

EIGHTH AMENDMENT MEANINGS FROM THE ABA'S MORATORIUM RESOLUTION

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I

INTRODUCTION

The American Bar Association's ("ABA's") objection to capital punishment as currently practiced¹ stands as one of the most provocative acts of self-proclaimed Eighth Amendment relevance to occur in many years, ranking with Justice Harry A. Blackmun's well-publicized renunciation of the death penalty in *Callins v. Collins*.² The ABA insists that its position—that America must institute substantial reforms in the administration of capital punishment immediately or cease executions altogether—is no mere expression of policy preference. To the contrary, the ABA insists that its position reflects, and indeed is compelled by, a proper appreciation of the Eighth Amendment.³ And it calls upon the nation to come to the same conclusion.

Yet the ABA resolution and its supporting report prove decidedly lean insofar as fully articulated constitutional arguments are concerned. The resolution, as is frequently the case with such documents, presents the ABA's proposals unadorned by any legal argument, and the supporting report concentrates almost entirely on the anecdotal documentation of perceived problems, confining its explicit constitutional references to general assertions of the need for fairness and consistency under the Eighth Amendment and its

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1. The ABA's resolution, Resolution of the House of Delegates (Feb. 1997), *reprinted in Appendix*, 61 LAW & CONTEMP. PROBS. 219 (Autumn 1998) [hereinafter ABA Resolution], and its supporting report, Report No. 107 (1997), *reprinted in Appendix, supra*, at 220 (Autumn 1998) [hereinafter ABA Report], are reproduced in an appendix to this symposium volume.

2. 510 U.S. 1141, 1143, 1145 (1994) (Blackmun, J., dissenting from denial of *certiorari* to *Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993)).

3. "Unless existing ABA policies are now implemented, many more prisoners will be executed under circumstances that are inconsistent with the Supreme Court's mandate, articulated in *Furman* [*v. Georgia*, 408 U.S. 238 (1972),] and *Gregg* [*v. Georgia*, 428 U.S. 153 (1976)], that the death penalty be fairly and justly administered." ABA Report, *supra* note 1, at 4, *reprinted in Appendix, supra* note 1, at 222.

jurisprudential touchstones, *Furman v. Georgia*⁴ and *Gregg v. Georgia*.⁵ Under the circumstances, this is unsurprising, understandable, and not to be faulted. We do well to remember that the ABA's action is first, foremost, and above all else an inaugural act—a bold social move intended to awaken public consciousness, stimulate thought, initiate inquiry and debate, and thereby instigate a change of course. Acts of that nature commonly evoke broadly appealing principles even as they leave for later the many questions that those principles, their implementation, and their relationship to other possibly conflicting principles raise.⁶ Justices of the Supreme Court have been forgiven for doing it,⁷ and the lawyers of the ABA surely can be, too.

The ABA beckons us to engage the resolution and explore the unarticulated Eighth Amendment meanings it might intimate. What follows is one such speculative inquiry in response to the ABA's invitation. It reaches three conclusions. First, the ABA's proposals do not challenge the capacity of the Eighth Amendment; they make no demands that the Amendment cannot oblige. Second, the true challenge posed by the ABA resolution is to the capacity of the people who administer the Amendment. Third, there is capacity remaining in the Eighth Amendment that we may be on the verge of tapping, and it could spell the end of the death penalty.

II

WHITHER MORAL ABOLITIONISM?

Hard-and-fast moral opponents of capital punishment might well bristle at some of the particulars of the ABA resolution. By bracketing the question of the death penalty's general propriety,⁸ and by intimating that it is possible to run a fair and just death penalty system provided that enough good lawyers and process are thrown at the problem,⁹ the ABA evidences an agnosticism that can

4. 408 U.S. 238 (1972).

5. 428 U.S. 153 (1976).

6. Keeping the message clean and simple can be highly advantageous, especially when the details are fraught with uncertainty and invite divisions of opinion that could splinter the majority needed to take the action in the first place and could alienate members of the intended audience as well. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-37 (1995); see also Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6-8 (1996) (discussing “decisional minimalism”).

7. See, e.g., *Furman*, 408 U.S. at 239-40 (declaring capital punishment as then administered cruel and unusual punishment); *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (declaring racially segregated schooling inherently unequal).

8. “[I]n adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.” ABA Resolution, *supra* note 1, at 1, *reprinted in Appendix, supra* note 1, at 220. The report reiterates that the resolution does “not commit the ABA to a policy regarding the morality or the advisability of capital punishment *per se*.” ABA Report, *supra* note 1, at 15, *reprinted in Appendix, supra* note 1, at 231.

9. The resolution states:

[T]he American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty *until* the jurisdiction implements policies and procedures that are consistent with . . . longstanding American Bar Association policies intended to (1)

frustrate those who find state-imposed premeditated killing reprehensible. While there is an oblique acknowledgment that “individual lawyers differ in their views on the death penalty in principle and on its constitutionality,”¹⁰ at no point in these documents does the ABA ever utter the uneuphemistic truth that a small but not insignificant minority in this country, and countless numbers worldwide, hold capital punishment to be an unforgivable violation of human dignity.¹¹ In this regard, the ABA resolution mirrors the state of contemporary constitutional discourse about the death penalty. Old-style moral abolitionism—as Austin Sarat has put it, the kind “founded on a belief in the incompatibility of capital punishment on the one hand and the values of a civilized society on the other”¹²—rarely enjoys a distinct voice in our constitutional discussions about capital punishment anymore. Like the ABA, we may allude to it, but we seldom speak it.¹³

It is not for want of ability to translate such sentiments into a constitutional argument. One need look no further than Justice William J. Brennan, Jr.’s opinion in *Furman*,¹⁴ reprised four years later in *Gregg*,¹⁵ for its most elaborate judicial development. Justice Brennan showed that the text, history, and spirit of the Eighth Amendment, as well as the judicial precedent concerning the

ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

ABA Resolution, *supra* note 1, at 1 (emphasis added), reprinted in *Appendix, supra* note 1, at 219.

10. ABA Report, *supra* note 1, at 2, reprinted in *Appendix, supra* note 1, at 220.

11. See, e.g., *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128, U.N. GAOR 3d Comm., 44th Sess., Annex, Agenda Item 98, at 2-5, U.N. Doc. A/Res/44/128 (1989) (seeking abolition of the death penalty to further the “enhancement of human dignity and progressive development of human rights”); see also *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 33-34 (Hugo Adam Bedau ed., 1997) [hereinafter *CURRENT CONTROVERSIES*] (reporting international abolitionist developments).

12. Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering Against Capital Punishment*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 317, 326 (Austin Sarat & Stuart Scheingold eds., 1998). Professor Sarat observes that this “traditional abolitionism” invokes a conception of the state as moral exemplar of the sort often associated with the views of Justice Louis D. Brandeis. See *id.* at 326, 345 n.90 (noting Brandeis’s views as stated in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)). For Sarat, “traditional abolitionism” is distinguishable from what he labels “new abolitionism,” which is “rooted in the belief that capital punishment cannot be administered in a manner compatible with due process of law” and which invokes a vision of “Justice as procedural rather than substantive, legal rather than moral.” *Id.* at 327.

I find Sarat’s distinction helpful here, even though differentiating among abolitionists is surely unnecessary in many other contexts—as it will be unnecessary at later points in this very article. See, e.g., Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 325 n.2 (1996) (noting Sarat’s “sociohistorical distinction” but, given the author’s purposes, rejecting it in favor of a broader use of the term “abolitionist” to refer generally to the anti-capital punishment bar).

13. I say seldom, not never. Hugo Adam Bedau has been a notable proponent of the moral argument. See, e.g., Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 145 (Michael J. Meyer & William A. Parent eds., 1992) [hereinafter *Bedau, Human Dignity*]; Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789 (1996) [hereinafter *Bedau, Eighth Amendment Strategies*].

14. *Furman v. Georgia*, 408 U.S. 238, 257 (1972) (Brennan, J., concurring).

15. *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting).

Amendment, can support the generalization of a basic principle—that a punishment must comport with human dignity¹⁶—which it is the duty of the judiciary to independently enforce,¹⁷ aided by subsidiary principles inherent in the Amendment and the precedent that are sufficient to guide the judicial determination.¹⁸ Capital punishment can be said to fail by this measure, Justice Brennan further demonstrated, its “fatal constitutional infirmity” being that it “treats ‘members of the human race as nonhumans, as objects to be toyed with and discarded[.]’” thereby violating “the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.”¹⁹

The argument’s premises and conclusions are, of course, contestable,²⁰ but mere contestability cannot account for the argument’s absence in constitutional conversations today. If the argument suffered some inherent weakness that placed it beyond the pale of respectable legal circles, its banishment would be understandable. It is not, however, that outlandish. True, the argument does feature many of the moves of classic 1960s-style Warren Court expansionism—the postulation of a Constitution of evolving principles that points toward a progressing society’s destination, and not simply a Constitution of rules that mark discrete limits already specifically settled by society; the identification of broad concepts through creative synthesis of text, history, and precedent; the assertion of a judicial obligation to administer the newly unleashed concepts with independence; and the refusal to conclusively privilege traditional or contemporary acceptance of specific practices when they conflict with the broader concepts. But moves like these have not experienced the wholesale repudiation that their detractors have desired. In recent years, arguments incorporating

16. *Furman*, 408 U.S. at 270 (Brennan, J., concurring).

17. Justice Brennan wrote in *Gregg*:

This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, “moral concepts” require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society. . . . A judicial determination whether the punishment of death comports with human dignity is therefore not only permitted but compelled by the Clause.

Gregg, 428 U.S. at 229-30 (Brennan, J., dissenting) (citations omitted).

18. *Furman*, 408 U.S. at 270 (Brennan, J., concurring). Justice Brennan identified four principles whose “function . . . is to enable a court to determine whether a punishment comports with human dignity.” *Id.* at 305 (Brennan, J., concurring). “The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings.” *Id.* at 271 (Brennan, J., concurring). The second principle is that “the State must not arbitrarily inflict a severe punishment.” *Id.* at 274 (Brennan, J., concurring). “A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society.” *Id.* at 277 (Brennan, J., concurring). “The final principle inherent in the Clause is that a severe punishment must not be excessive.” *Id.* at 279 (Brennan, J., concurring).

19. *Gregg*, 428 U.S. at 230 (Brennan, J., dissenting) (quoting *Furman*, 408 U.S. at 273 (Brennan, J., concurring)).

20. For a criticism of Justice Brennan’s argument, see Raoul Berger, *Justice Brennan, “Human Dignity,” and Constitutional Interpretation*, in *THE CONSTITUTION OF RIGHTS*, *supra* note 13, at 129. For a defense, along with constructive criticism, see Bedau, *Human Dignity*, *supra* note 13.

similar steps have survived direct challenge tempered, if not intact.²¹ They have been implicitly reaffirmed time and again through the perpetuation and development of doctrine they spawned.²² They have been advanced in cases of first impression.²³ Indeed, toned-down variants can even be detected in the Court's recent decisions reviving federalism²⁴ and extending strict scrutiny to affirmative action measures.²⁵

Nor is moral abolitionism's silence required by *stare decisis*. Although the Court upheld the death penalty against *per se* challenge in *Gregg*, Justices Brennan and Marshall demonstrated that it is possible to maintain a persistent but respectful disagreement with *Gregg* that robs neither the law nor the Court of dignity.²⁶ Examination of *Gregg* on its own terms, moreover, indicates that it really is not the unassailable precedent that many might have thought. Few probably recall that only four Justices sustained the death penalty in 1976 on the theory that is most preclusive of moral abolitionism—the argument that significant contemporary legislative support for the death penalty alone forecloses a conclusion of unconstitutionality.²⁷ A five-Justice majority of the Court saw an Eighth Amendment much more receptive to the moral abolitionist, and saw it with a unity of vision that those of us who write about or work in the administration of capital punishment overlook. Five Justices explicitly agreed

21. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 843 (1992) (plurality opinion) (O'Connor, J., joined by Kennedy and Souter, JJ.) (affirming core holding of *Roe v. Wade*, 410 U.S. 113 (1973), recognizing a fundamental privacy interest that extends to the choice of whether to carry a pregnancy to term); *Harmelin v. Michigan*, 501 U.S. 957, 998-1001 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ., concurring in part and concurring in the judgment) (affirming existence of proportionality principle under the Eighth Amendment in noncapital cases); *Stanford v. Kentucky*, 492 U.S. 361, 382 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (affirming the Court's constitutional obligation to conduct proportionality analysis in death cases).

22. No better example exists than the long line of capital punishment cases that build upon the principles generated by *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976).

23. See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 2258, 2281-83 (1997) (Souter, J., concurring in the judgment) (advocating judicial role to administer, through balancing, an "enforceable concept of liberty" that would apply in myriad cases involving governmental restraint).

24. See, e.g., *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169-70 (1997) (employing a requirement of proportionality and congruence, rather than the more deferential rational basis test, to congressional legislation under § 5 of the Fourteenth Amendment in order to promote federalism and separation of powers principles); *United States v. Lopez*, 514 U.S. 549, 560, 566 (1995) (asserting judicial role to determine whether regulated activity substantially affects commerce, in lieu of more deferential rational basis test, in order to promote federalism principles; asserting need for judicial maintenance of federalism principles notwithstanding uncertainty that such maintenance might produce).

25. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (generating from the Equal Protection Clause a personal right to equal dignity and respect that is presumptively violated by race-based governmental measures).

26. See MICHAEL MELLO, *AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL* (1996) (examining extensively Justices Brennan and Marshall's unwavering adherence to their views as stated in *Furman* and *Gregg*).

27. See *Roberts v. Louisiana*, 428 U.S. 325, 353 (1976) (White, J., dissenting, joined by Burger, C.J., and Blackmun and Rehnquist, JJ.) (concluding that the numerous legislative re-enactments of the death penalty after *Furman* were "profound developments . . . which th[e] Court must accept as demonstrating that capital punishment is acceptable to the contemporary community as just punishment" and which thus "foreclose[]" the constitutional challenge); see also *id.* at 355 (White, J., dissenting) (noting that the legislation reflects "solemn judgments" not to be denigrated).

that the Amendment dictates that punishments must comport with the basic concept of human dignity²⁸—which is to say that they accepted the basic premise of the moral abolitionist’s constitutional claim.²⁹ The same five explicitly agreed, furthermore, that contemporary society’s acceptance of a punishment is not decisive on the point³⁰—which is to say that they affirmed the need for some independent judicial implementation of the concept of human dignity, just as the moral abolitionist beseeches.³¹ The five divided over where to go from there, and divided in particular over the degree of judicial independence demanded and the degree of judicial certainty required in the face of apparent legislative opinion to the contrary. The two more scrutinizing Justices, Brennan and Marshall, naturally found their way to a conclusion of unconstitutionality.³² The remaining three Justices—Stewart, Powell, and Stevens—moderated their scrutiny in the name of judicial self-restraint and upheld the death penalty, but claimed to leave the door ajar for reappraisal upon “more convincing evidence.”³³ It is no stretch to say that a fractured decision like this leaves room enough for continued debate. And that says nothing of the fact that two of the Justices who voted to affirm the death penalty in 1976, Blackmun and Powell, eventually confessed error.³⁴

The reasons for the silence are cultural. Moral abolitionism’s withdrawal from constitutional discussions is a symptom of contemporary America’s affection for a death penalty that is symbolically vigorous but in ultimate actual infliction quite meek. Polls say a substantial majority of Americans favor capital punishment, politicians authorize it almost exponentially, and juries and judges “impose” it often. When all is said and done, however, executions have been carried out with relative infrequency.³⁵ Judge Alex Kozinski, together with his co-author Sean Gallagher, spoke for others when he credited (if that is the right word) this illusory death penalty to the “determined resistance of a small but

28. See *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *id.* at 229 (Brennan, J., dissenting); *id.* at 240-41 (Marshall, J., dissenting).

29. See, e.g., Bedau, *Human Dignity*, *supra* note 13 (developing the principle of human dignity).

30. See *Gregg*, 428 U.S. at 182 (opinion of Stewart, Powell, and Stevens, JJ.); *id.* at 228-29 (Brennan, J., dissenting); *id.* at 233, 240-41 (Marshall, J., dissenting).

31. See Bedau, *Human Dignity*, *supra* note 13, at 164 (arguing that the principle of human dignity must be enforceable independent of public sentiment).

32. See *Gregg*, 428 U.S. at 229-31 (Brennan, J., dissenting); *id.* at 240-41 (Marshall, J., dissenting).

33. See *id.* at 187 (opinion of Stewart, Powell, and Stevens, JJ.); see also *id.* at 174-76 (opinion of Stewart, Powell, and Stevens, JJ.) (discussing need for deference to state legislatures).

34. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of *certiorari* to *Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993)) (announcing that “[f]rom this day forward, I no longer shall tinker with the machinery of death”); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-54 (1994) (reporting an interview with Powell after his retirement in which Powell expressed regret for his vote in *McCleskey v. Kemp*, 481 U.S. 279 (1987), and stating that he had come to the conclusion that capital punishment is unconstitutional).

35. As of April 1, 1998, 451 executions had occurred in the United States since the reinstatement of capital punishment after *Gregg*; death row’s population stood at approximately 3,387 as of the same date. See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW, U.S.A., Spring 1998, at 1; see also CURRENT CONTROVERSIES, *supra* note 11, at 30-33 (gathering authorities demonstrating low ratio of executions to death sentences imposed); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 4 n.14 (1995) (same).

able minority”³⁶ that successfully plays a system marred by “too many procedural hurdles, too many appeals, too many dilatory tactics, too few lawyers, [and] too many lawyers.”³⁷ The capital defense bar appreciates the compliment, but the credit really should be shared. For where Kozinski sees an impasse resulting from a committed pro-death penalty majority’s good-sportsmanship concessions to a tenacious abolitionist minority,³⁸ one can just as easily see telling evidence that the majority’s so-called commitment to capital punishment is as shallow as it is wide. Proponents permit and endure the impasse because the death penalty in name means far more to them than the death penalty in deed, or, as Robert Weisberg has said, “because in a vague way they want the law to make a statement of social authority and control.”³⁹ High death-sentence-to-actual-execution ratios, moreover, are not the only indication of the soft underbelly of the public’s support. Polls show that the support drops markedly when meaningful punitive sanctions such as life imprisonment without possibility of parole are introduced to the equation.⁴⁰

Weisberg put his finger on the tricky demand the United States thus generates for itself: to achieve an equilibrium, a “happy condition of homeostasis,”⁴¹ that satisfies the symbolic commitment to capital punishment while minimizing the various discontents associated with actual executions. Ever since the threesome of Justices Stewart, Powell, and Stevens sought the middle ground in *Gregg* and its companion cases, constitutional death penalty discourse has been working to meet the social demand with an ingenuity that also is reflected in the ABA resolution. A thick regulatory legalese has developed—“minimize arbitrariness,” “heighten reliability,” *et cetera*—that affirms the death penalty’s lawful place in our anti-crime arsenal, leaves prosecutors and sentencers plenty of opportunity to seek and hand down death sentences, cleanses some of the system’s most glaring impurities while masking others, and manages to offer judges reasons to slow or abort the condemned inmate’s journey to execution

36. Kozinski & Gallagher, *supra* note 35, at 3.

37. *Id.* at 20. For a colorful observation that partakes of the same narrative line, see *Simmons v. South Carolina*, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting) (decrying that “[t]he heavily outnumbered opponents of capital punishment have successfully opened yet another front in their guerilla war to make this unquestionably constitutional sentence a practical impossibility”).

38. See Kozinski & Gallagher, *supra* note 35, at 28 (noting that “[r]ather than demonstrating the weakness of democracy, the willingness of the majority to let itself be buffaloed in this fashion shows the fundamental soundness of our constitutional system”).

39. Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283, 287 (1996).

40. See William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 79 (1994) (concluding that solid evidence supports conclusion that there is “acceptance” of capital punishment, but that there is not a “preference” for it over alternative punishments); see also HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* 116 (1993) (reporting survey showing sharp decline in support of death penalty when life without possibility of parole is introduced as an option); James Alan Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 514-15 (1990-91) (discussing survey results that showed similar effects).

41. Weisberg, *supra* note 39, at 285.

on a case-by-case basis.⁴² For this equilibrium-through-regulation trick to work, however, a definite complicity between the law and the death penalty must be maintained. The death penalty's power as a symbol depends on the law's tacit endorsement. Curiously enough, the judiciary's practical ability to draw down the execution rate in the name of reasonable regulation likewise depends on the law's tacit endorsement of the death penalty. As the *Gregg* threesome said, "unrealistic conditions" cannot be placed on the death penalty's use, lest the judiciary be made to appear that it is "indirectly outlaw[ing] capital punishment."⁴³

That is why moral abolitionism must keep fairly quiet. It challenges law's complicity.

III

THE ABOLITIONIST'S NARRATIVE OF INEVITABILITY

Opponents of the death penalty celebrate the ABA resolution nonetheless, and not just because forestalling executions comports with their objectives. Despite the ABA's disclaimer of any abolitionist intentions or effects, the audience still gets some say over the resolution's social meaning. And for the abolitionists in the audience, the ABA's action is rich in abolitionist significance. Like Justice Blackmun's "experience-based reevaluation"⁴⁴ of the death penalty culminating in his dissent from the denial of *certiorari* to *Callins*,⁴⁵ the ABA's call for a moratorium is one more example of how greater familiarity with capital punishment breeds, if not contempt, at least greater skepticism. It is thus one more step in what Anthony G. Amsterdam once described as "the slow but absolutely certain progress of maturing civilization that will bring an

42. As the ABA report notes, recent developments suggest that the balance may be changing and that executions will increase. See ABA Report, *supra* note 1, at 4, reprinted in *Appendix, supra* note 1, at 222. A defendant's ability to challenge a death sentence in post-conviction proceedings has been curtailed by Title I of the Antiterrorism and Effective Death Penalty Act of 1996, which erected new limitations on the writ of habeas corpus, especially in capital cases. See Pub. L. No. 104-132 §§ 101-108, 110 Stat. 1214, 1217-26. Compounding the problem for the inmate is the fact that funding has been withdrawn from Post-Conviction Defender Organizations that have played a major role in providing quality representation for condemned inmates. Compare Pub. L. No. 103-317, 108 Stat. 1724, 1750-51 (1995) (allocating up to \$19.8 million for Death Penalty Resource Centers), with Pub. L. No. 104-134, 110 Stat. 1321, 1321-34 (1996) (providing that "none of the funds provided in this Act shall be available for Death Penalty Resource Centers or Post-Conviction Defender Organizations after April 1, 1996"). For further discussion of these developments, see *infra* text accompanying notes 121-125.

43. See *McCleskey v. Kemp*, 481 U.S. 279, 313 n.37 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976)):

Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution. . . . [T]he requirement of heightened rationality in the imposition of capital punishment does not "plac[e] totally unrealistic conditions on its use."

Id.

44. Linda Greenhouse, *A Capacity to Change as Well as to Challenge*, N.Y. TIMES, Feb. 27, 1994, at § 4, 4.

45. See *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of *certiorari* to *Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993)).

inevitable end to punishment by death.”⁴⁶ Or so it will go down when it is incorporated into what we might call the abolitionist’s narrative of inevitability.

This narrative has been a familiar feature in our national capital punishment debate for many years now, told countless times in countless places. Rather than hear me render it, listen instead to Amsterdam’s powerful telling, from 1977:

[T]he point is perfectly plain. Capital punishment is a dying institution in this last quarter of the twentieth century. It has already been abandoned in law or in fact throughout most of the civilized world. England, Canada, the Scandinavian countries, virtually all of Western Europe . . . [and the] vast majority of countries in the Western Hemisphere have abolished it. . . . Even the countries which maintain capital punishment on the books have almost totally ceased to use it in fact. In the United States, considering only the last half century, executions have plummeted. . . .

Do you doubt that this development will continue? Do you doubt that it will continue because it is the path of civilization—the path up out of fear and terror and the barbarism that terror breeds, into self-confidence and decency in the administration of justice? The road, like any other built by men, has its detours, but over many generations it has run true, and will run true. And there will therefore come a time—perhaps in 20 years, perhaps in 50 or 100, but very surely and very shortly as the lifetime of nations is measured—when our children will look back at us in horror and unbelief because of what we did in their names and for their supposed safety. . . .

Our children will cease to execute murderers because executions are a self-deluding, self-defeating, self-degrading, futile, and entirely stupid means of dealing with the crime of murder. . . .⁴⁷

Amsterdam is nothing if not astute, and he labored under no misperceptions about the heavy legislative backlash against *Furman* and the Court’s substantial acquiescence to that backlash in the 1976 decisions. Such short-run deviations are to be expected, Amsterdam explained, but they are powerless to alter history’s established trajectory. “A generation or two within a single nation can retard but not reverse a long-term, worldwide evolution of this magnitude.”⁴⁸

During the past twenty years, the abolitionist’s narrative of inevitability has thickened to account for America’s experiment with a constitutionally regulated death penalty. The post-*Furman* affair is doomed to failure, it is said, and could well prove to accelerate the death penalty’s demise. Again, hear it as it has been said in the field, this time by James R. Acker and Charles S. Lanier:

[P]aradoxically, the country’s experiences with the death penalty under the post-*Furman* statutes one day will be viewed as the purgative that was necessary to finally exorcise these laws from the statute books. . . . Serious and perhaps inexorable problems linger in their administration. These problems strike at the heart of procedural fairness. They involve such issues as race discrimination, the erroneous conviction and execution of innocent people, and unequal justice, where the kind of lawyer and the amount of resources an accused has can make the difference between life and death, or even guilt and innocence.

46. Anthony G. Amsterdam, *Capital Punishment*, STANFORD MAG., Fall/Winter 1977, reprinted in THE DEATH PENALTY IN AMERICA 346, 346-47 (Hugo Adam Bedau ed., 3d ed. 1982).

47. *Id.* at 358.

48. *Id.* at 347.

As the post-*Furman* statutes continue to be implemented, Americans increasingly will be forced to confront these failures directly. No longer will the public, elected officials, and the courts have the secure comfort of maintaining the death penalty as an abstract symbol. . . .

Eventually, the public will come to appreciate and accept that the remaining vestiges of capital punishment are both unnecessary and ill-advised. And eventually, as has occurred in many other countries throughout the world, the death penalty will wither, die, and be removed from the American legal landscape.⁴⁹

Shine enough light on the death penalty and, in time, it will pass, for it cannot bear long the light of day.

The abolitionist's narrative has the selectivity, temporal ordering, and thematic structure sociologists expect,⁵⁰ as well as the descriptive force and prescriptive vision that a good "stock story" boasts.⁵¹ Whether it serves the abolitionist community in its efforts to persuade death-qualified jurors to return life sentences in capital trials is questionable; other narratives need to come into play there.⁵² But I have no doubt that the narrative of inevitability helps nourish and sustain the abolitionist community, lending meaning to the work its members do, a framework within which to do that work, and the inspiration to persevere in trying circumstances.⁵³ Nor do I doubt two other things: that the

49. James R. Acker & Charles S. Lanier, *Beyond Human Ability? The Rise and Fall of Death Penalty Legislation*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 77, 108-09 (James R. Acker et al. eds., 1998) (citation omitted). For a discussion of the ways in which foes of capital punishment consciously engage in the construction of this and other narratives, see Sarat, *supra* note 12; Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996).

50. Patricia Ewick and Susan S. Silbey have suggested the following definition:

[T]o qualify as narrative, a particular communication must minimally have three elements or features. First, a narrative relies on some form of selective appropriation of past events and characters. Second, within a narrative the events must be temporally ordered. This quality of narrative requires that the selected events be presented with a beginning, a middle, and an end. Third, the events and characters must be related to one another and to some overarching structure, often in the context of an opposition or struggle.

Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 L. & SOC'Y REV. 197, 200 (1995).

51. See, e.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 987 (1998) (noting how narratives are "stock stories . . . both descriptive and prescriptive: they not only frame our sense of what has happened and how events will unfold in the future, but also explain how those events should unfold").

52. See, e.g., Alfieri, *supra* note 12, at 347-52 (advocating an alternative moral discourse, for use at capital trials, that stresses the possibility of redemption); Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345 (urging consideration of feminist theories of gender in the structuring and presentation of capital defenses); Sarat, *supra* note 49, at 368-73 (describing narratives used in capital cases at trial level); Christopher J. Meade, Note, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 753-59 (1996) (exploring various narrative techniques).

53. Many lawyers who work on behalf of capital accused defendants and condemned inmates see themselves as engaged in a civil rights campaign. See, e.g., Sarat, *supra* note 12, at 324-29. Although difficult times for such lawyers in recent years have made "the civil rights spirit seem[] very old history," Robert Weisberg, *Who Defends Capital Defendants?*, 35 SANTA CLARA L. REV. 535, 543 (1995), they nonetheless report that the visions incorporated in the narrative of inevitability support them in their efforts. See, e.g., Sarat, *supra* note 12, at 336-39; see generally HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994* (1996) (focusing on anti-death penalty advocacy generally).

ABA's action comfortably fits into and promotes the narrative, and that it invites the association with an exquisite mimicry of the narrative that seems positively self-conscious. The organized bar, having perceived the realities of death penalty administration first-hand and close-up, comes forward to bear witness to ongoing indecencies—arbitrariness, capriciousness, discrimination, unfairness, and tragic errors against the innocent—that the public does not see and the bench and legislatures, in a weakness of nerve, fail to admit and address. The ABA does not take this action hastily because, like society in general, it does not formally disapprove of the death penalty and thus has accepted its existence. But the ABA is compelled by the enormity of the situation. “[I]t is apparent that the efforts to forge a fair capital punishment jurisprudence have failed;”⁵⁴ until this “deplorable state of affairs”⁵⁵ is rectified, “[i]t is essential that the ABA now forcefully urge that executions not occur.”⁵⁶ The time for “decisive action”⁵⁷ has come for the ABA, just as it came for Justice Blackmun in his last Term as an active Justice and for Justice Powell in retirement.⁵⁸ And as, the narrative promises, it will come for our nation.⁵⁹

By reciprocally tapping and feeding the narrative of inevitability in this fashion, the ABA resolution hints at much that is of constitutional relevance, quietly posing some haunting Eighth Amendment questions that pick at the “happy condition of homeostasis.”⁶⁰ Suppose we acknowledged and accepted the ABA's implicit invitation to credit the abolitionist's narrative as true. What if anything would stand in the way of an admission that Justice Thurgood Marshall's famous hypothesis—that “people who were fully informed as to the purposes of the [death] penalty and its liabilities would find the penalty shocking, unjust, and unacceptable”⁶¹—has plausibility, and that capital punishment thus just might fail under the Eighth Amendment? The usual easy ways out are not available to us. If we posit the narrative's correctness, Justice Marshall's argument cannot be rejected summarily for a faulty hypothesis about human behavior.⁶² Nor may we deny Justice Marshall's abolitionist conclusion by dis-

54. ABA Report, *supra* note 1, at 3, reprinted in *Appendix, supra* note 1, at 221.

55. *Id.*

56. *Id.* at 5, reprinted in *Appendix, supra* note 1, at 223.

57. *Id.* at 2, reprinted in *Appendix, supra* note 1, at 220.

58. See *supra* note 34 and accompanying text. Lest the allusion to Blackmun and Powell be missed by anyone, the ABA report mentions the about-faces of each Justice more than once. See ABA Report, *supra* note 1, at 3, 14, reprinted in *Appendix, supra* note 1, at 221, 230.

59. A counternarrative surely is conceivable—for instance, one that might relate the account of an unrepresentatively “liberal” (in the colloquial political sense of the word) ABA, see Jonathan Mahler, *The Federalist Capers: Inside Ken Starr's Intellectual Auxiliary*, LINGUA FRANCA, Sept. 1998, at 38, 41 (reporting the holding of such a view of the ABA by conservative legal thinkers), that has been infiltrated by the adroit guerilla band of capital punishment opponents. See, e.g., *Simmons v. South Carolina*, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting) (employing the “guerilla war” metaphor).

60. Weisberg, *supra* note 39, at 285.

61. *Furman v. Georgia*, 408 U.S. 238, 361 (1972) (Marshall, J., concurring); see also *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting). For Justice Marshall's full development of the hypothesis, see *Furman*, 408 U.S. at 360-69 (Marshall, J., concurring).

62. Although the accuracy of Justice Marshall's hypothesis is assumed here for purposes of argument, suffice it to note that those who have sought to test the hypothesis have reached mixed conclu-

missing out-of-hand the method of constitutional interpretation employed. Unlike Justice Brennan's argument from human dignity,⁶³ Justice Marshall's "informed citizenry" argument purports to hew to majoritarian sentiments and to make them the measure of what is constitutionally fundamental, a conventional interpretive move under the Eighth Amendment⁶⁴ (indeed, under the Due Process Clauses more generally⁶⁵) that is methodologically acceptable to all save the stingiest originalists.⁶⁶

Take away the factual denial and the general methodological objection, and we are forced to locate a cause for any resistance we might feel toward the argument somewhere in its interior. Is there a sticking point there? If society (again, accepting the narrative of inevitability) truly would renounce this social practice were the facts fully known and internalized by the people, what is to be gained by maintaining the practice in the meanwhile? If simple, guileless, useless ignorance were all that separated society from its destiny, reasons for the judiciary to stay its hand and prolong the inevitable would seem few and unpersuasive.⁶⁷ It might be argued that judicial restraint in the face of certain proof of the correctness of the hypothesis might still be a good thing, because society might accrue the benefits that come from the experience of arriving at its destiny the hard way, through communal growth and politically instigated reform. I am not sure what if anything survives of judicial review upon acceptance of this argument, nor is it easy to imagine the explanation that would be offered to the human beings who literally will be sacrificed in the interim. But matters are a great deal more complicated here. Is it not possible that society's relatively uninformed state is blissful, yielding benefits that judicial intervention to expedite the inevitable would preclude? Is it not possible that being uninformed pays dividends that society actually endeavors to maintain?

sions. See Bedau, *Eighth Amendment Strategies*, *supra* note 13, at 802 (summarizing research on the hypothesis and expressing doubt that factual information about the death penalty would change attitudes markedly toward rejection of capital punishment); Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT*, *supra* note 49, at 25, 31-41 (summarizing research on Justice Marshall's hypothesis).

63. See *supra* notes 14-20 and accompanying text.

64. The Court has embraced the proposition that the Eighth Amendment draws meaning from the "evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), stressing recently that "[i]n determining what standards have 'evolved,' . . . we have looked not to our own conceptions of decency, but to those of modern American society as a whole." *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989).

65. See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997) (discussing the Court's "established method of substantive-due-process analysis," noting that the nation's "history, legal traditions, and practices" constitute the crucial criteria).

66. As the sole measure of Eighth Amendment content, the methodology at issue may be criticized for being too majoritarian. See Bedau, *Eighth Amendment Strategies*, *supra* note 13, at 810-13 (arguing for a broader interpretation that sets aside popular or majoritarian considerations); see also Bedau, *Human Dignity*, *supra* note 13, at 164 (arguing similarly).

67. Society's failure to achieve its asserted destiny of course raises the possibility that that destiny is being described incorrectly—an uncertainty that doubtless would weigh on a jurist asked to act on Justice Marshall's hypothesis. But I have been assuming the correctness of the hypothesis for present purposes.

We have come to the rub, and we have seen it before. What stands between the narrative of inevitability and a declaration of constitutional abolition is contemporary America's affection for a death penalty that is symbolic but not real. So long as all the inconvenient facts about capital punishment—its high costs and its low returns—are kept at bay, our nation gets to perform a popular ritual of catharsis with the self-righteousness the ritual requires. It can rail at the criminal element with frustration-venting histrionics—more and more death penalty statutes, more and more death sentences “imposed” by sentencers and reported by the press—that bear few traceable consequences to tax the conscience. Law provides critical aid and comfort for this social exercise in willful blindness. An intricate regulatory framework laden with institutional buffers obscures the death penalty's inconvenient facts, diffuses responsibility for them, shields decisionmakers from them, and mitigates some of the consequences by delaying and forestalling executions.⁶⁸ Whatever might be said or supposed about an informed citizenry, *this* citizenry, in its time and place, works mighty hard to maintain an uninformed distance from the death penalty's hard truths because doing so enables the pursuit of short-term gratifications. That, in a nutshell, is the dynamic of death penalty symbolism.

Does the Eighth Amendment require society to forgo the short-run pursuit? Justice Marshall thought so, offering the undefended assertion that only conscious, knowledgeable social choices should count in the Eighth Amendment analysis.⁶⁹ There is another and perhaps stronger reason, which we will see in Part V. Before taking that up, however, let us first ponder the alternative. If the Eighth Amendment does not require society to forgo the short-run pursuit, what if anything is there left to say?

There is an old joke about a man and a psychiatrist. “Doctor, I have a problem,” the man says. “My brother thinks he is a chicken. It is terribly difficult for him, for me, and for our whole family. Please help us.” The psychiatrist offers to counsel the entire family, expressing the utmost confidence that she will succeed in curing the brother of his misconceptions. “In that case,” the man responds, “we're never coming here.” “Why not?” the puzzled psychiatrist asks. “Because,” the man answers, “we need the eggs.” Funny, perhaps, or at least it is when someone like Woody Allen tells it. But do you wonder what the psychiatrist should do in response? If an intervention—you could call

68. See, e.g., Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429-38 (1995) (discussing post-*Furman* regulatory regime as legitimating facade).

69. Justice Marshall wrote:

It might be argued that in choosing to remain indifferent and uninformed, citizens reflect their judgment that capital punishment is really a question of utility, not morality, and not one, therefore, of great concern. As attractive as this is on its face, it cannot be correct, because such an argument requires that the choice to remain ignorant or indifferent be a viable one. That, in turn, requires that it be a knowledgeable choice. It is therefore imperative for constitutional purposes to attempt to discern the probable opinion of an informed electorate.

Furman v. Georgia, 408 U.S. 238, 362 n.145 (1972) (Marshall, J., concurring).

it abolition—is inappropriate, should not the psychiatrist—call her the law—at least refrain from pretending that there are eggs in the basket?

IV

CHANGES IN ATTITUDE

This brings us to the ABA resolution proper.

The resolution urges several reforms in the administration of capital punishment, all claimed to be dictated by the Eighth Amendment's general mandate, attributed to *Furman*, that the death penalty be "fairly and justly administered."⁷⁰ There must be counsel reform, to minimize the arbitrariness stemming from inadequate and disparate defense lawyering;⁷¹ there must be post-conviction litigation reform, to restore state and federal avenues for full and fair litigation of constitutional claims;⁷² there must be procedural reform, to eliminate discrimination on the basis of the race of the victim or the defendant;⁷³ and there must be reform in the rules of eligibility, to prevent the execution of juveniles and the mentally retarded.⁷⁴ This is not, let us be clear, merely a friendly offer of technical support to legislatures and courts that might be amenable to reform, on the order of the Model Penal Code's well-known capital sentencing provisions⁷⁵ or the ABA's various death penalty counsel recommendations of nearly a decade ago.⁷⁶ In bundling these proposals together and pressing them anew on pain of a moratorium, the ABA means to commit a confrontational act. The ABA acknowledges that many of its former proposed reforms have been rejected directly or resisted actively by the courts, state legislatures, or Congress, but the ABA means to denounce that opposition.⁷⁷

70. ABA Report, *supra* note 1, at 4, *reprinted in Appendix, supra* note 1, at 222.

71. *See* ABA Resolution, *supra* note 1, at 1, *reprinted in Appendix, supra* note 1, at 219.

72. *See id.*, *reprinted in Appendix, supra* note 1, at 219.

73. *See id.*, *reprinted in Appendix, supra* note 1, at 219.

74. *See id.*, *reprinted in Appendix, supra* note 1, at 220.

75. *See* AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 210.6 (Proposed Official Draft, 1962) (setting forth standards for guided discretion in capital sentencing). For an illustration of the Model Penal Code's influence, see *Gregg v. Georgia*, 428 U.S. 153, 191, 193 & n.44 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (citing with approval the capital sentencing standards of § 210.6).

76. *See* 1 AMERICAN BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) [hereinafter ABA GUIDELINES] (proposing reforms to ensure the provision of effective assistance of counsel to defendants charged with capital crimes); American Bar Association, *Proceedings of the 1988 Midyear Meeting of the House Delegates, reprinted in* 113 A.B.A. at 12-13 (1996) (proposing policies relating to the provision of legal representation for condemned defendants in federal habeas corpus proceedings).

77. *See, e.g.*, ABA Report, *supra* note 1, at 2, *reprinted in Appendix, supra* note 1, at 220 (noting that "[n]ot only have the ABA's existing policies generally not been implemented, but also, and more critically, the federal and state governments have been moving in a direction contrary to these policies"); *id.* at 3-4, *reprinted in Appendix, supra* note 1, at 222 (noting that "although certain states have begun to implement some ABA policies, more states are moving in the opposite direction—undermining or eliminating important procedural safeguards that the ABA has found to be essential"); *id.* at 4, *reprinted in Appendix, supra* note 1, at 222 (noting congressional cutbacks in habeas corpus and the withdrawal of federal funding of defender organizations); *id.* at 11, 14-15, *reprinted in Appendix, supra* note 1, at 228, 230-31 (noting Supreme Court actions restricting habeas and the Court's re-

Even more than seeking reform, the ABA seems to be seeking to change the attitudes of those who participate in the constitutional regulation of capital punishment, whether they be legislators or judges. The nature of that change is what I wish to explore.

A. Principles and Method

One thing seems sure. The change in attitude contemplated by the ABA does not—yet, at least—require repudiation of the proceduralist regulatory tack the Supreme Court has charted under the Eighth Amendment since the compromising days of *Gregg* and its aftermath. Detractors have excoriated the project as a futile attempt to solve an intractable problem,⁷⁸ a prudential nightmare,⁷⁹ a failure of judicial steel, concentration, and creativity,⁸⁰ and a grievous and internally inconsistent breach of Eighth Amendment principles.⁸¹ The ABA's supporting report leaves open the possibility that the critics might yet be right,⁸² but the resolution itself proceeds undaunted by the criticism, serving up a superficially commonplace appeal for further regulation in the proceduralist vein. The resolution of course asks for results different from those reached by the courts and legislatures, but in constitutional vocabulary and general method, it is of a piece with *McCleskey v. Kemp*.⁸³ The resolution invokes no new Eighth Amendment principles and asks for no reconceptualized method for their implementation, demanding simply that enhanced procedural safeguards be employed to minimize arbitrariness, heighten reliability, and secure individualization in capital sentencing. And far from calling for a final renunciation of law's complicity in the maintenance of a social equilibrium that legitimates capital punishment,⁸⁴ the ABA resolution invites its continued com-

fusal to impose limitations on the availability of the death penalty in cases involving juvenile or mentally retarded offenders).

78. See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1143-59 (1994) (Blackmun, J., dissenting from denial of *certiorari* to *Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993)); *Godfrey v. Georgia*, 446 U.S. 420, 441-42 (1980) (Marshall, J., concurring in the judgment).

79. See, e.g., Joseph L. Hoffman, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817, 832 & n.79 (1993) (advocating creation of a "robust, case-specific death-penalty version of the Court's moribund Eighth Amendment proportionality doctrine" to supplant procedural regulation of capital trials); Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 796-97 (1998) (arguing for rejection, on prudential grounds, of procedural regulation of capital trials, and for institution of categorical rules to minimize imposition of morally undeserved death sentences).

80. See Steiker & Steiker, *supra* note 68, at 403-28.

81. See, e.g., *Callins*, 510 U.S. at 1142 (Scalia, J., concurring in the denial of *certiorari* to *Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993)); *Graham v. Collins*, 506 U.S. 461, 490-92 (Thomas, J., concurring); *Walton v. Arizona*, 497 U.S. 639, 656-73 (1990) (Scalia, J., concurring in part and concurring in judgment).

82. See ABA Report, *supra* note 1, at 3, reprinted in *Appendix, supra* note 1, at 219 (citing criticism of the Eighth Amendment jurisprudence with approval and declaring that "efforts to forge a fair capital punishment jurisprudence have failed").

83. 481 U.S. 279 (1987).

84. For an illuminating discussion of the varied conceptions of "legitimation"—each of which I intend to intimate here—see Steiker & Steiker, *supra* note 68, at 429-38.

licity on terms thought beneficial for all, thus promoting as a working hypothesis the proposition that law and its processes can, or at least must try to, domesticate the death penalty's unruliness.

B. The Relevant Facts

If the change in attitude envisioned by the ABA does not entail a new elaboration of basic Eighth Amendment principles or general Eighth Amendment method, perhaps it instead involves the manner in which decisionmakers determine and appraise the facts that are relevant to the constitutional principles and their application. (Not only those facts that bear on the Eighth Amendment question of whether risks of arbitrariness, discrimination, and unreliability persist in the administration of the death penalty, but also those that bear on the equally significant Eighth Amendment question of whether procedural safeguards are available to eliminate or minimize those risks.) Indeed, there is more than a hint from the ABA that it thinks a more sensitive and expansive appreciation of the facts of life in the administration of capital punishment is owing from those who formulate public opinion and shape the law. According to the ABA's supporting report, the resolution's proposals should be adjudged right and necessary—and the death-endorsing rest of the system's rejection of them adjudged so wrong as to require emphatic condemnation—because the ABA lawyers have a superior understanding of the situation thanks to “the special competence and experience that only members of the legal profession can bring to bear.”⁸⁵

Such self-proclaimed assertions of privileged perspective can be off-putting, but let that not detain us. Insofar as the ABA's action presents itself as a simple plea to decisionmakers to improve their collective work under the Eighth Amendment by striving for a comprehensive appreciation of the facts—all that is occurring in the administration of capital punishment, and all that might occur differently as well—two conclusions seem apt. First, the plea is well taken. Second, the plea, if honored, could lead to the adoption of some—but I do not think necessarily all—of the ABA's proposals, and therefore does not fully explain the ABA's challenge to prevailing practice.

Regarding the first conclusion, those responsible for the regulation of the death penalty stand to learn something from all who have perspective on its administration, for no one possesses a monopoly on the facts.⁸⁶ Furthermore, as we have seen, numerous incentives encourage decisionmakers (as well as the public generally) to mind their buffers and keep their distance from the harder facts about the death penalty.⁸⁷ The ABA's plea for greater factual awareness

85. ABA Report, *supra* note 1, at 15, *reprinted in Appendix, supra* note 1, at 231.

86. To be sure, many of the lawyers who comprise the ABA can contribute a valuable perspective. They enjoy an occupational proximity to and angle on the grit of the subject matter—what happens in the trenches of capital punishment, as well as the feasibility of alternative methods of doing business—that others who shape the law do not share. It is reasonable to expect that they might alert to and internalize facts that others differently situated miss, sense only faintly, or fail to fully grasp.

87. *See supra* notes 68-69 and accompanying text.

is an acknowledgment of and a challenge to this phenomenon. Let us continue to set aside for the time being the question whether this complex social exercise of willful blindness undermines the death penalty's constitutionality as a *per se* matter.⁸⁸ Let us also assume that the effort to regulate capital punishment in proceduralist ways inevitably produces and facilitates some of the buffering and distancing that is complained of here, and that this is a pleasant occurrence for a society eager for homeostasis. Is anyone bold enough to go further and argue that the regulatory regime of *Gregg* and its progeny deliberately aims to facilitate this willful blindness, and that it should be openly counted as among the regime's conscious objectives? I do not see how law possibly can admit to *that* degree of complicity. If law cannot and should not admit to such complicity, and if law observes the dictates of candor, then the ABA's plea to heed the facts better cannot be objectionable.

Regarding the second conclusion, each of the ABA's various reform proposals should be put to a simple test. First, stipulate that the ABA is correct in its factual claims—that risks of an Eighth Amendment evil persist with respect to the particular practice at issue, and that ameliorative procedures are available to reduce the risks. Then ask the key question: Might someone who accepts the stipulation and then applies established Eighth Amendment principles fairly and squarely to the situation nevertheless find an arguable reason to resist the ABA's proposal?⁸⁹ If the answer is "no," then the ABA should be thanked for bringing to the system's attention an unjustifiable case of unminimized arbitrariness or unreliability. But if the answer is "yes," then the system's failure to date to embrace the ABA's proposal cannot be blamed entirely upon a poor appreciation of the operational facts.

"But wait," you ask, "how can the answer to the key question ever be 'yes'? If risks of arbitrariness or unreliability are stipulated to be present, and it is stipulated that they could be reduced, how can it ever be said that they have been minimized to the Eighth Amendment's satisfaction?" It can be said, provided you accept—as the Supreme Court's post-*Furman* capital decisions have accepted unfailingly since the outset—that "minimization" is a term of art that allows some consideration to be paid to countervailing values. Put simply, some risks are not "constitutionally unacceptable"⁹⁰ under the jurisprudence because their further reduction, although humanly possible, comes at too great a cost.⁹¹

88. See *supra* note 69 and accompanying text (raising the question); *infra* text accompanying note 120 (posing a possible and partial answer).

89. In asking whether objection might be made to one or more of the ABA proposals, I am referring to the core of each proposal, difficult as that may be to define. As the peripheral details of each proposal are reached, the marginal contribution that each detail makes to the better regulation of capital punishment could possibly provoke reasonable debate.

90. *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (quoting *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986)).

91. For an extensive discussion, see Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1332-37, 1340-42 (1997); Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1667-81 (1993).

With respect to at least one of the ABA's proposed reforms, I think the answer to the key question is in fact "no." As my colleague Richard Rosen and I developed elsewhere, there is a compelling Eighth Amendment case for requiring counsel reforms along the lines advocated by the ABA in its *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.⁹² This case is compelling not just because there is substantial arbitrariness stemming from sharp disparities in the quality of defense counsel, and not just because that arbitrariness can be significantly reduced. It is compelling because this substantial arbitrariness can be greatly reduced at no significant cost to any countervailing interest that might be legitimately introduced into the Eighth Amendment equation.⁹³ But as much as I wholeheartedly support the remainder of the ABA's proposals, it seems beyond cavil that there are countervailing values implicated in each instance that a detractor might argue in opposition. For example, consider the habeas proposals. Broader habeas review, stripped of procedural defaults and other barriers to review, surely would enhance reliability and reduce arbitrariness. But we have been told time after time that countervailing values—such as the finality of judgments, comity, and federalism—would suffer in consequence and are not to be ignored in the Eighth Amendment calculation.⁹⁴ Or consider the proposals to declare juveniles and the mentally retarded ineligible for the death penalty. Bright-line rules immunizing such defendants (rather than case-by-case consideration of their age or mental retardation as a mitigating circumstance) would enhance reliability, reduce arbitrariness, and protect against disproportionate sentences. But we have been told that a countervailing value—the institutional virtue in observing limits on the federal judiciary's ability to differ with a social determination (made at the state level, no less) that some offenders in each category might merit the ultimate punishment—would suffer.⁹⁵ Consider, finally, the proposal challenging the persistence of racial discrimination. As Justice Stevens argued in his dissenting opinion in *McCleskey*, discrimination could be reduced signifi-

92. ABA GUIDELINES, *supra* note 76.

93. See Billionis & Rosen, *supra* note 91, at 1346-69.

94. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 417-19 (1993) (assuming the Eighth Amendment would render execution of a defendant unconstitutional upon a truly persuasive demonstration of "actual innocence" made after trial, finality interests would require that the threshold showing be "extraordinarily high"); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (noting, in a capital case, comity and federalism concerns that underlie the rule that state procedural defaults are to be observed in federal habeas); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (noting the finality concerns that underlie the rule against retroactive application of new constitutional rulings, and extending the rule to capital cases).

95. See *Stanford v. Kentucky*, 492 U.S. 361, 375-77 (1989) (plurality opinion) (Scalia, J.) (rejecting claim that a bright line rule of death-ineligibility for the juvenile offender is to be preferred to case-by-case analysis of mitigation; claim is to be rejected on the broad ground that case-by-case consideration can be declared constitutionally inadequate only if there is a social consensus that "no one can reasonably be held fully responsible" in the age group in question); *Penry v. Lynaugh*, 492 U.S. 302, 338-40 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (noting that it cannot be concluded that all mentally retarded people inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty, and that consideration of the mitigating effect of mental retardation should be conducted on a case-by-case basis).

cantly by restricting the aggravating circumstances that render a defendant eligible for the death penalty.⁹⁶ But we have been told that a countervailing value—the institutional virtue in observing limits on the judiciary’s ability to impose unrealistic conditions on the use of the death penalty—would suffer.⁹⁷

C. Countervailing Values and Points of Equilibrium

Death penalty decisionmakers who raise these countervailing values profess to see, hear, and accept the same facts stressed by the ABA. Perhaps there exists some false consciousness at play here, as critics of these decisionmakers doubtless suspect.⁹⁸ Unless self-deception is to be alleged against the whole lot, however, it would seem that the ABA’s differences of opinion with the decisionmakers are not entirely about the need to get the institutional facts straight. The change in attitude sought by the ABA runs deeper. The ABA is asking decisionmakers to significantly reduce their willingness to credit these countervailing values as obstacles to reform.

The ABA does not expressly say why these decisionmakers should change in the desired way. The resolution simply and tersely declares the proposed reforms, while the supporting report runs long on both anecdotes of arbitrariness and conclusions that our state of affairs must change but comes up short on explicit mention of any of the countervailing values that detractors of reform like to talk about. The failure to address such concerns makes the ABA documents representative of much anti-death penalty discourse, which is reluctant to take countervailing values head on.⁹⁹ Still, possible answers can be reasoned out from the resolution.

Imagine the ABA resolution were a *per curiam* opinion, ordering substantial reforms under the Eighth Amendment and consequently rejecting, but without any elaboration of the reasoning, the countervailing values raised in objection. Our hypothetical court, the ABA, disclaims abolitionist intentions and also denies that it is disturbing the settled principles and methods of the Eighth Amendment. What narrowest rationale would we ascribe to this other-

96. See *McCleskey v. Kemp*, 481 U.S. 279, 366-67 (1987) (Stevens, J., dissenting); see also DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 350 (1990) (discussing Justice Stevens’s dissent).

97. See *McCleskey*, 481 U.S. at 318-19.

98. See, e.g., Sarat, *supra* note 12, at 338 (reporting such criticism).

99. There are exceptions, most notably in the area of habeas corpus, where scholars have challenged the ascension of comity, federalism, and finality as counterweights to the need for protection of federal rights, particularly in the area of capital punishment. See, e.g., Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); James S. Liebman, *More Than “Slightly Retro”: The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-1991); James S. Liebman & William F. Ryan, *“Some Effective Power”: The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997); Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993).

wise opaque decision? We would treat it as representing a judgment that the ordered reforms *do not pose unrealistic conditions upon the use of the death penalty*. Countervailing values have not been ejected from the Eighth Amendment balance. They merely have been found inadequate to justify toleration of the correctable arbitrariness and unreliability observed in these situations.

Note what we just did. Employing the Eighth Amendment language of *Gregg* and *McCleskey*,¹⁰⁰ we characterized the ABA resolution as a formula for a new social equilibrium with respect to the death penalty. The ABA's proposed point of equilibrium represents a significant change—but it is no less conducive to society's basic need for homeostasis (and thus no less acceptable in that regard) than the point currently maintained by the Supreme Court, the Congress, the state legislatures, and the lower courts. If homeostasis is our Eighth Amendment goal,¹⁰¹ the ABA presents us an alternative.

There are reasons, moreover, to think that the ABA's alternative is indeed socially viable, and that it poses no unrealistic conditions on the death penalty. Because the ABA resolution leaves the competing forces in society with a fair portion of what each cherishes most, it has the tactical makings of a satisfactory equilibrium. Measured against the status quo ante, the resolution marks a substantial improvement for abolitionist forces. The number of death sentences handed down at trial ought to decline significantly if the resolution removes juveniles, the mentally retarded, and offenders lacking in serious aggravation from the pool. Similarly, for the foregoing reasons and also because of expanded post-conviction review, we can assume that the number of offenders who ultimately face the executioner would decline.¹⁰² Moreover, by striking at demonstrable risks of arbitrariness, unreliability, and the like, the resolution promotes values that abolitionists—and our Constitution, lest we forget—hold dear. Although these abolitionist gains come at the expense of the forces in support of capital punishment, the sacrifice might be an acceptable one to make. Contractions in death penalty statutes and declines in death sentences returned at trial could be bitter pills for the pro-death penalty majority to swallow. But if what matters most is a symbolically vigorous death penalty—on the books, stamped with the imprimatur of constitutionality, endorsed by law, and theoretically available for cathartic venting against society's greatest offenders—much of symbolic value would remain. And, in a reverse twist, once some of the symbol's most glaring blemishes are removed, it might gain some righteous luster. Neither side is fully satisfied, but each might carry on.

100. See *supra* note 43 and accompanying text.

101. See *supra* notes 35-43 and accompanying text.

102. Whether this assumption in fact would hold true is not entirely clear. It seems at least conceivable that some contractions in the size of the death-eligibility pool might have little effect on the actual number of executions. The assumption is made as stated in the text, however, because it posits the facts in the light that would be most troubling to the pro-death penalty majority's asserted point of view, and hence puts the ABA's resolution to the tougher test.

Whether social peace can be made on these terms is a question that only experience could answer beyond all doubt. That the ABA—a community whose views on the death penalty are, like America’s at large, varied—could settle on these terms supports an inference that it is possible. The ABA does not mirror society generally, however, and its collective appetite for the death penalty may not be as strong as the public’s. We thus should be cautious about assigning too much weight to this evidence. However, persuasive corroborative evidence comes from Judge Kozinski, a witness whose support for capital punishment will not be questioned here.¹⁰³ Writing before the ABA resolution was adopted, Kozinski advocated that America take legislative action to sharply restrict the range of offenses and offenders eligible for capital punishment.¹⁰⁴ Although Kozinski’s reasons differ from those underlying the ABA resolution, his proposal would have much the same effect on the availability of the death penalty and its symbolic power. If Kozinski can live with such a contracted death penalty, might not other supporters, too?

Demonstrating that the ABA resolution represents a viable alternative equilibrium does not necessarily demonstrate that it is constitutionally superior to the one maintained by death penalty decisionmakers today. One final argument is needed to complete the ABA’s case, and it might run as follows. If the ABA’s proposed regime is superior, it is not because the ABA possesses a privileged perspective and exercises privileged judgment. It is superior because, as between two socially acceptable death penalty regimes, the regime that serves constitutional values substantially better must be preferred. No one can seriously dispute that the ABA’s proposed regime serves the Eighth Amendment’s anti-arbitrariness and reliability values substantially better than the current regime. The question is rather whether other values of constitutional dimension offset these gains. If you recall the countervailing values that typically have been raised in constitutional objection to the ABA’s proposed reforms—judicial self-restraint in the face of uncertain or contrary social will, particularly as it relates to matters of state importance; comity and federalism; and the finality of judgments¹⁰⁵—you will note that each depends heavily (if not entirely) on public sentiment for its constitutional weight in this context. While judicial self-restraint is virtuous, its constitutional persuasiveness ebbs as society’s demand for deference on the matter in question weakens. Comity, federalism, and finality are important values, but any free-standing constitutional

103. Judge Kozinski has written:

[D]espite the qualms, despite the queasiness I still feel every time an execution is carried out in my jurisdiction, I tinker away. I do it because I have taken an oath. But there’s more. I do it because I believe that society is entitled to take the life of those who have shown utter contempt for the lives of others. And because I hear the tortured voices of the victims crying out to me for vindication.

Alex Kozinski, *Tinkering with Death*, NEW YORKER, Feb. 10, 1997, at 48, 53.

104. See Kozinski & Gallagher, *supra* note 35, at 29-32.

105. See *supra* notes 94-97 and accompanying text.

weight they might possess seems unimplicated here;¹⁰⁶ the primary constitutional significance that they bring to the scales derives from their political and social support and the demand for deference such support might make in the constitutional balance. Moreover, the political and social weight that these countervailing values enjoy is almost wholly a function of their effect on the administration of capital punishment. The best measure of their weight is the impact that their addition or subtraction has on society's ability to maintain a comfortable homeostasis in the matter of capital punishment. But if we already have determined—as objectively as possible—that society itself could accept the ABA's package as a viable point of equilibrium, it is probable that society does not accord these values great weight. And unless and until such values do weigh greatly to society, they should be of little consequence to the Eighth Amendment.

When regulating a social business that is more about symbolic gestures than actual executions, it is dangerously easy for judges and other decisionmakers to fall for the symbol, exaggerate the social will it represents, and conjure up obstacles to their regulatory efforts that are far more apparent than real. In this environment, it is all too easy for the law's overseers of the death penalty to underestimate the public's resilience to regulation, and all too easy for them to summon a false fear that every regulatory move might be received as a disavowal of capital punishment, an attempt at indirect abolition, or a withdrawal of the law's complicity. When this outcome occurs, there are no justified winners, just many unfortunate losers, such as Eighth Amendment values, responsible constitutional administration, the integrity of the law, conscientious politics, and the human beings who suffer and even pay with their lives in consequence. The ABA primarily is seeking to change, it seems to me, this very regrettable tendency on the part of those who administer the Eighth Amendment.

Harkening back to that joke about the psychiatrist, pretending to see imaginary eggs in someone else's delusory basket seems hardly the professional thing to do.

V

A CONCLUDING WORD ON THE WORD "UNUSUAL"

So this is the picture that an engagement with the ABA resolution invites us to draw: A conflicted society's conflicted policy demands a death penalty that is symbolically vigorous yet meek in its execution. The Eighth Amendment jurisprudence that *Furman* and *Gregg* wrought assists society in its effort to achieve and maintain a serviceable equilibrium, validating the death penalty in almost all of its broad gestures while providing the means to draw the execution rate down in often excruciating case-by-case ways. The jurisprudence makes

106. Stated otherwise, adoption of the ABA's various habeas corpus proposals would not violate the Constitution in the slightest.

this equilibrium its conscious goal; that is why it declines to impose regulations that would imply too much legal disavowal of the death penalty, labeling them “unrealistic conditions,” even though the regulations clearly would promote Eighth Amendment values. Difficult to begin with, the jurisprudence’s mission is made harder and costlier because it must rely on human actors who misread the social will and succumb too much to the symbol. Furthermore, law undertakes this mission to help society achieve what may merely be short-term gratifications that a more fully informed citizenry would, and inevitably will, renounce.

We have seen the ABA’s response to this picture: The law may (for the time being, at least) remain complicit in society’s quest to find and maintain equilibrium in the matter of capital punishment, but only if it proceeds with far more skepticism about the true needs of the symbol and far more solicitude for the values law has proclaimed in the name of the Eighth Amendment. A constitutionally superior equilibrium, more respectful of fundamental values and less indulgent of asserted countervailing values, is possible and must be instituted.

As we close, give thought to an alternative response to the picture, not urged by the ABA resolution, but brought to mind by our engagement with it: The law should end its complicity in this affair and declare capital punishment unconstitutional because what the picture really portrays is a stylized social effort to make a “cruel” punishment—“[t]he imposition and execution of the death penalty are obviously cruel in the dictionary sense”¹⁰⁷—an “unusual” punishment as well. A society bent on symbolic gestures casts an ever-widening net of death eligibility, and the etiquette of judicial review instructs that these legislative acts should be received in the first instance as “solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons.”¹⁰⁸ Not all offenders brought within the legislative net will be executed, of course. The group is winnowed down for reasons that are penologically sound—the need for individualized consideration of those “compassionate or mitigating factors stemming from the diverse frailties of humankind.”¹⁰⁹ The penological sorting is done, large numbers receive death sentences, and then something curious happens. The demand for symbolic vigor has been served on the public stage and the cases move to a shadowy margin where most of them stall. Of all those branded to die in service of the ostensibly solemn legislative judgment, only “a capriciously selected random handful”¹¹⁰ really face the executioner. And this is as society wants it and needs it to be, for it strikes the necessary, socially calming compromise between the

107. *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring).

108. *Roberts v. Louisiana*, 428 U.S. 325, 355 (1976) (White, J., dissenting).

109. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

110. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

demand for a symbolically vigorous death penalty and the demand for a minimum of executions.¹¹¹

Although exploration of the twists and turns implicated in that response must await another occasion, some preliminary observations and a sketch of the argument in rebuttal can be ventured. As for the preliminary observations, there are six.

First, calling this situation an example of a punishment that society has rendered “unusual” places no evident strain on the text of the Eighth Amendment.¹¹²

Second, calling this punishment “unusual” appears faithful to the precedent set by *Furman*. The cases are not formally identical. In *Furman*, the unusualness problem arose in the sentencing stage, where “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not” could be discerned.¹¹³ Here, the unusualness problem sets in subsequently, in a post-final-judgment netherworld. But unless arbitrariness and capriciousness enjoy an Eighth Amendment license to operate between the courtroom and the death house—thwarting the ostensible will of the legislature as well as the ostensible will of the sentencer and the court of judgment—the cases would seem the same in principle.

Third, calling this punishment “unusual” seemingly runs true to bedrock principles. Legislative policy, dutifully applied through the processes of law, dictates that an execution should occur. To suspend that judgment for lawfully ordained reasons is an entirely proper thing to do. But to fail to carry out the judgment for simple lack of social fortitude is—and there is no real way around this—antithetical to the rule of law.¹¹⁴ Failing to carry out the judgment most,

111. My concern here is with the socially deliberate “unusualness” of executions, and the significance of that unusualness under the Eighth Amendment. To be contrasted is quite a different concern that jurists and commentators have noted in recent years—the possibility that the Constitution forbids the extremely long periods of time that many inmates experience under a sentence of death because those periods are themselves “cruel and unusual” punishment. See, e.g., *Elledge v. Florida*, 119 S. Ct. 366 (1998) (Breyer, J., dissenting from denial of *certiorari* to *Elledge v. State*, 706 So. 2d 1340 (Fla. 1997)) (noting that executions in such circumstances might be “cruel and unusual” in violation of the Eighth Amendment); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., dissenting from denial of *certiorari* to *Lackey v. State*, 819 S.W.2d 111 (Tex. Crim. App. 1989) (en banc) (same)); Dan Crocker, *Extended Stays: Does Lengthy Imprisonment on Death Row Undermine the Goals of Capital Punishment?*, 1 J. GENDER, RACE & JUSTICE 555 (1998); Richard E. Shugrue, “A Fate Worse Than Death”—*An Essay on Whether Long Times on Death Row Are Cruel Times*, 29 CREIGHTON L. REV. 1 (1995); Michael P. Connolly, Note, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101 (1997); Kathleen M. Flynn, Note, “*The Agony of Suspense*”: *How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291 (1997).

112. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 670-71 (1990) (Scalia, J., concurring in part and concurring in judgment) (noting that the constitutional text can be read to refer to punishments “rarely or ‘freakishly’ imposed”).

113. *Furman*, 408 U.S. at 313 (White, J., concurring).

114. An analogy might be drawn to the practice of jury nullification, a practice that while immunized from corrective process has been deemed unworthy of any encouragement because of its inconsistency with the rule of law. See, e.g., *State v. Ragland*, 519 A.2d 1361, 1369-71 (N.J. 1986) (employing such reasoning to uphold instructions that discouraged jury nullification); see generally Richard H.

but not all, of the time only compounds the constitutional difficulty. Forcing a small and arbitrarily culled group of death row inmates to bear the final consequences that society is unwilling to impose upon all who are identically situated offends “the desire for equality . . . reflected in the ban against ‘cruel and unusual punishments.’”¹¹⁵

Fourth, recognizing the unusualness in capital punishment as administered today lends force to the constitutional argument of the moral abolitionist. In the tradition of Justice Brennan,¹¹⁶ Hugo Adam Bedau has argued persuasively that the death penalty’s cruelty lies in its utter annihilation of the offender,¹¹⁷ an act of astonishing power that declares a forfeiture of every last shred of the prisoner’s human dignity.¹¹⁸ Bedau poses the salient question: By what authority does society get to make such a “devastating judgment”?¹¹⁹ The concept of “unusualness” offers a partial answer, defining at least one set of circumstances in which the authority is lacking. “Unusualness” captures a state of political illegitimacy incompatible with the power to annihilate.

Fifth, recognizing that this unusualness is unacceptable also fortifies the abolitionist argument from the narrative of inevitability.¹²⁰ We need not go so far as to say that a society on the road to inevitable abolition cannot stop along the way for short-term gratifications. All we need to say is that society should not be allowed to employ a strategy of unusualness in punishment to do so, and that judges should not defer to such a strategy.

Sixth, drawing all this attention to the infrequency of executions and making it the basis of constitutional argument makes abolitionists, including me, edgy. Too much of such talk could well upset the equilibrium that both produces the infrequency of executions and depends upon that infrequency. It could backfire, leading not to abolition but instead to a token increase in executions to save the symbolic death penalty.

Consider, in that connection, the rebuttal that you no doubt anticipated from the start (and some of which was foreshadowed earlier¹²¹). It runs as follows. Most death cases do grind to a halt and executions are indeed relative rarities, but the situation is not attributable to the illegitimate social purposes alleged. Maintenance of a system of post-conviction review to ensure legitimate judgments and a legitimate death penalty regime is justified, and it accounts for some of the delay and rarity. The rest should be blamed on three problematic factors that have worked in tandem: (1) unnecessarily excessive opportunities for post-conviction litigation; (2) an unnecessarily complicated

Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997) (exploring various iterations of the rule of law).

115. *Furman*, 408 U.S. at 255 (Douglas, J., concurring).

116. See *supra* notes 14-20 and accompanying text.

117. See Bedau, *Human Dignity*, *supra* note 13, at 168.

118. See *id.* at 172-74.

119. See *id.* at 174.

120. See *supra* notes 61-69 and accompanying text.

121. See *supra* notes 36-37 and accompanying text.

Eighth Amendment jurisprudence; and (3) an artful band of capital defense attorneys intent on using the above two factors to stymie the system. Each of those problematic factors, however, has been addressed in recent years. Habeas has been curtailed,¹²² Eighth Amendment jurisprudence has been streamlined,¹²³ and death penalty resource centers have been shut down.¹²⁴ The situation, given time, should change.

There are those who doubt that the picture drawn today will change all that much. The pace of executions will pick up, but as Judge Kozinski has expressed, “it’s doubtful we have the resources or the will even to keep up with the three hundred or so convicted murderers we add to our death rows every year.”¹²⁵ But if we must wait and see—if the dramatic response of abolition is to be deemed premature, and we must refrain for a while from using the word “unusual” and pressing its constitutional significance—then the ABA’s response seems most consonant with our constitutional principles in the interim.

122. See *supra* note 42; ABA Report, *supra* note 1, at 4, 11-12, 15, reprinted in *Appendix*, *supra* note 1, at 222, 228-29, 231.

123. See, e.g., Bilionis, *supra* note 91, at 1652-54 (documenting the Supreme Court’s streamlining of capital punishment jurisprudence).

124. See *supra* note 42; ABA Report, *supra* note 1, at 4, 10, 15, reprinted in *Appendix*, *supra* note 1, at 222, 227, 231.

125. Kozinski, *supra* note 103, at 53.