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## The Court and Capital Punishment on Different Paths: Abolition in Waiting

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# The Court and Capital Punishment on Different Paths: Abolition in Waiting

Carol S. Steiker\* & Jordan M. Steiker\*\*

## *Abstract*

*The American death penalty finds itself in an unusual position. On the ground, the practice is weaker than at any other time in our history. Eleven jurisdictions have abandoned the death penalty over the past fifteen years, almost doubling the number of states without the punishment (twenty-three). Executions have declined substantially, totaling twenty-five or fewer a year nationwide for the past six years, compared to an average of seventy-seven a year during the six-year span around the millennium (1997-2002). Most tellingly, death sentences have fallen off a cliff, with fewer than fifty death sentences a year nationwide over the past six years – compared to highs of over three hundred per year in the mid-1990s. The last two years have seen only eighteen death sentences per year nationwide – fewer than two per capital jurisdiction.*

*This article examines the dynamics underlying this great decline of the American death penalty and assesses the likelihood of its continued diminution. At the same time capital punishment is withering in practice, the prospects for constitutional abolition via judicial decree have also decreased substantially, as the U.S. Supreme Court has shown marked hostility toward constitutional regulation of the death penalty. This new hostility replaces a jurisprudence that was increasingly hospitable to extensive regulation – even judicial abolition – of American capital punishment. The Court’s recent decisions threaten to jettison the jurisprudential commitment to “evolving standards of decency” as the touchstone for interpreting the Eighth Amendment in favor of a*

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*more limited originalist approach to gauging “cruel and unusual” punishments. The Court also appears eager to discourage end-stage litigation and to remove obstacles to both state and federal executions. The simultaneous decline of public support for the death penalty and judicial regulation of the death penalty has produced “abolition in waiting” – a marginalized practice that will remain on the books until changes in the composition of the Court permit reassessment of the death penalty’s constitutionality.*

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### I. Introduction

Twenty-five years ago, the American death penalty reached its modern peak.<sup>1</sup> Death sentences and executions were at their modern-day highs,<sup>2</sup> and public support for the death penalty – measured in opinion polls – was above seventy percent, having reached its modern high of 80% in 1994.<sup>3</sup> Legal regulation of the death penalty was undemanding; despite its complexity, then-prevailing constitutional doctrines minimally constrained capital trials, which facilitated both death sentences and executions.<sup>4</sup> The American death penalty seemed relatively secure both legally and as a matter of practice, an odd outlier in a world in which abolition was spreading rapidly.<sup>5</sup>

But then came the decline. Between 2000 and 2015, the American death penalty experienced an astonishing transformation. Death sentences declined over 80%, from over 300 per year nationwide in 1996 to fewer than 50 by 2015.<sup>6</sup> Executions experienced a similarly steep decline, falling from almost 100 per year nationwide at the turn of the millennium to fewer than 30 in

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1. *See Death Sentences in the United States Since 1977*, DEATH PENALTY INFO. CTR. [hereinafter *Death Sentences Data*] (documenting a peak of 315 death sentences handed down in 1996) [perma.cc/X5DU-YR3N].

2. *See id.* (noting that death sentences peaked in 1996); *see also Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. [hereinafter *Executions Data*] (highlighting that executions increased between 1996 and 1999 as forty-five executions were carried out in 1996 compared to ninety-eight executions carried out in 1999) [perma.cc/JV9G-ZDWQ]. *See generally Executions Overview*, DEATH PENALTY INFO. CTR. [perma.cc/7V4V-X6RJ].

3. *Death Penalty, In Depth: Topics A to Z*, GALLUP [hereinafter *Death Penalty Opinion Poll*] (illustrating that eighty percent of poll respondents supported the death penalty for persons convicted of murder in 1994, compared to fifty-four percent of respondents in 2021) [perma.cc/4TBN-EDUQ].

4. *See* CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 154–76 (2016) (explaining the evolution of the law surrounding the death penalty).

5. *See id.* at 255 (discussing how the United States' stance on the death penalty differs from other countries); *see also Countries That Have Abolished the Death Penalty Since 1976*, DEATH PENALTY INFO. CTR. (illustrating an accelerating trend towards abolition of the death penalty throughout the 1990s) [perma.cc/YU4E-6MGQ].

6. *See Death Sentences Data*, *supra* note 1 (showing that 315 death sentences were handed down in 1996, compared to forty-nine in 2015).

2015.<sup>7</sup> Six states abandoned the death penalty between 2007 and 2015,<sup>8</sup> and several others had gubernatorially-imposed moratoria on executions.<sup>9</sup> The Gallup Poll measured a significant waning in support for the death penalty, from the 80% high in the mid-1990s to 61% in 2015<sup>10</sup>; perhaps more tellingly, the number of people opposed to capital punishment almost tripled, from 13% in the 1995 poll to 37% in the 2015 poll.<sup>11</sup>

The legal landscape changed as well. For the first time, the U.S. Supreme Court insisted on higher standards of representation in capital trials, reversing several capital sentences where trial teams had failed to uncover and present important mitigating evidence supporting a non-death sentence.<sup>12</sup> The Court also crafted significant proportionality limits on the crimes triggering death-eligibility, precluding the punishment for non-homicidal offenses such as the rape of a child<sup>13</sup>; the Court also protected certain classes of offenders from the death penalty, disallowing the

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7. See *Executions Data*, *supra* note 2 (noting ninety-eight executions in 1999 compared to twenty-eight executions in 2015).

8. See *State by State: States With and Without the Death Penalty—2021*, DEATH PENALTY INFO. CTR. [hereinafter *State by State Data*] (showing that Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York abolished the death penalty between 2007 and 2015) [perma.cc/NG7L-RGBZ].

9. See *id.* (showing that gubernatorial moratoria were issued on executions in both Pennsylvania and Oregon in 2015 and 2011, respectively).

10. See *Death Penalty Opinion Poll*, *supra* note 3 (identifying a decrease between the 1990s and 2015 in percentage of people who approve the death penalty).

11. See *id.* (noting an increase in disapproval of the death penalty between 1995 and 2015).

12. See *Williams v. Taylor*, 529 U.S. 362, 393 (2000) (finding that a claim for ineffective assistance of counsel can be sustained by demonstrating that defense counsel failed to introduce mitigating evidence at trial); see *Wiggins v. Smith*, 539 U.S. 510, 521–24 (2003) (determining that a defense counsel’s failure to investigate is adequate grounds to sustain a claim for ineffective assistance of counsel); see *Rompilla v. Beard*, 545 U.S. 374, 383–89 (2005) (concluding that trial counsel’s failure to address evidence likely to be used by the prosecution is grounds for a claim of ineffective assistance of counsel).

13. See *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (reversing the state court’s decision to uphold a death sentence where the defendant was convicted of child rape).

punishment for persons with intellectual disability<sup>14</sup> and persons under the age of 18 at the time of the offense.<sup>15</sup> Even more important than the discrete results of the Court's decisions was the Court's evolving methodology, which seemed conducive to further constitutional regulation, perhaps even abolition.<sup>16</sup>

By 2015, the substantial withering of the death penalty on the ground, together with the Court's more robust doctrines limiting the reach of the death penalty, appeared to create a new possibility of constitutional abolition, a prospect that seemed unthinkable only two decades before. In fact, Justices Breyer and Ginsburg, in their dissent from a 2015 lethal injection decision, explicitly called for the reconsideration of the constitutionality of the death penalty, signaling to litigants that perhaps the Court was ready to deliver a death blow to capital punishment in America.<sup>17</sup> Maybe there were already five votes for such a decision, or maybe small changes to the composition of the Court would solidify the prospect.

The 2016 election demolished any thought of judicial abolition.<sup>18</sup> President Trump made three Court appointments, replacing two Justices (Kennedy and Ginsburg) who were essential to the Court's new searching scrutiny of the death penalty (as well as Justice Scalia), and the new Justices (Gorsuch, Kavanaugh, and Barrett) appear hostile to significant constitutional regulation of the death penalty.<sup>19</sup> On the ground, though, the death penalty

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14. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (concluding that executions of persons with intellectual disabilities violate the Eighth Amendment prohibition on cruel and unusual punishment).

15. See *Roper v. Simmons*, 543 U.S. 551, 572–75 (2005) (finding that the Eighth and Fourteenth Amendments prohibit imposition of the death penalty for crimes committed by persons under age 18 at the time of the offense).

16. See *Atkins*, 536 U.S. at 311–21 (finding confirmation of consensus in expert opinion, religious opinion, world opinion, and polling data).

17. See *Glossip v. Gross*, 576 U.S. 863, 908 (2015) (Breyer, J., dissenting) (“I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.”).

18. See Maurice Chammah, *The Supreme Court Let The Death Penalty Flourish. Now Americans are Ending It Themselves*, THE MARSHALL PROJECT (Jun. 29, 2022, 5:00 AM) (discussing how Trump's 2016 election victory precluded the possibility of judicial abolition of the death penalty at the Supreme Court level) [perma.cc/V5G9-LM25].

19. See *id.* (noting that Trump's nominees to the high court were unlikely to continue the modern trend towards restricting the application of the death penalty).

continues its free fall, with continued declines in death sentencing, executions, and public support for the death penalty, as well as additional states abandoning the death penalty – most notably Virginia, the first former Confederate state to abolish, in 2021.<sup>20</sup>

The question, then, is what to expect going forward with a Court committed to deregulation of the death penalty at the same time that the death penalty enjoys decreasing political and popular support. We contend that the Court’s deregulatory posture will facilitate executions in those jurisdictions inclined to perform them, as the Court will likely not only decline to issue stays but also override stays from lower courts and state courts where the stays rest on federal grounds. This dynamic will facilitate executions in those jurisdictions determined to carry them out, exacerbating the already pronounced geographic concentration of executions in a few active death penalty states, such as Texas.<sup>21</sup> Beyond that, the Court will likely increase the bite of restrictions contained in the Anti-Terrorism and Effective Death Penalty Act,<sup>22</sup> which, among other things, mandates deference not only to state findings of fact but also to state adjudications of legal claims.<sup>23</sup> Additionally, it is possible that the Court might revisit some of the constitutional protections available in capital proceedings, though we think this is less likely or at least will happen less frequently, because denying relief in capital cases is achievable without such revision given the strong AEDPA barriers to relief in federal court.<sup>24</sup>

We do not expect that the Court’s new permissiveness will stem the movement away from capital punishment on the ground. The national trend away from the death penalty in virtually every

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20. See Whitney Evans, *Virginia Governor Signs Law Abolishing the Death Penalty, A 1st in the South*, NPR (Mar. 24, 2021, 2:50 PM) (discussing Virginia’s legislative abolition of the death penalty) [perma.cc/J38R-2FFL].

21. See *Executions Data*, *supra* note 2 (illustrating the regional concentration of executions in the southern United States).

22. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214.

23. See 28 U.S.C. § 2254(d)(1) (2018) (stating that habeas petitions “shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim– resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law”).

24. See *id.* (imposing numerous obstacles to claims for relief in federal court).

jurisdiction, particularly away from *death sentences*, shows no signs of reversal and appears to be determined by multiple, reinforcing factors, including: cost, the changing political dynamics of large urban areas, the decreasing power of the death penalty as a wedge issue, and the growing isolation of the United States in its retention. It is striking that the declines in the death penalty are as staggering in red states as in blue states, with Texas's new death sentences falling below five a year<sup>25</sup> and some red states, including Utah, Kansas, and Montana, contemplating abolition.<sup>26</sup> We thus anticipate a continued withering of the American death penalty, strengthening the case for judicial abolition (as it becomes increasingly difficult to argue that the penalty meaningfully serves any purpose of punishment, such as deterrence), even though the current Court would certainly reject such a claim. In the end, we imagine that the American death penalty will linger in purgatory, with abolition in waiting, until the Court's composition changes in ways that make judicial abolition possible.

## II. *The Great Decline*

From the vantage point of the mid-1990s, it would have been hard to imagine the impending dramatic decline of the American death penalty.<sup>27</sup> Capital punishment had rebounded from its precarious status in the late-1960s and early-1970s. The rise in violent crime and the accompanying politicization of criminal justice issues (as exemplified by Nixon's Southern Strategy) buried

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25. See *Death Sentences Data*, *supra* note 1 (showing that Texas courts issued four new death sentences in 2019, two new death sentences in 2020, and three new death sentences in 2021). As of October 1, 2022, Texas has no new death sentences.

26. See *Death Penalty in Kansas*, KAN. LEGIS. RSCH. DEP'T. 8 (Jan. 27, 2021) (assessing the continued feasibility of the imposition of the death penalty in Kansas) [perma.cc/ZA5D-8Y6K]; see Seaborn Larson, *Bill to Abolish Death Penalty in Montana Tabled*, INDEP. REC. (Feb. 23, 2021) (discussing an ultimately unsuccessful legislative attempt to abolish the death penalty in Montana) [perma.cc/6Z5S-A3PH].

27. See *Death Sentences Data*, *supra* note 1 (documenting an increase of death sentences issued throughout the 1990s, peaking in 1999); *Death Penalty Opinion Poll*, *supra* note 3 (noting high levels of public support for the death penalty throughout the 1990s, peaking during 1994).



any abolitionist momentum.<sup>28</sup> The Court's temporary invalidation of capital statutes in *Furman v. Georgia*<sup>29</sup> in 1972 gave a welcome platform to those who wanted to strike back against the social permissiveness of the 1960s and the corresponding progressive agenda of the Warren Court, especially regarding the Court's solicitude for those charged with or convicted of crime. States quickly enacted new (and, in some cases, harsher) capital statutes to affirm their support for capital punishment.<sup>30</sup> The Court saw the writing on the wall and was hard-pressed in 1976 to declare the death penalty inconsistent with "evolving standards of decency," the touchstone of the Court's approach in applying the Eighth Amendment's ban on cruel and unusual punishments.<sup>31</sup> With the imprimatur of the Court, states began obtaining capital verdicts at a far greater clip than they had in the decades before *Furman*.<sup>32</sup> Executions resumed in 1977 after a decade-long absence. The continued spread of violent crime and the new scourge of crack cocaine in the 1980s produced a broad coalition supporting punitive approaches to evident social disorder. By the early 1990s, capital punishment was experiencing a genuine renaissance in the United States, with hundreds of new death sentences a year.<sup>33</sup> Opposition to the death penalty, even in liberal jurisdictions like New York, was a tremendous political liability, as evidenced by Governor Cuomo's surprising defeat in his reelection bid in 1994

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28. See Pamela E. Oliver, *The National Politics of Mass Incarceration*, NAT'L POL., 5 (last updated Aug. 2012) (working paper) (analyzing the politics of crime control and rising incarceration rates after 1970) [perma.cc/J9VY-8ZU5].

29. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (concluding that the death sentences obtained under challenged statutes violated both the Eighth and Fourteenth Amendments).

30. See Mark S. Hurwitz, *Give Him A Fair Trail, Then Hang Him: The Supreme Court's Modern Death Penalty Jurisprudence*, 29 JUST. SYS. J. 243, 247 (2008) ("The reaction to *Furman* was swift and vehement. Over two-thirds of the states and Congress amended their respective penal codes in response to *Furman* to include capital punishment . . .").

31. See *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (sustaining Georgia's new capital statute and rejecting claim that death penalty was inconsistent with prevailing standards of decency).

32. See *Death Sentences Data*, *supra* note 1 (noting rise in capital sentences post-*Gregg*).

33. See *Death Sentences Data*, *supra* note 1 (highlighting death sentences' dramatic increase during the 1990s).

in large part because of his steadfast refusal to support reintroduction of the death penalty.<sup>34</sup>

By the mid-1990s, the Court had cleared the path for widespread resumption of executions.<sup>35</sup> Though the Court had reversed numerous death sentences in the immediate years following its 1976 decisions recognizing the death penalty as a permissible punishment, reversals became less frequent as the basic (and quite minimal) requirements for state capital schemes were more clearly communicated by courts and understood by state actors. In 1987, the Court rejected one looming existential threat to the death penalty when it rejected a constitutional claim based on its racially discriminatory administration in Georgia.<sup>36</sup> Two years later, the Court made clear that there was insufficient evidence to justify exempting persons with intellectual disability or juveniles from the death penalty.<sup>37</sup> And, from the mid-1980s through the 1990s, the Court repeatedly and without exception rejected claims of ineffective representation at the punishment phase of capital trials, the most common complaint brought in federal proceedings by death-sentenced inmates.<sup>38</sup> In short, the death penalty seemed to enjoy broad political and popular support, and the Court was increasingly reluctant to impede the path to executions.

But the landscape changed markedly between 2000 and 2015. Looking back, it is difficult to assign precise weight to the

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34. See John J. Goldman, *In New York, Cuomo Loses to Once-Obscure Challenger*, L.A. TIMES (Nov. 9, 1994, 12:00 AM) (“Pataki, who started the campaign as an obscure 49-year-old legislator from Peekskill, built a winning platform of support with a pledge to restore the death penalty, to slash government spending and to cut state taxes by 25%.”) [perma.cc/8GKK-7LQA].

35. See *Executions Data*, *supra* note 2 (noting that executions rose from fourteen in 1991 to ninety-eight in 1999).

36. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (holding that defendant in order to prove unconstitutional discrimination must show purposeful discrimination in his particular case).

37. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (rejecting exemption for persons with intellectual disability); see also *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (rejecting exemption for juveniles).

38. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (adopting deferential test for adequate representation); see *Burger v. Kemp*, 483 U.S. 776 (1987) (upholding death sentence imposed on juvenile with history of abuse and neglect despite failure of lawyer to present any evidence in mitigation).

overlapping, mutually-reinforcing factors contributing to the decline. We identify nine dynamics we regard as most salient.

*A. Concern About Wrongful Convictions (and Possibly Executions)*

In the first few decades after *Furman*, the most commonly-voiced critique about the American death penalty focused on the multiple layers of review and extended delays between sentence and execution.<sup>39</sup> Such complaints by death-penalty supporters prompted Congress in 1996 to overhaul the federal habeas statute for the first time since Reconstruction, with the title of the legislation promising an “effective death penalty.”<sup>40</sup> President Bill Clinton, who had demonstrated his bona fides as a new type of tough-on-crime Democrat by presiding (as Arkansas Governor) over the execution of a brain-damaged death-row inmate in the run up to the 1992 election, signed the legislation.<sup>41</sup> But the second half of the 1990s brought unprecedented and astonishing scrutiny to the American criminal justice system in general and the American

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39. See, e.g., Lewis F. Powell, Jr., *Capital Punishment: Remarks of Lewis F. Powell Jr. to the Criminal Justice Section of the ABA* 9 (1988) (transcript available in the Washington & Lee Law Library Lewis F. Powell Jr. Archives) (“[W]e have more than 2000 convicted murderers on death row, and less than 100 executions. However this delay may be characterized, it hardly inspires confidence in or respect by the public for our criminal justice system.”); see David D. Savage, *Rehnquist Speaks Out on Death Row Appeals: Executions: The Chief Justice Lobbies for a Tough GOP Bill. He also Launches an Attack on Biden’s Measure.*, L.A. TIMES, May 16, 1990, at A15 (reporting on then-Chief Justice William H. Rehnquist’s “unusual public lobbying” and quoting his statements that the death penalty appeals system was characterized by “delays and repetitiousness,” “verge[d] on the chaotic,” and “crie[d] out for reform”); see William J. Clinton, *Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, (Apr. 24, 1996) (“From now on criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences, and families of victims will no longer have to endure years of anguish and suffering.”) [<https://perma.cc/52TB-VZMB>].

40. See Lincoln Caplan, *The Destruction of Defendants’ Rights*, THE NEW YORKER (June 21, 2015) (describing how the Anti-Terrorism and Effective Death Penalty Act of 1996 “gutted the federal writ of habeas corpus”) [[perma.cc/G5CP-BQGU](https://perma.cc/G5CP-BQGU)].

41. See Marshall Frady, *Death in Arkansas*, THE NEW YORKER, at 105 (Feb. 22, 1993) (describing the execution of a black, forty-year-old convict, Rickey Ray Rector, in Arkansas and Governor Clinton’s denial of Rector’s appeal for clemency) [[perma.cc/2J69-SXTU](https://perma.cc/2J69-SXTU)].

death penalty in particular.<sup>42</sup> Advances in DNA technology prompted reexamination of many convictions with preserved genetic material and revealed surprising numbers of wrongfully convicted inmates; these errors fueled the creation of “innocence projects” dedicated to uncovering errors in the criminal justice system.<sup>43</sup> In Illinois, journalists and lawyers uncovered scores of cases involving error (many traceable to prosecutorial misconduct), including more than a dozen involving death-sentenced inmates.<sup>44</sup> Anthony Porter, one of the exonerated inmates, had come within two days of execution in 1998 before his conviction was reversed in 1999.<sup>45</sup> The scandalous discovery of so many questionable capital convictions led to a moratorium on Illinois executions in 2000, the mass commutation of death-sentenced inmates in 2003, and ultimately to the repeal of the Illinois death penalty in 2011.<sup>46</sup>

The experience in Illinois spurred nationwide concern over the accuracy of the criminal justice system, revealing weaknesses in evidence long deemed reliable, including, among other things, eyewitness testimony, forensic “expert” testimony, and confessions.<sup>47</sup> In some cases, serious doubts were raised in cases of those already executed, including Texas inmates Carlos DeLuna

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42. See STEIKER & STEIKER, *supra* note 4 at 194 (arguing that support for the death penalty decreased in conjunction with the rise of worries about the reliability of the criminal justice system).

43. See *id.* at 208–210 (noting that creation of organizations combating wrongful convictions shined a negative spotlight on the death penalty).

44. See Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 594 (2004–2005) (“[T]he Chicago Tribune detailed systemic problems in the Illinois criminal justice system traceable in part to prosecutorial misconduct.”).

45. See Andrew Bluth, *Illinois Man Is Finally Cleared in 2 Murders*, N.Y. TIMES, Mar. 12, 1999, at A20 (“Mr. Porter . . . was released from jail last month after a group of Northwestern University students found evidence of his innocence.”) [perma.cc/QUS8-JVJ2].

46. See *How the Death Penalty was Abolished in Illinois*, CHI. TRIB. (May 15, 2018, 9:06 AM) (“In 2011, Illinois became the sixteenth state to stop using capital punishment. But the process of abolishing the death penalty took more than a decade and included a moratorium that spanned three governors.”) [https://perma.cc/4F6K-PEL8].

47. See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011) (recounting the story of Ronald Jones).

and Cameron Todd Willingham.<sup>48</sup> By the turn of the millennium, media accounts of the newly “exonerated” became commonplace rather than rare events, constraining public (and hence prosecutorial) enthusiasm for the death penalty.<sup>49</sup> Although concerns about wrongful convictions and executions are likely as old as the death penalty, the discovery of such extensive error in a concentrated timeframe seemed to shift the debate surrounding the American death penalty.

*B. Life Without Possibility of Parole and the Diminished Role of Incapacitation*

In the early 1970s, when the death penalty seemed vulnerable to constitutional invalidation, the most common alternative to the death penalty was a lengthy or “life” sentence with the possibility of parole.<sup>50</sup> At that time, rehabilitation remained a primary purpose of punishment, reflected in virtually all of the nomenclature surrounding our penal system (“penitentiaries,” “departments of correction,” etc.).<sup>51</sup> But the rise of violent crime, the politicization of criminal justice policy, and the distrust of penal authority to manage systems of parole (by both the left and

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48. See Maurice Possley & Steve Mills, *Did One Man Die for Another Man’s Crime?*, CHI. TRIB. (June 27, 2006, 12:00 AM) (casting doubt on guilt of Carlos DeLuna, executed by Texas in 1989) [perma.cc/9DJ8-8WRT]; see Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB. (Dec. 9, 2004, 2:00 AM) (showing weakness in case against Cameron Todd Willingham, executed in 2004) [perma.cc/KBM3-FRQF].

49. See Thomas Adcock, *Innocence Project Expanding Its Horizons*, LEGAL TIMES, Dec. 29, 2003, at 9 (claiming responsibility for 140 exonerations).

50. See Michelle Miao, *Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States*, 15 NW. J. L. & SOC. POL’Y. 173, 178 (2020) (“The need for an alternative to the death penalty to punish serious offenders, as well as a growing recognition of the finality of LWOP, made it an attractive option for those who found parole-eligible life imprisonment unpalatable.”).

51. See Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap between Rhetoric and Reality in U.S. Prison Programs*, 45 L. & SOC’Y REV. 33, 36 (2011) (“[B]etween the 1950s and 1970s, the ideal model of correctional administration founded on the belief that trained experts could administer individualized assessment and treatment that would ‘diagnose’ and ‘treat’ the causes of criminality in the way that medical doctors were able to cure other forms of illness”).

the right), prompted a shift away from rehabilitation as punishment's core function.<sup>52</sup> States began to adopt "life-without-possibility-of-parole" (LWOP) sentences, in part based on fears that those who avoided the death penalty would be too dangerous to reintroduce into society, and in part because of growing enthusiasm for more punitive sanctions (even in states without the death penalty, such as Wisconsin, which had abolished capital punishment in the mid-19<sup>th</sup> century).<sup>53</sup> Prior to *Furman*, LWOP was rare; but by 2005, virtually every state had made LWOP available for some offenses, including every death penalty state.<sup>54</sup> Death penalty supporters generally embraced LWOP because it guaranteed community safety in cases where the death penalty was not imposed and because of their general support for punitive sanctions; death penalty opponents frequently embraced LWOP as a pragmatic matter because it seemed preferable to the death penalty, both in individual cases and as a means of securing abolition via legislative repeal.<sup>55</sup>

Though many jurisdictions adopted LWOP in the 1970s and 1980s, by the mid-to-late 1990s there remained a lag in public awareness of the unavailability of parole in many cases, particularly for those defendants who had committed death-eligible offenses, were convicted of capital murder, but not sentenced to death.<sup>56</sup> In some death penalty states, prosecutors

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52. See *id.* at 37 ("Most scholars agree that one of the central changes in this period has been the decline of the rehabilitative ideal—the idea that prisons ought to serve as house of reformation where inmates could be rehabilitated and prepared for a return to society.") (internal citations omitted).

53. See Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L.R. 1242, 1280 (2011) ("Courts, to an increasing extent, are substituting life without parole for death in aggravated murder cases.").

54. See *Year That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFO. CTR. (Aug. 2, 2010) (listing the years that state legislatures abolished the death penalty) [perma.cc/CK92-MKMU].

55. See Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 175–77 (2008) (outlining different rationales for supporting LWOP).

56. See Amanda Downen, *An Analysis of Texas Capital Sentencing Procedure: Is Texas Denying its Capital Defendants Due Process by Keeping Jurors Uninformed of Parole Eligibility?*, 29 TEX. TECH L. REV. 1111, 1128–34 (1998) (discussing Supreme Court cases regarding jury instructions on parole eligibility in capital cases); see also *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994)

sought to prevent jurors from understanding that a “life” sentence actually meant “life without possibility of parole,” and the U.S. Supreme Court overturned several death sentences where trial courts refused to inform jurors that a life sentence in fact carried no possibility of parole, especially where prosecutors insisted the defendant would be dangerous in the future.<sup>57</sup> Texas, one of the last holdouts, was slow to embrace LWOP precisely because prosecutors feared that LWOP would dampen enthusiasm for the death penalty (and a quirky aspect of the Supreme Court’s jurisprudence allowed Texas to withhold from jurors the fact that a life sentence in a capital murder case included parole ineligibility for 40 years).<sup>58</sup> Once LWOP became the default sentence in virtually every capital jurisdiction (and the public in general and jurors in particular became aware of this fact), prosecutors sought, and jurors delivered, many fewer capital sentences.<sup>59</sup> The availability of LWOP gave meaningful cover to prosecutors who declined to seek the death penalty, as they could emphasize both the incapacitating promise of LWOP as well its harshness—that the offender would experience “death in prison.”<sup>60</sup> For similar reasons, LWOP’s availability as an alternative sanction

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(“We hold that where the defendant’s future dangerousness is at issue, and state law prohibits the defendant’s release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.”).

57. See *Simmons*, 512 U.S. at 156 (holding that due process requires the jury to be informed of the defendant’s ineligibility for parole where the state argues future dangerousness); see *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001) (holding that “whenever future dangerousness is at issue in a capital sentencing proceeding . . . due process requires that the jury be informed that a life sentence carries no possibility of parole”); see *Kelly v. South Carolina*, 534 U.S. 246, 257 (2002) (finding that statements during trial that the defendant would die in prison were not sufficiently clear to communicate the defendant’s parole ineligibility); see *Lynch v. Arizona*, 578 U.S. 613, 616–17 (2016) (finding that the trial court violated the defendant’s due process rights when it failed to inform the jury that the defendant would be ineligible for parole).

58. See *Brown v. Texas*, 522 U.S. 940, 940 (1997) (denying the petition for writ of certiorari).

59. See *Miao*, *supra* note 50 at 178–79 (describing the growth in public support of LWOP and the codification of LWOP in 26 states in the 1970s and 1980s).

60. See *id.* at 195–96 (“LWOP allows juries, prosecutors, and elected officials to make political and symbolic statements about crime . . .”).

undoubtedly contributed to repeal in the nearly dozen states that abandoned the death penalty over the past fifteen years.<sup>61</sup>

### *C. Terrorism Replaces Ordinary Crime as Existential Threat*

The backlash to *Furman* was fueled in part by the dramatic rise in violent crime that had begun almost a decade before, as well as the conscious political strategy to harness and exploit the power of criminal justice as a wedge issue. The reintroduction of the death penalty and explosion of capital sentences corresponded roughly with the period of increased salience of the “war on crime” and the “war on drugs,” which together wrought unprecedented punitiveness in criminal justice policies by the 1980s and 1990s.

The salience of ordinary crime as a wedge issue diminished, though, when a new “war on terror” was declared in the wake of the 9/11 attacks.<sup>62</sup> The existential threat of terror attacks displaced local crime as the focus on national concern and national politics.<sup>63</sup> Extraordinary resources were devoted to securing “the homeland,” including the wars in Afghanistan and Iraq, the use of extrajudicial killings via drone attacks, the efforts to harden “soft targets” including commercial air travel and utilities, and the use of Guantanamo to house “enemies” without charges or the prospects of trials. The emerging orientation focused not on the use of criminal justice systems or punishment, but rather on the use of military and civilian force to preemptively limit the capacity of those who might carry out terror attacks in the future. In this climate, and with sharp declines in the homicide rate between 1980

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61. See Ross Kleinstuber, Sandra Joy & Elizabeth A. Mansley, *Into the Abyss: The Unintended Consequences of Death Penalty Abolition*, 19 U. PA. J. L. & SOC. CHANGE 185, 186–89 (2017) (describing the history of LWOP’s impact on states’ abolition of the death penalty).

62. See Tom Toles, *How Terrorism is the Biggest Wedge Issue in the World Today*, WASH. POST, (Nov. 20, 2015) (describing the political response to 9/11 and the “war on terror”) [[perma.cc/PCF6-L6GC](https://perma.cc/PCF6-L6GC)].

63. See Michael T. Light, Michael Massoglia & Ellen Dinsmore, *How Do Criminal Courts Respond in Times of Crisis? Evidence From 9/11*, 125 AM. J. OF SOCIO. 485, 489–90 (2019) (studying changes in sentencing after 9/11 and other national emergencies).



and 2000, punishing domestic murders with death seemed less urgent and less connected to public safety.<sup>64</sup>

#### *D. Improved Capital Trial Advocacy*

At the time of *Furman*, capital trial advocacy was comparable to advocacy in other serious felony cases.<sup>65</sup> Most defendants facing the death penalty were represented by court-appointed lawyers who had little expertise or experience regarding capital matters.<sup>66</sup> Such lawyers tended to focus on the issue of guilt: whether the defendant could win an acquittal or at least a conviction on a lesser charge.<sup>67</sup> There was little attention to mitigating factors related solely to the question of *punishment*.<sup>68</sup> Many states had no mechanism for considering such evidence, conducting “unitary trials” in which guilt and punishment determinations were made at the same time and prohibiting the introduction of mitigating evidence that bore *solely* on punishment.<sup>69</sup>

The Court’s 1976 decision rejecting the mandatory death penalty, *Woodson v. North Carolina*,<sup>70</sup> spoke eloquently about the need for “individualized sentencing” in capital cases, so that jurors

64. See ALEXIA COOPER & ERICA L. SMITH, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008 2 (Bureau of Justice Statistics 2011) (noting in a Department of Justice report that in 1980 the homicide rate peaked at 10.2 per 100,000 U.S. residents and in 2000 it had fallen to below 6 per 100,000 U.S. residents).

65. STEIKER & STEIKER, *supra* note 4, at 195–203.

66. See *id.* at 195 (“Before the modern era, capital cases were handled by appointed lawyers who generally had no specialized knowledge or training related to the death penalty.”).

67. See *id.* at 195–96 (finding that defense attorneys would approach capital offenses in the same manner as non-capital felonies).

68. See Julia Hayes Kilborn, *Doctoring up the Capital Defense System: Raising the Standards for Louisiana’s Death Penalty Lawyers*, 64 LA. L. REV. 141, 146–47 (2003) (describing cases where defense counsel did not effectively utilize evidence that could have mitigated the capital sentence).

69. See, e.g., *State v. Crampton*, 248 N.E.2d 614, 617–18 (Ohio 1969) (finding that the defendant’s right against self-incrimination was not violated when he was put in the position of both denying guilt and asking for mercy in a single proceeding).

70. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (concluding “that the death sentences imposed upon the petitioners under North Carolina’s mandatory death sentence statute violated the Eighth and Fourteenth Amendments . . .”).

could respond to aspects of a defendant's character and background and the circumstances of the offense in deciding punishment.<sup>71</sup> As a result of that decision, every state adopted "bifurcated" proceedings with a separate trial focused solely on the appropriateness of a death sentence.<sup>72</sup> Despite this procedural innovation, capital trial advocacy in the years following *Woodson* remained rudimentary in most jurisdictions, particularly in the South.<sup>73</sup> States gave very limited resources for investigation or experts, and trial lawyers continued to focus almost exclusively on guilt-innocence phase issues.<sup>74</sup> Despite *Woodson's* insistence that "death is different," capital trials in the ensuing decade were barely distinguishable from their non-capital counterparts.

Over time, though, capital defense practices shifted. The Court's decisions "constitutionalizing" capital punishment eventually brought more resources and institutional support to the capital defense function, albeit indirectly.<sup>75</sup> In the first two decades post-*Furman*, the Court did not mandate greater expenditures or police the quality of capital representation; instead, its foundational decisions signaled that death penalty cases would receive increased scrutiny, and a variety of entities – the states, the federal government, traditional civil rights organizations, and new non-profits focusing on death penalty representation, began to devote more attention and resources to the capital defense function.<sup>76</sup> Many states began providing indigent death-sentenced

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71. See *id.* at 304 ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense . . .").

72. See David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105, 1114 (1999) (discussing states' responses to *Gregg v. Georgia* and related cases which affirmed, but did not require, a bifurcated system).

73. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1842–44 (1994) (describing low level of representation during the post-*Woodson* period).

74. See *id.* at 1842 (noting that some defense lawyers "did not know that a capital trial is bifurcated into separate determinations of guilt and punishment").

75. See STEIKER & STEIKER, *supra* note 4, at 195–98 (noting the rise in non-profits supporting defendants facing capital punishment).

76. See *id.* at 195–205 (documenting the increase in resources in capital cases).

inmates with representation in state postconviction proceedings, which provided something of an audit of capital trials – especially the adequacy of trial representation.<sup>77</sup> In 1988, the federal government provided funds for death-sentenced inmates to receive appointed counsel in federal habeas proceedings.<sup>78</sup> For the first time, there were substantial numbers of professionals involved exclusively in capital defense representation.<sup>79</sup> Perhaps most notably, a new professional role emerged for “mitigation specialists,” typically non-lawyers who focus on uncovering and presenting mitigating evidence at capital trials.<sup>80</sup> By the 1990s, these specialists were also enlisted in postconviction proceedings to highlight the failure to discover and present important mitigating evidence at trial.<sup>81</sup>

By the late 1990s and early 2000s, the norms surrounding capital trial practice differed markedly from pre-*Furman* and early post-*Furman* eras. These new norms were reflected in the American Bar Associations Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, first promulgated in 1989<sup>82</sup> and in a fuller, revised form in 2003.<sup>83</sup> Whereas capital trial lawyers typically engaged in little or no punishment phase investigation in those earlier eras, the ABA Guidelines called for capital defense “teams” which would conduct a thorough bio-

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77. See Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086 n. 45 (2006) (listing state laws providing for post-conviction representation).

78. See 21 U.S.C. § 848(q)(4)(B) (2000) (repealed 2006) (“In any post conviction proceeding . . . seeking to vacate or set aside a death sentence, any defendant who is . . . financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys . . .”).

79. See Russel Stetler, *Symposium: The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases* 46 HOFSTRA L. REV. 1161, 1162 (2020) (discussing the evolution of mitigation specialists).

80. See *id.* at 1166 (describing mitigation function).

81. See *id.* at 1176 (noting the emergence of mitigation specialists in post-conviction proceedings in the late 1980s).

82. See *generally* GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS’N 1989).

83. See *generally* GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS’N 2003).

psycho-social history of anyone facing the death penalty.<sup>84</sup> The Guidelines separately called for states to adequately fund the capital defense function, which typically involved a trial team of two attorneys, a fact investigator and a mitigation specialist.<sup>85</sup> The Guidelines also highlighted the strategic difference of capital trial representation, with its special focus on punishment phase preparation and the need to undertake comprehensive investigative efforts well before trial to optimize the possibility of resolving a case in a non-death plea.<sup>86</sup>

The new norms for capital trial advocacy influenced prosecutorial incentives; by the turn of the millennium, prosecutors could no longer expect a relatively quick and costless path to a death sentence.<sup>87</sup> Prosecutors began to seek the death penalty less frequently, and capital defense attorneys fared better in the relatively smaller number of cases that went to trial.<sup>88</sup>

### *E. The Global Movement Away from Capital Punishment*

When *Furman* invalidated prevailing statutes in 1972, only a small minority of countries had fully abolished capital punishment.<sup>89</sup> Had *Furman* “stuck,” the United States would have been in the vanguard of nations jettisoning the punishment. But three decades later, the United States had become an outlier in the other direction, as an astonishing number of jurisdictions moved into the abolitionist camp during the same period the American

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84. See American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1055–56 (2003) (insisting upon investigation into the client’s past to lessen culpability and support potential for rehabilitation).

85. See *id.* at 981–82.

86. See *id.* at 1044–46 (placing importance on counsel contact).

87. See, e.g., Stetler, *supra* note 79, at 1186 (analyzing the impact of mitigation specialists on the decrease in death penalty convictions over the last several decades).

88. See *id.* at 1195 (providing data to support the claim that the number of capital prosecutions has declined).

89. See, e.g., RICHARD C. DIETER, *Introduction: International Perspectives on the Death Penalty*, in *COMPARATIVE CAPITAL PUNISHMENT* 2, 5 (Carol S. Steiker & Jordan M. Steiker eds., 2019) (noting that a census prepared by UN found twenty-five abolitionist jurisdictions in 1965).

death penalty had become entrenched.<sup>90</sup> The various political, economic, and social contributors to this global movement are too numerous and complicated to document here.<sup>91</sup> But the “outlier status” of the American death penalty has influenced its domestic shape.<sup>92</sup> European opposition to the death penalty contributed to the refusal of European pharmaceutical companies to export drugs used in American lethal injection protocols, slowing executions in virtually all death penalty states.<sup>93</sup> The commitment of the European Union to limit use of the death penalty around the world has been manifest in its opposition to American capital practices, both as an *amicus* in cases challenging particular applications of the death penalty and as a funder of abolitionist efforts.<sup>94</sup> External opposition to the death penalty has also complicated capital prosecutions of non-national defendants, as well as subsequent litigation in cases involving death-sentenced non-national inmates.<sup>95</sup> But perhaps most importantly, the growing consensus among democratic nations to abandon the death penalty contributes to an aura of inevitability around abolition, likely influencing the decision of numerous states to formally abolish over the past fifteen years.<sup>96</sup> Each abolition is celebrated by the

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90. See *id.* at 5–7 (highlighting that many countries in the United Nations moved away from the death penalty).

91. See Carol S. Steiker & Jordan M. Steiker, *Global Abolition of Capital Punishment: Contributors, Challenges and Conundrums*, in *COMPARATIVE CAPITAL PUNISHMENT* 388, 388–97 (Carol S. Steiker & Jordan M. Steiker eds., 2019) (discussing factors leading to abolition around the world).

92. See James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 *GEO. L.J.* 1215, 1216–20 (2015) (discussing distinctive impact of outlier status).

93. See *id.* at 1217 (discussing drug shortages resulting from withdrawal of European-based drugs).

94. See Ionel Zamfir, *The Death Penalty and the EU’s Fight Against It*, EUROPEAN PARLIAMENTARY RSCH. SERV. (2019) (explaining the European Union and European Parliament’s anti-death penalty position).

95. See Daniel Cullen, *Foreign Nationals Facing the Death Penalty: The Role of Consular Assistance*, UNIV. OF OXFORD: DEATH PENALTY RSCH. UNIT BLOG (Nov. 26, 2021) (discussing the role of the International Court of Justice in settling disputes over capital sentencing of non-national defendants) [<https://perma.cc/S268-389G>].

96. See Richard C. Dieter, *supra* note at 89 at 5 (arguing that the public rejection of the death penalty by democratic nations plays a role in statewide abolition).

lighting of the Colosseum in Rome,<sup>97</sup> connecting individual state legislative efforts to a broader, more encompassing movement.

### *F. The Perils of Lethal Injection*

After the U.S. Supreme Court revived the death penalty in 1976 by upholding a trio of new capital statutes, death penalty jurisdictions shifted from previous execution methods (electrocution, gas, firing squad, and hanging) to the seemingly more “modern” alternative: lethal injection.<sup>98</sup> Texas carried out the first execution by lethal injection in 1982, and the move to lethal injection probably contributed modestly to the rapid growth in executions during the 1980s and 90s.<sup>99</sup> The shift reflected two different concerns – reducing the pain experienced by the inmate and shielding participants and observers from witnessing the violent destruction of the body of the condemned.<sup>100</sup> The eagerness to achieve both objectives was reflected in the initial protocol developed in Oklahoma which then spread throughout the states: after the administration of a barbiturate to prevent pain (sodium thiopental), the inmate would receive a paralytic, to prevent involuntary movement which might cause discomfort among those witnessing the execution, followed by a heart-stopping drug to induce death.<sup>101</sup> But over time it became apparent that the twin goals of painlessness and the *appearance* of painlessness did not necessarily point in the same direction.<sup>102</sup> The refusal of doctors to

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97. See, e.g., Claire Heininger, *Rome’s Colosseum Lit Up to Mark NJ Abolishing Death Penalty*, NJ.COM (Dec. 19, 2007, 6:39 PM) (reporting the ritual of the lighting of the colosseum to support the abolition of the death penalty) [perma.cc/W34V-YSFQ].

98. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?* 82 IOWA L. REV. 319, 373–74 (1997) (studying the impact of the 1976 Supreme Court decision in *Gregg v. Georgia* on the use of lethal injection).

99. See Stephen F. Smith, *Lethal Injection, Politics, and the Future of the Death Penalty: The Shifting Politics of the Death Penalty: Has the “Machinery of Death” Become a Clunker?* 49 U. RICH L. REV. 845, 850 (2015) (analyzing the substantial increase in executions in the 1980s and 1990s resulting from new statutory schemes which implemented the use of lethal injection at executions).

100. See Denno, *supra* note 98, at 379–80 (describing the effects of lethal injection on the human body).

101. See *id.* at 380 (explaining the steps taken to carry out a lethal injection).

102. See *id.* at 381–83 (discussing problems with protocol).

participate in executions meant heightened risk of improper administration of the anesthetic, and the use of the paralytic increased the chance the inadequate sedation might go undetected.<sup>103</sup> Concerns about the potential for severe, undetected pain during lethal injection prompted litigation, which began to impede executions by the early 2000s.<sup>104</sup> Some of the challenges, emphasizing the risk of unnecessary pain, rested on the Eighth Amendment.<sup>105</sup> Other challenges focused on issues arising whenever a state seeks to design and implement new execution protocols, including claims under state administrative procedure acts and freedom of information laws.<sup>106</sup> Not all of the litigation was successful. In particular, claims under the Eighth Amendment had little traction in the federal courts, especially the U.S. Supreme Court – which has never embraced any challenge to an execution method despite many opportunities to do so.<sup>107</sup> But the multiple avenues of challenge stalled executions in many jurisdictions.

The challenges to lethal injection were fueled by two additional, related developments: first, many actors, including foreign governments, foreign pharmaceutical suppliers, and domestic pharmaceutical suppliers, sought to prevent prisons from using drugs designed to improve patient care to end inmates' lives.<sup>108</sup> These efforts were successful, making it especially difficult

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103. See *id.* (discussing risks associated with inadequate training of executioners).

104. See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 60 (2007) (studying the influence of lethal injection challenges on the pace of executions).

105. See, e.g., *Nelson v. Campbell*, 541 U.S. 637, 639 (2004) (rejecting Nelson's Eighth Amendment claim challenging the use of a "cut-down" procedure to access his compromised veins to carry out lethal injection).

106. See *Evans v. State*, 396 Md. 256, 349–50 (2006) (holding that aspects of the Execution Operations Manual were not in compliance with Maryland's Administrative Procedure Act and therefore could not be used).

107. See *Baze v. Rees*, 553 U.S. 35, 62–63 (2008) (rejecting petitioners' Eighth Amendment challenge to Kentucky's lethal execution protocol); see *Glossip v. Gross*, 576 U.S. 863, 892 (2015) (rejecting Eighth Amendment challenge to use of midazolam); see *Bucklew v. Precythe*, 139 S. Ct. 1112, 1119 (2019) (rejecting as-applied challenge to lethal injection under the Eighth Amendment).

108. See Eric Berger, *Court, Culture, and the Lethal Injection Stalemate*, 62 *WM. & MARY L. REV.* 1, 33–42 (2020) (discussing foreign constraints on supply of drugs used in lethal injection).

for states to obtain sodium thiopental, which had been uniformly used as the sedative in the standard three-drug protocol.<sup>109</sup> As sodium thiopental's availability waned, states looked to experiment with other drugs, particularly midazolam.<sup>110</sup> The shift in protocol contributed to several highly-publicized “botched” midazolam executions across several jurisdictions, including Arizona, Oklahoma, Ohio, and Arizona.<sup>111</sup>

The interconnected developments of litigation, drug shortages, and botched executions have contributed to the significant decline in executions over the past fifteen years.<sup>112</sup> Challenges to execution protocols, in particular, are hazardous to the administration of the death penalty because there are many points of “veto” – including state courts, governors, state attorney generals, local prosecutors, and state prison officials; unless a protocol is designed and approved, drugs are obtained, and officials sign off on the protocol and the acceptability of the drugs, no execution will move forward. Some of these actors no doubt stopped executions because of genuine concerns about the risks posed by new protocols.<sup>113</sup> But in some states, lethal injection has become a placeholder for broader concerns about the death penalty; at a time of declining public support, some state actors may simply think it is not worth the effort to secure new drugs or design new protocols to facilitate executions, especially when such efforts might invite further litigation and not actually succeed.

The experience with lethal injection illustrates the false promise of a modern death penalty that comports with modern sensibilities. Heralded as a pain-free method that lacked the violence of older methods, lethal injection proved to be a messy and unreliable means of execution, especially as medical personnel and

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109. See *Overview of Lethal Injections Protocol*, DEATH PENALTY INFO. CTR. (Aug. 2, 2021) (explaining the three-drug combination that states used for lethal injections until 2009) [perma.cc/8TCU-DEUK].

110. See *id.*

111. See *Botched Executions*, DEATH PENALTY INFO. CTR. (listing incidents of botched executions from various states) [perma.cc/BH8U-DK3F].

112. See Eric Berger, *supra* note 108, at 4–11 (observing the factors that have contributed to the lowest execution rates in the United States in decades).

113. See *id.* at 57 (noting the diminished support for executions following botched executions).



pharmaceutical suppliers refused to be part of this new approach to ending lives.

### G. *The Extravagant Costs of Capital Punishment*

Throughout much of American history, “cost” was a pro-death penalty argument, as lengthy incarceration was a more expensive proposition than conducting an execution within weeks or months of a conviction.<sup>114</sup> That calculus was already changing by the 1960s and 70s, as the time between sentence and execution lengthened and death-sentenced inmates had increased access to post-conviction appeals.<sup>115</sup> In his *Furman* concurrence, Justice Marshall rejected cost savings as a reason to sustain the death penalty, asserting that “[w]hen all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.”<sup>116</sup> But it would be a few decades before capital costs exploded to the point that they far outstripped the costs of non-capital sanctions, including sentences of life without possibility of parole.<sup>117</sup>

Constitutional regulation of the death penalty fundamentally altered the institutions surrounding the administration of the death penalty. Prior to *Furman* and *Gregg*, capital trials were not remarkably different from non-capital trials in terms of investigation, voir dire, presentation of evidence, overall length, and overall cost.<sup>118</sup> But the Court’s increased attention to procedural safeguards in capital cases, reflected in its “death is different” mantra, slowly transformed capital trials into unique

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114. See Carol S. Steiker & Jordan M. Steiker, *Costs and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 UNIV. OF CHI. LEGAL F. 117, 131 (2010) (addressing consensus in the middle of the twentieth century that long-term incarceration was more expensive than capital punishment).

115. See *id.* at 131–32 (noting the shifting views on the costs of capital punishment).

116. *Furman v. Georgia*, 408 U.S. 238, 358 (1972) (Marshall, J., concurring).

117. See *Costs*, DEATH PENALTY INFO. CTR. (Oct. 28, 2021) (describing how the costs of capital punishment far outweigh alternative punishments) [perma.cc/K88G-SHWG].

118. See Steiker & Steiker, *supra* note 114, at 139 (noting the Pre-*Furman* similarities in costs for capital and non-capital trials).

and uniquely resource-consuming events.<sup>119</sup> As noted above, by the late 1990s, the solo appointed lawyers of the pre-*Furman* and early post-*Gregg* eras were increasingly replaced by capital trial “teams,” with multiple lawyers, a fact investigator, and a mitigation specialist. Comprehensive pre-trial mitigation investigations could run several hundred thousand dollars per case.<sup>120</sup> Whereas non-capital voir dire is usually accomplished in a single day (or perhaps a few days), capital voir dire, with new standards for death-qualification and life-qualification of jurors, was now frequently occupying months of court time.<sup>121</sup> Bifurcated trials generally involve much more testimony—including forensic and mental health experts—than their non-capital counterparts.<sup>122</sup> These increased expenditures associated with capital trial investigation, voir dire, and the trial itself, are generally concentrated on local taxing units (counties).<sup>123</sup> Over the past twenty years, district attorneys have increasingly recognized and responded to the significant financial burdens posed by full-blown capital trials and have become more willing to settle cases.<sup>124</sup>

Additional costs associated with capital postconviction litigation and death-row incarceration are spread more broadly.<sup>125</sup> It took more than a decade post-*Gregg* before the federal government and the states regularly provided indigent death-sentenced inmates with representation on state and federal habeas (in contrast to non-capital inmates, who rarely receive such

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119. See *id.* at 139 (explaining the impact the “death is different” doctrine has on capital trial practices).

120. See *id.* at 140; 148 (describing the requirements for capital representation and associated costs).

121. See *id.* at 141–42 (addressing the time-consuming nature of capital voir dire).

122. See *id.* at 139–141 (explaining the resource-consuming aspects of punishment-phase advocacy).

123. See *id.* at 159 (“Unlike the costs of imprisonment, which are borne largely at the state level, the costs of capital punishment fall predominantly at the local level, on the individual counties that prosecute capital crimes through their locally elected district attorneys.”).

124. See *id.* at 142 (noting that the decreased number of death penalty cases is traceable in part to cost concerns of district attorneys).

125. See *id.* at 139 (discussing costs associated with postconviction review, death-row incarceration, and executions).

representation).<sup>126</sup> At about the same time, death rows across the nation become more restrictive and vastly more expensive as inmates were placed in isolated single cells separate from the general prison population.<sup>127</sup> These postconviction litigation and incarceration costs, though more diffuse than trial costs, have exerted pressure on actors throughout the system and have played a significant role in the decision by many jurisdictions to repeal their capital statutes.

Concerns about the excessive cost of the American death penalty have played a much more significant role in shrinking its footprint than the deeper moral concerns inspiring abolition in Europe and other jurisdictions.<sup>128</sup> In some respects, this is because the experiment with extensive constitutional regulation has made the American death penalty a more expensive practice than perhaps any other penal practice around the world.

#### *H. The Challenges of Lengthy Death-Row Incarceration*

For most of American history, the length of time between sentence and execution was measured in weeks or months.<sup>129</sup> In 1890, for example, the U.S. Supreme Court addressed a Colorado statute in *In re Medley*<sup>130</sup> that mandated an execution not less than two nor more than four weeks after the issuance of a death sentence.<sup>131</sup> By the 1960s, though, death-row inmates had a much broader range of constitutional grounds to challenge their convictions and sentences, as well as more robust procedural

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126. *See id.* at 144 (“In 1988, Congress created a right to counsel for indigent death-sentenced inmates, leaving all other indigent inmates with no comparable right.”).

127. *See id.* at 119 (describing the rising costs of death row in various states).

128. *See id.* at 151–53 (“Instead of being forced into a ‘soft on crime’ rhetoric of sympathy for the dignity and equality of heinous murderers, abolitionists have used the cost argument to hack three new trails off the well-worn paths of the death penalty debates of the recent past.”).

129. *See Time on Death Row*, DEATH PENALTY INFO. CTR. (providing graphical data and statistics on the time between sentencing and execution) [perma.cc/LPU6-8NNN].

130. 134 U.S. 160 (1890).

131. *See id.* at 163–64 (specifying the timeframe that a judge may sentence a person who received the death penalty).

vehicles for doing so. Still, prior to *Furman*, it was extremely uncommon for executions to occur more than a few years after conviction. When Caryl Chessman was executed in 1960 for a series of non-homicidal offenses, the eleven years and ten months he spent on death row was the longest in American history.<sup>132</sup> After *Furman* and *Gregg*, the period between sentence and execution continued to grow.<sup>133</sup> In 1990, the *average* time between sentence and execution for those executed was 95 months.<sup>134</sup> By 2000, it had grown to 137 months (about as long as the interval in Chessman's case), and subsequently reached an all-time high of 264 months in 2019, with inmates spending on average between twenty years and a quarter-century on death row prior to execution.<sup>135</sup> Concerns about delays between sentence and execution led Congress to pass the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 1996, with significant limits on the ability of death-sentenced inmates to receive review of their constitutional claims on federal habeas.<sup>136</sup> AEDPA introduced a new statute of limitations for filing petitions, severely constrained successive petitions, limited evidentiary development, and added increased deference for claims rejected on their merits in state court.<sup>137</sup> Nonetheless, although AEDPA substantially decreased the likelihood of petitioners prevailing on federal habeas, it did little to accelerate cases through the system: instead of spending years addressing a petitioner's constitutional claims, federal habeas courts now spend years interpreting and applying AEDPA's myriad procedural limitations.<sup>138</sup>

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132. See David J. Krajicek, *Caryl Chessman Became International Crime Celebrity in the 1950s When He was Condemned to Die for Two Sexual Assaults*, N.Y. DAILY NEWS (May 24, 2014) (noting the unusually lengthy period of time that Chessman was behind bars before he was executed) [perma.cc/7DA5-8YWG].

133. See *Time on Death Row*, *supra* note 129 (denoting the trend of increased time behind bars for those facing execution).

134. See *id.*

135. See *id.*

136. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (increasing obstacles to merits review of federal constitutional claims and providing for deferential review of those claims).

137. *Id.*

138. See Dale Chappell, *Prison Legal News*, HUMAN RIGHTS DEF. CTR. (June 1, 2021) ("Since the AEDPA was enacted in 1996, the wait time on death row has literally *doubled*.") [perma.cc/C6PB-S33U].

Prolonged death-row incarceration is obviously a symptom of the death penalty's decline, but it also poses a significant threat to the continued use of the death penalty. Extended delays undermine the deterrent and retributive rationales for the death penalty, thus serving as a conspicuous reminder of the death penalty's inefficacy. Such delays contribute to the increased cost of capital punishment, as many jurisdictions pay not only the additional costs of capital trials but also *higher* incarceration costs than those associated with non-capital lifetime incarceration (because death-row incarceration is significantly more expensive than incarceration in general population). Many of the successful repeal efforts have highlighted the futility of having the death penalty on the books but limited and long-delayed executions. It is likely that extended death-row incarceration has also influenced prosecutors' decisions to settle cases, as a death verdict will inevitably be followed by lengthy litigation and possibly public and private frustration with the decades-long process of review.

Apart from these prosaic concerns about cost and efficacy, lengthy death-row confinement implicates deeper anxieties about human rights. Prevailing death-row confinement is not simply lengthy but brutal. Over the past three decades, many death-row jurisdictions have gravitated toward solitary confinement as the default means of housing death-sentenced inmates.<sup>139</sup> In these jurisdictions, such as Texas, inmates remain in their cells twenty-three hours a day and have no physical contact with other inmates or visiting family.<sup>140</sup> There are limited or (more often) no opportunities for social interaction, education, or work.<sup>141</sup> Whereas

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139. See Merel Pontier, *Cruel But Not Unusual The Automatic Use Of Indefinite Solitary Confinement On Death Row: A Comparison Of The Housing Policies Of Death-Sentenced Prisoners And Other Prisoners Throughout The United States*, 26 TEX. J. ON C.L. & C.R. 117, 119 (2020) (revealing that data collected as of April 2020 showed that out of 28 death-penalty states, 12 had automatic solitary confinement for individuals sentenced to death).

140. See Mark Richardson, *Study: Solitary Confinement on Texas Death Row is Torture*, PUBLIC NEWS SERV. (Apr. 26, 2017) (describing the conditions Death Row inmates face in Texas prisons) [perma.cc/W6QU-PJEW].

141. See *Time on Death Row*, *supra* note 129 (“While on death row, those serving capital sentences are generally isolated from other prisoners, excluded from prison educational and employment programs, and sharply restricted in terms of visitation and exercise, spending as many as 23 hours a day alone in their cells.”).

solitary confinement (euphemistically termed “administrative segregation”) is sometimes employed in general population, it is typically used in that context on an individualized and limited basis for prisoners who violate rules, with opportunities to move to a less restrictive setting based on behavior.<sup>142</sup> In the modern American death penalty, solitary confinement has become in most states not a tool of prisoner management but a feature of the *punishment*, applied wholesale to every inmate under a sentence of death.<sup>143</sup> In the prevailing regime, then, death-sentenced inmates receive “double” punishment: lengthy incarceration in solitary confinement, followed by execution.<sup>144</sup> In this respect, the United States is not just an outlier among Western democratic nations in its retention and use of the death penalty; it is virtually alone around the world in practicing an especially brutal form of capital punishment given that death is preceded by the additionally cruel punishment of prolonged isolation and deprivation.

### *I. The Changing Politics of Death Penalty Counties*

During the heyday of the death penalty’s resurgence, the death penalty was used by a much wider swath of counties across the country, and rural counties in particular were far more likely than urban counties to seek and obtain death sentences in eligible cases.<sup>145</sup> To give one eye-popping statistic from Georgia near the peak of death sentencing in the modern era, the capital sentencing rate in Fulton County (Atlanta) was four death verdicts per thousand homicides, as compared to thirty-three death verdicts

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142. See *Solitary Confinement*, PENAL REFORM INT’L (“Some form of short-term isolation from the rest of the prison population is used almost everywhere as punishment for breaches of prison discipline.”) [perma.cc/GDV3-4UBJ].

143. See *Time on Death Row*, *supra* note 129 (explaining that death row prisoners spend years in solitary confinement).

144. See *id.* (“[D]eath-row prisoners are subject to two distinct punishments: the death sentence itself and the years of living in conditions tantamount to solitary confinement . . .”).

145. See Brandon L. Garrett et. al., *The American Death Penalty Decline*, 107 J. OF CRIM. L. & CRIMINOLOGY 561, 565 (2017) (noting that at one point, it was rural counties that imposed the death penalty most often).

per thousand homicides in rural Muscogee County—a difference of more than 700%.<sup>146</sup>

But the death penalty’s great decline over the past two decades has been promoted by a dramatic geographical and geopolitical shift.<sup>147</sup> The death penalty has become increasingly geographically concentrated, such that “only 2% of the counties are responsible for the majority of today’s death row population and recent death sentences.”<sup>148</sup> Moreover, those counties are now much more likely to be urban than rural; a recent statistical study revealed that “rural counties have almost entirely dropped out of death sentencing.”<sup>149</sup> This geographical shift has been driven largely by the exorbitant cost of capital prosecutions, which eat up a much larger share of the budgets of small rural counties than those of larger cities.<sup>150</sup>

At the same time, the politics of urban centers have shifted.<sup>151</sup> Even in the mostly red states that still authorize and use the death penalty, urban centers are increasingly blue.<sup>152</sup> Since 2016, “Democrats have solidified their strength in virtually all of the nation’s major metropolitan areas” while “Republicans have consolidated their hold over small-town and rural America.”<sup>153</sup> This geopolitical shift is highly visible in the politics of criminal law enforcement, as so-called progressive prosecutors have been voted into office in many of the cities that used to produce large

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146. Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 106 (2002).

147. See *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases At Enormous Costs to All*, DEATH PENALTY INFO. CTR. 2, i–ii (Oct. 1, 2013) (providing statistics that reflect the concentration of executions in a small number of states).

148. *Id.*

149. BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 141 (2017).

150. See Garrett et al., *supra* note 145, at 605 (referring to statistics that show counties that are more densely populated are more likely to impose death penalties, likely because they can “absorb the costs of seeking the death penalty . . .”).

151. See Ronald Brownstein, *It’s Not Just Voting and Covid: How Red States Are Overriding Their Blue Cities*, CNN (June 8, 2021, 12:47 AM) (explaining that large metropolitan areas in states vote overwhelmingly Democratic, while the rural areas vote overwhelmingly Republican) [perma.cc/X9MU-GC6A].

152. See *id.* (identifying the political makeup of U.S. cities).

153. *Id.*

numbers of death sentences, such as Dallas, Los Angeles, and Philadelphia.<sup>154</sup>

Some of these progressive prosecutors have taken categorical stances against the death penalty, while others have greatly reduced their use of it.<sup>155</sup> Recently, 56 elected prosecutors from “a bipartisan network of reform prosecutors” issued a joint statement calling the American death penalty “broken” and urging systemic changes.<sup>156</sup> Some prosecutors who have taken categorical stances against the death penalty have received strong political pushback from their Governors or segments of their local constituencies.<sup>157</sup> Despite such opposition, the rates of death sentencing from urban centers remain at historic lows across the country. In short, the only jurisdictions that can still afford the extravagant financial costs of producing large numbers of death sentences no longer appear to have the political will to do so.

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The various factors contributing to the decline in the death penalty’s footprint are important individually, but they also are in many cases mutually-reinforcing. For example, improved trial representation, lethal injection difficulties, and lengthy death-row

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154. See Daniel Nichanian, *Newly Elected Prosecutors Are Challenging the Death Penalty*, THE APPEAL (Dec. 9, 2020) (stating that Los Angeles elected an anti-death-penalty prosecutor) [perma.cc/ELR4-VS2S]; see Jamil Smith, “*Progressive prosecutors are Working Within the System to Change It. How is that Going?*,” VOX (July 30, 2021, 12:00 PM) (explaining that Philadelphia’s prosecutor, Larry Krasner, is a “progressive prosecutor”) [perma.cc/X9C7-S7UK]; see Ariel Ramchandani, *A Texas Prosecutor Fights for Reform*, THE ATLANTIC (Oct. 24, 2019) (describing Dallas prosecutor, John Kreuzot, as a “progressive district attorney”) [perma.cc/4D7F-BZRJ].

155. See Nichanian, *supra* note 154 (explaining that progressive prosecutors take different approaches to their use of the death penalty).

156. See *56 Prosecutors Issue Joint Statement Calling for End of ‘Broken’ Death Penalty*, DEATH PENALTY INFO. CTR. (Feb. 21, 2022) [perma.cc/WA7Z-VA73].

157. See Jordan Smith, *The Power to Kill: What Happens When a Reform Prosecutor Stands Up to the Death Penalty*, THE INTERCEPT (Dec. 3, 2019, 8:31 AM) (describing how then-Governor Rick Scott of Florida reassigned first-degree murder cases away from the office of elected District Attorney Aramis Ayala in reaction to her categorical refusal to seek the death penalty) [perma.cc/KAM8-5FGN]; see Bruce Haring, *Los Angeles District Attorney George Gascon Revises Crime Policies in Wake of Recall Effort*, DEADLINE (Feb. 19, 2022, 10:45 AM) (detailing Gascon’s slight revision of his categorical stance against seeking the death penalty in response to the political movement to recall him)[perma.cc/72ZF-ZQE3].



incarceration substantially increase the cost of the death penalty. The increased costs of the criminal justice system (including the costs of the death penalty) have shifted the political landscape in large urban counties, enhancing the prospects of “smart on crime” candidates who are less committed to capital punishment.<sup>158</sup>

In addition, changes to the death penalty on the ground contributed to substantial changes in constitutional doctrine, which in turn further diminished the practice on the ground, creating a “feedback loop” between law and practice. This dynamic is evident in two of the most important areas of contemporary death penalty law: the standards governing ineffective assistance of counsel (“IAC”) claims under the Sixth Amendment, and the application of the Court’s proportionality doctrine under the Eighth Amendment.<sup>159</sup>

As noted above, in the early days post-*Furman*, trial representation in capital cases was rudimentary in many jurisdictions, especially in the deep South.<sup>160</sup> Lawyers were generally appointed by trial courts, and limited funds were available for investigation or experts.<sup>161</sup> Not surprisingly, when the Court defined the constitutional standards governing IAC claims in 1984,<sup>162</sup> it adopted an exceedingly deferential approach. Lawyers could not be found deficient if their representation fell within the wide range of practice existing at the time, and the Court made clear that it should not adopt *aspirational* standards

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158. See Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, DEATH PENALTY INFO. CTR. 6 (Oct. 20, 2009) (explaining how “smart on crime” candidates have moved away from the death penalty because of its cost) [<https://perma.cc/QAE6-CBC8>].

159. See *Williams v. Taylor*, 529 U.S. 362, 391–98 (2000) (the attorneys’ failure to investigate and present substantial mitigating evidence during the sentencing phase of a capital murder trial deprived client of constitutionally guaranteed right to effective assistance of counsel); see *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (prohibiting execution of persons with intellectual disability).

160. See STEIKER & STEIKER, *supra* note 4, at 154–76 (2016) (noting the lack of resources available in the 1970s for death penalty cases).

161. *Id.*

162. See *Strickland v. Washington*, 466 U.S. 668, 686; 698 (1984) (articulating “general standards for judging ineffectiveness claims” including that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result”).

so much as police marked departures from prevailing practices.<sup>163</sup> The Court also eschewed a “checklist” approach of expected tasks for capital defense teams in favor of a more amorphous “standard” of “effective representation,” rejecting the idea that the role of capital trial lawyers could be reduced to a set of specific responsibilities.<sup>164</sup> As institutional support for capital trial defense improved, with increased training and funding for capital advocacy, lawyers in capital cases began to mount substantial mitigation cases in support of their clients. The use of mitigation specialists and various psychiatric and psychological experts became increasingly the norm rather than the exception; and the American Bar Association codified the emerging best practices into “guidelines” for capital trial advocacy.<sup>165</sup> Those “guidelines” are essentially rules, requiring many specific tasks, including comprehensive mitigation investigation, efforts to secure an agreed-upon resolution, and significant client contact (to facilitate both investigation and efforts toward a non-death plea).<sup>166</sup>

Beginning in 2000, the Court moved away from its customary deference and granted relief in a trio of cases based on ineffective representation at the punishment phase of the capital trial.<sup>167</sup> The Court specifically invoked the ABA Guidelines as probative of expected performance and seemed to move in the direction of rules rather than standards when it comes to investigating and

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163. *See id.* at 689 (“[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”).

164. *See id.* at 690 (“The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges . . . and . . . could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.”).

165. *See* American Bar Association, *supra* note 84, at 955–60 (outlining the importance of a team approach to death penalty cases).

166. *See id.*

167. *See* *Williams v. Taylor*, 529 U.S. 362, 393 (2000) (finding ineffectiveness based on counsel’s failure to discover and present significant mitigating evidence); *see* *Wiggins v. Smith*, 539 U.S. 510, 538 (2003) (finding counsel’s failure to investigate and present mitigating evidence ineffective given prevailing standards); *see* *Rompilla v. Beard*, 545 U.S. 374, 389–90 (2005) (finding counsel’s failure to uncover mitigating evidence in file of a prior conviction fell below “the line of reasonable practice”).

presenting mitigating evidence.<sup>168</sup> These decisions were important not simply because of the relief to the particular prisoners; they also armed trial lawyers with authority to seek resources and adequate time in pre-trial litigation from trial judges accustomed to denying funding requests and extensions. In this respect, these decisions both acknowledged the improved quality of capital trial representation and reinforced that higher standard going forward. The changed practices on the ground prompted a reassessment of the constitutional floor for punishment-phase advocacy, which in turn prompted better trial-level representational practices.

A similar dynamic is evident in the Eighth Amendment proportionality context. In the first two decades post-*Furman*, the Court's proportionality doctrine was quite parsimonious. The Court embraced one significant exemption, invalidating the death penalty for the rape of an adult victim.<sup>169</sup> It also crafted limited protection for persons convicted of murder based on the conduct on another, sparing an accomplice in a getaway car from the death penalty given he had neither killed, attempted to kill, nor intended to kill<sup>170</sup> (though the Court soon after narrowed the scope of the exemption for "non-triggerpersons"<sup>171</sup>). In the late 1980s though, the Court declined to protect juveniles or persons with intellectual disabilities from the death penalty, stating that it could find no "evolving standard of decency" against those practices.<sup>172</sup> The

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168. See *Williams*, 529 U.S. at 396 (utilizing ABA Guidelines to determine whether trial counsel performed within expected standards); see *Wiggins*, 539 U.S. at 524 (relying upon ABA Guidelines to evaluate investigations into mitigating evidence); see *Rompilla*, 545 U.S. at 387 n.7 (citing ABA Guidelines that set forth "the obligations of defense counsel in death penalty cases").

169. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (announcing that "[w]e have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life" (internal quotations omitted)).

170. See *Enmund*, 458 U.S. at 797 (maintaining that an accomplice in a getaway car was not subject to the death penalty when he had had neither killed, attempted to kill, or intended to kill).

171. See *Tison*, 481 U.S. at 138 (narrowing the death penalty exception established in *Enmund* to individuals who do not play a substantial role in the crime or demonstrate a reckless indifference for human life).

172. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (declining to protect persons with intellectual disability from the death penalty); see *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (concluding that imposing the death penalty

denial of protection for persons with intellectual disabilities, in particular, prompted activism on the ground. Whereas only two states and the federal government barred the execution of such persons in 1989,<sup>173</sup> by the time the Court revisited the issue just thirteen years later in *Atkins v. Virginia*, nineteen jurisdictions prohibited the practice.<sup>174</sup> Though the eighteen states and the federal government aligned against the practice still represented a minority of death-penalty jurisdictions, the Court noted the “consistency” and “direction” of change toward prohibition, as well as the rarity of documented executions of persons with intellectual disabilities.<sup>175</sup> Perhaps more importantly, the Court amplified the factors it considered in gauging evolving standards: in addition to a headcount of states banning the practice and a number-crunching of sentences and executions involving the challenged practice, the Court found “confirmation” of a societal consensus forbidding such executions by examining professional opinion, religious opinion, world practices, and opinion polls.<sup>176</sup>

Three years later, in *Roper v. Simmons*,<sup>177</sup> the Court likewise found a societal consensus forbidding the execution of persons under the age of eighteen at the time of the crime. Again, the Court relied not only on the number of jurisdictions forbidding the practice (also nineteen) and the small number of death-sentenced and executed juveniles, but also on the other criteria mentioned above, especially the exceptionally clear consensus against the practice outside of the United States.<sup>178</sup> In both *Atkins* and *Simmons*, the changed practices on the ground caused the Court to reevaluate “evolving standards.” And the Court’s embrace of the new categorical exemptions not only narrowed the class of death-eligible defendants going forward; the two cases reaffirmed the

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against individuals aged 16 or 17 at the time of the offense does not violate the Eighth Amendment).

173. See *Penry*, 492 U.S. at 334 (discussing state statutory exemptions).

174. See *Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002) (detailing the exemption crafted by eighteen states and the federal government).

175. See *id.* at 315–16.

176. See *id.* at 316 n.21.

177. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

178. See *id.* at 575–76.

enormous mitigating significance of low intelligence and youth, decreasing the appetite for death sentences in cases *outside* of the protected class, involving defendants in their late teens and early twenties or persons with significant intellectual deficits (though lacking a confirmable diagnosis of intellectual disability). The proportionality exemption cases, like the IAC cases, illustrate a feedback loop of changed practices on the ground, judicial recognition of the emerging practices, followed by further, more robust changes on the ground.

Most significantly, the newly crafted proportionality doctrine seemed increasingly hospitable to global reconsideration of the death penalty. The traditional criteria – counting the number of states authorizing the practice and looking at trends in death sentences and executions – were already moving in a favorable direction, with a half dozen states abandoning the death penalty in an eight-year period, death sentencing falling to modern-era lows, and executions dropping close to 70% from their late 1990s peak.<sup>179</sup> The additional considerations (professional opinion, religious opinion, world practices, and opinion polls) all favored reconsideration as well. In 2009, the prestigious American Law Institute withdrew the model death penalty provisions from its Model Penal Code, citing “current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”<sup>180</sup> Numerous religious organizations and leaders increasingly pressed for death penalty abolition, most notably Pope Francis in his landmark appearance before Congress in 2015.<sup>181</sup> By the 21<sup>st</sup> century, world opinion and practice had moved decisively toward abolition, leaving the United States the lone developed Western democracy that retains capital punishment. And opinion polls showed a marked decline in public support for the death penalty, with even sharper declines when

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179. See *supra* Part I. Introduction (introducing the trajectory of the death penalty throughout the history of the United States).

180. Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 354 (2010).

181. See Mark Berman, *Pope Francis Tells Congress ‘Every Life Is Sacred,’ Says The Death Penalty Should Be Abolished*, WASH. POST (Sept. 24, 2015, 3:19 PM) (explaining the Pope’s use of the Golden Rule during his address to Congress about why the death penalty should be abolished) [perma.cc/2FMQ-7HUT].

pollsters frame the choice as the death penalty versus life without the possibility of parole (instead of the standard Gallup question focused on whether respondents favor the death penalty for persons convicted of murder).<sup>182</sup> It was in this context that Justice Stevens and then Justices Breyer and Ginsburg called for reexamination of the constitutionality of the death penalty.<sup>183</sup> Practices on the ground and constitutional doctrine appeared to be moving toward the same destination.

### *III. The New Divergence: Withering Practice, Diminished Regulation*

From the vantage point of 2015, the end of the American death penalty seemed to be on the horizon. The tremendous decline in the practice, measured by every available indicator, was the strongest manifestation of eroding public support for capital punishment. Politicians running for office at all levels of government took note and no longer reflexively embraced the death penalty or opposed its restriction or even repeal.<sup>184</sup> Indeed, many won election or re-election with avowed abolitionist views—positions that would have been unthinkable only two decades previously.<sup>185</sup> In February of 2015, Pennsylvania Governor Tom Wolf declared a moratorium on his state’s death penalty, reflecting

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182. See *Gallup Poll—For First Time, Majority of Americans Prefer Life Sentence to Capital Punishment*, DEATH PENALTY INFO. CTR. (Nov. 25, 2019) (revealing that American public opinion has shifted fifteen percent in just five years) [perma.cc/JS49-GJPU].

183. See *Baze v. Rees*, 553 U.S. 35, 71 (2008) (Stevens, J., concurring); see *Glossip v. Gross*, 576 U.S. 863, 908 (Breyer, J., dissenting) (2015).

184. See, e.g., Martin Auster Muhle, *Here Are Five Takeaways from the D.C. Mayoral Debate*, NPR (Mar 8, 2022) (reporting that none of the candidates endorse reinstating the death penalty [perma.cc/HMA7-RHS6]; see Pete Buttigieg (@PeteButtigieg), TWITTER (July 14, 2020, 9:57 AM) (“We should abolish the death penalty in America.”) [perma.cc/V3X8-3F5Y]; see *I Asked God to Forgive Me: Former Alabama Governors Express Doubts About Capital Punishment*, DEATH PENALTY INFO. CTR. (Nov. 1, 2021) (reporting former Alabama governors Willie B. Smith III and Don Siegelman’s serious doubts about the death penalty) [perma.cc/N2F4-4F3L].

185. See *The Biden Plan for Strengthening America’s Commitment to Justice*, DEMOCRATIC NAT’L CONVENTION (detailing then Candidate Joe Biden’s campaign plan for strengthening America’s commitment to justice through eliminating the death penalty) [perma.cc/ERM9-57MV].

the prevailing zeitgeist.<sup>186</sup> Even Texas, which led the country in executions in the modern era, saw a 75% drop in its execution rate from its peak in 2000 to 2014.<sup>187</sup> The mainstream media was full of predictions of the death penalty's demise, aptly illustrated by a detailed piece that made the cover of *Time* magazine in 2015 entitled, "The Death of the Death Penalty."<sup>188</sup>

The death penalty's waning in practice and politics appeared to augur a judicial change as well. In 2014, a Federal District Judge in California, home to the nation's largest death row, declared California's death penalty unconstitutional under the federal constitution on the ground that it no longer served any valid function of punishment in light of the extraordinarily long delays and vanishingly few executions produced by the state's capital process.<sup>189</sup> Although that decision was overturned on appeal in 2015,<sup>190</sup> Justice Breyer's dissent in *Glossip* that same year seemed to be an invitation to the capital defense bar to redouble their efforts in federal court to raise global constitutional challenges to the death penalty.<sup>191</sup> Justice Breyer took the unusual step of publishing his dissent as a free-standing book—an implicit declaration that the issue was of signal importance and worthy of a broad non-legal audience.<sup>192</sup> Many observers predicted a future, perhaps even imminent, decision by the Supreme Court abolishing

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186. See Daniel Kelly, *Pennsylvania Governor Declares Moratorium on Death Penalty*, REUTERS (Feb. 13, 2015) (explaining that the Governor's moratorium will stay in effect until the Governor reviews a task force report on the effectiveness of the death penalty) [perma.cc/4JCA-PLKM].

187. See *Texas Execution Total Since 1976*, DEATH PENALTY INFO. CTR. (2022) [perma.cc/PN5N-67GR].

188. See David Von Drehle, *The Death of the Death Penalty: Why the Era of Capital Punishment Is Ending*, TIME (June 8, 2015) (arguing that the death penalty is coming to an end) [perma.cc/VG5U-MRFD].

189. See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014) (explaining that insurmountable delays in the state's execution process rendered the promise of the death penalty in California an empty one), *rev'd sub nom.* *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

190. *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

191. See *Glossip v. Gross*, 576 U.S. 863, 893 (2015) (ruling that death-row inmates are not entitled to a preliminary injunction against the use of midazolam in the lethal injection protocol); see also *id.* at 908–944 (Breyer, J., dissenting) (contending that the imposition of the death penalty violates the Constitution).

192. See generally STEPHEN BREYER, *AGAINST THE DEATH PENALTY* (John Bessler ed., 2016).

the death penalty nationwide on constitutional grounds. David Von Drehle wrote in *Time* magazine: “The facts are irrefutable, and the logic is clear. Exhausted by so many years of trying to prop up this broken system, the court will one day throw in the towel.”<sup>193</sup> Robert Smith thought that “one day” was already here, writing in *Slate* that “[r]ecent Supreme Court opinions suggest there are five votes to abolish capital punishment.”<sup>194</sup> Justice Scalia—no friend to constitutional abolition—apparently agreed, remarking during a speech in 2015 that “it wouldn’t surprise me” if the Court ruled the death penalty unconstitutional.<sup>195</sup>

We ourselves were part of the chorus of prognosticators heralding an impending constitutional invalidation of the American death penalty by the U.S. Supreme Court. A chapter of our 2016 book, *Courting Death: The Supreme Court and Capital Punishment*, was devoted to detailing what we described as a doctrinal “blueprint for constitutional abolition.”<sup>196</sup> We concluded that chapter by predicting that “a ‘Furman II’ [a constitutional abolition of the death penalty by the Supreme Court] seems likely in the coming decade or two.”<sup>197</sup> We based that prediction on the fact that the Court then had four liberal sitting justices (Ginsburg, Breyer, Sotomayor, and Kagan), one “swing” justice who wrote many of the opinions limited capital punishment (Kennedy), and another Democratic nominee awaiting confirmation (Merrick Garland, nominated by President Obama after Justice Scalia’s sudden death in February of 2016).<sup>198</sup> Our book was published on Monday, November 7, 2016—one day before the (to us and many others) surprise victory of Donald Trump on November 8.<sup>199</sup>

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193. See Von Drehle, *supra* note 188 (predicting a future in the United States without the death penalty).

194. See Robert J. Smith, *The End of the Death Penalty?*, SLATE (July 1, 2015) (comparing Justice Breyer’s dissent in *Glossip* to the similar approach of Justice Kennedy in the *Obergefell* opinion) [perma.cc/FEL5-9FK8].

195. See *Justice Scalia: “Wouldn’t Surprise Me” If Death Penalty Struck Down*, CBS NEWS (Oct. 20, 2015) (discussing how the Supreme Court has made it difficult to impose the death penalty by increasingly adding mitigating circumstances that must be considered) [perma.cc/LW35-B4R5].

196. See STEIKER & STEIKER, *supra* note 4, at 271.

197. *Id.* at 289.

198. *Roberts Court (2016-2017)*, OYEZ [perma.cc/D7G8-HFV8].

199. See Daniel Arkin & Corky Siemaszko, *2016 Election: Donald Trump Wins the White House in Upset*, NBC NEWS (Nov. 9, 2016, 1:11 PM) (announcing



Luckily, we cautiously qualified our prediction with the caveat: “but only if justices who leave the current Court are replaced with justices who hold similar or more liberal views.”<sup>200</sup> Otherwise, our anticipation of constitutional abolition would have been even more of a “Dewey Defeats Truman” moment than it already was.

The presidential election of 2016 was portentous in so many ways—but not least for the fate of the American death penalty. With Garland’s appointment blocked and Justice Neil Gorsuch confirmed in his stead, followed by Justice Kennedy’s resignation and replacement with Justice Brett Kavanaugh, followed by Justice Ginsburg’s death and replacement with Justice Amy Coney Barrett, the headcount on the Court is now a solid six votes against constitutional abolition of the death penalty—and indeed, against the entire project of constitutional regulation of capital punishment.

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The first and most significant barometer of the new Court’s position on constitutional abolition came in the 2018 Term, soon after Justice Kavanaugh joined the Court and ensured a solid conservative majority.<sup>201</sup> In *Bucklew v. Precythe*,<sup>202</sup> the Court was faced with an as-applied challenge to Missouri’s lethal injection protocol.<sup>203</sup> Lethal injection litigation has been the site of the most comprehensive engagements of the American death penalty. In the first lethal injection case to reach the Court, *Baze v. Rees*,<sup>204</sup> Justice Stevens, one of the architects of the Court’s capital jurisprudence, chose that case as the vehicle to declare, in a concurring opinion, that the death penalty no longer comported with the Eighth

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the unexpected election of Donald J. Trump as the next President of the United States) [perma.cc/3ZQY-KRRM].

200. STEIKER & STEIKER, *supra* note 4, at **Error! Bookmark not defined**.<sup>289</sup>

201. See Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018) (noting the impact Kavanaugh will have on the court’s makeup).

202. 139 S. Ct. 1112 (2019).

203. See *id.* at 1118 (“[Bucklew] acknowledges that the U.S. Constitution permits a sentence of execution for his crimes. He accepts, too, that [Missouri’s] lethal injection protocol is constitutional in most applications. But because of his unusual medical condition, he contends the protocol is unconstitutional as applied to him.”).

204. 553 U.S. 35 (2008).

Amendment (though he would continue to adhere to precedent until overruled).<sup>205</sup> And, as noted above, Justice Breyer (joined by Justice Ginsburg) likewise offered his elaborate critique of the prevailing American death penalty in his dissent in *Glossip*, which had sustained Oklahoma’s continued use of midazolam despite several botched executions employing that drug.<sup>206</sup>

The lethal injection cases inspired these broader reflections because of the structure of the majority opinions: in each case, the Court began with the premise that, because “capital punishment is constitutional,” there must be a constitutional means of carrying out it out.<sup>207</sup> That structure was crucial to the Court’s decision to require inmates challenging execution methods to identify a “feasible, readily implemented” alternative mode of execution that would significantly reduce the risk of harm entailed by the challenged method.<sup>208</sup> As the death penalty became increasingly marginalized and the Court’s Eighth Amendment approach became more hospitable to a global challenge to the death penalty, the Justices on the Court with grave doubts about the death penalty did not want the “capital punishment-is-constitutional” premise to go unchallenged.<sup>209</sup> True, as Justice Stevens

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205. See *id.* at 86 (Stevens, J., concurring) (“[T]he pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.” (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring))).

206. See *Glossip v. Gross*, 576 U.S. 863, 946 (2015) (Breyer, J., dissenting) (“For the reasons I have set forth in this opinion, I believe it highly likely that the death penalty violates the Eighth Amendment.”).

207. See *Baze v. Rees* 553 U.S. 35, 47 (2008) (“We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.”); see also *Glossip*, 576 U.S. at 869 (“Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, [i]t necessarily follows that there must be a [constitutional] means of carrying it out.”) (quoting *Rees*, 553 U.S. at 47); see also *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (“The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously.”).

208. *Bucklew*, 139 S. Ct. at 1121.

209. See *Glossip*, 576 U.S. at 908–09 (Breyer, J., dissenting) (asking that the court consider whether the death penalty violates the Eighth Amendment of the Constitution given that it suffers from serious unreliability, arbitrariness in application, and unconscionably long delays that undermine the death penalty’s penological purpose).

acknowledged in *Baze*, the death penalty had been sustained against Eighth Amendment challenge in *Gregg*.<sup>210</sup> But the Court’s “evolving standards of decency” approach ensured that the issue could never be definitively settled in its favor. Both Justice Stevens and Justices Breyer and Ginsburg offered reasons to revisit *Gregg* given the death penalty’s prevailing administration and marginalization. Indeed, Justice Stevens emphasized that the constitutionality of the death penalty turned on its present-day effectiveness, particularly whether it presently made any “marginal contributions to any discernible social or public purposes.”<sup>211</sup> In this regard, Justice Stevens emphasized that the constitutionality of the death penalty under the Eighth Amendment could not be foreclosed by the textual recognition of the death penalty in other portions of the Constitution, noting that “[n]ot a single Justice in *Furman* concluded that the mention of the deprivation of ‘life’ in the Fifth and Fourteenth Amendments insulated the death penalty from constitutional challenge.”<sup>212</sup>

When Justice Breyer similarly called for reconsideration of the death penalty’s constitutionality in *Glossip*, Justice Scalia, joined by Justice Thomas, suggested a different sort of reconsideration.<sup>213</sup> In Justice Scalia’s view, the entire body of Eighth Amendment law took a wrong turn when the Court looked to “evolving standards of decency” as the framework for evaluating punishment practices.<sup>214</sup> That formulation was embraced over sixty years ago in *Trop v. Dulles*,<sup>215</sup> when the Court invalidated denaturalization as punishment for desertion during wartime.<sup>216</sup> A plurality of the

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210. See *Baze*, 553 U.S. at 78 (Stevens, J., concurring) (“In *Gregg v. Georgia*, 428 U.S. 153 (1976), we explained that unless a criminal sanction serves a legitimate penological function, it constitutes ‘gratuitous infliction of suffering’ in violation of the Eighth Amendment.”).

211. *Baze*, 553 U.S. at 83 (Stevens, J., concurring) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

212. *Id.* at 86 n.19.

213. *Glossip v. Gross*, 576 U.S. 863, 893–94 (2015) (Scalia, J., concurring).

214. *Id.*

215. 356 U.S. 86 (1958) (plurality opinion).

216. See *id.* at 101 (“We believe, as did Chief Judge Clark in the court below, that use of denaturalization as a punishment is barred by the Eighth Amendment.”).

*Trop* Court, relying on a 1910 decision<sup>217</sup> rejecting a punishment imposed in the Philippines (then a U.S. Territory), insisted that the Eighth Amendment “is not static” and “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>218</sup> This framing indicates that punishments previously embraced might come to be rejected, to the point that the Eighth Amendment forbids them. It also embraces a Durkheimian view of societies becoming less punitive as they “mature.”<sup>219</sup> Although the death penalty was not at issue in *Trop*, the plurality seemed to suggest that its constitutionality was likewise provisional, subject to reconsideration if it ever lost its widespread support: “the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.”<sup>220</sup>

For Justice Scalia, the Court’s efforts to discern “evolving standards” is hopelessly subjective; he advocated an “historical understanding” of the Amendment that focuses, presumably, on whether punishments were embraced or rejected at the time of the founding.<sup>221</sup> His scorn for the “evolving standards” approach cannot be overstated. In his view, *Trop* was not only wrongly decided, but “has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind.”<sup>222</sup> This is a striking indictment, especially given the relative paucity of cases invalidating punishment practices as contrary to evolving standards. In the capital context, this framework has crafted a few categorical exemptions, invalidating the death

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217. *Weems v. United States*, 217 U.S. 349 (1910).

218. *Trop*, 356 U.S. 86, 100–01.

219. Emile Durkheim, *Two Laws of Penal Evolution*, reprinted in 2 *ECON. & SOC’Y* 261, 263 (1973) (“The first law of penal evolution is also termed the law of amelioration . . . and may be rephrased thus: as societies evolve from primitive to an advanced type, the penalties for crimes are reduced in their intensity.”).

220. *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

221. See *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., concurring) (“If we were to travel down the path that Justice Breyer sets out for us and once again consider the constitutionality of the death penalty, I would ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment . . . should be overruled.”).

222. *Id.* at 899.

penalty for rape,<sup>223</sup> including the rape of a child (and presumably other ordinary non-homicidal crimes),<sup>224</sup> and as applied to juveniles,<sup>225</sup> persons with intellectual disabilities,<sup>226</sup> and certain non-trigger persons who are charged as parties or under the felony murder rule.<sup>227</sup> The framework has had even less purchase in the non-capital context, though it recently was invoked to prohibit the sentence of life without possibility of parole (LWOP) as applied to juveniles convicted of non-homicidal offenses<sup>228</sup> and the *mandatory* imposition of LWOP to juveniles who commit murder.<sup>229</sup> Ultimately, Justice Scalia's antipathy toward "evolving standards" was likely rooted less in what the doctrine had done to date than in the prospect of its role in abolishing the death penalty entirely; he also resented the repeated calls to revisit the issue, which he termed "Groundhog Day," referring to a film in which the same unsuccessful day is lived over and over.<sup>230</sup>

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223. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' an excessive penalty for the rapist who, as such, does not take human life." (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976))).

224. See *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008) ("These considerations lead us to conclude, in our independent judgment, that the death penalty is not a proportional punishment for the rape of a child.").

225. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

226. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (rejecting death penalty for person with intellectual disabilities).

227. See *Enmund v. Florida*, 458 U.S. 782, 801 (1982) ("For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.").

228. See *Graham v. Florida*, 560 U.S. 48, 82 (2010) ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.").

229. See *Miller v. Alabama*, 567 U.S. 460, 489 (2012) ("By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.").

230. See *Glossip v. Gross*, 576 U.S. 863, 893 (2015) (Scalia, J., concurring) (lamenting repeated calls to revisit the death penalty).

In *Bucklew*, Justice Gorsuch’s majority opinion embraces, albeit indirectly and in dicta, Justice Scalia’s critique of *Trop*. As in *Baze* and *Glossip*, the *Bucklew* begins with the proposition that the death penalty is a constitutional punishment.<sup>231</sup> But unlike those opinions, Justice Gorsuch’s opinion states that the death penalty is constitutional because it was “the standard penalty for all serious crimes at the time of the founding,” the text of the Fifth Amendment recognizes the punishment, and the First Congress, which proposed the Eighth Amendment, provided for numerous capital crimes.<sup>232</sup> This brief sketch makes clear that the *Bucklew* majority is unpersuaded that the death penalty’s constitutionality turns on “evolving standards of decency.” Driving the point home, Justice Gorsuch announces that the “Constitution [] permits States to authorize capital punishment” and “the judiciary bears no license to end a debate reserved for the people and their representatives.”<sup>233</sup>

*Bucklew* treats the constitutionality of the death penalty as an historical, permanent fact, rather than, as in *Trop* and *Gregg*, a contingency based on prevailing standards of decency. At the same time, the brief discussion of the death penalty’s constitutionality is dicta. The issue was not disputed. The Court does not mention *Trop* or any of the many cases, including *Gregg*, which adhered to and applied the “evolving standards” framework. But just as the extended discussions of the death penalty’s constitutionality by Justice Stevens and Justice Breyer sought to encourage litigants to question the prevailing status of the death penalty, *Bucklew* sends the message that such arguments are foreclosed – not because prevailing standards support the death penalty, but because prevailing standards are simply not pertinent to the constitutional question. And, of course, *Bucklew*, unlike the concurring and dissenting opinions in *Baze* and *Glossip*, speaks for a majority of the Court (and does so before Justice Barrett’s replacement of Justice Ginsburg).<sup>234</sup>

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231. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019) (“The Constitution allows capital punishment.”).

232. *Id.* (internal quotations omitted).

233. *Id.* at 1122–23.

234. See *id.* at 1118 (delivering an opinion by Gorsuch and joined by Chief Justice Roberts, Justice Thomas, Justice Alito, and Justice Kavanaugh).

*Bucklew* not only undermines global reconsideration of the death penalty's status, it also indirectly challenges the proportionality limits dependent on the evolving standards framework. Perhaps a line could be drawn between the availability of particular punishments, e.g., the death penalty, and the permissibility of applying punishments to particular offenses or to particular offenders. Even if evolving standards do not control which punishments are permitted, perhaps they still control who can receive such punishments, leaving in place the proportionality limits the Court has carved to date (mostly) in capital cases. Along these lines, Justice Scalia, when he (unsuccessfully) urged on originalist grounds to jettison proportionality analysis in the non-capital sphere, was willing to preserve proportionality review in capital cases as an aspect of the "death-is different" principle.<sup>235</sup> Nonetheless, *Bucklew* suggests that the current Court is not only "not ready" to provide the coup de grace to the American death penalty; it is a Court more likely to roll back the limited protections against extreme practices that the Court has already embraced.

*Bucklew*'s significance rests primarily on its seeming reorientation of Eighth Amendment methodology around text and history. But the opinion also reflects the Court's frustration with capital defense advocacy, particularly in "end-stage" litigation. The Court lamented how *Bucklew* "managed to secure delay through lawsuit after lawsuit" despite unfavorable rulings and warned lower courts to "police carefully against attempts to use [method-of-execution] challenges as tools to interpose unjustified delay."<sup>236</sup> The Court announced that "[l]ast minute stays" in capital litigation "should be the extreme exception, not the norm."<sup>237</sup> The Court sought to defend its widely criticized decision earlier in the Term in *Dunn v. Ray*<sup>238</sup> in which Ray challenged Alabama's policy permitting a Christian chaplain to be present in the execution chamber to minister to (presumably Christian) inmates while denying Muslim inmates a corresponding right to have an imam present in the chamber. The Eleventh Circuit had granted a stay just prior to Ray's execution, recognizing the substantial likelihood

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235. *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991).

236. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133–34 (2019).

237. *Id.* at 1134.

238. 139 S. Ct. 661 (2019).

(indeed virtual certainty) that the Alabama policy violated the Establishment Clause.<sup>239</sup> But the same members of the Court who constituted the *Bucklew* majority had supplied the votes to vacate the stay based on the last-minute nature of the application, despite the fact that Alabama had not clearly articulated its discriminatory policy until fifteen days before the execution (and Ray had filed within five days of that notice).<sup>240</sup> *Bucklew* reiterated that federal courts should protect death sentences from “undue” interference and use their equitable powers “to dismiss or curtail suits that are pursued in a ‘dilatory’ fashion.”<sup>241</sup>

It was not clear in *Bucklew* whether the Court was railing against only “dilatory” claims or creating a new presumption against any last-minute stays, regardless of the diligence of the inmate’s efforts. Justice Sotomayor, in dissent, feared the latter, arguing that the majority’s statement seemed to require lower courts to review last-minute stay applications “with an especially jaundiced eye” whether dilatory or not, amounting to “a radical reinvention of established law and the judicial role.”<sup>242</sup> In any case, the result in *Ray* was clear: last-minute stays in capital litigation can be rejected even where the absence of a stay will result in a plain violation of the Constitution. And *Bucklew* embraced rather than distanced itself from that result.

In this respect, *Ray* and *Bucklew* presaged the Court’s astonishing facilitation of the “Trump executions” during the last months of Trump’s presidency.<sup>243</sup> When President Trump assumed office in 2017, the federal government had executed three inmates over the preceding half century, the last one occurring in 2003.<sup>244</sup>

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239. See *Ray v. Comm’r*, 915 F.3d 689, 702–03 (11th Cir. 2019) (explaining grounds for stay).

240. See *Dunn*, 139 S. Ct. at 661–62 (Kagan, J., dissenting) (“The State contends that Ray should have known to bring his claim earlier, when his execution date was set on November 6. But the relevant statute would not have placed Ray on notice that the prison would deny his request.”).

241. *Bucklew*, 139 S. Ct. at 1134.

242. *Id.* at 1146 (Sotomayor, J., dissenting).

243. See Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 622 (2022) (recounting the Court’s facilitation of executions at the end of Trump’s term in office).

244. See *Executions Under the Federal Death Penalty*, DEATH PENALTY INFO. CTR. (displaying a record of every federal execution) [perma.cc/F9LT-G2W3].



One of the central obstacles was the absence of an approved execution protocol.<sup>245</sup> President Trump's ascension to office, together with his appointment of Jeff Sessions (and later William Barr) as Attorney General created political momentum to revive the federal death penalty. In 2019, at the urging of Barr, the Bureau of Prisons adopted a new execution protocol and the Department of Justice began to schedule executions.<sup>246</sup> Five executions were scheduled to occur between December and January 2019-20, but those were stayed by lower federal courts and the U.S. Supreme Court declined to vacate the stays.<sup>247</sup> During the last six months of Trump's presidency, though, his administration executed all thirteen inmates scheduled for execution (one of the inmates received a stay, a new execution date, and was ultimately executed).<sup>248</sup>

The sheer number of federal executions accomplished in such a brief window is noteworthy. But more remarkable was the Court's role in clearing the obstacles along the way. The first four execution dates were stayed by a federal district judge hours prior to the first execution to consider an Eighth Amendment challenge to the new protocol.<sup>249</sup> The judge made clear that the inmates had not been dilatory in raising the issue.<sup>250</sup> The Court of Appeals for the D.C. Circuit unanimously declined to vacate the stay and ordered an expedited briefing schedule to resolve the Eighth Amendment question promptly (though not in time to remain on schedule for the first three dates).<sup>251</sup> But in *Barr v. Lee*,<sup>252</sup> the Court vacated the stay in an unsigned 5-4 opinion (over two dissents speaking for four Justices), allowing the first execution (as well as the other scheduled executions) to proceed as planned. The per curiam opinion resolved any doubts about the meaning of *Bucklew*. The Court insisted that "the plaintiffs in this case have

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245. Kovarsky, *supra* note 243, at 629–30.

246. *Id.* at 634.

247. *Id.* at 635.

248. *Id.* at 638.

249. *See Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020).

250. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 125 (D.C. Cir. 2020) (explaining grounds for stay).

251. *See id.* at 137–38.

252. 140 S. Ct. 2590 (2020).

not made the showing required to justify last-minute intervention by a Federal Court,”<sup>253</sup> repeating *Bucklew*’s pronouncement that “[l]ast-minute stays . . . should be the extreme exception, not the norm.”<sup>254</sup> As Justice Sotomayor feared in *Bucklew*, last-minute stays are now disfavored (“extreme exception”) whether or not an inmate is dilatory. The new equities of capital punishment litigation resolve doubts in favor of finality and execution rather than against the possibility of irremediable violations of constitutional norms.

Over the next six months (between the first federal execution on July 14, 2020, and the execution of the last inmate on January 16, 2021), the Court was confronted a wide variety of constitutional and statutory challenges to the scheduled executions.<sup>255</sup> Some of the cases presented common issues regarding execution protocols, the sourcing of execution drugs, intricate statutory questions arising under applicable federal death penalty statutes, and COVID questions.<sup>256</sup> Other cases raised garden-variety capital claims, including competency-to-be-executed claims, prosecutorial misconduct claims, and intellectual disability claims. A detailed accounting of the range and complexity of those claims can be found in Lee Kovarsky’s illuminating article, “The Trump Executions.”<sup>257</sup>

For present purposes, the Court’s behavior was striking in three respects. First, the Court repeatedly vacated stays or declined to issue stays, permitting the executions of *all* of the inmates to go forward, even though many of the cases involved undecided, important issues of federal law. Second, the Court did so without opinion or explanation (unlike in *Lee*), even when substantial issues were presented and lower courts had issued stays, presumably taking account of the *Bucklew-Lee* “extreme exception” standard. In this respect, the Court’s behavior during the Trump executions stands as the most prominent example of

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253. *Id.* at 2591.

254. *Id.*

255. See Kovarsky, *supra* note 243, at 638–658 (detailing the timeline of scheduled executions and method-of-execution challenges raised over the six-month period).

256. See generally *id.* at 638–56.

257. See generally *id.*

the Court's increasing reliance on the "shadow docket," in which the Court decides the rights of litigants without full briefing, oral argument, and in this context, any reasoned decision.<sup>258</sup> The Court's *overriding* of stays, in particular, left the litigants and the public at large without any direction regarding the defects in the inmates' applications or in the lower courts' decisions granting the stays (e.g., lack of merit in the underlying claims, procedural barriers to relief, "dilatatory" tactics in raising the claims, or something else).<sup>259</sup> Third, the Court took extraordinary steps to ensure that the final execution would be consummated before Trump left office. The inmate in that case, Dustin Higgs, raised an unusual and unresolved question about which state's execution method should apply, given the federal statutory "parity" provision and the fact that Maryland had abandoned the death penalty in the years following Higgs' sentencing.<sup>260</sup> The execution was scheduled for January 16, just days before President Trump would leave office. The Court of Appeals for the Fourth Circuit had agreed to resolve the question in an expedited manner, but the Supreme Court, on January 15, took the astonishingly rare step of granting certiorari "before judgment" to ensure that the execution could go forward on the scheduled date; in a short order lacking any explanation or legal analysis, the Court vacated the stay and remanded to the district court to designate Indiana as the controlling jurisdiction for choice of execution procedures.<sup>261</sup> The surrounding circumstances suggested strongly that the Court's recourse to this unusual procedure was intended to facilitate the execution before Joe Biden's inauguration as President, given that Biden's position on the death penalty rendered any post-January 20 execution dates precarious.<sup>262</sup> As Steven Vladeck observes in his

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258. See STEPHEN I. VLADECK, *THE SHADOW DOCKET* (forthcoming 2023) (detailing and lamenting the Supreme Court's use of a "shadow docket" to decide unresolved important questions of law without full briefing or argument).

259. See Kovarsky, *supra* note 243, at 673 (arguing that the Court's reliance on shadow-docket orders left questions about "whether the rulings were based on the merits, a harm assessment, an evolving presumption against end-stage relief, or something else").

260. *United States v. Higgs*, No. PJM 98-520, 2020 U.S. Dist. LEXIS 243757 (4th Cir. Dec. 29, 2020), *rev'd*, 141 S. Ct. 645 (2021).

261. *United States v. Higgs*, 141 S. Ct. 645 (2021).

262. See Kovarsky, *supra* note 243, at 667 ("The Supreme Court was protecting the inaugural margin because a sufficient number of Justices believed

comprehensive book on the shadow docket, “the Court had not just enabled the Trump executions in general; it had invented a brand-new shadow-docket procedure to allow the Trump Administration to execute one last prisoner on its way out the door.”<sup>263</sup>

As the Trump executions unfolded, it was plausible to chalk up the Court’s unprecedented deference/facilitation to its respect for a coordinate branch of the federal government and to the unique obstacles the federal government had experienced in carrying out executions over almost two decades. But that hypothesis was dispelled this year when the Court in a state case again vacated a stay of execution without explanation despite a strong underlying federal claim.<sup>264</sup> In *Hamm v. Reeves*,<sup>265</sup> a federal district judge held that an inmate had made a strong showing that Alabama had improperly interfered with his state-created right to choose his execution method and the equities favored a stay.<sup>266</sup> The Court of Appeals for the Eleventh Circuit unanimously sustained the injunction in a lengthy opinion after full briefing and argument.<sup>267</sup> In a one-sentence order, the Court vacated the stay and allowed the execution to proceed, with four Justices (including Justice Barrett) noting their disagreement.<sup>268</sup>

The new conservative majority seems committed to narrowing constitutional and statutory protections for death-sentenced inmates and to clearing obstacles to executions, with particular hostility toward end-stage litigation. Its implicit rejection of *Trop* represents a dramatic departure from the trajectory of the Court’s jurisprudence as elaborated by Justice Kennedy, which focused on evolving standards of decency and looked broadly to discern them. The Court’s hostility to end-stage litigation is less dramatic a shift,

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that the presidential transition threatened the federal government’s ability to carry out the executions.”).

263. VLADECK, *supra* note 258 (forthcoming).

264. *See Hamm v. Reeves*, 142 S. Ct. 743, 743 (2022) (vacating the district court’s stay).

265. *Reeves v. Dunn*, 580 F. Supp. 3d 1060 (M.D. Ala.), *rev’d sub nom.* *Hamm v. Reeves*, 142 S. Ct. 743 (2022).

266. *See Dunn*, 580 F. Supp. 3d at 1078 (determining that equities supported stay).

267. *See Reeves v. Comm’r*, 23 F. 4th 1308 (11th Cir.), *rev’d sub nom.* *Hamm v. Reeves*, 142 S. Ct. 743 (2022) (affirming the injunction).

268. *Hamm*, 142 S. Ct. at 743.

as the Court has not been a hospitable forum in this regard, but the Trump executions and *Reeves* suggest a broader strategy of facilitating executions and abandoning any deference to lower courts inclined to grant stays or entertain claims.<sup>269</sup>

#### *IV. The Path Forward: Abolition in Waiting*

For the foreseeable future, we will likely see a continuing divide between a Supreme Court largely hostile to the project of constitutional regulation of the death penalty and a reality on the ground that is nonetheless inhospitable to the robust use of the death penalty. Neither side of the equation shows any signs of imminent change. What does this scenario mean for the future of the American death penalty? In the short term, although the Supreme Court's aggressively anti-regulatory approach will speed executions in states that seek to move forward with them, the death penalty will nonetheless continue to dwindle across the country, because of the many forces—institutional, financial, and political—arrayed against it. Although nationwide abolition will almost certainly require constitutional action by the Supreme Court that will not be forthcoming anytime soon, we can expect continued dwindling, perhaps even dramatic diminishment, of the practice despite the Court's constitutional permissiveness. Such continued decline will lay the groundwork for a potential constitutional coup de grace by a future Court.<sup>270</sup> We can expect to live in what might be called “abolition in waiting” for the near-term future.

The Supreme Court's withdrawal from the field of robust constitutional regulation of the death penalty will have discernible effects on the shape and speed of the death penalty in states that seek to move forward with capital prosecutions and executions. As the Court's interventions to speed along the Trump administration's executions indicate, the Court will likely remain unreceptive to late-stage litigation—refusing to impose stays to

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269. See generally Hamm, 142 S. Ct. 743; see Kovarsky, *supra* note 243, at 662 n. 326 (highlighting the Supreme Court's move of vacating stays administered by lower courts).

270. See generally Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211 (2012).

permit litigation of late-arising federal constitutional claims as well as taking the more interventionist approach of lifting stays that lower courts may have imposed to facilitate the consideration of federal claims.<sup>271</sup> This antipathy to end-stage litigation will disproportionately affect claims that by their nature tend to arise late in the litigation process, such as claims of incompetence to be executed due to declining mental health on death row, claims regarding new, recently discovered evidence, and claims challenging execution methods or procedures.

In addition to its pronounced aversion to late-stage capital litigation, the Court will continue to police lower federal courts for insufficient deference to state court rulings in capital cases, as recent reversals of decisions by the Ninth and Six Circuits portend. In its 2020 decision in *Shinn v. Kayer*,<sup>272</sup> the Court reversed a Ninth Circuit ruling granting a capital defendant habeas relief on a claim of ineffective assistance of counsel.<sup>273</sup> The Court criticized the Ninth Circuit for insufficient deference under AEDPA to the state court's denial of the petitioner's claim, noting that the federal court should have framed "the relevant question as whether a fairminded jurist could reach a different conclusion."<sup>274</sup> The Court went on to explain that "the AEDPA framework" takes on "special importance" in claims involving ineffective assistance of counsel or other doctrines that involve "more general" rules and standards<sup>275</sup>. In such cases, "a state court has *even more* latitude to reasonably

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271. See Kovarsky, *supra* note 243, at 658 (2022) ("By the conclusion of the Trump Executions the Court established it would intervene aggressively against method-of-execution claims . . .").

272. See *Shinn v. Kayer*, 141 S. Ct. 517, 526 (2020) (holding that "fairminded jurists could not disagree with state court's determination that counsel's allegedly deficient performance was not prejudicial").

273. See *id.* (stating that the Ninth Circuit exceeded its authority in rejecting the state court's determination, "which was not so obviously wrong to be 'beyond any possibility for fair-minded disagreement'").

274. See *id.* at 524 (critiquing the panel's conclusion that "evidence presented to the [postconviction] court established the statutory mitigating circumstance of mental impairment and that there was a causal connection between Kayer's mental impairment and the crime" (citing *Kayer v. Ryan*, 923 F.3d 692, 723 (9th Cir. 2019))).

275. See *id.* at 523 ("We have recognized the special importance of the AEDPA framework in cases involving *Strickland* claims.").

determine that a defendant has not satisfied that standard.”<sup>276</sup> The following year, in *Mays v. Hines*,<sup>277</sup> the Court reversed a Sixth Circuit ruling granting habeas relief on ineffective assistance of counsel grounds, and in doing so shed light on the practical significance of the “fairminded jurist” standard.<sup>278</sup> The Court explained, “If this rule means anything, it is that a federal court must carefully consider all the reasons and evidence supporting the state court’s decision. After all, there is no way to hold that a decision was ‘lacking in justification’ without identifying—let alone rebutting—all of the justifications.”<sup>279</sup> Together, *Kayer* and *Hines* suggest that deference to state courts requires not only explanation of why a state court decision was unreasonable under AEDPA, but also a specific rebuttal of each of the state court’s arguments.<sup>280</sup>

In the short term, the current Court’s aggressive stance on end-stage litigation, coupled with its policing of AEDPA deference by the lower federal courts, will facilitate executions in states that seek to carry them out. Not every state that authorizes the death penalty falls into this category. Three states (California, Pennsylvania, and Oregon) have gubernatorial moratoria currently in place.<sup>281</sup> And even in states without moratoria, there are many that have not carried out executions in at least a

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276. *Id.* (emphasis added) (citing *Knowles v. Mirzayance*, 556 U.S. 111 (2009)).

277. *See Mays v. Hines*, 141 S. Ct. 1145 (2021) (holding that the postconviction court’s determination that trial counsel was not ineffective was not unreasonable).

278. *See id.* at 1149 (“[A] federal court may intrude on a State’s “sovereign power to punish offenders” only when a decision ‘was so lacking in justification . . . beyond any possibility for fairminded disagreement.’” (citing *Harrington v. Richter*, 562 U.S. 86 (2011))).

279. *See id.* (citing *Kayer*, 141 S. Ct. at 523).

280. *See id.* (stating that the majority failed to address the state court’s argument with regards to the “substantial evidence linking him to the crime” and failed to “engage with the dissent[‘s] recount[ing of] th[e] evidence” against *Hines*); *see also Shinn v. Kayer*, 141 S. Ct. 517, 524 (2020) (“Federal courts may not disturb the judgments of state courts unless “each ground supporting the state court decision is examined and found to be unreasonable.” (quoting *Wetzel v. Lamber*, 565 U.S. 520 (2012))).

281. *State by State*, DEATH PENALTY INFO. CTR. (2021) [perma.cc/XA25-FLZY].

decade—or in some cases much longer.<sup>282</sup> But other states, including Texas, Tennessee, and Missouri, have execution dates set for the current year and the apparent political will to move forward with them.<sup>283</sup> In states like these, executions will progress with little legal resistance from the federal courts and begin to thin the ranks of death row.<sup>284</sup>

The political will to carry out executions, however, does not entail the will or the ability to produce new death sentences to counteract the shrinkage of death row. Despite a current Court that seems intent on facilitating the practice of capital punishment, all indicators suggest that the dramatic decline of the death penalty will hold steady or even increase over time due to the durability of the many forces, surveyed above, that produced that decline.<sup>285</sup> The politics of the death penalty have profoundly shifted in recent decades, largely in response to concerns about cost and wrongful convictions. And the alternative sentence of life without possibility of parole gives prosecutors, juries, and the public more reason to be satisfied with life sentences even in heinous cases. None of these underlying conditions shows any sign of changing. Indeed, the cost of capital punishment has risen even faster in recent years in response to the skyrocketing price of lethal

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282. See *Executions by State and Year*, DEATH PENALTY INFO. CTR. (2020) (showing that Indiana, Kansas, Kentucky, Montana, Nevada, North Carolina, South Carolina, Utah, and Wyoming have not carried out an execution in at least 10 years) Wyoming's last execution was in 1992, and Kansas' was in 1965. [perma.cc/7YF8-HZWC]; see also *States With No Recent Executions*, DEATH PENALTY INFO. CTR. (updated May 11, 2022), (providing data on 36 states, plus 2 jurisdictions (District of Columbia and Military), with no death penalty or no executions in at least 10 years) [perma.cc/D2U9-NT4T].

283. *Death Row Information: Scheduled Executions*, TEXAS DEP'T OF CRIM. JUST., (last updated August 18, 2022) [perma.cc/22AK-4NM7]; Travis Loller, *Tennessee Sets 3 More Inmate Executions, Plans 5 in 2022*, ABC NEWS (Mar. 3, 2022) [perma.cc/E35L-Z94U]; see also Jim Salter, *Execution Set for Man Whose Sentence Was Overturned 3 Times*, AP NEWS (Feb. 2, 2022), ("The Missouri Supreme Court on Monday set a May 3 [2022] execution date for Carman Deck.") [perma.cc/3X8U-6RAP].

284. See Emily Olson-Gault, *Supreme Court "Guts" Case Law Protecting the Right to Counsel*, A.B.A. (May 22, 2022) ("A series of Court decisions over the decades . . . announced increasingly narrow interpretations of AEDPA, further restricting the ability of federal courts to hear claims of error.") [perma.cc/A2A9-6H7V].

285. See *supra* Part II. The Great Decline (describing the overlapping, mutually-reinforcing factors contributing to the decline in executions).



injection drugs.<sup>286</sup> As pharmaceutical companies increasingly have refused to permit the use of their drugs in executions, corrections departments have turned instead to compounding pharmacies to buy drugs for use in lethal injection.<sup>287</sup> The cost of these drugs have increased dramatically over the past decade.<sup>288</sup> For example, in 2014, it cost Virginia \$250 to receive drugs directly from pharmaceutical manufacturers.<sup>289</sup> In 2016, the state spent \$66,000 to obtain the drugs necessary for the next two executions.<sup>290</sup> Tennessee paid \$190,000 to acquire midazolam, vecuronium bromide, and potassium chloride between 2017 and 2020—a period during which only two executions took place.<sup>291</sup> In 2020, Arizona paid \$1.5 million for one thousand one-gram vials of pentobarbital sodium salt.<sup>292</sup> Because of the difficulty and high cost of obtaining drugs for lethal injections, some states are now turning to

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286. See Ronnie K. Stephens, *The Cost of Federal Executions in Trump's Last Year A Lingering Burden*, INTERROGATING JUST. (Feb. 11, 2021) (“Across the first five federal executions of 2020, the ACLU estimates that the total cost was close to \$4.7 million. This would mean that all 13 executions cost a total of \$11.7 million.”) [perma.cc/J3BN-3JQN].

287. See Alanna Durkin Richer, *Execution Costs Spike in Virginia; State Pays Pharmacy \$66K*, AP NEWS (Dec. 12, 2016) (reporting on a new law that will allow Virginia to “have the drugs made at a compounding pharmacy and shield its identity from the public”) [perma.cc/VZY3-94E5].

see also Sheila Burke, *Tennessee Supreme Court Upholds Lethal Injection Method*, AP NEWS (Mar. 29, 2017) (“Drugs used in lethal injections have become harder for states to secure because manufacturers have refused to sell them to prisons for executions.”) [perma.cc/7PEE-ASZ9]; see also *Arizona Finds Pharmacist to Prepare Lethal Injections*, AP NEWS (Oct. 27, 2020) (“Arizona and other states have struggled to buy execution drugs after U.S. and European pharmaceutical companies began blocking the use of their products in lethal injections.”) [perma.cc/8MP4-X2QR].

288. See *Weighing the Cost of the Death Penalty on Families and Taxpayers*, KOAA NEWS (last updated Feb. 28, 2022, 10:13 AM) (utilizing data reports from the Death Penalty Information Center to report on the rising costs of lethal injection drugs from \$83.55 in 2011 per dose, to \$16,500 per dose in states like Virginia) [perma.cc/4BC8-V8Q4].

289. See *Virginia's Lethal Injection Costs Set to Skyrocket to \$16.5K*, AP NEWS (Sept. 30, 2016) (noting that in the span of two years, the cost of the drug rose from slightly less than \$250 to \$16,500) [perma.cc/TPR6-XH8S].

290. Richer, *supra* note 287.

291. Ed Pilkington, *Revealed: Republican-led States Secretly Spending Huge Sums on Execution Drugs*, THE GUARDIAN (Apr. 9, 2021) [perma.cc/Q3WW-J4B3].

292. *Id.*

alternative methods of execution, which generates the additional costs of litigation challenges.<sup>293</sup>

Nor is there any sign of a reversal of the new demographics and politics of many urban centers that have brought progressive prosecutors into office in the very counties that produced the most death sentences in earlier eras. As many cities cease to produce death sentences in large quantities, it will fall to rural counties to replenish dwindling death rows. But while rural counties may still have the political will to seek death sentences, they often do not have the resources to fund the high costs of capital litigation.<sup>294</sup> And even when capital charges are sought despite their cost, the prosecution must square off against a substantially improved and more effective capital defense bar, a product of the training and institutional support generated during the previous two decades.<sup>295</sup> Finally, while the Supreme Court may not be recognizing new protections for capital defendants, legal challenges in state and lower federal courts to new lethal injection drugs and procedures, as well as to entirely new methods of execution, will continue to have the capacity to gum up the machinery of death.<sup>296</sup> Fewer death sentences and longer delays

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293. See Joseph Ax & Nate Raymond, *U.S. States Considering Alternative Execution Methods Face Legal Hurdles*, REUTERS (Apr. 19, 2017) (stating that executions methods, such as toxic gas or firing squads, may be a violation of the U.S. Constitution's ban on cruel and unusual punishment) [perma.cc/FFE4-EUND].

294. See Maurice Chammah, *The Price of Death: Why Capital Punishment Cases Are in Steep Decline, Even in Texas*, SLATE (Dec. 17, 2014, 8:00 AM) (“While many prosecutors are still reluctant to admit that finances play a role in their decisions about the death penalty, some of them—especially in small, rural counties—have been increasingly frank in wondering whether capital punishment is worth the price to their communities.”) [perma.cc/4ZUS-YNBB].

295. See *State Standards for Appointment of Counsel in Death Penalty Cases*, A.B.A. (May 2021) (providing “counsel appointment standards in states with the death penalty”) [perma.cc/9NW9-37UP]; see also *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 914, 939–43 (revised Feb. 2003) (providing guidance on Guideline 2.1—Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases, and supporting the Guideline with related standards and rationale from “national professional groups concerned with criminal justice issues”).

296. See, e.g., *New Brief: Ohio Governor Issues Three More Reprieve, Reschedules Executions for 2025*, DEATH PENALTY INFO. CTR. (Feb. 19, 2022) (reporting on the rescheduling of three 2022 Ohio executions to 2025 due to

will only underscore the inefficacy and cruelty of the death penalty, and invite further international criticism and isolation.<sup>297</sup>

Only one factor that contributed to the death penalty's massive decline has changed in recent years—the direction of the murder rate.<sup>298</sup> In the early years of the twenty-first century, public attention appeared to shift from a long-standing focus on domestic murders to new fears of international terrorism following the traumatic events of 9/11.<sup>299</sup> Domestic murder rates had been dropping since 1990 and continued to drop for most of the first two decades of the new millennium, further muting both public fear of “ordinary” murderers and the drumbeat of law-and-order politics.<sup>300</sup> However, in recent years, homicide rates have risen dramatically, logging a 30% increase in 2020—the largest annual increase on record.<sup>301</sup> The rate continued to rise in 2021 as well.<sup>302</sup> It remains to be seen whether this change is a blip or the beginning of a longer trend like the one that fueled punitive criminal punishment policies from the 1960s through the 1980s.<sup>303</sup> But even if the upward trend in murder rates persists for more than a brief

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“ongoing problems involving the willingness of pharmaceutical suppliers to provide drugs.”) [perma.cc/B4LF-SK47].

297. See generally U.N. DEP'T OF HUMAN RIGHTS, OFF. OF THE HIGH COMM'R, MOVING AWAY FROM THE DEATH PENALTY ARGUMENTS, TRENDS, AND PERSPECTIVES (2015).

298. See generally David A. Graham, *America Is Having a Violence Wave, Not a Crime Wave*, THE ATLANTIC (Sept. 29, 2021) [https://perma.cc/7XDG-84GG].

299. See generally Hannah Hartig and Carroll Doherty, *Two Decades Later, the Enduring Legacy of 9/11*, PEW RSCH. CTR. (Sept. 2., 2021) [https://perma.cc/T5JW-NHKR].

300. See Ames Grawert, *Crime Trends: 1990-2016*, BRENNAN CTR. FOR JUST. (Apr. 18, 2017) (“From 1991 to 2016, the murder rate fell by roughly half, from 9.8 killings per 100,000 to 5.3.”) [https://perma.cc/2CCH-7UTT].

301. See Graham, *supra* note 298 (“A historic rise in homicides in 2020—and continued bloodshed in 2021—has incited fears that after years of plummeting crime rates, the U.S. could be headed back to the bad old days, when a crime wave gripped the country from the 1970s to the 1990s.”).

302. *Id.*; see also Nicole Sganga, *Homicides in Major American Cities Increased in 2021, New Study Finds*, CBS NEWS (Jan. 26, 2022, 12:00 AM) (“Homicides in major American cities ticked up in 2021, with a 5% increase from 2020 and a 44% increase over 2019, according to a new analysis of crime trends released Tuesday by the Council on Criminal Justice (CCJ).”) [https://perma.cc/Y5CZ-WTZN].

303. See Robert B. Semple Jr., *Nixon Says He Kept Vows To Check Rise in Crime*, N.Y. TIMES (Oct. 16, 1972) (attributing the rise in crime in the 1960s to Nixon's political positions regarding punishment) [https://perma.cc/MV5U-8TT5].

period, it seems doubtful that such a change would be enough to counteract all of the other forces that currently inhibit the robust practice of capital punishment in the United States.

Thus, the current divergence between the Supreme Court and capital practices on the ground appears to be one that will continue for the foreseeable future—with a firm conservative majority friendly to the death penalty in control of the Court and durable circumstances inhospitable to the robust use of the death penalty widespread on the ground. What consequences might flow from this continuing divergence?

One possibility is a feedback loop between the Court's hostility to constitutional regulation and state or local practices on the ground. As noted above, when the Court intensified its constitutional regulation of capital representation and proportionality limits on the use of the capital sanction, we saw feedback loops on the ground that promoted better lawyering in capital cases and restricted the scope of the death penalty.<sup>304</sup> Just as constitutional regulation can produce a virtuous circle of improved procedures and restraint in the use of the death penalty, so might constitutional *de*-regulation encourage states to loosen their own oversight mechanisms for ensuring fairness and restraint in capital prosecutions. As some members of the Court appear willing to rethink the very foundations of the Eighth Amendment, perhaps some states will seek to revive practices that they had been forced to abandon in response to earlier, more expansive readings of the Eighth Amendment—for example, seeking to reauthorize the death penalty for the crime of raping (but not killing) a child.<sup>305</sup>

But as death rows shrink, and death sentences and executions become even rarer events, we might instead see a decline in the salience of the death penalty as a “hot button” political topic. The diminishing and increasingly geographically concentrated use of the death penalty will make it less pertinent to most people's lives

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304. See *supra* Part II. The Great Decline.

305. See *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (striking down under the Eighth Amendment Louisiana's law authorizing the death penalty for child rape).

and less of a “wedge issue” that is useful to politicians.<sup>306</sup> The bipartisan support for death penalty reform and abolition that has emerged in many jurisdictions over the past decade suggest the waning power of the issue as a litmus test for many politicians.<sup>307</sup> However, it is possible that rising homicide rates might prompt populist, “strong man” politicians to use the death penalty as shorthand for their strength and power—much the way Donald Trump did in the months leading up to his re-election bid. And there is always the possibility that some particularly heinous offense will revive interest in an otherwise flagging death penalty, temporarily elevating its salience locally or beyond.

Just as the waning of the practice of capital punishment on the ground may shift incentives for politicians, so too will the continued hostility of the Supreme Court to constitutional regulation of the death penalty shift incentives for advocates of reform and abolition. It is abundantly clear that the Supreme Court is not the place to seek or expect constitutional abolition or even robust enforcement of constitutional protections in capital cases for the foreseeable future. Thus, we should expect to see advocates shift their focus from federal constitutional litigation to other venues and modes of change. State constitutional litigation has proven to be a robust avenue for reform and abolition in recent years.<sup>308</sup> State legislatures have also proven increasingly willing to restrict or abolish the death penalty, as indicated by Oregon’s recent overhaul of its capital statute,<sup>309</sup> and by Virginia’s historic

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306. See *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Cost to All*, DEATH PENALTY INFO. CTR. (Oct. 1, 2013) (“Contrary to the assumption that the death penalty is widely practiced across the country, it is actually the domain of a small percentage of U.S. counties in a handful of states.”) [<https://perma.cc/PRD3-6E2F>].

307. See *The Emergence of Conservative Legislators and Thought Leaders as Proponents of Death-Penalty Abolition*, DEATH PENALTY INFO. CTR. (June 5, 2019) (noting that “capital punishment appears to have moved from its former status as a political wedge issue to a policy issue that is attracting bipartisan cooperation”) [<https://perma.cc/EJZ8-L8M3>].

308. See Carol S. Steiker & Jordan M. Steiker, *Little Furmans Everywhere: State Court Constitutional Intervention and the Decline of the American Death Penalty*, CORNELL L. REV. (forthcoming 2022).

309. See *Oregon Governor Signs Bill Narrowing Use of Death Penalty*, DEATH PENALTY INFO. CTR. (Aug. 2, 2019) (“Oregon Governor Kate Brown . . . on August 1, 2019 signed a bill significantly limiting the crimes for which capital punishment can be imposed in the state.”) [<https://perma.cc/2PB3-TRL3>].

abolition of the death penalty, the first state of the former Confederacy to do so.<sup>310</sup> Other potential avenues for advocates include seeking presidential or gubernatorial moratoria or clemency, judicial rule changes rather than constitutional litigation, the establishment of expert commissions, and/or public education campaigns.<sup>311</sup> While capital defense lawyers of course have an ethical obligation to pursue any and all constitutional challenges on behalf of their clients, we should nonetheless expect to see a shift in the attention and resources of nonprofit advocacy organizations toward alternatives to constitutional litigation in their strategic plans.<sup>312</sup>

However, in the long term, the only plausible path to achieve complete nationwide abolition in the United States remains federal constitutional abolition, given our federalist structure of government and the likelihood that some number of states will continue to authorize capital punishment even if they do not use it frequently.<sup>313</sup> As the death penalty continues to decline on the ground, it will set the stage for a future federal constitutional *coup de grace* under the Supreme Court's Eighth Amendment doctrine, which looks primarily to practices on the ground, as we have explained in detail elsewhere.<sup>314</sup> Ironically, the Court's current facilitation of executions may augment rather than diminish this groundwork, given that states that seek to conduct executions will face little constitutional friction and will be able to empty their death rows, but nonetheless lack the institutional and political will to fill them up again, changing the profile of the practice in the

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310. See Veronica Stracqualursi, *Virginia Governor Signs Historic Bill Abolishing Death Penalty into Law*, CNN (Mar. 24, 2021, 4:04 PM) (“Virginia . . . became the 23<sup>rd</sup> state to abolish the death penalty after Gov. Ralph Northam signed historic legislation into law that ends capital punishment in the commonwealth.”) [<https://perma.cc/H6HB-2VLU>].

311. See Fatimah Loren Muhammad, *Justice from Within: The Death Penalty and a New Vision for Criminal Justice through a Racial Justice Lens*, NONPROFIT QUARTERLY (Nov. 28, 2017) (detailing various modes of anti-death penalty advocacy including public information campaigns) [<https://perma.cc/US2T-REJ6>].

312. See *id.* (providing an example of a death penalty abolition nonprofit that is focused on racial justice conversations as strategy as opposed to a pure focus on Supreme Court litigation).

313. See STEIKER & STEIKER, *supra* note 4, at 271 (showcasing a blueprint for constitutional abolition of the death penalty).

314. See generally *id.* at 255–89.

future. Moreover, additional states may join Virginia in the abolitionist camp, and others may join the *de facto* abolitionist states that have not conducted an execution in a decade or more.<sup>315</sup> This continued diminishment not only will constitute “objective evidence” of “evolving standards of decency” under the Eighth Amendment,<sup>316</sup> but also will render the death penalty less efficacious in serving any purported purpose of punishment, such as deterrence or retribution. In a context of continuing diminishment, it will become increasingly more difficult, both as a policy matter and as a constitutional matter, to argue that the death penalty is a necessary punishment that meaningfully advances penological goals.

If and when a future Court becomes more receptive to a categorical constitutional challenge to the death penalty, however, it is possible that the underlying Eighth Amendment framework will have changed in the interim. As discussed above,<sup>317</sup> some members of the current Court have expressed skepticism about the “evolving standards of decency” standard that places so much emphasis on the shape and direction of current practices on the ground. Writing for the Court in the recent decision reinstating the death sentence of the Boston Marathon bomber, Justice Thomas made a point of raising a possible originalist challenge to current Eighth Amendment interpretations: “Some have argued that these cases [requiring the admission of all relevant mitigating evidence] and their progeny do not reflect the original meaning of the Eighth Amendment, whose prohibition ‘relates to the character of the punishment, and not the process by which it is imposed.’ Neither party here asks us to revisit that question and we decline to do so.”<sup>318</sup> This footnote will likely be read by state governments defending capital verdicts from constitutional challenge as an invitation to ask the Court for just such a revisiting of the meaning

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315. See *State by State Data*, *supra* note 8 (listing *de facto* abolitionist states).

316. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (applying Eighth Amendment proportionality doctrine that looks to objective evidence of evolving standards of decency to exempt those with intellectual disability from the death penalty).

317. See *supra* Part III. The New Divergence: Withering Practice, Diminished Regulation.

318. *United States v. Tsarnaev*, 142 S. Ct. 1024, n.1038 (2022) (internal citations omitted).

of the Eighth Amendment. But even if the current Court were to jettison some or all of the current Eighth Amendment framework, that would not stop a later Court from reinstating the earlier (current) understanding—especially in light of the fact that it has been the reigning paradigm for well over a half century. Any Court that would be open to a categorical constitutional challenge to the American death penalty would no doubt also be willing to first endorse (or reinstate) the longstanding “evolving standards of decency” Eighth Amendment framework.<sup>319</sup>

Regardless of what the current Supreme Court says or does, it is clear that on the ground, standards of decency are indeed evolving, as the death penalty’s dramatic decline of the past decades looks likely to continue well into the future. Under the reigning Eighth Amendment paradigm, constitutional law is being written—perhaps not in the ink of Supreme Court opinions, but inscribed through myriad changes in the practice of capital punishment across the country. We thus are living and will likely continue to live for the foreseeable future in a period of “abolition in waiting.” Unless there is some radical divergence from this path forward, the final destination is not in doubt. It may be a generation or more in the future, but it is more a question of “when” rather than “if” a categorical constitutional abolition will eventually be achieved.

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319. See *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (explaining the current Eighth Amendment framework that death penalty analysis must include consideration of contemporary values).