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## Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment

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

### Introduction

Fifty years ago, in the early 1960s, death penalty abolitionists in the United States began a litigation campaign to bring an end to capital punishment in the United States. Over the next few decades, abolition would sweep through Europe and the Anglo-American legal world, where it now appears firmly established. In the United States, however, the constitutional abolition imposed by *Furman v. Georgia*<sup>1</sup> in 1972 was tentative and short-lived. The Supreme Court's re-authorization of the death penalty in 1976 led to a raft of new capital statutes and a rising tide of executions. The Court's approach to the death penalty in the post-1976 "modern era" of American capital punishment diverged, however, from the deferential, federalist approach of the preceding two centuries, during which states retained virtually complete control over death penalty practices. Rather, the Supreme Court inaugurated an ongoing project of federal constitutional review of capital punishment, through which it developed an intricate body of Eighth Amendment doctrine. The United States became the first and only one of its peer nations to move not from formal retention of the death penalty to abolition, but rather from retention to *regulation*.

Writing in the mid-1990s, we criticized the Supreme Court for failing to provide effective regulation of capital practices, while simultaneously creating a misleading impression of extensive judicial oversight.<sup>2</sup> The Court's capital jurisprudence, though arcane and intricate, placed few meaningful restrictions on state

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

2. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 357 (1995).

capital practices. But the very existence of a seemingly extensive (though in fact minimally intrusive) body of federal constitutional law worked to entrench and legitimate the death penalty. We lamented the ways in which judicial efforts to rationalize capital punishment had created the worst of all possible worlds—a system that did very little to cure the arbitrary and discriminatory administration of capital punishment but gave the reassuring appearance of doing much more. We attributed the soaring rates of death sentences and executions in the 1990s in part to the legitimating effect of the Supreme Court's project of constitutional regulation.

Then everything changed. Starting in 2000, the number of death sentences and executions plummeted for more than a decade, and several states recently have legislatively repealed the death penalty for the first time since the 1960s. In the mid-1990s, American abolition appeared an extremely remote prospect. Today, less than two decades later, the potential for abolition looks very different, and the question seems to be more one of when and how—rather than whether—the American death penalty will expire.<sup>3</sup> Our consideration of the causes of this precipitous and unexpected turnaround has led us to the surprising conclusion that the same regulatory reforms of the modern era that we described as legitimating and entrenching the practice of capital punishment have also contributed to its recent destabilization. Doctrines and institutions created by constitutional litigation have slowly created an environment that is less hospitable to the continued robust use of the death penalty and have provided a blueprint for further reform or even abolition, but in ways that were not anticipated by the initial reformers (nor by us, writing in the 1990s).

In this Article, we trace the ways in which contemporary efforts to regulate the death penalty have produced such unforeseen and surprising results. We contrast the effects of the death penalty reforms of prior generations—such as narrowing the scope of death-eligible crimes, privatizing and centralizing executions, and improving execution methods—with the reforms of the modern era, arguing that the current regime represents a fundamental break with past modes of regulating capital punishment. First and foremost, the death penalty is now subject to extensive legal regulation, in contrast to the virtually

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3. See Carol S. Steiker & Jordan M. Steiker, *The Beginning of the End?*, in *THE ROAD TO ABOLITION: THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 97, 98 (Charles J. Ogletree & Austin Sarat eds., 2009).

unregulated practice of prior generations. Second, extensive legal regulation has produced a significant gap between death sentencing and executions, creating a large class of death row inmates who are housed in increasingly restrictive conditions, many of whom face no foreseeable likelihood of execution. Third, death penalty litigation is increasingly performed by a specialized defense bar, as “generalists” have been replaced by (or supplemented with) capital trial lawyers, state postconviction lawyers, and federal habeas lawyers. Fourth, and relatedly, the primary focus of capital trials has shifted from the question of guilt or innocence of the underlying offense to the punishment issue of life or death. This shift is not merely one of degree or emphasis; it amounts to an entire rethinking of the obligations of trial counsel and of the function of the death penalty trial. Fifth, death-penalty states have made sentences of life without possibility of parole virtually the sole alternative to death as the punishment for capital offenses (in contrast to earlier generations, in which death-eligible offenses were punishable by terms of years or life imprisonment with parole eligibility).

These reforms of the modern era, unlike those of prior generations, contain within them the seeds of destabilization and have in fact rendered the American death penalty quite precarious. This is true notwithstanding the fact that most of the changes to American capital punishment in the modern era were not designed or expected to undermine the death penalty. Rather, contemporary capital practice reflects various efforts to tame the death penalty by making its administration more regularized, law-like, and humane. Such a path might have been expected to increase the death penalty’s legitimacy by adapting it to contemporary sensibilities, and during the early period of the modern era, the reforms likely supported the continued use of the death penalty. But whatever legitimacy gains have been produced by the modernizing project of capital reforms, they have been swamped—especially during the past decade—by the counter-vailing dysfunction wrought by extensive legal regulation of the death penalty. The sheer cost of capital proceedings, the uncertainty of executions, and the resulting dramatic decline in capital sentencing are looming problems for the continued use of the death penalty in the United States. Judicial abolition—on the heels of legislative abolition by a critical mass of states—is a genuine prospect on the horizon.

These observations offer insights into at least two debates about capital punishment. First, one of the most important and perplexing questions about the death penalty is the relationship

between “reform” and “abolition.” On the one hand, “civilizing” the death penalty by removing its worst excesses—whether in the form of “botched executions” or unsavory applications, such as against the young or mentally impaired—might stabilize the institution and mute public opposition.<sup>4</sup> On the other hand, capital “reform” might be viewed as the precursor to abolition, especially if the “reform” tends to highlight the viability of noncapital options or undermines the perceived goals of capital punishment.<sup>5</sup> By contrasting the effects of earlier generations of death penalty reform with those of the modern era, we are able to develop a fine-grained picture of the complex ways that particular death penalty reforms have restructured the institutional landscape and made it more or less favorable for abolition. This very particular picture, in turn, might help us to understand more generally how legal reform can lead to either entrenchment or destabilization or both, so that law reformers can better predict the effects of future efforts.

Second, how does the prospect of abolition in the United States relate to the already completed abolition in our peer countries? Some sociological theorists see abolition as the end stage of a centuries-long process of “civilization” and the development of the modern liberal state in which the death penalty is progressively narrowed, limited, privatized, and rendered more humane, until eventually it disappears.<sup>6</sup> In this account, American progress toward abolition has been slowed or halted in recent decades, but its eventual accomplishment will be part of the same long trajectory that our peer countries have followed. Others have argued that American abolition, if it occurs, will owe a large debt to the example of our peer countries, who will put political pressure on the United States to join them and who will influence our citizens and judges in softer but more pervasive ways that will

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4. See Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative ‘Reform’ of the Death Penalty*, 63 OHIO ST. L.J. 419, 425 (2002) (“Abolitionists could and should engage in nuanced, case-by-case analysis of the legitimating or entrenching potential of each proposed legislative reform.”).

5. *Id.* at 430 (describing potential “anti-legitimizing reforms” that might “plant the seeds for future reform or abolition”).

6. See, e.g., DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* 72 (2010) (“[I]t is possible to outline the general pattern of change in Western nations and to develop an explanatory account of how social developments transformed the institution [of capital punishment].”); see *id.* at 71 (noting that “the civilizing processes” described by sociologist Norbert Elias “certainly played a part” in the abolition of the death penalty in Western nations, though it must be complemented by a more comprehensive account of the social processes at work).

help to bring about eventual abolition.<sup>7</sup> Our account stands in contrast to both of these arguments. American abolition, if it occurs, will be in large part the product of a distinctively American project—the intensive legal regulation of capital punishment—that is separate from and in contrast to the abolition experiences of other nations. This regulatory project carried within it the inevitable seeds of destabilization and decline of the death penalty, in ways that neither the abolitionist litigators nor the reformist judges who created it anticipated. Just as there have been theories of American exceptionalism to account for our outlier status in retention, so does recent experience suggest a unique—and exceptional—path to abolition.

### I. Early Reform

Given the present status of the United States as the only Western democracy that has retained the death penalty,<sup>8</sup> it is easy to lose sight of the early efforts of American civic leaders and American jurisdictions to reform the death penalty and ameliorate its harshness. At the time of the nation's founding, all states authorized capital punishment, having inherited the punishment from England as the ordinary response to murder.<sup>9</sup> Our Constitution appears to presume the existence of the death penalty, with the reference to deprivations of "life" in the Due Process and Double Jeopardy Clauses,<sup>10</sup> and the explicit mention of "capital" crimes in the Grand Jury Clause.<sup>11</sup> The death penalty was available for many crimes apart from murder—burglary, rape, manslaughter, arson—though not so many as the famously long list of capital crimes in England.<sup>12</sup>

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7. See, e.g., FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 180–83 (2003) (describing "the capital punishment policy and attitudes of other developed nations" as first on a list of "the major cultural and political influences on the institutions and decision makers who have the power to make death penalty policy").

8. JOHN F. GALLIHER ET AL., *AMERICA WITHOUT THE DEATH PENALTY* 4 (2002) ("The continued use of capital punishment distinguishes the United States from all other Western, industrialized nations.").

9. See *id.* at 5–23 (detailing the historical origins of English capital punishment and its influence on the development and application of the death penalty in the American colonies during the seventeenth and eighteenth centuries).

10. U.S. CONST. amend. V.

11. *Id.*

12. See GARLAND, *supra* note 6, at 81 ("[T]he expansion of England's capital laws between 1688 and 1820, . . . grew from about 50 to more than 200 offenses . . .").

A. *Scope and Discretion: Narrowing the Range of Crimes Subject to the Death Penalty*

The same Enlightenment forces and republican ideologies that contributed to our Revolution also generated skepticism about the efficacy and desirability of the death penalty. Many of our founders—including James Madison, Thomas Jefferson, Benjamin Franklin, and Benjamin Rush—were familiar with Cesare Beccaria’s pathbreaking critique of the death penalty<sup>13</sup> and accordingly advocated restriction or abolition of capital punishment.<sup>14</sup> Perhaps the first and most significant reform of the U.S. death penalty came in Pennsylvania with the decision to recognize degrees of murder. That decision was wholly designed to limit the reach of the death penalty, with only murders in the first degree warranting the punishment of death. Pennsylvania’s innovation spread to many other states, and its decision in the 1790s to protect even some murderers from the death penalty was quite a radical transformation. Pennsylvania’s decision was palatable in part because of the emergence of the penitentiary, which provided incarceration as an alternative to the physical punishments and fines, which had been staples of eighteenth century punishment. Pennsylvania’s recognition of degrees of murder was followed by the decision of many states, including Pennsylvania, to make many previously capital crimes noncapital; in the early nineteenth century, many northern jurisdictions eliminated the availability of the death penalty for rape, robbery, burglary, and arson—to the point that treason and murder became the sole capital offenses in northern states by 1860.<sup>15</sup> In the South, too, the number of capital crimes was restricted—at least as applied to White persons, though the death penalty was available for a wider range of crimes for African Americans (both free and enslaved).<sup>16</sup>

Although some proponents of narrowing the range of death-eligible crimes were likely motivated by broader opposition to the death penalty,<sup>17</sup> many others urged such narrowing to protect the

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13. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 71–76 (Graeme R. Newman & Pietro Marongiu trans., Transaction Publishers 5th ed. 2009) (1764).

14. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 91–97 (2002); HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1994, at 7 (1996).

15. BANNER, *supra* note 14, at 131.

16. *Id.* at 139 (“By the Civil War capital punishment for [W]hites was, with a few exceptions, in practice reserved for murder throughout the South nearly as much as in the North.”).

17. At the same time that many American jurisdictions were narrowing the reach of the death penalty, a few others were abolishing it altogether. Michigan abolished the death penalty in 1846 for all crimes other than treason, followed

death penalty. This is a recurrent theme surrounding American death penalty reform—the uneasy alliance between abolitionists and retentionists to improve the American death penalty. From the retentionist perspective, broad death-penalty eligibility frequently caused prosecutors, judges, and especially jurors to resist convicting guilty offenders based on the perceived excessiveness of the punishment. Excessively harsh availability of the death penalty—evident in the recourse to this sort of nullification—tended to undermine the death penalty. Thus, for retentionists, narrowing the death penalty was a means of strengthening the death penalty rather than a step toward eliminating it. More generally, reform of the death penalty was often inspired not necessarily by concerns about the death penalty *per se*, but by a larger shift in attitudes regarding the causes of crime and the purposes of punishment. The movement to penitentiaries, reflecting a greater confidence in the prospects for rehabilitation (and a correspondingly diminished belief in fundamental depravity), rendered the death penalty less appropriate or necessary for a wide range of offenders.<sup>18</sup>

The second significant reform of the death penalty—related to the first—was the decision of American jurisdictions to give sentencers the choice to withhold the death penalty, even for offenders convicted of first-degree murder. The introduction of discretion was in part motivated by the same impulse to reduce the number of capital crimes—the fear that jurors would nullify to avoid imposition of the death penalty in particularly undeserving cases.<sup>19</sup> The movement toward discretion was a long process, initiated in Tennessee in the 1830s and gradually embraced universally by capital jurisdictions over a lengthy period (right up to the 1950s and 1960s).<sup>20</sup>

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closely by total abolition of the death penalty in Rhode Island in 1852 and Wisconsin in 1853. HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 21 (3d ed. 1982). Michigan is thus regarded as the first English-speaking jurisdiction in the world to achieve abolition. *Id.*

18. LOUIS P. MASUR, *RITES OF EXECUTION* 5 (1989) (“Condemnations of the death penalty marked the emergence of a new understanding of crime and punishment. Essayists argued that social influences, not depravity, caused crime and that reformation, not retribution, should govern punishments.”).

19. Philip English Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, in *CAPITAL PUNISHMENT IN THE UNITED STATES* 49, 49–51 (Hugo Adam Bedau & Chester M. Pierce eds., 1976).

20. BEDAU, *supra* note 17, at 9–12.



B. *Changing Sensibilities: Privatizing and Humanizing Executions*

The third major capital reform was the movement of public executions to inside jail or prison walls. Again, this reform was not primarily or even significantly a reflection of widespread doubts about the wisdom of the death penalty; rather, the emergence of a middle class in the nineteenth century, which cultivated a sense of refinement and culture, regarded public executions as the province of the lower elements of society.<sup>21</sup> Public executions were no longer regarded as religious, edifying rituals (characterized by solemn sermons), but instead were viewed as raucous, raw spectacles (although it is not altogether clear that the actual practice had changed that significantly). This newly emerging sensibility caused states to require the removal of executions from public view beginning in the 1830s.<sup>22</sup> By 1860, all northern states, as well as Georgia, had abolished public hangings, and much of the South banned such hangings by the end of the nineteenth century.<sup>23</sup>

Abolitionists often supported privatizing executions to demonstrate their lack of utility as a deterrent.<sup>24</sup> Indeed, this argument had something of a self-fulfilling character, because the prevailing deterrent value of executions was likely diminished by privatization. But death penalty supporters also embraced privatization based partly on a fear that the unfavorable publicity surrounding particularly raucous or unseemly executions would threaten the continued practice.<sup>25</sup> In part, the movement from public to private executions reflected the changing role of capital punishment. As the political and religious roles of the death penalty diminished, and the death penalty became less a symbol of state or church authority than an ordinary exercise of modernizing criminal justice systems, the need for public execution ceremonies likewise diminished.<sup>26</sup> In this respect, the decision to remove

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21. See JOHN D. BESSLER, *DEATH IN THE DARK* 43 (1997) (describing legislative motivation to curtail the "spectacle" of executions and their "demoralizing" effects).

22. *Id.* at 44-45.

23. *Id.* at 154-55.

24. *Id.* at 45 (quoting a Massachusetts legislative report stating that "the privatization of executions was 'a virtual abandonment of the argument that capital punishment is calculated to deter from the commission of crime'" and describing privatization, through the eyes of an abolitionist Wisconsin state senator, as an "entering wedge [by abolitionists] to take more sweeping action").

25. *Id.* at 71 ("[M]any private execution laws were enacted in the midst of credible legislative attempts to abolish capital punishment entirely.").

26. GARLAND, *supra* note 6, at 87-96 (describing emergence of the "modern mode" of capital punishment in the nineteenth century).

executions from public view signaled a different role for capital punishment rather than an emerging desire to end the practice altogether.

The experience in Minnesota reflects an extreme effort to shield the public from executions. In 1889, Minnesota passed what was dubbed the “Midnight Assassination Law,” which required not only that executions be conducted privately, but in the early hours of the morning with an extremely limited number of spectators.<sup>27</sup> The end of executions in Minnesota was wrought by a botched execution by hanging almost two decades later, in which the condemned, William Williams, fell to the floor when the trap door was opened because the sheriff had miscalculated the proper length for the rope.<sup>28</sup> Deputies had to prop up Williams to facilitate his strangulation, and despite the Midnight Assassination law, the newspapers caught wind of the story and published it.<sup>29</sup> In the wake of those events, three Minnesota papers—the *St. Paul Pioneer Press*, the *St. Paul Dispatch*, and the *St. Paul Daily News*—were all fined (after unsuccessful legal challenges to their prosecution).<sup>30</sup> More importantly, Minnesota’s governor subsequently recommended abolition of the death penalty in his next legislative address, and the legislature overwhelmingly approved abolition a few years later, in 1911.<sup>31</sup>

Some southern jurisdictions retained public hangings for rape into the early twentieth century. This retention may have been partially motivated by a desire to prevent lynchings.<sup>32</sup> One of the last public executions was conducted in Kentucky in 1936. Although the defendant had committed murder as well as rape, he was charged only with rape so that his execution could be conducted in public view; Kentucky law punished murder with electrocution in the state penitentiary but authorized public local executions for the crime of rape.<sup>33</sup>

27. BESSLER, *supra* note 21, at 98.

28. *Id.* at 110.

29. *Id.* at 110–11.

30. *Id.* at 120.

31. *Id.* at 124–25.

32. See Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 649 (2010). But see BANNER, *supra* note 14, at 154 (“Public execution held on longer in parts of the South, where the mounting frequency of lynchings prevented [W]hites from becoming too sensitive to the public display of violence.”).

33. See 10,000 See *Hanging of Kentucky Negro*, N.Y. TIMES, Aug. 15, 1936, at 30; *Woman Sheriff Ready to Hang Youth at Dawn*, CHI. DAILY TRIB., Aug. 14, 1936, at 3.

The end of public hangings undoubtedly challenged some bases for retaining the death penalty, particularly its role in dramatically illustrating to the public the cost of crime. In the end, however, shielding executions from public view also deflected criticism about the barbarity of the punishment and might simply have "adapted" the death penalty to modern sensibilities. As one historian observed, "[s]ome of the death penalty's later opponents looked back with mixed feelings at what they came to see as a bad bargain, in which supporters of capital punishment had bought off much of the opposition by agreeing to remove executions from public view."<sup>34</sup>

The same sensibilities that sought to shield the public from executions also led to efforts to humanize executions by making them less painful and less visibly destructive of the body. In the late 1800s hanging began to give way to electrocution because, as the Williams episode in Minnesota demonstrated, inexpert hangings led to prolonged death, decapitation, or some other mishap. Although the first electrocution was botched, refinements of the method led to greater enthusiasm, and many states moved from hanging to electrocution between 1890 and 1950.<sup>35</sup> Some states also moved to lethal gas (as an alternative to either hanging or electrocution) because of the apparent minimal pain and minimal destruction of the body: hanging could crush the neck and electrocution could cause burns. More recently, virtually all jurisdictions have moved to lethal injection—again based on a desire to inflict minimal pain and minimal visible injury. Whereas in the past, part of the punishment of death was the pain, humiliation, and degradation of the execution itself, in the late nineteenth and twentieth centuries, the punishment of death gradually became the loss of life, not the manner of death. As in the other reforms discussed above, supporters did not see humanizing executions to make them less painful and less destructive of the body as hostile to capital punishment itself, but rather as a means of accommodating the death penalty to modern sensibilities, reflecting again the somewhat changing role of the death penalty.

### *C. Centralizing Executions*

The final reform of the death penalty in the premodern era involved the centralization of executions—their movement from

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34. BANNER, *supra* note 14, at 156.

35. *See id.* at 189.

local administration by county officials to state administration in state penitentiaries.<sup>36</sup> Centralization was partly motivated by the replacement of hangings with other forms of execution such as electrocution and lethal gas, which required more expertise to administer. Cost was likely an additional factor, as it simply was not cost effective or feasible for local counties to own and operate their own electric chairs or gas chambers. Centralization of executions also reflected a more general transition from local, communal criminal justice practices to more bureaucratic, hierarchical structures characteristic of modernizing societies. As with the other reforms, few participants in the decisions of every state to shift executions from the county to the state level—or contemporary observers of those transitions—would have understood the movement of executions to state prisons as an *abolitionist* development or as a reform that seriously called into question the institution of capital punishment itself.

#### *D. Premodern Reforms: On the Path to Abolition?*

Even though the reforms discussed above—narrowing of death eligibility, permitting discretionary grants of mercy, and concealing, humanizing, and centralizing executions—were not primarily understood as abolitionist measures, there is the possibility that the reforms put us on the path to abolition or reflected values that are ultimately inconsistent with the continued use of the death penalty. This sort of claim can be divided into two hypotheses. The weaker of the two offers a highly deterministic view of these reforms. On this view, the reforms entail the seeds of the death penalty's destruction. Narrowing the scope of death-penalty eligibility and requiring the exercise of discretion in sentencing limit the total number of death sentences, making the practice more confined, more fragile, and more subject to question. The process of concealing, humanizing, and centralizing executions transforms executions into marginal events marked by state shame instead of robust, collective, social practices. On this account, deprived of its powerful practical and symbolic roles, and replaced by imprisonment for many categories of offenses, the death penalty was placed on a path of inevitable decline and eventual abolition.

A corollary to this argument is the observation that most, if not all, of the reforms described above were adopted in many other

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36. WILLIAM J. BOWERS, *EXECUTIONS IN AMERICA* 31 (1974).

countries more or less at the same time as in the United States,<sup>37</sup> and in all other Western democracies the reforms were eventually followed by the declining use and eventual abolition of the death penalty.<sup>38</sup> Hence, the United States is simply lagging behind other countries along the same path, and the reforms will function as important causal contributors to eventual abolition.

The problem with these hypotheses is that the reforms have, in the past and in the present, happily coexisted with retention. Narrowing the death penalty to murder has not diminished significantly the potential pool of the condemned, in part because the United States experiences a great deal of murder. The humanizing, concealing, and centralizing of executions has not triggered much abolitionist momentum. Indeed, there were far more cries of "hypocrisy" at the time these reforms were embraced than in contemporary American discourse. Opponents of the death penalty rarely draw attention to the muted spectacle executions have become, perhaps fearing that the likely response would be to advocate a reversion to harsher, more public forms of execution.

Moreover, the deterministic, causal thesis is undermined by the sheer time that has elapsed since the adoption of the major premodern reforms. The narrowing of death-penalty eligibility to murder (and rape in the South) began in the eighteenth century and was virtually complete by the early twentieth century, in practice if not in law. Concealing executions also began almost two centuries ago, and was fully accomplished by the 1930s. The process of humanizing executions has been an ongoing process that dates back at least a century, as does the centralizing of executions. Thus, although many countries that have abolished the death penalty adopted many of these same reforms and arrived on an abolitionist path, it is hard to say that these reforms in any meaningful sense *caused* abolition.

A more modest and more plausible account views the reforms of the premodern era as the product of a set of values that powerfully motivated abolition in other countries. Even if those reforms did not *cause* abolition in other countries, the values which produced those reforms and abolition elsewhere will likely motivate abolition in the United States as well. On this view, the civilizing, humanizing, and bureaucratic impulses that narrowed the death penalty, centralized its administration, and animated

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37. ZIMRING, *supra* note 7, at 16.

38. *Id.* at 17-41 (describing the abolition of the death penalty in various European countries).

efforts to reduce its pain and horror, are values that inevitably undermine the continued use of the death penalty.

From this perspective, though there may be bumps along the abolitionist road in the United States based on some distinctive aspects of American politics, federalism, or rates of victimization and violence, eventually “civilizing” and “humanizing” impulses will win out. Though there is much to recommend this view, there is a strong case on the other side. The centerpiece of that case is the notable lack of any strong human-rights-based or human-dignity-based critique of the American death penalty in contemporary American discourse. The United States prides itself as a democratic, egalitarian, rights-based society, and yet few contemporary opponents of the American death penalty appear to claim that the punishment is contrary to some fundamental notion of civilization or humanity. Indeed, such critiques of the death penalty on the grounds of human dignity or essential human rights appeared much more frequently in the discourse of earlier American eras. When Minnesota discussed abolition at the end of the nineteenth century, one legislator described the death penalty as “this harlot of judicial murder [that] smear[s] the pages of our history with her bloody fingers [and] trail[s] her crimson robes through our Halls of Justice.”<sup>39</sup> In the debates that led to abolition in Michigan in the 1840s, the committee recommending abolition declared, “no man hath a power to destroy life but by commission from God, the author of it.”<sup>40</sup>

These are not the sort of sentiments frequently aired in or endorsed by contemporary legislatures (particularly in retentionist states). In fact, most of the anti-death-penalty discourse in contemporary debates is pragmatic and utilitarian rather than rooted in deontological conceptions of human rights or religious commands. Opponents of the death penalty emphasize its cost, its arbitrary or discriminatory distribution, and the risk of executing the innocent. Moreover, the pragmatic focus has been self-consciously embraced in light of the widespread perception that Americans have much less discomfort with capital punishment as a punishment than with its prevailing administration. Along these lines, the National Coalition to Abolish the Death Penalty, a leader in American anti-death-penalty advocacy, tellingly propounds “Ten Reasons Why Capital Punishment is Flawed Public Policy” as the centerpiece of its web-based advocacy.<sup>41</sup> Even

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39. BESSLER, *supra* note 21, at 125.

40. GALLIHER ET AL., *supra* note 8, at 15.

41. See *Death Penalty Overview: Ten Reasons Why Capital Punishment Is*

the two human-rights-based and religious-based arguments appearing on that list (“Capital punishment goes against almost every religion” and “The U.S. is keeping company with notorious human rights abusers”<sup>42</sup>) seem to be one step removed from directly asserting the *immorality* of the death penalty. The reluctance to condemn the death penalty on absolutist moral grounds is perhaps best illustrated by the tact of contemporary American opponents to advocate legislative “repeal” of the death penalty rather than using the morally fraught term “abolition.”<sup>43</sup> Such a strategy avoids the implication that the decision to end the practice is morally compelled to the same extent as the duty to end slavery. “Repeal” also suggests that the decision to withdraw the death penalty need not be a permanent or irreversible one.

Thus, while the reforms of the premodern era might carry the seeds of an attack based on emerging norms of civility and humanity, those seeds do not appear to be particularly ripe. And though we have travelled on the same road as most abolitionist states in many of our common reforms, it is not obvious that the road cannot maintain a divide at the end, with one abolitionist path and the other retentionist. The question remains whether the reforms of the present era—most of which are distinct to the American experience—are similarly able to coexist with retention.

## II. Reforms of the Modern Era

The modern era of the death penalty was inaugurated by the striking decline in death sentencing and executions in the 1960s. Those declines, together with a myriad of social and political forces, including the Civil Rights Movement and the Vietnam War, prompted a rethinking of the role of capital punishment in America.<sup>44</sup> Prior to the late 1950s, the United States had experienced a four-decade period in which no American state had abolished the death penalty.<sup>45</sup> But over the next decade, Alaska and Hawaii entered the Union as abolitionist states (having abolished the death penalty as territories just before statehood), and Delaware, Oregon, Iowa, West Virginia, Vermont, and New

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*Flawed Public Policy*, NAT'L COALITION TO ABOLISH DEATH PENALTY, <http://www.ncadp.org/index.cfm?content=5> (last visited Feb. 29, 2012).

42. *Id.*

43. See Steiker & Steiker, *supra* note 32, at 676.

44. See *id.* at 667.

45. BOWERS, *supra* note 36, at 7.

York all abolished the death penalty for ordinary murder, with some of those states securing total abolition.<sup>46</sup>

#### A. *Increased Regulation of the Death Penalty*

In addition to these political developments, the death penalty became subject to significant legal regulation for the first time in American history. The U.S. Supreme Court first signaled the possibility of meaningful federal constitutional regulation in 1963 when three justices urged the Court (unsuccessfully) to decide whether the death penalty is excessive when imposed for the crime of rape.<sup>47</sup> Just a year before, the Court had incorporated the Eighth Amendment's prohibition of cruel and unusual punishment and applied it against the states via the Fourteenth Amendment's Due Process Clause.<sup>48</sup> Emboldened by the apparent interest of some members of the Court in regulating the American death penalty, as well as the Warren Court's dramatically increasing role in supervising state criminal processes, the NAACP Legal Defense Fund (LDF) launched an attack on capital punishment, in part because of its manifestly discriminatory administration, particularly in rape cases.<sup>49</sup> The LDF, via its moratorium strategy<sup>50</sup> of challenging capital sentences in every jurisdiction based on all available constitutional grounds, managed to bring executions to a halt by 1967.<sup>51</sup> Five years later, in *Furman v. Georgia*,<sup>52</sup> the U.S. Supreme Court invalidated prevailing capital statutes based largely on their failure to guide sentencer discretion; states had authorized the death penalty for a wide range of crimes, including murder and rape, yet only a fraction of persons convicted of such offenses had actually been sentenced to death (much less executed).<sup>53</sup> The looming gap between death-penalty eligibility and actual sentencing practices, together with the failure of states to endorse any conception of the worst of the worst offenses or offenders, led the Court to find the status quo

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46. *Id.*

47. *Rudolph v. Alabama*, 375 U.S. 889, 889 (1963) (Goldberg, J., dissenting from denial of certiorari).

48. *Robinson v. California*, 370 U.S. 660, 666 (1962) (holding incarceration to be excessive punishment for the crime of "addiction" to a controlled substance).

49. *See Steiker & Steiker*, *supra* note 32, at 667.

50. MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 107 (1973).

51. *Id.* at 106-25 (describing the moratorium strategy).

52. 408 U.S. 238 (1972).

53. *See Steiker & Steiker*, *supra* note 2, at 364-69 (describing the constitutional concerns supporting the result in *Furman*).



intolerably arbitrary.<sup>54</sup> Only two Justices—Brennan and Marshall—concluded that the death penalty was in all cases contrary to evolving standards of decency,<sup>55</sup> and in the wake of the Court's decision, states passed new capital statutes with an eye toward limiting or abolishing sentencer discretion to comply with the Court's mandate.<sup>56</sup> Four years later, in 1976, the Court reviewed five of the new statutes, upholding three schemes that confined the death penalty to aggravated murder via specially enumerated circumstances,<sup>57</sup> and striking down two schemes that made the death penalty mandatory for certain offenses.<sup>58</sup>

The modern American death penalty consists of the regime produced in the wake of the Court's landmark decisions in 1972 and 1976 and its subsequent (and continuing) regulatory efforts. Those decisions spawned numerous core doctrines, including the requirements that states narrow the class of those eligible for the death penalty through the use of at least one nonvague aggravating factor,<sup>59</sup> that states facilitate robust consideration of a defendant's mitigating evidence (broadly construed),<sup>60</sup> and that states withhold the death penalty from offenders deemed undeserving by contemporary standards (including juveniles,<sup>61</sup> persons with mental retardation,<sup>62</sup> persons convicted of rape and other nonhomicidal ordinary offenses,<sup>63</sup> and persons convicted based on the actions of another and who were not themselves major participants in the offense).<sup>64</sup> In addition, the Court has developed numerous doctrines regulating other fundamental aspects of capital proceedings, such as the selection and exclusion of potential capital jurors<sup>65</sup> and the minimal requirements for

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54. *Id.*

55. *Id.* at 362.

56. MELTSNER, *supra* note 50, at 306–09.

57. Steiker & Steiker, *supra* note 2, at 363–65.

58. *Id.* at 369–70.

59. Zant v. Stephens, 462 U.S. 862, 877 (1983).

60. Tennard v. Dretke, 542 U.S. 274, 288–89 (2004).

61. Roper v. Simmons, 543 U.S. 551, 568 (2005).

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

63. Kennedy v. Louisiana, 554 U.S. 407, 434 (2008).

64. Enmund v. Florida, 458 U.S. 782, 801 (1982).

65. See, e.g., Morgan v. Illinois, 504 U.S. 719, 728–34 (1992) (holding that death penalty defendants are entitled to an impartial jury, defendants in death penalty cases may exclude any venireperson who would automatically vote for the death penalty, and a court must allow inquiry into venirepersons' views on capital punishment if the defendant so requests); Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (“[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty.”).

effective capital investigation and representation.<sup>66</sup> In the dozens—indeed hundreds—of capital cases in which the Court has issued merits decisions over the past four post-*Furman* decades, the Court has addressed many other aspects of capital litigation including permissible types of prosecutorial argument,<sup>67</sup> the circumstances under which death-sentenced inmates may assert their factual innocence based on newly discovered evidence,<sup>68</sup> and the requisite mental bearing for condemned prisoners at the time of their execution.<sup>69</sup>

Looking back from the present, it is clear that the foundational cases of the 1970s heralded a new era in which courts would play a much more substantial role in the American capital system. The proliferation of doctrines and subdoctrines touching all aspects of the capital process—the investigation of crime, the conduct of both prosecutors and defense attorneys, jury selection, jury instructions, and so on—certainly have transformed the American death penalty. But the most important changes might not be reflected in the content of those doctrines so much as in the process by which they are enforced. Indeed, the actual requirements imposed on states in administering the death penalty are less strenuous than the legions of cases heard and decided by the U.S. Supreme Court would suggest.<sup>70</sup> A disproportionate number of those cases focus less on the substantive commands of the Eighth and Fourteenth Amendments than on procedural questions surrounding their enforcement.<sup>71</sup> In 1996, with the passage of the

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66. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 380–93 (2005) (requiring capital defense counsel to acquire and review any evidence that they believe the prosecution might use to establish aggravation for sentencing); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (requiring capital defense counsel to conduct a reasonable investigation and present reasonable mitigating evidence); *Williams v. Taylor*, 529 U.S. 362, 391–98 (2000) (condemning a capital defense attorney's failure to investigate and present evidence and his lack of preparation as ineffective assistance of counsel).

67. See, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985) (prohibiting prosecution in a capital case from inaccurately suggesting to jurors that an appellate court will reassess the appropriateness of a death sentence).

68. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 404–05 (1993) (suggesting that capital convicts are not entitled to federal habeas review of claims of actual innocence unaccompanied by claim of separate constitutional violation).

69. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (holding that a state may not impose the death penalty upon a defendant who is incompetent at the time of execution and must afford adequate procedural protections to safeguard that right).

70. *Steiker & Steiker*, *supra* note 2, at 402 (describing the quite minimal yet complex demands of contemporary capital doctrines).

71. Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 317.

Antiterrorism and Effective Death Penalty Act,<sup>72</sup> Congress substantially curtailed the ability of federal courts to engage in de novo review of state court decisions denying relief on federal claims. Over the past fifteen years, the lower federal courts and the U.S. Supreme Court have spent an extraordinary amount of time analyzing the consequences of those changes, and a significant percentage of federal habeas litigation is devoted to ascertaining whether the federal courts can reach the merits of constitutional claims surrounding the implementation of the death penalty (as opposed to the merits of the cases themselves).<sup>73</sup>

*B. Professionalization of the Capital Litigation Bar*

The “constitutionalization” or “legalization” of the death penalty, the process of subjecting every aspect of the capital process to federal legal norms and standards (even if quite minimal), has created a new cadre of lawyers specializing in capital litigation. Many active death penalty states have transferred the responsibility for defending capital convictions and sentences from local district attorneys to lawyers within state attorney general offices who have particular knowledge about the operation of federal habeas and the federal constitutional law applicable to the death penalty. On the defense side, capital trial representation, state postconviction representation, and capital litigation in federal habeas have become distinct professional roles. Before the modern era, capital cases were handled by appointed lawyers who generally had no specialized knowledge or training related to the death penalty or postconviction procedure.<sup>74</sup> Capital appeals and postconviction were likewise handled by generalist lawyers with no particular training or expertise.<sup>75</sup> The LDF’s efforts in the 1960s marked the first time in American history that capital litigation became a distinct practice, and the Court’s decisions announcing constitutional limitations on the death penalty generated a need for greater specialization and training.<sup>76</sup> The transformation of capital representation has taken several decades; it was still not uncommon for generalist lawyers

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72. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, § 107(a), 110 Stat. 1214, 1221.

73. Steiker, *supra* note 71.

74. Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL. F. 117, 139.

75. *Id.*

76. *Id.* at 138–40.

to represent capital defendants at trials in the 1970s and early 1980s.<sup>77</sup>

Today, though, a group of professional capital litigators engages in direct representation and postconviction representation of capital defendants and inmates, and these litigators also provide support and consulting for private criminal defense lawyers who work on these cases. This is not to say that every capital case is actually litigated by expertly trained and professionally committed capital litigators. But many dozens—indeed hundreds—of these professionals are involved in capital litigation nationwide, and their presence reinforces the role of legal regulation in the American death penalty. Just as the LDF shared pleadings and strategies in its moratorium effort, so too do contemporary capital litigators collaborate in designing and refining legal claims (as well as conducting trainings to ensure wide availability of the prevailing standard of practice).<sup>78</sup> As a result, in many if not most capital cases, the work of professional capital litigators will be reflected in the range and quality of claims raised and litigated through multiple stages of the process. A particularly telling example of the coordination and sophistication of capital defense lawyers can be found in the recent rounds of lethal injection litigation. Claims surrounding lethal injection protocols have been pursued vigorously in virtually every death penalty jurisdiction in the country, with significant success in forcing jurisdictions to reconsider or redesign their procedures,<sup>79</sup> notwithstanding the U.S. Supreme Court's rejection of a challenge to Kentucky's lethal injection protocol in 2008.<sup>80</sup>

### C. *Growing Time Between Sentencing and Execution*

Overall, the Court's articulation of an extensive body of capital doctrines, as well as a dense thicket of procedural rules governing their enforcement, has transformed the American death penalty most fundamentally by extending the time between death sentences and executions. Throughout most of our history, weeks or maybe months separated the pronouncement of sentence and the ultimate execution.<sup>81</sup> Today, the separation is measured by

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77. *Id.*

78. See, e.g., *The Innocence Network Holds an Annual Conference*, INNOCENCE NETWORK, <http://www.innocencenetwork.org/conference> (last visited Feb. 20, 2012) (announcing the Innocence Network's annual conference for capital defense attorneys).

79. Steiker & Steiker, *supra* note 74, at 145–46.

80. *Baze v. Rees*, 553 U.S. 35, 62–63 (2008).

81. Steiker & Steiker, *supra* note 32, at 677–79.

years or decades in active executing states. In a larger group of inactive states, the separation is simply immeasurable, because the imposition of legal constraints (in conjunction with other political and social forces) has created a de facto moratorium on executions (except, perhaps, for “volunteers” who seek execution by waiving their appeals).<sup>82</sup> Constitutionalization and proceduralization have created the new “death-row phenomenon”—long-term confinement by many prisoners awaiting execution.<sup>83</sup> Whereas the accumulation of inmates in the late 1960s reached about six hundred inmates nationwide, which was regarded as an extraordinary number at that time, today there are several thousand inmates languishing on death row (more than seven hundred in California alone).<sup>84</sup>

This phenomenon destabilizes the death penalty in numerous ways. First, extending the time between sentence and execution undercuts two of the most pressing pro-death-penalty arguments: deterrence and retribution. Deterrence is attenuated when it is widely understood that an execution will not occur until many years after sentence, if at all. Moreover, the retributive value of executions is diminished when the person executed has lived a “second lifetime” on death row. Given that the death-sentencing decision now encompasses a broad inquiry into a defendant’s background and character, a lengthy gap between sentence and execution necessarily excludes relevant information—the second life lived—from the sentencing decision (and clemency is a poor substitute for updating the death-worthiness of the condemned). In more colloquial terms, the death-row phenomenon has prompted deep psychological questions about whether a person executed twenty years after the offense and sentence is the same person who had been condemned two decades earlier.

Second, the death-row phenomenon creates a new moral problem for the death penalty, one that Justice Breyer and former Justice Stevens have highlighted on several occasions.<sup>85</sup> The death

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82. Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in ‘Executing’ Versus ‘Symbolic’ States in the United States*, 84 TEX. L. REV. 1869, 1870–75 (2006).

83. Steiker & Steiker, *supra* note 32, at 681.

84. Judge Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters: A Roadmap to Mend or End the California Legislature’s Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S51 (2011).

85. *Johnson v. Bredesen*, 130 S. Ct. 541, 542 (2009) (Stevens, J., joined by Breyer, J., respecting denial of certiorari); *Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., respecting denial of certiorari); *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari).

penalty now encompasses two separate punishments: lengthy incarceration under very severe conditions (essentially solitary confinement in many states), followed by an execution. Even if the public and courts are persuaded that the death penalty itself is not an excessively cruel punishment, there are increasing doubts about whether the present regime of lengthy solitary confinement and subsequent execution is tolerable.

Third, the extensive legal regulation surrounding the death penalty, with more substantial trials, lengthy appeals, and functionally indeterminate sentences, has exponentially increased the cost of capital punishment. Whereas cost was traditionally a pro-death-penalty argument (why should the state spend money housing inmates for life?), cost has become decisively an anti-death-penalty argument, as the modern regulatory apparatus imposes severe costs that are difficult, if not impossible, to curb.<sup>86</sup> Over the past three-to-five years, concerns about the cost of capital punishment have become a driving force behind efforts to repeal the death penalty,<sup>87</sup> and such concerns have contributed to the decisions of prosecutors to forego capital sentences, with dramatic declines in death sentencing over the past decade.<sup>88</sup>

#### *D. Increasing Focus on Mitigation*

Part of the increase in capital costs is attributable to the emergence of mitigation as the primary focus of capital litigators. Prior to the modern era, the focal point of capital trials, like their noncapital counterparts, was the question of guilt versus innocence.<sup>89</sup> Most states did not allow the presentation of evidence unrelated to guilt or innocence,<sup>90</sup> and lawyers in capital cases did little if any investigation unrelated to the commission of the offense. Indeed, lawyers in capital cases were not typically what we would today call “death penalty lawyers”; they tended to be generalists who approached capital cases in the same way they would approach other serious felony cases.<sup>91</sup>

When the U.S. Supreme Court invalidated mandatory capital statutes in 1976,<sup>92</sup> the Court constitutionalized the requirement of

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86. Steiker & Steiker, *supra* note 74, at 137–50.

87. *Id.* at 118–24.

88. *Id.* at 142.

89. MELTSNER, *supra* note 50, at 68.

90. *Id.*

91. Carol S. Steiker, *Darrow's Defense of Leopold and Loeb: The Seminal Sentencing of the Century*, in TRIAL STORIES, 117, 142–45 (Michael E. Tigar & Angela Jordan Davis eds., 2007).

92. *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428

individualized sentencing. In one respect, the Court was simply recognizing the national norm of discretion in capital cases, given the near-uniform rejection of mandatory death sentencing provisions by the 1960s.<sup>93</sup> But, in its elaboration and enforcement of a right to individualized sentencing, the Court considerably broadened the range of evidence relevant to the punishment decision.<sup>94</sup> Moreover, the “professionalization” of the capital litigation bar in response to the Court’s regulatory efforts significantly changed the scope and scale of trial defense efforts. Prior to the 1970s, punishment-phase investigation and advocacy was rudimentary and secondary.<sup>95</sup> By the late 1980s, the emerging norm for capital-trial representation included a comprehensive evaluation of a defendant’s life and circumstances.<sup>96</sup>

In 1989, the American Bar Association (ABA) promulgated detailed standards for the appointment and performance of counsel in capital cases.<sup>97</sup> Those standards outlined the wide range of tasks necessary to effective capital-trial representation, including investigation into a defendant’s medical history, educational history, special educational needs, military service, employment and training history, family and social history, and religious and cultural influences.<sup>98</sup> Fourteen years later, in its revised guidelines, the ABA described even greater responsibilities, recognizing that effective capital representation requires the coordination of a capital-punishment team, including a professional investigator, a mitigation specialist, and all other pertinent professional experts.<sup>99</sup> The defense approach contemplated under the standards includes vigorous efforts to seek a plea based on extensive mitigation investigation, aggressive pretrial motion practice to assert all nonfrivolous challenges to the prosecution’s evidence and the state capital scheme, and informed jury selection

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U.S. 280 (1976).

93. See *Woodson*, 428 U.S. at 298.

94. See Jordan M. Steiker, Penry v. Lynaugh: *The Hazards of Predicting the Future*, in *DEATH PENALTY STORIES* 277, 306–10 (John H. Blume & Jordan M. Steiker eds., 2009) (describing the expansion of the Court’s individualization principle).

95. Steiker & Steiker, *supra* note 74, at 138–40.

96. *Id.* at 139–41.

97. *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, AM. B. ASS’N, [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/Standards/National/1989Guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf) (last visited Feb. 6, 2012).

98. *Id.*

99. Am. Bar Ass’n, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 *HOFSTRA L. REV.* 913, 925 (2003).

efforts to ensure reasonable consideration of mitigation evidence.<sup>100</sup> Acknowledging that this sort of representation requires states to commit “substantial resources” to capital-trial defense, the ABA remarked “that any other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.”<sup>101</sup>

The transformation of capital-trial defense, reflected in the ABA standards (though not fully in capital practice) has been destabilizing to the continued use of the death penalty in at least two ways. First, like the additional layers of procedural safeguards wrought by increased legal regulation, the emergence of robust individualization and other trial-preparation standards has dramatically raised the cost of capital punishment.<sup>102</sup> Capital-trial costs are stunningly greater than their noncapital counterparts.<sup>103</sup> Second, robust individualization fits uneasily with many traditional and religious defenses of the death penalty, because it presumes that “an eye for an eye” is an inappropriate command; the death penalty decision must be as much a judgment about the offender as the offense.<sup>104</sup> As capital representation increasingly becomes a sophisticated, collaborative effort to avoid the imposition of a death sentence, capital punishment becomes less common and indeed less expected as the ordinary response even to aggravated murder.<sup>105</sup> High profile cases yielding life sentences in the wake of extensive mitigation cases—such as those involving Terry Nichols (who participated in the Oklahoma City bombing),<sup>106</sup> and Brian Nichols (who killed a state court judge and others while escaping from his rape trial in a Georgia courthouse)<sup>107</sup>—reflect the new reality that no crimes, no matter their severity, are invariably punished by death.

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100. *Id.* at 1043–54.

101. *Id.* at 930.

102. Steiker & Steiker, *supra* note 74, at 140.

103. *Id.* at 137–50 (detailing the “new cost” of capital punishment).

104. See Am. Bar Ass’n, *supra* note 99, at 1062.

105. See *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Feb. 6, 2012) (detailing the sharp decline in executions from 1996 to 2011).

106. See *Hung Jury Spares Nichols a Second Time from Death*, N.Y. TIMES, June 12, 2004, at A7.

107. See *Multiple Life Terms for Courthouse Killing in Atlanta*, N.Y. TIMES, Dec. 14, 2008, at A37.



*E. Life-Without-Parole as an Alternative*

The final major reform in contemporary capital practice has been the emergence of life-without-parole (LWOP) as the primary alternative punishment to the death penalty for capital crimes.<sup>108</sup> Prior to the 1970s, LWOP was essentially nonexistent within the United States.<sup>109</sup> LWOP first emerged in a few states in response to *Furman's* invalidation of prevailing capital statutes, but its widespread adoption in subsequent decades was driven by broader considerations. The rise of violent crime in the 1970s and 1980s, increasing skepticism about the rehabilitative role of prisons, and frustration with the lack of transparency in criminal sentencing all contributed to more punitive sentencing regimes, which included fewer opportunities for parole. Although death-penalty opponents tended to support LWOP in death-penalty states in hopes of reducing capital sentences, the movement toward LWOP was a crashing wave, embraced in states without the death penalty, as well as for certain noncapital offenses in states that retained the death penalty. But death-penalty supporters recognized the danger LWOP poses for the death penalty.<sup>110</sup> In Texas, prosecutors resisted LWOP for years, and reluctantly capitulated only after the U.S. Supreme Court invalidated the death penalty for juveniles, fearing an insufficiently punitive or protective alternative to death in capital cases involving juveniles.

Although the recent, ubiquitous embrace of LWOP is not primarily attributable to concerns about the death penalty, its effects on the death penalty have been dramatic. The emergence of LWOP is likely the single most important causal factor in the extraordinary decline in American death sentencing over the past fifteen years. The number of new death sentences has dropped almost two-thirds from the number of death sentences obtained in the mid-1990s, from a nationwide average of 314 per year (1994–96) to a nationwide average of 98 (2009–11).<sup>111</sup> This past year saw the fewest new death sentences in the modern era, a total of 78 nationwide.<sup>112</sup> LWOP provides substantial cover to prosecutors who forego capital sentences, as it ameliorates concerns about

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108. *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1840 (2006).

109. *Id.*

110. *Id.* at 1842.

111. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 105.

112. *Id.*

recidivism from the pro-death-penalty side.<sup>113</sup> In states like Texas, where a jury must find a likelihood of future dangerousness before imposing the death penalty,<sup>114</sup> the elimination of parole for life-sentenced offenders strikes at the core of the state's justification for retention.

Overall, the combined power of legal regulation, robust mitigation, and the alternative of LWOP has made the death penalty significantly more expensive, less frequently imposed, and less responsive to the death penalty's main justifications. Like the reforms of the premodern era, the reforms of the present day were not self-consciously adopted to defeat the death penalty. The imposition of constitutional norms to state capital practices was the natural outgrowth of a larger movement toward nationalizing criminal justice standards; indeed, imposing constitutional safeguards was the *alternative* to constitutional abolition.<sup>115</sup> New legal norms, in turn, transformed capital practices, such that contemporary capital trials and appeals bear little resemblance to their pre-*Furman* counterparts.<sup>116</sup> Some of the transformation resulted from direct judicial command or legislative action (e.g., the establishment of a distinct punishment phase, extensive voir dire, mandatory postconviction review with appointment of counsel), but some change is attributable to the creation of a professional capital punishment bar, which itself was the by-product of increased legal regulation.<sup>117</sup> Likewise, LWOP developed not to limit the death penalty but because of independent considerations.

### III. The Modern Predicament: The Storm Following the Calm

Is the modern version of the American death penalty a stable practice? Before *Furman*, the death penalty appeared particularly vulnerable. Death-sentencing rates were declining,<sup>118</sup> executions had become virtually nonexistent,<sup>119</sup> several jurisdictions had

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113. See *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, *supra* note 108, at 1843–44.

114. TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2011).

115. Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 778–82 (2012) (reviewing GARLAND, *supra* note 6).

116. Steiker & Steiker, *supra* note 74, at 138–41.

117. *Id.* at 138–40.

118. *Thompson v. Oklahoma*, 487 U.S. 815, 854–55 (1988) (O'Connor, J., concurring).

119. *Id.*

severely restricted or abolished the death penalty,<sup>120</sup> public support for the death penalty (as measured by polling data) had reached an all-time low,<sup>121</sup> other Western democracies were on the precipice of abolition,<sup>122</sup> and the death penalty was under federal constitutional attack. The Court could have issued a fatal blow to the death penalty, instead of its cacophonous, fractured indictment of prevailing capital statutes in *Furman*. *Furman*'s tentativeness, coupled with the dramatic rise in violent crime, fueled a backlash to the Court's decision. Instead of continued decline or constitutional abolition, the death penalty in United States was revived. Dozens of new capital statutes were passed, the basic constitutionality of the punishment was affirmed by the Court, and executions resumed less than five years later.<sup>123</sup>

#### A. Resurgence of the Death Penalty

During the two decades following *Furman*, the increased legal regulation of the death penalty likely contributed to its growth. First, the Court's decisions in 1976 upholding the new statutes explicitly disavowed the language in some of the *Furman* concurrences, insisting that the death penalty was no longer consistent with evolving standards of decency.<sup>124</sup> In so doing, the Court gave its imprimatur to the continued use of the punishment. As might be expected, the Court's decision did not directly endorse capital punishment; rather, the Court framed its conclusion as addressing the *permissibility* rather than the *desirability* of capital punishment.<sup>125</sup> According to the Court, states were entitled to retain the death penalty on retributivist and deterrence grounds; given these legitimate objectives, the death penalty did not violate human dignity.<sup>126</sup> But in our culture, saying that the Constitution does not forbid a practice often confers a special legitimacy, and the Court's embrace of the new capital statutes undoubtedly contributed to the subsequent decline in anti-death-penalty sentiment.

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120. *Id.*; Steiker, *supra* note 115, at 778.

121. Steiker, *supra* note 115, at 778.

122. *Id.*

123. Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 38 (2007) (detailing the return of executions in 1977 and their rise in successive years).

124. *Gregg v. Georgia*, 428 U.S. 153, 181–84 (1976) (Stewart, Powell, & Stevens, JJ., plurality opinion).

125. *Id.* at 186 (“[W]e cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong.”).

126. *Id.* at 182–86.

Second, apart from undermining the broad moral attack on the death penalty, the Court's assertion of ongoing regulatory oversight blunted criticism of the states' administration of the death penalty. Whereas prior to *Furman*, state capital systems entrusted the death-penalty decision to the unguided discretion of prosecutors and jurors, in the post-*Furman* world states designed new capital statutes which gave structure to the death-penalty decision. States enumerated "aggravating factors," which became indispensable to the imposition of a death sentence, and the Court policed the application of such factors in individual cases.<sup>127</sup> As the Court declared in upholding Georgia's new statute in 1976, "[n]o longer can a jury wantonly and freakishly impose the death sentence."<sup>128</sup>

Over the next two decades, the Court reversed death sentences in large numbers of cases, contributing to the perception that the death penalty was subject to too much rather than too little regulation.<sup>129</sup> This perception of overregulation became entrenched notwithstanding the fact that the actual demands of the Court's capital jurisprudence were quite minimal, and the resulting distribution of the death penalty remained quite problematic. Judicial intervention thus stabilized capital punishment, and paved the way for executions to resume without the discomfort evident in the pre-*Furman* decade. Indeed, other actors in the capital system—particularly executive officials—appeared to abdicate their oversight responsibilities in light of the judicial takeover of the capital system.<sup>130</sup> In the first two decades of the post-*Furman* era, executive clemency fell well below pre-*Furman* levels,<sup>131</sup> as governors deferred to the judicial system in policing unjust executions, despite the fact that the courts tended not to review whether particular executions were actually justified.<sup>132</sup>

By the mid- to late 1990s, the modern American death penalty appeared more stable and more robust than the death penalty it replaced. Death sentences and executions rose to their

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127. See *Brown v. Sanders*, 546 U.S. 212, 220 (2006); *Zant v. Stephens*, 462 U.S. 862, 862–64 (1983); *Proffitt v. Florida*, 428 U.S. 242, 251–54 (1976).

128. *Gregg*, 428 U.S. at 206–07.

129. *Steiker & Steiker*, *supra* note 2, at 436.

130. *Id.* at 435.

131. Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7, 17 (1992) ("Executive clemency all but disappeared in the United States in the era of hands-on federal court involvement.")

132. *Steiker & Steiker*, *supra* note 2, at 435.

highest levels in years,<sup>133</sup> and the population on death row grew to over three thousand inmates, approximately seven times the size of death row in 1976.<sup>134</sup> To this point, the American death penalty had received the benefits of legal regulation—increased legitimacy and decreased nonjudicial scrutiny—but had yet to fully experience its costs.

### B. Recent Destabilization of the Death Penalty

Over the past fifteen years, the new regime the Court set into motion has been substantially and perhaps irrevocably undermined. The discovery of numerous wrongfully convicted inmates on death row<sup>135</sup>—in Illinois and elsewhere—has cast a different light on the reliability of the capital system. These exonerations resulted in part from the emergence of more sophisticated technologies for evaluating DNA and other forensic evidence.<sup>136</sup> But they also were an unanticipated consequence of the increased regulation of the death penalty. Many of the exonerations were uncovered because of the efforts of newly established defense organizations, such as the Innocence Project (founded in 1992)<sup>137</sup> and Northwestern University's Center for Wrongful Convictions (founded in 1998).<sup>138</sup> Although these particular organizations do not confine their work to capital cases, much of their success on the capital side is attributable to two new features of the American death penalty: a network of committed capital litigators and the lengthy separation between death sentences and executions.

In most capital jurisdictions, specialized death penalty attorneys, investigators, and mitigation experts are involved in the representation of death-sentenced inmates, either through direct representation or through consulting relationships. These

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133. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 105; *Executions by Year Since 1976*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/executions-year> (last visited Feb. 16, 2012).

134. *Size of Death Row by Year – 1968-Present*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#year> (last visited Feb. 16, 2012).

135. Brandon L. Garret, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1648–49 (2008); Ronald Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 739–43 (2001).

136. Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 594 (2005).

137. *About the Innocence Project*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/> (last visited Apr. 23, 2012).

138. *About Us*, NW. L.: CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/wrongfulconvictions/aboutus/> (last visited Apr. 23, 2012).

attorneys work in a variety of institutional settings, including state-established capital defense organizations, state post-conviction offices, private nonprofit capital defense groups, and federally funded federal habeas assistance projects. Whereas fewer than a couple of dozen or so attorneys were part of the pre-*Furman* network, a much larger group of lawyers, investigators, and other specialists is involved in contemporary litigation,<sup>139</sup> certainly totaling in the hundreds. Although such lawyers and specialists do not and cannot reach every death-sentenced inmate, they provide a level of scrutiny of capital verdicts and sentences that simply was absent under the prior system. Moreover, the new capital doctrines, filtered through tiers of review in the state and federal systems, have vastly extended the time between sentence and execution. This gap has been crucial to the exoneration enterprise, as many of those found innocent would simply have been executed under the old regime.<sup>140</sup> The modern death penalty is thus characterized by many more opportunities for, and actual instances of, discovering the fallibility of the capital system, and this dynamic—virtually absent in the pre-*Furman* system—contributes to the destabilization of the death penalty.<sup>141</sup>

The other major cost imposed by the modern regulatory system is financial—the exponentially increased expense of trying, housing, and executing capital offenders.<sup>142</sup> During the first two decades of legal regulation, states experienced only a fraction of these increased costs. Although the Court insisted on a constitutional right to individualized sentencing in the 1976 cases, capital trials were not transformed overnight. Well into the late 1980s and early 1990s, states did not adequately fund trial representation (often imposing absolute caps on attorneys' fees and expert expenses), and the prevailing level of practice remained poor, particularly in the South.<sup>143</sup> The first interventions by the U.S. Supreme Court on ineffective-assistance-of-counsel grounds

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139. Innocence Network, *INNOCENCE NETWORK REPORT: EXONERATIONS 2011*, at 12–13 (2011), available at [http://www.innocencenetwork.org/annual-reports/innocence-network-report-2011/at\\_download/file](http://www.innocencenetwork.org/annual-reports/innocence-network-report-2011/at_download/file) (highlighting over fifty organizations in the United States that specialize in death penalty litigation).

140. See, e.g., Steiker & Steiker, *supra* note 136 (noting that one Illinois inmate came perilously close to execution prior to his exoneration).

141. Steiker & Steiker, *supra* note 4, at 425–27 (discussing the abolitionist potential of “institution-building” reforms, such as the proliferation of specialized capital defender offices).

142. Steiker & Steiker, *supra* note 32, at 662–63.

143. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *YALE L.J.* 1835, 1843–55 (1994).

did not occur until 2000,<sup>144</sup> and vigorous mitigation development and presentation did not become the norm until the late 1990s at the earliest.<sup>145</sup> At about the same time, states began to fund state postconviction representation in capital cases, in part to enjoy the benefits of fast-track federal habeas review (“opt-in” status) under the Antiterrorism and Effective Death Penalty Act,<sup>146</sup> though states have not received those benefits to date. Moreover, death-row-incarceration costs did not skyrocket until the 1990s. The national death-row population did not reach one thousand until 1982, two thousand until 1988, three thousand until 1995, and thirty-five hundred until 1999 (and it has remained above three thousand since that time).<sup>147</sup> The solitary-confinement style of death-row incarceration did not become the national norm until recently,<sup>148</sup> and this cost has become an increasingly large part of the added marginal cost of the American death penalty.<sup>149</sup>

Thus, the extraordinary rise in capital costs is a very recent phenomenon, and likely a permanent one. The increased trial, appellate, and postconviction costs are the product of entrenched legal norms, and the heightened incarceration costs appear to be an unavoidable public policy concession given (perhaps exaggerated) fears of violence on the part of death-sentenced inmates. These increased costs, in turn, together with growing public skepticism about the accuracy of the capital system and the near-universal embrace of LWOP as the alternative punishment to death, have radically altered the calculus of prosecutors, who have sought death sentences much less frequently over the past years, sending the absolute number of death sentences to modern-era lows.<sup>150</sup> Last year marked the first time in the modern era that death sentences nationwide dipped below one hundred, and the seventy-eight death sentences represent less than one-third of the

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144. *Rompilla v. Beard*, 545 U.S. 374, 380–93 (2005); *Wiggins v. Smith*, 539 U.S. 510, 519–38 (2003); *Williams v. Taylor*, 529 U.S. 362, 391–98 (2000).

145. *Steiker & Steiker*, *supra* note 32, at 669.

146. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §§ 2261–66 (2006).

147. *Size of Death Row by Year – 1968-Present*, *supra* note 134.

148. *Steiker & Steiker*, *supra* note 32, at 679. Texas, for example, did not move its death row to the “super-max” facility in West Livingston, Texas, until 1999; prior to that time, Texas death-sentenced inmates were housed in ordinary prison cells and could participate in a work program. *Id.*

149. *See, e.g.*, Alarcón & Mitchell, *supra* note 84, at S107 (indicating that death-row incarceration in California costs an additional \$100,663 per death-row inmate in 2010, or about \$71 million for the 713 death-sentenced inmates on California’s death row).

150. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 105.

number of sentences obtained in any year between 1982 and 1999, and one-quarter of the number obtained in the peak 1994–96 years.<sup>151</sup> This precipitous decline in death sentences is not attributable to the also-noteworthy decline in murders, as the death-sentencing rate (death sentences per murder) has also declined remarkably over the past thirteen years.<sup>152</sup>

### C. *Looking Forward: An Abolitionist Future?*

The dramatic decline in death sentencing might reflect a passing moment, much like the decline in the decade leading up to *Furman*. Perhaps a return of the high violent-crime rates of the 1970s and 1980s would fuel another explosion in death sentences. But the hallmarks of the modern regime—exorbitant capital costs, increased scrutiny of capital verdicts and sentences through a professionalized capital bar, and the establishment of LWOP as the norm for capital murder—constitute *institutional* pressures against death sentencing. Those institutional pressures, in turn, have a feedback loop to legal regulation. One of the major concerns in *Furman* was the rarity of the death sentences as a response to death-eligible crimes.<sup>153</sup> In the words of Justice White, commenting on the administration of the death penalty in the pre-*Furman* era, “[T]he penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.”<sup>154</sup> The increase in death sentencing and executions over the following twenty-five years insulated the death penalty from this sort of challenge, but the recent dramatic declines give contemporary force to that argument. Thus, legal regulation of the death penalty can reduce use of the death penalty, which in turn carries the potential for greater legal regulation, including abolition.

Moreover, the same institutional pressures contributing to the decline in death sentencing have recently led to repeal in several jurisdictions, including Connecticut,<sup>155</sup> Illinois,<sup>156</sup> New Jersey,<sup>157</sup> and New Mexico.<sup>158</sup> These legislative reversals, though

151. *Id.*

152. *Death Penalty Sentences Have Dropped Considerably in the Current Decade*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-penalty-sentences-have-dropped-considerably-current-decade> (last updated Feb. 16, 2012).

153. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

154. *Id.*

155. S.B. 280 (Conn. 2012).

156. 30 ILL. COMP. STAT. 105 / 5.786 (2011); 725 ILL. COMP. STAT. 5 / 119-1 (2011); 725 ILL. COMP. STAT. 124 / 1-99 (repealed 2012).

157. N.J. STAT. ANN. § 2C:11-3 (West 2007).



significant in themselves, are also significant to the prospects for judicial abolition. Over the past two decades, various members of the Court have expressed increasing doubts about the sustainability of the American death penalty. Justice Blackmun, a dissenter in *Furman* and a member of the Court that upheld the new statutes in 1976, lamented, just prior to his retirement, that legal regulation of the death penalty had been unsuccessful on its own terms.<sup>159</sup> He announced he would “no longer . . . tinker with the machinery of death” because of the failure of contemporary regulation to solve the problems of arbitrariness and discrimination that justified the Court’s intervention in the first place.<sup>160</sup> More recently, Justice Stevens likewise concluded that the death penalty was no longer constitutionally viable.<sup>161</sup> In Justice Stevens’s view, the incapacitation justification for the death penalty has been undercut by the introduction of LWOP, the deterrence justification lacks empirical support, and the retributive justification cannot be squared with the trend toward humanizing executions.<sup>162</sup> Other justices, too, have recently lamented the failure of contemporary regulation to achieve its avowed goals<sup>163</sup> or to be sufficiently responsive to accuracy concerns in light of demonstrated error in capital cases.<sup>164</sup>

Perhaps more importantly, the Court’s proportionality cases have developed a new methodology for gauging evolving standards of decency, and the new measures are particularly hospitable to judicial abolition, especially if more states were to reject the penalty. In *Atkins v. Virginia*,<sup>165</sup> the Court imposed a proportionality bar against executing persons with mental retardation, despite the fact that a majority of death penalty states permitted the punishment.<sup>166</sup> The Court noted that the absolute number of states prohibiting the practice was less significant than the

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158. N.M. STAT. ANN. § 31-18-14 (West 2009).

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

160. *Id.*

161. *Baze v. Rees*, 553 U.S. 35, 71 (2008) (Stevens, J., concurring).

162. *Id.* at 78–81.

163. *Ring v. Arizona*, 536 U.S. 584, 614–19 (2002) (Breyer, J., concurring) (cataloging the defects in prevailing capital practice notwithstanding the Court’s regulation and urging a requirement that jurors—not judges—make the ultimate determination whether to impose the death penalty).

164. *Kansas v. Marsh*, 548 U.S. 163, 207–10 (2006) (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting) (calling for a new capital jurisprudence informed by the lessons of wrongful convictions).

165. 536 U.S. 304 (2002).

166. *Id.* at 315, 321.

“consistency of the direction of change.”<sup>167</sup> Hence, if several more jurisdictions were to defect to the abolitionist or repeal camp, the Court might view such movement as significant evidence of contemporary rejection of the practice altogether. In subsequent decisions, the Court imposed additional proportionality limitations on the death penalty, precluding the execution of juveniles and persons convicted of nonhomicidal, ordinary offenses (including the rape of a child).<sup>168</sup> These decisions reflect a shift in emphasis from the number of states embracing a practice to other indicia of prevailing values, including expert opinion, international opinion, polling data, and actual practices. The declining and exceedingly rare use of the death penalty on the ground, in light of these decisions, constitutes powerful evidence of its inconsistency with prevailing moral norms—not to mention expert and international opinion, which are increasingly aligned against capital punishment.

Thus, the modern project of regulating the death penalty has increasingly provided a framework for revisiting the constitutionality of the death penalty itself. Indeed, the legal regulation of the death penalty, adopted as an alternative to constitutional abolition, has provided a yardstick for measuring the death penalty’s success. A decision invalidating the death penalty in the early 1970s would have marked an abrupt break from prevailing legal norms given the total absence of legal regulation of capital punishment to that point. Today, the Court can highlight the aspirations of the new legal framework and emphasize the distance between the prevailing reality and those aspirations, much in the way Justices Blackmun and Stevens renounced their constitutional support for the death penalty notwithstanding their prior endorsement of the post-*Furman* schemes.<sup>169</sup>

## Conclusion

A number of recent death penalty scholars have noted the oddity of our prevailing system, in which the death penalty seems ill-suited to survive given the demands of contemporary legal norms and the accompanying crushing costs. David Garland, for

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167. *Id.* at 315.

168. *Kennedy v. Louisiana*, 554 U.S. 407, 441–47 (2008) (prohibiting the death penalty on Eighth Amendment grounds for the rape of a child where the crime was not intended to, and did not, result in the victim’s death); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (prohibiting the death penalty on Eighth and Fourteenth Amendment grounds for offenders under eighteen years of age at the time of the crime).

169. *See supra* notes 159–62 and accompanying text.

example, describes the present American death penalty as “peculiar” given that “the forms through which it is now enacted seem ambivalent and poorly adapted to the stated purposes of criminal justice.”<sup>170</sup> Frank Zimring likewise highlights the “contradiction” between the values underlying the death penalty and those required of due process.<sup>171</sup> But neither of these scholars appeared particularly sanguine about the prospects for abolition in the near future. In Garland’s view, the death penalty, dysfunctional though it is, nonetheless serves social purposes other than those advertised,<sup>172</sup> and in any case is insulated from total abolition by the decentralization of authority over criminal law.<sup>173</sup> Zimring, writing almost a decade ago, was observing the zenith of capital sentencing and executions, and though he expressed confidence in the eventual abolition of the death penalty,<sup>174</sup> the trajectory of the late 1990s did not seem promising. Today, the conflict between the legal regulation of the death penalty and its continued use appears more permanent and more destructive than the early decades of regulation would have predicted. In short, the modern American death penalty—with its unprecedented costs, alternatives, and legal regulatory framework—seems newly vulnerable to judicial invalidation. Reform of the death penalty and its abolition might well be on the same path.

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170. GARLAND, *supra* note 6, at 13.

171. ZIMRING, *supra* note 7, at 130–31.

172. GARLAND, *supra* note 6, at 285–310.

173. *Id.* at 310.

174. ZIMRING, *supra* note 131, at 205 (“[The] ultimate outcome [of abolition] seems inevitable in any but the most pessimistic view of the American future.”).