25, 1972) (available on Westlaw at 1972 WL 125855):

> [I]t must be remembered that both Furman and Jackson were tried in the latter months of 1968, *after* the Georgia jury selection system was corrected to expunge the element of prima facie discrimination which arose from the use of segregated tax digests as a source of jurors, by substituting the voter lists. The potentiality of racially discriminatory juries was erased in both of these trials.

[252] Gregg US Brief at *66 (cited in note 163).

belief that "inequality . . . may be curable in the long run" through legal intervention.[253]

Even as the Court officially proclaimed the possibility of equality through law, surely the justices entertained doubts about the speed and completeness of change over time, especially given the baseline of long-standing racial inequality that the Court started from in the 1960s and 1970s. In light of these entirely plausible doubts, the justices may have hesitated to treat racial disparities as a ground for invalidating capital punishment because of the likelihood that similar disparities existed and would continue to exist in the imposition of noncapital punishments—which could not simply be excised from the legal system like the single penalty of death. Indeed, when the Court finally squarely addressed the issue of racial disparities in capital sentencing in *McCleskey*, this concern about the scope of the remedy was paramount. As Powell explained, "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[254] These concerns must have been heightened by the Court's decision to invalidate the use of capital punishment for the crime of rape. The Court had seen the staggering statistics on the race-based use of prosecutions for rape in the South, and it could not possibly have believed that disparate charging and sentencing in rape cases would disappear simply because the death penalty was off the table. To invalidate the entire criminal-justice system if its workings could be shown—as they plausibly could—to be affected by racial prejudice would be unthinkable. But if the Court relied on racial disparities to invalidate capital punishment, it would be forced to explain why similar disparities must be accepted in the imposition of ordinary criminal punishment. The Court no doubt sought to avoid a public announcement that racism is unavoidable and therefore must be tolerated—both for the country's sake and for the justices' own psychological comfort.

Indeed, the Court knew exactly what such a disheartening announcement would sound like, as Justice Antonin Scalia had circulated a memo to his fellow justices in *McCleskey* that suggested that he might write a concurrence along precisely these lines. Scalia explained, "Since it is my view that the unconscious

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[253] Roberts, *Race-Blind Abolition* at *27, 28 (cited in note 241) (quotation marks omitted), citing *Makwanyane* at ¶ 185 (Didcott concurring).

[254] *McCleskey*, 481 US at 314–15.

operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof."[255] Although Scalia never wrote this concurrence, his characteristic bluntness revealed the Court's dilemma with regard to evidence of racial disparities in capital sentencing. If the Court directly addressed the issue and declared the statistical proof of racial discrimination inadequate, then it would simply invite further litigation, as armies of social scientists would seek to provide the missing proof. If the Court declared the statistical proof adequate and granted relief, then it would have to face the inevitable challenge to the entire criminal-justice system without the possibility of granting similar relief. The *McCleskey* Court, by assuming without deciding the soundness of the Baldus study but denying individual relief based on statistical proof, tried to have it both ways—to avoid the enormity of the remedy sought for systemic discrimination while still maintaining that the Constitution prohibited racial discrimination in individual cases. As the Court must have predicted, the *McCleskey* decision proved controversial not least because of its disingenuousness.[256] The remedial difficulties that the Court ultimately addressed in *McCleskey* must have been apparent in the litigation regarding racial disparities in the Court's foundational cases, thus offering yet another powerful motivation to steer the discussions and ground the decisions in race-neutral terms.

Thus, the Court's focus on issues such as death qualification in *Witherspoon*, arbitrariness in swing *Furman* concurrences, and proportionality in *Coker*—without any sustained discussion of the racial significance of these particular legal issues or of the broader racial context—turns out to be less mysterious than it appears at first blush. As the litigants pounded on the racial issues in the Court's foundational capital punishment cases, the justices had ample opportunity to consider the costs, along many dimensions, of opening a public discussion about the evidence and constitutional significance of racial disparities in the administration of the death penalty. The Court's failure to engage robustly in this discussion could not have been inadvertent, and

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[255] Justice Antonin Scalia, *Memorandum to the Conference Re: No. 84-6811–* McCleskey v. Kemp (Jan 6, 1987), available at Library of Congress, Thurgood Marshall Papers, *McCleskey v Kemp* file ("Memorandum from Scalia").

[256] See Sundby, 10 Ohio St J Crim L at 33–35 (cited in note 234).

thus its silence reflects the power of the kinds of considerations that we have attempted here to unearth and flesh out.

IV. CONSIDERING THE CONSEQUENCES OF AVOIDANCE

What consequences flowed from the Court's avoidance of race in its foundational decisions? As in *Brown*, the Court's various opinions, from *Rudolph* to *Coker*, offered a woefully incomplete picture of the underlying practice. The price of omitting a discussion of race was to create the false impression that the greatest failings of the American capital punishment system could be found in discrete procedures (such as the death qualification of jurors, unitary trials, and the absence of guidance in state capital statutes). Of course, the Court might have had good reasons, both political and epistemological, for resisting the most encompassing and speculative of the LDF's claims—that the death penalty remained on the books largely because only blacks and other marginal groups were caught in the execution net. But even if the Court was not persuaded by that assertion, it could have said much more about how race historically and at that time informed decisions at every level, including legislative selection of crimes punishable by death, prosecutorial decisions to charge capitally in individual cases, judge and jury verdicts, and appellate and executive discretionary outlets from the ultimate imposition of the punishment.

As discussed below, the failure to come to terms with race has had complicated consequences for death-penalty jurisprudence, but, in a more basic sense, this failure disserved the Court in its role as a chronicler of history and social and political practices. Had the Court framed its constitutional regulation of capital punishment against the backdrop of antebellum codes, lynchings, mob-dominated trials, and disparate-enforcement patterns, the Court would have done a much better job of explaining *why* the death penalty deserved the sustained attention of the American judiciary. This would have been true even had the Court ultimately framed its doctrines in nonracial terms. Moreover, to the extent that the Court's silence about race was calculated (as in *Brown*) to preserve the Court's capital and prevent popular backlash or resistance, it was spectacularly unsuccessful. As in *Brown*, the Court's general audience understood that it was taking sides in a culture war over racial status even as the Court omitted the history of deliberate discrimination that offered the greatest justification for its interventions.

In the short term, the Court's failure to acknowledge racial discrimination in cases like *Rudolph* and *Coker* undermined the strength of that claim when it arrived before the Court in the late 1980s. As Professor Johnson persuasively argues, *Coker* managed to erase the most racially discriminatory practice (punishing rape with death) without providing the racial context surrounding that decision; thus, when the Court finally engaged a statistical study of racial discrimination in *McCleskey*, it was presented with a much less racially skewed death penalty and no "official" judicial record that race had ever played a substantial role in recent capital sentencing.[257] As a result, the Court was better able to give Georgia prosecutors and judges the benefit of the doubt and to "decline to assume that what is unexplained is invidious."[258] Johnson argues that a stronger opinion in *Coker* documenting the race-of-the-victim effects in rape cases would have made it more difficult to dismiss strong race-of-the-victim effects in the Baldus study—a dynamic that might have been outcome determinative given the Court's 5–4 division.[259] Perhaps so. But Justice Powell, the only available majority vote in *McCleskey*, was undoubtedly aware of Wolfgang and the rape studies even though they did not make their way into the *Coker* decision. His reluctance to side with the dissenters seems just as plausibly attributable to the problem of remedy and fears of spillover to the noncapital side of the criminal-justice system discussed above as to his need, in Justice Scalia's words, for "more proof."[260]

The most dramatic consequences of the Court's silence about race were neither contemplated nor foreseeable. Three powerful strands of contemporary capital jurisprudence are traceable to the Court's framing of its decisions in its early cases and thus, in some ways, traceable to the Court's decision to bypass race. The first two strands are the robust requirement of individualized sentencing[261] and the accompanying heightened representational requirements in capital trials.[262] The Court's decision in *Maxwell* and later in *Furman* to focus on the problem of standardless discretion (rather than, say, racially

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[257] See Johnson, *Of Rape, Race, and Burying the Past* at 196–200 (cited in note 26).

[258] *McCleskey*, 481 US at 313.

[259] See Johnson, *Of Rape, Race, and Burying the Past* at 200 (cited in note 26).

[260] Memorandum from Scalia (cited in note 255).

[261] See *McCleskey*, 481 US at 297.

[262] See *Rompilla v Beard*, 545 US 374, 387 (2005).

discriminatory outcomes) has radically transformed capital practice, but in ways that are themselves contingent, complex, and unanticipated. The Court's regulatory intervention in *Furman* required states to provide capital-sentencing guidelines if they sought to retain the death penalty. Numerous jurisdictions, including North Carolina and Louisiana, pursued what they regarded as the clearest and most definitive path in this regard—the decision to make capital punishment mandatory for certain crimes.[263] When the Court rejected the mandatory statutes, it formally recognized, in unprecedented language, the significance of a defendant's character and background as well as the circumstances of the offense to the death-penalty decision.[264] That recognition not only required states to provide a meaningful vehicle for the consideration of mitigating evidence broadly defined,[265] but it also profoundly altered the way that institutional actors conceived of the responsibilities of trial counsel.[266] Instead of treating capital cases like any other serious felonies, capital-trial lawyers increasingly understand their special obligation to investigate and present a wide range of mitigating evidence. Such efforts require a capital-defense team, with psychiatric, psychological, and mitigation specialists, and these heightened demands are reflected in both the increasingly specific professional norms promulgated by the American Bar Association[267] and the Court's own doctrines elaborating the Sixth Amendment right to effective counsel as applied to capital sentencing.[268]

The irony, of course, is that the Court's concern about the absence of guidelines ultimately produced a much more substantial commitment to open-ended individualized sentencing. That

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[263] See Banner, *The Death Penalty* at 269 (cited in note 8).

[264] See *Woodson v North Carolina*, 428 US 280, 304 (1976) (Stewart) (plurality).

[265] See, for example, *Tennard v Dretke*, 542 US 274, 288–89 (2004).

[266] See Carol S. Steiker and Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 L & Inequality 211, 228 (2012).

[267] Compare American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) (former ABA guidelines), archived at http://perma.cc/U3Q5-87HQ, with American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L Rev 913 (2003) (new ABA guidelines).

[268] See, for example, *Rompilla*, 545 US at 387 (holding that the absence of an adequate mitigation investigation denied the defendant his Sixth Amendment right to effective representation); *Wiggins v Smith*, 539 US 510, 524–25 (2003) (same); *Williams v Taylor*, 529 US 362, 396 (2000) (same).

commitment has improved death-penalty representation, but it has also proven extraordinarily costly. Contemporary capital trials are far more expensive than their counterparts in the 1960s and 1970s, and those costs have increasingly destabilized the practice.[269] Capital prosecutions have declined dramatically over the past fifteen years, and the costs associated with capital-trial defense—commonly borne by local rather than state governments—have contributed significantly to the decline.[270]

Would a race-conscious or race-focused capital jurisprudence have avoided these developments? If the Court had addressed the racially discriminatory application of capital-rape statutes in *Rudolph* or *Maxwell*, it might have alleviated some of the pressure to address the "arbitrary" and "freakish" aspects of the American death penalty a few years later.[271] It is difficult to assess, counterfactually, whether an early win on race grounds would have contributed momentum to the sort of temporary abolition achieved in *Furman* (with the unexpected consequences described above) or, on the other hand, would have defused a continuing commitment by the LDF to attack, or the Court to regulate, capital punishment.

The race avoidance in *Coker* produced a third powerful strand of contemporary death-penalty law—the Court's proportionality doctrine. Prior to *Coker*, the Court had virtually no experience gauging whether particular punishments, though permissible generally, were excessive as applied to particular offenses or offenders. And *Coker* could have avoided this difficult enterprise by choosing a black defendant–white victim case and ruling that the long-standing (and continuing) racial discrimination in capital-rape prosecutions required prohibiting the practice. Instead, the Court sought to assess proportionality by looking at "objective" indicia of prevailing values (state statutes and jury decisionmaking) and consulting its own judgment regarding the challenged practice and the purposes of punishment.[272] That proportionality approach yielded modest results in the first two decades after *Coker*, with the Court upholding the death penalty as applied to juveniles[273] and persons with intellectual

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269 See Steiker and Steiker, 30 L & Inequality at 231–33 (cited in note 266).

270 Steiker and Steiker, 2010 U Chi Legal F at 142 (cited in note 20).

271 See note 134 and accompanying text.

272 *Coker*, 433 US at 592.

273 *Stanford v Kentucky*, 492 US 361, 380 (1989).

disabilities[274] and carving a small layer of protection for nontriggerpersons convicted under the law of parties.[275] But the past fifteen years have seen a dramatic expansion of the doctrine. The Court reversed the earlier denials of protection for juveniles[276] and persons with intellectual disabilities[277] and, in the context of a defendant sentenced to death for child rape, condemned the application of capital punishment to nonhomicidal ordinary crimes.[278]

More importantly, the Court's new proportionality jurisprudence has broadened the criteria for assessing prevailing standards of decency, consulting professional and expert opinion, opinion polling data, and world practices and attitudes.[279] This new methodology facilitated the Court's rejections of the juvenile death penalty and the execution of the intellectually disabled despite the fact that, in both cases, more death-penalty states permitted the challenged practice than prohibited it (a fact that would have been fatal under the Court's prior approach). In addition, the new methodology indicates a potential route to judicial abolition, as each of the emerging factors increasingly weighs against the continued retention of the death penalty writ large.[280]

In light of the unexpected growth of the individualization requirement (and the accompanying extraordinary costs of capital representation), as well as the contemporary expansion of the proportionality doctrine, the race avoidance of *Rudolph*, *Maxwell*, *Furman*, and *Coker* might have yielded more-substantial and intrusive regulation of state capital practices than more-focused, race-based approaches. This dynamic is not unfamiliar. In the wake of the Civil War, advocates for racial justice sought explicit, simple declarations of racial equality in the Civil Rights Act of 1866[281] and the Fourteenth Amendment. For example, Congressman Thaddeus Stevens, leader of the Radical Republicans in the House of Representatives, proposed

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[274] *Penry v Lynaugh*, 492 US 302, 340 (1989).

[275] See *Enmund v Florida*, 458 US 782, 788 (1982); *Tison v Arizona*, 481 US 137, 158 (1987).

[276] *Roper v Simmons*, 543 US 551, 578–79 (2005).

[277] *Atkins v Virginia*, 536 US 304, 321 (2002).

[278] *Kennedy v Louisiana*, 554 US 407, 446–47 (2008).

[279] See Carol S. Steiker and Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S Cal L Rev 733, 764 (2014).

[280] See id.

[281] 14 Stat 27, codified at 42 USC §§ 1981–82.

the following amendment: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."[282] And an original proposal for the Civil Rights Act would have condemned any race discrimination with respect to "civil rights or immunities."[283] Concerns about the potentially broad implications of general guarantees of racial equality (including their consequences for antimiscegenation laws, segregation, and voting restrictions) caused the Reconstruction-era Congress to ultimately embrace a narrower, more targeted Civil Rights Act, safeguarding specific rights of economic personhood.[284] Those same concerns likely informed the choice to forgo Stevens's straightforward protection against racial discrimination in favor of the vague, nonracial language in the Fourteenth Amendment, which protects "privileges and immunities" from abridgement, assures "due process of law" prior to deprivations of life, liberty, or property, and prohibits denials of "equal protection of the laws."[285] The desire not to intrude too much on racial prerogatives ultimately paved the way for a dramatic expansion of the scope of liberty and equality protected by the Fourteenth Amendment apart from race, though it obviously came at the price of delaying (or at least contributing to the delay) for at least three-quarters of a century the dismantling of Jim Crow.[286] So too might race avoidance in the capital punishment context produce more-enduring and intrusive regulation of capital punishment than the more-limited, though more-threatening, race-based intervention that the Court abjured.

CONCLUSION

The American death penalty is often described as exceptional. In the mid-nineteenth century, Alexis de Tocqueville observed the relative mildness of the American death penalty, and the decision of some American states to limit or abolish capital

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[282] Paul Brest, et al, *Processes of Constitutional Decisionmaking: Cases and Materials* 309 (Aspen 5th ed 2006).

[283] Id at 302.

[284] See Andrew Kull, *The Color-Blind Constitution* 76–79 (Harvard 1992).

[285] US Const Amend XIV. See also Kull, *The Color-Blind Constitution* at 82–86 (cited in note 284).

[286] The cost here might be overstated, given that the explicit guarantee of racial equality in the context of voting did little to protect that right until congressional intervention in the 1960s. See Klarman, *From Jim Crow to Civil Rights* at 253 (cited in note 1).

punishment put the United States ahead of its European counterparts.[287] Today, the United States is viewed as an outlier in the other direction, chided for its barbarity as the sole Western democracy that retains capital punishment. The United States is also an outlier among current retentionist states in its extensive efforts to regulate and tame the practice. But perhaps the most long-standing and consistent ground for distinction is the extent to which the American death penalty is and has been "soaked" in racism.[288] The story of how the American death penalty came under assault in the 1960s, was almost judicially abolished in the early 1970s, and has been subject to continuing constitutional regulation thereafter cannot be told without detailed attention to race. And yet the Supreme Court opinions addressing the American death penalty during this foundational era are soaked in euphemism, addressing problems of "arbitrariness," "caprice," and "disproportionality." We have sought to illuminate the causes and consequences of the Court's race avoidance. We are confident that, whatever the future holds for the American death penalty, its destiny is in some important sense linked to the distinctive and destructive role of racial discrimination in American society.

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[287] See Alexis de Tocqueville, 2 *Democracy in America* 166 (Vintage 1990).

[288] Banner, *Traces of Slavery* at 97 (cited in note 28).

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Capital Punishment: A Century of Discontinuous Debate

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I. CRIMES AND PUNISHMENTS

CAPITAL PUNISHMENT: A CENTURY OF DISCONTINUOUS DEBATE

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I. INTRODUCTION

A little more than one hundred years ago, in 1909 (the same year as the founding conference for the *Journal of Criminal Law and Criminology*[1]), the U.S. Supreme Court held its first and thus far only full-blown criminal trial under its original jurisdiction. The defendants were a group of city officials and townspeople from Chattanooga, Tennessee, and the charges were criminal contempt. The charges arose from the lynching of Ed Johnson—a black man accused of raping a white woman—an act of defiance in response to the Supreme Court's assertion of jurisdiction to conduct federal habeas corpus review of his case. Johnson's state court trial began two weeks after the crime and concluded four days later; his lawyers had been allotted only ten days to prepare his defense. Johnson was convicted and sentenced to death by an all-white jury on extremely flimsy evidence (the victim and sole witness to the crime testified, "I will not swear that he is the man") in a hasty proceeding suffused with the threat of mob violence. The Tennessee Supreme Court denied Johnson's appeal, but Justice John Marshall Harlan (famous dissenter in *Plessy v. Ferguson*[2] thirteen years earlier), after consulting with his brethren, accepted habeas review of the case as the Circuit Justice hearing emergency appeals from

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[1] The *Journal* was a product of the "National Conference on Criminal Law and Criminology," held in 1909 to celebrate the fiftieth anniversary of Northwestern University School of Law. Journal of Criminal Law & Criminology, About the Journal: History of The Journal of Criminal Law & Criminology, http://www.law.northwestern.edu/jclc/about/ (last visited Aug. 18, 2010).

[2] 163 U.S. 537, 552-64 (1896) (Harlan, J., disssenting).

the Sixth Circuit. The day following Justice Harlan's order, a mob removed Johnson from his cell with the tacit permission of jail officials and the county sheriff. The mob brought Johnson to the county bridge that spanned the Tennessee River, where they hanged him and also shot him more than fifty times. One of those involved was a deputy sheriff who fired five shots himself at point-blank range and left a note pinned to Johnson's body that read: "To Justice Harlan. Come get your n——r now." The Supreme Court, in an opinion by Justice Oliver Wendell Holmes, rejected vociferous defense arguments that the Court's assertion of jurisdiction over the case constituted an unlawful intervention in state processes and held instead that the violation of the Court's order, if willful, would constitute criminal contempt.[3] Ultimately, the sheriff, a deputy sheriff, and four leaders of the lynch mob were convicted of contempt at trial and given sentences ranging from sixty to ninety days in prison, though the sheriff was greeted as a hero in Chattanooga upon his early release by a crowd of 10,000 supporters.[4]

No one doubts that death penalty litigation has changed a great deal in the past on hundred years, as this dramatic case illustrates. The authority of the United States Supreme Court and the federal courts more generally to review state capital and criminal convictions is now unquestioned, thanks in no small part to the Chattanooga contempt prosecutions. Moreover, starting in the decades following Johnson's lynching and accelerating during the constitutional criminal procedure revolution of the 1960s, the Supreme Court established a plethora of constitutional guarantees regarding state capital and criminal processes—including the rights to appointed counsel, representative juries, and insulation from the threat of mob violence, among many others. Ironically, Ed Johnson's lawyers raised all three of these claims in their representation of him, but to no avail. Indeed, it is clear that the recognition of these federal rights was driven in large part by trials like Johnson's—hasty, mob-driven capital trials of black defendants in state courts in the South that could be so perfunctory as to earn the sobriquet "legal lynchings."[5] The procedural world of Ed Johnson's trial is unrecognizable today and elicits amazed headshakes when presented to

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[3] United States v. Shipp, 203 U.S. 563, 573-74 (1906).

[4] All of the facts regarding Johnson's trial and lynching and the contempt proceedings that followed are taken from Mark Curriden, *A Supreme Case of Contempt*, A.B.A. J., June 2009, at 34, *available at* http://www.abajournal.com/magazine/article/a_supreme_case_of_contempt/.

[5] *See generally* Michael J. Klarman, Powell v. Alabama*: The Supreme Court Confronts "Legal Lynchings," in* CRIMINAL PROCEDURE STORIES 1, 42-43 (Carol S. Steiker ed., 2006) (describing the phenomenon of the Supreme Court responding to "legal lynchings" with new constitutional protections in the context of the famous "Scottsboro Boys" case).

current law students studying the history of criminal procedure and federal habeas corpus.

In contrast to the transformation of the legal *process* for capital trials, many assume that the nature of public *discourse* about capital punishment has remained relatively static, with the same old, well-worn arguments about the morality or wisdom of the death penalty recycled through the generations. There is a non-fanciful basis for this assumption, as some of the most familiar arguments in debates about the death penalty make a fairly unchanged appearance across the centuries. The leading scholarly work on the history of the American death penalty describes a college student at Columbia who, having left an essay until the last minute, sighs that time pressure forced him "to take refuge in some old thread bare subject as Capital punishment"—in 1793![6] What was already "threadbare" at the time of our nation's founding has seen more than 200 years of further wear and tear. Any student of death penalty debates over the generations recognizes the timeless quality of certain approaches. For example, Cesare Beccaria's seminal 1764 essay *Of Crimes and Punishments*,[7] the first sustained attack on the death penalty in the modern West, argued that long-term incarceration is a better deterrent than death and that executions set a bad example for the populace, decrying the absurdity of the state killing in an attempt to demonstrate that killing is wrong. These arguments could be lifted and dropped into a contemporary state legislative session or high school debater's file without any change at all.

Our purpose in this essay is to challenge the easy (because partially true) assumption that there is nothing new under the sun in death penalty discourse. Rather, we contend that debates about capital punishment have been as much *dis*continuous as continuous over the past century. Some arguments that were made in the past have been entirely discredited or even forgotten today, while our current debates contain arguments that would be utterly foreign to denizens of earlier decades, despite the fact that they cared deeply about the issue of capital punishment in their own times. We address two "lost" arguments from the past in favor of the retention of capital punishment: the contention that capital punishment was a necessary antidote to extrajudicial lynchings and the defense of capital punishment as part of a larger program of eugenics endorsed by many progressive leaders of the late nineteenth and early twentieth centuries. We also explore two "new" abolitionist arguments from the present: the fiscal argument about

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[6] *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 88 (2002).

[7] *See generally* CESARE BECCARIA, OF CRIMES AND PUNISHMENTS (1764), *available at* http://www.constitution.org/cb/crim_pun.htm.

the greater cost of capital punishment even in comparison to life imprisonment and the concerns raised about the suffering of those awaiting execution for lengthy periods (so-called Death Row Phenomenon). We hope to show not only that death penalty discourse has not been as static as is often assumed, but also that the debates of each era provide a window onto both the nature of the actual practice of the death penalty in different times and the broader social contexts in which that practice has operated.

II. TWO FORGOTTEN ARGUMENTS FOR THE RETENTION OF CAPITAL PUNISHMENT

Consider the following thought experiment. Imagine asking the members of any current audience in the United States to give the two strongest arguments they can think of in favor of the retention of capital punishment. The audience members would doubtless disagree and produce a varied list of considerations, but it is highly unlikely that such a list would contain arguments about either the prevention of lynchings or the promotion of a program of eugenics. Yet these two considerations were powerfully present in the lively debates about capital punishment that took place a century ago. Not everyone who supported capital punishment in the early twentieth century found either or both of these arguments persuasive, and not everyone concerned about lynchings or enthusiastic about the eugenics movement supported capital punishment. Yet everyone familiar with public discourse about the death penalty at the time would have recognized the *relevance* of these considerations to the debate and, indeed, their sometimes decisive impact on policy. In what follows, we hope to re-capture a flavor of the significance of these issues to early twentieth-century debates about the death penalty and explore what light this significance sheds on the changing role of capital punishment as a social practice over the past century.

A. THE DEATH PENALTY AS A NECESSARY ANTIDOTE TO LYNCHING

Our country's shameful history of lynchings—extrajudicial executions mostly of black men suspected of criminal acts against whites—has been well-documented. During the Reconstruction Era in the South, freed blacks were frequently the target of lethal violence even in the absence of any suspicion of criminal wrongdoing, merely as part of "the wave of counterrevolutionary terror that swept over large parts of the South" after

the Civil War.[8] But the practice of lynching continued robustly well past Reconstruction and into the twentieth century, primarily in the South, claiming the lives of 4,708 people between the years of 1882 (when the Tuskegee Institute first began keeping such records) and 1944 (after which lynchings declined steeply).[9] The vast majority of these victims were black men, and while statistically, the most commonly cited motivation for lynching was the suspected murder of a white person by a black man, the "most emotionally potent excuse" was the claim that a black man had raped a white woman.[10] Historians of lynching in the South find it difficult to overstate the centrality of the fear of black rapists to the practice of lynching: "Black men were lynched for other crimes, but rape was always the key."[11] Even high-level elected officials in the South publicly endorsed lynching as the only "suitable punishment" for black men who raped white women.[12] Lynching was so entrenched a practice that in the most intense period of lynchings in American history, 1889-1893,[13] considerably more people were lynched than executed nationwide—921 to 556, by one count.[14]

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[8] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, 425 (1988); *see generally* GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION (1984).

[9] *See* PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA viii (2002).

[10] RANDALL KENNEDY, RACE, CRIME, AND THE LAW 45 (1997).

[11] EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 240 (1984).

[12] KENNEDY, *supra* note 10, at 45-46 (quoting U.S. Senator Theodore Bilbo of Mississippi, among others).

[13] AYERS, *supra* note 11, at 238.

[14] James W. Garner, *Crime and Judicial Inefficiency*, 29 ANNALS AM. ACAD. 601 (1907), *reprinted in* DEBATERS' HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT 10, 11 (C. E. Fanning, ed., 1909) (reproducing the table compiled by the *Chicago Tribune* and published in 1906). Ayers places the number of lynchings during this period at "nearly 700" but does not offer a specific source reference and does not indicate whether this figure includes both black and white victims. *See* AYERS, *supra* note 11, at 238. A source comprehensively comparing the number of lynchings and legal executions over time finds that lynchings outnumbered legal executions in the South and Border states (where the vast majority of lynchings occurred) between the years 1886 and 1895, with the balance shifting toward legal executions over the next three decades. During this entire period (1886-1925), lynchings never fell below half the number of executions, and the total numbers of lynchings and executions in the two regions over this thirty-year period came out almost exactly equal. *See* HOWARD W. ALLEN & JEROME M. CLUBB, RACE, CLASS, AND THE DEATH PENALTY: CAPITAL PUNISHMENT IN AMERICAN HISTORY 84 tbl. 4.3 (2008). Moreover, the ratio of lynchings to executions is higher and more sustained over time for blacks. *See id.* The exact number of lynchings (and, in this period, of executions as well) is probably impossible to determine, but precision is not crucial to the argument; any of the figures listed above

The practice of lynching had some obvious implications for the practice of capital punishment at the turn of the century. Many victims of lynching were first identified as criminal suspects by their arrest on capital charges. Lynchings frequently commenced with mobs dragging capital suspects from their jail cells, often with the tacit or active participation of local officials, before any trial could take place or lawful sentence be imposed.[15] Even when the criminal process was allowed to run its course, the threat of mob violence pervaded many trials, particularly trials of black men charged with capital crimes against white victims. Jurors in such cases must have felt intense pressure to yield to the passion of the mob, if, indeed, they did not share that passion themselves. During Ed Johnson's trial in 1906, when the white victim identified Johnson as her rapist, one of the jurors had to be restrained by his fellows as he leapt from his chair yelling, "If I could get at him, I would tear his heart out right now!"[16] The threat of lynching affected post-trial proceedings as well; Johnson was by no means the only capital defendant advised to relinquish his appellate rights in an attempt to stave off a lynch mob (an attempt that proved vain in Johnson's case).[17] The ever-present threat of lynching led reformers to urge speeding up the criminal process to allow for immediate trials followed by instant executions,[18] pressures that created the practice known derogatorily as "legal lynching," a process that was often only a hairsbreadth away from the illegal version.[19] The prevalence of lynching in the Deep South at the turn of the century is probably best illustrated by the ingenious argument of a defense lawyer to the jury in a case of alleged interracial attempted rape in Louisiana in 1907 to the effect that his client *must* be innocent because otherwise he surely would already have been lynched![20]

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supports the claim that lynchings clearly outnumbered executions for a period shortly before the turn of the twentieth century and remained numerically substantial in relation to executions for decades after the turn of the century, at least in the regions in which lynching was widely practiced.

[15] *See* AYERS, *supra* note 11, at 245-46 (describing collusion of local officials); KENNEDY, *supra* note 10, at 42-44 (quoting from NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918, 11-18 (1919)).

[16] *See* Curriden, *supra* note 4, at 34.

[17] *See id.*; *see also* Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching?*, *in* FROM LYNCH MOBS TO THE KILLING STATES: RACE AND THE DEATH PENALTY IN AMERICA 21, 35 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (describing a 1929 execution in Texas in which the defendant's lawyers waived appeal to avoid a lynching as representative of summary capital processes or "legal lynchings").

[18] AYERS, *supra* note 11, at 246.

[19] *See* Klarman, *supra* note 5, at 2-3.

[20] *See* Jennifer Wriggins, Comment, *Race, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 109 (1983) (quoting State v. Petit, 119 La. 1013, 1016 (1907) ("Now, don't you know

The practice of lynching, however, affected not only the administration of capital punishment as described above, but also public discourse about capital punishment as appropriate public policy. Supporters of capital punishment urged that the maintenance of the death penalty was a necessary antidote to lynching; indeed, it may well be that some who might otherwise have opposed the death penalty came reluctantly to support it as a lesser evil, given that the anti-lynching voices tended to come from the more politically progressive members of communities in which lynching was most prevalent. The role of lynching in public discourse about capital punishment in the early twentieth century is most visible in the debates surrounding the wave of abolitionist legislation during the Progressive Era and the almost as powerful wave of reinstatement that shortly followed. The experiences of Colorado and Tennessee, which both abolished and quickly reinstated the death penalty during this period, are particularly instructive about the powerful role that lynching could play in the fate of the death penalty as law. But arguments about lynching and capital punishment extended beyond specific legislative initiatives and were clearly present more generally as stock positions in academic and popular treatments of "the death penalty debate" during the first few decades of the twentieth century.

First, consider the role of lynching in the waves of abolition and reinstatement during the Progressive Era. The early decades of the twentieth century were the most active period of death penalty repeal and reinstatement in American history. Ten states abolished capital punishment between 1897 and 1917, and eight of them reinstated the death penalty by the end of the 1930s, some within only a few years of the original abolition.[21] To be sure, each of these ten states has its own death penalty story, and different considerations weighed more or less heavily in different places at different times. Moreover, with the exception of Tennessee, all of these states were in the West or Midwest rather than the heartland of lynchings in the American South. Nonetheless, lynchings were "*the* most important common triggering event in reinstatement of the death penalty" after abolition, occurring in each of the four states with the shortest periods of death penalty abolition.[22] The experiences of Tennessee (the only Southern state to abolish the death penalty during this era) and Colorado

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that, if this n——r had committed such a crime, he never would have been brought here and tried . . . he would have been lynched . . . .")).

[21] John F. Galliher, Gregory Ray & Brent Cook, *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 543-573 (1992) (providing state-by-state accounts).

[22] *Id.* at 574 (emphasis added).

(which was the first to abolish the death penalty during this era, but reinstated before any other states joined it) are particularly helpful in understanding the power of lynching in the politics of capital punishment in the early twentieth century.

In Tennessee, abolition was accomplished in 1915 largely as a result of the determined efforts of Duke Bowers, a retired Memphis merchant who was so involved and influential that the legislation abolishing the death penalty was titled the "Duke Bowers' Bill."[23] Bowers submitted a lengthy brief to the legislature in support of the bill, in which he made a plethora of arguments against the death penalty, emphasizing in particular the risk of executing the innocent.[24] But he also responded directly to the argument that abolition would lead to more lynchings: "It is claimed by advocates of the death penalty that if it is abrogated, it would increase lynching. Here . . . statistics come to our aid [because other states did not experience a rise in lynchings after abolition]."[25] Bowers also maintained that lynch mobs are encouraged more by state executions than by abolition: "If the State does not consider life sacred, the mob, with ready rope, will strangle the suspected. . . . In other words, why may not the mob do quickly what the law does slowly?"[26] The Governor of Tennessee received many letters urging the Governor's veto of the bill predicting (or even threatening) mob violence in its wake. A county attorney argued that the bill would "only encourage mob law," while a Tennessee state committee member predicted that "if this bill should become law it would be almost impossible to suppress mobs in their efforts to punish colored criminals."[27] Governor Thomas Rye sent a veto statement to the legislature explaining his refusal to sign the bill into law on the grounds that it would "increase crime and encourage mob law."[28] But the Governor's veto was not sent within the five-day time period set by state law, and thus abolition was passed in Tennessee.

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[23] *Id.* at 556-57.

[24] *See* Duke C. Bowers et. al., Life Imprisonment vs. The Death Penalty, Brief to the Honorable Members of the Senate and Lower House of the Fifty-Eighth General Assembly and to the Chairman and Members of the Judiciary Committees Thereof (1915), *available at* http://www.archive.org/details/lifeimprisonment00bowe.pdf.

[25] *Id.* at 18.

[26] *Id.*

[27] Galliher et al., *supra* note 21, at 557 (quoting letters received by Tennessee Governor Thomas Rye).

[28] Margaret Vandiver & Michel Coconis, "*Sentenced to the Punishment of Death:" Pre-*Furman *Capital Crimes and Executions in Shelby County, Tennessee*, 31 U. MEM. L. REV. 861, 881 (2001) (quoting Governor's veto message to the state assembly).

What is perhaps most striking about Tennessee's abolition of capital punishment (aside from its brevity, about which more below) is that, despite the common listing of Tennessee among the ten Progressive Era abolitionist states, Tennessee's bill did not, in fact, "abolish" the death penalty. Rather, Tennessee's hard-fought measure abolished the death penalty only for most forms of murder; it retained it for both for murder committed by a prisoner serving a life sentence (rare) and also for the crime of rape (not so rare), which was in practice punished by death only when the perpetrator was black.[29] Tennessee's retention for rape was unique among the rest of the Progressive Era abolition bills, and it reflected the distinctively Southern belief that lynch mob violence simply could not be suppressed in cases of black men accused of the rape of white women, especially if the law refused to treat such outrages as capital crimes.[30]

Tennessee's abolition was short-lived; the death penalty was reinstated a mere four years later in 1919. The emphasis on lynching in the drive for reinstatement was, if anything, even stronger than it had been during the abolition battle. Three lynchings (all of black men) occurred during the four-year period of abolition, and all three lynchings were prolonged, public, and gruesome affairs involving torture and burning.[31] These events provoked community outrage, reflected in a series of editorials in the *Nashville Tennessean*, and led to the formation of a citizen-sponsored "Law and Order League" to combat lynching.[32] Because Tennessee's period of abolition overlapped with the United States' involvement in World War I, anti-lynching advocates also highlighted the effects of such violence on the war effort:

> "[t]he lynching . . . yesterday, can but sow disunion among our people, undermine the morale of our negro troops, and lessen the effectiveness of our propaganda among the colored people for food production and conservation. It will, therefore, tend to prolong the war and increase the price of victory."[33]

One week after Governor Albert H. Roberts took office in 1919, he sent an urgent message to the legislature, calling upon them to repeal

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[29] BANNER, *supra* note 6, at 222.

[30] *See* George W. Hays (former Governor of Arkansas), *The Necessity for Capital Punishment*, *in* CAPITAL PUNISHMENT 156, 162 (Julia E. Johnsen ed., 1939) ("[I]t is plainly evident that if capital punishment were abolished and the bloodcurdling assaults [earlier described by the author as "fiendish crimes of low-grade types of Negroes"] were unpunishable by death, mob violence would be supreme."); *see also* Vandiver & Coconis, *supra* note 28, at 880.

[31] *See* Galliher et al., *supra* note 21, at 564-65.

[32] *Id.* at 565.

[33] *Id.* (quoting *Lynching Evil to be Fought*, NASHVILLE TENNESSEAN, Apr. 25, 1918, at 8).

abolition, charging that "the 'Bowers Law'[] has been the contributing cause to the commission of the crime of murder and to the summary vengeance of the mob on the murderer,"[34] essentially echoing the concerns of Governor Rye's toothless veto message four years previously. The legislature lost no time in acting; both houses voted by large majorities to repeal abolition within twenty-four hours.[35]

Colorado's abolition bill, in contrast to that of Tennessee, enjoyed the support of the Governor and was passed by the state senate without discussion and by a large majority in 1897.[36] But Colorado's law lasted no longer than Tennessee's (four years) and was reinstated under similar pressures—"in the face of what at the time seemed the threat of mob rule."[37] In the year preceding reinstatement in Colorado, two gruesome lynchings (both of men, one "mulatto" and one black) were carried out before large crowds. The *Rocky Mountain Daily News* editorialized strenuously in favor of reinstatement in order "to prevent the recurrence of such horrors."[38] In addition to their intrinsic horribleness, lynching represented the frightening threat of the deterioration of the rule of law and democratic governance: "The greatest danger in a republic is a mob," the Bowers brief would later argue in Tennessee, quoting a "learned statesman."[39] Governing elites, especially in the South, feared the volatility of the large class of poor whites, who could easily be moved to racially motivated violence in times of economic uncertainty and escalating crime. A white woman writing in 1914 on race relations in the South described this class as "the nitrogen of the South"—a combustible element "ready at a touch" to ignite "and in the ensuing explosion to rend the social fabric in every direction."[40] On a less apocalyptic but perhaps more accessible level, lynchings also posed a threat to the state's image: "In the case of such crimes [that led to lynching] . . . a jury may be relied upon to fix the penalty at death, and the certainty that it will do so will stop the blackening of

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[34] Vandiver & Coconis, *supra* note 28, at 882 (quoting Governor Roberts's message to the state assembly).

[35] *Id.* at 882-83.

[36] Galliher et al., *supra* note 21, at 553.

[37] HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 10 (rev. ed. 1967).

[38] Galliher et al., *supra* note 21, at 561 (quoting *Restore Capital Punishment*, ROCKY MOUNTAIN DAILY NEWS, May 24, 1900, at 4).

[39] *See* Bowers, *supra* note 24, at 18.

[40] AYERS, *supra* note 11, at 245 (quoting LILY H. HAMMOND, IN BLACK AND WHITE: AN INTERPRETATION OF SOUTHERN LIFE 60-61 (1914)).

Colorado's fair name with lynchings."[41] The apparently widespread belief in Colorado that the lack of capital punishment made lynchings more likely, if not inevitable,[42] undermined the earlier acceptance of abolition. The legislature's reinstatement was attributed by the press chiefly to the most recent murder followed by lynching that had occurred only six months previously.[43]

Quite apart from the central role that lynching played in the abolition, and especially the reinstatement, of capital punishment during the Progressive era, the assertion that abolition would increase lynch mob violence was a frequently made "stock" argument in the death penalty debates of the early twentieth century, untethered to specific legislative proposals. The Bowers brief to the Tennessee legislature is some evidence of the general familiarity of the argument, with its reference to the lynching argument made by unnamed "advocates of the death penalty."[44] But the best proof of the salience of the lynching argument is probably the publication in several editions of the popular *Debaters' Handbook* on capital punishment of an essay entitled "Capital Punishment and Lynching," devoted entirely to the argument that "to abolish capital punishment in this country is likely to provoke lynchings. Whenever unusually brutal and atrocious crimes are committed, particularly if they cross racial lines, nothing less than the death penalty will satisfy the general sense of justice that is to be found in the average American community."[45] This piece appeared in the first four of five editions of the *Handbook*, published in 1909, 1913, 1917, and 1925, respectively.[46] It disappeared from the fifth edition, published in 1939, although the argument "Lynchings would increase" is included in that volume as part of an outline of arguments for and against the death penalty under the general heading "It is socially desirable that we retain the death penalty."[47]

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[41] Galliher et al., *supra* note 21, at 561 (quoting *Restore Capital Punishment*, ROCKY MOUNTAIN DAILY NEWS, May 24, 1900, at 4).

[42] *Id.* at 562.

[43] *Id.*

[44] *See supra* text accompanying notes 23-28.

[45] J. E. Cutler, *Capital Punishment and Lynching*, 29 ANNALS AM. ACAD. 622, (1907), *reprinted in* DEBATERS' HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT 17, 21-22 (C.E. Fanning, ed., 1909).

[46] *See* DEBATERS' HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT (C.E. Fanning, ed., 1909, 1913, and 1917); THE HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT (Lamar T. Beman, ed., 1925) [hereinafter Beman].

[47] *Summary of Arguments*, *in* CAPITAL PUNISHMENT 231, 243 (Julia E. Johnsen, ed., 1939).

Not surprisingly, the same *Handbook* series also contains attempted refutations of this pro-death penalty lynching argument. One edition of the *Handbook* contains an excerpt from the learned statesman quoted, but not identified, in the Bowers brief who argues, "The greatest danger in a republic is a mob, and as long as States inflict the penalty of death, mobs will follow the example."[48] Alternatively, some abolitionists in the *Handbook* cleverly countered the claim that lynchings will result from the perceived under-enforcement of the law resulting from abolition with the plausible assertion that retention of capital punishment itself leads to under-enforcement of the law, because juries sometimes wrongly acquit for fear of inflicting death[49] (and thus presumably will incite lynch mobs in this way, as well). A more direct response to the lynching argument, similar once again to one of the arguments in the Bowers brief, was made in a 1927 book grandly titled *Capital Punishment in the Twentieth Century*, to the effect that if lynchings were really substitutions for capital punishment, one would expect to see more of them in abolitionist states.[50] Nonetheless, as the book points out, lynchings were demonstrably more common in states that retained the death penalty than in those that abolished it. Of course, this argument leads to the question of whether the states (particularly those of the Deep South) that refused to abolish the death penalty would have experienced no rise in lynchings had *they* abolished it. But the existence of such a counter-argument in an abolitionist-tilted survey of capital punishment demonstrates the felt need to address what a review (in this illustrious *Journal*) of the 1927 book places first on a list of retentionist arguments: the "danger of lynching."[51]

The prevalence and pride of place of the lynching argument in the early years of the twentieth century, both in legislatures and in public discourse more broadly, reflects a world in which capital punishment played a very different role from its place in our current one. In this earlier world (or at least in regions of it), extrajudicial lethal violence, targeted especially at black men suspected of crimes against whites, was so common that it could seem foolhardy, sentimental, or simply counterproductive to attack the more vulnerable, but morally and socially more benign, legal

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[48] Robert G. Ingersoll, 24 AM. L. REV. 203 (1890), *reprinted in* Beman, *supra* note 46, at 350.

[49] *See Does Capital Punishment Prevent Convictions?*, 40 REV. REV. 219, (1909), *reprinted in* DEBATERS' HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT 136 (C.E. Fanning, ed., 1909).

[50] E. ROY CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY 85-86 (1927).

[51] Clifford Kirkpatrick, *Review of E. Roy Calvert*, Capital Punishment in the Twentieth Century (1927), 18 J. AM. INST. CRIM. L. & CRIMINOLOGY 609, 611 (1928).

form of execution. In this world, state imposed death was *not* the worst, or even the most likely, fate that could befall one suspected of a capital crime. The defiance of the U.S. Supreme Court by Ed Johnson's lynch mob is a powerful symbol of the fragility of the legal order a century ago (at least in certain places and with regard to interracial crimes) and the difficult tradeoffs that many perceived in the relationship between lynchings and legal executions.

B. CAPITAL PUNISHMENT AND EUGENICS

We, the authors, first encountered the proposal that eugenics might undergird an argument in support of capital punishment as law clerks for Justice Thurgood Marshall. Working on capital cases in Justice Marshall's chambers, we took pains to familiarize ourselves with the Court's history of constitutional regulation of capital punishment and especially with the opinions of our boss, who joined the Court just before it began to "constitutionalize" the death penalty in the late 1960s. We were both struck by Justice Marshall's opinion in the landmark case of *Furman v. Georgia*,[52] which temporarily struck down capital punishment as it was then administered in the United States. In order to assess whether the death penalty was an excessive or unnecessary punishment under the Eighth Amendment, Justice Marshall identified "six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy."[53] The rest of list was familiar to us, even formulaic, but—eugenics?? It seemed to us at the time, in our youth and inexperience, that Justice Marshall was conjuring a straw man, positing an argument that no one actually made and that could not really be taken seriously.

A visit to the early twentieth century, however, puts flesh and blood on the supposed straw man of the argument from eugenics. The influence of the eugenics movement on those concerned with the problems of crime and punishment was enormous and, indeed, central to this *Journal*'s own founding a century ago. John H. Wigmore, then the Dean of Northwestern University School of Law, was a key member of the organizing committee for the First National Conference on Criminal Law and Criminology in 1909, which led to the founding of the American Institute of Criminal Law and Criminology and its official organ, this *Journal*.[54] Writing more than a

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[52] 408 U.S. 238, 314 (1972) (Marshall, J., concurring).

[53] *Id.* at 342.

[54] *See* Jennifer Devroye, *The Rise and Fall of the American Institute of Criminal Law and Criminology*, 100 J. CRIM. L. & CRIMINOLOGY 7, 7 (2010).

decade later, Wigmore and other members of the Institute explained that "the inspiration of Italy's criminalists was strongly influential in the founding of the 'Journal of the Institute' in 1909."[55] By "Italy's criminalists," Wigmore meant Cesare Lombroso and his student Enrico Ferri, of the Italian Positivist School, who developed biological theories of innate criminality. Lombroso sought to define the criminal type, *Homo delinquens*, as a throwback to an earlier evolutionary era.[56] He believed that one could see "the nature of the criminal" in the physical attributes of criminals (large jaws, high cheek bones, handle-shaped ears, insensitivity to pain, etc.)—"an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals."[57] Ferri shared Lombroso's belief in the existence of congenital murderers with distinctive physical characteristics and defended the idea of the "born criminal" in his most important work, *Criminal Sociology*, published in 1917 in English translation by the American Institute of Criminal Law and Criminology.[58]

Lombroso and Ferri's belief in the heritability of criminality was of obvious relevance to those interested in the science of eugenics, defined by its founder, the British naturalist Francis Galton, as "the study of agencies under social control that may improve or impair the racial qualities of future generations, either physically or mentally."[59] The eugenics movement of the late nineteenth and early twentieth centuries was an attempt to harness the science of eugenics "for the improvement of the human race by better breeding," according to Charles B. Davenport, a leader of the movement in the United States in the early part of the twentieth century.[60] Many reformers believed that eugenics offered some obvious prescriptions for criminal justice policy, beyond studying the heredity and physical characteristics of criminals. In addition to "positive" eugenics (promoting the propagation of the fit), many criminal justice reformers urged policies of "negative" eugenics (preventing the propagation of the unfit),[61] often citing

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[55] Robert H. Gault, James W. Garner, Edwin R. Keedy & John H. Wigmore, *The Progress of Penal Law in the United States of America*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 173, 174 (1924).

[56] *See* ELOF AXEL CARLSON, THE UNFIT: A HISTORY OF A BAD IDEA 45 (2001).

[57] *Id.* at 44 (quoting Leonard D. Savitz, *Introduction* to GINA LOMBROSO-FERRERO, CRIMINAL MAN, ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO xxv (1911)).

[58] Devroye, *supra* note 54, at 13.

[59] RUTH CLIFFORD ENGS, THE EUGENICS MOVEMENT: AN ENCYCLOPEDIA xii (2005) (quoting Sir Francis Galton, *Herbert Spencer Lecture Delivered before the University at Oxford, June 5, 1907*, *in* ESSAYS IN EUGENICS 81 (1909)).

[60] *Id.* (quoting CHARLES DAVENPORT, HEREDITY IN RELATION TO EUGENICS 1 (1911)).

[61] DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 47 (1985).

the work of Lombroso.[62] In particular, sterilization and even castration were frequently at the center of eugenics-inspired proposals to prevent crime and punish criminals.[63] Many states passed legislation in the first few decades of the twentieth century compelling or permitting sterilization of those who were epileptic, insane, or mentally retarded, or of those who combined some mental defect with criminal behavior, or as punishment for those who committed crimes such as rape or indecent exposure, or who were recidivist offenders.[64]

Despite the belief of many reformers in the early twentieth century that the insights of eugenics into the causes of crime yielded obvious beneficial prescriptions for crime policy, there was real division among eugenics enthusiasts about its implications for capital punishment. Some of those most enthusiastic about the sterilization or castration of prisoners were opposed to capital punishment, believing that these alternative responses to criminality would be either more effective deterrents or more humane, or both.[65] Moreover, not every eugenics enthusiast was drawn to "negative" policies like sterilization or immigration restriction. Rather, many social radicals and utopians embraced eugenics;[66] among these were passionate eugenics enthusiasts who supported more voluntary policies like the legalization of birth control and euthanasia, disdained the crude theories of racial or ethnic superiority that eventually tainted the eugenics movement, and strenuously opposed capital punishment.[67] For this wing of the eugenics movement, their opposition to capital punishment was not a position they took *despite* their eugenic convictions, but rather *because* of them. Eugenics helped to undermine the assumption of free will that underlay the retributive justice of capital (and indeed of all) punishment. If criminal behavior is to some degree determined by heritable biological traits (and their interaction with the environment), then the moral case for capital punishment based on just deserts is weakened by a corresponding degree (if not entirely eliminated). As an abolitionist writing in 1927 explained, "The trend of modern psychological thought . . . [is] that conduct is not

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[62] *See* CARLSON, *supra* note 56, at 399 (offering flowchart depicting Lombroso's influence in the rise of negative eugenics).

[63] *See id.* at 199-229.

[64] *See id.* at 248.

[65] *See id.* at 202-03, 205 (describing views of Dr. Walter Lindley, Dr. W.A. Hammond, and Dr. Robert Boal regarding castration and sterilization).

[66] *See* KEVLES, *supra* note 61, at 85.

[67] *See* ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA 118 (describing the beliefs of eugenics enthusiast and innovative reformer August Vollmer).

determined by an unknowable something called free will, but by personality traits built up through the interaction of heredity and environment."[68]

So why did Justice Marshall identify eugenics as a *pro*-death penalty argument? As one historian of the eugenics movement explains, "To the followers of Lombroso, the criminal problem was solved through emigration, perpetual imprisonment, and *capital punishment* to protect the present and to prevent the genetic spread of crime."[69] Even those who opposed the death penalty in the early twentieth century found it easy to see and articulate the eugenic argument for capital punishment. As a prominent abolitionist explained in 1919, the death penalty "might be defended as an agency of conscious artificial selection for the elimination of dangerous biologic stocks from the community, in accordance with the ideas of the Positivist school of criminologists."[70] Another abolitionist elaborated, "There is a eugenic objection sometimes raised to the substitution of life imprisonment for Capital Punishment. A life imprisonment sentence in present practice is subject to periodic review and generally means ultimate release. . . . [Thus,] it may be extremely undesirable to allow certain persons of tainted heredity to go free."[71] These authors went on to rebut such arguments as proving far too much[72] and leading to "unthinkable" excesses,[73] but they phrase their objections as counters to what appears to be a "stock" or familiar argument.

The salience of the eugenic argument in favor of capital punishment is most clear in its frequent repetition in the essays and articles collected in the *Debaters' Handbook* series published five times over the course of the thirty years between 1909 and 1939. In the first edition of the *Handbook*, a supporter of capital punishment replied to a recent abolitionist essay with the following observations drawn from the work of Lombroso:

> The fact is that there is mentally a true criminal type . . . . Heredity and atavism between them have produced the criminal recidivist, the throw-back in the evolution of mankind.
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> Granting . . . that reformation is out of the question, are we not to continue and say that the interests, and even the *being* of the criminal, are to be sacrificed for the

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[68] CALVERT, *supra* note 50, at 150 (internal quotes omitted).

[69] CARLSON, *supra* note 56, at 68 (emphasis added).

[70] RAYMOND T. BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 97-98 (1919).

[71] CALVERT, *supra* note 50, at 193.

[72] *Id.* at 195 ("To assert that society has the right to kill those of its members who are of no use to it or who are judged unfit to live, is a very dangerous argument which might be applicable to many persons and groups other than murderers!").

[73] BYE, *supra* note 70, at 98 ("[T]he logical application of this principle would involve such an increase in the number of executions that it is unthinkable.").

> welfare of the public? Surely if the first premise is correct, the second necessarily follows.[74]

In the same edition of the *Handbook*, an abolitionist listed eight arguments in favor of capital punishment, the second of which was that "[i]t rids society of criminal pests and dangerous savages."[75] Although the author ultimately advocated for reliance on "brick walls and strong cells"[76] instead of the death penalty, the prominence of such a social hygiene argument on this list is telling with regard to the salience of the eugenic argument the debates of the time. Both of these essays were reprinted in the second and third editions of the *Handbook*, and the Vicars essay was also reprinted in the fourth edition. Although neither essay made it into the fifth edition of the *Handbook*, that volume's outline of arguments for and against the death includes the argument that "[i]t is socially desirable that we retain the death penalty," because "[t]he elimination of the worst classes of murderers . . . is *biologically* better."[77]

Despite the prominence of these eugenic arguments about capital punishment in the debates of the early twentieth century, at least one historian of the American death penalty, Stuart Banner, argues that "the death penalty was never widely perceived to have a eugenic basis."[78] Banner recognizes that during the heyday of the eugenics movement in the early part of the twentieth century, "there were a few proponents of the death penalty on the ground that it would prevent the worst criminals from reproducing."[79] However, Banner contends that this view was not particularly influential because it was undermined both by the fact that "capital punishment was a patently inefficient eugenic program" and by the way in which "[b]iological theories of crime tended to undermine, not support, capital punishment."[80] Banner is surely right that the eugenic argument for capital punishment lacks some logical force, but its ubiquity and persistence over time (at least until World War II) suggest that its persuasiveness lay in something other than its logic.

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[74] C.J. Ingram, *Shall We Abolish the Death Penalty?*, 170 WESTMINSTER REV. 91-98, (1908), *reprinted in* DEBATERS' HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT 156, 164 (C. E. Fanning ed., 1909) (emphasis added).

[75] G. Rayleigh Vicars, *Ought Capital Punishment to be Abolished?*, 143 WESTMINSTER REV. 561 (1895), *reprinted in* DEBATERS' HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT 137, 139 (C. E. Fanning ed., 1909).

[76] *Id.* at 143.

[77] *Summary of Arguments*, *in* CAPITAL PUNISHMENT 231, 243 (Julia E. Johnsen ed., 1939) (emphasis added).

[78] BANNER, *supra* note 6, at 213.

[79] *Id.*

[80] *Id.*

What that something else might be is illuminated in the fifth edition of the *Handbook* series published in 1939, when the eugenic argument in favor of capital punishment became more overtly and intensely racist, at the same time that eugenic ideas and policies were reaching full flower in Nazi Germany. In one excerpt, a supporter of capital punishment urged the maintenance of the death penalty as a form of societal self-defense against dangerous inferior groups, like immigrants and blacks. On the topic of immigration, the author (a member of the Michigan State Bar Association's Committee on Capital Punishment) explained, "With the good immigrant has come the bad. The scum of Europe, like the plague of the locusts, has descended upon us."[81] On the topic of blacks, the author was even more explicit:

> It has been established beyond any doubt that our modern killer is biologically inferior. Authorities agree upon this fact. To illustrate: Memphis, with its illiterate, defective Negro population, has the highest murder rate of any American city. On the other hand, St. Paul and Minneapolis, of almost pure Scandinavian stock, have the lowest.[82]

The author urged that the death penalty "will terminate the breeding of diseased stock . . . and it will prevent the repetition by this offender, of further monstrous acts."[83] Along similar lines, the former Governor of Arkansas argued that the death penalty was necessary to deal with one of the South's most serious problems—"the Negro question."[84] The former Governor explained that "the latter race is still quite primitive, and in general culture and advancement in a childish stage of progress."[85] He warned, "If the death penalty were to be removed from our statute-books, the tendency to commit deeds of violence would be heightened owing to this Negro problem. The greater number of the race do not maintain the same ideals as the whites."[86] Governor Hays's arguments echo the earlier views of J.E. Cutler, published in the first several volumes of the *Handbook* series, that the "the colored race in the United States is a child race,"[87] one that does not share "the same standards as the whites, either intellectually, morally, or industrially."[88] Both Hays and Cutler argued that the

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[81] John M. Dunham, *Report of Committee on Capital Punishment, 1928*, 8 MICH. ST. BAR J. 279 (1929), *reprinted in* CAPITAL PUNISHMENT 192, 195 (Julia E. Johnsen ed., 1939).

[82] *Id.*

[83] *Id.*

[84] Hays, *supra* note 30, at 161.

[85] *Id.*

[86] *Id.* at 162.

[87] Cutler, *supra* note 45, at 164.

[88] *Id.*

predisposition of the black race to heinous crimes meant that capital punishment was necessary both to deter such crimes and to prevent the outraged lynchings that would inevitably follow in the absence of swift and certain capital justice.

Thus, it is not surprising that Thurgood Marshall, alone among the Justices who each wrote individually on the question of the constitutionality of capital punishment in *Furman*, would remember the eugenic argument in favor of capital punishment, with its eventually explicit racial cast. Justice Marshall had worked on numerous criminal and capital cases early in his career in the 1930s and 1940s, and arguments of the type made by Cutler and Hays were not ancient history to him, but rather lived reality. The rise of eugenics as a powerful new idea, while often embraced by progressive reformers, also allowed old-fashioned racists—the ideological descendents of those who had defended slavery on the grounds that some inferior races were "natural slaves"[89]—to add a new scientific gloss to an old prejudice. When considered together, the early twentieth century arguments about lynching and eugenics unearthed above reveal how much the debates about capital punishment at that time were debates about race and how much the death penalty itself, as it was practiced on the ground, was racially inflected. Justice Marshall clearly did not need such a reminder, but perhaps we, in our supposed "post-racial" society in which other issues predominate in our own death penalty debates, are more prone to forget. Thus, we would do well to heed the lessons that these two "lost" arguments teach us about the strong connections, which would have been obvious to contemporaneous observers a century ago, between the death penalty question and what Governor Hays called "the Negro question."

III. TWO NEW ARGUMENTS AGAINST CAPITAL PUNISHMENT

The most powerful "new" argument in the death penalty debate—one that simply did not exist in any sustained form prior to the modern era of capital punishment in the United States (post-1976)—emphasizes the greater cost of capital punishment compared to the alternative of long-term

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[89] T.R.R. Cobb, author of an influential nineteenth-century study of the Southern law of slavery, explained that his "'inquiry into the physical, mental, and moral development of the negro race, seems to point them clearly, as peculiarly fitted for a laborious class.'" *See* Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1022 (2002) (quoting Thomas R.R. Cobb, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY 46-47 (1858)). The idea of "natural slaves" relied upon by some nineteenth-century defenders of slavery in the United States can be traced back to Aristotle. *See generally* Fred Miller, *Aristotle's Political Theory*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2002), http://plato.stanford.edu/entries/aristotle-politics/.

(even lifetime) imprisonment. The argument has become so ubiquitous in contemporary debates about the death penalty that it is hard to imagine that it was virtually non-existent until a few decades ago. Indeed, in one generation, the cost argument has become perhaps the greatest threat to the continued robust use of capital punishment in the United States. This section will examine how and why the cost argument emerged over the past few decades as well as the reasons for its virtual absence in death penalty discourse during the first centuries of capital practice in this country. The section will also highlight the particular prominence of the cost argument in the past few years and its critical role in efforts to limit and repeal the death penalty. The cost argument is important not simply because it is new, but because it significantly broadens the constituency concerned about the death penalty. The utilitarian, community-oriented cast of the cost argument has much more traction in popular and legislative debate than its longstanding counterparts emphasizing equality and individual rights-based objections to capital punishment.

A second important "new" argument in the death penalty debate focuses on another aspect of contemporary capital practice distinctive to our time: the prolonged interval between the pronouncement of sentence and execution, often endured by the condemned in essentially solitary confinement. Unlike concerns about cost, concerns about excessive death row confinement have not emerged in public discourse or legislative debate as the most pressing grounds for challenging the death penalty. But the claim that prolonged death row confinement is unconstitutionally cruel exposes some of the central failings of the prevailing capital system. Although presently cast as a claim of individual deprivation, it also calls into question whether the American death penalty as a *system* can continue on its present course. Moreover, the central fact behind the claim—that death sentences are often hollow pronouncements—has generated a new, victim-oriented assault on the death penalty emphasizing the inability of our capital system to provide meaningful redress for victims' families.

A. THE ABSENCE AND EMERGENCE OF COST CONSIDERATIONS IN THE AMERICAN DEATH PENALTY DEBATE

At one level, the explanation for the absence of the cost argument prior to the modern era is rather straightforward. Before the U.S. Supreme Court embarked on its course of constitutional regulation of capital punishment in the early 1970s, the costs associated with the death penalty were relatively

minimal.[90] This was true both in comparison to the cost of available non-capital sanctions throughout our history and in comparison to the cost of the death penalty in the present day. Prior to the Court's intervention, capital trials were not categorically different from cases involving non-capital serious felonies, and the length and costs associated with such trials were modest compared to contemporary practice. Post-conviction expenses in capital cases were likewise relatively modest, both in terms of litigation costs (state and federal habeas) and incarceration costs. For most of our country's history, the average time between pronouncement of sentence and execution was measured in weeks and months (not years and decades), so there was little reason to believe that the pronouncement of a sentence of death imposed a significant ongoing financial burden for the state. Hence, to the extent financial considerations bore on the death penalty debate prior to the modern era, they tended to support rather than undermine the case for capital punishment.

Yet interestingly, throughout our country's history, the question of cost and the death penalty was rarely broached—even during times of economic crisis and even when the relative cost advantages or disadvantages of executions seemed obvious. During the colonial era, for example, the death penalty was likely more expensive than its alternatives. Incarceration was not yet a viable penal option (jails were used primarily for debtors and pre-trial incarceration), and the most common non-capital sanctions—fines, corporal punishments (whippings, brandings), and shaming punishments (the stock and the public cage)—involved fewer community resources than those expended on public executions.[91] It was common to allow a period of several weeks or even months to elapse between sentencing and execution to facilitate the offender's repentance and to make arrangements for the edifying spectacle that the execution was expected to offer.[92] The costs associated with even this short-term delay were not insignificant (the simple housing and feeding of the condemned was a "significant expense,"[93] as well as the cost of pursuing and recapturing condemned inmates who

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[90] A more sustained discussion of the role of the cost argument in past and present American death penalty discourse can be found in Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 CHI. L. F. 93.

[91] David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 111, 112 (Norval Morris & David J. Rothman eds., 1995).

[92] *See* BANNER, *supra* note 6, at 17.

[93] *Id.*

escaped from the often insecure jails[94]), but these expenses were absorbed without much reflection or reservation. The unquestioned willingness to incur such costs reflected a consensus about the importance of the criminal's salvation (to be secured by the power of the impending execution to focus an offender's attention on his redemption) as well as the assumption that public attendance at executions served valuable functions in terms of general deterrence and community cohesiveness.

Toward the end of the colonial era, influential Founding era thinkers, including Benjamin Franklin and James Madison, offered the first sustained critique of the American death penalty, urging restriction and even abolition in the new republic. These and other early American critics of the death penalty borrowed heavily from the enormously influential work of Cesare Beccaria, whose essay *Of Crimes and Punishments*, published in 1764, called for the wholesale abolition of capital punishment.[95] Becarria's essay included arguments from political theory (individuals lacked the right to commit suicide and thus could not delegate that power to the state) as well as instrumental claims (the threat of "perpetual slavery" was a sufficient deterrent to crime and the purported benefits of public executions were undermined by their "barbarity"). Becarria's arguments framed the debate about the death penalty on both sides of the Atlantic during the late eighteenth and early nineteenth centuries, and the question of "cost" in its modern sense (e.g., the relative financial costs to the state of imposing death versus some alternative punishment) was entirely absent from his lengthy critique notwithstanding his strongly utilitarian approach to the issue. Some other influential theorists, including Jeremy Bentham and Thomas Jefferson, observed that the death penalty prevented offenders from engaging in labor which could provide compensation to their victims or the State,[96] but these observations were not tied to a more comprehensive calculus of the financial costs of the death penalty versus its alternatives. In

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[94] *See id.* at 18 ("The expenses of twice recapturing John Brown [a condemned burglar who twice escaped from the Litchfield jail], for example, formed a major part of the bill submitted to the Connecticut Assembly by William Stanton, Litchfield's jailer.").

[95] *See* BECCARIA, *supra* note 7.

[96] *See* HUGO ADAM BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 76-78 (1987) (discussing Bentham's essay, *The Rationale of Punishment*, published in 1775, in which Bentham argues that imprisonment was a superior punishment to execution because the death penalty was "not convertible to profit" and lacked "frugality" in that convicts could not provide "compensation" to victims or to the state); BANNER, *supra* note 6, at 95 (discussing Jefferson's argument in favor of abandoning capital punishment for lesser felonies in the newly independent state of Virginia in 1778 because criminals who were not executed might "be rendered useful in various labors for the public").

any event, it is clear that questions of financial cost took a back seat to the more prevalent arguments about optimal deterrence and appropriate moral education that lay at the heart of the new utilitarian critique of the death penalty.

Nor did the question of financial cost emerge during the great prison-building period of the early and mid-nineteenth century. Pennsylvania, New York, and other states through the Northeast and Midwest inaugurated a new era of criminal justice with the establishment of penitentiaries, founded on the belief that wrongdoers could be reformed if removed from pernicious societal influences and subjected to a regimen of strict discipline in a "corruption-free environment."[97] The construction of prisons required enormous outlays of public funds and offered a previously unavailable alternative to the death penalty: lengthy incarceration. Notwithstanding the obvious financial impact of the penitentiary movement, and the possibility that the death penalty might provide a less expensive alternative for serious offenders, there is little indication that the debate over the death penalty shifted toward considerations of cost in the wake of massive public expenditures on the newly constructed, imposing prisons. The absence of such argument is likely attributable to the confidence of reformers that the new prisons would produce greater social benefits than costs.[98] On the one hand, the penitentiaries were expected to provide the conditions for genuine repentance (and thus salvation), a benefit that the religiously motivated reformers were unlikely to subject to a conventional "cost-benefit" analysis. In addition, reformers believed that penitentiaries would significantly reduce recidivism through reformation, a promise that, if realized, might outweigh the costs of the prisons themselves.[99] Perhaps most importantly, the penitentiary system was organized around the principle of compelled labor, a highly valuable commodity in an era of increased industrialization.[100] Prison labor greatly offset the cost of building and

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[97] DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 71 (1971).

[98] Rothman, *supra* note 91, at 121 ("Given the promise of reform, legislatures readily appropriated the funds for construction, and when more cells were needed, they made the funds available.").

[99] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 80 (1993) (describing the confidence of "almost all prison reformers" that the new penitentiary "was stern but effective medicine" for shaping the characters and promoting the rehabilitation of prisoners).

[100] *See, e.g.*, MICHAEL IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION 1750-1850, at 109-11 (1978) (describing how Jeremy Bentham touted the Panopticon as a source of free labor).

maintaining prisons and thus muted concerns about the potential costs to the state of lengthy incarceration.

Hence, even during the Progressive Era, when many states revisited the wisdom of capital punishment, references to the costs associated with lengthy incarceration are difficult to find. Indeed, in the widely available *Debaters' Handbook* on capital punishment discussed above, few references to cost appear in the dozens of collected excerpts from newspapers, magazines, and scholarly journals, and when the subject arises, it is treated rather perfunctorily. For example, one author lists as the sixth of eight arguments in favor of the death penalty that "[i]t saves the community all cost of keeping criminals for many years," but the author quickly acknowledges the "rude truth" that "men under a life sentence could be placed in a position to earn the cost of their keep and a good margin over in addition."[101] Overall, from the Founding era well into the early twentieth century, one gets the sense that both capital punishment and imprisonment were relatively cheap compared to their costs today, so that no one spent much time trying to figure out which was cheaper or arguing for or against the death penalty on such grounds. Moreover, the strong ideological and religious commitments which motivated the use of the death penalty and imprisonment appear to have overwhelmed considerations of cost in the modern sense.

By the mid-twentieth century, a consensus seemed to have emerged that long-term incarceration was in fact more expensive than capital punishment, despite any offset from prison labor. Capital trials, especially in the South, involved minimal safeguards[102] and often were completed, from jury selection to sentencing, in a matter of hours or (a few) days. Moreover, the interval between sentence and execution remained quite modest well into the twentieth century, as state and federal postconviction remedies remained relatively unintrusive. That capital punishment produced economic advantages vis-à-vis long-term incarceration was "a very pervasive belief"[103] in the second half of the twentieth century, so much so that the public continued to assume that capital punishment was the cheaper option even as the costs of administering the death penalty began to rise in the later decades of the twentieth century.[104]

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[101] Vicars, *supra* note 75, at 142.

[102] *See supra* notes 3-5 and accompanying text.

[103] RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 187 (1991).

[104] *See* Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 142 tbl.6 (1983) (finding that 73.4% of respondents thought that the death penalty cost taxpayers less than life imprisonment).

The 1960s produced a sustained reexamination of capital punishment both in the public sphere and especially in the courts. Capital sentences and executions declined substantially in the decades following World War II, and several states legislatively limited or abolished the death penalty in the early 1960s. The Civil Rights movement and the Vietnam War generated considerable skepticism about the benign character of governmental power. A Gallup Poll in 1966 found for the first and only time that more Americans opposed capital punishment than supported it.[105] Concerns about discrimination and abuse in the criminal justice system—particularly the perfunctory trials of the old South—prompted the Warren Court to extend many of the criminal procedure protections in the Bill of Rights against the states, including the exclusionary rule of the Fourth Amendment, the rights to counsel and jury trial in the Sixth Amendment, and the prohibition against cruel and unusual punishment in the Eighth Amendment. When several members of the Court signaled in 1963 that the death penalty might be disproportionate when used to punish the crime of rape,[106] the nation's leading civil rights organization, the Legal Defense Fund of the NAACP (LDF), embarked on an ambitious "moratorium" strategy to bring executions in the country to a halt.[107]

In defending death-sentenced inmates, LDF lawyers made use of the many newly recognized procedural protections available in state criminal proceedings. They also developed a distinctive set of arguments focused on the failings of the American death penalty itself. These core arguments emphasized the discriminatory and arbitrary administration of the death penalty, the lack of continuing public support for the punishment, the anachronistic character of "retributive" defenses of the death penalty, and the inability of the death penalty to serve any important social values (including deterrence), especially in light of its rare imposition.

The LDF strategy succeeded in bringing executions to a halt, and the Supreme Court agreed to decide whether the American death penalty comported with "evolving standards of decency" under the Eighth Amendment. The resulting decision in *Furman v. Georgia*[108] invalidated

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[105] Frank Newport, *In U.S., Two-Thirds Continue to Support Death Penalty*, GALLUP, Oct. 23, 2009, http://www.gallup.com/poll/123638/In-U.S.-Two-Thirds-Continue-Support-Death-Penalty.aspx.

[106] Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting) (lamenting the Court's unwillingness to decide whether "the imposition of the death penalty by those States which retain it for rape violate[s] 'evolving standards of decency that mark the progress of [our]maturing society' or 'standards of decency more or less universally accepted'").

[107] MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 107 (1973).

[108] 408 U.S. 238 (1972).

prevailing capital statutes largely because of their failure to provide adequate guidance to sentencers in choosing between life and death. The case generated the most sustained judicial consideration of the American death penalty in U.S. history, with almost 250 pages in the U.S. Reports offering arguments supporting and opposing its continued use.[109] Notably absent from the extensive discussions is any sustained focus on the question of cost. Indeed, the sole mention of cost was offered by Justice Marshall to rebut the claim that the death penalty is a cheaper alternative than imprisonment: "As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect."[110] The absence of the cost argument in the various opinions stems in part from the fact that the cost argument is not a *constitutional* argument against the death penalty (though it might be part of a constitutional *defense* of the punishment, in response to the claim that the death penalty serves no valid state goals). But the absence of the cost argument is likely also attributable to the widespread belief (and perhaps reality) that the death penalty was comparatively cheaper than long-term imprisonment. At the time of *Furman* and well into the 1980s, supporters of the death penalty were much more likely than opponents to list the cost of the death penalty as a reason supporting their position.[111]

Furman itself, though, would radically reshape the economics of capital punishment. By embarking on a course of constitutional regulation of the death penalty—the defining feature of the "modern era" of the American death penalty—the Court would significantly increase the costs of capital litigation. Neither the increase in costs nor the shift in public opinion would occur overnight. It would take more than a quarter century before the conventional wisdom regarding the comparatively higher cost of imprisonment would give way to a new, widespread belief that the death penalty is substantially more expensive than the alternative of imprisonment—even life imprisonment without the possibility of parole.

In the wake of *Furman*, numerous states sought to cure the constitutional defect of standardless discretion by redrafting their capital statutes. Some states made the death penalty mandatory for certain offenses, while others sought to structure the death penalty decision through the use of aggravating and mitigating factors. When the Supreme Court

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[109] *Id.* at 239-470.

[110] *Id.* at 357 (Marshall, J., concurring).

[111] Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, *in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 90, 98 (Hugo Adam Bedau ed., 1997).

revisited capital punishment in 1976, reviewing five of the new capital schemes, it upheld the guided discretion statutes and invalidated the mandatory ones.[112] It rejected the mandatory statutes because of the "qualitative difference" between capital and non-capital punishment, inaugurating a new constitutional commitment to the death-is-different principle.[113]

The defining feature of the guided discretion schemes was the establishment of a distinct punishment phase in capital proceedings during which the jury (or judge) would be focused solely on the question of punishment. The guided discretion statutes no longer permitted the death penalty to be imposed for the crime of murder or rape without a separate finding of at least one "aggravating" factor. Moreover, the bifurcated structure of capital proceedings suggested that defense attorneys should devote substantial energy and resources not only to the question of guilt or innocence, but also to developing and presenting "mitigating" evidence that might justify a sentence less than death.

As a result of the recasting of state capital statutes, as well as the Court's embrace of the "death-is-different" principle, the costs associated with capital trials would grow exponentially in the following decades. The new model of bifurcated proceedings with a focused punishment phase would gradually become the national norm, and the Court's emerging capital doctrines would substantially alter many state capital trial practices, including voir dire, the use of experts, the expectations of defense counsel, and, especially, the investigation and presentation of mitigating evidence. In addition, post-trial litigation costs would become vastly greater in capital cases. At the state level, most states gradually developed schemes requiring the appointment of counsel for death-sentenced inmates in state postconviction proceedings even though non-capital inmates had no such right to post-trial representation. Congress likewise made provision for appointment of counsel in capital federal habeas proceedings (with non-capital inmates enjoying no comparable entitlement).[114]

The Supreme Court's development of intricate doctrines governing capital proceedings greatly extended the average time between sentence and execution. During the first two decades of constitutional regulation, capital sentences were subject to a remarkable reversal rate, with about 68% of

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[112] *See* Gregg v. Georgia, 428 U.S. 153, 206-208 (1976); Proffitt v. Florida, 428 U.S. 242, 259-260 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

[113] *Woodson*, 428 U.S. at 305 (joint opinion of Stewart, Powell, and Stevens, JJ.).

[114] 21 U.S.C § 848(q)(4)(B) (2006) (repealed by Pub. L. No. 109-177, 120 Stat. 231, 232 (2006)).

capital verdicts invalidated on direct appeal or in postconviction.[115] As a result, the number of inmates on death rows throughout the country increased dramatically in the 1980s and 1990s, reaching a modern era nationwide high of over 3,500 inmates by 2000—over five times the size of the national death row that accumulated during the five-year moratorium on executions preceding *Furman*.[116]

The bulk of the new expenses in capital litigation are incurred at trial. But the cost of managing large death rows has also become quite substantial. In California, for example, a recent report indicated that death-row incarceration costs the state an additional $90,000 per inmate, per year (above the cost of non-capital incarceration), or $60 million a year overall.[117] Moreover, in a number of states (including California), the prospects for converting death sentences into executions remain quite remote. The multiple opportunities for review at different stages and in different courts allow for executions to be avoided almost altogether in jurisdictions where there is not a sustained political will for them to go forward. Given the intricate doctrines surrounding the implementation of the death penalty, executions require a "perfect storm" of cooperation involving numerous actors, including local prosecutors and judges, state-wide prosecutors and judges, state executive officials, and federal judges. As a result, only a handful of the thirty-five states that currently authorize the death penalty have carried out significant numbers of executions over the past thirty-five years (with only five carrying out more than fifty, and with three—Texas, Virginia, and Oklahoma—accounting for more than half (661) of the executions nationwide (1,261)).[118]

The combination of increased trial costs, increased postconviction litigation costs, and increased incarceration costs in capital cases, together with the absence of significant numbers of executions in many states, has changed the way in which the "costs" of the death penalty are understood and discussed. The relative cost of the death penalty is no longer captured by a simple comparison of the cost of a capital trial together with the cost of

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[115] James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX L. REV. 1839, 1850 (2000).

[116] For the increase in death row inmates during the 1980s and 1990s, see Death Penalty Information Center, *Death Sentences in the United States from 1977 to 2008* (2010), http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008. For the number of people on death row at the time of *Furman*, see MELTSNER, *supra* note 107, at 292-93.

[117] CALIFORNIA COMM'N ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT 141 (Gerald Uelmen ed., 2008), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf.

[118] *State by State Database*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state_by_state (last visited Aug. 18, 2010).

carrying out an execution, on the one hand, versus the cost of a non-capital trial and the cost of lengthy imprisonment, on the other. Rather, the relative cost of administering the death penalty post-*Furman* now often requires a comparison of the cost of *multiple* capital trials *and* the cost of lengthy, often indefinite imprisonment on death row versus the cost of a single, non-capital trial and the cost of lengthy (non-capital) imprisonment.

Indeed, the modern era has inaugurated a new measure of the cost of the death penalty: the *cost per execution* in a particular state. This accounting method divides the total expenditures on capital cases within a jurisdiction (trial costs, postconviction litigation costs, death-row incarceration costs) by the number of death sentences the jurisdiction actually consummates with an execution. In jurisdictions with few executions, the figures are staggering. Using this approach, a recent editorial in the *New York Times* suggested that California's thirteen executions over the past thirty-five years cost about a quarter of a *billion* dollars each.[119] In Maryland, which came close to abolishing the death penalty in its recent legislative session, a 2008 study indicated that the state spent at least an additional $37.2 million for each of the state's five executions in the modern era.[120]

Concerns about the cost of capital punishment were first voiced with some frequency beginning in the 1990s, as changes in capital practice and the growth of death rows began to transform the economics of capital punishment. Such concerns undoubtedly have contributed to the extraordinary decline in capital sentencing over the past fifteen years. In the mid-1990s, the yearly number of death sentences obtained nationwide averaged about 326.[121] Since that time, capital sentences have declined over 60%, with annual death sentences over the past three years hovering around 112.[122] This remarkable decline in death sentences is not attributable to the relatively modest decline in murders during this period (in fact, the murder rate has remained virtually constant from 2000-2007, at the same time that death sentences dropped about 50%).[123] Although there

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[119] Editorial, *High Cost of Death Row*, N.Y. TIMES, Sept. 28, 2009, at A22.

[120] JOHN ROMAN ET AL, URBAN INSTITUTE JUSTICE POL'Y CTR., THE COST OF THE DEATH PENALTY IN MARYLAND 3 (2008), http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf (estimating total cost of capital cases at about $186 million).

[121] *Death Sentences in the United States from 1977 to 2008*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited Aug. 18, 2010).

[122] *Id.*

[123] *Death Penalty Sentences Have Dropped Considerably in the Current Decade*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/death-penalty-sentences-have-dropped-considerably-current-decade (last visited Aug. 18, 2010).

is no comprehensive data definitively establishing the causes of the decline, the available evidence points to the decreased willingness of district attorneys to seek the death penalty, in large part because of cost concerns. Prosecutors declining to seek death have repeatedly defended their decisions on cost-cutting grounds,[124] and numerous editorials and news reports have brought public attention and scrutiny to expensive cases in which prosecutors chose to seek death.[125]

The most tangible evidence of the emergence of the cost argument has surfaced in contemporary legislative debates about whether to retain the death penalty. The cost argument may well have been decisive in the legislative repeals of the death penalty in New Jersey (2007) and New Mexico (2009), as well as the decision not to reinstate the death penalty in New York after its statute was found defective in 2004. In New Jersey, public opinion leaned toward retention at the time the legislature acted.[126] The state commission charged with studying capital punishment concluded that the death penalty was no longer consistent with evolving standards of decency.[127] But, as newspaper coverage of the legislative decision reflects, "equally persuasive to lawmakers was not saving lives but saving money,"[128] given the increased costs of death-row incarceration. A policy report indicated that New Jersey had spent over a quarter of a billion dollars on the death penalty in the two or so decades prior to repeal (over and above what the state would have spent on life without the possibility of parole)[129] even though the death-row population numbered only ten and no executions had been carried out by the time repeal was achieved. In low

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[124] *See, e.g.*, Jimmie E. Gates, *Budget Kills Capital Cases*, CLARION-LEDGER (Jackson, MS), Oct. 26, 2009, at A1; Patrick Orr, *Idaho Prosecutors Opting Not to Seek Death Penalty*, IDAHO STATESMAN (Nov. 3, 2009), http://www.idahostatesman.com/1441/v-print/story/959060.html.

[125] *See, e.g.*, Logan Carver, *Death Penalty Cases More Expensive than Lifetime Imprisonment, But Local CDA Says Cost Never a Consideration*, LUBBOCK AVALANCHE-J. (Dec. 13, 2009), http://lubbockonline.com/stories/121309/loc_535156806.shtml; Shawn Day, *Virginia's Budget Woes Slow Down Capital Cases*, VIRGINIAN-PILOT, Dec. 7, 2009, http://hamptonroads.com/2009/12/state%E2%80%99s-budget-woes-bring-slowdown-capital-cases; Russell Gold, *Counties Struggle With High Cost Of Prosecuting Death-Penalty Cases—Result Is Often Higher Taxes, Less Spending on Services*, WALL ST. J., Jan. 9, 2002, at B1; Jon Murray, *Is Death Penalty Worth the Price?*, INDIANAPOLIS STAR, Dec. 10, 2009, at A1.

[126] Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3.

[127] *Id.*

[128] *Id.*

[129] Mary E. Forsberg, *Money for Nothing?: The Financial Cost of New Jersey's Death Penalty*, N.J. PERSPECTIVE, Nov. 2005, at 16.

death-sentencing, low executing states like New Jersey, the cost of the death penalty is measured by the cost of maintaining a capital *system* and not simply the cost of particular cases. Along these lines, New Hampshire is presently considering whether to repeal its capital statute, and one of the six questions to be addressed by a specially formed commission is whether "there is a significant difference in the cost of prosecution and incarceration between capital punishment and life without possibility of parole for the convicted capital murderer."[130] Like New Jersey, New Hampshire has a relatively dormant capital system, with only one inmate on death row and no executions since 1939; one of the immediate financial considerations, though, is whether to construct and staff a lethal injection death chamber, as a recent state department of corrections master plan indicated that such an effort would cost the state over $3 million.[131] In New York, after the state's capital statute (enacted in 1995) was invalidated by the state courts in 2004, the state assembly conducted extensive public hearings to inform its decision whether to fix the eminently correctable defect in the statute. Among the prominent considerations in its decision not to act was the high cost of administering a capital system. The assembly's report on the public hearings cited testimony from a district attorney that the state spent as much as $200 million on capital prosecutions in the decade or so that the statute had been in effect and that the reinstatement of the death penalty might cost the state an additional $500 million over twenty years, while likely yielding only two or three executions during that period.[132]

In New Mexico, the only state to repeal its capital statute since the economic downturn of late 2008, the cost issue may have tipped the balance. As one commentator observed:

> [T]he New Mexico abolition campaign made use of an argument never used in death penalty debate in the 1960s and 1970s but which probably helped turn the tide in 2009—the cost of administering the death penalty, from trial to appeal to post conviction relief to federal habeas corpus to isolation of men on death row to costs of

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[130] Kevin Landrigan, *Panel Puts Death Penalty on Trial*, THE TELEGRAPH (Nashua, N.H.), Oct. 22, 2009, at 3.

[131] *Id.*

[132] JOSEPH LENTOL, HELENE WEINSTEIN & JEFFRION AUBRY, THE DEATH PENALTY IN NEW YORK 27-30 (2005), *available at* http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf (reporting on five public hearings on the death penalty in New York conducted by the Assembly standing committees on Codes, Judiciary, and Correction, December 15, 2004-February 11, 2005).

> execution was simply an expenditure of too much public money when the state was starving for dollars for good programs.[133]

The cost argument has also been prominent in several other states in which repeal has been considered but not accomplished. In Colorado, for example, the effort to repeal the death penalty was explicitly tied to freeing up funds to solve "cold cases."[134] Despite its small death row (three), Colorado apparently spends approximately four million dollars a year on capital costs.[135] The proposed legislation mandated that the money saved by abolishing the death penalty would be dedicated to funding eight state investigators who would reopen more than 1,400 cold case homicides.[136] Although the measure was barely defeated, the striking aspect of the Colorado experience was the abolitionist strategy to drive home the opportunity costs of retention by highlighting in concrete terms the alternative goods that death penalty dollars could purchase.

References to the issue of cost have exploded over the past two years in response to the global fiscal crisis. Cash-strapped states face increasing pressure to moderate their use of the death penalty or abandon it altogether. Recent editorials in California, with titles such as "Save $1 Billion in Five Years—End the Death Penalty,"[137] and "California Can't Afford the Death Penalty,"[138] capture the prevailing mood. Similar editorials have appeared throughout the country lamenting the expense of capital punishment. The National Coalition to Abolish the Death Penalty—the leading abolitionist organization in the country—now lists as its first (of ten) public policy arguments against the death penalty: "Executions are carried out at a staggering cost to taxpayers."[139] The Death Penalty Information Center, which both reports on, and editorializes about, the American death penalty, has stepped up its coverage of the financial implications of capital

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[133] Galen Barnett, *A Golden Opportunity to End the Death Penalty*, OREGONIAN, Apr. 6, 2009, http://www.oregonlive.com/opinion/index.ssf/2009/04/a_golden_opportunity_to_end_th.html.

[134] Morgan Carroll & Paul Weissmann, *Revisit Death Penalty Bill*, DENVER POST, May 21, 2009, at B11.

[135] *Id.*

[136] Tim Hoover & John Ingold, *Ritter Keeps Death-Penalty View to Himself*, DENVER POST, May 8, 2009, at 4B.

[137] Natasha Minsker, *Save $1 Billion in Five Years—End the Death Penalty in California*, L.A. PROGRESSIVE (May 25, 2009), http://www.laprogressive.com/healthcare-issues/save-1-billion-in-five-years%E2%80%94end-the-death-penalty-in-california/.

[138] John Van de Kamp, *California Can't Afford the Death Penalty*, PRESS DEMOCRAT, June 14, 2009, at B7.

[139] *Death Penalty Overview: Ten Reasons Why Capital Punishment is Flawed Public Policy*, NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, http://www.ncadp.org/index.cfm?content=5 (last visited Nov. 10, 2010).

punishment. The heading of its recently released year-end summary declared: "Fewest Death Sentences Since Death Penalty Reinstated in 1976; As Costs Rose in a Time of Economic Crisis, Eleven States Considered Abolishing the Death Penalty."[140] This coverage followed the release of the Center's earlier special report on the cost issue: "Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis."[141]

The newfound prominence of the cost argument is undoubtedly traceable to two important recent developments: the escalating costs of capital punishment in the modern era and the economic downturn over the past two years. But the seemingly deep resonance of the cost argument in contemporary debate has other roots as well. The cost argument effectively shifts the focus of anti-death penalty energy from individual rights and humanitarian-based arguments that never commanded wide or overwhelming public support in this country. Whereas European opposition to the death penalty draws heavily from claims about human dignity and concerns about the potential abusive uses of state power (rooted in the memory of genocide, fascism, communism, and ethnic cleansing), there has never been widespread anxiety or ambivalence in this country about entrusting the state with the power to kill or subjecting individuals to this supreme sanction. The states' quick and decisive reaction to *Furman*—thirty-five states quickly enacted new capital statutes in response to the Court's decision—reflects to some degree the absence in this country of a politically significant coalition organized around deeply held, rights-based opposition to capital punishment.

Thus, while the cost argument's appearance may be the product of changed fiscal realities, it owes its special prominence and power to the way in which it focuses on uncontroversial, instrumental, collective goals rather than contentious claims about disputed individual "rights." The recent effort in Colorado to tie legislative repeal of the death penalty to increased funding for the investigation of unsolved murders is a clear example of the turn from focusing on the condemned to focusing on alternative collective goods. In terms of practical politics, this change in focus toward instrumental argument has created a "bigger tent" for those concerned about capital punishment. To accommodate this broader constituency (including politicians who have no interest in rejecting the death penalty as inhumane), advocates for withdrawal of the death penalty

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[140] *The Death Penalty in 2009: Year End Report*, DEATH PENALTY INFORMATION CENTER (2009), http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf.

[141] RICHARD C. DIETER, SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS (Death Penalty Information Center 2009), *available at* http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf.

have recast their efforts in terms of "repeal" rather than "abolition." The repeal movement—with its focus on pragmatic reassessment of the costs and benefits of the death penalty—has in many respects supplanted the narrower and less successful "abolition" movement, which, as the term connotes, has long been rooted in a moral imperative comparable to the effort to end slavery.

The cost argument also provides a strong counter to the two most prominent "pro-death penalty" positions of the current era: retribution and deterrence. The retributive argument, emphasizing that the death penalty provides the only appropriate moral response to the "worst" offenses and offenders, has become perhaps the most significant justification for the death penalty in recent years as part of the general revival of retributivism as the leading theory of punishment. Like the anti-death penalty argument emphasizing human dignity, the pro-death penalty retributive argument ultimately relies on an abstract moral claim that is not susceptible to empirical argument or instrumental balancing. Against this lofty moral claim, proponents of repeal can insist that we simply cannot afford to base our criminal justice policy on this contested moral claim; the large size of the overall cost differential between capital and non-capital sentencing means that we sacrifice too much in terms of other public goods by retaining the death penalty. As a result, the rhetorical position of abolitionists and retentionists in previous debates gets flipped: abolitionists get to shed the unattractive cloak of soft sentimentality and don the mantle of fiscal responsibility, while retentionists now have to rebut charges that their attachment to the death penalty is a form of unworldly moralism.

The claim of deterrence by death penalty supporters has long been contested. In the era preceding *Furman*, the claim that deterrence of murder was a justification for retaining capital punishment was generally accepted to be unproven, perhaps even unprovable.[142] More recently, many economists and statisticians have revisited the question whether the death penalty deters, with some studies purporting to find statistically significant deterrent effects. Although these studies have been subject to withering criticism from detractors, opponents of the death penalty have found themselves increasingly on the defensive about the possible value of the death penalty as a deterrent.[143] The cost argument provides a powerful

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[142] *See* Steiker & Steiker, *supra* note 90, at 156-57 (describing the pre-*Furman* consensus on the deterrence question based on the work of Thorsten Sellin).

[143] For summaries of both the new generation of deterrence studies and the criticisms the studies have engendered, see John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 804-820 (2005); Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital*

rejoinder to the deterrence argument, because the unstated premise of the deterrence claim is that the resources expended on the death penalty are roughly comparable to those incurred via other sanctions. If capital punishment were no more expensive than life imprisonment, then it would seem natural to focus largely on their comparative efficacy as alternative punishment options. But if abolishing capital punishment would result in cost savings above and beyond the costs of lifetime incarceration, the additional money saved could be used for other projects—whether law enforcement initiatives such as Colorado's proposed "cold case" funding or social programs such as funding for early childhood education—that might offer better crime control than the foregone executions. Thus, even *granting* the claim that the death penalty deters homicide better than life imprisonment, opponents can still argue that the cost savings produced by abolition would yield maximum benefits to public safety. The cost argument thus allows abolitionists to put deterrence in its (subsidiary) place in the larger calculus of crime prevention and to differentiate being "smart on crime" from being "tough on crime."

The power of the cost argument stems not only from its ability to focus political actors and the general public on competing public goods. The concern about costs also indirectly sheds light on numerous pathologies in prevailing capital practice, including the inability of states to satisfy minimum constitutional requirements in capital trials (reflected in high reversal rates), the absence of political will to carry out executions, the arbitrariness wrought by the few executions that in fact occur and the difficulties (both pragmatic and moral) stemming from prolonged death-row incarceration. Cost is not only a way of *avoiding* anti-death penalty arguments that have less traction (such as concerns about arbitrariness and human dignity); focusing on cost *reminds* the audience of these problems even as it concentrates attention on the bottom line. Cost is thus a window into the current dysfunction of the American capital system, and it provides a non-ideological, non-controversial shorthand for expressing concern about a myriad of problems.

B. THE DEATH ROW PHENOMENON: A DISTINCTIVE FEATURE OF MODERN CAPITAL PRACTICE

The modern death penalty debate does not present a choice between lengthy imprisonment and execution. Rather, the choice is between lengthy

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Punishment, 4 OHIO ST. J. CRIM. L. 255, 269-89 (2006); Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 ANN. REV. L. SOC. SCI. 151, 153-163 (2005).

imprisonment and lengthy imprisonment *followed by* execution. Or, more accurately, the choice is between (1) lengthy imprisonment, and (2) lengthy imprisonment under extreme conditions (usually solitary confinement) followed by execution, or death in prison while still under a sentence of death. The unprecedented length of the interval between sentence and execution, as well as the increasingly harsh conditions of death row, have generated a new and powerful concern about the American death penalty—a concern that might well have significant constitutional ramifications.

At the outset, it must be conceded that concerns about the interval between pronouncement of sentence and execution are not entirely "new." Over a century ago, the Supreme Court invalidated the application of a Colorado law that had altered the post-sentence protocol for consummating death sentences with executions.[144] The law became operative after the petitioner had committed his offense and been sentenced to death. Among the changes in the protocol were substituting imprisonment in the county jail with solitary confinement in the state penitentiary and giving the warden discretion to set the date of execution whereas previously it had been fixed by the court. The Supreme Court found that both of these changes violated the Ex Post Facto Clause of the Constitution because they amounted to "greater punishment." The Court explained that solitary confinement had long been viewed as an additional punishment, citing an English statute passed under King George II that added solitary confinement to the punishment of death as a "further terror and peculiar mark of infamy" to deter "the horrid crime of murder [that had] of late been more frequently perpetrated."[145] The Court also cited the negative experiences associated with solitary confinement in this country, describing how, in prisons housing non-capital inmates, a

> considerable number of the prisoners [subjected to solitary confinement] fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others become violently insane . . . while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[146]

On the second issue, the Court insisted that affording the warden discretion to determine when the execution would be held (and to keep the date secret from the prisoner and the public) increased the petitioner's punishment because "one of the most horrible feelings to which [the condemned] can be subjected during [the time confined in the penitentiary awaiting execution]

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[144] *In re* Medley, 134 U.S. 160 (1890).

[145] *Id.* at 170.

[146] *Id.* at 168.

is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place."[147]

What makes the Court's ruling extraordinary in light of contemporary practice is not the suggestion that solitary confinement and uncertainty as to the date of execution constitute additional punishments. It is the fact that the Colorado law set an outside limit of four weeks before the execution would be conducted and the warden's discretion amounted only to deciding when, after at least two but not more than four weeks of confinement, the execution would be conducted.

Today, of course, the interval between sentence and execution is often measured in decades rather than weeks (as in Colorado of the late nineteenth century) or months and years (as in the practice preceding *Furman*). Moreover, the interval continues to increase; inmates executed in 2007 had spent an average of 153 months on death row, compared to an average of about 140 months in 2000 and 95 months in 1990.[148] In addition, the conditions of death row confinement have become appreciably worse over the past several decades. Solitary confinement for as much as twenty-three hours a day has become the national norm, and most states prohibit death-sentenced inmates from group recreation or having any contact visits with family members or friends. Until recently, Texas, which houses the third largest death row in the country, had permitted death-sentenced inmates with good disciplinary records to participate in a work program (a garment factory) and group recreation. But the state eliminated both programs in the wake of an escape incident from death row in 1998; as a result, death row was moved to a "super-max" facility in which death-sentenced inmates are locked in their cells twenty-three hours a day and are permitted no physical contact with any other persons.

As the American death penalty stabilized in the two decades following *Furman*—in the sense that questions about the constitutionality of the punishment itself receded from view—concerns about the cruelty and constitutionality of prolonged death row confinement began to be voiced. One catalyst for such reflections was the decision of the Privy Council in the early 1990s declaring that two Jamaican death sentences should be overturned based on the "inhuman" length of confinement awaiting execution (at the time of the decision, the appellants had spent about fourteen years in prison post-trial).[149] American death-row prisoners had

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[147] *Id.* at 172.

[148] *Time on Death Row*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/time-death-row#INTRODUCTION (last visited Aug. 18, 2010).

[149] Pratt v. Att'y Gen. for Jamaica, [1994] 2 A.C. 1 (P.C.) 4 (en banc).

challenged their length of confinement prior to the Privy Council decision,[150] perhaps most famously in the efforts of Caryl Chessman to avoid execution in the early 1960s,[151] but the issue had very little traction in the state or federal courts. Most courts embraced the view expressed in Chessman's case that "[i]t may show a basic weakness in our government system that a case like this takes so long, but I do not see how we can offer life (under a death sentence) as a prize for one who can stall the processes for a given number of years."[152]

The Privy Council decision was important not simply because it found the lengthy imprisonment intolerable, but because it identified the problem as a systemic one in the Jamaican system. The Privy Council noted that numerous other prisoners had spent at least ten years awaiting execution and that such delays "had never happened in Jamaica before independence" or in the United Kingdom when it administered the death penalty.[153] Chessman's lengthy death-row incarceration (twelve years) had been aberrational. By the early 1990s, though, such incarceration in the U.S. while awaiting execution was increasingly becoming the norm.

Soon after the Privy Council decision, Justice Stevens announced his interest in the constitutional question surrounding prolonged death-row incarceration in *Lackey v. Texas*,[154] a case in which the Court denied certiorari. He did not dissent from the Court's refusal to hear the claim of the inmate (who had spent seventeen years on death row), recognizing that the "novel" issue should percolate in the state and lower federal courts.[155] He also identified some issues he thought relevant to the claim, such as the reasons for the delay in a particular inmate's case (e.g., whether the inmate had submitted frivolous filings or whether the State's negligent or deliberate actions had contributed to the delay).[156] But his agnosticism about the claim was tempered by his suggestions of its merit, citing the rarity of delays at the time of the Founding, the suggestion in *Medley* that prolonged uncertainty about one's fate generates "horrible feelings," and

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[150] *See, e.g.*, Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990) (rejecting a constitutional claim based on length of death-row incarceration).

[151] Chessman v. Dickson, 275 F.2d 604 (9th Cir. 1960).

[152] *Id.* at 607.

[153] *Pratt*, 2 A.C. at 17 ("The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal even to the House of Lords within a matter of months. Delays in terms of years are unheard of.").

[154] 514 U.S. 1045 (1995).

[155] *Id.* at 1047.

[156] *Id.*

the persuasive power of the Privy Council decision.[157] Justice Breyer also indicated his agreement "that the issue is an important undecided one."[158]

Justice Stevens's opinion respecting the denial of certiorari prompted inmates to raise "*Lackey*" claims with increasing frequency. Together with the Privy Council decision, Stevens's opinion also led to more extensive scholarly attention to both the psychological and legal aspects of the "death row phenomenon"—the physical and emotional consequences of prolonged incarceration under a sentence of death. Over the past fifteen years, Justices Stevens and Breyer have repeatedly called for the Court to address the issue, with Justice Breyer characterizing the claim as "serious"[159] and "particularly strong,"[160] and Justice Stevens ultimately declaring that prolonged death row incarceration is "unacceptably cruel."[161]

What should we make of the repeated, unsuccessful efforts to bring the *Lackey* claim before the Court, with the most recent efforts[162] occurring last year? The claim clearly has enough staying power to command the sustained attention of members of the Court, and yet has not been embraced by any lower courts or been advanced as a major anti-death penalty argument in public discourse. On the one hand, the problem is getting worse. Whereas few inmates had been on death row as long as twenty years at the time *Lackey* was (not) decided, there are now considerable numbers of inmates who have been on death row at least two decades. Indeed, William Lee Thompson, the inmate whose *Lackey* claim was most recently before the Court in 2009, arrived on death row in 1976, about two years before Lackey; the additional fourteen year interval between the denial in Lackey's case and the denial in his case meant that Thompson had spent over thirty-two years on death row (the *Lackey* claim itself has now been subject to prolonged limbo). In addition, death-row confinement is much more severe than in the pre-*Lackey* era. Justice Stevens made no mention of death-row conditions in his *Lackey* opinion, but his *Thompson* opinion describes the petitioner's "23 hours per day in isolation in a 6- by 9-foot cell."[163]

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[157] *Id.* at 1045-47.

[158] *Id.* at 1047.

[159] Elledge v. Florida, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari).

[160] Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari).

[161] Thompson v. McNeil, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., opinion respecting denial of certiorari).

[162] Johnson v. Bredesen, 130 S. Ct. 541 (2009) (Stevens, J., joined by Breyer, J., statement respecting the denial of certiorari); *Thompson*, 129 S. Ct. at 1300.

[163] 129 S. Ct. at 1299.

On the other hand, the repeated unwillingness of other members of the Court to hear the *Lackey* claim reflects some obvious difficulties underlying the claim. There is the Chessman problem, the reluctance to reward inmates who manage to keep their appeals (and themselves) alive long enough to challenge prolonged incarceration. Justice Thomas, who has repeatedly criticized the Stevens-Breyer effort to bring the claim before the Court, has been particularly vehement in highlighting this concern, insisting that he is "unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."[164] But even if that problem could be solved (by focusing on delays wholly or mostly attributable to the state, or by rejecting the notion that seeking enforcement of constitutional guarantees forfeits the right against excessively prolonged death-row incarceration), there remains the line-drawing problem. Does the Constitution set an outside limit on death-row incarceration (five years? twenty years?)? If a "rule" could be devised, how would the rule affect the behavior of lawyers and courts? Would the recognition of a *Lackey* right to be free of excessive death-row incarceration lead to summary consideration of constitutional claims? One of the likely reasons why the "prolonged incarceration" claim has not been vigorously embraced by abolitionists (the National Coalition Against the Death Penalty omits this argument in its list of ten reasons to oppose the death penalty[165]) is that one obvious response to the claim is to truncate protections in capital cases. Moreover, specific concerns about the deprivations of death row (particularly solitary confinement) are also unlikely to find much resonance in either legal or popular opinion, given the extent to which concerns about prison conditions generally fall on deaf ears in both arenas. Although states do not make solitary confinement a prescribed punishment for given offenses, solitary confinement has become increasingly common as an instrument of control in prisons. The general deference afforded to prisons in maintaining order and discipline (both as a matter of law and public opinion) undermines any challenge to the conditions of confinement on death row.

The real power of the *Lackey* claim is not in its potential to yield fruit as a cognizable claim of individual deprivation. Rather, the issue sheds light on the dysfunctional character of our capital system. In *Lackey* itself,

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[164] Knight v. Florida, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari).

[165] *Death Penalty Overview: Ten Reasons Why Capital Punishment is Flawed Public Policy,* NATIONAL COALITION TO ABOLISH THE DEATH PENALTY 2010), http://www.ncadp.org/index.cfm?content=5.

Justice Stevens, echoing Justice White's opinion in *Furman*, intimated that the death penalty might become an unconstitutionally cruel punishment if it "ceases realistically to further" the purposes of retribution or deterrence.[166] Justice White had made this argument in light of the rarity of death sentences and executions in the era preceding *Furman.* The increased death-sentencing in the wake of *Furman* likely persuaded Justice White that retention would not, as in the pre-*Furman* era, lead to "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."[167] But if executions are endlessly delayed, and carried out only after inmates have already suffered extensive, long-term deprivation, it is hard to see what additional retributive or deterrent value is secured by consummating the delayed executions. In this respect, the argument about prolonged death row incarceration draws attention to the inability of states to carry out executions in a sufficiently timely fashion to claim any public benefit. Concerns about the "death row phenomenon"—the cruelty visited upon particular inmates—is a window into the failure of the American death penalty to satisfy the minimal conditions for its continued use.

It is thus not surprising that Justice Stevens, who had voted to uphold the death penalty in 1976,[168] and who later declared that the American death penalty was no longer constitutionally sustainable in 2008,[169] wove his argument about prolonged incarceration into his broader critique of the American system of capital punishment. In *Baze*, Justice Stevens argued that the retention of the death penalty in the United States was "the product of habit and inattention rather than an acceptable deliberative process"[170] because the penalty no longer served the purposes of incapacitation, deterrence, or retribution. It failed along these lines, in Justice Stevens's view, because the widespread embrace of life-without-possibility-of-parole sentences had rendered the incapacitation goal unnecessary, the claim of deterrence had not been established, and the retributive value of the death penalty was undercut by its sanitized administration in the modern era.[171] In *Thompson*, Justice Stevens's second-to-last word on *Lackey*,[172] he

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[166] Lackey v. Texas, 514 U.S. 1045, 1046 (1995) (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

[167] Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring).

[168] Gregg v. Georgia, 428 U.S. 153, 206-208 (1976); Proffitt v. Florida, 428 U.S. 242, 259-60 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976).

[169] Baze v. Rees, 553 U.S. 35, 78, 86 (2008) (Stevens, J., concurring in the judgment).

[170] *Id.* at 78.

[171] *Id*. at 78-81.

[172] Justice Stevens's final opinion respecting the Court's refusal to entertain a *Lackey* claim was issued in *Johnson v. Bredesen*, 130 S. Ct. 541 (2009), in which he criticized the

invoked his dissent in *Baze*, arguing that "the diminished justification for carrying out an execution after the lapse of so much time"[173] reinforced his view that the death penalty cannot withstand review via "an acceptable deliberative process."[174]

Interestingly, Justice Stevens's position finds some support from an otherwise unlikely ally. In the first few years following the reinstatement of the death penalty in *Gregg v. Georgia*[175] and its companion cases,[176] Justice Rehnquist expressed concern about what he then regarded as inordinate delays in capital litigation. Writing in 1981—fewer than five years post-*Gregg* and at a time in which no inmate had spent as much as a decade on death row—Justice Rehnquist lamented that "hundreds of prisoners condemned to die [] languish on the various 'death rows,' [and] few of them appear to face any imminent prospect of their sentence being executed."[177] Presaging Justice Stevens's later critique, Justice Rehnquist went on to say that delays between sentence and execution undermine the deterrent and retributive value of the death penalty.[178] Justice Rehnquist made these observations not to lay the building blocks of a constitutional assault on the death penalty, but to encourage the Court to use its discretionary jurisdiction to accelerate executions. His opinion—like many of those lamenting the failure of the Court to review *Lackey* claims—was framed as a dissent from the Court's denial of certiorari in a capital case. The case, *Coleman v. Balkcom*,[179] has largely been lost to history, even though it contains one of the more striking suggestions in capital litigation. Although Justice Rehnquist was unpersuaded that the Georgia courts had committed federal constitutional error in the petitioner's case, he argued that the Court should grant certiorari in the case to expedite consideration of

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refusal of the lower federal court to review petitioner's *Lackey* claim under 42 U.S.C. § 1983.

[173] Thompson v. McNeil, 129 S. Ct. 1299, 1300 (2009).

[174] *Id.*

[175] 428 U.S. 153, 206-08 (1976).

[176] Proffitt v. Florida, 428 U.S. 242, 259-60 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976).

[177] Coleman v. Balkcom, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari).

[178] *Id.* at 959 ("When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system."); *id.* at 960 ("There can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution.").

[179] 451 U.S. 949 (1981).

his claims and to speed his execution.[180] According to Justice Stevens, who agreed with the Court's denial of certiorari, Justice Rehnquist was advancing the proposition "that we should promptly grant certiorari and decide the merits of every capital case coming from the state courts in order to expedite the administration of the death penalty."[181] Justice Stevens rejected this call, observing that "the Court wisely declines to select this group of [capital] cases in which to experiment with accelerated procedures."[182] Interestingly, *Coleman* is the first case in which Justice Stevens confronted the nascent *Lackey* problem, and he seemed to acquiesce in the "inevitab[ility] that there must be a significant period of incarceration on death row during the interval between sentencing and execution."[183]

Justice Rehnquist's attempt to accelerate federal review of state death sentences was on its own terms designed to give states the freedom to reap the benefits of capital punishment. But lurking in the opinion is undoubtedly also the concern that continued extensive delays in the administration of the death penalty might call into question the desirability—and perhaps constitutionality—of the death penalty itself. Justice Rehnquist's lament that the Court's constitutional regulation of the death penalty had "made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes"[184] seems almost quaint given how early his concerns were voiced in the modern experiment with federal constitutional regulation. And it certainly is ironic that Justice Stevens, who rejected the call for accelerated procedures and accepted as inevitable some significant pre-execution incarceration, would insist almost thirty years later that such prolonged incarceration, together with other dysfunctional features of states' death penalty practice, had rendered the American system of capital punishment unconstitutional.

Ultimately, then, the significance of the "death row phenomenon" argument is the way in which it highlights the "American capital punishment phenomenon"—the prevailing fragility of the death penalty in this country given the ongoing, pronounced inability of states to

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[180] *Id.* at 963 ("If capital punishment is indeed constitutional when imposed for the taking of the life of another human being, we cannot responsibly discharge our duty by pristinely denying a petition such as this, realizing full well that our action will simply further protract the litigation.").

[181] *Id.* at 949 (Stevens, J., concurring).

[182] *Id.* at 953.

[183] *Id.* at 952.

[184] *Id.* at 959 (Rehnquist, J., dissenting).

consummate death sentences with executions. Even high executing states such as Texas and Florida have inmates who have been on death row since the late 1970s (as reflected by the fact that Lackey himself was a Texas inmate and another *Lackey* dissent-from-denial, in *Knight v. Florida*,[185] came to the Court from the Florida Supreme Court). The problem is particularly pronounced in states such as California and Pennsylvania, where death-sentencing is high and executions are low or non-existent. Indeed, the Ninth Circuit *Capital Punishment Handbook* has a separate section called "Tenure on Death Row,"[186] replete with citations to relevant cases and articles.

Neither his comments in *Baze* nor his statement in *Thompson* were joined by any other members of the Court, but Justice Stevens's attack on the *administration* of the death penalty (rather than the death penalty itself) resonates with recent Court opinions expressing concern about the American death penalty. Over the past ten years, the Court has imposed strict proportionality limits on the death penalty, eliminating its availability for juveniles,[187] persons with mental retardation,[188] and for non-homicidal offenses against persons, such as the rape of a child.[189] Dissenting justices have also expressed concerns about the lack of safeguards against the execution of the innocent,[190] the potential disconnect between capital sentences and community values,[191] and continuing arbitrariness in the distribution of death sentences and executions.[192] It seems likely that any future effort to radically limit or constitutionally abolish the death penalty will be rooted not in a judicial declaration that the death penalty itself is inhumane or violative of human dignity, but in an opinion similar to the ones authored by Justice Stevens cataloguing the failure of the American death penalty to secure the goals the death penalty is said to advance, or to do so in an acceptable way. Thus, the lingering claim of unacceptably cruel prolonged death row incarceration remains a potent reminder of the unmet promises of the American death penalty, and it could ultimately provide a wedge for reconsideration of the death penalty's ultimate constitutionality.

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[185] 528 U.S. 990 (1999).

[186] Office of the Circuit Executive, U.S. Court of Appeals for the Ninth Circuit, Ninth Circuit Capital Punishment Handbook, at Section 1.9 (Tenure on Death Row), *available at* http://207.41.19.15/web/sdocuments.nsf/3779242195bb2339882568480080d277/24338af313e4f4f588256849006a4914?OpenDocument.

[187] Roper v. Simmons, 543 U.S. 551 (2005).

[188] Atkins v. Virginia, 536 U.S. 304 (2002).

[189] Kennedy v. Louisiana, 129 S. Ct. 1 (2008).

[190] Kansas v. Marsh, 548 U.S. 163, 207 (2006) (Souter, J., dissenting).

[191] Ring v. Arizona, 536 U.S. 584, 618 (2002) (Breyer, J., concurring in judgment).

[192] *Id.* at 617.

Outside of the courts, concerns about prolonged death-row incarceration have contributed to a powerful new policy argument against the death penalty: the claim that the death penalty disserves the families and loved ones of murder victims. For many years, the claim that the death penalty should be retained to ease the pain of the victim's family went largely unchallenged and unanswered. Over the past two decades, though, coinciding with the dramatic expansion of the length of death-row incarceration, many opponents of the death penalty have highlighted the pain and frustration for victims' families caused by extensive post-trial delays. A recent editorial opposing capital punishment by a former district attorney in Oregon captures this new form of argument (as well as the cost argument): "Let me say that my compunctions primarily are not on moral or ethical grounds involving putting a convicted murderer to death, but on the way it is used (or not used) in this state, and the enormous expense in dollars and emotional capital for the families of homicide victims."[193] In a recent California case, the father of the murder victim agreed with the district attorney's decision to accept a non-death plea in the multiple victim case because of the likely length of appeals.[194] The father stated that "[w]hile our unequivocal first choice is the death penalty, we acknowledge that in California that penalty has become an empty promise," and the district attorney indicated that her decision to accept the plea was motivated in part to spare the victims' families the years of "suffering" that post-trial review would entail. In New Jersey, Kathleen Garcia, a member of the state's Death Penalty Study Commission who had lost a family member to murder, based her support of repeal on the harm to victims' families caused by delays in the capital system. In an editorial directed to the reconsideration of the death penalty in New Hampshire, Garcia wrote:

> Make no mistake—I am a conservative, a victims' advocate and a death penalty supporter. But my real life experience has taught me that as long as the death penalty is on the books in any form, it will continue to harm survivors. For that reason alone, it must be ended.[195]

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[193] Dan Glode, Editorial, *Death Penalty Conflicts*, NEWPORT NEWS TIMES, June 25, 2010, http://www.newportnewstimes.com/v2_news_articles.php?heading=0&story_id=23050&page=72.

[194] Teri Figueroa & Mark Walker, *State's Death Penalty Lacks Urgency: Chances of Dying from Old Age, Sickness or Suicide Are Greater than Lethal Injection*, NORTH COUNTY TIMES, Apr. 17, 2010, http://www.nctimes.com/news/local/sdcounty/article_f54f505a-2993-5c54-a248-ca751d3091ed.html.

[195] Kathleen M. Garcia, Editorial, *Death Penalty Hurts—Not Helps—Families of Murder Victims*, NASHUA TELEGRAPH, Mar. 28, 2010, http://www.nashuatelegraph.com/opinion/perspectives/687551-263/death-penalty-hurts--not-helps-.html.

Thus, the argument about the excessive cruelty to prisoners caused by delays in the system has lent significant support to the claim that our present system is excessively cruel to the families and loved ones of victims. The irony, of course, is that the prisoners' suffering is insufficient to console the survivors' unmet expectation of, and hope for, executions, but the suffering on both sides leads to the same place—great reservations about the sustainability of the death penalty.

Contemporary death penalty discourse thus increasingly avoids conflict over the abstract rightness or wrongness of punishing crime with death. The debate over capital punishment has become a debate about the American system of capital punishment (with its costs and delays), and this turn has provided momentum to the repeal/abolition side. The future stability of the death penalty depends either on a real shift on the ground in the economics and efficiency of the death penalty or on the ability of supporters to refocus the American death penalty debate on abstract retributive arguments, with their longstanding popular appeal in American culture, emphasizing that some crimes can be appropriately met only with death.

IV. CONCLUSION

We have paid scant attention to the continuity across generations in arguments about the morality and wisdom of capital punishment. As any high school debater could attest, there is a set of relatively stable arguments that appear and reappear with regularity in different times and places. However, the foregoing discussion puts to rest the much stronger notion that death penalty debates are entirely static. Rather, it is clear that there are discontinuities across eras—discontinuities so dramatic that participants from an earlier era could not have anticipated, and those from a later era might not even remember, some of the central claims and arguments made at a different time. So, as we have reflected on the nature of capital punishment on the one-hundredth anniversary of this important journal, we have highlighted ways in which the discontinuity in arguments surrounding the death penalty has revealed significant discontinuities in the broader legal and political culture. In our examination of the changing debates, we have illuminated the different fundamental values that were thought to be implicated by the abolition or retention of the death penalty at different times. In addition, we have uncovered the ways in which debates about the death penalty are not hermetically sealed from other controversial issues of the day, such as the pressing problem of lynchings in the early twentieth century, and the deep financial crisis in the early twenty-first century. The metamorphosis of the values and issues involved, and the terms in which

they are addressed, shows that there is surprising elasticity in what is encompassed and at stake in death penalty debates over time.

Moreover, discontinuities in discourse can be understood only in the full context of how the death penalty was actually administered in the different eras. The debates reveal enormous changes in the practice of the death penalty on the ground, including the types of offenses thought to be death-worthy, the kinds of victims and perpetrators involved, the procedures for adjudicating guilt and sentence, the modes of execution, and the nature of death row confinement and prisons more broadly—in short, the entire criminal justice apparatus surrounding the death penalty. The debates about the death penalty in different eras thus shed light not only on the values and issues that are thought to be implicated by the practice of capital punishment in the abstract, but also on the particularities of the practice of capital punishment at a given time. In other words, changes in discourse reveal not only what capital punishment meant or symbolized but also what capital punishment was or is.

When we look back one hundred years to Ed Johnson's rudimentary trial and extrajudicial execution in the face of the Supreme Court's effort to exercise jurisdiction over his case, we cannot help being struck by the foreignness of Ed Johnson's world. It is easier, however, to forget the strangeness of the discourse of the past, in part because words fade more quickly than deeds. By being attentive to the actual debates of the past, we can recapture the particularity of the everyday world in which the death penalty operated, and engage what the abolition or retention of the death penalty meant at different historical moments. Such reflection also allows us to see how the language and arguments of present death penalty discourse reveal important aspects of our own world. The foreignness of the past in both practice and discourse helps reveal the contingency of the present and suggests new possibilities for the future.

Professors Carol and Jordan Steiker,
Capital Punishment & American Exceptionalism

CAROL S. STEIKER*

Capital Punishment and American Exceptionalism

In 1931, the year before his appointment to the U.S. Supreme Court, Benjamin Cardozo predicted that "[p]erhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life."[1] The operative word here has turned out to be "perhaps," given that here we are in the United States almost three-quarters of a century later and still going strong. But, ironically, Cardozo's prediction proved more or less true for the rest of the Western industrialized world. Soon after World War II and the spate of executions of wartime collaborators that ensued, the use of the death penalty began to decline in Western Europe, and capital punishment for ordinary crimes has at this point been abolished, either de jure or de facto, in every single Western industrialized nation except for the United States.

At the same time, the countries that most vigorously employ the death penalty are generally ones that the United States has the least in common with politically, economically, or socially, and ones that the United States is wont to define itself against, as they are among the least democratic and the worst human rights abusers in the world. In recent years, the top four employers of capital punishment were China, Iran, Saudi Arabia—and the United States.[2] Moreover, in the past twelve years, only seven

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[1] BENJAMIN N. CARDOZO, LAW AND LITERATURE 93-94 (1931).

[2] Amnesty Int'l, *Death Penalty Around the World, Facts and Figures on the Death Penalty* (Mar. 2002), *at* http://www.amnesty-usa.org/abolish/world.html.

countries in the world are known to have executed prisoners who were under eighteen-years-old at the time of their crimes: the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Yemen—and the United States.[3] Stephen Bright, capital defense lawyer and abolitionist activist, mordantly quips that, "If people were asked thirty years ago which one of the following three countries—Russia, South Africa, and the United States—would be most likely to have the death penalty at the turn of the century, few people would have answered the United States."[4] Yet it is true that even South Africa and Russia (and many other states of the former Soviet Union) have abandoned the death penalty, while the United States has retained it. And we have not retained it merely formally or even modestly. At the very same time that the pace of abolition quickened in Europe, the pace of executions quickened here in the United States. The rate of executions has risen precipitously since the Supreme Court reinstated the death penalty in 1976 in *Gregg v. Georgia* and its quartet of accompanying cases,[5] and we have executed more people in *each* of the last five years than in any other year since 1955.[6]

What accounts for this gross discrepancy in the use of capital punishment between the United States and the rest of the countries that we consider to be our "peers" in so many other respects? The answer to this question must be found primarily in the events of the last three decades or so, for it is only during this time period that America's use of capital punishment has diverged widely from that of Western Europe. Indeed, in the nineteenth century, to the extent that American criminal justice policy diverged from that of Europe, it was in the other direction. In his famous observations on *Democracy in America*, published in 1840, Alexis de Tocqueville commented on the "mildness" of criminal justice administration in America, noting that

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[3] *Id.*

[4] Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 2.

[5] *See* Gregg v. Georgia, 428 U.S. 153 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

[6] *See* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 11 tbl.1-3 (Hugo Adam Bedau ed., 1997) (executions from 1950-1995); Amnesty Int'l, *The Death Penalty in the U.S., U.S. Executions by Year Since 1976* (last modified April 1, 2002), *at* http://www.amnesty-usa.org/abolish/execsince76/html.

"[w]hereas the English seem to want to preserve carefully the bloody traces of the Middle Ages in their penal legislation, the Americans have almost made the death penalty disappear from their codes."[7] Tocqueville was not alone; historian Stuart Banner writes that mid-nineteenth-century movements to abolish the death penalty in the United States positively "astonished" other European visitors to America.[8] These abolitionist movements did not turn out to be permanently successful except in a small minority of states, primarily in the Midwest and Northeast. Hence, the United States as a nation did not end up in the abolitionist vanguard, like the Scandinavian countries that led Europe in abolishing capital punishment for ordinary crimes in the first few decades of the twentieth century. But neither did the United States diverge in the other direction from the rest of Western Europe until the 1970s. As recently as the mid-1960s, the status of capital punishment in America would not have been a very promising exemplar of "American exceptionalism." At that time, the U.S. looked like most of the rest of Europe (and Canada, and most of Australia) with regard to the use of capital punishment: while most states and the federal government had the death penalty on the books, it was rarely used; during the 1960s, the nation-wide execution rate dropped on average to less than a handful each year.[9]

Yet in the decades that followed the 1960s, all of the other Western democracies abandoned the death penalty for ordinary crimes either de jure or de facto, and many countries that had already abandoned it for ordinary crimes abandoned it for all crimes, including such crimes as terrorism, treason, and military offenses. For example, England abolished the death penalty for murder provisionally in 1965 and then made it permanent in 1969;[10] Canada abolished it for murder in 1976; Spain in 1978; Luxembourg in 1979; France in 1981; Australia in 1984; Ireland in 1990; and Greece in 1993.[11] In addition, many European coun-

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[7] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 538 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Chicago Univ. Press 2000) (1840).

[8] STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 113 (2002).

[9] *See* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 6, at 11 tbl.1-3.

[10] *See* Murder (Abolition of Death Penalty) Act, 1965, c. 71 (Eng.) (This Act was made permanent by virtue of affirmative resolutions of both Houses of Parliament on 16 and 18 December 1969).

[11] Amnesty Int'l, *The Death Penalty Worldwide, Abolitionist and Retentionist Countries* (Nov. 2001), *at* http://www.amnesty-usa.org/abolish/abret.html.

tries that had already abolished the death penalty for murder before the 1960s moved to abolish it for all crimes in the 1970s, 1980s, and 1990s, such as Sweden and Finland in 1972; Portugal in 1976; Denmark in 1978; Norway in 1979; the Netherlands in 1982; Switzerland in 1992; and Italy in 1994.[12]

This pattern—of European abolition contrasted with American enthusiasm for the death penalty—is widely remarked, especially by abolitionists, both here and abroad, who seek to shame the United States by the dual strategy of highlighting the unsavory character of the rest of the "death penalty club" while at the same time noting that Europe (and Canada, Australia, New Zealand, Mexico, and many other countries) seem to manage well enough without resorting to executions.[13] Yet there is surprisingly little sustained commentary, scholarly or popular, about why it is that the U.S. differs so much from its European brethren on the issue of capital punishment.[14] The reason for the rela-

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[12] *Id.*

[13] The following quotes from two different French human rights activists are typical of abolitionist sentiment inside as well as outside the United States: "No advanced country does this [uses capital punishment]. America is doing it along with countries like China and Russia and other countries that have terrible human rights records." Suzanne Daley, *Europeans Deplore Executions in the U.S.*, N.Y. TIMES, Feb. 26, 2000, at A8 (quoting Henry Leclerc, the president of the Human Rights League in Paris). "We are in an age of globalization, and sometimes our American friends have a lesson to teach us, and maybe sometime we have a lesson to teach them." *Id.* (quoting Patrick Baudouin, the president of the International League of Human Rights).

[14] Scholarly writing on American exceptionalism with regard to capital punishment is sparse and heavily tilted toward student-written law review notes. *See, e.g.*, Cheryl Aviva Amitay, Note, *Justice or "Just Us": The Anomalous Retention of the Death Penalty in the United States*, 7 MD. J. CONTEMP. LEGAL ISSUES 543 (1996); Laurence A. Grayer, Comment, *A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, 23 DENV. J. INT'L L. & POL'Y 555 (1995); Kristi Tumminello Prinzo, Note, *The United States—"Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend is Towards Its Abolition*, 24 BROOK. J. INT'L L. 855 (1999). Scholarly treatment by non-student authors of the reasons for American exceptionalism have tended to be brief and elliptical, if they exist at all, in works otherwise devoted to more empirical, historical, or sociological aspects of capital punishment. *See, e.g.*, THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 6 (collection of essays on controversies regarding capital punishment in America); BANNER, *supra* note 8 (history of capital punishment in America); ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE (1996) (survey of abolition around the world); RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA (1991) (largely empirical treatment of use of capital punishment in America); WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (1993) (history of development of international human rights norms dealing with capital punishment); AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION

tive silence on this topic, it seems, is that people think they know why, and their (rather diverse) explanatory theories are often mentioned in passing, without support or elaboration, as if they were perfectly obvious. My object here is to take a sustained look at possible explanations for American exceptionalism with regard to capital punishment, with an eye for questioning and complicating what has been presented, when it has been discussed at all, as obvious or simple. It turns out that the number of possible theories is large, and the provenance of such theories is broad: they range from the sociological, to the political, to the historical, to the cultural, to the legal. Of course, none of these categories is wholly separate from any of the others, and both the boundaries between them and the relationship among them is highly contestable. Nonetheless, it is possible to articulate a large number of distinguishable hypotheses, in order to explore their strengths and weaknesses in some depth.

I by no means wish to suggest that I believe that there is a single theory out there which can be proven to be "the" reason for the complex phenomenon at issue. Why the U.S. is different from its European friends and allies in its use of capital punishment at this point in time is no doubt multiply determined in much the same way that the weather is. Meteorologists can identify many of the factors that produce the phenomenon of "weather," like wind speed, barometric pressure, and cloud formation (among many others, no doubt), but they cannot always say what is cause and what is effect, nor can they reliably predict what will happen as the factors change, as we all know! To say that a phenomenon is multiply determined is different from saying that it is over-determined, in the sense of inevitably the product of multiple forces, each of which alone or in smaller combinations would produce the same result. Not only do I wish to resist reductionist simplicity, I also wish to embrace the contingency that attends most complex phenomena.

What follows is consideration of ten theories of American exceptionalism. As you will see, many of these theories are interconnected, but the disaggregation is helpful in evaluating the strengths and weaknesses of each theory.

(2001) (cultural analysis of capital punishment in America); FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA (1986) (comparative assessment of America's movement toward abolition of capital punishment).

1. Homicide Rates: The most common theory one encounters in writing and conversation on this issue is the fairly straightforward, sociological observation that the United States has a much higher homicide rate than that of any of our Western European (or other peer) counterparts. Notably, during the 1960s and 1970s—the period when U.S. capital punishment policy first began to diverge from that of Western Europe—the American homicide rate rose dramatically to a level much higher than that of most other Western industrialized nations. Although the rate dropped modestly in the early 1980s, it spiked again later in the decade; as of 1990, the American homicide rate was four and a half times that of Canada, nine times that of France or Germany, and thirteen times that of the United Kingdom.[15] Although the rate fell substantially in the 1990s, as of 1998, the U.S. homicide rate was still "two to four times higher than those of most Western countries."[16]

Often, though not always, this "homicide rates" theory for American exceptionalism regarding capital punishment is proffered with a defensive spin, the underlying implication being, "If you had our problems, you'd have our solutions, too." Of course, there is no way to test this counter-factual, short of seeing Western European homicide rates climb to American levels, and maybe not even then. However, recent studies of comparative non-capital penal policies seriously challenge the general claim that crime policy is determined primarily by crime rates. In his introductory essay to a diverse and impressive collection of studies in *Sentencing and Sanctions in Western Countries*,[17] Michael Tonry unequivocally states his conclusion: "The evidence is clear; national differences in imprisonment rates and patterns result not from differences in crime but from differences in policy."[18] As part of his analysis, Tonry compares violent crime rates from the 1960s to the early 1990s in three countries—the U.S., Germany, and Finland—and finds very similar rates of change in violent crime (all three curves go steeply upward) but utterly dissimilar penal policy responses. The U.S. continuously ups the ante, sending more and more offenders to prison; Finland

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15 BANNER, *supra* note 8, at 300-01.

16 Michael Tonry, *Punishment Policies and Patterns in Western Countries*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 13 (Michael Tonry & Richard S. Frase eds., 2001).

17 *Id.*

18 *Id.* at 7.

reacts in the opposite manner, imprisoning many fewer people; and Germany reacts inconsistently, first lowering, then raising, and then lowering again its imprisonment rates, even as violent crime continues its steep rise throughout the period in question. Tonry concludes that crime rates cannot be viewed as the primary determinant of punitiveness in penal policy (at least as measured by rates of imprisonment); rather, he argues that other factors altogether—such as American moralism, history, and politics—are really at work in the divergence of American penal policy from that of Finland and Germany (and by implication, other Western European nations).[19]

Tonry's work has obvious implications for the question of the roots of American exceptionalism regarding capital punishment: it would be odd indeed if there were a substantial correlation between homicide rates and rates of capital punishment when there is so little correlation between violent crime rates and rates of imprisonment. One might argue that homicide, especially murder, is a crime of particular horror, and that therefore homicide rates might drive capital punishment policy even if other crimes rates do not drive other penal policy, because high murder rates will generate the political will to add a stronger deterrent or the desire for some appropriate public display of revulsion and repudiation. Or one might argue that, even if capital punishment policy does not rise and fall with any great sensitivity to murder rates, once murder rates reach a certain level, or "tipping point" (such as has been reached in the U.S. but not elsewhere in the industrialized West), the death penalty becomes more thinkable, or desirable, or necessary. In short, one would need some sort of "death is different" argument for why homicide rates drive capital punishment policy in a way that violent crime rates apparently do not drive ordinary, non-capital penal policy. Any such argument, however, loses some plausibility when one considers the politics of penal policy writ large in the United States, for it is easily apparent that the very same political coalitions generally support *either* both capital punishment for murder and severe non-capital punishment for other crimes *or* (in considerably smaller numbers) abolition of capital punishment and less severe non-capital punishment for other crimes. In light of this strong and obvious convergence, it is hard to believe that the wellsprings of political attitudes and action regarding capital punish-

[19] *Id.* at 18.

ment derive from a different source from the well-springs of political attitudes and action regarding penal policy generally.

In addition, the "homicide rates" hypothesis for American exceptionalism regarding capital punishment is beset by a further difficulty: examined more closely, homicide rates and execution rates dramatically diverge at important points in the past thirty years; indeed, they diverge much more than they converge.[20] From the mid-1960s to the mid-1970s, homicide rates roughly doubled, while execution rates fell to zero for several years preceding the Supreme Court's temporary invalidation of the death penalty in *Furman v. Georgia* in 1972[21] (though this might have been due, at least in part, to the "moratorium" strategy of the abolitionist litigators leading up to *Furman*).[22] Even more significantly, homicide rates fell precipitously throughout most of the 1990s, while execution rates soared, reaching levels not seen since the 1950s. Moreover, there were some substantial fluctuations in homicide rates even during the 1970s and 1980s, which are not mirrored at all by fluctuations in execution rates. The strongest response to the disjunction between homicide rates and execution rates must be one of significant "lag time"—i.e., that executions took a while to catch up to the rising homicide rates of the 1960s and 1970s and that they have not yet been deflated by the falling homicide rates of the 1990s. As for the discrepancies between homicide rates and execution rates in the late 1970s and early 1980s, Supreme Court litigation working out the details of post-*Furman* constitutional requirements for capital punishment would necessarily have warped execution rates during that period so as to render comparison with homicide rates meaningless. However, these responses to the disjunction between homicide rates and execution rates founder when one considers death sentencing rates during the same thirty-year period, because one would not expect to see the same degree of "lag time" in this measure. Yet one sees a pattern on death row similar to the one

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[20] *Compare* Fed. Bureau of Investigation, U.S. Dep't of Justice, CRIME IN THE UNITED STATES 1960-2001 (reporting rates for murder and non-negligent homicide from 1960 through 2001), *with* THE DEATH PENALTY IN AMERICA'S CURRENT CONTROVERSIES, *supra* note 6, at 11 tbl.1-3 (giving execution rates from 1930 through 1995), *and* Amnesty Int'l, *U.S. Executions by Year Since 1976*, *at* http://www.amnestyusa.org/abolish/eversince76.html (giving execution rates from 1976 through 2001).

[21] 408 U.S. 238 (1972).

[22] *See* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 106-25 (1973).

in the death chamber: death row grew much more slowly in the late 1960s, when homicide rates were soaring, than it has in the 1990s, when homicide rates were plummeting.[23] These disjunctions between death sentencing rates and execution rates, on the one hand, and homicide rates on the other, certainly raise some serious problems for the "homicide rates" explanatory thesis.

These problems become only more apparent when one looks at the state and local level. On the state level, the "homicide rates" thesis gets some modest support from the generally higher homicide rates in the Southern and Border states, which also form the "death belt" primarily responsible for the nation's executions.[24] But the thesis also suffers some embarrassment as well, in light of the fact that Texas, Virginia, Missouri, Florida, and Oklahoma—the five leading states in executions in the modern era, accounting together for almost two-thirds of the nation's executions since *Furman v. Georgia*[25]—have five of the lowest homicide rates in the "death belt."[26] Even if homicide rates somehow play a role in the formal retention of the death penalty at the state level,[27] something else is accounting for the use of the

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[23] *See* Death Penalty Info. Ctr., Size of Death Row by Year (2002), *at* http://www.deathpenaltyinfo.org/DRowInfo.html#year.

[24] *See* Death Penalty Info. Ctr., Facts About Deterrence and the Death Penalty, Murder Rates by State 1995-1999 (last visited May 16, 2002), *at* http://www.deathpenaltyinfo.org/deter.html [hereinafter Death Penalty Info. Ctr.].

[25] NAACP Legal Defense and Educ. Fund, Inc., *Death Row U.S.A., Spring 2002*, *at* http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf.

[26] Death Penalty Info. Ctr., *supra* note 24. Of course, proponents of the "homicide rates" thesis and/or the death penalty itself would no doubt argue that the relatively low homicide rates in these five states is the result of their high use of the death penalty. This claim is implausible on many levels, the most obvious being that no state, even the really big users of the death penalty, uses capital punishment with any kind of frequency or reliability at all, so even the staunchest believer in deterrence theory would not expect to see a significant deterrent effect. This commonsense judgment is borne out by recent studies of two of the five leading death penalty states. *See* Jon Sorensen et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481 (1999) (finding no correlation between execution rates and either murder rates or felony rates in the period studied, 1984-1997); William C. Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 CRIMINOLOGY 711 (1998) (finding no evidence of a deterrent effect on total killings or on any sub-type of killing during the period studied, 1989-1991, but finding evidence of a "brutalization" effect in the *rise* of certain sub-types of killings after Oklahoma's return to the use of capital punishment after a twenty-five-year hiatus).

[27] Even this thesis has some trouble accounting for Alaska and Michigan, staunchly abolitionist states, each with a homicide rate higher, by recent count, than that of any of the five leading death penalty states. *See* Death Penalty Info. Ctr., *supra* note 24.

death penalty, as reflected in execution rates, within states. The role of "something else" becomes even more clear when one examines intra-state variations in death penalty practices. Within individual states, there is staggeringly large variation among individual counties in death sentencing rates that are clearly attributable to something other than homicide rates. For example, in Texas, which leads the country in executions in absolute numerical terms, Dallas County (Dallas) and Harris County (Houston), two counties with strikingly similar demographics and crime rates, have very different death sentencing rates, with Dallas County returning eleven death verdicts per thousand homicides, while Harris County returns nineteen death verdicts per thousand homicides. One sees a similar disjunction in Pennsylvania between Allegheny County (Pittsburgh) and Philadelphia County (Philadelphia), which have death verdict rates of twelve and twenty-seven per thousand homicides, respectively. In Georgia, another significant death penalty state, the death sentencing rate ranges from four death verdicts per thousand homicides in Fulton County (Atlanta) to thirty-three death verdicts per thousand homicides in rural Muscogee County—a difference of more than 700%! One sees similarly large variations within many other states that are completely uncorrelated with differences in either homicide rates or crime rates more generally.[28]

Moreover, if one widens the lens to the larger world, one finds further evidence challenging the persuasiveness of the "homicide rates" thesis. It cannot explain why a large number of countries with extremely high serious murder rates—such as South Africa, Mexico, and Brazil—have abolished the death penalty, while Japan, with a comparatively low homicide rate, continues to retain it. Obviously, each country has its own peculiar death penalty "story," as testified to by the unique experience of South Africa.[29] But this recognition of the complex singularity of national experiences with capital punishment should only further undermine the simplistic "homicide rates" thesis as fundamentally inadequate or at the very least, incomplete.

The foregoing demonstrates, at a minimum, that high homicide rates are neither necessary nor sufficient for the formal retention

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[28] *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (2002).

[29] *See* Carol S. Steiker, *Pretoria, Not Peoria: S v. Makwanyane and Another, 1995 (3) SA 391*, 74 TEX. L. REV. 1285 (1996) (describing decision of the South African Constitutional Court abolishing the death penalty in post-apartheid South Africa).

or vigorous use of capital punishment, and that low homicide rates are neither necessary nor sufficient for its abolition or more modest use. This is not at all to suggest that homicide rates play no role at all in America's anomalous retention and use of the death penalty in the Western industrialized world; rather, it is clear that other forces must be at work as well. Hence, on to other explanatory theories of American exceptionalism.

2. Public Opinion: Related to the "homicide rates" theory is the theory that the United States has capital punishment because of strong public support for it; presumably, public support for the death penalty is bolstered, at least in part, by the fear and disgust generated by high homicide rates. There is no dearth of polling data demonstrating American public opinion in support of capital punishment. Particularly helpful in providing a long view are the Gallup polls that were conducted for much of the twentieth century charting answers to the basic question, "Do you favor the death penalty for those convicted of murder?"[30] Like most European nations, the U.S. experienced a decline in popular support for the death penalty during the 1960s. The low point in the U.S. was 1966, when the Gallup poll of that year revealed—for the first and only time in the century—that more respondents opposed rather than supported capital punishment (forty-seven percent to forty-two percent).[31] That trend, however, has dramatically reversed in the past three decades, with American public support for capital punishment rising precipitously, peaking in 1994 at eighty percent and declining only during the last few years to sixty-five percent in May, 2001, and sixty-eight percent in October, 2001—substantially lower, but nowhere near the levels of the 1960s.

One could argue that the "public opinion" thesis buttresses the "homicide rates" thesis in that the fluctuations in public support for capital punishment in the three decades since the 1960s are much more consonant with fluctuations in homicide rates during that period than are fluctuations in either execution rates or death sentencing rates. Public opinion in support of capital punishment grew in the late 1960s and early 1970s along with the homicide rate, whereas the execution rate fell to zero and the

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[30] *See* Robert M. Bohm, *American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls*, *in* THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH 113 (Robert M. Bohm ed., 1991).

[31] *Id.* at 116.

growth of the death row population slowed. Moreover, public opinion in support of capital punishment fell, albeit modestly, in the last few years of the 1990s, shortly after the homicide rate dropped substantially, whereas the execution rate has remained extraordinarily high, along with the growth in the size of the death population. The fit is not perfect, primarily because homicide rates rose earlier and faster in the 1960s than did public support for capital punishment, and homicide rates fell earlier and faster in the 1990s than did public support for capital punishment (and there are some other, more modest, divergences along the way), but the case for at least loose correlation has some surface plausibility. Thus, one might reasonably argue that high American homicide rates led to strong public support for capital punishment, which promoted formal retention of the death penalty, even if other forces are at play in producing actual death verdicts and executions within individual states.

The problem with this argument is that there are better explanations for the most significant fluctuations in public attitudes about capital punishment during this time period that have nothing to do with homicide rates. While the Gallup polls reveal a modest increase in support for capital punishment between 1966 and 1972,[32] public opinion made a substantial leap immediately after, and apparently in response to, the Supreme Court's decision in *Furman*. Two Gallup polls taken in 1972—one before and one after *Furman*—reveal a seven percent increase in support for the death penalty immediately after *Furman*, as compared with an eight percent increase in the six-year period between 1966 and 1972. Moreover, the same two polls reveal a nine percent decrease in opposition to the death penalty immediately after *Furman*, as compared with merely a six percent decrease between 1966 and 1972.[33] Thus, it seems likely that the Supreme Court's decision in *Furman* itself played a bigger role in bolstering public support for capital punishment, at least as reflected in polling data, than did rising homicide rates. Similarly, while it is true that homicide rates fell substantially in the 1990s, followed by a significant (but not as large) dip in public support

[32] In 1966, forty-two percent favored the death penalty; forty-seven percent opposed. In 1972, fifty percent favored the death penalty; forty-two percent opposed. *Id.*

[33] The 1972 polls showed fifty percent in favor of the death penalty and forty-one percent opposed pre-*Furman*, and fifty-seven percent in favor and thirty-two percent opposed post-*Furman*. *Id.*

for the death penalty, this dip in public support is better accounted for by highly disturbing accounts of innocent people exonerated from death row. From Illinois' moratorium on executions as a result of the exoneration of thirteen death row inmates from that state alone,[34] to the proliferation of DNA exonerations in capital and non-capital cases alike,[35] to studies documenting extremely high reversal rates in capital cases in the post-*Furman* era,[36] concerns about the unreliability of the capital process and the possible execution of the innocent are much more likely to be the driving force behind the recent drops in support for capital punishment than is the declining homicide rate. Indeed, respondents overwhelmingly cite this concern when polled about the fairness of the death penalty.[37] Thus, the simple story that high homicide rates drive strong public support for capital punishment which in turn drives retention of capital punishment clearly needs some further nuance.

The "public opinion" thesis runs into bigger problems, however, than its failure to buttress the "crime rates" thesis. The most problematic and little-remarked problem for the "public opinion" thesis as an explanation for American exceptionalism with regard to capital punishment is that similar levels of public support for capital punishment existed in Western European countries at the time of abolition. Majorities of roughly two-thirds opposed abolition in Great Britain in the 1960s, Canada in the 1970s, France in the 1980s, and the Federal Republic of Germany in the late 1940s (when capital punishment was abolished in Germany's post-World War II constitution). "Indeed, there are no examples of abolition occurring at a time when public opinion supported the measure."[38] It is true that support for capital punishment has tended to fall in Europe over the last three decades—but only *after* abolition had already occurred, and thus more likely as a product of abolition (or the forces that produced

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[34] *See* Ken Armstrong & Steve Mills, *Ryan: 'Until I Can Be Sure'; Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at A1.

[35] *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001).

[36] *See* LIEBMAN ET AL., *supra* note 28.

[37] *See* Ann Coulter, *We're Not Executing the Innocent*, USA TODAY, May 8, 2001, at A13 (citing Washington Post/ABC News poll in which sixty-eight percent agreed that the death penalty was unfair "because sometimes an innocent person is executed").

[38] ZIMRING & HAWKINS, *supra* note 14, at 22.

abolition) than as cause of it.[39] Moreover, in countries where support for capital punishment remains high, like Great Britain, efforts to reinstate the death penalty continue to fail, often by wide margins.[40] Perhaps the question to be addressed is not, "Why does the U.S. retain the death penalty when Europe has abandoned it?", but rather, "Why did European democracies abandon the death penalty despite substantial popular support for it?" The possibility of "European exceptionalism" is discussed further below.[41]

To be fair to the "public opinion" thesis, the polling data that shows similar *levels* of support for capital punishment in the United States and most European countries at the time of abolition almost never attempts to measure the comparative *intensity* of respondents' support for capital punishment. Yet, it is plausible, indeed even likely, that Americans care more about capital punishment than their European and other Western counterparts do (or did at the time of abolition), even when raw numbers of those who "support" or "oppose" capital punishment appear similar. There is some modest empirical support for this claim to be found in a consistent pattern of American polling data: a 1974 study found that seventy-nine percent of respondents who supported the death penalty reported a sense of personal outrage when a convicted murderer was sentenced to a penalty less than death;[42] a 1986 opinion poll indicated that sixty-five percent of all American adult respondents identified the death penalty as an issue they "feel very strongly about;"[43] a 1988 presidential election exit poll revealed that more voters identified the death penalty as an issue that was "very important" to them than identified social security, health care, education, or the candidates' political

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[39] *Id.*

[40] Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. TRANSNAT'L L. & POL'Y 517, 526 (1997) (noting that "the British Parliament has debated the issue more than a dozen times in recent years, but on the last occasion, the majority against reinstatement [of capital punishment] was the largest ever").

[41] *See* discussions below of "Populism" and "European Exceptionalism" *infra* pp. 114-18, 126-27.

[42] Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 155 (1983).

[43] Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, J. SOC. ISSUES, Summer 1994, at 19, 23 (citing Associated Press/Media General poll of the nationwide adult population in November, 1986).

party;[44] and a 1994 New York gubernatorial exit poll found that one in five voters cited capital punishment as the "most important" issue in the race.[45] While there is no comparable "intensity" data from Europe, the tepid popular response in Europe to abolition and the failure of movements for reinstatement to garner widespread support suggest that European voters simply do not share Americans' fervor on this issue. Perhaps the strongest support for the "intensity" spin on the "public opinion" thesis comes from the salience of crime generally, and capital punishment particularly, as a political issue in the United States—another obviously intertwined theory of American exceptionalism to which I now turn.

3. Salience of Crime as a Political Issue: The most persuasive reason to believe that Americans care more intensely about capital punishment is the simple fact that crime and punishment have risen to and remained at the indisputable top of the American political agenda at all levels of government. Since 1968, when Richard Nixon ran for president on a largely "law and order" platform, crime policy has been a hugely salient issue in local, state, and national elections, to a degree not rivaled in any of our peer Western nations. It would not be hyperbolic to conclude that crime has been the central theme in the rhetoric of American electoral politics and in the strategies of elected officials in the decades since 1968.[46]

The death penalty has often come to serve as a focal point in electoral politics already organized around law and order. Particularly frightening and repulsive murders grab the public imagination, while the drama of the death penalty provides an easily accessible symbol of righteousness and order to aspiring politi-

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[44] *Id.* (citing ABC News exit poll of 23,000 voters in the 1988 presidential election in which George Bush overwhelmingly defeated Michael Dukakis).

[45] *See* Todd S. Purdum, *Voters Cry: Enough, Mr. Cuomo!* N.Y. TIMES, Nov. 9, 1994, at B11 (citing exit polls in the 1994 gubernatorial election in which George Pataki defeated incumbent Mario Cuomo, paving the way for the reinstatement of the death penalty in the state of New York).

[46] *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 152-53 (2001) (proposing that "the increased salience of crime" in the decades following the 1960s was due in large part to the fact that the "social distance between the middle classes and crime was greatly diminished, with consequences for point of view and perspective"). *See generally* Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111 (2000) (surveying political science, criminology, and sociology literature to support the conclusion that crime was *the* primary motivating political force in the post-1960s decades).

cians. One need not look far at all to find numerous examples of electoral races at all levels of government that were dominated by the death penalty cast as an issue of crime control, and, indeed, election results that were likely determined by the death penalty positions of the candidates.

Starting at the top, it is more than a little odd that we know so much about the positions of presidential candidates on capital punishment, given that ninety-nine percent of executions take place at the state level. Not only do we know about presidential positions on the issue, we really seem to care. Who can forget the pivotal moment during the 1988 presidential debates when Michael Dukakis gave an emotionless response to a question about whether his views on the death penalty would change if his wife were raped and murdered?[47] No doubt learning from Dukakis' disastrous example, then-Governor Bill Clinton flew back to Arkansas from the campaign trial in 1992 to validate the execution of a severely mentally disabled murderer who had survived a suicide attempt during which he had fired a shotgun into his own head.[48] The most recent presidential election in 2000 is notable for the fact that every single one of the initial eleven candidates for president, despite other ideological differences, made clear his support for the death penalty.

The centrality of the death penalty as a political issue gets only more dramatic when one looks at state and local elections. In three major gubernatorial races in 1990 alone, the death penalty played a prominent, even central, role. In California, John K. Van de Kamp ran a television advertisement with a gas chamber in the background, highlighting the number of murderers that he put or kept on death row in his roles as District Attorney and Attorney General.[49] In Texas, Jim Mattox ran against Ann Richards in the Democratic primary with ads taking credit for thirty-two executions in his role as Attorney General.[50] In Florida, incumbent Governor Bob Martinez ran ads boasting of the ninety-plus death warrants he had signed while in office.[51]

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[47] *See* Bill Sammon, *Liberals See Death Penalty As Issue; But Gore Avoids Faceoff With Bush*, WASH. TIMES, June 14, 2000, at A1.

[48] Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105.

[49] John Balzar, *Van de Kamp TV Ads Focus on Death Row, Will Air Today*, L.A. TIMES, Mar. 21, 1990, at A3.

[50] Robert Guskind, *Hitting the Hot Button*, NAT'L J., Aug. 4, 1990, at 1887.

[51] Richard Cohen, *Playing Politics with the Death Penalty*, WASH. POST, Mar. 20, 1990, at A19.

The governors are not alone in their political resort to the power of the death penalty in electoral politics: the issue has figured prominently in the election and political strategy of legislators, judges, and prosecutors, as well, in situations too numerous to count. Some illustrative examples: In 1993, Senate Republicans pledged opposition to judicial nominees they considered "insufficiently committed to the death penalty."[52] This threat was not merely a reflection of the peaking of national death penalty support in 1994; as recently as 1999, Missouri state judge Ronnie White was denied a federal judgeship by Senate Republicans, led by then-Senator, now-Attorney General, John Ashcroft, who declared Judge White "pro-criminal," in part because he opposed the death penalty.[53] California Supreme Court Chief Justice Rose Bird and two of her colleagues famously lost their seats because of their votes overturning death sentences, and many other elected state judges have been attacked, and frequently defeated, because of their unpopular votes overturning death verdicts.[54] Prosecutors, who are overwhelmingly elected officials in the United States, face the same political pressures on the issue of capital punishment.[55]

In the United States, two things are indisputably true, and "exceptional," at least as a matter of degree, in comparison to the rest of the industrialized West. First, crime has a political salience that is extraordinarily high, almost impossible to overstate. As a result, themes of "law and order" tend to dominate electoral battles at all levels of government, and the designation "soft on crime" tends to be a political liability of enormous and generally untenable consequence for political actors at all levels of government. Second, the death penalty has become a potent symbol in the politics of "law and order," despite its relative insignificance as a matter of crime control policy. Political actors clearly believe, apparently correctly, that their support for capital

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[52] Neal A. Lewis, *GOP to Challenge Judicial Nominees Who Oppose Death Penalty*, N.Y. TIMES, Oct. 15, 1993, at A26.

[53] Stuart Taylor, Jr., *The Shame of the Ronnie White Vote*, NAT'L J., Oct. 16, 1999, at 2949.

[54] *See generally* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995) (canvassing the political impact of the death penalty on elected judges).

[55] *See generally* Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283 (2001).

punishment translates directly in voters' minds as support for "tough" crime control generally. This strong linkage of the death penalty to the politics of law and order renders more plausible the claim that Americans support capital punishment with a greater intensity, if not in greater numbers, than Europeans, now or in the recent past.

4. Populism: Often proffered more as an alternative than as a complement to the "intensity of preference" theory of American exceptionalism is the theory that populism in American politics, as compared to elitism in European politics, best accounts for differences in death penalty policy. As some Americans like to respond to our European detractors, it is not that Americans have different attitudes about capital punishment, it is that our political institutions are more responsive to the public will. In this vein, a provocative and much cited article in The New Republic sweepingly claimed, "Basically, then, Europe doesn't have the death penalty because its political systems are less democratic, or at least more insulated from populist impulses."[56] This theory conveniently offers an explanation both for why the death penalty continues to flourish in the United States and for how Western European nations managed to achieve universal abolition despite wide-spread popular support for capital punishment.

The "American populism" theory has two dimensions to it, one institutional and one that might better be termed cultural. The institutional dimension emphasizes the populist features of the structures of American political organization, especially as compared to European democracies. Obviously, not all American political structures tend toward the populist, as the presidential election of 2000 amply demonstrated. The electoral college and the bicameral structure of Congress have often been noted as anti-populist, at least in the sense of anti-majoritarian. Nonetheless, there are certain features of American electoral politics that can fairly be described as distinctively populist in comparison to most European parliamentary democracies. The use of the "primary" system to select party candidates in both federal and state elections in the United States is one of the best examples of American political exceptionalism; in other Western democracies, political parties put up candidates for election without throwing the question open to popular intervention—a system

[56] Joshua Micah Marshall, *Death in Venice: Europe's Death-Penalty Elitism*, NEW REPUBLIC, July 13, 2000, at 14.

much more likely to exclude mavericks and to insulate candidates from hot-button single issues like the death penalty.[57] Similarly, the widespread availability and (somewhat more modest use) of direct democracy tools, such as referenda and initiatives, is another exceptional feature of American politics, that, like the "primary" system, tends to increase the power of single-issue voters and to promote populist tendencies in political debates and platforms.[58] In contrast, many European parliamentary systems imitate that of Britain, "in which the ruling political party is tightly disciplined and in firm control of governmental policy and its implementation until the next election," and thus less susceptible to populist influences.[59]

While these differences in democratic organization certainly do exist, differences in political culture between the United States and the rest of the West appear even more striking. In the United States, politicians are conspicuously anti-elitist in their rhetoric and folksy in their self-presentation. Plainly spoken personal anecdotes tend to displace complex policy analysis, and rolled-up shirt-sleeves and cowboy hats are more the sartorial norm than the exception. Even though successful political candidates are frequently consummate political insiders, "it is almost obligatory for American politicians of both the right and the left

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[57] Note that many of the political contests in which the death penalty was a particularly hot-button issue were primary races. *See supra* pp. 112-14.

[58] Nearly half of the states permit direct democracy tools, although only a handful of states have averaged more than one initiative per election cycle. *See generally* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES (Shawn Bowler et al. eds., 1998); REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT-DEMOCRACY (David Butler & Austin Ranney eds., 1994); PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS (1998). Successful initiatives on criminal justice issues, not surprisingly, have been almost exclusively of the "tough-on-crime" variety, such as California's famous "three-strikes-you're-out" legislation, mandating life sentences for certain repeat offenders. As one student of initiatives has observed:

> Those accused and convicted of crimes, especially violent crimes, are a highly unpopular minority group. In recent decades, large segments of the public have viewed legislatures and courts as being too soft on criminals. Thus, conditions have been ripe for initiatives that restrict the rights of the accused and increase the penalties for those convicted. When "tough-on-crime" measures appear on the ballot, they almost always win, and often by large margins.

Kenneth P. Miller, *Courts as Watchdogs of the Washington State Initiative Process*, 24 SEATTLE U. L. REV. 1053, 1068 (2001).

[59] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 69 (2001).

to profess mistrust of government."[60] Gary Wills, in his recent history of Americans' long-standing distrust of government, argues that Americans have always tended toward a conception of government as appropriately "provincial, amateur, authentic, spontaneous, candid, homogeneous, traditional, popular, organic, rights-oriented, religious, voluntary, participatory, and rotational" as opposed to "cosmopolitan, expert, authoritative, efficient, confidential, articulated in its parts, progressive, elite, mechanical, duties-oriented, secular, regulatory, and delegative."[61] This political culture creates a strong tendency to defer to clear majority sentiment, not merely as a matter of political expediency, but also as a reflection of the role-conception of elected officials.

If one accepts Wills' two lists of opposing values in government, the second more accurately depicts the political culture of most other Western democracies. Unlike the United States, most European countries have a culture of political elitism and careerism, whereby political leaders are produced in large part through education and graduated ascension through professional bureaucracies. The United States simply has no equivalent to France's Ecole Nationale d'Administration (ENA) or Britain's civil service. These institutions both reflect and reinforce a political culture in which political leaders are viewed and view themselves as educated elites who have a duty to make decisions in light of their expertise and thus, more often than in the United States, to lead the public rather than to follow it. In such cultures it is imaginable for a Minister of Justice to respond to polling revealing substantial popular support for the death penalty with the comment, "They don't really want the death penalty; they are objecting to the increasing violence."[62] This anecdote captures a conception of political responsibility that permits, indeed requires, the mediating of popular desires through expertise to a degree that would result in suspicion if not outrage in the United States.

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[60] SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 23 (1996) (quoting Mary Ann Glendon, *Rights in Twentieth Century Constitutions*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 521 (Geoffrey R. Stone et al. eds., 1992)).

[61] GARY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 17-18 (1999).

[62] Marshall, *supra* note 56, at 15 (quoting the Swedish Minister of Justice in response to a 1997 poll showing that forty-nine percent of Swedes wanted the death penalty reinstated).

The foregoing is not meant to celebrate the United States as "authentically" democratic in comparison to European bureaucratic elitism; nor, on the other hand, is it meant to exalt European abolition of capital punishment as progressive and "civilized" in comparison to American retention as crude and atavistic. Wills himself denies that either list of contrasting political values is clearly superior or even that they are mutually exclusive; "Ideally," he says, "government should combine all these values in a tempered way, since the one set does not necessarily preclude the other."[63] Rather, to Wills, the two clusters of values reflect poles on a continuum that have historically been *perceived* to be in tension.[64] Although Wills uses these two poles to reflect competing sets of political values within the United States throughout its history, I suggest that his contrasting poles in fact correspond rather well to contrasting current political realities in the United States and the rest of the West, which in turn, make it correspondingly easier or harder for public opinion to translate directly into policy.

While the most common argument from populism is the one I have sketched above—that populist political structures and political culture in the United States allow popular support for capital punishment to translate more directly into public policy than it can in Europe—there is an alternative argument from populism that treats America's populist political culture more as a *motivation* for retaining capital punishment than as a *mechanism* by which retention occurs. This alternative argument proposes that the inherent fragility and insecurity of the more populist versions of democracy create a demand for compelling symbols of strength and sovereignty, of which the death penalty is a potent example. Austin Sarat has made the best case for this claim:

> It may be that our attachment to state killing is paradoxically a result of our deep attachment to popular sovereignty. Where sovereignty is most fragile, as it always is where its locus is in "the People," dramatic symbols of its presence, like capital punishment, may be most important. The maintenance of capital punishment is, one might argue, essential to the demonstration that sovereignty could reside in the people. If the sovereignty of the people is to be genuine, it has to mimic the sovereign power and prerogatives of the monarchical forms it displaced and about whose sovereignty there could be few

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63 WILLS, *supra* note 61, at 18.

64 *Id.*

doubts.[65]

This argument is a modern echo of one of the founding mythologizers of American populist democracy, Thomas Paine, who wrote in 1776 that,

> in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law *ought* to be King [and ceremoniously crowned as such]; . . . but lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.[66]

There is no more vivid way for the law to be ceremoniously crowned as king than by the use of capital punishment duly authorized and channeled through the legal system.

Unlike the more familiar argument from populism, this latter argument has a harder time establishing that American populist democracy is exceptional, as compared to other Western democracies, in its need for dramatic enactments of popular sovereignty. After all, the entire rest of the Western democratic world also moved, some nations quite dramatically, from monarchical to democratic systems of government. What reasons are there for believing that their democratic structures are any more fragile or insecure than our own? Why would their democracies—all of them newer than our own—not crave the same sort of enactments of popular sovereignty in imitation of former monarchical prerogatives? The basis for American exceptionalism here is harder to clearly identify than it is in the context of political institutions and culture.

5. Criminal Justice Populism: The argument for the "populism" theory of American exceptionalism with regard to capital punishment gains strength when one recognizes that it is not merely that politics is more populist in the United States, but also that criminal justice is thought to be a particularly appropriate subject for populist influence and control within the political arena. One of the most clearly "exceptional" aspects of the structure of American government is the much greater degree of

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[65] Austin Sarat, *The Law and Politics Book Review*, Mar. 1998, at 114-16 (reviewing AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION (James Acker et al. eds., 1998)).

[66] THOMAS PAINE, COMMON SENSE (1776), *reprinted in* THOMAS PAINE: RIGHTS OF MAN, COMMON SENSE, AND OTHER POLITICAL WRITINGS 34 (Mark Philip ed., Oxford Univ. Press 1995).

both lay participation in the criminal justice system and direct political accountability of institutional actors within the criminal justice system. While many other countries use lay fact-finders to a certain extent in criminal trials, no other country authorizes such a large role for criminal trial juries as does the United States.[67] Moreover, the extensive use of lay grand juries in the charging process in the United States is even more truly anomalous.[68] Equally anomalous is the fact that the vast majority of American prosecutors are elected rather than appointed.[69] Judges, too, are directly elected or otherwise politically accountable in a large number of states.[70] This current state of affairs is the result of a uniquely American turn during the nineteenth century toward increasing and entrenching democratic control over state and local governments through state constitutionalism.[71]

These clearly "exceptional" institutional arrangements, like populism in electoral politics, provide a mechanism through which popular support for the use of capital punishment can influence institutional decision-making. In this context, however, the influence is not on legislative decision-making but rather on prosecutorial charging decisions, judicial conducting of criminal trials, and lay rendering of verdicts and sentences—especially in highly publicized capital, or potentially capital, cases. Elected officials who campaigned on a death penalty platform, or re-elected officials who were vigorous advocates for the use of available capital sanctions while in office, no doubt perceive a man-

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[67] *See* CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley ed., 1999).

[68] *Id.*

[69] While federal prosecutors are appointed by the President, over ninety-five percent of county and municipal prosecutors are selected by popular election. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996).

[70] Twenty-three states have popular elections for nearly all levels of the state judiciary, while an additional ten states combine a system of popular election with executive or legislative appointment of judges. 33 COUNCIL OF STATE GOVERN-MENTS, BOOK OF THE STATES, 2000/2001, at 137-39 (2002).

[71] The rise of Jacksonian democracy in the 1820s provided an impetus toward extending the franchise and providing for the popular election of many state and local officials, including judges, prosecutors, and sheriffs. To a large extent, these movements toward republicanism were accomplished by state constitution drafting or revision. *See* Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, *in* ENCYCLOPEDIA OF CRIME AND JUSTICE 1242, 1243 (Joshua Dressler et al. eds., 2d ed. 2002); G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729, 736-37.

date to use the death penalty in a way that European judges and prosecutors, more isolated products of an elite bureaucracy, could not possibly. There is thus something of a "feed-back" loop between voters and elected officials that tends to reinforce and intensify tendencies toward the use of capital punishment. This loop helps to explain some of the extreme intra-state variation noted above[72] in the use of the death penalty: some of the most "active" counties have been those with a District Attorney highly and vocally committed to the use of capital punishment, such as Johnny Holmes, Jr., in Houston, known as "the Texas Terminator,"[73] and Lynne Abraham in Philadelphia, dubbed "the deadliest D.A."[74]

While the "criminal justice populism" theory offers a plausible account for the role of populism in producing capital charges, verdicts, sentences, and executions, it has less direct relevance to the issue of abolition or retention per se. The election of many state court judges does help to explain why judicial abolition, in the rare instances in which it has been attempted, as it was briefly in federal court and with more lasting influence in the state of Massachusetts, has occurred in jurisdictions where judges are appointed and thus buffered from political influence.[75] But the relevance of criminal justice populism to legislative abolition—where almost all the action has been in the rest of the Western world—is less clear. Perhaps one could argue that the greater use of existing capital statutes in states with greater criminal justice populism makes abolition that much more unthinkable; but one could also argue that greater use of capital punishment is more likely to produce either controversial cases, like the recent capital prosecution of Andrea Yates in Texas,[76] or serious legal

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[72] *See supra* pp. 105-06.

[73] James Langton, *The Texas Terminator Keeps Death Row Busy*, LONDON SUNDAY TEL., July 18, 1999, at 29.

[74] Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, July 16, 1995 (Magazine), at 21.

[75] *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (invalidating the capital statutes of virtually every American jurisdiction under the Eighth Amendment); Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984) (striking down new death penalty legislation under the Massachusetts Declaration of Rights, even after the passage of a state constitutional amendment authorizing capital punishment); D.A. for the Suffolk Dist. v. Watson, 411 N.E.2d 1274 (Mass. 1980) (striking down new death penalty legislation under Massachusetts Declaration of Rights); Commonwealth v. O'Neal, 339 N.E.2d 676 (Mass. 1975) (striking down Massachusetts death penalty under the Massachusetts Declaration of Rights).

[76] *See* Paul Duggan, *NOW Rallies to Mother's Defense: Group Says Woman*

error that might undermine confidence in the system of capital justice.[77] However, if declining use of the death penalty or de facto abolition (defined as ten years without an execution) or outright moratorium is a necessary step on the road to abolition, as the experience of many European countries might suggest,[78] then American criminal justice populism may indeed present a serious impediment to American abolition.

6. Federalism: Another "exceptional" feature of American political organization is American federalism. A number of other Western democracies, such as Germany, Switzerland, and Canada, are structured on a federal model, with discrete governmental units allocated some autonomous spheres of authority within the larger federal nation-state. However, the United States is the only country that gives full criminal law-making power to individual federal units. This grant cannot be superseded by Congress, as the federal constitution is structured to ensure state dominance over criminal law.[79] As a result, criminal law-making and law enforcement are understood and experienced in the United States as primarily a state and local concern, with federal law-making and enforcement as a limited, specialized adjunct.[80] This arrangement, unique in Western democracies, necessarily permits local or regional enthusiasts to keep the death penalty going within the United States, even when attitudes and trends are moving in the opposite direction in other parts of the country. Nationwide abolition can thus be achieved, as a legislative matter, only by convincing the legislatures of fifty different states and the federal legislature as well.

Needs Help, Not Prison, in Drowning of 5 Children, WASH. POST, Sept. 3, 2001, at A3.

[77] *See* JAMES S. LIEBMAN ET AL., *supra* note 28, at 164-66 (greater use of the death penalty is correlated with higher error rates).

[78] *See* Amnesty Int'l, The Death Penalty Around the World, Abolitionist and Retentionist Countries (Mar. 2002), *at* http://www.amnesty-usa.org/abolish/world.html (revealing the existence of a significant time lag between the last recorded execution and the date of *de jure* abolition in the vast majority of abolitionist countries).

[79] *See* Sara Sun Beale, *Federal Criminal Jurisdiction*, ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 71, at 775 ("General police powers and the bulk of criminal jurisdiction were not granted to the federal government, and accordingly were uniformly recognized to be reserved to the states.").

[80] *See* Daniel C. Richman, *Federal Criminal Law Enforcement*, *in* ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 71, at 779 (noting that what is most surprising about the federal enforcement apparatus is its small size, at least when compared to the network of state and local enforcement agencies, which have primary responsibility for patrolling the streets and pursue most of the crimes that happen on or off them).

Coordination is the most obvious challenge for a successful nationwide abolitionist movement in such a system. This coordination problem is exacerbated by the radical decentralization of criminal law enforcement authority with states. Local district attorneys control the use of the death penalty on a county-wide basis; thus, even achieving state-wide abolition is difficult without the cooperation and support of local law enforcement officials whose individual political views and agendas must be accommodated. In addition to the problems of coordination posed by federalism and localism, the continued existence and use of the death penalty in some states (and in some counties within states) makes it more difficult to urge abolition in the larger context and even promotes the attempts of proponents to urge reinstatement in abolitionist jurisdictions. State and local political actors with national political aspirations have reasons to oppose abolition (or even to actively promote capital punishment) in their own bailiwicks if their political fortunes depend on other jurisdictions in which support for the death penalty is strong.

7. Southern Exceptionalism: The natural and intended consequence of American federalism is substantial state and regional variation, which is clearly observable in the context of capital punishment. The vast majority of executions within the United States, at least in the "modern era" of capital punishment since *Furman v. Georgia*, have been carried out by a handful of states located in the American South and Southwest.[81] Hence one theory of American exceptionalism regarding capital punishment is the thesis that the country as a whole is not exceptional; rather the South (if one expands the concept to include the Southwestern border states) is exceptional within America. This theory, of course, then requires an account of what makes the South exceptional, if it is to provide an explanation for American exceptionalism. Such an account could and should receive more attention than I can offer here,[82] but I will provide a brief sketch of four interrelated theories of American Southern exceptionalism.

First, perhaps the most obvious aspect of Southern exceptionalism is race. The American South has a distinctive legacy of racial inequality stemming from the wide-spread practice of chattel

[81] *See* Death Penalty Info. Ctr., *supra* note 24.

[82] *See, e.g.*, Jordan M. Steiker, *The Empty Death Chamber: The Death Penalty as Symbol Versus Practice in Retentionist Jurisdictions in the United States*, (forthcoming 2003) (manuscript on file with the author) (offering a detailed account of Southern exceptionalism with regard to capital punishment).

slavery and continues to have disproportionately large (though still minority) black populations. From colonial times, the capital punishment policies of the American South were deeply marked by the institution of slavery. The eighteenth century saw the widespread enactment of capital crimes targeted solely at crimes by slaves.[83] In the first half of the nineteenth century, the abolitionist movement of the Northeast and Midwest had no Southern analog, in part because of its connection to the movement to abolish slavery[84] and in part because slaveowners perceived capital punishment to be a necessary deterrent to serious crimes by slaves.[85] As a result, reports historian Stuart Banner, "By the time of the Civil War . . . [s]lavery had produced a wide cultural gap between the northern and southern states in attitudes toward capital punishment."[86] This cultural gap did not close with the abolition of slavery after the Civil War; rather, what followed was a long era of lynchings in which mob executions of black men were common[87] and an even longer era of "legal lynchings" in the South—"execution[s] sanctioned by the forms of judicial process absent the substance of judicial fairness."[88] This long-standing and close association of capital punishment with the formal and informal social control of blacks in the South may contribute to Southern unwillingness to part with the death penalty, particularly in an era, as noted above, in which the death penalty plays such a strong symbolic role in the politics of crime control.[89] Indeed, recent empirical studies show that racial prejudice is significantly linked both to support for the death penalty and for tougher crime control policies,[90] *and* that such prejudice remains

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[83] *See* BANNER, *supra* note 8, at 8.

Most of these race-dependent capital crimes, unsurprisingly, were created in the southern colonies. Slaves made up more than half the population of South Carolina by 1720 and nearly half that of Virginia by 1750. To manage these captive workforces the southern colonies resorted to ever-increasing lists of capital statutes.

[84] *Id.*

Id. at 142-43.

[85] *Id.* at 142.

[86] *Id.* at 143.

[87] *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 41-47 (1997) (describing and documenting the lynching of black victims in the post-Civil War era, the vast majority of which occurred in the South).

[88] *Id.* at 88.

[89] *See supra* pp. 123-26.

[90] *See* Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. RES. CRIME & DELINQ. 202 (1994) (reporting empirical study in which two indexes of facial prejudice were significantly linked to greater support for the death penalty among whites, even after controlling for relevant dem-

stronger among native white southerners than among whites who were born and live elsewhere.[91]

A different facet of American Southern exceptionalism is the South's distinctive embrace of Protestant fundamentalism. Indeed, the term "the death belt" is a play on "the Bible belt," with both terms designating the American South. Numerous sociological studies find a correlation between Southern fundamentalism and support for the death penalty.[92] How exactly the dynamic works connecting Southern fundamentalism and attitudes about capital punishment is an interesting and unsettled question, about which sociologists and theologians will continue to debate. Nonetheless, whether it is fundamentalist doctrine or leadership or something else that forges the connection, it is hard to gainsay that Southern fundamentalist Protestantism plays some role in generating or reinforcing support for capital punishment in the South.

Third, there is substantial support for the view that the American South has a distinctive sub-culture of violence, whether it is measured in homicide rates,[93] gun ownership rates,[94] or attitudes

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ographic and attitudinal variables); Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 SOC. PSYCHOL. Q. 67 (1991) (empirical analysis finding that racial prejudice significantly predicts both support for the death penalty and tougher crime control policies).

91 *See* Christopher G. Ellison, *Southern Culture and Firearms Ownership*, 72 SOC. SCI. Q. 267 (1991) (reporting a significant relationship between racial antipathy and firearms ownership among native Southerners).

92 *See, e.g.*, Marian J. Borg, *The Southern Subculture of Punitiveness? Regional Variation in Support for Capital Punishment*, 34 J. RES. CRIME & DELINQ. 25 (1997) (reporting empirical study showing that fundamentalist church membership is significantly related to southerners' attitudes toward capital punishment); Chester L. Britt, *Race, Religion, and Support for the Death Penalty: A Research Note*, 15 JUST. Q. 175 (1998) (reporting empirical study in which white fundamentalists showed higher levels of support for the death penalty than either black fundamentalists or white and black nonfundamentalists); Harold G. Grasmick & John K. Cochran, *Religion, Punitive Justice, and Support for the Death Penalty*, 10 JUST. Q. 289 (1993) (reporting empirical study finding that evangelical/fundamentalist Protestantism was correlated with punitiveness in criminal justice policy, including the death penalty for both adults and juveniles); Harold G. Grasmick et al., *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, 30 CRIMINOLOGY 21 (1992) (reporting empirical study in which individuals affiliated with fundamentalist Protestant denominations were reported to have the highest punitiveness and biblical literalism measures, of which only the latter was correlated with greater death penalty support).

93 *Supra* pp. 102-07.

94 *See* James D. Wright & Linda L. Marston, *The Ownership of the Means of Destruction: Weapons in the United States* 23 SOC. PROBS. 93 (1975).

toward defensive and retaliatory interpersonal violence.[95] The roots of the greater violence in the South are hypothesized to stem from a Southern "honor culture" in which dueling, among other forms of interpersonal violence, was more of an accepted practice than elsewhere.[96] The connection between the relatively more violent Southern culture and the use of capital punishment is speculative, but the Southern emphasis on defensive and retaliatory violence on the interpersonal level has some obvious connection to support for capital punishment, and it would not be surprising more generally, if a more violent culture made more violent penalties seem both more necessary and less shocking.

Fourth and finally, the American South is exceptional in the strength and depth of its resistance to the civil rights movement of the 1950s and 1960s, to which the movement for the abolition of capital punishment has had strong connections. In the 1960s, death penalty abolition was promoted by the very same institutional actors who had promoted the end of racial segregation in the South, and through the very same means—federal constitutional imposition through litigation. It was the N.A.A.C.P. Legal Defense and Education Fund that litigated both the major desegregation cases and the death penalty cases. Some part of Southern enthusiasm for capital punishment in the modern, post-*Furman* era may well be a reaction to this connection and to the attempt of the federal government to impose "national" values on Southern culture.

It is a fair question whether any or all of these aspects of Southern exceptionalism fully account for the disproportionate use of the death penalty in the American South. But the biggest qualification of the "Southern exceptionalism" thesis for American exceptionalism with regard to capital punishment comes from the recognition, more fully fleshed out by Jordan Steiker,[97] that states outside of the South still make significant use of their capital statutes in the production of death sentences, even though their execution rates are far lower than those of the South. While the South may dominate the country in executions, that is

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[95] *See* Christopher G. Ellison, *An Eye for an Eye? A Note on the Southern Subculture of Violence Thesis*, 69 SOC. FORCES 1223 (1991) (finding that older Southerners express strong normative support for defensive and retaliatory interpersonal violence).

[96] *See generally* RICHARD E. NISBETT & DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH (1996).

[97] *See* Jordan Steiker, *supra* note 82.

not the only measure of "use" of capital punishment. The United States cannot explain away its national exceptionalism as wholly a product of regionalism.

8. European Exceptionalism: This theory turns the tables and asks whether there is something distinctive about European politics, culture, or history that would lead to wholesale abolition of the death penalty in the space of only a few short decades. A version of this theory has already been explored above as a contrast to American political populism: bureaucratic elitism in European politics has allowed European political leaders to abolish the death penalty despite substantial popular support for capital punishment at the time of abolition. But this theory does not explain what has lead European political leaders to conclude that the death penalty must be abandoned at this precise point in time.

The answer to this question may lie in Europe's distinctive historical experiences during the twentieth century. Europeans and others who have recently and vividly experienced terrible abuses of state power may see more reason to remove the death penalty from the state's arsenal of sanctions. Within the last century, Europe experienced two horrific World Wars fought on its soil and witnessed the bloody rules of Mussolini, Hitler, and Stalin. These experiences may have helped to create a climate in which dramatic demonstrations of state-approved violence are disfavored. Moreover, Europe has suffered numerous violent ethnic conflicts throughout the last century, and it may fear that the use of the death penalty could play a role in exacerbating such conflicts. Thus, it is not surprising that fears of Irishmen being wrongly convicted and executed for terrorism have changed the minds of some British supporters of capital punishment[98] or that capital punishment is not on the table as an available sanction for the Bosnian War Crimes Tribunal. It is worth noting, too, that while methods of execution have been sanitized in the United States, at the time abolition in Britain and France, the sole mode of execution was the gallows and the guillotine, respectively, each of which carry some significant historical baggage. With associations to the hanging fairs at Tyburn and the bloody Terror during

[98] *See* Hood, *supra* note 40, at 526 (noting that "the revelation of several miscarriages of justice in cases where the persons—mostly Irish convicted of terrorist murder—would have been executed has convinced many former advocates that a return to capital punishment could not be safely administered").

the French Revolution, the gallows and the guillotine themselves embodied reasons for British and French political leaders to distance themselves from capital punishment.

The World Wars and ethnic conflicts in Europe no doubt contributed to Europe's far greater willingness than that of the United States to generate and support international norms, especially those related to human rights. The casting of abolition of the death penalty as an issue of international human rights (as opposed to a prerogative of purely domestic concern) has been well documented;[99] the most dramatic and powerful example of this trend is Protocol No. 6 to the European Convention on Human Rights, abolishing the use of the death penalty in peacetime, which was adopted in 1983—many years ahead of the corresponding provisions adopted by the United Nations or inter-American human rights law.[100] Membership in the Council of Europe, which is required for admission to the European Union, now requires adherence to Protocol No. 6, a requirement that ensures both that Eastern Europe will follow the abolitionist trend begun in the West and that there will be no backsliding on the issue of capital punishment in already abolitionist states. In contrast, the United States has managed to maintain some version of isolationism throughout much of the same twentieth century, and a version of such "anti-internationalism" still runs fairly deep today, in what one commentator calls "the new sovereigntist" vision, which holds that "the United States can pick and choose the international conventions and laws that serve its purpose and reject those that do not."[101] One aspect of international law which the United States has steadfastly rejected is the abolition of capital punishment for adults or even for juveniles.

9. American Cultural Exceptionalism: This theory is in some ways the inverse of the "European exceptionalism" thesis and in some ways an extension of the "Southern exceptionalism" thesis. Admittedly more popular in Europe than in the United States, this theory posits that the United States (rather than merely the American South) has a "sub-culture of violence" in the larger Western culture. Perhaps because of its relatively recent experience as a "frontier" society, the theory holds, America is simply

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[99] *See* SCHABAS, *supra* note 14.

[100] *Id.* at 219-20.

[101] Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.-Dec. 2000, at 9.

more violent and crude than the rest of the Western industrialized world. Proponents of this theory note that America is also an outlier on the issue of gun control, regulating firearms to a much lesser degree than our Western counterparts, and that American popular culture glorifies violence, usually by gun-toting macho men. From G.I. Joe, to cop shows on T.V., to the American Western film, American popular culture celebrates violence by soldiers, law enforcers, and righteous men outside the law—promoting exactly the values one might expect to lead to an embrace of capital punishment. Even American intellectual elites occasionally seem to enjoy sending up American society in this way. When French Minister of Justice Robert Badinter visited the United States in 1983, fresh from leading the successful abolitionist charge in France, the Washington Post ran an op-ed reporting, almost gleefully, Badinter's comment that on the day the death penalty was abolished in France, he received a telegram from a Texas millionaire who wanted to buy an outlawed guillotine for his game room.[102]

It is hard to prove or disprove this theory, but there are a number of reasons to be at least somewhat skeptical of it. One reason is that public opinion polls, discussed above,[103] show that Europeans, too, support capital punishment in substantial numbers, despite any "cultural" differences that might exist. Another is that Europeans are huge consumers of exactly the media products that are noted as support for the "American violence" thesis; indeed, as many or more of the top-grossing films in Europe, as compared to the United States, are American films that are R-rated for violence.[104] A third is that there is surprisingly little empirical support for a strong, generalized connection between media violence and violent attitudes or behavior, despite many attempts to forge such a link. And a fourth is that the higher homicide rates in the United States are partly, though not completely, a result of laxer gun control laws and thus not as strong an independent indicator of violence as the foregoing might suggest. These qualifications are not meant to refute the claim that the United States might have more "violent" a culture than the rest of the West, or that this violence might play a role in the

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[102] Colman McCarthy, *Messenger of Life*, WASH. POST, Feb. 12, 1983, at A15.

[103] *See supra* pp. 107-11.

[104] *See* Movie Ratings—Box Office Charts, *at* http://charts.boom.ru/eng/ MOVIES/index.htm (last visited June 12, 2002).

retention of capital punishment in the United States, but rather to suggest that such a claim is a good deal hazier and more conjectural than is often acknowledged.

10. Historical Contingency: This last theory is like the proverbial thirteenth chime of the clock that casts doubt on all that has come before. Perhaps because it fits so poorly with all the other theories, it has been surprisingly neglected. The "historical contingency" thesis holds that the failure of the United States to abolish the death penalty was something of an historical accident—a near miss, if you will. The U.S. Supreme Court *did*, in fact, abolish capital punishment in 1972 with its decision in *Furman v. Georgia*. Many believed at the time that the abolition was permanent. If it had turned out to be so, there would be no question of American exceptionalism with regard to capital punishment today: our abolition would have fit perfectly with that of the rest of the industrialized West. If the Supreme Court had managed to speak more clearly, emphatically, and unanimously on the issue in the original *Furman* decision, or if the Court's membership had changed differently between 1972 and 1976, abolition might well have been permanent. But the Court's legitimacy was weakened by its decisions promoting integration, regulating the police, and legalizing abortion, and by 1976, it was willing to retrench on the issue of capital punishment in response to the outpouring of rage that *Furman* had generated.

Significantly, the Court chose constitutional regulation of capital punishment rather than abolition as its mode of retrenchment. As I have argued at greater length elsewhere, this choice helped to legitimize and stabilize the practice of capital punishment in the United States.[105] Moreover, the Court's validation of the continuing use of the death penalty as a matter of constitutional law also created an impediment to American acceptance of capital punishment as a violation of international human rights law, so prevalent in Europe and elsewhere. It is hard for American political leaders to articulate, or for members of the American public to accept, that our much vaunted constitution could validate something that constituted a violation of international human rights.

The "historical contingency" thesis proposes that the U.S. Su-

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[105] *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 426-38 (1995).

preme Court is the institution most similarly situated to the abolitionist legislatures that led the rest of the Western industrialized world to abolition. Only the Court had the power to effect change throughout the United States; only the Court was sufficiently insulated from political will that it could lead rather than follow public opinion. In the aftermath of the Court's failure, the hope for abolition turned to individual state legislatures, with all of the forces noted above arrayed against abolition. In addition, the Court's hope that it could regulate and reform the death penalty through the constitution ironically added to those forces both by promising to ensure the fairness of the capital process (without actually delivering on this promise) and by rendering less powerful international claims that the death penalty violated fundamental and universal norms.

CONCLUSION

A quick perusal of this essay, simply by the sheer number of headings and theories, conveys a sense that powerful forces, unique to the United States, have compelled the result that we see today—anomalous American retention of capital punishment in the Western industrialized world. In fact, a careful reading should promote a much more nuanced view. Some of the most popular and easy theories of American exceptionalism with regard to capital punishment have less to recommend them than meets the eye, and a sobering recognition of the many contingencies that have attended America's recent "death penalty story" (and all of history) should temper a bleak acceptance of historical "fate."