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## Abolishing the American Death Penalty: The Court of Public Opinion Versus The U.S. Supreme Court

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## Essay

# ABOLISHING THE AMERICAN DEATH PENALTY: THE COURT OF PUBLIC OPINION VERSUS THE U.S. SUPREME COURT

Carol S. Steiker & Jordan M. Steiker\*

### I. INTRODUCTION

The American death penalty is newly fragile. About two decades ago, death sentences and executions reached their modern era highs and capital punishment seemed to be an entrenched part of the criminal justice system. Thirty-eight states and the federal government had capital statutes on the books, and political actors at all levels seemed committed to accelerating executions. Emblematic of this commitment was Congress's passage of the Antiterrorism and Effective Death Penalty Act of 1996, which limited federal habeas corpus review of state and federal prisoners with the hope of reducing the time between sentence and execution. But the last fifteen years or so have seen an extraordinary withering of the death penalty.<sup>1</sup> Six jurisdictions have legislatively abandoned capital punishment, with several others on the cusp of doing so. Executions have declined over seventy percent, from their 1999 high of ninety-eight to a low of twenty last year.<sup>2</sup> Those executions are increasingly confined to a handful of states and to a handful of counties within those states. Death sentences have dropped even more dramatically, from a high of 315 per year nationwide in 1996 to a low last year of 30—over a 90 percent decline.<sup>3</sup> Other indications of the weakening of the death penalty abound. Public support for the death penalty, as reflected in opinion polls, has declined substantially over the past twenty-five years.<sup>4</sup> At its recent convention in advance of the 2016 presidential election, the Democratic Party included abolition of the death penalty in

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<sup>1</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>2</sup> See *Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> [<https://perma.cc/24DK-GAUY>].

<sup>3</sup> See *Death Sentences by Year Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-year-1977-present> [<https://perma.cc/2FUN-US3S>].

<sup>4</sup> See *Death Penalty Trends*, GALLUP INC., <http://www.gallup.com/poll/1606/death-penalty.aspx> [<https://perma.cc/BT2B-S52A>] (reflecting 60% support for death penalty for the crime of murder in October 2015, compared to 75-80% in the years 1988-1995).

the party platform for the first time. Over the past several years, even some conservative, evangelical, and victims-advocate groups have voiced their opposition to capital punishment.<sup>5</sup>

In light of these developments, the most apt questions surrounding the American death penalty seem to be *when* and *how*, rather than *whether* the death penalty will be abolished. Given our federal structure, the only real prospect for nationwide abolition is a decision by the U.S. Supreme Court finding the practice unconstitutional. Over four decades ago, the Court came close to ending the death penalty in 1972, when it found all prevailing statutes unconstitutional.<sup>6</sup> Four years later, the Court upheld many new statutes passed in the wake of its decision.<sup>7</sup> Since that time, the Court has developed a complicated series of doctrines regulating the operation of the American death penalty but has stopped short of finding the practice unconstitutional. Increasingly though, Justices on the Court have indicated a willingness to revisit the broader issue of the constitutionality of the death penalty writ large.<sup>8</sup>

What would constitutional abolition look like? This Essay focuses on the surprising disconnect between some of the most powerful anti-death penalty arguments in the public arena and the arguments most likely to prevail in the Court. Three central abolitionist arguments have had enormous traction among opponents of the death penalty, yet each has fared poorly in Supreme Court decisions and none are likely to provide a dispositive, independent basis for constitutional abolition going forward. The first of these arguments concerns racial discrimination in the administration of the American death penalty. Concerns about racial discrimination were at the forefront of the efforts to regulate and restrict capital punishment in the 1960s, but the Supreme Court declined in numerous cases to hold that discriminatory application of capital punishment requires judicial intervention, much less abolition.<sup>9</sup> Constitutional abolition is thus unlikely to rest on the troubling and continuing role of race in the American capital system. The second major ground of attack focuses on the problem of wrongful convictions and

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<sup>5</sup> See CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 215–16 (2016) (discussing opposition to the death penalty by George Will, murder victims' families, Kansas college Republicans, and evangelical Christians).

<sup>6</sup> See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

<sup>7</sup> See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (upholding Georgia's guided discretion scheme).

<sup>8</sup> See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2795 (2015) (Breyer, J., joined by Ginsburg, J., dissenting).

<sup>9</sup> See Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 244 (2015) [hereinafter Steiker & Steiker, *Race*].

executions. The discovery of numerous innocents on death row in the late 1990s is often credited as a major turning point in the stability of the American death penalty, and concerns about wrongful convictions are perhaps the most frequently voiced grounds in contemporary public discourse for jettisoning capital punishment. But the Supreme Court has rejected the idea that federal courts should police the accuracy of capital convictions, refusing to endorse the basic proposition that the Constitution forbids the execution of a convicted inmate who later uncovers evidence disproving or substantially undermining his or her guilt.<sup>10</sup> The Court's lack of solicitude for the claims of wrongfully condemned inmates suggests that the Court is unlikely to hold that inaccuracy in the capital system fatally undermines its constitutional status. The third and most ubiquitous ground for attacking capital punishment rests on some version of human dignity. Concerns about the inhumanity of the death penalty have dominated opposition to capital punishment since the Enlightenment era, both in the United States and around the world. Opposition rooted in human dignity encompasses a number of related but distinct claims, including the assertion that capital punishment denies the worth of the individual, creates an unacceptable power in the State, treats offenders as means rather than ends, and imposes excessive suffering. These types of attacks on the death penalty have been voiced throughout American history, from the earliest days of the anti-gallows movement to the advocacy of contemporary abolitionist groups, such as the National Coalition to Abolish the Death Penalty. Arguments about human dignity provided the most important grounds for abolition in the vast majority of jurisdictions around the world that have jettisoned capital punishment, especially in Europe, and they remain the most compelling and salient bases for challenging the death penalty in continuing efforts to abolish it worldwide. Claims of human dignity, though, have had far less traction in the U.S. courts, particularly the Supreme Court. Although litigants in the 1960s and 1970s pressed the Court to find the death penalty violative of human dignity, the Court sidestepped such an approach and instead focused on the administration of the death penalty rather than its fundamental justice. When it upheld new capital statutes in 1976, it declared that the choice to retain capital punishment belonged to the states, holding that the practice could be justified on retributive or deterrence grounds. Since that time, the Court has scarcely mentioned claims of human dignity, even as it has faced challenges to dubious execution methods. If the Court were to address and endorse a categorical challenge to the death penalty, it would be

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<sup>10</sup> See *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

unlikely to rest its case primarily on the intrinsic value of human life or the impermissibility of state involvement in killing.

The first part of this Essay illustrates the ways in which concerns about racial discrimination, wrongful conviction, and human dignity have been marginalized within the Court's extensive constitutional regulation of the death penalty. The second portion traces the Court's most likely path to constitutional abolition given prevailing capital jurisprudence and the subordinate—but still significant—role of such concerns within that jurisprudence.

## II. PATHS NOT TAKEN

### A. Racial Discrimination

The American death penalty has always been tainted by racial discrimination. In the antebellum South, the use of capital punishment was closely allied with the slave economy that had been established in the colonial era.<sup>11</sup> Capital offenses included crimes against slavery, such as encouraging slaves to escape or rise up against their masters. Execution methods employed against slaves were particularly gruesome, mirroring the especially harsh treatment reserved for those convicted of treason in England and elsewhere given the existential threat posed by such offending.<sup>12</sup> Southern capital codes made the availability of the death penalty turn on the racial characteristics or slave status of the offender and victim.<sup>13</sup> South Carolina, for example, made it a capital crime for slaves to maim or even "bruise" a white person. In the antebellum period, race and capital punishment were mutually reinforcing, in that race influenced the administration of the death penalty and the death penalty helped cement and give significance to racial identity.

After the Civil War, the explicit use of race in state capital statutes disappeared, but racial discrimination permeated every aspect of capital proceedings, from the initial criminal investigation (including methods used to elicit confessions), to charging decisions, jury selection, appointment of defense counsel, presentation of evidence, prosecutorial tactics, sentencing proceedings, appeals, and the availability of clemency. In addition, antagonism toward the newly-freed black population produced a generation of extra-legal executions in the form of lynching. More blacks were lynched in the two decades spanning 1885-1905 (close to 2,000) than the total number of persons executed in the United States

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<sup>11</sup> See Steiker & Steiker, *Race*, *supra* note 9, at 245.

<sup>12</sup> See *id.* at 246.

<sup>13</sup> See *id.* at 248.

over the past fifty years (approaching 1,500).<sup>14</sup> As lynching declined by the late 1920s, executions climbed. The summary legal proceedings afforded black defendants in capital cases earned the sobriquet “legal lynching.” Many capital trials in the South were conducted without even a pretense of fairness, in some cases with a mob at the courthouse steps or even in the courtroom itself. The discriminatory administration of the death penalty was perhaps most evident in capital rape cases. An overwhelming percentage of those sentenced and executed for rape in the twentieth century were black defendants convicted of raping white victims; all such executions after the 1920s were confined to southern states and the District of Columbia.<sup>15</sup>

By the 1960s, concerns about racial discrimination were a central part of the critique of the American death penalty. In 1963, when three Justices on the U.S. Supreme Court for the first time suggested that the death penalty might be constitutionally excessive as applied to certain offenders, they chose rape cases from the South in which blacks had been sentenced to die for the rape of white victims.<sup>16</sup> Justice Arthur Goldberg, writing a dissent from the Court’s decision to deny certiorari, suggested that the Court should decide whether the death penalty is disproportionate for the offense of rape. The original draft of Goldberg’s dissent highlighted the manifest racial discrimination in such cases, but at the urging of Chief Justice Earl Warren, his discussion of race was omitted in his published opinion.<sup>17</sup> That opinion nonetheless triggered the National Association for the Advancement of Colored People (“NAACP”) Legal Defense Fund (“LDF”) to include abolition of capital punishment as part of its ongoing portfolio of racial justice causes, alongside its efforts to desegregate schools, end discrimination in housing and employment, and ensure voting opportunities. Over the next decades, the LDF invested enormous resources in capital litigation, becoming the most prominent abolitionist group in the United States. The LDF began its efforts by commissioning empirical research to document the role of race in Southern rape cases. By the late 1960s, the LDF had successfully pursued a moratorium strategy that brought executions in the United States to a halt and set the stage for the Supreme Court to address the constitutionality of the death penalty.

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<sup>14</sup> See *Classroom: Lynchings, by Year and Race, 1882–1968*, CHARLES CHESTNUT DIGITAL ARCHIVE, [http://www.chesnuttarchive.org/classroom/lynching\\_table\\_year.html](http://www.chesnuttarchive.org/classroom/lynching_table_year.html) [https://perma.cc/GP9K-75WA].

<sup>15</sup> U.S. DEP’T OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, BULLETIN NO. 45, *Capital Punishment 1930-1968* (1969).

<sup>16</sup> See *Rudolph v. Alabama*, 375 U.S. 889, 889 (1963).

<sup>17</sup> See EVAN MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 28-29 (2013).

Despite longstanding concerns about racial discrimination in the administration of the death penalty and the efforts of the LDF and others to highlight such discrimination in litigation, the Supreme Court avoided addressing racial discrimination as a basis for restricting the death penalty. In the mid-1960s, the Court declined to review a challenge to the death penalty resting on the LDF's empirical study showing a powerful linkage between race and the death penalty in rape cases.<sup>18</sup> When the Court invalidated prevailing statutes in *Furman v. Georgia* in 1972, the Justices supporting that result tended to highlight general "arbitrariness" rather than racial discrimination. In 1977, when the Court found the death penalty excessive as applied to rape, it chose the (rare) case of a white offender who had been sentenced to death and said nothing about the role of racial discrimination in such cases.<sup>19</sup>

In 1987, in *McCleskey v. Kemp*, the Court finally addressed directly the claim that the racially discriminatory operation of the death penalty violates the Constitution.<sup>20</sup> The death-sentenced inmate presented a sophisticated statistical analysis, the Baldus study, which found that race played a significant role in capital outcomes in post-*Furman* Georgia, particularly the race of victims. The Court assumed for purposes of decision that the study was sound. Yet the Court declined to give relief, holding that the defendant could not rely on evidence of systematic racial discrimination and instead must offer proof of discrimination in his own case.<sup>21</sup> The Court indicated that allowing such statistical evidence to provide the basis of a constitutional claim would open the door to challenges based on other types of discrimination; it also suggested that it could not confine a decision granting relief to *capital* defendants and that a ruling for *McCleskey* would therefore threaten the operation of the entire criminal justice system.<sup>22</sup>

The Court's rejection of systemic racial discrimination as grounds for challenging capital punishment makes it unlikely that the Court would frame constitutional abolition primarily in such terms. The unlikelihood of race-based abolition is reflected and reinforced by the appearance of a case on the Court's docket this Term. In *Buck v. Davis*, the Court refused to allow a capital sentence to stand where defense counsel put on an expert who indicated that the defendant was more likely to be dangerous because

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<sup>18</sup> See *Maxwell v. Bishop*, 398 U.S. 262, 267 (1970) (limiting grant of certiorari to claims regarding standardless discretion and the unitary structure of the capital trial and refusing to accept review of the racial discrimination claim).

<sup>19</sup> See *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

<sup>20</sup> See 481 U.S. 279, 313 (1987).

<sup>21</sup> See *id.* at 292.

<sup>22</sup> See *id.* at 314-17.

he is black.<sup>23</sup> That such a question remained open to argument in 2016 suggests how far the Court is from finding racial discrimination as a basis for wholesale constitutional rejection of capital punishment.

The Court's reluctance to focus on race in its capital jurisprudence stems from several considerations. First, the Court faces the problem of measuring the impact of race on the capital system and deciding how much impact is constitutionally intolerable. In Justice Lewis Powell's initial draft of the majority opinion in *McCleskey*, he criticized the Baldus study and left open the possibility that a more persuasive empirical demonstration of racial bias might require judicial relief. Justice Antonin Scalia objected to this approach, wanting to avoid endless litigation involving sophisticated studies beyond the grasp of most lawyers and judges.<sup>24</sup> The *McCleskey* litigation reveals the institutional limits of courts in understanding, distilling, and applying the results of social science in constitutional litigation. Moreover, even when courts are able to confidently assess the impact of race on capital decision-making, it remains difficult for those courts to determine when a state system has crossed the constitutional line. States likely will vary in the extent to which racial discrimination infects capital decision-making. If systemic racial discrimination is a cognizable claim, courts will have to develop manageable, non-arbitrary standards for assessing such claims. Studies confined geographically to one jurisdiction (or a small number of jurisdictions), or temporally to a particular span of time, are unlikely to provide the Court sufficient grounds for permanent abolition throughout the United States.

Second and relatedly, the Court is much more comfortable regulating criminal justice procedures than criminal justice outcomes. The Court can encourage or require states to adopt safeguards to minimize the impact of racial discrimination (such as policing the use of racially discriminatory strikes in jury selection), but the Court does not have the tools to ensure equal outcomes. Moreover, in *McCleskey*, the Court highlighted the fact that one of the important safeguards in capital cases – the ability of juries to reject the death penalty based on mitigating circumstances – actually undercuts the equality of outcomes, because a commitment to discretion in capital cases entails the possibility that such discretion will be exercised in arbitrary or invidious ways.<sup>25</sup>

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<sup>23</sup> *Buck v. Davis*, 580 U.S. \_\_\_\_ (2017).

<sup>24</sup> 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").

<sup>25</sup> See *McCleskey*, 481 U.S. at 302–03.



Third, the Court has been loath to treat racial discrimination as beyond repair in other constitutional contexts. In its desegregation and affirmative action cases, the Court emphasized that remedies should be structured with an end date in mind, in part based on the Court's belief that racial discrimination is surmountable.<sup>26</sup> Given this confidence in the eventual decline in the effects of past discrimination, the Court is unlikely to throw up its hands and declare the death penalty unconstitutional based on evidence of lingering racial discrimination in capital cases. Such a concession in the capital context would have destabilizing consequences for its broader approach to racial discrimination in other contexts, many of which have a greater pull on the Court's attention and resources.

Finally, the remedy of abolition appears to be ill-suited to the problem of racial discrimination that the Baldus study and other studies have identified. The most pronounced manifestation of racial discrimination in Georgia was the unwillingness of prosecutors and jurors to seek or return capital verdicts in minority victim cases. This sort of under-enforcement would be most naturally addressed by *increasing* capital prosecutions in such circumstances; abolition would not necessarily increase solicitude for minority victims or rectify the imbalanced response to their victimization.

Thus, even though racial discrimination has been and remains a ubiquitous problem in the administration of the death penalty and concerns about racial discrimination motivated the campaign to restrict capital punishment both within and outside of the Court, the Court is unlikely to abolish the death penalty primarily on such grounds. The Court's decisions provide extremely limited tools for attacking capital punishment as racially discriminatory, and the Court has said remarkably little about race and the death penalty despite abundant opportunities to do so.

#### B. *Wrongful Convictions*

Fear of executing innocents is likely as old as the death penalty itself. Many abolitionist jurisdictions around the world, including Great Britain, were motivated to abolish in part by high-profile wrongful convictions and/or executions.<sup>27</sup> In the United States, concerns about innocence have surfaced at various times with various levels of urgency. The late 1990s marked the beginning of an era of unprecedented anxiety about the problem of wrongful convictions. Technological advances in DNA analysis made it possible to assess scores of cases with preserved DNA,

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<sup>26</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (asserting that affirmative action should no longer be necessary in university admissions decisions in twenty-five years).

<sup>27</sup> See ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 54-55 (5th ed. 2015).

and the results were disheartening. Testing revealed numerous wrongfully convicted inmates in both capital and non-capital cases. A new cottage industry of “innocence projects” emerged to revisit convictions with the benefit of new technology as well as new insights into the factors leading to wrongful conviction.

The most troubling spate of exonerations occurred in Illinois, with the discovery of more than a dozen wrongfully condemned men on a death row that housed fewer than 200 inmates. The Illinois experience triggered intensive media coverage of the “exoneration” phenomenon and deeper examination of the causes of inaccurate verdicts. One predictable source of error was police and/or prosecutorial misconduct, but studies also revealed endemic problems with evidence long regarded as reliable, at least by the public at large: eyewitness testimony and confessions. The experience in Illinois led Republican Governor George Ryan to declare a moratorium on executions in 2000 based on his “grave concerns about our state’s shameful record of convicting innocent people and putting them on death row.”<sup>28</sup> The moratorium was followed three years later by Governor Ryan’s grant of mass clemency to everyone on death row and eleven years later by Illinois’s decision to abolish the death penalty.

Concerns about wrongful convictions have contributed substantially to the decline in the American death penalty over the past fifteen years. The issue was central in the debates culminating in the legislative repeal of capital statutes in New Jersey, New Mexico, Illinois, Connecticut, Maryland, and Nebraska (whose capital statute was reinstated by referendum in November of 2016). Many observers also credit concerns about innocence with contributing substantially to the remarkable decline in death sentences – from over 300 a year in the mid-1990s to just 30 in the most recent year.

But the resonance of concerns about innocence with the general public is not reflected in prevailing constitutional doctrine. For the past fifty years, the Supreme Court has extensively regulated state criminal processes. The Court has applied against the states virtually all of the provisions of the Bill of Rights concerning the investigation and prosecution of a crime, including the prohibition of unreasonable searches and seizures, the guarantee against double jeopardy, the right against compelled self-incrimination, the right to counsel, the right to a jury trial, and the prohibition of cruel and unusual punishments. All of these guarantees were designed to constrain the federal government, but the

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<sup>28</sup> *Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System*, ILL. GOV'T NEWS NETWORK (Jan. 31, 2000), <http://www3.illinois.gov/PressReleases/showpressrelease.cfm?subjectid=3&recnum=359> [<https://perma.cc/4QZC-P6BR>].

Court held in a series of cases that these protections were essential aspects of due process secured by the Fourteenth Amendment and therefore applicable against state criminal justice actors.<sup>29</sup> As a result of these decisions, federal courts routinely address claims that state police or prosecutors have violated basic procedural protections.

Despite the enormous expansion of federal constitutional protections in state criminal cases, the Court has declined to provide any specific protection for inmates who claim to have suffered wrongful conviction apart from the minimal requirement that the evidence at trial be sufficient to establish all elements of the convicted offense. In 1993, the issue came to the Court in a stark fashion, when Leonel Herrera, a Texas death-sentenced inmate, presented new evidence that his brother had committed the offense for which Herrera had been sentenced to die.<sup>30</sup> Under Texas law, such evidence had to be presented within thirty days of trial, and after that period, an inmate was forever barred from claiming wrongful conviction in court. Because Herrera's evidence came outside that deadline, the state court refused even to look at the evidence or consider the claim. When Herrera filed a federal habeas corpus petition claiming that Texas had violated the Constitution by not considering his new evidence, the lower federal courts held that claims of "bare-innocence" – resting on newly-discovered evidence of innocence without evidence of a separate constitutional violation, such as prosecutorial misconduct – are not cognizable in federal court. The U.S. Supreme Court agreed to address Herrera's claim but ultimately withheld relief, suggesting strongly that claims of wrongful conviction should be directed not to the courts but to executive clemency. The Court declined to decide whether, as Herrera provocatively framed the question for review, the Constitution prohibits the execution of an innocent person.<sup>31</sup>

More than two decades post-*Herrera*, the Court has yet to embrace the proposition that a condemned inmate with newly-discovered, airtight evidence of his innocence has a constitutional right to judicial relief. Given the Court's reticence to embrace this basic claim of an individual who asserts his innocence based on new evidence, it is unsurprising that courts have been unreceptive to the much broader assertion that the general unreliability of the death penalty is a reason to condemn the punishment in all cases. One exception, coming on the heels of the experience in Illinois, was the decision of a federal judge in 2002 to invalidate the federal death penalty based on an intolerable risk of wrongful conviction and

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<sup>29</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963); *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968).

<sup>30</sup> See *Herrera v. Collins*, 506 U.S. 390, 393 (1993).

<sup>31</sup> See *id.* at 398.

execution.<sup>32</sup> The opinion, citing the recent spate of exonerations, declared that “[w]e now know, in a way almost unthinkable even a decade ago, that our system of criminal justice, for all its protections, is sufficiently fallible that innocent people are convicted of capital crimes with some frequency.”<sup>33</sup> The opinion suggested that the death penalty cut off the possibility of discovering and vindicating claims of actual innocence. But that decision was promptly reversed, with the federal appellate court noting that nothing in the Court’s jurisprudence suggested a constitutional right “to a continued opportunity for exoneration throughout the course of one’s natural life.”<sup>34</sup>

What accounts for the courts’ unwillingness to transform concern about erroneous convictions and executions into a cognizable constitutional claim? One threshold problem is defining what counts as a wrongful conviction. Is a conviction “wrongful” if later evidence simply undermines proof of guilt beyond a reasonable doubt? Under that approach, an inmate would be deemed “wrongfully convicted” even if it were more likely than not that he was in fact guilty, so long as new evidence creates at least some reasonable doubt. Or should “wrongful conviction” attach only to cases in which an inmate affirmatively establishes his *innocence*? The absence of an agreed-upon sense of wrongful conviction undermines the possibility of consensus about the magnitude of the phenomenon.

To structure an opinion around the prevalence of wrongful convictions, courts would have to resolve this definitional problem. They would also face the near-impossible task of gathering usable data of error rates in capital cases. Such an undertaking would require deciding the appropriate jurisdictional focus: should courts look at error at the county level, state level, or national level? Even if a court could surmount these obstacles—deciding what counts as a wrongful execution, amassing data appropriate to the definition, and choosing the governmental unit to be assessed—it would then have to determine how much error is constitutionally intolerable. As in the racial discrimination context described above, courts would face the complicated (and perhaps unseemly) job of quantifying constitutionally acceptable rates of error (if, say, a one percent error rate were operative and acceptable, we would expect to have had fifteen or so wrongful executions since executions resumed in 1977).

Apart from these practical problems, a claim centered on the risk of wrongful execution raises conceptual problems as well. Why is wrongful

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<sup>32</sup> See *United States v. Quinones*, 196 F. Supp. 2d 416, 418 (S.D.N.Y. 2002).

<sup>33</sup> *Id.* at 420.

<sup>34</sup> *United States v. Quinones*, 313 F.3d 49, 52 (2d Cir. 2002).

execution worse than wrongful incarceration? Many people argue that errors can be discovered and corrected if an inmate is sentenced to lengthy incarceration, but there are reasons to believe that errors are more likely to be detected in cases where an inmate is sentenced to death. Non-capital inmates ordinarily have no right to counsel in state or federal post-conviction proceedings, whereas capital inmates are generally afforded such representation. An unrepresented innocent inmate is unlikely to exert the legal and political pressure necessary to overturn or commute his sentence. The high visibility of capital cases also makes it much more likely that media will be drawn to claims of innocence asserted by death-sentenced inmates. Hence, even though executed inmates lose their opportunity for vindication once executed, their pre-execution opportunities for vindication are generally vastly superior to their non-capital counterparts, which suggests that their overall chance of vindication might be more substantial.

Along similar lines, the notion that errors are “irrevocable” in death cases but fixable on the non-capital side rests on the implausible assumption that incarcerated inmates can be made whole in the rare cases where their innocence is uncovered and vindicated. Time lost during wrongful incarceration is not recoverable. An inmate who spends twenty-five years wrongfully imprisoned can have some semblance of a life after vindication, but the wrongful punishment he or she endured cannot be undone.

More broadly, the Court’s reluctance to construct a constitutional jurisprudence responsive to the problems of wrongful conviction and execution reflects the distinctively American preoccupation with procedural rather than substantive justice. Wrongful conviction in the United States means conviction in violation of the rules, not innocence of the underlying offense. The American attraction to procedural justice is rooted in part in the Constitution itself, which speaks in terms of due process and prohibits certain practices rather than guarantees substantive justice (apart, perhaps, from the prohibition of cruel and unusual punishments). The American adversarial system is premised on the notion that substantive justice is achieved when zealous advocates for the state and the defendant fairly present their sides in court. The use of lay jurors, the exclusion of relevant evidence obtained in violation of constitutional rules, and the circumscribed review of jury verdicts all reveal the limited commitment to *accuracy* in trial outcomes as opposed to the robust commitment to fair competition in court. This longstanding commitment to proceduralism in American criminal justice explains the unwillingness of the Court in *Herrera* to constitutionalize a right to be free from execution if new evidence suggests innocence. It also portends the

limited prospects for constitutional abolition of the death penalty resting on the risk of wrongful execution.

### C. *Human Dignity*

Throughout American history, opponents of the American death penalty have offered numerous critiques regarding its wisdom as public policy. During the era of public executions, critics cited the coarsening effects of such spectacles. In later years, opponents pointed to the absence of proven deterrent effects, its arbitrary and discriminatory implementation, and the risk of error. More recently, opponents tend to highlight the increased financial costs associated with capital punishment, which vastly exceed the cost of non-capital proceedings (even when combined with the cost of lengthy—even lifetime—incarceration). Despite the ubiquity of these pragmatic challenges, one suspects that the opposition of those most committed to abolition rests on concerns about the fundamental morality of the practice—separate and apart from deficiencies in its administration. Some base their moral objections to capital punishment on religious grounds, such as Quakers and Catholics. Since the founding, many of those who oppose the death penalty on secular grounds have deemed it inconsistent with human dignity. The claim from human dignity appears in many forms, including the claim that capital punishment denies the humanity or redemptive capacity of the offender, constitutes excessive cruelty, is incompatible with democracy, or establishes an inappropriate relation between state and citizen. Outside of the United States, the argument based on human dignity is by far the most commonly invoked ground for opposing capital punishment, both in countries that have abolished it and in those on the brink of abolition. In the contemporary abolition movement, the arguments from religion and human dignity are often complementary, as reflected in the Vatican’s declaration that the death penalty is “an affront to human dignity.”<sup>35</sup>

Despite the prominence of the human dignity argument among ardent abolitionists both here and abroad, the argument has been largely absent in most American constitutional discourse. In the few cases challenging capital practices that made their way to the Supreme Court in the nineteenth and early twentieth centuries, which focused primarily on particular methods of execution, the Court ruled that capital punishment was not cruel in the constitutional sense so long as it did not involve

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<sup>35</sup> See *Vatican Says Death Penalty is “Affront to Human Dignity,”* DEATH PENALTY INFO. CTR. (Oct. 17, 2016), <http://www.deathpenaltyinfo.org/vatican-says-death-penalty-affront-human-dignity> [https://perma.cc/43Y4-G6R4.].

“something more than the mere extinguishment of life.”<sup>36</sup> Even when an inmate complained that it was constitutionally excessive to electrocute him a second time after the first attempted electrocution failed, the Court refused to intervene, stating that “[a]ccidents happen for which no man is to blame,” and “[t]he traditional humanity of modern Anglo-American law” forbids only “unnecessary pain in the execution of the death sentence.”<sup>37</sup>

When the Court addressed the claim in *Furman v. Georgia* that capital punishment constitutes cruel and unusual punishment under the Eighth Amendment, the Justices focused on the administration of the death penalty rather than its moral acceptability. Only Justice William Brennan insisted that the death penalty violates human dignity, asserting that capital punishment necessarily involves the state in the “denial of the executed person’s humanity.”<sup>38</sup> His colleagues, on the other hand, directed their energies toward pragmatic considerations such as deterrence, cost, error, and arbitrariness. Even Justice Thurgood Marshall, who agreed with Justice Brennan that the death penalty should be deemed unconstitutional in all cases, emphasized instrumental concerns such as the lack of proven deterrent effect, the low recidivism rate of convicted murderers, the cost, and the brutalization effects of executions.<sup>39</sup>

When the Court upheld several capital statutes four years later, the Court seemed to reject the notion that capital punishment is incompatible with human dignity, holding that it can be justified on retributive or deterrence grounds.<sup>40</sup> Over the forty ensuing years, the debates about capital punishment at the Court have focused almost exclusively on pragmatic considerations, ranging from the adequacy of aggravating factors, the ability of jurors to consider mitigating evidence, the competence of trial counsel, discrimination in jury selection, and so on. Occasionally in dissent, a Justice has noted the inhumanity of execution methods or death-row confinement,<sup>41</sup> but no member of the Court since Justice Brennan has offered a sustained attack on capital punishment as inconsistent with human dignity. Justice Stephen Breyer, who penned the most comprehensive recent challenge to the American death penalty in

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<sup>36</sup> *In re Kemmler*, 136 U.S. 426, 447 (1890).

<sup>37</sup> *Louisiana v. Resweber*, 329 U.S. 459, 462–63 (1947).

<sup>38</sup> *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

<sup>39</sup> *See id.* at 362–63 (Marshall, J., concurring).

<sup>40</sup> *See Gregg v. Georgia*, 428 U.S. 153, 183–87 (1976).

<sup>41</sup> *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726, 2797 (2015) (Breyer, J., dissenting) (discussing effects of long-term solitary confinement on death row); *Baze v. Rees*, 553 U.S. 35, 123 (2008) (Ginsburg, J., dissenting) (arguing for constitutional protection in the lethal injection process to ensure an inmate is unconscious so as to avoid risk of inflicting severe and unnecessary pain).

*Glossip v. Gross*, adhered to the largely instrumental critique of the American practice, emphasizing its lack of reliability, arbitrariness in administration, long delays between sentence and execution, and declining use.<sup>42</sup> Given the virtually complete absence of judicial focus on human dignity in its hundreds of opinions addressing capital punishment (including dissents), the Court is unlikely to reject the death penalty primarily on such grounds.

The paucity of attention to human dignity concerns in capital punishment discourse in the American courts stems from several factors. As noted above, many of the protections in our Constitution are procedural in nature. Even the Eighth Amendment provision regarding “cruel” punishments requires that such punishments also be “unusual” to be forbidden. Contrast, in this regard, France’s Declaration of the Rights of Man and Citizen, drafted at roughly the same time, which includes the pronouncement that “[t]he law ought to establish only penalties that are strictly and obviously necessary.”<sup>43</sup> The American constitutional tradition scarcely mentions human dignity in many contexts where we might expect to find such references, including cases involving freedom of speech, freedom of religion, and racial justice. Only recently, in the Court’s cases prohibiting the criminalization of homosexual sodomy and sustaining the right of marriage for gay couples, does the Court appear to invoke human dignity as a primary ground for decision.<sup>44</sup>

More recent national constitutions, especially those framed after the horrors of the Holocaust or apartheid, explicitly protect human dignity and/or human life, providing a constitutional basis for abolition of the death penalty even when there is no specific provision on the subject. In addition, political alliances, like the European Union, reinforce human dignity as a central political commitment, whereas the U.S. Supreme Court has tended to interpret constitutional commitments to personal liberty in a somewhat idiosyncratic and isolated manner (although, as discussed below, this isolated approach is diminishing in the capital context).

The unavailability of human dignity as a constitutional argument likely also contributed to the capital litigation strategy pursued in the

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<sup>42</sup> See 135 S. Ct. at 2755–56 (2015) (Breyer, J. dissenting).

<sup>43</sup> Bill Stuntz powerfully contrasts the American constitutional focus on procedural protections with the more robust substantive guarantees of the roughly contemporaneous French Declaration of the Rights of Man and Citizen. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 76 (2011).

<sup>44</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (holding that the prohibition on same-sex marriage “demeans gays and lesbians”); *Lawrence v. Texas*, 539 U.S. 558, 558 (2003) (“The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”).



1960s and 1970s. When the NAACP LDF formulated its attack on the American death penalty, it decided to attack particular vulnerable practices, such as death-qualified juries, wide discretion in capital sentencing, and unitary sentencing procedures, rather than seeking judicial condemnation of the death penalty as fundamentally unjust in the abstract. Even when the LDF took the next step in challenging the constitutionality of the death penalty as a whole, it emphasized aspects of its administration rather than its inconsistency with human dignity. The Court, in turn, framed its constitutional regulation in light of these challenges, focusing exclusively on state death penalty practices rather than the death penalty itself. The limited protection for human dignity in the American constitutional tradition and the resulting strategic choices in capital litigation created a path of dependence in which the American death penalty continues to be contested on pragmatic, instrumental grounds. Moreover, the Court's resolutely pragmatic focus has likely influenced death penalty discourse in the public sphere, marginalizing further death penalty opposition rooted in deontological principle.

Outside of the Court, opponents of the death penalty have submerged absolutist arguments against the death penalty to find common ground with potential allies who do not share their foundational moral objections. Such opponents have recast efforts to eliminate the death penalty as "repeals" rather than "abolition" to avoid the moralism associated with the latter. It is much easier to find common ground around issues of wrongful conviction and cost than around the much more fraught culture-war question whether states ought to be allowed to execute heinous offenders. The United States has thus become an outlier beyond its mere retention of the death penalty; it is an outlier in the diminishing visibility of human dignity as a basis for death penalty opposition both on and off the Court.

### III. THE PATH TO CONSTITUTIONAL ABOLITION

Although arguments about race, innocence, and human dignity will not likely provide a direct constitutional route to abolition of the death penalty, they may nonetheless play a significant supporting role in what we predict is the most likely path to constitutional invalidation of capital punishment. The constitutional doctrine that the Supreme Court has elaborated to address "excessive" or "disproportionate" punishment under the Eighth Amendment is the most likely legal vehicle to lead to a categorical constitutional abolition for a variety of reasons. This doctrine is long-established and well-elaborated, and it has been used by the Court recently in a series of cases yielding significant limitations on both the death penalty and the sentence of life-without-parole. Moreover, Justice

Anthony Kennedy, who has been a key swing vote on the Court, authored several of these recent opinions elaborating the Eighth Amendment's proportionality principle. Finally, the Court's proportionality doctrine is capacious in terms of the kinds of evidence and arguments that it encompasses, creating room for concerns about race, innocence, and human dignity to play a supporting role in evaluating the constitutionality of challenged punishment practices.

The Court's proportionality doctrine had an early start, with its essential outlines sketched in *Gregg*, the case that reinstated the death penalty just four years after the Court had invalidated all prevailing capital statutes in 1972 in the landmark *Furman* decision.<sup>45</sup> In *Gregg*, the Court explained that the Eighth Amendment prohibition of "cruel and unusual punishments" requires consideration of whether a challenged practice violates "the evolving standards of decency that mark the progress of a maturing society."<sup>46</sup> This latter phrase does not by its terms offer much helpful direction, but the *Gregg* Court began to identify the relevant criteria for gauging "evolving standards of decency." First, the Court looked to legislative enactments, noting that thirty-five states and the federal government had enacted new death penalty statutes since 1972. The Court also considered the outcomes of individual sentencing hearings, noting that more than 450 death sentences had been imposed under the new statutes. In addition to this quantifiable evidence of contemporary standards, the Court addressed what it identified as the twin purposes of capital punishment—deterrence and retribution—and concluded that these purposes could plausibly be served by reinstating the practice of capital punishment under the revised statutory schemes.

Since 1976, the Court has increasingly fleshed out its Eighth Amendment analysis, striking down both capital and non-capital sentences that the Court found to violate "evolving standards of decency." Just one year after *Gregg*, the Court invalidated the death penalty for the crime of the rape of an adult woman as "grossly disproportionate and excessive punishment" for such a crime.<sup>47</sup> Once again, the Court started with consideration of legislative enactments and jury verdicts, which together constituted "objective evidence of the country's present judgment concerning the acceptability of death as a penalty."<sup>48</sup> Georgia was the only state that authorized the death penalty for the crime of rape, and its juries had returned relatively few death sentences for rapists in the years prior to the Court's decision. But once again, the Court did not

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<sup>45</sup> See *Gregg*, 428 U.S. at 154.

<sup>46</sup> *Id.* at 173 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>47</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

<sup>48</sup> *Id.* at 593.

restrict its analysis to quantitative evidence, explaining that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”<sup>49</sup> By “our own judgment,” the Court was not suggesting that the Justices invoke their own moral or policy preferences, but rather that they consider—as they had done in *Gregg*—whether the challenged practice promoted the deterrent and retributive purposes of capital punishment. The Court concluded that death was a disproportionate punishment for someone who had not taken a life because such a sentence ran afoul of the basic retributive command of proportionality.

The Court applied the same reasoning to strike down the death penalty for defendants convicted of felony murder for killings that they personally did not commit or assist or intend to take place, but rather that were committed by a codefendant in a joint felony.<sup>50</sup> The Court later restricted its felony-murder exemption to those defendants who played only a minor role in the criminal undertaking or who lacked reckless disregard for the possibility that life might be taken.<sup>51</sup> In both of its decisions regarding the death penalty for felony murder, the Court performed the same two-step analysis outlined above: (1) it considered “objective evidence” of society’s views such as legislative enactments and jury verdicts; and (2) it consulted its “own judgment” by considering whether the purposes of deterrence and retribution were served by the practice in question.

For a period of almost two decades, from the mid-1980s until the early 2000s, the Court did not strike down any punishment practices under the Eighth Amendment, and indeed, it rejected two challenges to the death penalty brought by juvenile offenders and offenders with intellectual disability in 1989.<sup>52</sup> It seemed to many that the Court’s proportionality doctrine had hit a wall beyond which it might not progress further. But starting in 2002, the doctrine took on new life and momentum as the Court used it five times in a ten-year period to limit the reach of both the death penalty and the sentence of life-without-parole. In this series of five cases, the Court entrenched and elaborated its Eighth Amendment doctrine, expounding upon—and expanding—the evidence relevant to discerning “evolving standards of decency.”

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<sup>49</sup> *Id.* at 597.

<sup>50</sup> *See Enmund v. Florida*, 458 U.S. 782, 797 (1982).

<sup>51</sup> *See Tison v. Arizona*, 481 U.S. 137, 137 (1987).

<sup>52</sup> *See Stanford v. Kentucky*, 492 U.S. 361, 336–37 (1989); *Penry v. Lynaugh*, 492 U.S. 302, 368 (1989).

In its 2002 decision in *Atkins v. Virginia*, the Court struck down the death penalty for offenders with an intellectual disability.<sup>53</sup> In this case, the objective evidence was not nearly so stark as it had been with regard to the death penalty for rape. Twenty of the thirty-eight states that authorized the death penalty permitted the execution of offenders with an intellectual disability, while only eighteen prohibited it. The Court nonetheless found a legislative consensus against the practice by adding the twelve abolitionist states to the count, thus yielding a legislative majority of thirty states rejecting the practice, with only twenty states accepting it. But the Court noted that even on the “objective” side of its analysis, raw numbers did not rule; rather, the Court explained, “[i]t is not so much the number of [states exempting offenders with an intellectual disability] that is significant, but the consistency of the direction of change.”<sup>54</sup> It was significant to the Court that sixteen of the eighteen states that prohibited the execution of offenders with intellectual disabilities had done so within the thirteen years prior to the Court’s decision and that no state had withdrawn such an exemption in the same period. Thus, the Court’s objective analysis looks to recent history and emerging trends, not only to legislative head counts.

Moreover, the *Atkins* Court offered an even more expansive elaboration of its objective analysis by considering, albeit in a footnote, evidence of “a much broader social and professional consensus.”<sup>55</sup> The Court explained that its conclusion about national consensus was supported by the views of expert organizations, representatives of diverse religious communities, the world community, and the general public (expressed through polling data). The Court’s willingness to consult such a wide variety of sources to establish whether a societal consensus had emerged was a game-changing moment in Eighth Amendment law. No longer was the “objective evidence” of “evolving standards of decency” primarily grounded in legislative nose counting. Rather, such evidence was qualitative as well as quantitative. The significance of this analytical shift was reflected in the vehemence of the dissent it engendered. Justice Scalia was scathing in his repudiation of the Court’s analysis, even bestowing upon it a sarcastic award: “[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.”<sup>56</sup>

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<sup>53</sup> See 536 U.S. 304, 306 (2002).

<sup>54</sup> *Id.* at 344.

<sup>55</sup> *Id.* at 316 n.21.

<sup>56</sup> *Id.* at 347 (Scalia, J., dissenting).

Objective evidence aside, the *Atkins* Court also found that its own judgment called for an exemption from the death penalty for offenders with intellectual disabilities, because such offenders were less culpable for their offenses and less likely to be deterred. In bringing its own judgment to bear, the Court also emphasized a wholly new consideration: it noted that offenders with intellectual disabilities in the aggregate “face a special risk of wrongful execution” because of their susceptibility to giving false confessions, their lessened ability to consult with counsel, their possibly inappropriate affect at trial, and the risk that juries will consider them more dangerous because of their disability. For the first time, concerns about innocence became an explicit part of the Court’s proportionality analysis.

Three years later, the Court—per Justice Anthony Kennedy—underscored the expansive approach it had adopted in *Atkins* when it struck down the death penalty for juvenile offenders in *Roper v. Simmons* in 2005.<sup>57</sup> Expert opinion was the centerpiece of the *Simmons* Court’s analysis, as the Court emphasized the wealth of scientific and sociological studies that revealed how different adolescents are from adults in terms of maturity, self-control, and susceptibility to peer influences, and how much more transitory and less fixed is the adolescent personality. The Court explained that these proven qualities of youth make juvenile offenders less culpable for their offenses (thus undermining the goal of retribution) and make it less likely that juveniles can be deterred by the threat of a death sentence (thus undermining the goal of deterrence). The Court also took the occasion to give full-throated voice to the significance of the views of the world community. Justice Kennedy forcefully and dramatically emphasized the appropriateness of consulting the experience and views of other nations: “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>58</sup>

Justice Kennedy wrote for the Court again three years later when the Court declared the death penalty unconstitutional for the crime of raping a child in *Kennedy v. Louisiana* in 2008.<sup>59</sup> The objective evidence of consensus against the use of capital punishment in this context was strong, given that only a handful of states had passed laws punishing child rape with death, and Louisiana was the only one that had actually sentenced anyone to death for such a crime since 1964. Although the case would

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<sup>57</sup> See 543 U.S. 551, 563–64 (2005).

<sup>58</sup> *Id.* at 578.

<sup>59</sup> See 554 U.S. 407, 413 (2008).

have been easy to dispose of on the objective numbers alone, the Court spoke more broadly, explaining that death is an excessive punishment for any interpersonal crime that does not involve the taking of life, simply as a matter of retributive justice. Moreover, the Court again adverted to the problem of innocence, noting “serious systemic concerns in prosecuting child rape,” including the documented problem of unreliable child testimony, which can create a “special risk of wrongful execution.”<sup>60</sup> The *Kennedy* Court introduced yet another concern regarding the extension of the death penalty to the crime of child rape, observing that sentencing juries would have little guidance in choosing the few cases deserving of death from the regrettably large numbers of rape cases involving child victims. As a result, explained the Court, “we have no confidence that the imposition of the death penalty would not be so arbitrary as to be “freakis[h].”<sup>61</sup> The Court made no specific mention of the possibility of racial discrimination, even though the issue had been raised extensively in the briefing of the case. But the Court’s use of the word “freakish” and accompanying citation to *Furman* constituted a strong gesture in that direction. The *Furman* Court’s use of words like “freakish,” “wanton,” and “arbitrary” were widely read as code for the risk of racial discrimination; at the time of the decision, “everyone understood *Furman* as having been about race.”<sup>62</sup>

The Court’s commitment to its Eighth Amendment proportionality doctrine is illustrated by the extension and further elaboration of that doctrine in the noncapital context. The Court used the principles that it developed in the series of capital cases described above to limit the imposition of the noncapital sentence of life-without-parole (“LWOP”) on juvenile offenders. In *Graham v. Florida*, the Court constitutionally barred the imposition of LWOP sentences on juvenile offenders who had committed nonhomicide offenses.<sup>63</sup> The Court held that its proportionality doctrine, although developed in the context of capital cases, is the proper legal rubric for consideration of all “categorical” Eighth Amendment claims—that is, for Eighth Amendment challenges to a particular type of sentence as it applies to an entire class of offenders. In addition to its detailed consideration of objective evidence such as legislative authorization and actual sentences imposed, the Court emphasized the special status of youth, reiterating its analysis from *Roper*

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<sup>60</sup> *Id.* at 443.

<sup>61</sup> *Id.* (citing Justice Stewart’s concurrence in *Furman*).

<sup>62</sup> MANDERY, *supra* note 17, at 276.

<sup>63</sup> See 560 U.S. 48, 82 (2010). The Court extended its holding in *Graham* two years later, holding that juvenile homicide offenders could not receive *mandatory* life-without-parole (“LWOP”) sentences. See *Miller v. Alabama*, 132, S. Ct. 2455, 2469 (2012).

*v. Simmons*, the case outlawing the juvenile death penalty.<sup>64</sup> Also consistent with its approach in *Simmons*, the Court underscored the significance of world opinion, noting, “the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders.”<sup>65</sup>

The *Graham* Court also drew on the part of its analysis in *Kennedy v. Louisiana* that had raised concerns about “freakish” application of the death penalty in the context of child rape in light of the broad discretion afforded capital sentencing juries. Raising a similar concern about accuracy in LWOP sentencing, the *Graham* Court explained that a categorical rule exempting juveniles from LWOP sentences in non-homicide cases was necessary because decision-making in this context is too potentially arbitrary, allowing the imposition of an LWOP sentence on a juvenile “[b]ased only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved.”<sup>66</sup> The Court concluded: “A categorical rule avoids the risk that . . . a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide.”<sup>67</sup> Although the Court did not explicitly raise the issue of racial discrimination (though here, too, it was extensively briefed), the Court’s concern that discretionary judgments about “depravity” might be unreliable implicitly speaks to concerns about discrimination.

The hundreds of pages of Supreme Court opinions elaborating the Eighth Amendment’s proportionality doctrine have transformed what might have remained a largely quantitative analysis of consensus-by-numbers into a much broader, more qualitative assessment of emerging societal trends. This doctrine is not a likely vehicle for claims of factual innocence, challenges to racial discrimination, or elaboration of the meaning of human dignity. Nonetheless, there is room in the newly capacious proportionality analysis for consideration of each of these disparate issues, and thus each may play a role in a future global challenge to capital punishment under the Eighth Amendment.

The objective, quantitative evidence of a growing consensus against the death penalty is becoming stronger with each passing year. In the past decade, six states have repealed their death penalty laws, a rate that is unprecedented in recent history. Moreover, in the past two years, two state supreme courts have declared their state’s death penalties unconstitutional, bringing the number of states without death penalty

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<sup>64</sup> See *Graham*, 560 U.S. at 91-92.

<sup>65</sup> *Id.* at 81.

<sup>66</sup> *Id.* at 77.

<sup>67</sup> *Id.* at 78-79.

statutes to nineteen, with another eleven states reaching essentially “de facto abolitionist” status, having not performed any executions in a decade.<sup>68</sup> Even more striking is the decline in use of the death penalty on the ground, with both executions and new death sentences falling off dramatically from late 1990s highs. While this powerful quantitative case for an emerging consensus against capital punishment in America will no doubt be the starting point for an Eighth Amendment categorical challenge to the death penalty, the constitutional analysis will not end there, as the Court has repeatedly emphasized that other considerations are relevant to the question. Concerns about race, innocence, and human dignity all can be addressed within this broader analysis.

Although the Court has declined to expressly invoke concerns about racial discrimination in its Eighth Amendment analysis, there are two ways in which such concerns may yet play a part in an Eighth Amendment challenge to the death penalty. First, as noted above, the Court has repeatedly raised concerns about “freakish” or “erroneous” sentencing determinations arising from inadequately fettered discretion. In both *Kennedy* and *Graham*, these concerns played an explicit part in the Court’s Eighth Amendment invalidation of the challenged sentences (the death penalty for child rape in *Kennedy* and LWOP for juvenile nonhomicide offenders in *Graham*). Evidence of racially discriminatory patterns in capital sentencing thus may be relevant to a constitutional challenge to capital punishment—not to “prove” intentional discrimination in a particular case (proof that was required and not found by the Court in *McCleskey*), but rather to demonstrate the inadequacy of the capital justice system’s constraints on sentencing discretion.<sup>69</sup> Second, when the Court brings its “own judgment” to bear as part of its Eighth Amendment analysis, it asks whether the practice at issue serves the purposes of retribution or deterrence. If death sentences are meted out on the basis of arbitrary or invidious characteristics of the offender (like race or ethnicity), then by definition, the death penalty is not being imposed according to offenders’ just desserts, and thus runs afoul of the core principle of retributive justice. Evidence of racially discriminatory patterns in capital sentencing is directly relevant to whether the death penalty meets retributive goals *as practiced*, rather than in abstract theory.

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<sup>68</sup> In his 2015 dissent in *Glossip v. Gross*, Justice Breyer counted eleven states as de facto abolitionist because they had not conducted executions in more than eight years. Ten of those eleven states remain abolitionist today. One of those states, Arkansas, has since resumed executions, but the de facto abolitionist count remains at eleven because Nebraska, which Justice Breyer treated as a seventh repeal jurisdiction, reinstated its death penalty but has not conducted an execution in two decades. See *Glossip v. Gross*, 135 S. Ct. 2726, 2773, 2778 (2015) (Breyer, J., dissenting).

<sup>69</sup> See 481 U.S. 279, 297 (1987).



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The Supreme Court has been reluctant to authorize a federal judicial forum for death row inmates to bring individual claims of factual innocence based on new evidence discovered after trial.<sup>70</sup> But the Court has been quite willing to raise concerns about innocence in bringing its “own judgment” to bear on the constitutionality of challenged death penalty practices. It has raised concerns about the potential for wrongful conviction of offenders with intellectual disabilities because of the difficulties their disabilities raise in the investigation and trial contexts. Similarly, it has raised concerns about the potential wrongful conviction of offenders charged with child rape because of the unreliability of child testimony. In this way, evidence of a heightened risk of wrongful convictions in capital cases, which has been documented by scholars, may play a significant role in the Court’s evaluation of the constitutionality of the death penalty, wholly apart from the Court’s analysis of the objective evidence of its declining use. But innocence may also come into play on the objective side of the Court’s analysis, because concerns about innocence have been one of the most powerful forces driving both the legislative repeal movement and the declining use of the death penalty on the ground.<sup>71</sup> Innocence thus explains the dramatic decline in the raw numbers and suggests that this decline is not a temporary blip but rather an enduring feature of the landscape of capital punishment.

Finally, there is also a role for invocations of human dignity in the Court’s Eighth Amendment analysis. At a semantic level, the Court has frequently intoned, “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>72</sup> At a *realpolitik* level, Justice Kennedy has shown great interest in the concept of dignity, raising it in contexts as diverse as same-sex marriage and restrictions on abortion rights.<sup>73</sup> Given the results of the 2016 election and the confirmation of Justice Neil Gorsuch, it is unclear whether or for how long Justice Kennedy will continue to play a role as swing Justice on the Court. But concerns about dignity may enter the Court’s Eighth Amendment analysis in yet a different way. The Court has reiterated, first in a footnote in *Atkins* and then in the text of both *Simmons* and *Graham*, that the views of the world community play a role in establishing an emerging Eighth

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<sup>70</sup> See *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

<sup>71</sup> See, e.g., Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996); Richard C. Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent*, DEATH PENALTY INFO. CTR. (1997), <http://www.deathpenaltyinfo.org/node/523?scid=45&did=292> [https://perma.cc/X2JB-6HHA].

<sup>72</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

<sup>73</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

Amendment consensus. The fact that all of our peer countries – all of the other Western democracies – have abolished capital punishment, and for quite some time now, is thus undeniably relevant to the Court’s consideration of the objective evidence of consensus. While the views of other nations are not dispositive of the Eighth Amendment question, the Court has maintained that a uniform perspective abroad “underscores” the centrality of certain rights in our own constitutional system. Our closest peers in the world – the countries of Western Europe – abolished capital punishment not for the pragmatic reasons that now dominate the American debate (e.g., discrimination, innocence, cost), but rather primarily on grounds of human dignity, which plays a much greater role in European criminal justice discourse than in our own.<sup>74</sup> Thus, concerns about human dignity may be smuggled onto less hospitable American soil through consideration of the views of our European peers.

#### IV. CONCLUSION

The issues that any concerned citizen would raise about the American death penalty are not the same issues that the U.S. Supreme Court will most likely address under the Constitution in response to a categorical challenge to capital punishment. Nonetheless, concerns about racial discrimination, innocence, and respect for human dignity can and likely will play a role, albeit a supporting and/or indirect one, in the Eighth Amendment rubric that the Court will most likely bring to bear on the question. At a broader level, however, these concerns will come into play in an atmospheric as well as an analytic fashion. Should the U.S. Supreme Court take up a categorical Eighth Amendment challenge to capital punishment under the Eighth Amendment, the real question will be whether the Court’s forty-year project to regulate and rationalize the most extreme penal sanction under the Constitution has succeeded (well enough) or failed. By raising the issues of discrimination, innocence, and dignity, litigants will essentially be arguing that the regulatory project has failed – and, indeed, was perhaps an impossible mission from the very start.

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<sup>74</sup> Cf. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 207 (2003).

