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The Rise, Fall, and Afterlife of the Death Penalty in the United States

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Abstract

This review addresses four key issues in the modern (post-1976) era of capital punishment in the United States. First, why has the United States retained the death penalty when all its peer countries (all other developed Western democracies) have abolished it? Second, how should we understand the role of race in shaping the distinctive path of capital punishment in the United States, given our country's history of race-based slavery and slavery's intractable legacy of discrimination? Third, what is the significance of the sudden and profound withering of the practice of capital punishment in the past two decades? And, finally, what would abolition of the death penalty in the United States (should it ever occur) mean for the larger criminal justice system?

INTRODUCTION

In the forty-plus years since the US Supreme Court temporarily invalidated and then reinstated the American death penalty (a period referred to as the modern era of the nation's death penalty), the practice of capital punishment has had the trajectory of a roller coaster. For more than two decades, from the 1970s through the 1990s, the use of the death penalty soared: Legislatures passed new statutes reinstating capital punishment and expanded preexisting statutory schemes; juries returned increasing numbers of death sentences; and states executed increasing numbers of inmates, reaching highs not seen since the 1950s. After the turn of the millennium, however, the use of the death penalty went into a steep dive, marked by a spate of legislative repeals, state judicial invalidations, and gubernatorial moratoria, as well as by stunning declines in death sentencing and execution rates across the country.

The turbulent recent course of the American death penalty has provoked both public debate and scholarly engagement. This review addresses four key issues that have received sustained attention: why the United States retained the death penalty when all of its peer countries (all other developed Western democracies) have abolished it; how we understand the role of race in shaping the distinctive path of capital punishment in the United States, given our country's history of race-based slavery and slavery's intractable legacy of discrimination; the significance of the sudden and profound withering of the practice of capital punishment in the past two decades; and, finally, what abolition of the death penalty in the United States (should it ever occur) would mean for the larger criminal justice system.

CAPITAL PUNISHMENT AND AMERICAN EXCEPTIONALISM

Once the Supreme Court reinstated capital punishment in *Gregg v. Georgia* (1976) and accompanying cases after having constitutionally invalidated it in *Furman v. Georgia* (1972), the death penalty saw an extraordinary resurgence in the United States. By the mid-1990s, hundreds of new death sentences were being imposed each year, and dozens of inmates were being executed, with a sentencing peak of 315 in 1996 and an execution peak of 98 in 1999 (Death Penal. Inf. Cent. 2019). As remarkable as this revival was in sheer numerical terms, it was especially striking in light of the fate of the death penalty in the rest of the developed West. At the same time that increased use of the death penalty was gaining momentum in the United States, abolition of the death penalty was gaining momentum among the countries that the United States considers its closest peers (Hood & Hoyle 2015). This divergence with respect to capital punishment echoed a larger divide in criminal justice practices. In the decades after 1970, the United States saw a massive rise in its incarceration rate relative to its Western democratic cohort and to its own recent past, such that the United States achieved and continues to maintain the highest per capita incarceration rate in the world (Whitman 2003).

These developments prompted scholars from a variety of fields to explore the reasons for the striking divergence of the United States from its international peers. The resulting scholarly assessments range broadly, offering a diverse set of explanations for what many have called American exceptionalism with regard to crime policy in general and capital punishment in particular (Reitz 2018). These explanations tend to be rooted in long-standing and distinctive features of American culture and political, economic, and legal institutions. To fully and persuasively explain the unusual trajectory of criminal justice and capital punishment practices in the United States, however, such accounts need to be connected to more contemporary events, given that the divergence of the United States from its international cohort is of relatively recent vintage. Furthermore, with regard to capital punishment in particular, explanations of American exceptionalism need to account

for both the precipitous rise and startling fall of the American death penalty over the past 40 years as well as for the noteworthy involvement of the US Supreme Court in the recent American death penalty story.

Which distinctive features of the United States best account for its exceptional criminal justice and capital punishment practices? Some accounts emphasize deep and long-standing cultural commitments. For example, legal historian James Whitman (2003) locates the primary roots of American divergence from Europe in historical practices that reach back to the mid-eighteenth century. In the early modern era in Europe, Whitman argues, high-status and low-status offenders were treated differently with regard to criminal punishment, with milder and more dignified punishments (such as relatively privileged confinement and beheading) reserved for aristocrats and harsher and more degrading punishments (such as forced labor, mutilation, and hanging) inflicted on the common people. But as liberalization and democratization began to take hold in the modern era, continental European countries such as France and Germany extended the use of dignified punishments to all, essentially leveling up acceptable punishment practices. By contrast, in the United States, egalitarianism involved eliminating all forms of high-status treatment, thus leveling down punishment practices and leading to a generalized use of harsh sanctions and an embrace of degradation as an acceptable or even essential element of punishment. Whitman thus traces the current broad divide in punishment practices between the United States and its peers to the gradual emergence of differing norms of status equality.

A more multifactored but similarly long-range account is offered by criminologist Michael Tonry (2009, p. 381), whose empirical work has found that moderate penal policies and low imprisonment rates are associated with "low levels of income inequality, high levels of trust and legitimacy, strong welfare states, professionalized as opposed to politicized criminal justice systems and consensual rather than conflictual political cultures." In explaining how the United States ended up at the more punitive pole of each of these metrics, Tonry theorizes that the answer lies in American cultural and political values—in particular, in four factors that Tonry (2009, p. 390) calls "the paranoid strain, Protestant fundamentalism, governmental structure and patterns of racial hierarchy." By paranoid strain, Tonry means to describe a Manichean style of American politics in which whatever is opposed is construed as evil and therefore eradicable by any means. Tonry connects Protestant fundamentalism to intolerance and xenophobia and gives historical examples of Protestant fundamentalist support for the activities of the Ku Klux Klan, McCarthyism, and moralistic crusades against drugs and crime. The governmental structures Tonry sees as most implicated in crime policy are the federalism commanded by the Constitution, the widespread state practices of electing prosecutors and judges, and winner-take-all electoral systems, which together result in the politicization of criminal justice policy. Finally, in explaining the role of patterns of racial hierarchy, Tonry notes the persistent racially disparate impact of criminal justice policies in the United States, concluding that long-standing racial hostility and insensitivity led to an indifference to the massive human costs of punitive crime control policies in the United States. To explain the sturdy persistence of these distinctively American cultural and political values, Tonry reaches far back in history: "Big ideas about American history, including the Puritanism and intolerance of the first settlers, ideals of individualism and libertarianism associated with the frontier and the early slavery-based Southern economy, no doubt need to be woven into the answers" (Tonry 2009, p. 390).

A less cultural and more structural account is offered by law professor Nicola Lacey, who emphasizes the importance of prevailing structures of political economy, as well as associated differences in political systems, to explain penal policy differences (Lacey 2008). Lacey contrasts two polar modes of political economy in contemporary democracies. On the one hand, the coordinated market economy (CME) invests in education and job training because it depends on

stability and long-term relationships; it "incorporates a wide range of social groups and institutions into a highly co-ordinated governmental structure" (Lacey 2008, p. 58). On the other hand, the liberal market economy (LME) is more individualistic, less regulatory, and less dependent "on the sorts of co-ordinating institutions which are needed to sustain long-term economic and social relations" (Lacey 2008, p. 59). Lacey argues that because CMEs benefit more from the reintegration of offenders into society and the economy, they are less likely to opt for harsh punishments that make such reintegration more difficult. Conversely, LMEs are more likely to produce surplus unskilled labor and thus more likely to tolerate or even welcome harsh, exclusionary penal policies. Lacey notes that these two types of economies are associated empirically with different political systems as well. CMEs are associated with systems of proportional representation, whereas LMEs tend to have first-past-the-post, winner-take-all electoral systems. In the latter type of electoral system, the pursuit of floating, median voters allows for single-issue campaigns, whereas proportional, parliamentary political systems tend to insulate candidates from such pressures. Lacey also notes a second political difference that is associated empirically with the two types of economies: the degree of deference accorded to the expertise of the professional bureaucracy. In CMEs, criminal justice officials tend to be long-term, career civil servants whose social status is high, whose expertise is respected, and who operate within a more insulated and less politically polarized environment. By contrast, the same officials in LMEs more often face either direct electoral accountability or strong pressure to defer to the political needs of the elected leaders whom they serve.

The difference in emphasis among these representative accounts of American exceptionalism in criminal justice policy writ large is echoed in more focused accounts of American exceptionalism with regard to capital punishment. Criminologist Franklin Zimring (2003) roots American divergence from European abolition in the distinctive culture of lynching and vigilante justice that prevailed in some parts of the United States more than a century ago. Looking specifically at execution rates (rather than formal retention of the death penalty or even death-sentencing rates), Zimring demonstrates a strong association between a jurisdiction's history of vigilante conduct in the early twentieth century and its propensity to conduct executions in the 1980s and 1990s. Zimring explains this connection by noting the radical degovernmentalization of the death penalty in the United States—the way in which capital punishment has been symbolically transformed from a sovereign act to one done by and on behalf of victims and communities (Zimring 2003). Contemporary executions thus echo the enactment of vigilante violence in earlier eras, at least in American communities with deeply ingrained histories of such vigilante practices, which include many states in the American South. Zimring contrasts this American reinvention of the meaning of capital punishment to the European contemporary turn toward seeing capital punishment as an issue about the limits of state power and international human rights. In his account, the deep divergence between these two diametrically opposed discourses explains the divide in practices across the Atlantic.

In contrast to Zimring's primarily cultural account, sociologist David Garland (2010) emphasizes the relative weakness of the American state. Although acknowledging the role of distinctive American cultural commitments in its death penalty practices, Garland highlights the way in which cultural dispositions are mediated through institutional and political structures. In particular, Garland underscores how limits on federal power devolved authority over capital punishment to local political communities. American constitutional federalism is a substantial part of the story, but Garland (2010, p. 155) contends that the relative weakness of the American nation-state was "economic and logistical as well as political." The institution of chattel slavery limited the federal government's powers to tax and to monopolize the legitimate use of force because slave states' resistance to federal power led to less regulated markets and less centralized law enforcement. In

Garland's account, this vacuum of state power at the center helped to create powerful localism and populism in the United States. It is these institutional and political features that undergird and interact with other features of American society and culture to shape capital punishment practices—features such as lack of social solidarity and conflict among social groups, particularly along the lines of race; high levels of interpersonal violence, especially in the South; and dispositions toward antistatism, individualism, and religiosity, among other things.

All of these varying accounts of American exceptionalism with regard to criminal justice and capital punishment practices have a degree of surface plausibility. But for any account to be persuasive, it needs a connection to contemporary events, given that the divergence of the United States from its peers is of relatively recent vintage (Garland 2018, Steiker 2005). Accounts that are rooted in the history of previous centuries, established political or economic structures, or deep cultural predispositions are not necessarily wrong, but they need to be supplemented with explanations of how those features became salient in the decades after 1970, when the phenomenon of American penal and capital exceptionalism emerged.

There is no shortage of such supplemental contemporary accounts, which themselves diverge in terms of emphasis. One set of accounts highlights the importance of race, particularly in the South, in promoting American exceptionalism (Alexander 2010, Kirchmeier 2015, Ogletree & Sarat 2006, Vandiver 2018). These accounts directly connect America's history of slavery, lynching, and Jim Crow to support for harsh criminal and capital punishment in the decades that followed the Civil Rights Movement. This long and ignoble history engendered the Republican Party's successful Southern strategy—its deliberate use of crime as a racially coded wedge issue to draw conservative Southern Democrats (so-called Dixiecrats) away from their historical allegiance to the Democratic Party (Alexander 2010). This strategy was first formulated in the 1960s, but its dynamic persisted powerfully for decades and played out especially dramatically in the death penalty context. The face of Willie Horton, a black man charged with the rape and murder of a white woman, became a powerful focal point in the 1988 presidential campaign of Texas Republican George H.W. Bush against Massachusetts Democrat Michael Dukakis, who famously flubbed a televised debate by asserting that his opposition to the death penalty would not waver even if his own wife were raped and murdered. In the next election cycle, then-Governor Bill Clinton of Arkansas made a point of returning to his home state during his presidential campaign to be present for the execution of a mentally disabled black man sentenced to death for killing a white police officer. Racial history may also continue to exert an influence on contemporary death penalty practices and commitments through less direct or deliberate mechanisms, such as its imprint on legal culture (Vandiver 2018) or the operation of prosecutorial muscle memory (Garrett 2017, Kovarsky 2016).

Other accounts focus on crime rates to establish a contemporary link between the distinctive political institutions of the United States and American exceptionalism in criminal and capital punishment. The first-past-the-post, winner-take-all structure of the American political system creates competition for floating median voters that often produces single-issue campaigns, especially when there is an issue—like crime over recent decades—that appeals strongly to many such voters (Lacey 2008). The three-decade-long rise in crime from roughly 1960 to 1990 led to a much greater popular and legislative tolerance for extreme solutions to the crime problem (Stuntz 2011) and even to an overarching structure of governance built around the concepts of crime and victimization (Gottschalk 2006, Simon 2007). The influence of populism and the resistance to elite opinion and expertise within American political institutions permitted harsh punishments, especially the death penalty, to flourish in the United States even as bureaucratic elites rejected such practices in Europe (Barkow 2019, Hammel 2010). Indeed, European identity has converged around Europe's now entrenched opposition to the death penalty (Girling 2005) in much the same

way that some states and localities within the United States have identified with their harsh punishment practices, as expressed by the slogan "Texas Tough" (Perkinson 2010). If elite institutions such as the American Bar Association or the American Law Institute controlled crime policy in the United States, it is likely that American use of incarceration and the death penalty would look much more like that of Europe.

Persuasive accounts of American exceptionalism not only need a link to contemporary events but also an explanation for the extraordinary decline in the American death penalty over the past two decades after its tremendous rise in the decades before that (Steiker 2012). Deep historical, institutional, or cultural explanations often make the American embrace of capital punishment seem inevitable and thus have a hard time accounting for the death penalty's stunning recent dive, even in American strongholds like Texas. There are many plausible contributors to what law professor Brandon Garrett calls the "Great American Death Penalty Decline," including the DNA revolution and evidence of wrongful capital convictions, the rise in the cost of capital prosecutions, the development of more robust capital defense institutions, and the advent of the alternative sentence of life without possibility of parole (LWOP) (Baumgartner et al. 2008, Garrett 2017, Steiker & Steiker 2012). But fitting these recent developments into an explanatory account of American exceptionalism remains challenging. Indeed, one scholar has pushed back on the exceptionalism frame for the American death penalty. Garland (2018) has suggested that perhaps the United States is not so much exceptional as simply delayed—moving along the same path as its European peers and finally now approaching the same end.

This depiction of the American death penalty trajectory as a slower and more reluctant version of the European experience misses something important about the recent course of capital punishment in the United States. What is truly distinctive—indeed, unique—about the modern era of the American death penalty is how central a role the Supreme Court and the Constitution have played in virtually every major development. When the Supreme Court reinstated the death penalty in 1976 after temporarily abolishing it in 1972, the Court did not merely hit resume on a long-running drama; rather, the Court assumed an ongoing role in shaping the practice of capital punishment across the country, embarking on an unprecedented project of intensive, top-down, judicial regulation of the American death penalty under the Eighth Amendment of the Constitution (Steiker & Steiker 2016). This experiment with constitutional regulation of the death penalty (Acker et al. 2014), more than the mere fact of continued retention, is what most sets the United States apart from its peer countries. And as we have argued at length elsewhere, constitutional regulation will likely shape a distinctive American abolition of the death penalty, if and when it comes (Steiker & Steiker 2016).

RACE AND THE AMERICAN DEATH PENALTY

Race has long influenced the operation of the American death penalty system. Capital punishment in the antebellum South was an essential part of maintaining the slave economy, as owners needed additional incentives for subservience from an already imprisoned population (Steiker & Steiker 2016). Different, and more gruesome, modes of execution were reserved for slaves convicted of murdering their owners or plotting revolt (Steiker & Steiker 2016). Southern states explicitly made race part of their capital codes, punishing many more offenses with death when the offender was black (free or slave) and the victim white (Banner 2002). Whereas the vast majority of whites executed in the antebellum South were punished for murder, blacks were also frequently executed for rape, slave revolt, attempted murder, burglary, and arson (Banner 2002). Owners of executed slaves were compensated by the state to discourage shielding their slaves from the harsh, racialized criminal justice system (Banner 2002).

After the passage of the Fourteenth Amendment, discrimination disappeared from the face of Southern statutes but persisted in many other forms. Reconstruction gave rise to an extraordinary rise in lynching, which became a more prominent and frequent means of killing blacks suspected of crime (or other transgressions) than official executions. Lynching revealed not only the fragility of state and local power in monopolizing the use of deadly force but also the limits of federal judicial power. In 1906, after Justice John Marshall Harlan agreed to exercise the Supreme Court's federal habeas corpus power to address the legality of a conviction and death sentence obtained against a black defendant convicted of rape in Chattanooga, Tennessee, a mob broke into the local jail (with little resistance and indeed tacit support from law enforcement authorities) and lynched the defendant on a bridge spanning the Tennessee River. One of those involved in the lynching—a deputy sheriff who shot the defendant five times—pinned a note to his body that read: "To Justice Harlan. Come get your nigger now" (Steiker & Steiker 2016, p. 34). The Supreme Court ultimately convicted some of the participants and derelict law enforcement officials of criminal contempt (in the first and only criminal trial before the Court), but the community's successful defiance of the Court's intervention was perhaps more revealing than the Court's exercise of its contempt power.

Concerns about lynching helped cement death penalty retentionism, as several states (Colorado, Arizona, Tennessee, and Missouri) that had abolished the death penalty for murder during the progressive era reinstated the punishment at least partly in response to lynching (Galliher et al. 1992). In fact, many years later, when the Supreme Court essentially reinstated the death penalty in *Gregg v. Georgia* by upholding the death penalty against a global Eighth Amendment challenge in 1976, the central opinion in that case pointed to the risk of lynching as a reason to sustain the death penalty, despite the fact that lynching had all but disappeared by that point in American history: "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law" (*Gregg v. Georgia* 1976, p. 183).

As lynching waned by the late 1920s, executions accelerated, reaching their all-time highs in the 1930s. Scholars remain divided about various causal connections between lynching and capital punishment, with some viewing legal executions as a substitute for lynching and others rejecting that hypothesis, regarding executions and lynching as distinct forms of social control (Oshinsky 2010, Vandiver 2006). In many jurisdictions, particularly in the Deep South, the dividing line between lynching and capital punishment was not so stark. In some cases, mobs were at the courthouse steps, or even in the courtroom, insisting on the swift declaration of a death sentence and imposition of an execution (Vandiver 2006). In a 1934 Mississippi trial of three black defendants accused of raping a white high school student, a mob of several thousand surrounded the De Soto County courthouse and dispersed only after they were promised that the father of the victim would himself be permitted to hang the alleged offenders after a swift trial, convictions, and death sentences (Vandiver 2006). The judge told the mob to wait for an official execution rather than a lynching, warning that a lynching might help spur passage of federal antilynching legislation, thereby imperiling "one of the South's cherished possessions—the supremacy of the white race" (McMillen 1990, p. 207).

These "legal lynchings" prompted the Supreme Court to begin to regulate state capital systems. Although the Bill of Rights was originally designed and understood to place limits on federal power, beginning in the twentieth century the Supreme Court began to find some of the specific protections in the Bill of Rights to be part of the liberty protected by the Due Process Clause of the Fourteenth Amendment, which directly binds state actors. The infamous Scottsboro Boys case in the early 1930s saw eight black teenagers wrongly convicted of raping two white females in Scottsboro, Alabama, and sentenced to death (the jury could not agree on punishment for the

youngest—thirteen-years-old—defendant). The Supreme Court held for the first time that state criminal defendants on trial for their lives could not be denied counsel. One year after the Court extended the 8th Amendment's prohibition of cruel and unusual punishment against the states in 1962, Justice Goldberg urged the Court to address whether the death penalty should be a permissible punishment for the crime of rape. In his original draft opinion, Justice Goldberg made reference to the states' racially discriminatory administration of the death penalty in rape cases, but at the insistence of Chief Justice Warren, his published dissent omitted any language about racial discrimination (Mandery 2014).

Nonetheless, Justice Goldberg's opinion led the NAACP Legal Defense Fund (LDF) to take up the issue of death penalty abolition. The LDF long regarded the death penalty as an issue of racial justice, given the concentration of executions in the former Confederacy and the unequal treatment of minority defendants and minority victims in the capital punishment process. The LDF embarked on an ambitious moratorium strategy with the goal of bringing executions in the country to a halt (Meltsner 2011); as part of this effort, the LDF innovatively challenged a variety of specific death penalty practices (notably the use of unitary trials and the absence of discernable standards in imposing the penalty). But the LDF also focused on documenting and challenging the racially discriminatory aspects of the American death penalty. One of its first steps after Justice Goldberg's opinion was to engage an eminent sociologist, Marvin Wolfgang, to conduct an empirical study of the impact of race on capital cases in the South. With the help of 28 law students, Wolfgang collected data on the disposition of rape cases during the period from 1945 through 1965. The resulting study found that black defendant/white victim cases were overwhelmingly more likely to produce death sentences than any other racial combination; the LDF subsequently relied on the study in an Arkansas case to challenge the death sentence of a black inmate condemned to death for raping a white victim. The challenge was rejected in the lower federal courts (*Maxwell v. Bishop* 1968), with then-judge Harry Blackmun expressing great skepticism about granting individual inmates relief on the basis of statistical evidence of racial injustice: "We are not ready to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice" (*Maxwell v. Bishop* 1968, p. 147).

The Supreme Court agreed to hear the inmate's case but not his claim of racial discrimination. Indeed, as the Court increasingly asserted its role in regulating the death penalty in the late 1960s and early 1970s, it repeatedly avoided addressing the question of racial discrimination (Steiker & Steiker 2016). When the Court invalidated prevailing statutes in 1972, concerns about racial discrimination played a subordinate role in the Court's opinions, which emphasized instead the arbitrary and infrequent use of the American death penalty. Five years later, when the Court invalidated the death penalty for rape, it chose the rare case of a white defendant sentenced to death for rape as the vehicle for its decision (Johnson 2009); despite its familiarity with the powerful evidence of racial discrimination in capital rape cases, the Court said nothing about that history as it ended the practice.

Despite the Court's reluctance to address the role of race in the American death penalty, the LDF continued to develop evidence of its racially discriminatory administration. A new study conducted by a team of researchers (the Baldus study) focused on Georgia's post-*Furman* use of the death penalty (Kirchmeier 2015). The study indicated that race continued to influence capital outcomes notwithstanding the additional safeguards in the post-*Furman* Georgia statute. In particular, after controlling for numerous nonracial variables, the study found that cases involving white victims were at least four times more likely to generate death sentences than cases with minority victims; cases with black defendants and white victims were the most likely to produce such verdicts. The LDF invoked the study in federal habeas litigation on behalf of a black inmate

sentenced to death for killing a white police officer in the course of a robbery. As in the earlier litigation, the lower federal courts declined relief, questioning both the study's methodology and whether it could support relief for any particular inmate. This time, the Supreme Court agreed to hear the issue in *McCleskey v. Kemp* (1987).

The Court denied relief. It assumed, for the purposes of its decision, that the Baldus study was methodologically sound. But it insisted that McCleskey could not prevail by showing system-wide racial discrimination and instead would need to show the presence of racially discriminatory conduct in his own case. The Court suggested that upending death sentences on the basis of evidence of broad racial discrimination would threaten noncapital sentences as well, thereby threatening the efficacy of the criminal justice system. The Court also implied that racially discriminatory outcomes might be the inevitable by-product of the constitutionally mandated discretion the Court had deemed essential to capital sentencing.

McCleskey is a remarkable decision in acknowledging the presence of racial disparities and suggesting that they are not susceptible to judicial remediation (Steiker & Steiker 2016). *McCleskey*'s legacy remains contested. Although it possibly strengthened the political case against the death penalty by highlighting the failure of legislatures and courts to curtail its discriminatory administration (Kirchmeier 2015), the decision may reflect a broader reluctance to engage the death penalty on racial terms, thereby contributing to a diminished role for race in contemporary abolitionist discourse (Sarat 2006).

Since *McCleskey*, the Supreme Court has focused on more discrete instances of alleged racial discrimination and misconduct. It reversed a decision in a Texas case in which the inmate's expert witness at trial had stated that the inmate was an increased risk of dangerousness because he was black as well as a decision in a Mississippi case concerning racial discrimination in the use of peremptory challenges, a chronic problem in capital cases. In the former case, *Buck v. Davis* (2017, p. 777), Chief Justice Roberts declared that "some toxins can be deadly in small doses," although it remains unclear whether the Court is able or willing to address racism in its larger manifestations.

Racial discrimination appears to permeate all phases of capital litigation, including investigation, charging decisions, jury selection, and sentencing (Lynch 2006). Such discrimination appears to influence not only which inmates are sentenced to death but also which are actually executed (Garrett 2017). Although the Supreme Court seems unlikely to rest a decision to abolish the death penalty on grounds of racial discrimination (Steiker & Steiker 2016), the Washington State Supreme Court recently struck down the death penalty on state constitutional grounds because of its racially discriminatory administration. Concerns about racial discrimination might motivate further judicial intervention, even if such intervention is not explicitly grounded on those concerns.

THE RECENT DECLINE OF THE AMERICAN DEATH PENALTY: CAUSES AND SIGNIFICANCE

Over the past two decades, the American death penalty has declined precipitously along every important dimension (Baumgartner et al. 2018). In the late 1990s, capital jurisdictions produced close to 300 new death sentences a year; over the past three years, the United States has averaged fewer than 40 per year, reflecting a decline of more than 85% (Death Penal. Inf. Cent. 2019). The country averaged almost 70 executions per year in the late 1990s, compared to an average of 23 over the past three years, representing a 66% decline (Death Penal. Inf. Cent. 2019). Four additional jurisdictions (California, Colorado, Oregon, and Pennsylvania) are currently under executive-imposed moratoriums on executions so that more than a third of the approximately 2,750 death-row inmates nationwide are currently immune from execution. Nine states have legislatively or judicially

abandoned the death penalty since 2004 (Connecticut, Delaware, Illinois, Maryland, New Hampshire, New Jersey, New Mexico, New York, Washington). Of the twenty-five states with operable capital statutes on the books (excluding those with moratoriums in place), only eleven have carried out at least one execution over the past three years, and only four of those jurisdictions carried out as many as five executions during that period (Death Penal. Inf. Cent. 2019). In addition, death sentences are increasingly concentrated in just a few counties (Breyer & Bessler 2016), with the vast majority of American counties inactive in producing death sentences. In terms of executions, Texas alone has carried out more than 40% of the past 100 executions nationwide (Death Penal. Inf. Cent. 2019). Popular support for the death penalty, as measured by opinion polls, has also declined dramatically, from more than 75% support in the mid-1990s to about 56% support in the most recent Gallup polls.

These developments point to a broad weakening of the death penalty, but each has its own (although often overlapping) story. The decline in death sentences is likely attributable in part to the decline in murder rates, although the decline in death sentences is more dramatic, and the connection between murder rates and death-sentencing rates is not uniform throughout the country (Garrett 2017). Two related developments also have contributed to the decline in death sentencing: the increased professionalism of the capital defense bar, which has improved trial-level representation particularly in the development of mitigating evidence, and the rising costs of capital trials. Brandon Garrett (2017) calls the first of these developments "the defense-lawyering effect," and he finds a strong association between states adopting capital defender offices (instead of court-appointed counsel) and declines in death sentencing. But there is little data showing that prosecutors have been less successful in obtaining capital verdicts in cases that go to trial; rather, the evidence suggests that declines in seeking the death penalty are primarily responsible for declines in death sentences. Of course, improved trial representation might contribute significantly to the willingness of prosecutors to settle capital charges with nondeath sentences. But prosecutors are likely also motivated by a variety of considerations apart from the likelihood of success at trial, including cost, the availability of LWOP sentences, and declining public pressure to produce death sentences. Also, capital trial costs have risen steeply over the past two decades (Baumgartner et al. 2018). Every capital jurisdiction now offers LWOP as an alternative to the death penalty (Death Penal. Inf. Cent. 2019). And public support for the death penalty has dropped significantly since the mid-1990s to modern-era lows (Baumgartner et al. 2018).

Whereas death sentences are primarily produced by the decisions of prosecutors and juries, executions require the coordination of numerous actors, including state and federal judges, state attorneys general, and state governors (Steiker & Steiker 2016). One primary obstacle to executions over the past twelve years has been litigation over state execution protocols. The Supreme Court's decision to address the constitutionality of Kentucky's three-drug lethal injection protocol led to a temporary de facto moratorium on executions beginning in September 2007 and ending in May 2008 (Death Penal. Inf. Cent. 2019). Although the Supreme Court rejected the constitutional claim, the decision of drug manufacturers to limit the availability of their drugs for use in executions created shortages nationwide, forcing states to modify their lethal injection protocols (Gibson & Lain 2015). Shifting protocols, in turn, gave rise to challenges under both federal and state law and also led to some high-profile botched executions in a number of states. The lethal injection controversy has limited executions in a number of direct and indirect ways. Some states lack the drugs to carry out executions; some states have no approved protocol; concerns about botched executions have diminished the appetite for executions; and the presence of the lethal injection controversy allows actors (e.g., judges, state officials) who have reservations about capital punishment apart from the risks of lethal injection to limit or preclude executions (Steiker & Steiker 2016). Executions have never climbed back to their 2006, pre-moratorium level.

Executions have also declined because of the declining death-row population. Given that executions are dependent on death sentences, executions are a lagging indicator of the strength of the death penalty (whereas death sentences are a leading indicator). Virginia, the second leading state in terms of executions (113) in the modern era, was so successful in executing its condemned inmates (and so unsuccessful in generating new death sentences) that it now has a death-row population under five. Texas may soon find itself in a similar situation: Its high rate of executions and low death-sentencing rate will continue to shrink the size of Texas's death row, which at 223 is less than half its 1999 high (460). At the same time, some states with large death rows (California, Pennsylvania) have a diminished political appetite for executions, as reflected in part by the moratoriums imposed by their governors. If these trends hold, the largest numbers of death-row inmates will be housed in the states least committed to killing them. The remarkable decline in death sentences suggests that the currently low number of executions is unsustainable in the near term, and we should expect a significant decline in executions within the next two decades.

Declining death sentences and executions could lead to further state repeals. The repeal of capital statutes over the past three decades has occurred largely in marginal death penalty states, with either low numbers of death sentences, low numbers of executions, or both. Some states achieved abolition because of court rulings invalidating prevailing statutes (New York, Delaware, Washington) and insufficient political energy to address or cure the identified defects. The rest of the recent repeals have been legislative (New Jersey, New Mexico, Illinois, Connecticut, Maryland, New Hampshire). Although each state has experienced a somewhat distinctive path to repeal, a number of common concerns have surfaced in the repeal process, including the risk of wrongful convictions/executions, cost, arbitrariness, discrimination, and the wrongness of state killing. Concerns about wrongful convictions were particularly prominent in Illinois, which had experienced a large number of exonerations in a relatively short period in the late 1990s.

In the immediate aftermath of *Furman* (1972), the Gallup poll (2019) found that 57% of Americans were "in favor of the death penalty for a person convicted of murder." That percentage rose steadily, reaching a high of 80% in 1994. Over the past 25 years, the support has declined steadily, returning to the *Furman* era levels (55% in 2017, 56% in 2018). Perhaps most telling, the number of persons not in favor of the death penalty has moved from its low of 13% in 1995 to its modern-era high of 41% in both 2017 and 2018. Apart from the period 1965–1972, the percentage of persons not in favor of the death penalty had never climbed above 40% (Gallup first asked the question in the current format in the mid-1930s). The graph of public support reflected in the Gallup poll (1972–2018) looks similar to the graph of death sentencing during the same period, although death sentencing rose more quickly and declined more precipitously than the poll numbers in support of the death penalty. Although it is often speculated that concerns about wrongful conviction contributed strongly to the decline in popular support, the phenomenon of exonerations gained visibility in the late 1990s and yet the steep decline in public support did not fully register until fairly recently, dipping below 64% for the first time (since 1978) in 2011. Those not in favor of the death penalty did not climb above 35% until 2015 (and was as low as 25% in 2002). In their statistical study of the modern death penalty, Baumgartner and his team (Baumgartner et al. 2018, p. 287) claim that "innocence, cost, controversies involving lethal injections, botched executions, and other factors have clearly dampened whatever enthusiasm Americans may once have been said to have for capital punishment." An important and unresolved research question concerns the interaction of death sentencing and public opinion. It seems logical to suppose that diminished public support for the death penalty would contribute to a decline in death sentencing, but the mechanism is complicated by the practice of death-qualifying jurors, which insulates juries from strong opponents of capital punishment. The converse association is underexplored—whether low death-sentencing rates contribute to declines in public support. Interestingly, public

support for the death penalty within particular states appears unrelated to the number of executions conducted within those states (Baumgartner et al. 2018).

Will the marked declines in the American death penalty—in death sentences, executions, retentionist states, and public support—ultimately lead to nationwide abolition? Abolition, if it is to occur, will require intervention by the Supreme Court; American federalism makes it unlikely that all states will abandon the death penalty or that Congress could or would require it (Steiker & Steiker 2016). Interestingly, over the past thirty years, several justices have called for reconsideration of the Court's 1976 decisions sustaining the death penalty as consistent with evolving standards of decency. Justice Blackmun, who had dissented in *Furman* on the grounds that the question of capital punishment appropriately remained with the states, ultimately concluded that the death penalty could not be administered in a constitutional manner (*Callins v. Collins* 1994). Justice Stevens, who had been instrumental in upholding several capital statutes in 1976, urged the Court to revisit those decisions in light of his concerns about discrimination, error, and whether the death penalty, as practiced in the United States, could meaningfully advance the goals of deterrence or retribution (*Baze v. Rees* 2008). More recently, Justices Breyer and Ginsburg wrote a lengthy dissent in a lethal injection case calling for "full briefing on whether the death penalty violates the Constitution" (*Glossip v. Gross* 2015, p. 2,755); their opinion suggested strongly that they believed the death penalty should be deemed unconstitutional in light of its unreliability, arbitrary administration, length delays (rendering the punishment both cruel and ineffective), and rapidly diminishing use.

In addition, the Court's recent proportionality decisions have broadened the criteria relevant to whether a practice violates evolving standards of decency. Whereas previous decisions strongly privileged legislative, sentencing, and execution decisions (how many states prohibit the challenged practice and how frequently states engage in the challenged practice), more recent cases invalidating the death penalty for juveniles and persons with intellectual disabilities considered professional and expert opinion, religious opinion, world opinion and practice, and public opinion polls (*Atkins v. Virginia* 2002, *Roper v. Simmons* 2005). In both of those cases, the Court invalidated the challenged practice even though a majority of death penalty states permitted it. These newly invoked indicia of prevailing moral standards are more conducive to judicial abolition than the older criteria, although the older criteria (statutes, death sentences, and executions) increasingly support the abolitionist side as well. However, the Court as presently constituted seems unlikely to embrace a global challenge to the American death penalty, declaring straightforwardly and unequivocally in the most recent lethal injection case that the Constitution allows capital punishment and therefore must permit some means for carrying it out (*Bucklew v. Precythe* 2019). The recent death penalty decisions reveal an increasing gap on the Court between those who believe the constitutionality of the death penalty should be gauged by contemporary standards and practices and those who regard the question as settled by the text of the Constitution and the views regarding capital punishment at the founding.

If the Court were to abolish the death penalty, would abolition stick or would such a decision trigger a backlash comparable to what followed *Furman*? Several considerations lessen the likelihood of backlash. At the time of *Furman*, there was minimal doctrinal support for permanent invalidation of the death penalty, and the abruptness of *Furman* likely contributed to its harsh reception; in contrast, the past forty years have produced numerous death penalty doctrines and decisions that could be invoked in support of constitutional abolition. Relatedly, the post-*Furman* choice to regulate rather than abolish the death penalty was premised in large part on the potential of regulation to cure some of the manifest pathologies of the practice (including arbitrariness, discrimination, and error). Virtually no one regards the experiment to cure those pathologies a success, and a decision declaring the death penalty unconstitutional would not face

the same pressure to simply improve rather than reject the practice. Lastly, the effort to abolish the American death penalty in the 1960s and early 1970s put the United States on a slightly earlier path toward abolition than the rest of the world, and thus the United States was not a wild outlier in its retention when the death penalty was revived in 1976. Today, though, the United States faces increasing criticism and pressure from peer countries for its retention of the death penalty. Hence, a decision abolishing the American death penalty would align the United States with the rest of the developed democratic world and thus provide a firmer foundation for permanent abolition.

AMERICAN CRIMINAL JUSTICE IN THE WAKE OF ABOLITION

If and when abolition of the American death penalty occurs, it will not be experienced simply as an absence. Rather, American criminal justice will reshape itself around the new vacuum. As the use of the death penalty has declined across the United States, knowledgeable observers have begun to venture predictions about what a future without capital punishment will look like. These prognostications tend to be rosy, forecasting not merely the end of an ineffective, unjust, and immoral practice but also across-the-board improvements in other aspects of the criminal justice system. Although some of these optimistic assessments are well-founded, there are grounds for some pessimistic predictions about the systemic effects of abolition. These less rosy possibilities are no reason not to vigorously seek the end of capital punishment as a good in its own right. But it is helpful to be clear-eyed and realistic about the range of possible ancillary effects across the wider legal system.

One unambiguous gain will be the cost savings that abolition of the death penalty will entail for many jurisdictions. In earlier eras, it was accurately assumed that the death penalty was, if nothing else, a less expensive sanction than lifetime (or even long-term) incarceration. The post-1976 modern era of capital punishment, however, saw tremendous increases in the cost of administering capital punishment, driven primarily by the Supreme Court's new constitutional oversight of the process (Steiker & Steiker 2012). As a result, states' own analyses of the relative cost of capital and noncapital prosecutions revealed that capital prosecutions were substantially more expensive, even when factoring in the cost of lifetime incarceration (Steiker & Steiker 2010). When California Governor Gavin Newsom announced a moratorium on executions in 2019, he repeatedly invoked the extraordinary cost of maintaining the state's death penalty over the past forty years, citing the figure of five billion dollars for a system that carried out only 13 executions during that period (Wilson & Berman 2019). In addition to the financial cost of specialized capital litigation, death-row facilities, and execution chambers, capital cases consume vastly more than their per capita share of court resources, burdening already overloaded criminal dockets. The freeing up of these fiscal and institutional resources would undoubtedly benefit the broader criminal justice system if the savings were directed to those ends.

The abolition of the death penalty would also open up the possibility of more frank and skeptical assessments of other extremely harsh punishments—most notably, the sentence of LWOP. Public opinion polls have indicated that support for capital punishment declines when LWOP is available as an alternative sentence (Garrett 2017). As a result, antideath penalty advocates have tended to support, or at least not oppose, the introduction of LWOP sentences as an alternative to the death penalty. Over a period of several decades, LWOP sentences have become firmly entrenched in the American penal landscape and are now available in every state except for Alaska—yet another way in which the United States has become an outlier (exceptional) in its punishment practices (Hood & Hoyle 2015, Mauer & Nellis 2018). In addition to muting opposition to LWOP from the abolitionist community, the continued existence of the death penalty has also worked to normalize other extreme sentences, such as ordinary (parole-eligible) life sentences and lengthy

terms of years. It can be difficult to mount a convincing case that LWOP is too extreme and cruel a sentence when its imposition is celebrated as a victory in capital cases. The eradication of the death penalty would free abolitionists from their reluctant support of LWOP and allow a more honest assessment of the cruelty of LWOP and other extraordinarily harsh sentences. Anti-LWOP advocates are already setting the stage for such a discussion when they refer to LWOP as a sentence of death in prison—implicitly analogizing it to capital punishment (Ridgeway & Casella 2014). Furthermore, the end of capital punishment would raise the question of whether some aspects of the especially protective procedural regime currently reserved for capital prosecutions should be extended to prosecutions seeking LWOP or other extreme sentences (Mauer & Nellis 2018).

One of the procedural protections most commonly invoked as holding out the possibility of transforming noncapital criminal justice is the practice of mitigation. The Supreme Court has mandated that capital defense lawyers investigate and mount an effective mitigating case on behalf of their clients. This duty requires lawyers to explore anything that might reduce the defendant's culpability for the crime or otherwise call for a sentence less than death (Monahan & Clark 2017). Some observers have argued that mitigation practice—and the perspective on the limits of individual culpability that it embodies—may engender a less punitive and more rehabilitative approach to criminal justice (Garrett 2017, Gohara 2013). Mitigation is indeed a normatively attractive practice that brings criminal punishment more in line with its purported purposes and helps to keep it within moral limits. However, the expansion of mitigation practice into the noncapital criminal justice system faces daunting challenges of feasibility. Capital prosecutions number (at most, in these days of declining use) in the hundreds each year, whereas noncapital homicides alone number in the thousands and serious felonies in the tens of thousands. Investigating mitigating evidence—which includes gaining the trust of family members, tracking down school, employment, medical, mental health, military service, and incarceration records, and identifying and soliciting the help of relevant expert witnesses—is tremendously time-consuming and costly. The well-documented limitations on criminal defense budgets for the indigent, who make up the vast majority of defendants, render such an enormous expansion of the duties of criminal defense lawyers highly unlikely. If mitigation practice migrates into the noncapital criminal justice system, it will likely be in a highly circumscribed and episodic, rather than wholesale, fashion.

Another often expressed hope is that the abolition of the death penalty will bring the United States closer to its peer countries by expressing acceptance of a human rights framework to govern that issue. On a formal level, this hope will almost certainly be realized. If nationwide abolition were achieved, the United States would no longer need to cast a nay vote when the UN General Assembly adopts resolutions calling for a worldwide moratorium on the death penalty, as it has done seven times since 2007 (Caplan 2016, UN 2018). Furthermore, the structure of punishment within the United States would be less grossly out of step with international norms, given that the world's most serious crimes are not punishable by death under international law (Bessler 2017). As a result, the United States would enjoy less friction with its allies, especially in the context of seeking extradition of suspects facing serious (formerly capital) charges in American courts (Steiker & Steiker 2016).

However, on a more substantive level, it seems doubtful that American abolition would represent a deeper acceptance of the norm of respect for human dignity that the international consensus on the death penalty embodies. Some experts hope that worldwide abolition of the death penalty will mark the success of an increasingly global postwar international human rights agenda and the general acceptance of the concept of human dignity as part of a new global common law (Novak 2019). But American abolition, if and when it comes, will likely be rooted in more pragmatic concerns, which tend to dominate American discourse on the issue (Steiker & Steiker 2016). Extreme criminal punishments like the death penalty both reflect and reinforce a vision of offenders as

less than human (Christie 2014). But even without capital punishment, the vigorous use of other extremely harsh punishments (like LWOP) and the maintenance of degrading conditions of incarceration (such as excessive use of solitary confinement and tolerance of sexual violence) stand in the way of a full embrace of human dignity in punishment practices. And although the death penalty may have facilitated the rise of mass incarceration in the United States (Scherdin 2014), the converse does not follow: The dismantling of the death penalty will not immediately or inevitably do much to reverse the massive scale of American imprisonment.

But pessimistic possibilities are not confined simply to tempering the hopes of optimists. Abolition of the death penalty might actually impede (as opposed to only marginally advance) progressive reform in the larger criminal justice system. The end of capital punishment in the United States would eliminate the powerful spotlight that capital cases shine on the workings of the criminal justice system. The severity and irrevocability of death naturally evoke heightened concerns about the possibility of unfairness and miscarriages of justice in capital cases. Combine these concerns with the high drama of death penalty cases, from initial crime reporting through trial and execution, and the result is public and media attention on problems in the criminal justice system that might otherwise fly below the radar. Courts, too, currently give disproportionate consideration to generally applicable legal issues in the context of capital cases—issues that might not otherwise make it onto their noncapital dockets. Thus, far from catalyzing reform of the noncapital criminal justice system, the end of the death penalty might simply make reforms seem less necessary and injustices less dramatic and disturbing (Steiker & Steiker 2016).

It would be ideal if abolition of the American death penalty, should it occur, also engendered advances in the broader criminal justice system, but there are reasons to be skeptical about the most optimistic predictions. Consequently, the case for ending the American death penalty must stand or fall on its own merits. That case is an increasingly powerful one. The United States is exceptional in its retention and use of the death penalty, a position that puts it at odds with most of the developed, democratic world. American retention appears to be tied in part to its distinctive history of racial subordination and injustice. And by every measure, the American death penalty is withering, reflecting its increasing tension with contemporary moral standards and undercutting its ability to serve any penological purpose (such as deterrence or retribution) necessary to justify its retention.

DISCLOSURE STATEMENT

Both authors have worked as advocates for the reform and abolition of capital punishment and have performed legal work on behalf of defendants in capital cases. Outside of that work, the authors are not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

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