

OHIO STATE LAW JOURNAL

Volume 63, Number 1, 2002

Foreword: Addressing Capital Punishment Through Statutory Reform

DOUGLAS A. BERMAN*

The Symposium at The Michael E. Moritz College of Law at The Ohio State University on “Addressing Capital Punishment Through Statutory Reform” and this issue of the *Ohio State Law Journal* represent, to my knowledge, the first time scholars and practitioners have come together to examine the death penalty specifically through the lens of statutory reform. This fact is as surprising as it is eventful, because America’s history with the death penalty has been a story primarily about, and directed by, legislative developments.

I. THE CENTRALITY OF STATUTORY DEVELOPMENTS

State legislatures principally have been responsible for the acceptance and evolution (and even sometimes the abandonment) of capital punishment in the American criminal justice system from the colonial and founding eras, through the nineteenth and twentieth centuries, and now into the twenty-first century. A number of colonial legislative enactments, though influenced by England’s embrace of the punishment of death, uniquely defined and often significantly confined which crimes were to be subject to capital punishment.¹ State legislatures further narrowed the reach of the death penalty through the early nineteenth century as states, prodded often by vocal abolitionists and led by developments in Pennsylvania, divided the offense of murder into degrees and provided that only the most aggravated murderers would be subject to the punishment of death.² The late nineteenth and early twentieth

* Associate Professor, The Moritz College of Law at The Ohio State University. I am thankful for the support of the entire community of The Moritz College of Law at The Ohio State University and for the help of individuals and groups too numerous to mention in the development and presentation of this Symposium. I am particularly grateful for the extraordinary work of Amy Ita, the *Journal*’s student Symposium Editor, without whose efforts this event and this article would not have been possible.

¹ See HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 6–7 (3d ed. 1982); *CASES AND MATERIALS ON THE DEATH PENALTY* 21 (Nina Rivkind & Steven F. Shatz eds., 2001); see also Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 155–56 (2000) (noting varying colonial attitudes and approaches to capital punishment).

² See BEDAU, *supra* note 1, at 4–5; see also Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949) (discussing Pennsylvania’s

centuries also saw states, as the product of legislative enactments, move away from mandating death as the punishment for certain crimes by giving juries discretion to choose which defendants would be sentenced to die.³ Throughout all these periods, statutory enactments have also played a fundamental role in the evolution of where and how executions are carried out.⁴

Of course, the hallmark of the modern death penalty era has been the considerable involvement of courts in the regulation of capital punishment, inaugurated by the U.S. Supreme Court's 1972 landmark ruling in *Furman v. Georgia*,⁵ which invalidated all the capital punishment schemes then in place in the states.⁶ However, even through this modern era, legislatures and their statutory choices have remained a principal and central determinant of the capital punishment landscape.

The Supreme Court itself recognized and legitimized the centrality of legislative

decision to create degrees of murder); LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865, 50–89 (1989).

³ See BEDAU, *supra* note 1, at 9–11; John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 148–54 (1986); see also *McGautha v. California*, 402 U.S. 183, 198–200 (1971) (recounting history of American laws allowing jury discretion in ascribing punishment of death). As Professor Rory Little has noted, the development of the federal death penalty throughout the nineteenth and twentieth centuries was likewise shaped by legislative enactments, although historically “Congress has acted not as a leader, but rather as a follower of well-established state law trends.” Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347, 360–63 (1999).

⁴ See BEDAU, *supra* note 1, at 12–18 (discussing both the cessation of public executions and the development of seemingly more human execution methods); see also Deborah W. Denno, *Adieu to Electrocution*, 26 OHIO N. U. L. REV. 665, 674–76 & app. tbls. 2–3 (2000) (detailing state-by-state changes in execution methods).

⁵ 408 U.S. 238 (1972).

⁶ In *Furman*, a deeply-divided Supreme Court voted 5 to 4, with every Justice writing separately, that capital punishment schemes which gave juries complete and unguided discretion in the imposition of death sentences violated the Eighth Amendment’s prohibition of cruel and unusual punishments. See *id.* A complete list of subsequent Supreme Court cases regulating the administration of capital punishment would include more than one hundred decisions. The most significant precedents following *Furman*’s invalidation of a totally discretionary process for capital sentencing include: *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding one method of guiding jury discretion when imposing the death penalty); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down mandatory death penalty scheme); *Lockett v. Ohio*, 438 U.S. 586 (1978) (requiring the admission of certain mitigating evidence in capital sentencing proceeding); *Beck v. Alabama*, 447 U.S. 625 (1980) (requiring certain lesser-included offense instructions to be given during capital trials); and *Penry v. Lynaugh*, 492 U.S. 302 (1989) (requiring jury instructions sufficient to ensure capital sentencers can give effect to mitigating evidence). See generally CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS (Randall Coyne & Lyn Entzerth eds., 1994) (collecting selections from major Supreme Court cases regulating administration of capital punishment); CASES AND MATERIALS ON THE DEATH PENALTY, *supra* note 1 (same).

judgments in *Gregg v. Georgia*,⁷ wherein the Court relied heavily on the fact that so many state legislatures had re-enacted capital statutes following *Furman* to conclude that the death penalty does not transgress “evolving standards of decency” said to be the touchstone of the Eighth Amendment’s prohibition on cruel and unusual punishments.⁸ And the Supreme Court has subsequently reinforced the significance of legislative action by repeatedly asserting that state statutes are to be the first, and most important, consideration when gauging the “standards of decency,” which are determinative of a punishment’s constitutionality.⁹

In this context, it is especially telling that the Supreme Court recently decided to accept certiorari in a case challenging the constitutionality of executing persons with mental retardation.¹⁰ The Court’s decision to reconsider this issue, despite having previously held in *Penry v. Lynaugh*¹¹ that defendants with mental retardation could be lawfully executed, appears to be the direct result of the fact that fifteen state legislatures have decided to prohibit the execution of mentally retarded defendants since the *Penry* ruling.¹²

The Supreme Court’s decision to reconsider the constitutionality of executing persons with mental retardation is only one of many recent events that has brought renewed attention to capital punishment and only one of many signs that we are in the midst of a pivotal new period in the modern American story of the death penalty. Fueled by media reports and academic research about various problems with the

⁷ 428 U.S. 153 (1976).

⁸ See *id.* at 179–81.

⁹ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) (“[F]irst among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society’s elected representatives.”) (internal quotations omitted); *Penry v. Lynaugh*, 492 U.S. 302, 332–35 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988); *Tison v. Arizona*, 481 U.S. 137, 154 (1987); *Enmund v. Florida*, 458 U.S. 782, 792–93 (1982); *Coker v. Georgia*, 433 U.S. 584, 594 (1977); see also Earl Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 100–03 (1997) (discussing the Supreme Court’s reliance on state statutes in developing its Eighth Amendment jurisprudence).

¹⁰ See *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999), *cert. granted sub. nom.* *Atkins v. Virginia*, 70 U.S.L.W. 3232 (U.S. Sept. 25, 2001) (No. 00-8452), *cert. grant amended* 70 U.S.L.W. 3233. The same day that the Supreme Court granted certiorari in *Atkins*, the Court dismissed as improvidently granted the certiorari writ in *McCarver v. North Carolina*, another case that concerned the constitutionality of executing mentally retarded defendants. This dismissal followed a decision by North Carolina’s legislature to pass a new statute that categorically banned the execution of persons with mental retardation. See Frank Green, *Va. Case to Serve as Test for Court*, RICHMOND TIMES-DISPATCH, Sept. 26, 2001, at A1 (discussing grant of certiorari in *Atkins* and dismissal of *McCarver*); Stan Swofford, *Justices Avoid N.C. Execution Case*, GREENSBORO NEWS & REC., Sept. 26, 2001, at B1 (discussing dismissal of *McCarver* appeal).

¹¹ 492 U.S. 302 (1989).

¹² See, e.g., Raymond Bonner, *North Carolina to Bar Executing the Retarded*, N.Y. TIMES, Aug. 4, 2001, at A10; see also Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911 (2001) (discussing these legislative developments).

administration of the death penalty throughout the United States, elected politicians and the general public over the past few years have been closely scrutinizing and significantly questioning our criminal justice system's embrace of this ultimate punishment.¹³

One clear and dramatic recent turning point in the public and political dialogue about the death penalty was Illinois Governor George Ryan's bold decision in January 2000 to impose a moratorium on executions in his state following the exoneration of thirteen innocent persons wrongly convicted and sent to Illinois' death row.¹⁴ Though Governor Ryan's imposition of a moratorium in Illinois is an executive action, the roots of his decision—and a primary catalyst for new public and political awareness about problems in the administration of capital punishment—actually lies in earlier legislative action. In 1996, Congress withdrew funding for Post-Conviction Defender Organizations¹⁵ and also greatly restricted prisoners' access to federal courts through the Antiterrorism and Effective Death Penalty Act (AEDPA).¹⁶ This legislation helped set the stage for a significant increase in the number of executions over the last five years¹⁷ and also diminished the opportunity for the most questionable capital convictions and sentences to be examined and remedied through

¹³ See Timothy V. Kaufman-Osborn, *Regulating Death: Capital Punishment and the Late Liberal State*, 111 YALE L.J. 681, 682 (2001) (noting that “the question of capital punishment is disputed today in a way that it has not been since the 1970s”); Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millenium*, 100 MICH. L. REV. (forthcoming 2002) (manuscript at 1, on file with author) (“Not since 1972, when the Supreme Court invalidated the death penalty as then applied, has there been such palpable concern over its use”); Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 734–43 (2001) (reviewing the evidence and growing awareness of the numerous problems infecting the administration of capital punishment in the United States); see also Thomas Healy, *Death Penalty Support Drops as Debate Shifts*, BALT. SUN, July 25, 2001, at 1A (discussing renewed public and political attention to the death penalty).

¹⁴ See Joseph L. Hoffman, *Violence and the Truth*, 76 IND. L.J. 939, 944 (2001) (discussing developments in Illinois as sending “a shockwave that continues to reverberate across the country (and around the world)”; William Claiborne & Paul Duggan, *Spotlight on Death Penalty: Illinois Ban Ignites a National Debate*, WASH. POST, June 18, 2000, at A1 (discussing impact of Ryan's moratorium decision on public opinion and political debates concerning capital punishment); see also Governor's Commission on Capital Punishment, at <http://www.idoc.state.il.us/ccp/index.html> (2000) (outlining the study of the death penalty in Illinois following Governor Ryan's imposition of a moratorium on executions).

¹⁵ See Pub. L. No. 104-134, 110 Stat. 1321, 1321–34 (1996).

¹⁶ See Pub. L. No. 104-132, 110 Stat. 1214, 1217–26 (codified at 28 U.S.C. §§ 2244–2266 (Supp. III 1997)).

¹⁷ In the five-year period from 1991 to 1996, there were on average about forty executions per year in the United States, whereas in the five-year period from 1997 to 2001, there were on average nearly eighty executions per year. See Richard Stewart, *All-time Execution Record Likely*, HOUS. CHRON., Dec. 8, 2000, at 1; Death Penalty Information Center, *Number of Executions by Year Since 1976*, at <http://www.deathpenaltyinfo.org/dpicexec.html> (last modified Dec. 12, 2001).

post-conviction processes.¹⁸ By creating the conditions for more executions and more problematic executions, Congress all but ensured that the modern administration of the death penalty would be subject to renewed attention and greater examination.

Indeed, three years before Governor Ryan's imposition of a moratorium in Illinois, congressional action to speed the pace of executions prompted the American Bar Association to pass a resolution urging a moratorium on all executions until jurisdictions implemented a series of death penalty reforms.¹⁹ The ABA's appeal for a moratorium, though stated in broad and general terms, seems directed primarily toward legislatures, because the reforms advocated are most viable through statutory enactments.²⁰ The force of the ABA's recommendation—coupled with continuing concerns about the possibility of wrongful convictions and also broader concerns about racial disparities and other inequities in the administration of the death penalty—has resulted in a sea-change in the politics of the death penalty²¹ and has prompted legislative reform proposals for capital punishment in the U.S. Congress and in nearly every state that utilizes the death penalty.²²

It was against this dynamic and still-developing backdrop that academics and practitioners convened at The Moritz College of Law at The Ohio State University in late March 2001 for two days of insightful and productive discussions on the topic of "Addressing Capital Punishment Through Statutory Reform." Through a series of panels on the first day, commentators took stock of these developments in the law and

¹⁸ See Kaufman-Osborn, *supra* note 13, at 681–82 (discussing how recent limitations on capital case review and restricted defense funding has meant that "the gears of the machinery of death are now unusually well-greased").

¹⁹ See *Report with Recommendations No. 107*, 1997 A.B.A. SEC. INDIVIDUAL RTS. & RESP., available at <http://www.abanet.org/irr/rec107.html> (Feb. 3, 1997) [hereinafter ABA Report]; see also James E. Coleman, Jr., *Foreword: The ABA's Proposed Moratorium on the Death Penalty*, 61 LAW & CONTEMP. PROB. 1, 3–4 (1998) (discussing how congressional death penalty legislation in 1996 "figured prominently in the ABA's adoption of the Moratorium Resolution").

²⁰ See ABA Report, *supra* note 19, at 1–2; see also Symposium, *The ABA's Proposed Moratorium on the Death Penalty*, LAW & CONTEMP. PROBS., Vol. 61, No. 4 (1998) (special issue with a series of articles examining ABA's moratorium resolution).

²¹ See Jonathan Alter, *The Death Penalty on Trial*, NEWSWEEK, June 12, 2000, at 24, 26–34 (noting changes in political rhetoric concerning the death penalty); John Harwood, *Bush May Be Hurt by Handling of Death-Penalty Issue*, WALL ST. J., Mar. 21, 2000, at A28 (suggesting "a national shift in the politics of capital punishment"); see also Hoffman, *supra* note 14, at 940–41 (reviewing reasons why "[e]ven the broadest measures of public sentiment reflect a significant recent shift in attitudes about the death penalty").

²² During the live Symposium, Richard C. Dieter, Executive Director of the Death Penalty Information Center, detailed the considerable amount of legislative activity taking place across the country on a range of death penalty issues. The substance of Mr. Dieter's presentation and a list of proposals to reform capital punishment can be found at his organization's web site. See Death Penalty Information Center, *Proposed Changes in the Death Penalty Around the U.S. 2000–2001*, at <http://www.deathpenaltyinfo.org/Changes.html> (last visited Jan. 5, 2002); see also Toni Lacy, *Push to Reform Death Penalty Growing, Advocates: Mistakes Could Shake Confidence in System*, USA TODAY, Feb. 20, 2001, at 5A (detailing legislative proposals relating to the death penalty).

politics of the death penalty at the national level. An opening panel examined broad institutional dynamics by addressing the importance and impact of statutes and politics in the administration of the death penalty.²³ Subsequent panels explored the need and means to reform who is sentenced to death²⁴ and the need and means to reform how death penalty sentences are ascribed, reviewed, and carried out.²⁵ A final panel on the first day of the Symposium expanded horizons by looking for lessons in the modern history of capital punishment extending beyond the United States and even beyond the administration of the death penalty. On the second day of the Symposium, the focus shifted from the national story to the state of Ohio's unique experience with the death penalty. A series of presentations on this "Ohio day" of the Symposium grounded and enhanced the analysis of evolving death penalty issues through the careful examination of one state's distinctive place in these broader developments.²⁶

I am very pleased that so much of what was said during the live portion of the Symposium is reflected and memorialized in the pages of this special issue of the *Ohio State Law Journal*. And because a few paragraphs cannot adequately reflect the many important themes and ideas developed by the leading academics, policy-makers, and practitioners who played a role in this event, I will not endeavor here to summarize the work of our contributors but will simply let their own words speak for themselves. Instead, to conclude this Foreword, I want to explain briefly why I thought it so important to convene leading voices in this field to discuss the value of,

²³ For a written account of some of the discussion during this panel, see Austin Sarat, *The "New Abolitionism" and the Possibilities of Legislative Action: The New Hampshire Experience*, 63 OHIO ST. L. J. 343 (2002); Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417 (2002) [hereinafter Steiker & Steiker, *Should Abolitionists Support*].

²⁴ For a written account of some of the discussion during this panel, see Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433 (2002); Ronald J. Tabak, *Striving to Eliminate Unjust Executions: Why the ABA Individual Rights & Responsibilities Section Has Issued Protocols on Unfair Implementation of Capital Punishment*, 63 OHIO ST. L.J. 475 (2002).

²⁵ For a written account of some of the discussion during this panel, see Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63 (2002); James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315 (2002) [hereinafter Liebman, *Death Penalty Reform*].

²⁶ For a written account of some of these presentations, see Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263 (2002); S. Adele Shank, *The Death Penalty in Ohio: Fairness, Reliability, and Justice at Risk—A Report on Reforms in Ohio's Use of the Death Penalty Since the 1997 Ohio State Bar Association Recommendations Were Made*, 63 OHIO ST. L.J. 371 (2002); Joseph E. Wilhelm & Kelly L. Culshaw, *Ohio's Death Penalty Statute: The Good, the Bad, and the Ugly*, 63 OHIO ST. L.J. 549 (2002); see also Dana K. Cole, *Expanding Felony-Murder In Ohio: Felony-Murder or Murder-Felony?*, 63 OHIO ST. L.J. 15 (2002).

and possibilities for, statutory reform of the modern administration of capital punishment.

II. THE IMPORTANCE OF, AND HOPE FOR, STATUTORY REFORM

All the recent media coverage about the death penalty highlights that it is now a special and critical moment, both historically and politically, in the modern American story of capital punishment, and thus an appropriate time to review and draw lessons from the recent history of the death penalty. Such review leads me to conclude that appellate courts, particularly federal courts considering habeas petitions, have not proven particularly well-suited to remedy systemic problems in the administration of capital punishment (and may not even be particularly effective at policing the application of the death penalty in individual cases). This disconcerting reality—which I suggest below may be institutionally inevitable—entails that ensuring an accurate, fair, and reliable death penalty system may be a job primarily for legislatures.

Starting with the landmark ruling in *Furman*, the U.S. Supreme Court has spent the last three decades requiring and shaping reforms of death penalty procedures through interpretations of the Eighth Amendment in an effort to ensure greater reliability in the application of this ultimate punishment.²⁷ Yet, despite earnest and considerable efforts, it is now widely accepted that the Supreme Court's work over the past thirty years in regulating capital punishment has been, in the words of Professors Carol Steiker and Jordan Steiker, "a stunning failure on the Court's own terms."²⁸ Whether documented by the voluminous academic criticisms of the

²⁷ See *supra* note 6 (discussing some major Supreme Court cases).

²⁸ Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 403 (1995) [hereinafter Steiker & Steiker, *Sober Second Thoughts*]; see also *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (concluding that, despite the Supreme Court's continual efforts, "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies"); Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 862 (1998) ("The Court's experiment with capital-sentencing regulation counts among its major modern failures. The Court has accomplished very little of value, after investing vast judicial resources."); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2048–57 (2000) [hereinafter Liebman, *Overproduction*] (describing the death penalty system that has developed from Supreme Court regulation as "perverse," "immensely expensive," "penologically risky," and "egregiously prone to substantive error"); Logan, *supra* note 13, (manuscript at 10, on file with author) (explaining that judicial regulation "has yielded a capital punishment system of enormous expense and bewildering complexity, which, paradoxically, shares much of the arbitrariness condemned in *Furman*"). But cf. David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545 (1997) (suggesting that the Supreme Court's regulatory efforts have been at least partially successful).

Supreme Court's capital jurisprudence,²⁹ or by the ever-growing empirical and anecdotal evidence that the administration of the death penalty is not significantly more reliable, accurate, or fair today than thirty years ago,³⁰ there is a consensus that the modern death penalty system is badly broken despite the Supreme Court's considerable regulatory efforts.³¹

Though there are many and varied accounts of the sorry state of capital sentencing,³² I see these developments revealing certain fundamental institutional realities concerning the work of the Supreme Court in the regulation of the criminal justice system. The Supreme Court, as the ultimate interpreter and expounder of constitutional limitations, is necessarily and only concerned with what may qualify as a minimally acceptable death penalty scheme. As Justice Scalia often cheekily stresses in his opinions, the Court is not charged with assessing or exploring what would serve as a maximally effective sentencing scheme.³³ That is, the Supreme Court is only expected and required to determine constitutional floors establishing the minimum sentencing procedures states must utilize; the Court is not required to, nor is it likely to, address policy alternatives that might reveal preferable sentencing procedures that states could utilize. Moreover, because of the Justices' attentiveness to issues of federalism and the separation of powers, the Supreme Court is understandably (and many would say appropriately) institutionally inclined to set such

²⁹ See, e.g., *supra* note 28; see also Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1647–48 & nn. 20–22 (1993) (citing many sources while noting that “[c]ritics have been giving the Court’s death penalty jurisprudence a bad name for years. . . . Dozens of articles each year take the Court to task for the wide array of outrages and blunders . . . with few, if any, kind words to be said for the path the Court has taken.”).

³⁰ See, e.g., Tabak, *supra* note 13, at 734–43 (detailing evidence of systemic problems with the administration of capital punishment); Penny J. White, *Errors and Ethics: Dilemmas in Death*, 29 HOFSTRA L. REV. 1265, 1268–84 (2001) (lamenting the “multitude of errors that occur in capital cases” and reviewing recent developments which have made the “imperfections of America’s capital punishment system” that much “more demonstrable and more disturbing”); ABA Report, *supra* note 19; see also Christi Parsons, *ABA Chief Seeks Halt to Executions*, CHI. TRIB., Aug. 4, 2001, at 11 (noting various reasons and studies supporting ABA’s continued advocacy for moratorium on executions).

³¹ Professor James Liebman has aptly used the term “broken” to describe the modern death penalty system in his recent examination of reversal rates in death penalty cases. See James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973–1995* (2000), at <http://www.law.columbia.edu/instructionalservices/liebman> [hereinafter Liebman, *A Broken System*]; see also Liebman, *Overproduction*, *supra* note 28 (discussing reasons why modern death penalty system is broken).

³² See generally *supra* notes 28–31.

³³ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 427–29 & n.* (1993) (Scalia, J., concurring) (lamenting other Justices’ unwillingness to acknowledge the “unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be”); see also *Apprendi v. New Jersey*, 530 U.S. 466, 498–99 (2000) (Scalia, J., concurring) (assailing Justice Breyer for “proceed[ing] on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says.”).

constitutional floors as low as possible.³⁴

Because of these institutional realities, it is ultimately not very surprising that, despite a seemingly endless stream of death penalty rulings over the past three decades, the Supreme Court's capital jurisprudence actually places "relatively minimal demands on states seeking to administer the death penalty."³⁵ Consequently, it also should be unsurprising that the Supreme Court has failed to engineer fully effective system-wide remedies to the various systemic problems—for example, the wrongful conviction of innocent persons, racial disparities and other inequities in who is sentenced to die, the poor quality of representation received by many capital defendants, the poor treatment of juveniles and mentally disadvantaged defendants—that continue to plague the administration of capital punishment in the United States.³⁶

³⁴ See, e.g., *Medina v. California*, 505 U.S. 437, 442–44 (1992) (asserting that interpretations of the Due Process Clause in criminal cases must show deference to "considered legislative judgments"); *Harmelin v. Michigan*, 501 U.S. 957, 996–1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (stressing principles of federalism and separation of powers to justify a very limited role for the Supreme Court in judging the proportionality of sentences); *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (upholding Georgia's capital sentencing scheme while asserting that "unrealistic conditions" which might "indirectly outlaw [] capital punishment" cannot be placed on the death penalty); see also *Bilonis*, *supra* 29, at 1669–81 (discussing the impact of "the institutional and structural considerations that argue for judicial restraint" on the Supreme Court's capital jurisprudence).

³⁵ *Steiker & Steiker, Sober Second Thoughts*, *supra* note 28, at 371; see also *Callins v. Collins*, 510 U.S. 1141, 1145 (1993) (Blackmun, J., dissenting) (asserting that "the Court has chosen to deregulate the entire enterprise [of capital sentencing], replacing, it would seem, substantive constitutional requirements with mere esthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States"); 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, 618–22 (1999) (discussing "Supreme Court decisions [which] have relaxed both statutory restraints on, and judicial scrutiny of, guided discretion in capital sentencing"); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (identifying an early turn in Supreme Court jurisprudence to limit the constitutional requirements on capital sentencing).

³⁶ The last thirty years of court regulation may also reveal that lower appellate courts are also relatively ineffective, or at the very least inefficient, even in policing the application of the death penalty in individual cases. Professor James Liebman's study of reversal rates in capital cases not only documents how often appellate courts find capital convictions legally problematic, but also reveals that many layers of appellate review are needed to recognize the multitude of errors committed in capital cases, which in turn further suggests that many injustices in capital cases may still go unremedied. See Liebman, *A Broken System*, *supra* note 31; see also Liebman, *Death Penalty Reform*, *supra* note 25, at 316 (detailing significant percentage of reversals in each level of appellate review while stressing that "even the entire, three-tiered [court] inspection process is not infallible").

This reality may, yet again, be the product of certain institutional realities in appellate court review of individual death sentences. Though all the problems that infect the modern administration of capital punishment are apparent and striking when capital punishment is

One primary goal of this Symposium has been to highlight that we now may be able to turn to legislatures to find some hope within an otherwise discouraging story about the reform of capital systems. Before the recent sea-change in public opinion about the death penalty, elected lawmakers seemed politically compelled to champion their unwavering support for the death penalty³⁷ and often backed up campaign

examined from a system-wide perspective, these problems can often fade in significance and impact when any individual case is examined. When each death sentence is reviewed on a case-by-case basis—which, of course, is how appellate courts confront the death penalty—the well-documented systemic problems are readily overshadowed by the often gruesome facts of the crimes that typically are eligible for the death penalty. The day-to-day reality for appellate courts, especially for federal courts hearing collateral attacks on death sentences in habeas cases, is that the capital defendant's crime provides a distorting lens through which the court sees issues on appeal. Although reviewing courts may well generally recognize and want to eliminate system-wide problems in the administration of capital punishment, it is still a challenge for a reviewing court to identify and remedy these systemic problems in any individual case when an awful murder has been convincingly pinned on a particular defendant and a jury has not only returned a guilty verdict but also called for death as the punishment. Put simply, the immediate case-specific realities can all too readily eclipse system-wide concerns.

The Supreme Court's decision in the (in)famous case of *McClesky v. Kemp*, 481 U.S. 279 (1987), reflects these fundamental institutional dynamics. To its credit, the Supreme Court accepted the validity of the Baldus study showing racial disparities in capital sentencing outcomes and essentially conceded that there was a system-wide racial problem in Georgia's application of the death penalty. *See id.* at 292. But the Supreme Court denied habeas relief to the defendant, saying that it could not identify any overt intentional racial discrimination in McClesky's own case, and that it was not institutionally suited to provide a constitutional remedy in the absence of such evidence. *See id.* Similarly, my own experiences in helping to represent on appeal Terry Washington, a mentally retarded man executed by the State of Texas in 1997, showed me firsthand how case-specific matters can overshadow systemic problems in individual death penalty cases. Washington was a black man with an IQ measured as low as 59 and a gruesome childhood who allegedly stabbed a white female co-worker in a restaurant. On appeal, we had a little evidence raising questions about guilt and a lot of evidence of horrible lawyering by the court-appointed lawyer who was a specialist in divorce law and did not even realize that Washington was mentally retarded, nor that he could request a court-appointed expert to explore Washington's mental condition. Appellate courts, often emphasizing the details of the crime, turned deaf ears to all of our arguments claiming ineffective assistance of counsel; the Fifth Circuit all but conceded that Washington's trial lawyer was deficient for not effectively presenting mitigating evidence, but held there was no prejudice because the nature of crime would have produced a death verdict nonetheless. *See Washington v. Johnson*, 90 F.3d 945 (5th Cir. 1996), *cert. denied* 520 U.S. 1122 (1997).

³⁷ *See, e.g.*, Michael Mello, *A Letter on a Lawyer's Life of Death*, 38 S. TEX. L. REV. 121, 202–03 (1997) (discussing “a grizzly right of every fall election cycle: the executioner's song as a central theme in political campaigns, with politicians playing ‘can you top this’ with each other about how passionately they themselves ‘believe in’ the death penalty”); Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 240, 266–68, 270–73 (1994) (giving examples of political campaigns stressing support for the death penalty); Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1999, at 66, 78 (describing political gains by elected officials from portraying

promises by expanding the number of capital offenses³⁸ and limiting capital defendants' opportunities for appellate review.³⁹

However, as previously detailed, the political climate surrounding the death penalty has shifted dramatically over the past few years as a result of greater public awareness of the problems plaguing the administration of capital punishment, particularly the problem of wrongful convictions.⁴⁰ The new public and political dialogues mean that politicians can now speak more soberly and realistically about flaws in the administration of capital punishment, even in those jurisdictions in which not long ago it was an act of political suicide for an elected official to criticize the death penalty in any way.⁴¹

As a closing thought, I want to suggest that this new legislative era is both understandable and especially important in light of an insightful observation made by John Stuart Mill in his renown "Speech in Favor of Capital Punishment."⁴² Stressing that the "practical power" of a punishment "depends far less on what it is than on what it seems," Mill asserted that the death penalty for atrocious murderers is "the least cruel mode in which it is possible adequately to deter from the crime."⁴³ Mill claimed that because the punishment of death "makes an impression on the

themselves as especially "tough" on the death penalty).

³⁸ See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 396–99 (1998) (documenting that, in 1995 and 1996 alone, well over a dozen states expanded the reach of their death penalty laws by "adding [new] aggravating circumstances, expand[ing] existing aggravating circumstances, [or] adding to the definition of capital murder"); see also Leigh Dingerson, *Reclaiming the Gavel: Making Sense Out of the Death Penalty Debate in State Legislatures*, 18 N.Y.U. REV. L. & SOC. CHANGE 873, 876 (1991) (noting that 1990 state legislative sessions created over 185 death-penalty-related bills in 43 states and that "most bills have favored the expansion, expedition or reinstatement of capital punishment").

³⁹ Congress enacted the most conspicuous and consequential recent limits on capital defendants' appellate review opportunities through its restrictions on federal habeas corpus in the Antiterrorism and Effective Death Penalty Act of 1996. See Pub. L. No. 104-132, 110 Stat. 1214 (codified in part at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266 (2000)). Within the past decade, a number of state legislatures have also restricted capital defendants' opportunities for appellate review. See Steiker & Steiker, *Sober Second Thoughts*, *supra* note 28, at 423 & n.324 (listing statutes).

⁴⁰ See *supra* notes 13–22 and accompanying text; see also Sarat, *supra* note 23, at 347 (noting evidence that "the political climate [around the death penalty] seems to have altered"); Steiker & Steiker, *Should Abolitionists Support*, *supra* note 23 (discussing recent changes in public and political views on the death penalty).

⁴¹ See, e.g., Alter, *supra* note 21; G. Terry Madonna & Michael Young, *Pennsylvanians Increasingly Back Moratorium on the Death Penalty*, ALLENTOWN MORNING CALL, August 23, 2001, at A17; Tom Mashberg, *U.S. Resolve for Death Penalty Weakens*, BOSTON HERALD, June 10, 2001, at 8.

⁴² John Stuart Mill, *Speech in Favor of Capital Punishment 1868*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 271 (Gertrude Ezorsky ed. 1972).

⁴³ *Id.* at 272.

imagination so entirely out of proportion to its real severity," it is a more effective deterrent than the alternative of life imprisonment which is "less severe indeed in appearance, and therefore less efficacious, but far more cruel in reality."⁴⁴

Of course, empirical evidence has never fully substantiated Mill's hypothesis that the death penalty is a superior deterrent to life imprisonment, as studies on capital punishment's deterrent effects have generally proved inconclusive at best.⁴⁵ Yet, Mill's insight about capital punishment's "impression on the imagination" still merits considerable attention, especially when contemplating the potential for, and direction of, future reforms of the death penalty and the entire criminal justice system. Though the punishment of death may not significantly impact the behavior of potential killers, the awesomeness of this punishment indisputably does impact the behavior of our criminal justice institutions. In particular, we are seeing today the ways in which the drama of the death penalty—the fact that we are, in Mill's words, "so much shocked by death"⁴⁶—fuels a genuine and considerable interest in legislatures and legislators, and in the public at large, to be particularly cautious and conscientious before fully embracing and comfortably imposing the punishment of death.

The new public awareness of errors in capital cases combined with the death penalty's "impression on the imagination" is what now is allowing legislators to speak and act more soberly and realistically about a range of criminal justice issues pertaining to capital punishment. Moreover, because all the major problems identified in the administration of the death penalty (for example, wrongful convictions, racial and other disparities, poor quality and funding of defense counsel) are not unique to capital punishment, but actually plague the entire criminal justice system, advocates who have traditionally opposed the death penalty because of due process and equal protection concerns should consider taking advantage of the unique opportunity presented by capital punishment's "impression on the imagination" to work toward developing legislative reforms which would be a step toward remedying problems that infest the entire criminal justice system.⁴⁷

⁴⁴ *Id.*

⁴⁵ See, e.g., Ruth D. Peterson & William C. Bailey, *Murder and Capital Punishment in the Evolving Context of the Post-Furman Era*, 66 SOC. FORCES 774 (1988); Jon Sorenson et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481, 481 (1999); see also Michael Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 7 (1996) (reporting that 87.5% of criminologists do not believe the death penalty has deterrent effects).

⁴⁶ See Mill, *supra* note 42.

⁴⁷ The recent movement in many states toward allowing defendants, and not just capital defendants, access to DNA testing—see, e.g., *Bill Giving Convicts Access to DNA Testing Becomes Law*, DALLAS MORNING NEWS, Apr. 6, 2001, at 36A (discussing new Texas statute); Ashley Lowery, *New Law Allows Prisoners to Request DNA Tests*, SOUTH BEND TRIBUNE, Jan. 7, 2001 (discussing Michigan bill allowing prisoners to apply for DNA testing within a five-year time frame)—is a significant and important example of the system-wide reforms that can be engendered by concerns over errors in capital cases. See generally Sarat, *supra* note 23 (discussing how death

In other words, I am suggesting that Mill's insight may actually point to a different sort of pragmatic, utilitarian argument for supporting (or at least tolerating) the death penalty. In modern America, capital punishment's "impression on the imagination" may be needed to ensure that our legal institutions do not get complacent about problems that pervade our criminal justice system, and may even provide a critical means to engineer remedies to system-wide problems through well-crafted legislative reforms. If this Symposium in some way helps kick-start the engine of such reforms, it has been a huge success.

