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HAS THE "MACHINERY OF DEATH" BECOME A CLUNKER?

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In 1994, Justice Blackmun famously announced that he would no longer "tinker with the machinery of death."[1] The timing of that announcement said as much about the state of America's death penalty on the eve of the new millennium as it did about how he wished to be remembered when he retired from the Supreme Court of the United States later that same year.

By the mid-1990s, the "machinery of death" was not only working, but in fact, humming.[2] Year after year, hundreds of additional persons were added to death row, and the number of executions climbed to heights not seen in many decades.[3] In 1994 alone, 315 new death sentences were imposed—a record never exceeded, and matched only once (in 1996), after executions resumed in 1976 following *Furman v. Georgia*.[4] Within a few short years, the number of executions would reach its post-1976 peak of ninety-eight.[5] The prospect of "mending," let alone "ending," capital punishment was thus assuredly bleak when Justice Blackmun shifted his stance on the death penalty.

Out of the ashes of this "abolitionist" defeat, new hope has sprung, quite unexpectedly, in recent years. Predictably perhaps, anti-death penalty activists and commentators have seized upon recent trends against capital punishment as proof that the American death penalty will soon become extinct.[6] More surprisingly,

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

2. *See Executions by Year Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year (last updated Feb. 5, 2015); DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2013: YEAR END REPORT 1–2 (2013) [hereinafter DEATH PENALTY IN 2013], *available at* http://deathpenaltyinfo.org/documents/YearEnd2013.pdf.

3. *See id.*

4. 408 U.S. 238, 240 (1972) (per curiam); DEATH PENALTY IN 2013, *supra* note 2, at 1.

5. DEATH PENALTY IN 2013, *supra* note 2, at 1.

6. *See, e.g.*, Erik Eckhold, *In Death Penalty's Steady Decline, Some Experts See a So-*

scholars who had previously despaired that the death penalty was firmly entrenched in American society now believe abolition of the death penalty is on the horizon.[7] There is a growing sentiment that the death penalty is finally on its last legs in the United States.

This symposium essay sounds a cautionary note while ultimately remaining agnostic about what the future holds for the death penalty. There are a variety of reasons to be skeptical about the abolitionists' newfound optimism. The usual reasons for optimism about ending the death penalty—sharp declines in public support for the death penalty and of the ultimate sanction—do not necessarily portend the demise of the death penalty. This essay argues that other factors can account for recent declines in capital punishment and that there are countervailing factors suggesting that the American death penalty is alive and well, despite what may prove to be a period of relative hibernation.

More fundamentally, to make a credible case that the "machinery of death" is no longer a well-oiled machine but rather a "clunker" destined for the scrapyard, the optimists must take account of the so-called "politics of death."[8] The death penalty did

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cietal Shift, N.Y. TIMES, Dec. 14, 2013, at A30 (detailing the death penalty's decline and predictions of a societal shift regarding capital punishment); Scott Bland, *Is the Death Penalty Dying?*, NAT'L J. (Feb. 13, 2014), http://www.nationaljournal.com/politics/is-the-death-penalty-dying-20140213 (discussing the decrease in public support for the death penalty); Matt Ford, *In Texas, the Death Penalty Is Slowly Dying Out*, ATLANTIC (Oct. 29, 2014, 12:49 AM), http://www.theatlantic.com/national/archive/2014/10/texas-death-penalty-executions/382057/ (reporting the declining rate of executions in Texas and the United States as a whole).

7. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 212 (2012) [hereinafter Steiker & Steiker, *Destabilization*]. Within a year of Justice Blackmun's disavowal of the "machinery of death," the leading review of the Supreme Court's effort to reform the death penalty concluded, with "gloomy irony," that its effort "not only has failed to meet its purported goal of rationalizing the imposition of the death penalty, but also may have helped to stabilize and entrench the practice of capital punishment in the United States." Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995) [hereinafter Steiker & Steiker, *Sober Second Thoughts*]. In more recent work, Professors Steiker and Steiker conclude that "[t]oday, 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." *Destabilization*, *supra*, at 212.

8. *See generally* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 283 (2008) [hereinafter Smith, *Politics of Death*] (discussing the role of the United States Supreme Court's involvement in referencing the death penalty).

not come back with a vengeance in the wake of *Furman v. Georgia* by accident or coincidence. The problem, from the abolitionist perspective, was that *Furman* unleashed political forces that united prosecutors, legislators, and judges in "death penalty" states in the effort to liberalize and utilize the ultimate sanction.[9] Unless these forces have radically changed—and this essay finds no evidence that they have—there is reason to believe that the American experiment with capital punishment will continue, in some form, well into the foreseeable future.

I. THE ABOLITIONIST PESSIMISM OF OLD

Opponents of capital punishment have understandably been pessimistic, until recently, about the prospect of ending the death penalty in the near term. The death penalty was said to be on the verge of extinction fifty years ago, yet it came roaring back.[10] As the new millennium approached, the pendulum had swung so far in death's direction that leading scholars openly despaired—with good reason—of the prospects for abolition.[11]

Prior to the Supreme Court's 1972 decision in *Furman v. Georgia*, executions were on a much longer and far steeper decline than in recent years.[12] There was, as Justice Brennan would note in *Furman*, a "steady decline" in the number of executions "in every decade since the 1930s."[13] From an annual average of 167 executions in the 1930s, the annual average more than halved to 72 in the 1950s.[14] In the decade immediately prior to *Furman* (1962–1972), there were only 46 executions total—an average of roughly 5 executions per year—and 36 of those 46 executions took place in two years, 1963–1964.[15]

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9. *See* Smith, *Politics of Death*, *supra* note 8, at 294.

10. *See* DEATH PENALTY IN 2013, *supra* note 2, at 1.

11. *See, e.g.*, Steiker & Steiker, *Sober Second Thoughts*, *supra* note 7, at 360.

12. TRACY L. SNELL, DEP'T OF JUST., CAPITAL PUNISHMENT, 2012—STATISTICAL TABLES 2–3 (2014), *available at* http://www.bjs.gov/content/pub/pdf/cp12st.pdf.

13. *Furman*, 408 U.S. at 291 (Brennan, J., concurring); *see also* FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 26–27 (Cambridge Univ. Press 1986) ("[T]here had been a dramatic decline in the number of executions per year over the preceding three decades: from 199 in 1935 to 1 in 1966.").

14. *Furman*, 408 U.S. at 291 & n.40 (Brennan, J., concurring).

15. *Id.*

Stark though it was, the declining number of executions understated just how dire the death penalty's situation was as the 1960s drew to a close. According to opinion polls, the American public was closely divided on the death penalty.[16] Although it received majority support through most of the 1960s, opposition "remained high," ranging from a low of 40% in 1967 to a high of 46% in 1971.[17] Indeed, in 1966, polls found that a bare majority (53%) actually opposed the death penalty.[18]

The growing reluctance to decree death in the run-up to *Furman* manifested itself in courtrooms and the political process alike. As Professor Corinna Barrett Lain has explained: "By the mid-1960s, the nation appeared to be moving towards abolition of its own accord. . . . [E]xecutions were dwindling, state legislatures were abolishing the death penalty, [and] a world-wide abolition movement was underway. . . ."[19] The result, Professor Lain concludes, "was a socio-political context uniquely conducive to the Court's 1972 landmark ruling [in *Furman*]."[20]

Given this background, the Justices in *Furman* could hardly be faulted for thinking that all it would take was a constitutional nudge to end the death penalty once and for all. After all, in addition to dramatic legislative and popular movement away from support for executions, media elites were already predicting an imminent end to the death penalty.[21] In 1967 alone, for example, "*Time* magazine twice wrote about 'The Dying Death Penalty.'"[22]

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16. *See* ZIMRING & HAWKINS, *supra* note 13, at 39 & tbl.2.7 (reporting annual public opinion poll results from 1953 to 1974).

17. *Id.*

18. *Id.*

19. Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 19 (2007). Between 1957 and 1969, fourteen states had either abolished the death penalty altogether or achieved something close to abolition by restricting the death penalty to a small number of especially serious crimes. *Id.* at 22–23. Virtually every state (even in the Old South) had repealed older mandatory death sentence laws in favor of allowing juries broad discretion to show mercy, and "juries in the 1960s were returning death sentences only around ten-to-twenty percent of the time they were asked to do so." *See id.* at 21, 23–24. The President's Commission on Law Enforcement and Administration of Justice thus was on solid ground in its 1967 conclusion that "all available data indicate that judges, juries, and governors are becoming increasingly reluctant to impose, or authorize the carrying out of a death sentence." PRESIDENT'S COMM'N ON L. ENFORCEMENT & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967).

20. Lain, *supra* note 19, at 19.

21. *See id.* at 41–42.

22. *Id.*; *see also id.* at 41 n.234 (citing other examples of contemporary predictions of

Even supporters of the death penalty agreed that the end was near.[23]

The death penalty, however, would prove to be far more resilient than even its strongest supporters would have dreamed. Instead of being a catalyst for abolition of the death penalty, the decision in *Furman* unwittingly spurred capital punishment to dizzying and unprecedented new heights.

In *Furman*, the Court ruled that the death penalty was administered in a manner which violated the Eighth Amendment.[24] Although there was no majority opinion, the Justices who agreed with the result cited concerns that the death penalty was imposed in an arbitrary manner.[25] Without a reliable means of ensuring that the few persons condemned to death truly would be the "worst" of all eligible offenders instead of merely the unlucky few targeted for death, the death penalty violated the Cruel and Unusual Punishments Clause.[26] The Court's sweeping pronouncement invalidated "the capital punishment laws of 39 States and the District of Columbia," as well as the federal death penalty.[27]

Though widely viewed as abolishing capital punishment,[28] *Furman* actually triggered a backlash against the Court—and, with it, the decades long move to abolish the death penalty.[29] Instead of accepting the Court's mandate, legislatures quickly reenacted their capital sentencing statutes in an effort to comply with *Furman*'s new constitutional mandates.[30] Interestingly, far from being limited to the southern states that most strongly supported

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the death penalty's imminent demise).

23. *Id.* at 42, 43 n.243.

24. Furman v. Georgia, 408 U.S. 238, 256 (1972) (Douglas, J., concurring); *id.* at 276–77, 295 (Brennan, J., concurring).

25. *See id.* at 256 (Douglas, J., concurring).

26. *Id.* at 294 (Brennan, J., concurring); *see id.* at 242, 245 (Douglas, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 312 (White, J., concurring).

27. *Id.* at 411 (Blackmun, J., dissenting). Decades later, of course, Justice Blackmun would disavow further "tinker[ing]" with the "machinery of death" and deem capital punishment unconstitutional per se. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

28. *See* Lain, *supra* note 19, at 45 ("When the Supreme Court decided *Furman* in June 1972, almost everyone—including the Justices themselves—believed that America had seen its last execution.") (footnotes omitted).

29. *See id.* at 46 ("In the wake of *Furman*, death penalty supporters mobilized, resulting in one of the most dramatic backlashes the nation had ever seen.").

30. *See id.* at 47–48.

capital punishment, the backlash against *Furman* took place "all over the country: in abolitionist states, in de facto abolitionist states, and in death penalty states."[31]

The results were stunning. "[B]y 1976, 35 states and the federal government had redrafted their capital punishment statutes in order to maintain their authority to execute post-*Furman*."[32] Faced with this stunning nationwide rejection of the *Furman* mandate, the Supreme Court backed away from the abolitionist precipice and held that the new statutes were, facially at least, constitutional.[33] Just four years after executions had apparently ended, the Court declared it "now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction."[34]

With the new statutory schemes came a new determination to impose and carry out death sentences. The result was "skyrocketing executions."[35] From the low single digits in the late 1970s and early 1980s, annual execution totals jumped substantially to several dozen through the late 1980s and early 1990s.[36] Executions reached a post-*Furman* high of ninety-eight in 1999 and averaged almost sixty-eight annually from 1995–2005.[37] By 2004, the "machinery of death" was in high gear, and "there were more than three thousand people on death row nationwide"—a figure that would have been unthinkable in the decades prior to *Furman*.[38]

This period understandably induced pessimism among death penalty opponents. Two decades after many believed the death penalty was on the verge of extinction, "the nation's death chambers were back in business, with the Court's blessing, and busier

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31. ZIMRING & HAWKINS, *supra* note 13, at 42–43.

32. Steiker & Steiker, *Sober Second Thoughts*, *supra* note 7, at 410.

33. *See, e.g.* Gregg v. Georgia, 428 U.S. 153, 207 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242, 259–60 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion).

34. *Gregg*, 428 U.S. at 179.

35. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2047 (2000).

36. *Executions by Year Since 1976*, *supra* note 2.

37. *Id.*

38. Smith, *Politics of Death*, *supra* note 8, at 291. At the time of *Furman*, in contrast, there were roughly 600 inmates on death row nationwide. Furman v. Georgia, 408 U.S. 238, 417 (1972) (Powell, J., dissenting).

than they had been in decades."[39] Public support for the death penalty climbed to record heights—heights achieved because, after *Furman*, there was a "dramatic decline" in reported opposition to the death penalty.[40] With such strong public support and demonstrated willingness on the part of prosecutors and courts to use the ultimate sanction, there was every reason to think the death penalty would remain a fixture of American criminal justice.

Worse still, the *Furman* regime did little to rationalize the imposition of the death penalty. The leading articulation of this view comes from the seminal 1995 article by Professors Carol Steiker and Jordon Steiker, lamenting the unwitting entrenchment of the death penalty by the abolitionist-minded Supreme Court of the 1970s.[41] After surveying the Supreme Court's complicated death penalty jurisprudence following resumption of executions in 1976, Professors Steiker and Steiker concluded that "the Supreme Court's detailed attention to death penalty law . . . has helped people to accept without second thoughts—much less 'sober' ones—our profoundly failed system of capital punishment."[42]

II. *FURMAN* IS DEAD, LONG LIVE *FURMAN*!

From the abolitionist vantage point, the American death penalty, circa 1990–2000, provided little cause for celebration. In continuing to use the death penalty as a punishment for ordinary crimes, the United States stood (and still stands) among "rogue, repressive, or fundamentalist regimes—not exactly the kind of company that Americans ordinarily wish to keep."[43] Nevertheless, the situation was not quite as bleak as many critics of capital

39. Smith, *Politics of Death*, *supra* note 8, at 291, 381.

40. *See id.* at 292. Over the quarter-century following *Furman*, support for the death penalty ranged from a low of 65% to a high of an incredible 85%. *Id.*

41. Steiker & Steiker, *Sober Second Thoughts*, *supra* note 7, at 360.

42. *Id.* at 438. I have reached similar conclusions in my own work. *See, e.g.*, Stephen F. Smith, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105, 120 (2011) [hereinafter Smith, *Localism*] (referring to *Furman* as "an abject failure"). My central claim is that *Furman* created "a politicized death penalty system in which the life-or-death decision is skewed in favor of death" and that the death penalty is "exercised in ways that allow race, poverty, and other arbitrary influences to factor into life/death decisions. . . ." Smith, *Politics of Death*, *supra* note 8, at 334.

43. *Id.* at 284.

punishment perceived it to be—and, as this essay argues in the next part, the future may not be as bright as they claim.

A. *Localism and* Furman

The gloominess of abolitionists over the prospect of repealing capital punishment tended to obscure an essential reality: In the vast majority of the country, and even in most of the Deep South, they had already succeeded in their goal of ending executions.

Although *Furman* itself was a dramatic exercise of national power—that is, the Supreme Court imposed national standards prescribing how valid death penalty schemes can be structured and implemented—the most decisive aspect of the *Furman* regime, and the ultimate abolitionist hope, turned out to be its localism. The death penalty would be *authorized* at the state level, and regulated judicially at the national and state levels, but it would be *administered* locally.[44] This meant that local communities, not politicians in distant state capitals, would have the final say about when, and how often, the death penalty was used.

Local control of the death penalty was and is no small matter. Vesting control over capital punishment at the local level made exercises of discretion concerning the death penalty "accountable to the wishes and values of the communities the law enforcement and [prosecutors] serve[]."[45] As Professor James Liebman has found, "More than anything else, . . . it is the practices, policies, habits, and political milieu of local prosecutors, jurors, and judges that dictate whether a given defendant in the United States—whatever his crime—will be charged, tried, convicted, and sentenced capitally and executed."[46]

The localism of the death penalty should have afforded abolitionists some degree of hope in what otherwise would have been an entirely pessimistic state of affairs. "[W]hile states have

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44. *See* Smith, *Localism*, *supra* note 42, at 111–12. As Professor James Liebman and his co-author explain: "[M]any of the most important capital decisions are exclusively the domain of local actors—including whether to investigate, charge, convict, and condemn a suspect," and "local actors often make these decisions quite differently from their counterparts in neighboring locales." James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 262 (2011).

45. *See* Smith, *Localism*, *supra* note 42, at 112.

46. Liebman & Clarke, *supra* note 44, at 262.

rushed to expand the death penalty and make it easier to impose since *Furman*, the localities that actually bear the cost of funding capital trials have shown remarkable restraint in the use of the ultimate sanction."[47] Even in states such as Texas (which leads the nation in annual and total executions since *Furman*), the death penalty today is limited to "an idiosyncratic minority of death-prone communities."[48]

The vast majority of the country, then, has either officially abolished the death penalty or essentially done so de facto.[49] As Professor Liebman persuasively explains:

> Unlike state-by-state analyses or national polling numbers—which portray the penalty as a penological tool of choice of a comfortable majority of Americans and American jurisdictions—county-level analysis reveals that the modern American death penalty is a distinctly minority practice across the United States and in most or all of the thirty-four so-called death penalty States.[50]

This is very good news for abolitionists, even if the minority of localities continue to generate an inordinately large number of death sentences.

Nevertheless, the reduction in the number of localities enforcing the death penalty cannot properly be considered a "success" for the *Furman* regime. Quite simply, reducing the number of executions was not among the goals *Furman* sought to achieve.[51] To the contrary, the goal of the *Furman* regime was to rationalize the imposition of capital punishment to ensure that the ultimate

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47. Smith, *Localism*, *supra* note 42, at 120 (footnote omitted) (citing a two-decade-long study finding that more than 80% of counties in "death" states had no death penalty convictions, with another 10% having had only one such conviction). For a more recent study reaching the same results, see Liebman & Clarke, *supra* note 44, at 261–63.

48. Liebman & Clarke, *supra* note 44, at 261–63, 328; *see also* Ned Walpin, *Why Is Texas #1 in Executions?*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/texas.html (last visited Feb. 27, 2015) (reporting that Texas has performed more executions than any other state since 1976).

49. *See* Liebman & Clarke, *supra* note 44, at 338 (describing the shrinking use of the death penalty in many jurisdictions).

50. *Id.* at 262–63 (footnote omitted). This is true even in "Texas—the so-called 'Death Penalty Capital of the Western World,' with nearly 500 executions since 1982 . . . , [where] just under two-thirds of the counties . . . did not carry out a single execution in the past thirty-five years." *Id.* at 261 (footnote omitted).

51. *See generally* Steiker & Steiker, *Sober Second Thoughts*, *supra* note 7, at 361–71 (finding in the *Furman* regime inherent mandates that death be imposed based on individual desert in a fair and rational manner through heightened procedural safeguards appropriate to the high-stakes of the life/death decision).

sanction is both fairly applied and reserved, in law and in fact, for the worst offenders.[52] The Court (as opposed to the NAACP and other abolitionists who challenged the constitutionality of the death penalty) was ultimately agnostic about the proper level of enforcement of the death penalty.[53]

Indeed, the fact that the death penalty was so rarely imposed at the time of *Furman* was cited as a major reason for invalidating capital punishment.[54] The fact that death was so rarely imposed meant that capital punishment was "freakishly imposed," in a manner as arbitrary as "being struck by lightning,"[55] or even imposed according to illegitimate criteria (such as race).[56] The decision thus put a premium on an accurate and reliable process of isolating the few offenders who truly deserve death from the many who do not—and did so even at the cost that such a process might result in more executions than under the pre-*Furman* period.

Although abolitionists understandably cheer recent downward trends in the use of the death penalty, these trends provide further evidence for the view that *Furman* has proved to be a "disaster"[57] and an "abject failure."[58] The fact that the death penalty is now restricted to particular pockets of the country with unusually

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52. *See id.*

53. *See* Lain, Furman *Fundamentals*, *supra* note 19, at 20; Steiker & Steiker, *Sober Second Thoughts*, *supra* note 7, at 362–64.

54. *See* Furman v. Georgia, 408 U.S. 238, 291 (1972) (Brennan, J., concurring).

55. *Id.* at 309–10 (Stewart, J., concurring). Justice Stewart elaborated that the prisoners in *Furman* were "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed," with "many [offenders] just as reprehensible as these" having only received prison sentences. *Id.*

56. Although he ultimately did not rely on the point, Justice Stewart stated that "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 310 (Stewart, J., concurring). Indeed, persistent widespread racial disparities have been found across the country in the application of the death penalty. *See generally* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990) (indicating that there is persuasive evidence that white-victim cases are treated more punitively than black-victim cases). A disturbing recent study found that "of all reported homicides and executions in the modern era (from 1976 onwards) . . . there are very few cases in which Whites are executed for killing Blacks, and a disproportionately high number of cases in which Blacks are executed for killing Whites." Frank R. Baumgartner et al., *#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1976–2013*, POL. GROUPS & IDENTITIES (forthcoming 2015) (manuscript at 16), *available at* www.unc.edu/~fbaum/articles/PGI-2015-blacklives.pdf.

57. Steiker & Steiker, *Sober Second Thoughts*, *supra* note 7, at 426.

58. Smith, *Localism*, *supra* note 42, at 120.

strong support for capital punishment seems to suggest continued (or, quite possibly, increased) arbitrariness in the use of the death penalty.

The death penalty today is a peculiar institution, in the same way that slavery was in the antebellum South the century before. The pockets of localities which continue to generate death sentences are unusually resistant to strong reasons for restraint in the use of the ultimate sanction—reasons such as the high cost to the locality,[59] the low likelihood of success,[60] and the inability to execute the sentence without many years of litigation.[61] These compelling reasons for widespread non-enforcement of the death penalty in the rest of the country are given remarkably little weight in the few counties that regularly enforce the death penalty today.[62]

The likely explanation is politics—or, more aptly perhaps, a fundamentally broken politics. The death-prone pockets of the country differ, in critical respects, from the rest of their own states and the country as a whole. As Professor Liebman has explained, those communities are racially polarized places where law enforcement is too ineffective to protect whites from the high homicide rates that are tolerated nationwide with respect to poor, minority communities.[63] These communities also have "a vigilante

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59. It is difficult to find reliable studies of the costs of obtaining and carrying out death sentences. The available cost estimates are advocacy-driven, with opponents of capital punishment reporting high costs and supporters minimizing the costs. Nevertheless, a fairly recent article by an apparent death penalty *supporter* claims that the "average cost per execution in the United States ranges from $2 million to $3 million," with extraordinary cases potentially costing even more. David A. Wallace, *Dead Men Walking—An Abuse of Executive Clemency Power in Illinois*, 29 U. DAYTON L. REV. 379, 396 (2004).

60. A study conducted by Professor Liebman and others found that 68% of capital sentences reviewed from 1973 to 1995 were overturned. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1852 (2000).

61. On average, it takes twelve years for a capital case to wind its way through the various layers of appellate review in the state and federal systems and result in a "green light" to conduct an execution. *See* Liebman & Clarke, *supra* note 44, at 291.

62. *See, e.g.*, *id.* at 305–07 (discussing the lack of concern for accuracy in high death penalty rate localities).

63. Liebman describes "capitally prone communities" as follows:

> These communities exhibit a fear of outside influences that threaten the local values and experiences that set them off from the national and global mainstream. Whites in these communities, who we take to be a proxy for more privileged residents, tend to have high rates of homicide victimization relative to the rates experienced by African-American residents, and the white population tends to be located in close proximity to poor and African-

tradition with deep roots," including the terroristic, overtly racist form of vigilantism known as lynching.[64]

For the fearful white majority in these communities, it is the fact that death is decreed in response to a violent attack against whites by outsiders that matters most, not the ultimate fate of the person condemned to die.[65] "Most of what the [death-prone] community wants," Liebman explains, "comes with the spasm of retributive anger it expresses contemporaneously with its experience of the homicidal invasion by publicly condemning the killer to die."[66] If the death sentence is overturned years later, as the vast majority of capital verdicts are,[67] the anger of the community has already been satiated by the verdict of death. Under these conditions, it is hardly surprising that prosecutors in these communities continue to seek and obtain death sentences even as most of their counterparts elsewhere—both in their own states, as well as the nation at large—increasingly conclude that the game is simply not worth the candle except in truly extraordinary cases.

Current patterns of regionally isolated, low-level enforcement of the death penalty provide even further evidence that the *Furman* regime has failed to bring rationality and fairness to the administration of capital punishment. The death penalty is being used today in those localities that are least likely to make fair and dispassionate capital charging decisions based on individual desert and statutory standards of death eligibility—localities where racial tensions run especially high and death sentences serve the same role of the lynchings of yesteryear.[68] Today, when the death penalty is largely used only "when the worst effects of crime have spilled over from poor and minority neighborhoods" into more affluent, white neighborhoods,[69] *Furman* has been

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American communities.

Id. at 289–90.

64. *Id.* at 279–80, 290. For a demonstration that the counties where the death penalty is used today overlap with areas where lynchings occurred, see generally FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 89 (Oxford Univ. Press 2003).

65. *See* Liebman & Clarke, *supra* note 44, at 304.

66. *Id.* at 305.

67. *See supra* note 60.

68. *See* Liebman & Clarke, *supra* note 44, at 278–80.

69. *Id.* at 270.

turned on its head. Death is being sought and imposed haphazardly based on race, not neutral standards of general applicability—and in an unusually error-prone manner at odds with the heightened procedural safeguards the *Furman* regime demands.[70]

The prognosis for *Furman* is likewise grim for the rest of the country where the death penalty is authorized but not being used. *Furman* sought to have capital charging and sentencing decisions made on the basis of legislative standards separating the few cases where death is deserved from the many where it is not.[71] In the places where the death penalty is in desuetude, the reason is not that the death-eligible killings taking place there do not deserve death; to the contrary, given the remarkable breadth in legislative standards of death eligibility, few first-degree murders are immune from capital charges.[72] The reason for not enforcing the death penalty, rather, is cost,[73] a factor having no bearing on desert. *Furman* sought to *rationalize* the death penalty, not to *nullify* it by making it so expensive that it would never be enforced. Thus, all across the country, both where the authorized penalty of death is being used frequently and where it has fallen into disuse, four decades of "doctrinal head-banging" have accomplished precious little to reform capital charging and sentencing.[74]

B. Furman *as Emerging Abolitionist Success Story*

Although there is not much to say for *Furman*, measured in terms of its goals of rationalizing the death penalty and making it fairly and equitably applied, it is now being cast in the unlikely role of abolitionist superhero. Ironically, given that *Furman* itself did not rule the death penalty unconstitutional per se[75]—a posi-

70. *See id.* at 267–68. Liebman explains that the "states and counties that produced the most error-prone death verdicts were also the ones that generated the most [capital] verdicts per 1000 homicides." *Id.* at 267 (citing an empirical study).

71. *See supra* notes 24–27 and accompanying text.

72. *See* Smith, *Politics of Death*, *supra* note 8, at 297 & n.50 (discussing wide breadth of legislative standards of death eligibility); *Crimes Punishable by the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.death.penaltyinfo.org/crimes-punishable-death-penalty#BJs (last visited Feb. 27, 2015) (noting that at least twenty-two states can impose the death penalty for first-degree murder, though some also require a statutorily defined aggravating circumstance).

73. *See* Steiker & Steiker, *Destabilization*, *supra* note 7, at 239–40.

74. Steiker & Steiker, *Sober Second Thoughts*, *supra* note 7, at 359.

75. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1992) (per curiam).

tion endorsed by only two Justices in *Furman*[76] and by one other Justice decades later[77]—and ushered in decades of "skyrocketing executions,"[78] death penalty abolitionists now claim that *Furman* has finally pushed a reluctant nation to the verge of abolishing capital punishment.

The means by which *Furman* has ostensibly brought abolition into the realm of possibility is, for the most part, cost.[79] On this account, *Furman*'s "super due process" approach to the death penalty, coupled with years of protracted litigation and high reversal rates,[80] has significantly altered the contemporary death-penalty landscape. As public support for the death penalty has steadily declined in recent years,[81] the number of executions has plummeted,[82] and, most surprisingly, several states have formally abolished the death penalty.[83] These unexpected developments

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76. *Id.* at 305 (1972) (Brennan, J., concurring) ("When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity."); *id.* at 358–59 (Marshall, J., concurring) ("There is but one conclusion . . . the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment.").

77. Callins v. Collins, 510 U.S. 1141, 1145, 1159 (1994) (Blackmun, J., dissenting).

78. Liebman, *supra* note 35, at 2047.

79. Steiker & Steiker, *Destabilization*, *supra* note 7, at 239.

80. *See supra* notes 59–61 and accompanying text.

81. According to recent polling, from 1996 to 2013, support for the death penalty nationwide declined from 78% to 55%, while anti-death penalty sentiment doubled, going from 18% to 37%. Michael Lipka, *Support for Death Penalty Drops Among Americans*, PEW RES. CTR. (Feb. 12, 2014), http://www.pewresearch.org/fact-tank/2014/02/12/support-for-death-penalty-drops-among-americans/. This is the lowest recorded level of support for capital punishment since the time of *Furman*. Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low*, GALLUP (Oct. 13, 2011), http://www.gallup.com/poll/150089/support-death-penalty-falls-year-low.aspx. For a more fine-grained analysis of recent polling results, see RICHARD C. DIETER, DEATH PENALTY INFO. CTR., A CRISIS OF CONFIDENCE: AMERICANS' DOUBTS ABOUT THE DEATH PENALTY (2007), *available at* http://www.deathpenaltyinfo.org/CoC.pdf.

82. After trending upward for the first two decades after *Furman* and reaching its peak in 1999 (with 98 prisoners put to death that year), the number of executions conducted annually has been consistently trending downward. *Executions by Year Since 1976*, *supra* note 2. Since 2005, the number of executions has declined every year save two. *Id.* In 2012, the execution total stayed the same as the prior year (43 executions). *Id.* While 2009 was the only year in which executions increased over the prior year. *Id.* As a result of these steady declines in executions, only 39 people were put to death in 2013, well below the 65 put to death 10 years earlier, and almost two-thirds less than the 1999 peak of 98 executions. *Id.*

83. Since 2007, legislatures in five states have repealed the death penalty. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Feb. 27, 2015). *See generally* Ian Simpson, *Maryland Becomes Latest U.S. State to Abolish Death Penalty*, REUTERS (May 2, 2013,

are said, with varying degrees of certainty, to portend an imminent end to the American experiment with capital punishment.[84]

The leading scholarly proponents of this view are none other than *Furman*'s leading abolitionist critics, Professors Steiker and Steiker. Although they previously despaired that *Furman* "may have helped to stabilize and entrench the practice of capital punishment in the United States,"[85] they now believe the tide has turned in the direction of abolition.[86]

Entrenchment, they contend, was not the only effect of *Furman*; the larger, long-term effect seems to have been to "destabilize" the death penalty.[87] Due to "[t]he sheer cost of capital proceedings, the uncertainty of executions, and the resulting dramatic decline in capital sentencing," they claim that abolition "is a genuine prospect on the horizon."[88] They are now so sanguine about the future that, for them, "the question seems to be more one of when and how—rather than whether—the American death penalty will expire."[89]

III. SKEPTICISM ABOUT THE RECENT OPTIMISM

Without a doubt, the current state of the death penalty is markedly different from what it was even a decade ago. It is possible that the death penalty may be entering its final chapter, as the optimists claim[90]—but it is also possible that the death penalty may, one day, awake from its relative slumber. This, of course, is precisely what happened during the last period, prior to *Fur-*

5:15 PM), http://www.reuters.com/article/2013/05/02/us-usa-maryland-deathpenalty-idUSBRE9410TQ20130502. These states are Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), and New Mexico (2009). *States with and Without the Death Penalty*, *supra*. These were the first legislative repeals in almost a generation. *Id.* In 2007, the death penalty was abolished in a sixth state (New York) as a result of a court decision, rather than legislation. *Id.*

84. *See supra* note 6.

85. Steiker & Steiker, *Sober Second Thoughts*, *supra* note 7, at 360.

86. *See* Steiker & Steiker, *Destabilization*, *supra* note 7, at 213.

87. *Id.*

88. *Id.* at 213.

89. *Id.* at 212.

90. Mark Berman, *How the Death Penalty Continued its Slow, Steady Decline in 2014*, WASH. POST (Dec. 18, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/12/18/how-the-death-penalty-continued-its-slow-steady-decline-in-2014/.

man, of sustained decline in the death penalty nationwide.[91] Death penalty opponents would do well to remember this history, lest they be condemned to repeat it.

Although this essay ultimately remain agnostic about the future of capital punishment, the death penalty may not be on nearly as shaky ground as abolitionists would like to believe. That is to say, the developments that have given rise to optimism in abolitionist quarters—declined executions, recent repeals of capital punishment, and diminished public support—can be explained away in terms which suggest continued entrenchment of the death penalty as a sanction for ordinary crime.

A. *The "Crime Drop"*

The strongest alternative explanation for recent declines in the death penalty involves crime rates. Crime rates, of course, are not constant but rather change over time.[92] Although police agencies and prosecutors predictably claim credit for drops in crime—so-called "broken windows" policing in New York City is a case in point[93]—it is clear that larger societal forces, including the state of the economy, have as much impact, if not more, on crime rates.[94]

As it turns out, homicide rates, and, as concerns the felony-murder aggravating factor, rates of other felonies, currently stand at record lows. According to one recent account:

> In the mid-1990s, crime rates plummeted all across America (in cities, suburbs, exurbs, and rural areas), across all demographic groups

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91. *See supra* text accompanying notes 12–23.

92. 9 Robert F. Meier et al., *Crime and the Criminal Event Perspective, in* THE PROCESS AND STRUCTURE OF CRIME: CRIMINAL EVENTS AND CRIME ANALYSIS 11 (Robert F. Meier et al., eds., 2001).

93. *See, e.g.*, Abby Johnston, *Holder Claims Credit for Drop in Federal Drug Prosecutions But Is That the Whole Story?*, DENVER-CHANNEL (Feb. 19, 2015, 3:43 PM), www.thedenverchannel.com/decodedc/holder-claims-credit-for-drop-in-federal-drug-prosecutions; Crimesider Staff, *Chicago Police Credit New Tactics for Drop in Homicides*, CBSNEWS (Feb. 7, 2014, 2:22 PM), www.cbsnews.com/news/chicago-police-credit-new-tactics-for-drop-in-homicides/; Alexandra Wolfe, *William Bratton on Being New York's Policeman*, WALL ST. J. (Aug. 1, 2014, 5:38 PM), www.wsj.com/articles/william-bratton-on-being-new-yorks-policeman-and-a-new-controversy-1406929086.

94. *See generally* THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman eds., 2006) (compiling works "to identify the plausible causes of the crime drop and to assess the contribution of each").

> (rich and poor, black and white, young and old), and were seen in every crime category. By 2007, the latest year for which systematic data are available, rape, robbery, homicide, burglary, larceny, and motor vehicle theft were all down nearly 40 percent from the peak of the US crime wave in 1991.[95]

To put these numbers into perspective, "[b]y the early twenty-first century, violent crime had reached historic lows; in 2000, for example, homicide rates reached levels *last reported in the mid-1960s*."[96]

It hardly seems coincidental that during the two periods in which the death penalty was said to be "circling the drain"—the 1960s and the 2000s—murder rates were at roughly the same low level. At times when murder rates, and rates of other felonies, are historically low, elected prosecutors would naturally charge fewer capital crimes. Simply put, there are fewer qualifying crimes (first-degree murders) committed, and a smaller pool of death-eligible crimes throughout the country should translate into a decline in the number of capital charges filed.[97]

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95. Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LEGAL & SOC. INQUIRY. 489, 490 (2010) (citations omitted). For an illuminating effort to explain what caused the recent drop in crime, a question which has bedeviled researchers, see generally FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (Oxford Univ. Press 2007).

96. Barker, *supra* note 95, at 490 (emphasis added). Barker goes on to explain:

> The scale of the crime decline was enormous. It impacted all crime categories and did so in large numbers: violent and property crime fell by well over 30 percent, with some specific categories falling more. . . . The 1990s crime decline is distinctive because of the steepness of its curve: 43 percent decrease in homicides, 38 percent decrease for all violent crime, and 37 percent decrease in property crimes—and its longevity: it lasted over sixteen years, much longer than the two to four years of earlier declines.

Id. at 495 (footnote omitted).

97. Indeed, the ebb-and-flow of the death penalty over the last half century can be understood in relation to changing crime rates. As Professor Gary Lafree has explained:

> The low crime period, from 1946 to 1960, is marked by low and stable crime rates; the crime boom period, from 1961 to 1973, is marked by rapidly increasing crime rates; the crime plateau period, from 1974 to 1990, is marked by fluctuating but consistently high crime rates; and the crime bust period, from 1991 to 1999, is marked by steep declines in crime.

Gary Lafree, *Explaining the Crime Bust of the 1990s*, 91 J. CRIM. L. & CRIMINOLOGY 269, 270 (2001). These historical movements in crime rates correspond fairly closely to the periods of declining executions before *Furman*, the sharp rise in executions during the 1980s and 1990s, and the declines in executions during the 2000s. *Executions by Year Since 1976*, *supra* note 2.

Of course, the death-sentencing rate has also declined in recent years, not just the capital charging rate.[98] This, however, does not necessarily suggest greater reluctance on the part of jurors to decree death. Even for death-qualified jurors, their willingness to decree death should correlate with their fear of victimization and sense that violent crime is out of control. Given that recent declines in crime rates matched "similar declines in criminal *victimization* rates" and that "the chances of being murdered decreased across all racial and ethnic groups, across all regions, and across all socioeconomic groups,"[99] it makes perfect sense that the rate of death sentences imposed in capital cases would decline as murders and other violent crimes plummeted during the late 1990s and 2000s.[100]

B. *"Monkey Wrenches" in the "Machinery of Death"*

Declined rates of violent crime and victimization are not the only explanation for recent declines in executions. The criminal justice system has suffered a number of serious exogenous shocks—shocks which, necessarily and logically, have interfered with the effort to conduct executions at rates seen in prior decades. Recent reductions in execution therefore do not suggest greater reluctance to execute persons on death row.

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98. *See* Steiker & Steiker, *Destabilization*, *supra* note 7, at 241.

99. *See* Barker, *supra* note 95, at 496–97 (footnotes omitted).

100. The widespread availability of life without parole ("LWOP") as an alternative to execution may play a role in reduced executions at the margin, but is unlikely to account for a significant reduction in executions. The key point here is to distinguish between *voters* and *capital jurors*. Among voters, support for the death penalty is greatly reduced, if not overtaken by the opposing view, when LWOP is available. *See, e.g.*, Richard C. Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, DEATH PENALTY INFO. CTR. (Apr. 1993), *available at* http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty (reporting that "the sentence of life without parole plus restitution causes a support [for the death penalty] drop of 36% and relegates capital punishment to a minority position"). This, however, is assuredly not the case with capital jurors. The jurors seated in capital cases go through the process of "death qualification," which (unlike public-opinion polling) removes anyone whose views on the death penalty might prevent them from sentencing a defendant to death. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 170–71 (1986) (discussing "death qualification," and holding the practice to be constitutional). In addition to the potential that death-qualified juries may be "uncommonly willing to condemn a man to die," Witherspoon v. Illinois, 391 U.S. 510, 521 (1968), death-qualified juries have "significantly stronger implicit racial biases . . . and explicit racial biases than jury-eligible citizens generally." Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 569 (2014).

The most significant of the exogenous shocks to the death penalty system involve the widely reported shortage of lethal injection drugs.[101] Lethal injection is now the execution method of choice because it makes executions appear to be more humane by masking any obvious signs of suffering or distress by the condemned prisoner.[102] Building on prior denials by member nations of American efforts to obtain the drug for use in executions, the European Union has banned export to the United States of sodium thiopental, a drug essential to the now-standard three-drug lethal-injection "cocktail."[103]

Without sodium thiopental, states have tried to conduct lethal injections with other drugs obtained from unregulated compounding pharmacies in the United States—with, at times, disastrous results.[104] Prisoners have challenged these substitute, untested lethal injection methods as cruel and unusual punishment.[105] Although similar challenges to the three-drug lethal-injection method failed,[106] the latest round of challenges got a considerable boost from gruesome media reports of botched executions—reports which led *The New Republic* to declare 2014 the worst year in the history of lethal injection.[107]

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101. *See, e.g.*, John Ericson, *Botched Execution Shows Perils of Lethal Injection Drug Shortage*, NEWSWEEK (Apr. 30, 2014, 10:00 AM), www.newsweek.com/2014/05/16/states-go-great-lengths-find-lethal-injection-drugs-249154.html; Jennifer Horne, *Lethal Injection Drug Shortage*, CAPITAL IDEAS (Feb. 17, 2011), www.csg.org/pubs/capitolideas/enews/issue65_4.aspx.

102. *See* Editorial, *The Humane Death Penalty Charade*, N.Y. TIMES, Jan. 27, 2015, at A20; Ericson, *supra* note 101.

103. *See* Commission Regulation 1352/2011, 2011 O.J. (L 338) 31, 34 (EU); Horne, *supra* note 101; Ian Steadman, *US Prisons, Foiled by an EU Boycott, Are Turning to Untested Drugs in Executions*, NEW STATESMAN (Jan. 14, 2014, 7:23 PM), http://www.newstatesman.com/future-proof/2014/01/us-prisons-foiled-eu-boycott-are-turning-untested-drugs-executions.

104. *See, e.g.*, Steadman, *supra* note 103.

105. *See* Adam Liptak, *Justices Stay Executions of 3 in Oklahoma, Pending Decision on Lethal Drug Protocol*, N.Y. TIMES, Jan. 28, 2015, at A14.

106. *See* Baze v. Rees, 553 U.S. 35, 41, 44 (2008) (plurality opinion).

107. Ben Crair, *2014 Is Already the Worst Year in the History of Lethal Injection*, NEW REPUBLIC, July 24, 2014, http://www.newrepublic.com/article/118833/2014-botched-executions-worst-year-lethal-injection-history. According to a media account of one notoriously botched Oklahoma execution:

> In April, Oklahoma carried out what may have been the worst lethal injection in U.S. history: Executioners pushed an IV catheter straight through a vein in Clayton Lockett's groin, so that the drugs filled his tissue and not his bloodstream. As Lockett writhed and grimaced, the executioners closed the curtains and tried to call off the execution—but it was too late, and he even-

The significance of the lethal injection litigation to recent execution totals, and the larger international struggle by the United States to acquire the drugs necessary for a "humane" execution, cannot be overstated. Lethal injection is the execution method prescribed by law; few states, at present, have back-up execution methods.[108] Court challenges to improvised lethal injection methods strike at the very heart of the governments' ability to conduct executions.

As legal challenges worked their way through the lower courts to the Supreme Court—which has finally agreed to decide whether certain substitute lethal injection procedures are unconstitutional[109]—it became obvious that the death penalty, as we know it, had been thrown into disarray all across the country. In response to its botched execution of Dennis McGuire, who "choked, gasped and clenched his fists for more than twenty minutes during his execution last year,"[110] Ohio suspended all executions for the rest of the year as it searched for a more effective method of lethal injection.[111]

Now that Oklahoma's lethal injection method is before the Supreme Court, all executions from that state are on hold pending the Court's decision.[112] To the extent other states use the same method as Oklahoma—and it would appear that "more than two dozen" do, including California[113]—the litigation could approximate a national moratorium on executions. It is only natural that

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tually died of a heart attack.

Id.

108. *Methods of Execution*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/methods-execution (last visited Feb. 27, 2015).

109. Richard Wolf, *Supreme Court Will Review Use of Lethal Injections*, USA TODAY (Jan. 23, 2015, 8:42 PM), http://www.usatoday.com/story/news/nation/2015/01/23/supreme-court-execution-drug/22212827/.

110. Timothy Williams, *Drug Switch May Delay Executions in Ohio*, N.Y. TIMES, Jan. 8, 2015, at A13.

111. Ohio has come up with a new protocol, but will continue to postpone executions until it locates another source for a critical component of the drug cocktail. Alan Johnson, *Ohio Revises Death Penalty Protocol, Will Delay Executions*, COLUMBUS DISPATCH (Jan. 9, 2015, 4:29 AM), http://www.dispatch.com/content/stories/local/2015/01/08/death-penalty-protocol.html.

112. Glossip v. Gross, 776 F.3d 721 (10th Cir. Jan. 12, 2015), *cert. granted sub nom.* Glossip v. Gross, 83 U.S.L.W. 3625 (U.S. Jan. 23, 2015) (No. 14-7955).

113. Editorial, *In Lethal Injection Case, High Court Has a Chance to Take a Bold Step*, L.A. TIMES (Jan. 26, 2015, 5:38 PM), http://www.latimes.com/opinion/editorials/la-ed-death-penalty-supreme-court-oklahoma-drugs-20150127-story.html.

states would find it difficult to proceed with executions when they have been forced to devise, and defend throughout the court system, new, untested methods of lethal injection over the last few years.

Another exogenous shock interfering with the normal pace of executions involves mental retardation. In *Atkins v. Virginia*, the Supreme Court held that it is unconstitutional to execute mentally retarded persons.[114] Although *Atkins* was decided more than ten years ago, the underlying question of how to define mental retardation is still being vigorously litigated. Just last year, for example, the Court struck down a rigid Florida law which defined retardation as an IQ below 70, foreclosing further exploration of intellectual disability for persons with IQs above 70.[115] The Court held that this "create[d] an unacceptable risk that persons with intellectual disability will be executed."[116] That decision did not just impact Florida; to the contrary, eight other states employed the same flawed approach, and even more states used an equally rigid IQ standard, albeit at 75 instead of 70.[117]

The decision in *Hall v. Florida*, which dramatically changed how states must identify the "mentally retarded" and hold them exempt from the death penalty, has broad implications for current execution levels. The *Atkins* dissent stated that "experts have estimated that as many as 10 percent of death row inmates are mentally retarded."[118] Assuming that to be the case, the *Atkins* decision implicates hundreds of death sentences, and not just sentences against offenders with IQs at or slightly above 70. Even prisoners with higher IQ scores can attempt to prove mental retardation through other indicia of intellectual impairment. A line of cases as far-reaching as *Atkins* and *Hall* will, of necessity, delay the pace at which even the most eager state can conduct executions.

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114. 536 U.S. 304, 321 (2002).

115. Hall v. Florida, 574 U.S. ___, 134 S. Ct. 1986, 1990 (2014).

116. *Id.*

117. *Id.* at 1996–97 (noting similar IQ standards in Alabama, Arizona, Delaware, Kansas, Kentucky, North Carolina, Virginia, and Washington).

118. *Atkins*, 536 U.S. at 324 (Rehnquist, J., dissenting).

C. *The Move From De Facto to De Jure Abolition*

Opponents of the death penalty often cite the legislative votes in the five states that have repealed capital punishment in the last half-decade as proof of gathering momentum in favor of abolition.[119] The symbolic significance of these votes is not to be denied: It is important that several states have had the courage and, in the abolitionist view, good sense, to reject the death penalty, for it shows that the death penalty is not "immune from the influence of democracy."[120] Nevertheless, these states are far from representative of the states which have accounted for the bulk of executions, and even less representative of the minority of death-prone localities nationwide.

The recent legislation to abolish the death penalty has been enacted in states that only rarely enforced the death penalty in the first place. Take New Jersey, the state which led the recent spate of repeals, as an example. Its 2007 decision to repeal the death penalty did not require anything approaching political courage.[121] The death penalty was so unpopular that the state did not join the national stampede to reinstate the death penalty after *Furman v. Georgia* until 1982.[122] Even after twenty years of having the death penalty back on the books, New Jersey could not bring itself to put anyone to death.[123] By 2007, the state had conducted exactly zero executions since 1963.[124]

The states that followed New Jersey's lead were similarly states in which, de facto, the death penalty had already been abrogated. As Connecticut's governor noted in signing a bill abolishing the death penalty in 2012: "In the last 52 years, only two people have been put to death in Connecticut—and both of them volunteered for it. . . ."[125] New Mexico, which abolished the death penalty in 2009, had only two men on death row and had only ex-

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119. *See supra* note 83.

120. Smith, *Politics of Death*, *supra* note 8, at 298.

121. *See id.* at 299–300.

122. *Id.*

123. *Id.*

124. *Id.* at 299.

125. David Ariosto, *Connecticut Becomes the 17th State to Abolish Death Penalty*, CNN (Apr. 25, 2012, 5:41 PM), http://www.cnn.com/2012/04/25/justice/connecticut-death-penalty-law-repealed/.

ecuted nine people since 1933.[126] Likewise, when it abolished the death penalty in 2013, Maryland had only put five people to death (the last almost a decade earlier) since 1978.[127]

Illinois, too, fits this mold, but not quite as neatly as the other states. The last execution in that state took place in 1999, twelve years before the death penalty was abolished.[128] Executions had been officially on hold in that state for so long that, by the time the legislation reached the governor, only fifteen people were on death row, and "61 percent of voters questioned in a poll did not even know the state still had a death penalty."[129] Thus, in Illinois, as in the other states to reject capital punishment by statute, the decision to abolish the death penalty merely confirmed the obvious—that the state had been out of the execution business for years.

Despite these abolitionist legislative victories, there is contrary evidence suggesting that the death penalty remains resilient nationwide, even in jurisdictions with comparatively weak support for capital punishment. The federal government is a case in point. It is trending in the opposite direction of the "repeal" states—that is, in the direction of more executions.

By wide margins, Congress revived the death penalty in 1988, and expanded it a few years later to include an array of additional offenses.[130] In 1996, Congress passed (and President Bill Clinton signed into law) the Antiterrorism and Effective Death Penalty Act with the purpose of making the death penalty "expeditious

126. *See New Mexico Abolishes Death Penalty*, CBSNEWS (Mar. 18, 2009, 2:38 PM), http://www.cbsnews.com/news/new-mexico-abolishes-death-penalty/.

127. Simpson, *supra* note 83.

128. Steven Mills, *What Killed Illinois' Death Penalty: It Wasn't the Question of Morality But the Question of Accuracy That Led State to Abolish Capital Punishment*, CHI. TRIB. (Mar. 10, 2011), http://articles.chicagotribune.com/2011-03-10/news/ct-met-illinois-death-pe nalty-history20110309_1_death-penalty-death-row-death-sentences.

129. *Id.* Until the prior governor cleared death row on his last day in office, there were 157 death-row inmates in Illinois, but the state had conducted only twelve executions since 1976. *See id.*; *Illinois Death Row Inmates Granted Commutation by Governor George Ryan on January 12, 2003*, DEATH PENALTY INFO. CTR., http://www./deathpenaltyinfo.org /node/677 (last visited Feb. 27, 2015).

130. In 1988, Congress authorized the death penalty for "drug kingpin" murders. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4387 (codified at 21 U.S.C. § 848(e) (1988)). In 1994, Congress passed the Federal Death Penalty Act, further expanding the federal crimes punishable by death. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (codified at 18 U.S.C. §§ 3591–98 (1994)).

and virtually impervious to attack in federal court."[131] Since 1988, federal courts have sentenced seventy-four people to die.[132] Federal authorities made history in 2001 by conducting the first federal execution since the 1960s (that of Timothy McVeigh, the Oklahoma City bomber), and have conducted two additional executions since that time.[133] At present, President Barack Obama's Justice Department is pursuing a death sentence against the Boston Marathon bomber, even though opposition to the death penalty runs high in Massachusetts, a state which has not had the death penalty for thirty years.[134]

Furthermore, in what can only be described as an extreme form of cognitive dissonance (or perhaps political cowardice), two of the five states to abolish the death penalty in recent years—Connecticut and New Mexico—left open the possibility of future executions within their own abolitionist borders. Both states elected to leave in place death sentences handed down before its repeal legislation (eleven in Connecticut and three in New Mexico).[135] Barring further developments (the Connecticut high court will decide whether it is constitutional to give the repeal legisla-

131. See Smith, *Politics of Death*, *supra* note 8, at 301.

132. *Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/federal-death-row-prisoners (last updated Dec. 18, 2014).

133. *Federal Executions 1927–2003*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/federal-executions-1927-2003 (last visited Feb. 27, 2015).

134. *See* Brian MacQuarrie, *In Globe Poll, Most Favor Life Term for Dzhokhar Tsarnaev*, BOS. GLOBE (Sept. 16, 2013), *available at* http://www.bostonglobe.com/metro/2013/09/15/most-boston-residents-favor-life-without-parole-for-tsarnaev-convicted-poll-shows/Ur6ivWIUiYCpEZLXBApHDL/story.html; *Massachusetts*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/massachusetts-0 (last visited Feb. 27, 2015). Although McVeigh's crime, like that of the alleged Boston marathon bomber, can be regarded as terrorism—not an ordinary crime—the same cannot be said for the bulk of the roughly sixty prisoners on federal death row. *See Federal Death Row Prisoners*, *supra* note 133.

135. *See* Alaine Griffin, *Death Penalty Repeal Changes the Legal Landscape*, HARTFORD COURANT (Apr. 13, 2012), http://articles.courant.com/2012-04-13/news/hc-death-penalty-repeal-impact-0415-20120413_1_death-row-death-penalty-julia-ashe/2. Governors in Illinois, Maryland, and New Jersey, by contrast, cleared death row in the wake of abolition by commuting preexisting death sentences to life without parole. Ariane de Vogue & Barbara Pinto, *Illinois Abolishes Death Penalty; 16th State to End Executions*, ABC NEWS (Mar. 9, 2011), http://abcnews.go.com/Politics/illinois-16th-state-abolish-death-penalty/story?id=13095912; Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST (Dec. 14, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/12/13/AR2007121301302.html; *US: Maryland Abolishes Death Penalty*, HUM. RTS. WATCH (May 2, 2013), http://www.hrw.org/news/2013/05/02/us-maryland-abolishes-death-penalty. It should be noted that in Connecticut, the commutation power is reposed in a pardons board, not the governor. CHRISTOPHER REINHART, CONN. GEN. ASSEMBLY, PARDONS (2004), *available at* http://cga.ct.gov/2004/rpt/2004-R-0877.htm.

tion prospective effect only), these states stand poised to carry out a penalty that they have already abolished, something that has never happened before. Even in those states which only rarely imposed or carried out death sentences, and ultimately repealed the death penalty, they could not muster the political will to follow their abolitionist impulses to their logical end.

D. *The Fickle Nature of Capital Opinion Polling*

Abolitionists also claim optimism based on the concomitant drop in public support for, and rise in opposition to, the death penalty. For reasons similar to those previously explored, however, the recent crime drop[136] can explain the sharp declines in support for the death penalty over the past decade. To the extent fear of homicide and other violent crime recedes, the death penalty will no longer seem to be the essential self-defense mechanism that many voters believe it to be during periods of increased crime and heightened fear of victimization. Not surprisingly, movements in polling data have tended to track movements in homicide rates.[137]

Not only does the breadth and intensity of support for capital punishment vary as crime rates change, but other issues of more pressing concern to voters can easily push the death penalty onto the back burner. This is especially true when the period of reduced rates of crime (and hence fear of victimization) is characterized by other phenomena of greater concern to voters. The 2000s were notable not just for the unexpected decline in crime, death sentences, and executions, but also for the economic collapse and foreign wars claiming the lives of thousands of American troops.[138] These events would naturally push "bread-and-butter" issues (issues such as job creation, sagging home values,

136. *See supra* Part III.A.

137. As a recent report by the Pew Research Center notes, "Public support for the death penalty has tracked rates of violent crime, as calculated by the FBI." Drew DeSilver, *Lower Support for Death Penalty Tracks with Falling Crime Rates, More Exonerations*, PEW RES. CTR. (Mar. 28, 2014), http://www.pewresearch.org/fact-tank/2014/03/28/lower-suppo rt-for-death-penalty-tracks-with-falling-crime-rates-more-exonerations/.

138. *See, e.g.*, *How We've Changed Since 9/11*, INFOPLEASE, http://www.infoplease.com /us/history/911-anniversary-civilian-changes.html (last visited Feb. 27, 2015).

and high gasoline prices) and "war-and-peace" issues to the fore, leaving voters less concerned about the death penalty.[139]

Finally, polls seeking respondents' views in the abstract about the death penalty have proven to be more than a little fickle over the decades. Events which might have been expected to swing the pendulum radically—such as the terrorist attacks of 9/11 and exonerations of wrongfully convicted death row inmates—have had surprisingly muted effects on public opinion.[140] Conversely, *Furman v. Georgia*, a badly splintered[141] (and, as a matter of legal reasoning, highly dubious) decision, should have had little effect on views on the death penalty, yet it caused abolitionist sentiment to collapse.[142] In light of this history of wide, and often unpredictable, swings in public opinion on what one would expect to be largely matters of deeply held moral beliefs and values, it would be hazardous to place much weight on opinion polls as a basis for predicting what the future holds for capital punishment.

These admittedly somewhat speculative alternative explanations should suffice to show that, striking though they are, recent declines in the death penalty need not portend abolition. It is entirely possible that the death penalty may be, to some extent, "down" at present, but not "out." We have to await the final bell to find out what the ultimate outcome will be.

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139. For example, exit polling from the 2012 election "show[ed] the economy is the number one issue on voters' minds. Sixty percent called it the most important issue. Healthcare is a distant second at 17%. It is followed by the deficit at 17% and foreign policy at 4%." Joe Von Kanel, *Exit Polls: Top Issues for Voters*, CNN (Nov. 6, 2012, 7:43 PM), http://politicalticker.blogs.cnn.com/2012/11/06/exit-polls-top-issues-for-voters/. Crime in general, and murder in particular, simply did not rate as voters cast their ballots in 2012, a year of continued death penalty lows in which several leading "death" states (including Alabama, Georgia, North Carolina, and Virginia) did not conduct a single execution. *See* Bill Meares, *Executions, Death Sentences Remain Steady Over Past Year*, CNN (Dec. 18, 2012, 1:30 AM), http://www.cnn.com/2012/12/18/us/death-penalty-numbers/ (reporting that forty-three executions were carried out in 2012 and eighty new death sentences imposed, "the second lowest total [of death sentences imposed] since executions resumed in 1976").

140. *See, e.g.*, Smith, *Politics of Death*, *supra* note 8, at 299; David W. Moore, *Public Divided Between Death Penalty and Life Imprisonment Without Parole*, GALLUP (June 2, 2004), http://www.gallup.com/poll/11878/public-divided-between-death-penalty-life-imprisonment-without-parole.aspx (discussing the impact that 9/11 and wrongful convictions have had on death penalty opinion).

141. *See* Lain, *supra* note 19, at 50–51.

142. *See* Smith, *Politics of Death*, *supra* note 8, at 292.

CONCLUSION

This essay argues that recent reports of the death penalty's demise may turn out to be greatly exaggerated. The death penalty rose from the ashes in the 1970s after decades of decline. It is quite possible the same resurgence will occur after recent moves away from capital punishment.

True, recent years have seen remarkable changes in the proverbial "facts on the ground." Sharp reductions in executions, legislative repeal of the death penalty, and an erosion of public support for the death penalty are all major developments no one could have foreseen. These changes, however, may be attributable to factors other than imminent triumph of the movement to abolish the death penalty. This essay concludes that the future of America's death penalty is, at present, uncertain.

If this agnosticism is right, then it is too early for abolitionists to declare "Mission Accomplished." There is still much more to do—in legislatures, in the courts, and, ultimately, in the court of public opinion—to make the death penalty a thing of the past. It would be a tragic mistake for those who oppose the death penalty or the arbitrary manner in which it is administered to treat abolition as a *fait accompli.*

Similarly, those who favor the death penalty should treat recent events as a call to action. If in fact the death penalty is in a precarious position today, those who support it should seize the mantle of reform, if only to avoid losing the ability to put individuals to death. Remaining content with a status quo in which death is sought haphazardly and administered arbitrarily may well eventually spell the end of the death penalty. If that happens, those who stubbornly oppose death penalty reform and defend an indefensible status quo in which, to quote a recent study, "Black Lives Don't Matter,"[143] will have only themselves to blame.

143. Baumgartner et al., *supra* note 56.

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