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Judicial Abolition of the American Death Penalty under the Eighth Amendment: The Most Likely Path

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INTRODUCTION: THE DECLINE OF THE AMERICAN DEATH PENALTY

Over the past fifty years, the death penalty has rapidly declined around the world. In 1965, only twenty-five countries were in the abolitionist camp.[1] By 2018, 106 countries had legally abolished the death penalty for all crimes, and another thirty-six countries were deemed "de facto" abolitionist by Amnesty International (reflected in part by not carrying out any executions over the past ten years).[2] The magnitude of the shift from majority retentionist to majority abolitionist jurisdictions does not capture the depth of the world's turn away from the death penalty, what is fairly characterized as a true "global movement toward the universal abolition of capital punishment."[3] During this turn, countries have increasingly viewed the death penalty not as a local issue of criminal justice policy but rather as an issue of fundamental human rights, with an imperative to end the practice through international advocacy and treaties. During this period, the United States came quite close to being on the early side of this global movement, having experienced an informal moratorium on executions for almost ten years (June 1967–January 1977), followed by what many thought at the time was the end of the American death penalty — the Supreme Court's invalidation of prevailing capital statutes in *Furman v. Georgia* 1972.[4] But state legislatures reasserted their commitment to the death

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[1] Richard Dieter, *Introduction: International Perspectives on the Death Penalty*, *in* Comparative Capital Punishment (Carol Steiker & Jordan Steiker eds., 2019).

[2] *Death Penalty in 2018: Facts and Figures*, Amnesty Int'l, www.amnesty.org/en/latest/news/2019/04/death-penalty-facts-and-figures-2018/ (last visited Sept. 26, 2019).

[3] Death Penalty Worldwide Int'l Human Rts. Clinic, Pathways to Abolition of the Death Penalty 2 (June 2016), www.deathpenaltyworldwide.org/pdf/pathways-english.pdf.

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

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penalty in response to *Furman*, the Court affirmed the basic constitutionality of the death penalty in 1976,[5] executions resumed in 1977, and the United States emerged as one of the world's leading executioners by the mid-1990s. The revitalization of the American death penalty, coinciding as it did with the marked decline of capital punishment in the rest of the world, led many to wonder what accounted for American exceptionalism — its emergence as the sole developed Western democracy with both the death penalty on the books and active execution chambers.

Over the past two decades, though, the American death penalty has experienced an enormous decline — mirroring the weakening of capital punishment around the world. Beginning with New York and New Jersey in 2007, nine states have abandoned the death penalty over the past twelve years — a seismic shift given that the most recent abolition (not triggered by a judicial decision) before 2007 was a half-century ago (1965).[6] Executions, too, have declined substantially, to about twenty-three executions per year nationwide from 2016 to 2018, down over seventy-five percent from the high of ninety-eight executions nationwide in 1999.[7] The most dramatic and important development, though, is the extraordinary decline in capital sentencing. Death sentences have dropped from their highs in the mid-1990s of more than 300 sentences per year to about forty death sentences per year nationwide from 2015 to 2018;[8] with only fourteen death sentences nationwide recorded by mid-year 2019,[9] the United States may see the fewest number of death sentences in the modern era of the American death penalty, stretching back to the early 1970s. Given the lag between death sentences and executions, death sentences are the "leading indicator" of American capital practice, and the prevailing historic lows in death sentencing suggest a significantly diminished presence of the death penalty going forward.

The declines in death sentencing and executions understate the extent to which the death penalty in the United States has become marginalized and confined to a very small number of states and counties: four states (Texas, Alabama, Georgia, and Florida) account for over seventy-five percent of all executions since 2016, and a slightly different combination of states (California, Florida, Ohio, and Texas) accounts for over half the death verdicts issued in that time.[10] Opinion polls reflect a significant decline in public support for capital punishment as well. In 1995, only

[5] Gregg v. Georgia, 428 U.S. 153 (1976).

[6] *State by State*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Sept. 26, 2019).

[7] *Executions by State and Region Since 1976*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 (last visited Sept. 26, 2019).

[8] *Death Sentences in the United States Since 1977*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year (last visited Sept. 26, 2019).

[9] *DPIC Mid-Year Review: At Midpoint of 2019, Death Penalty Remains Near Historic Lows*, Death Penalty Info. Ctr. (July 1, 2019), https://deathpenaltyinfo.org/news/dpic-mid-year-review-at-midpoint-of-2019-death-penalty-use-remains-near-historic-lows.

[10] *Death Sentences in the United States Since 1977*, *supra* note 8.

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thirteen percent of Americans polled by Gallup answered "no" to the question: "Are you in favor of the death penalty for a person convicted of murder," compared to forty-one percent who answered "no" in the two recent (2018, 2017) Gallup polls asking the identical question, an increase of over two hundred percent.[11] That level of opposition to the death penalty was last achieved in 1972, just before the Court's invalidation of prevailing statutes.[12]

Is the present weakening of the American death penalty a harbinger of abolition? American abolition of the death penalty will occur, if it does, through a judicial decision invalidating the practice as inconsistent with the Eighth Amendment. The current weakening of the death penalty has marginalized the death penalty to a handful of jurisdictions, but those jurisdictions — including Texas, Alabama, Florida — are unlikely to abolish in the near future. Even if Congress were to have an appetite to ban the death penalty (and there is no indication of the type of coordinated opposition among congressional and executive decision-makers necessary for such legislation), substantial doubts remain about the ability of Congress to use its powers under Article I or section 5 of the Fourteenth Amendment to preclude the use of the death penalty.

Judicial abolition became much less likely in the short term with the recent replacement of Justices Scalia and Kennedy with Justices Gorsuch and Kavanaugh. The significance of those replacements became clear in the Court's recent decision in *Bucklew v. Precythe*,[13] rejecting an as-applied challenge to Missouri's lethal injection protocol. In evaluating the inmate's claim, the Court began with its observation that the "Constitution allows capital punishment."[14] That observation was not new: in both of the Court's prior lethal injection cases, *Baze v. Rees*[15] and *Glossip v. Gross*,[16] the Court assumed that "because it is settled that capital punishment is constitutional . . . there must be a constitutional means of carrying it out."[17] It is fair to read *Baze* and *Glossip* as simply reflecting the holding in *Gregg v. Georgia*[18] that the death penalty remains consistent with "evolving standards of decency," the approach to Eighth Amendment analysis that the Court first embraced more than six decades ago in *Trop v. Dulles*.[19]

But Justice Gorsuch's majority opinion in *Bucklew* made clear, in a manner that *Baze* and *Glossip* did not, that the majority views the issue of the death penalty's constitutionality as essentially foreclosed by the text and history of the Constitution. Justice Gorsuch cites the language in the Fifth Amendment "expressly contemplat

[11] *Death Penalty*, GALLUP, https://news.gallup.com/poll/1606/death-penalty.aspx (last visited Sept. 26, 2019).
[12] *Id.*
[13] 139 S. Ct. 1112 (2019).
[14] *Id.* at 1122.
[15] 553 U.S. 35 (2008).
[16] 135 S. Ct. 2726, 2732–33 (2015).
[17] *Id.* (quoting *Baze*, 553 U.S. at 47).
[18] 428 U.S. 153 (1976).
[19] 356 U.S. 86 (1958).

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[ing] that a defendant may be tried for a 'capital' crime and 'deprived of life' as a penalty," as well as the fact that the First Congress "made a number of crimes punishable by death."[20] On these grounds, Justice Gorsuch insists that although states may choose to abandon the death penalty, "the judiciary bears no license to end a debate reserved for the people and their representatives."[21] *Bucklew*'s approach to the constitutionality of the death penalty is an implicit assault on the Court's longstanding proportionality analysis, which the Court has deployed in striking down the death penalty as applied to persons with intellectual disability,[22] juveniles,[23] and offenders convicted of non-homicidal crimes against persons (including the rape of a child).[24] *Bucklew* suggests strongly that the current majority would not be inclined to evaluate the constitutionality of the death penalty in the same manner as it evaluated those particular practices by assessing current indicia of societal support. Nonetheless, *Bucklew* is not an enormous obstacle to a future Court revisiting the constitutionality of the death penalty: the constitutionality of the death penalty was not contested in *Bucklew* and the case is not fairly read to overrule *sub silentio* the *Trop* framework, which was decisive to numerous Court holdings (whereas *Bucklew*'s discussion of the constitutionality of the death penalty is plainly dictum).

If the Court were to revisit the constitutionality of the American death penalty, what would judicial abolition look like? On this score, there is a surprising disconnect between the concerns that have animated growing discontent about the American death penalty and prevailing capital doctrines. In particular, it is unlikely that the Court would invalidate the death penalty based on its racially discriminatory imposition, the risk (or demonstrated presence) of wrongful convictions or executions, or its denial of human dignity. Each of these concerns has played a significant role in catalyzing opposition to the death penalty. Concerns about the death penalty's racially discriminatory administration led to the initial efforts by the NAACP Legal Defense Fund (LDF) in the 1960s to challenge the practice. Concerns about wrongful convictions brought a new circumspection about capital punishment in the late 1990s, contributing significantly to the drop in public support (and in capital sentencing). The argument that capital punishment is inconsistent with human dignity is by far the most frequently voiced ground for abolition around the world. Yet each of these arguments would encounter formidable jurisprudential obstacles as stand-alone grounds for constitutional abolition of the death penalty. The first section of this chapter will examine those obstacles, and the next section will discuss the more likely path to judicial abolition — the Court's

[20] Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019).
[21] *Id.* at 1123.
[22] Atkins v. Virginia, 536 U.S. 23 (2002).
[23] Roper v. Simmons, 543 U.S. 551 (2005).
[24] Kennedy v. Louisiana, 554 U.S. 407 (2008).

proportionality doctrine — as well as the subsidiary role concerns about race, wrongful convictions, and human dignity might play within that doctrine.

JURISPRUDENTIAL OBSTACLES TO INVALIDATION OF THE DEATH PENALTY BASED ON RACE, WRONGFUL CONVICTIONS, OR INCOMPATIBILITY WITH HUMAN DIGNITY

Many problems haunt the American death penalty. Capital trial lawyers are often underfunded, poorly trained, and insufficiently committed to their clients. Prosecutors routinely fail to comply with basic ethical duties in capital litigation, particularly their responsibility to disclose exculpatory information to the defense. Death-row incarceration has become increasingly cruel, as most states have gravitated toward solitary confinement as the sole means of incarcerating death-row inmates, a problem exacerbated by mental health challenges among the death-row population and the length of time between sentencing and execution. Clemency has all but disappeared as a check on the fundamental justice of capital sentences. But three concerns stand out as especially vexing, having plagued the American death penalty since its inception: the role of race discrimination in the application of the death penalty, the proneness of the capital system to error, and the incompatibility of capital punishment with fundamental conceptions of human dignity. Despite the compelling nature and urgency of these concerns, the Court has marginalized them within constitutional discourse, making them unlikely stand-alone grounds for constitutional abolition of the death penalty.

Race

Race discrimination has played an outsized role in the American death penalty from the colonial period to the present day. During the antebellum period, Southern capital codes explicitly made the death penalty's availability turn on the race of the accused and the victim.[25] Modes of execution were more draconian for African-American offenders.[26] After the conclusion of the Civil War and the passage of the Fourteenth Amendment, racial discrimination continued despite the command of equal protection of the laws. In many parts of the country but particularly the South, African Americans were effectively precluded from serving as jurors in capital trials (despite the Court's rejection of formal discrimination in state juror qualifications[27]), and disparate treatment was the norm in all aspects of capital litigation — in charging decisions, trials, appeals, and executive clemency. In the period spanning

[25] Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi. L. Rev. 243, 245–46 (2015).
[26] *Id.* at 246.
[27] Strauder v. West Virginia, 100 U.S. 303 (1880).

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the Civil War to the Depression, discriminatory capital trials were sometimes better than the alternative, as the specter of lynching often cast a shadow over the proceedings. Cases involving accusations of black-on-white crime were often litigated swiftly and without a pretense of process, earning the sobriquet "legal lynchings." During the twentieth century, the role of race discrimination was particularly evident in rape prosecutions, as the vast majority of those executed for rape were African-American defendants convicted of raping white victims.

Concerns about race discrimination in capital cases prompted the Legal Defense Fund to lead the effort against the death penalty in the 1960s. As part of its effort, the LDF enlisted Marvin Wolfgang, an eminent sociologist, to document the discriminatory application of the death penalty in the South. Wolfgang's empirical study ultimately served as the basis of a constitutional challenge to the use of the death penalty in rape cases in Arkansas.[28]

In *Maxwell v. Bishop*,[29] then-Judge Harry Blackmun, writing for a panel of the U.S. Court of Appeals for the Eighth Circuit, rejected the claim of race discrimination and expressed deep skepticism about the possibility of the defendant ever prevailing on the basis of statistical showings of statewide racial discrimination.[30] The U.S. Supreme Court, though it agreed to hear Maxwell's appeal of the panel's denial of federal habeas relief, declined to grant review of his race discrimination claim — one of many occasions in which the Supreme Court declined to address directly claims of race discrimination in the administration of the death penalty.[31] Indeed, when the Court ruled almost a decade later that the death penalty was excessive as applied to the crime of rape, it selected the case of a white defendant as a vehicle for its decision and made no mention of race — though it was plainly aware of the evidence of longstanding race discrimination in capital rape cases.[32]

When the Court invalidated prevailing statutes in *Furman* based largely on the death penalty's unpredictable and unprincipled administration, the opinions supporting the judgment generally avoided discussing race discrimination directly, instead referring euphemistically to broader concerns about "arbitrariness" in the American capital system.[33] After the Court upheld several of the new capital statutes enacted post-*Furman*, the LDF again sought to document the role of race in a Southern capital jurisdiction, this time in Georgia's post-*Furman* regime. Eventually, the Supreme Court addressed an extensive empirical study by the Baldus group finding a significant role of race — particularly the race of victims — in the

[28] Steiker & Steiker, *supra* note 25, at 255–57.

[29] 398 F.2d 138 (8th Cir. 1968).

[30] *Id.* at 148 ("We are not certain that, for Maxwell, statistics will ever be his redemption.").

[31] Steiker & Steiker, *supra* note 25, at 265. Justice Douglas alone offered a sustained critique of the operation of racial discrimination within the American death penalty. *See* Furman v. Georgia, 408 U.S. 238, 249–50 (1972) (Douglas, J., concurring).

[32] *Id.* at 273–77 (discussing the Court's choice of a white defendant and avoidance of race in *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion)).

[33] *Coker*, 433 U.S. at 584.

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distribution of capital verdicts in Georgia. The Court rejected the constitutional claim in *McCleskey v. Kemp*.[34]

The most striking aspect of *McCleskey* is the fact that the Court assumed for the purposes of its decision that the Baldus study was methodologically sound.[35] An early draft of Justice Powell's majority decision had criticized the study and left open the possibility that stronger evidence of the role of race in capital sentencing might justify relief; but Justice Scalia objected to this approach in a memorandum, insisting that he did not want to pretend that more "proof" of the role of irrational prejudice, including racial prejudice, would change the outcome.[36] Instead, at Justice Scalia's urging, the majority opinion concluded that statistical evidence of racial discrimination is insufficient to establish a constitutional violation under either the Eighth Amendment or the Fourteenth Amendment's guarantee of equal protection.

The Court's decision seemed to rest on its view of the disruptiveness of a contrary holding. The Court recognized that discretion inevitably invites arbitrariness, including race discrimination,[37] and that the Court's individualization doctrine *requires* states to afford significant discretion in the capital context. Accordingly, the Court seemed to suggest (as Justice Scalia stated explicitly in his memorandum) that a demand that capital sentencing be free of racial influences was unrealistic and incompatible with its continued retention.[38] Moreover, the Court feared that the successful use of statistical evidence in the capital context might threaten the administration of non-capital punishments, given that the Eighth Amendment applies "to all penalties."[39]

Apart from these concerns, the Court was likely influenced by several other considerations. If it were to entertain challenges based on statistical studies, the Court would have to decide the difficult question of how much racial influence on capital sentencing is constitutionally unacceptable, a determination that itself would be arbitrary. The Court would also have to decide upon an appropriate remedy. Given that the most powerful finding of the Baldus study was the unwillingness of prosecutors and jurors to produce death sentences in minority victim cases, it is not at all clear that exempting offenders with white victims from the death penalty

[34] 481 U.S. 279 (1987).

[35] *Id.* at 291 n.7.

[36] Justice Antonin Scalia, *Memorandum to the Conference Re: No. 84-6811*-McCleskey v. Kemp (Jan. 6, 1987), *available at* Library of Congress, Thurgood Marshall Papers, *McCleskey v. Kemp* file ("Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof.").

[37] *McCleskey*, 481 U.S. at 312.

[38] *Id.* at 319 ("As we have stated specifically in the context of capital punishment, the Constitution does not place totally unrealistic conditions on its use." (internal quotation marks and citation omitted)).

[39] *Id.* at 315.

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(as the Court was asked to do in *McCleskey*) is responsive to the underlying discrimination; it does little to address the indifference to minority victims that produced the disparate results. And the Court lacks the power to command prosecutors to seek, and jurors to return, death verdicts in minority victim cases. More generally, these sort of line-drawing and remedial problems underscore why the Court is much more comfortable making *procedural* rather than *substantive* interventions as it regulates capital punishment. Most of the Court's decisions focus on structuring the capital decision-making process and the duties of the various institutional actors (prosecutors, defense attorneys, judges). The Court's jurisprudence is designed to reduce arbitrariness and discrimination, but it has never sought — outside a set of proportionality decisions restricting the death penalty's application to certain offenders and offenses — to regulate capital outcomes directly.

McCleskey is a formidable obstacle to challenging the continued use of the death penalty based on its racially-discriminatory administration. The Court's justifications for refusing relief to an individual defendant based on systemic racial discrimination would likely be invoked in a case globally challenging the continued use of the death penalty. Moreover, *McCleskey*'s seeming indifference to the quantity and quality of evidence demonstrating the influence of race in capital sentencing was self-consciously designed to foreclose race-based challenges in the future. Simply put, from the Court's perspective, a decision rejecting the death penalty as racially discriminatory would have too much disruptive potential by opening the door to challenges to a host of racially skewed American criminal justice practices — including disparate policing policies, fees and fines, and the severity of non-capital sentences.

Innocence

Concerns about the possibility of wrongful convictions and executions are likely as old as the death penalty. Some countries in the abolitionist camp were motivated in part to abolish because of high-profile wrongful convictions (as in the case of the United Kingdom following the execution and subsequent exoneration of Timothy Evans). In the United States, such concerns surfaced in some of the most famous capital prosecutions of the twentieth century, including in the cases of Leo Frank, Sacco and Vanzetti, and the Rosenbergs. But concerns about wrongful convictions reached a new level of urgency in the late 1990s, as advances in technology facilitated more accurate testing of DNA evidence.[40] As the technology was applied to preserved genetic material in criminal cases, numerous inmates — including some death-sentenced inmates — were found to have been wrongly convicted.[41]

[40] 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, 594–95 (2005).

[41] *Id.*

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Even though most criminal cases lack available genetic material for testing, the sudden technological shift prompted a growth industry in uncovering error in the criminal justice system, reflected in the establishment of "Innocence Projects" dedicated exclusively to such efforts. The most dramatic spate of exonerations occurred in Illinois, where the discovery of more than a dozen wrongly death-sentenced inmates produced a firestorm of popular and political outcry. In 2000, Illinois Governor George Ryan declared a moratorium on executions, which was followed three years later by his decision to commute the death sentences of all inmates on the state's death row. The Illinois legislature subsequently abolished the death penalty.

The revelation that capital verdicts could be returned with some frequency against innocent defendants shook American confidence in the death penalty. The "exoneration" phenomenon, brought home to the wider public through both journalistic and artistic efforts (including stage and film productions of "The Exonerated"), seemed to significantly shift public discourse around the death penalty. Beginning in the early 2000s, death-sentencing rates began to plummet, dropping below two hundred sentences a year in 2001, and below one hundred sentences a year by 2011.[42] Support for the death penalty in the Gallup poll fell below seventy percent in 2000 (having never been below that number in the 1990s), and support fell to sixty-one percent by 2011.[43] By 2006, executions fell below forty-five a year for the first time since 1994, and they have remained below forty-five every year since 2010.[44] Within two decades of the high-profile exonerations in Illinois, numerous states repealed their capital statutes, with concerns about innocence in the forefront of the public debates of repeal.

Despite its power to move public opinion, the fear of wrongful convictions has had little traction in shaping the constitutional jurisprudence around the death penalty. Since the Court "constitutionalized" capital punishment law in the 1970s, it has crafted numerous doctrines regulating capital practices, including jury selection, the use of aggravating and mitigating factors to guide sentencer discretion, the essential duties of counsel in preparing for the punishment phase, and so on. But the Court has resisted any special protections to guard against the possibility of executing innocents. In the early 1990s — before the spate of exonerations in Illinois—the Court was confronted in *Herrera v. Collins*[45] with a claim of innocence by Leonel Herrera, a death-sentenced inmate in Texas. After Herrera had been convicted and sentenced to death, his attorneys discovered new evidence of his innocence, including the statement of his brother's attorney that the brother had confessed to the murder underlying Herrera's death sentence. Prevailing Texas

[42] *Death Sentences in the United States Since 1977*, *supra* note 8.
[43] *Death Penalty*, *supra* note 11.
[44] *Facts about the Death Penalty*, Death Penalty Info. Ctr., https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1568209571.pdf (last updated Sept. 11, 2019).
[45] 506 U.S. 390 (1993).

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procedural rules, though, like those of other states at the time, precluded revisiting any criminal verdict (including a death verdict) based on new evidence of innocence unless such evidence was discovered and presented within thirty days of trial. In federal habeas proceedings, Herrera argued that the refusal of the state courts to consider new evidence of innocence in a capital case violated the Constitution, and that the federal court should address his evidence to determine whether he had been wrongly convicted. The Court of Appeals for the Fifth Circuit denied the claim, stating that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."[46]

Herrera filed a petition for certiorari raising the question of whether the Constitution prohibits the execution of an innocent person. Chief Justice William Rehnquist, writing for the Court, suggested strongly that the Constitution does not mandate relief based on post-trial evidence of actual innocence, even in a capital case; he insisted that as a matter of longstanding practice, the appropriate forum for such claims is executive clemency. Ultimately, the Court left open whether a "truly persuasive demonstration of 'actual innocence' made after trial" in a capital case might require judicial relief.[47] In the quarter decade since Herrera's claim was rejected, though, the Court has never embraced the proposition that courts are obligated to provide a forum to vindicate claims of actual innocence, even to prevent a wrongful execution.

Herrera suggests strongly that the Court would not invalidate the death penalty based on concerns of wrongful conviction or execution. If the Constitution does not afford a remedy to an individual inmate based on demonstrated innocence in his own case, it seems unlikely that capital punishment as a practice would be deemed unconstitutional based on fears of a pervasive *risk* of error within the capital system. Indeed, when a federal district judge invalided the federal death penalty based on such fears (in the wake of the exonerations of the late 1990s),[48] that decision was promptly reversed by the Court of Appeals for the Second Circuit.[49] Though several Justices have lamented the failure of the Court to develop a jurisprudence responsive to the discovery of wrongful capital convictions,[50] the Court shows no signs of reversing course. Individual wrongful executions do not currently violate the Constitution, and systemic error — even in capital cases — appears to be an unlikely standalone basis for judicial abolition of the death penalty.

[46] *Id.* at 398.
[47] *Id.* at 417.
[48] United States v. Quinones, 196 F. Supp. 2d 416, (S.D.N.Y. 2002).
[49] United States v. Quinones, 313 F.3d 49 (2d Cir. 2002).
[50] Kansas v. Marsh, 548 U.S. 163, 207–08 (2006) (Souter, J., joined by Justices Stevens, Ginsburg, & Breyer) ("Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests.").

The Court's reluctance to shape its doctrine in response to wrongful convictions is likely rooted in many of the same concerns as its reluctance to police systemic race discrimination. Here, too, the Court confronts the difficult problem of quantifying the level of intolerable error. What percentage of inaccurate verdicts (or executions) renders the death penalty unconstitutional? Would a high rate of error in one jurisdiction call for the abolition of the death penalty in other jurisdictions? Moreover, there is the additional question of what counts as a "wrongful" conviction or execution. Is a conviction "wrongful" when an inmate can establish a reasonable doubt in later proceedings? Or is it wrongful only when an inmate can *prove* his innocence? And, if an affirmative showing is required, what quantum of proof is required (must an inmate establish his innocence by a preponderance of the evidence or beyond a reasonable doubt)? As the questions make clear, the difficulty in structuring a doctrine around the problem of wrongful conviction mirrors the problems of remedy in the race context: without a clear baseline of acceptable results in capital cases, it is hard to conclude that a particular jurisdiction (or the nation as a whole) has crossed the constitutional line.

Human Dignity

The belief that the death penalty violates human dignity has fueled the remarkable and unprecedented global movement of death penalty abolition over the past four decades. This belief is reflected in the European Union's insistence on death penalty abolition as a condition of membership, confirming that Europe no longer views the death penalty as a mere policy choice but as a basic issue of human rights. It is also reflected in the Vatican's opposition to capital punishment, with its 2007 declaration that the death penalty is an "affront to human dignity."[51] In the United States, too, opponents of the death penalty are likely motivated by their view that the death penalty creates an unacceptable relation between the state and its people and that executing offenders is intrinsically (not simply instrumentally) wrong. But American discourse around the death penalty has gravitated away from human dignity concerns. Part of the reason for this turn away from human dignity is the desire to build a winning coalition against the death penalty. Opponents of the death penalty are more likely to convert supporters by noting problems with its administration (such the risk of error or the extravagant costs associated with capital trials and subsequent appeals) than by insisting on the fundamental wrongness of the practice. The shift in emphasis is reflected in contemporary efforts of opponents to "repeal" the death penalty rather than "abolish" it, as they seek to avoid the

[51] *Vatican Says Death Penalty Is "Affront to Human Dignity,"* Death Penalty Info. Ctr. (Feb. 19, 2017), https://deathpenaltyinfo.org/news/vatican-says-death-penalty-is-affront-to-human-dignity.

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moralistic overtones of "abolition" (with the connotation that the end of capital punishment is rooted in a moral imperative akin to the end of slavery).

But the diminished presence of human dignity concerns in popular capital punishment discourse rests as well on a pragmatic assessment of the Court's unwillingness to reject the death penalty based on such concerns. Throughout its history, the Court has been underwhelmed by the proposition that the death penalty is by its nature unconstitutionally cruel. When New York embraced electrocution as its means of execution, and the method was challenged under the Eighth Amendment, the Court insisted that capital punishment is not cruel in the constitutional sense so long as it does not involve "something more than the mere extinguishment of life."[52] When a subsequent effort to electrocute a prisoner in Louisiana failed, and the inmate sought to prevent the state from attempting to electrocute him a second time (what was derided as "death by installments"), the Court rejected the claim, announcing that "[a]ccidents happen for which no man is to blame," and "[t]he traditional humanity of Anglo-American law" forbids only "unnecessary pain in the execution of the death sentence."[53] Even when the Court took up the question of the sustainability of the death penalty in its landmark decision in *Furman*, the five Justices who voted to invalidate prevailing statutes seemed to strain to avoid addressing whether the death penalty is incompatible with human dignity. Instead, the opinions in that case focused primarily on a variety of pragmatic considerations, including the death penalty's arbitrary administration, its lack of a proven deterrent effect, its cost, and the potential brutalization effect of executions.[54] Only Justice William Brennan spoke at length about the basic morality of the death penalty, claiming that capital punishment necessarily amounts to a "denial of the executed person's humanity."[55] Since *Furman*, the Court has been preoccupied with policing specific state practices rather than confronting whether the death penalty itself is fundamentally wrong. Accordingly, there are essentially no doctrinal building blocks for a judicial decision invalidating the death penalty as violative of human dignity.

RACE, INNOCENCE, AND CRUELTY AS CONTRIBUTORS TO CONSTITUTIONAL ABOLITION UNDER THE EIGHTH AMENDMENT

Despite the difficulties faced by arguments based on race, innocence, and cruelty as stand-alone constitutional challenges, these widespread concerns have played a powerful role in generating skepticism about the death penalty, both in and outside of the courts. Several Supreme Court Justices have announced their support for constitutional abolition based on some combination of these concerns, as have other

[52] *In re* Kemmler, 136 U.S. 426, 447 (1890).
[53] Louisiana v. Resweber, 329 U.S. 459, 462–63 (1947) (plurality opinion).
[54] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 362–63 (1972) (Marshall, J., concurring).
[55] *Id.* at 290 (Brennan, J., concurring).

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federal judges. State court judges, as well as other state actors such as governors and legislators, have also based decisions to reform, restrict, or repeal the death penalty on such concerns. More broadly, the general public's appetite for executions and new death sentences has diminished in response to media reports about these endemic problems, especially exonerations of people wrongfully convicted and sentenced to death. It is unlikely that race, innocence, or cruelty will be the central focus of a constitutional ruling that ends the American death penalty, as we believe that such a decision, if it ever comes, is more likely to be rooted in the Supreme Court's Eighth Amendment proportionality doctrine. However, these three issues will help create the conditions for an ultimate proportionality challenge and also play a supporting role within that doctrinal structure.

Changing Hearts and Minds in the Federal Courts

Some of the most dramatic moments in the past two decades of "the Great American death penalty decline"[56] have been statements from members of the nation's highest court to the effect that the death penalty no longer comports with the U.S. Constitution. In their Eighth Amendment analyses, these Justices elaborated on what they viewed as the most important dysfunctions of prevailing capital practices, with special attention to concerns about race, innocence, and/or cruelty.

Justice John Paul Stevens joined the Court in late 1975, just in time for the 1976 revival of the death penalty in *Gregg v. Georgia*,[57] merely four years after the Court had constitutionally invalidated all prevailing capital statutes.[58] Justice Stevens was one of the three Justices who authored the influential plurality opinion in *Gregg* that upheld a new generation of reformed capital statutes, and for decades thereafter, he was a reliable member of a centrist coalition on the Court that sought to reform the death penalty rather than to abolish or deregulate it. But thirty-two years after he joined the Court, Justice Stevens had seen enough. Invoking his extensive exposure to death penalty cases over the years, Justice Stevens concluded in 2008 in *Baze v. Rees* that the death penalty categorically violates the Eighth Amendment, though he continued to vote to uphold executions as a matter of *stare decisis*.[59]

Justice Stevens' concurring opinion in *Baze* provided a lengthy list of problems with the American death penalty and failures of the Court's decisions to adequately address those problems. Justice Stevens began by describing the death penalty's diminishing contributions to its penological rationales of deterrence and retribution.

[56] *See* Brandon L. Garrett, End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice 79 (2017) (describing the "remarkable decline" in the use of the death penalty in the United States since the late 1990s).

[57] 428 U.S. 153 (1976).

[58] *See* Furman v. Georgia, 408 U.S. 238 (1972).

[59] *See* Baze v. Rees, 553 U.S. 35, 86–87 (2008) (Stevens, J., concurring in judgment).

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He then moved on to procedural issues, listing four primary concerns, three of which addressed either racial discrimination or innocence. As for discrimination, Justice Stevens acknowledged that the risk of discriminatory application of the death penalty had been "dramatically reduced," but lamented that "the Court has allowed it to continue to play an unacceptable role in capital cases."[60] As for innocence, Justice Stevens critiqued precedents that he believed increased the risk of error in capital cases by "placing a thumb on the prosecutor's side of the scales."[61] But what he declared to be of "decisive importance" was the irrevocable nature of the death penalty, given the "risk of executing innocent defendants."[62]

Less than a decade later in 2015, Justice Stephen Breyer wrote a lengthy, empirically supported dissent in *Glossip v. Gross*,[63] joined by Justice Ruth Bader Ginsburg, urging the Court to take up the constitutionality of the death penalty under the Eighth Amendment. Although Justice Breyer stopped just shy of unequivocally declaring the death penalty unconstitutional, his opinion left no doubt where he stood. Like Justice Stevens before him, Justice Breyer emphasized both innocence and race as among the most important problems in the administration of the death penalty. With regard to race, Justice Breyer canvassed studies documenting the influence of race on the imposition of the death penalty under the broader rubric of "arbitrariness," which the Court's precedents have long identified as violating the Eighth Amendment.[64] Unlike Justice Stevens, Justice Breyer did not treat racial discrimination as distinctive or focus his attention primarily on the Court's decision in *McCleskey*, which rejected an Eighth Amendment challenge based on proven racial disparities in capital sentencing. Rather, Justice Breyer considered studies about the influence of race in capital cases alongside of studies about the influence of gender, geography, and the availability of resources for defense counsel. Ultimately, Justice Breyer echoed Justice Stevens in referencing his long experience with capital cases, though he widened his lens to include multiple sources of arbitrariness: "The studies bear out my own view, reached after considering thousands of death penalty cases . . . over the course of more than 20 years. I see discrepancies for which I can find no rational explanations."[65]

Also similar to Justice Stevens, Justice Breyer placed strong emphasis on concerns about innocence. He marshaled extensive social science research suggesting that the

[60] *Id.* at 85 (critiquing the Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987).
[61] *Id.*
[62] *Id.* at 85–86. Despite the fact that he expressed concerns about the cruelty of the lethal injection protocol at issue in *Baze*, Justice Stevens did not list the cruelty of the death penalty among his reasons for its categorical unconstitutionality. Rather, he invoked the very *lack* of cruelty of most current execution methods as a reason to find the death penalty unconstitutional — because it no longer could be thought to serve retributive ends by mirroring the defendant's own wrongdoing. *See id.* at 80–81.
[63] Glossip v. Gross, 135 S. Ct. 2726 (2015).
[64] *Id.* at 2759 (Breyer, J., dissenting).
[65] *Id.* at 2763.

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risk of error in capital cases is substantial and in fact greater than the risk of wrongful conviction in non-capital cases. In considering what constitutes a wrongful conviction, Justice Breyer once again widened his lens and included "individuals who may well be actually innocent *or* whose convictions (in the law's view) do not warrant the death penalty's application."[66] Although he acknowledged that the research and figures he presented were "likely controversial," Justice Breyer argued that they "suggest a serious problem of reliability" and that their very contestability was an argument in favor of full briefing of the question before the Court.

Finally, Justice Breyer also focused on the cruelty of the death penalty in terms of the suffering of the condemned, an issue that Justice Stevens had omitted from his categorical constitutional analysis. Although Justices Breyer and Ginsburg both joined Justice Sonia Sotomayor's dissent from the Court's constitutional validation of Oklahoma's lethal injection protocol, Justice Breyer focused his concerns about cruelty not on prevailing modes of execution but rather on excessive delays between sentence and execution. Explaining that extraordinarily lengthy stays on death row are common, Justice Breyer emphasized the "dehumanizing effect" of solitary confinement (which nearly all death penalty states use for death row prisoners) and the "horrible feelings" of uncertainty that death row inmates endure over the years as they await execution.[67] Justice Breyer also argued that excessive delays undermine the death penalty's primary penological rationales of deterrence and retribution, rendering the suffering of the condemned "patently excessive" and "gratuitous."[68]

In an unusual move, Justice Breyer published his dissent in *Glossip* as a book entitled *Against the Death Penalty*, edited and introduced by law professor John Bessler and published by Brookings Institution Press.[69] This decision reflects the view that a wider audience than readers of U.S. Reports would be interested in the arguments and empirical information presented in Justice Breyer's dissent. This view finds support in the broad swath of people, among both institutional actors and the general public, who appear to have been moved by many of the same concerns that animated Justice Breyer.

Justice Antonin Scalia derided Justice Breyer's *Glossip* dissent by declaring "Welcome to Groundhog Day,"[70] a reference to the film in which a newscaster lives through the same day over and over again. Justice Scalia sarcastically described the Court's "long-running drama" in which new Justices "take[] on the role of the abolitionists."[71] But Justice Scalia's mockery is telling about the traction that the kinds of arguments marshaled by Justice Breyer have had. Justices Breyer, Ginsburg,

[66] *Id.* at 2759(emphasis added).
[67] *Id.* at 2765 (internal quotation marks and citation omitted).
[68] *Id.* at 2771 (quoting the Court's opinions in *Gregg* and *Furman*).
[69] Stephen Breyer, Against the Death Penalty (John D. Bessler ed., 2016).
[70] Glossip v. Gross, 135 S. Ct. 2726, 2746 (2015) (Scalia, J., concurring).
[71] *Id.* at 2747.

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and Stevens represent only the latest in a longer line of Supreme Court Justices who have declared the death penalty categorically unconstitutional,[72] and they almost certainly will not be the last. Lower federal court judges, too, have begun to respond to the dysfunctions of the American capital justice system with opinions questioning or invalidating the federal death penalty. Judge Jed Rakoff was the first of such judges, who struck down the federal death penalty in 2002 on the ground that it created "an undue risk of executing innocent people."[73] Although his decision was reversed on the merits by the Second Circuit Court of Appeals, concerns about innocence and other problems in the administration of the death penalty have continued to reverberate. In 2016, Judge Geoffrey Crawford took the unusual step of holding a two-week hearing on the constitutionality of the federal death penalty, explicitly citing Justice Breyer's dissent in *Glossip* as raising serious constitutional concerns about the practice of capital punishment. Although Judge Crawford concluded that a federal trial judge "is without authority to rewrite the law so as to overrule the majority position at the Supreme Court,"[74] he nonetheless noted that "a trial court has its own contribution to make to the debate."[75] By holding hearings and permitting witnesses to testify, Judge Crawford added to Justice Breyer's empirical record, tracking the same four categories (unreliability, arbitrariness, excessive delay, and decline in use of the death penalty) that Justice Breyer used to organize his *Glossip* dissent. Although Judge Crawford believed that he lacked institutional authority to invalidate the federal death penalty, he nonetheless concluded that "the [] findings and the fuller record of the hearing conducted before the court substantiate the questions and the criticism expressed in the *Glossip* dissent."[76]

Influencing Death Penalty Decisions in the States

Concerns about race, innocence, and cruelty also have had tremendous influence on state governmental actors — influence that has driven the steep decline in death sentences and executions over the past decades. This influence is seen not only in state courts, but also across all branches of state government.

At the judicial level, the two most recent state supreme court decisions declaring the death penalty unconstitutional under state constitutional law relied either substantially or exclusively on concerns about racial discrimination and innocence. In contrast to the U.S. Supreme Court's rejection of an Eighth Amendment challenge to the death penalty based on patterns of racial disparities, the Washington

[72] *See* Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 How. L.J. 525 (2009) (describing the repeated phenomenon of Supreme Court Justices concluding that the death penalty is unconstitutional after years of observing it from the bench).
[73] United States v. Quinones, 205 F. Supp.2d 256 (S.D.N.Y. 2002).
[74] United States v. Fell, 224 F. Supp.3d 327, 328 (D. Vt. 2016).
[75] *Id.* at 329.
[76] *Id.* at 358.

State Supreme Court in 2018 declared its state's death penalty unconstitutional solely on the ground that it was administered "in an arbitrary and racially biased manner."[77] The court relied on a statistical study that demonstrated that black defendants were four and a half times more likely to be sentenced to death than similarly situated white defendants. In 2015, the Connecticut Supreme Court declared its state's death penalty unconstitutional in a sweeping opinion that relied on concerns about both racial discrimination and innocence, among other issues.[78] That decision, too, relied upon a statistical study demonstrating racial discrimination in the imposition of the death penalty within the state, as well as upon more general studies of the problems of racial discrimination and wrongful conviction in the administration of the death penalty, citing Justice Breyer's opinion in *Glossip*, among other sources.

State governors have been motivated the most by concerns about innocence — most likely because they often have the power to prevent the consummation of a death sentence with an execution and thus often bear direct responsibility for the execution of those who may have been wrongfully convicted. Republican Governor George Ryan of Illinois most dramatically responded to these concerns by granting mass clemency to all of the state's 167 death row inmates in 2003, after a spate of condemned prisoners were exonerated, some at the last minute.[79] Most recently, Governor Gavin Newsom of California early in 2019 declared a moratorium on executions in that state — which is home to the country's largest death row of more than seven hundred condemned prisoners — for as long as he holds office. Newsom cited a variety of problems in the administration of the California death penalty, but he emphasized that "most of all, the death penalty is absolute, irreversible and irreparable in the event of a human error."[80]

The problems of error and racial discrimination are also routinely aired in legislative hearings that culminate in the repeal of state capital statutes. For example, when Illinois repealed its death penalty in 2011, that decision was deeply marked by the exonerations and mass commutations that preceded it, reflecting the fact that, in former Governor Ryan's words, the state's death penalty system was "haunted by the demon of error."[81] When Maryland abolished the death penalty in 2013, its capital statute was the narrowest in the country, and it had only five people on death row — but four of the five were black men whose victims had been white. Governor Martin O'Malley, a former prosecutor and mayor of Baltimore, explained that his reasons

[77] State v. Gregory, 427 P.3d 621 (Wash. 2018).
[78] State v. Santiago, 122 A.3d 1 (Conn. 2015).
[79] *See* Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. Times, Jan. 12, 2003, www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html.
[80] Scott Shafer & Marisa Lagos, *Gov. Gavin Newsom Suspends Death Penalty in California*, NPR Morning Edition, Mar. 11, 2019.
[81] *See How the Death Penalty Was Abolished in Illinois*, Chicago Trib., May 15, 2018, www.chicagotribune.com/news/ct-met-illinois-death-penalty-timeline-gfx-20180514-htmlstory.html.

for signing the repeal bill into law included that the death penalty "cannot be administered without racial bias" and that "there is no way to reverse a mistake if an innocent person is put to death."[82]

Even some locally elected district attorneys who have donned the mantle of progressive prosecution have questioned the death penalty. When Aramis Ayala, the first black person elected prosecutor in Florida, announced that she would refuse to seek the death penalty in her county, she based her decision on standard law enforcement grounds of cost and ineffectiveness. However, the president of the Florida NAACP greeted Ayala's decision as a step toward racial justice, stating, "A powerful symbol of racial injustice has now been discarded in Orange County."[83] Philadelphia District Attorney Larry Krasner, a former public defender, has mounted a categorical challenge to the Pennsylvania death penalty under the state constitution on the grounds that it has been imposed in an "unreliable" and "arbitrary" fashion.[84] Krasner's brief relies heavily on a study by his office that analyzed the 155 cases in which death sentences were imposed in Philadelphia between 1978 and 2017. The District Attorney's Office study revealed "troubling data" regarding the race of the Philadelphia defendants currently on death row, eighty-two percent of whom are black, and ninety-one percent of whom are members of a minority group.[85] Krasner's brief also invokes the findings of the Pennsylvania Supreme Court's Committee on Racial and Gender Bias, which concluded that there were "strong indicators that Pennsylvania's capital justice system does not operate in an evenhanded manner."[86]

Cruelty, whether of execution methods or lengthy stays on death row, is less commonly offered as a rationale from public officials for abolishing or limiting the death penalty. However, concerns about botched executions have led some chief executives to study or halt executions. For example, in the wake of the apparently torturous execution of Clayton Lockett in Oklahoma in 2016, Oklahoma Governor Mary Fallin ordered an independent review of the execution, and then-President

[82] Joe Sutton, *Maryland Governor Signs Death Penalty Repeal*, CNN, May 2, 2013, www.cnn.com/2013/05/02/us/maryland-death-penalty/index.html.

[83] Frances Robles & Alan Blinder, *Florida Prosecutor Takes a Bold Stand against Death Penalty*, N.Y. Times, Mar. 16, 2017, www.nytimes.com/2017/03/16/us/orlando-prosecutor-will-no-longer-seek-death-penalty.html. Ayala's refusal to seek the death penalty evoked pushback from the governor of Florida, who took the controversial step of removing her from capital cases in her county. The controversy ultimately led Ayala to decline to seek reelection in 2019. *See* Monivette Cordeiro & Jeff Weiner, *Aramis Ayala Won't Seek Re-election as Orange-Osceola State Attorney; Belvin Perry May Enter Race*, Orlando Sentinel, May 28, 2019, www.orlandosentinel.com/news/breaking-news/os-ne-aramis-ayala-no-re-election-run-orange-osceola-state-attorney-20190528-z65rv7rmqjdqfoyxsd6rp6junu-story.html.

[84] *See* Commonwealth's Br. for Respondent, Cox v. Commonwealth of Pennsylvania, No. 102 EM 2018, July 15, 2019, at i.

[85] *Id.* at 3, 5.

[86] *Id.* at 48–49 (citing Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Judicial System 201 (Mar. 2003)).

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Barack Obama ordered a study of the federal death penalty, specifically referencing the events in Oklahoma.[87] In Ohio, Republican Governor Mike DeWine ordered a series of reprieves for death row prisoners while a new execution protocol is developed after an Ohio magistrate judge likened the use of midazolam in the state's lethal injection process to "waterboarding."[88] More generally, as other contributions to this volume describe in more detail, the intensive litigation over execution protocols and the increasing unavailability of lethal injection drugs have slowed or stopped executions in many states across the country.[89] Arguments about cruelty may not top the list of rationales that public officials offer for decisions to restrict or repeal the death penalty, but the controversy over lethal injection protocols has nonetheless played a substantial role in limiting the pace of executions over the past two decades.

Declining Public Appetite

General public support for the death penalty has declined significantly over the past two and a half decades in response to some of the same concerns that have moved judges and public officials, reaching lows not seen since the early 1970s.[90] In particular, public opinion polls show that people are especially concerned that the death penalty is unfair because "sometimes an innocent person is executed."[91] In the period following the so-called DNA revolution of the late 1990s, which produced a spate of exonerations through new technology, the percent of the public that reported concerns about wrongful conviction in the capital context more than doubled, moving from eleven percent to twenty-five percent.[92] But concerns about racial discrimination and cruelty seem to play less of a role in public skepticism about the death penalty. Indeed, one study showed that white respondents favored the death penalty *more* rather than less if they believed it was imposed in a racially discriminatory manner.[93] And families of murder victims sometimes evince

[87] *See* Corinna Barrett Lain, *The Politics of Botched Executions*, 49 RICH. L. REV. 825, 838–39 (2015); Eyder Peralta, *Oklahoma Governor Calls for Review of Botched Execution*, NPR NEWS, Apr. 30, 2014.

[88] *See* Jessie Balmert, *Ohio Gov. Mike DeWine Delays 3 More Executions after Judge Compares Method to "Waterboarding,"* CINCINNATI ENQ., Mar. 7, 2019, www.cincinnati.com/story/news/politics/2019/03/07/ohio-governor-delays-3-more-executions/3091289002/.

[89] *See generally* Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, NEW YORKER, May 21, 2016, www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs (describing the increasing unavailability of lethal injection drugs and the litigation surrounding lethal injection protocols).

[90] *See Death Penalty*, *supra* note 11.

[91] GARRETT, *supra* note 56, at 91.

[92] *Id.*

[93] Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 1001 (2007).

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disappointment that current methods of execution are relatively painless,[94] a view that may extend past those immediately impacted by heinous crimes.

It is difficult to determine how much and in what ways waning public support has contributed to the dramatic decline in the use of the death penalty over the past two decades. It is unlikely that changes in public attitudes about the death penalty translate directly into jury verdicts in capital cases, because capital juries are "death qualified" to remove prospective jurors who have serious reservations about capital punishment. Rather, public opinion likely affects the discretionary decision-making of institutional actors through ordinary politics — through the election of state and local officials, including governors, legislators, prosecutors, and often judges as well. Thus, whatever public opinion may show about changes in public attitudes over time, it seems fair to view the statements and actions of public officials as reasonably reliable proxies for attitudes of the general public among their constituents, especially on an issue with as much emotional salience as the death penalty.

Constitutional Abolition under the Eighth Amendment

Despite the retentionist views of the current Republican presidential administration and the conservative majority on the U.S. Supreme Court, we continue to believe that a categorical constitutional abolition of the death penalty under the Eighth Amendment will eventually occur if recent trends in death penalty practices continue (or even merely stabilize) on the ground. For the reasons elaborated above, we think it is unlikely that such an Eighth Amendment ruling will be premised on race, innocence, or cruelty as a stand-alone rationale for constitutional abolition. Rather, we think the most likely route to constitutional abolition is through application of the Court's Eighth Amendment proportionality doctrine.[95] In sketching the likely contours of a proportionality ruling abolishing the death penalty, we nonetheless see a role for concerns about race, innocence, and cruelty — in both creating the conditions on the ground that will permit a proportionality challenge to succeed and in bolstering the doctrinal analysis.

Just one year after the Court reauthorized capital punishment in 1976, it issued its first proportionality limitation on the scope of the death penalty, ruling that a sentence of death was constitutionally excessive for the crime of the rape of an adult woman.[96] In the more than forty years since, the Court has continued to

[94] *See* Joan Bundy, *Should the Condemned Suffer through Painful Executions? Victims' Families Torn*, Associated Press, July 28, 2014, www.masslive.com/news/2014/07/should_the_condemned_suffer_th.html.

[95] For an elaboration of the constitutional path that we predict, see Carol S. Steiker & Jordan M. Steiker, Courting Death: The Supreme Court and Capital Punishment 255–89 (2016).

[96] *See* Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion).

restrict the scope of the death penalty under the Eighth Amendment, declaring it unconstitutional for some offenders convicted of felony murder as accomplices who did not themselves kill,[97] for offenders with intellectual disability,[98] for juvenile offenders,[99] and for offenders convicted of any interpersonal crimes other than murder.[100] In doing so, the Court has developed an elaborate proportionality analysis under the Eighth Amendment, a doctrine that it has even exported from the capital context to apply to the imposition of sentences of life without possibility of parole (LWOP) on juvenile offenders — reasoning that LWOP is like capital punishment in that it is the most severe punishment that may constitutionally be imposed on juveniles.[101]

The basic structure of the Court's Eighth Amendment proportionality doctrine is simple, despite numerous refinements wrought by repeated application over the years. The analysis has two parts. First, the Court considers "objective evidence" that a challenged punishment practice violates the Eighth Amendment by running afoul of "evolving standards of decency."[102] Such evidence tends to focus on the extent to which the challenged practice is permitted by state legislatures, invoked by prosecutors, and actually imposed by juries and judges. Second, the Court brings its "own judgment" to bear on the question of proportionality.[103] In doing so, the Court primarily addresses whether the challenged practice adequately advances the twin penological goals of capital punishment (deterrence and retribution). In every case in which the Court has either invalidated or upheld a practice under its proportionality doctrine, it has found that both parts of the analysis have pointed in the same direction, so it is not clear what would happen should "objective evidence" and the Court's "own judgment" diverge.

The issues of race, innocence, and cruelty have a dual role to play in supporting an eventual categorical constitutional challenge to the death penalty under the Eighth Amendment. First, as elaborated above, these concerns have played a substantial role in driving the tremendous decline in the use of the death penalty over the past two decades. Given the centrality of "objective evidence" that societal views about a practice have changed to the Court's proportionality analysis, the rising number of legislative repeals and the declining number of executions and new death sentences will be of crucial importance in a categorical challenge to capital punishment under the Eighth Amendment. Unfortunately, the problems of

[97] *See* Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982).
[98] *See* Atkins v. Virginia, 536 U.S. 304 (2002).
[99] *See* Roper v. Simmons, 543 U.S. 551 (2005).
[100] *See* Kennedy v. Louisiana, 554 U.S. 407 (2008).
[101] *See* Miller v. Alabama, 567 U.S. 460 (2012) (holding that mandatory LWOP is constitutionally excessive for juvenile homicide offenders); Graham v. Florida, 560 U.S. 48 (2010) (holding that LWOP is constitutionally excessive for juvenile offenders convicted of non-homicide crimes).
[102] *See, e.g.*, *Atkins*, 536 U.S. at 312.
[103] *Id.*

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discrimination, wrongful conviction, and cruel suffering in the use of the death penalty have not been and are not likely to be substantially ameliorated by policy reform, so it seems probable that the declines in the use of capital punishment that have resulted from such concerns are not a mere temporary blip but rather a more enduring feature of death penalty practice. Thus, concerns about race, innocence, and cruelty will likely continue to play an important role in creating the conditions that make the death penalty vulnerable to a categorical Eighth Amendment proportionality challenge.

Second, there is some room for direct consideration of the issues of race, innocence, and cruelty within the Court's proportionality doctrine — not as freestanding claims, but as part of the considerations that the Court addresses under the rubric of bringing its "own judgment" to bear. The issue of innocence, in particular, has been invoked by the Court on more than one occasion with regard to its "own judgment." For example, the Court raised the concern that offenders with intellectual disability might be wrongfully convicted or sentenced to death because of the difficulties that their disability would likely raise in the investigation and trial contexts, concluding that such defendants "face a special risk of wrongful execution."[104] Similarly, the Court raised the concern that offenders charged with child rape might be wrongfully convicted because of manipulation of child witnesses, noting "the special risks of unreliable testimony with respect to this crime."[105] In this way, evidence of a heightened risk of wrongful conviction in capital cases more generally may play a role in the Court's doctrinal evaluation of the constitutionality of the death penalty under the Eighth Amendment. As for concerns about racial discrimination, they may enter the Court's proportionality analysis through the Court's consideration, under its "own judgment," of whether the death penalty promotes the goal of retribution. If death sentences are imposed on the basis of arbitrary or invidious characteristics of the offender such as race and ethnicity, then by definition, the death penalty is not being imposed according to offenders' just deserts and thus runs afoul of the core principle of retributive justice. Evidence of racially discriminatory patterns in capital sentencing is directly relevant to whether the death penalty meets retributive goals *as practiced*, rather than in abstract theory. Finally, concerns about the cruelty of modes of execution or lengthy stays on death row have a less obvious place in the Court's doctrine. However, as Justice Breyer explained in his *Glossip* dissent, excessive delays make the death penalty unable to deliver on its deterrent and retributive promises and thus render the suffering of prisoners on death row gratuitous and excessive.[106]

[104] *See id.* at 321.
[105] *See Kennedy*, 554 U.S. at 444.
[106] *See supra* text accompanying notes 63–68.

The Court's proportionality doctrine represents both the most established and the most capacious avenue for a categorical constitutional challenge to the death penalty under the Eighth Amendment. Such a challenge would build on and incorporate the concerns about racial discrimination, wrongful conviction of the innocent, and excessive cruelty that are prevalent in public discourse and that have deeply influenced the trajectory of death penalty practices in recent decades.