# BLUE STATE FANTASIES AND THE DEATH PENALTY

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## I. INTRODUCTION

Texas is the most appropriate American locale for a symposium on the death penalty. Today we sit in West Texas, which still makes me think of *Friday Night Lights* (*FNL*), the hit television series about the fictional City of Dillon and its beloved football team.[1] *FNL* was a smash with critics, too, and became the subject of weekly thought pieces from some of the most insightful writers dotting the Internet commentariat.[2] One of the more profound observations about the show came from then-*Slate* writer Hanna Rosin, who remarked after the series aired its finale: "There are plenty of red-state shows out there . . . , but *FNL* is a blue-state fantasy of a red-state show . . . ."[3]

And so it has been with the death penalty, the Supreme Court, and its all-important retiree, Justice Kennedy.[4] With a similar benefit of hindsight, the notion that what one might now call the early Roberts Court or its longtime swing Justice ever seriously flirted with death penalty abolition was a blue-state fantasy about a red-state Court.[5] There were some high-profile

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1. *Friday Night Lights* (NBC television broadcast 2006).

2. *See generally* Hanna Rosin, *Series Finale: FNL Is a Blue-State Fantasy of a Red-State Show*, SLATE (Feb. 10, 2011, 1:15 PM), http://www.slate.com/articles/arts/tv_club/features/2010/friday_night_lights_season_5/series_finale_fnl_is_a_bluestate_fantasy_of_a_redstate_show.html.

3. *Id.*

4. *See* Jordan S. Rubin, *Will the Supreme Court Kill the Death Penalty This Term?* BLOOMBERG L. (Nov. 20, 2017), https://www.bna.com/supreme-court-kill-n73014472287/.

5. *See, e.g.*, Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 521–22, 535 (2017) (construing abolition as an inevitability and predicting a post-capital punishment landscape); Dahlia Lithwick, *Fates Worse Than Death?*, SLATE (July 14, 2015, 3:19 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/07/will_kennedy_overturn_the_death_penalty_his_views

rulings on hot-button social issues that complicate the edges of the picture, but the Court was *basically* conservative and so was Justice Kennedy.[6] During the October 2017 term—what turned out to be his swan song—Justice Kennedy did not vote with the liberal Justices on a *single case* that was decided 5–4.[7]

Fevered speculation about whether a Supreme Court with Justice Kennedy as the median voter would have abolished the death penalty was wishful thinking by a blue-state legal community that was misreading available information about a red-state Court's median voter.[8] And, with Justice Brett Kavanaugh replacing Justice Kennedy, the median vote almost certainly belongs to Chief Justice Roberts. Focusing on the difference between Justice Kennedy and Chief Justice Roberts, then, probably produces more information about the direction of the Court than does focusing on the difference between Justices Kennedy and Kavanaugh—at least on death penalty issues.[9]

The median-vote shift from Justice Kennedy to Chief Justice Roberts is, obviously, consequential.[10] The argument I make here is that, because the public was too optimistic about Justice Kennedy's voting behavior in capital cases, the delta is smaller for death penalty issues than it is for other areas of American law. In Part II, I situate new empirical findings about reduced use of the death penalty in the context of the Supreme Court's current capital punishment jurisprudence, and explain why, whether Justice Kennedy was

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_on_solitary_confinement.html (suggesting Justice Kennedy's position on unrelated issues like solitary confinement will lead him to vote in favor of abolition); Rubin, *supra* note 4 (theorizing that Justice Kennedy might author a death penalty opinion in the same vein as *Obergefell v. Hodges*, in which he sides with the "[p]opular opinion against the death penalty" by abolishing it).

6. *See* A. E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 292, 305 (2015) (stating first that the Supreme Court has held a conservative majority since Justice Warren's departure, then classifying Justice Kennedy as a conservative justice); Robert Barnes, *Trump Makes His Pick, But It's Still Anthony Kennedy's Supreme Court*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/politics/courts_law/trump-makes-his-pick-but-its-still-anthony-kennedys-supreme-court/2017/01/31/1de12472-e7e0-11e6-bf6f-301b6b443624_story.html (describing the appointment of Justice Gorsuch as restoring "the court's long-held position as a generally conservative body"); Andrew Cohen, *Anthony Kennedy Is the Bulwark Against a Conservative Counterrevolution*, BRENNAN CTR. FOR JUST. (June 26, 2017), https://www.brennancenter.org/blog/anthony-kennedy-bulwark-against-conservative-counterrevolution (highlighting how far right the Supreme Court has moved in the past twelve years); *cf.* Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1671 (2015) (acknowledging the conservative majority and typical political divide among the Justices, but also advocating that there is a second ideological spectrum bounded on poles of legalism and pragmatism).

7. *See* Ruth Marcus, *This Must Be Another Bork Moment*, WASH. POST (June 28, 2018), https://www.washingtonpost.com/opinions/this-must-be-another-bork-moment/2018/06/28/f9aba454-7aed-11e8-80be-6d32e182a3bc_story.html?noredirect=on&utm_term=.34d77b8f395e.

8. *See* Rubin, *supra* note 4.

9. This Symposium Article was originally drafted before Justice Kennedy announced his retirement but has been updated, where necessary, to reflect the presence of Justice Kavanaugh on the Bench.

10. Marcus, *supra* note 7.

the median voter or not, the *existing* Eighth Amendment framework largely mooted the constitutional significance of that reduction.[11] If the Court was going to abolish or broadly restrict the death penalty, then it was (and is) going to have to do so by changing the framework itself.[12] In Part III, I explain that Justice Kennedy was not, in fact, receptive to major paradigm changes and that reformist hope projected onto him was largely a blue-state fantasy.[13] In Part IV, I make my own predictions about the medium-term future of the Court's capital punishment doctrine and relate that projected state of affairs to what the case law might have looked like had Justice Kennedy served through the next presidential election.[14] On death penalty issues, the difference between the votes of Justice Kennedy and Chief Justice Roberts is significant but less than many realize.[15]

## II. THE EXISTING FRAMEWORK

Most people don't know it, but Alan Dershowitz is an important figure in the arc of the American death penalty. In 1963, he wrote a memo to Justice Goldberg questioning the constitutionality of the death penalty, which Justice Goldberg turned into a 1963 dissent from an order denying certiorari in *Rudolph v. Alabama*.[16] Justice Goldberg's statement in *Rudolph* kick-started the NAACP Legal Defense Fund's (LDF) furious assault on the American death penalty, which in turn culminated in *Furman v. Georgia*—the landmark Supreme Court case invalidating every death sentence and every death sentencing statute in every American jurisdiction.[17] Four years after *Furman*,

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part III.

14. *See infra* Part IV.

15. There is truth to the observation that predictions about the death penalty's future should be about more than tea leaves from scattered speeches, hiring decisions, and opinions. Professor Jordan Steiker reasonably made this point during the question-and-answer period of this symposium and made an extremely persuasive case as to the longer-term fate of the death penalty in the United States. *See* Jordan Steiker, Judge Robert M. Parker Endowed Chair in Law, The Univ. of Tex. at Austin Sch. of Law, Luncheon Speaker at the Texas Tech School of Law's Criminal Law Symposium (Apr. 13, 2018). Unexpected events happen and preferences converge in surprising ways, but it is more likely than not that over the course of the next fifty years the United States will strike down the death penalty. The observations I make here are about something different; they are predictions about the short-to-medium term, and so I must necessarily make certain assumptions about the composition of the Supreme Court.

16. Jesse Wegman, *The Death Memo*, N.Y. TIMES (Aug. 24, 2013), https://www.nytimes.com/2013/08/25/opinion/sunday/the-death-memo.html; *see* Rudolph v. Alabama, 375 U.S. 889, 889–91 (1963) (Goldberg, J., dissenting). Justice Goldberg and Alan Dershowitz also wrote an article for the *Harvard Law Review* based on this memo. *See* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

17. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

however, the Court decided the so-called 1976 Cases, which effectively permitted states to reboot their death sentencing practices.[18]

Some fifty years later, after the death penalty reestablished a secure presence on the American penal landscape, Professor Dershowitz made a prediction regarding abolition.[19] He said: "It's going to happen the way things always happen at the [C]ourt . . . . The [C]ourt will appear to be leading, but it will be following."[20] The Court-as-frontrunner theory has an impressive pedigree.[21] Harvard Law Professor Michael Klarman, for example, made a particularly highly regarded version of this argument as it pertained to the Court's desegregation decisions.[22] Even if the Court does no more than follow popular cultural preferences, there persists blue-state hope that such following *just might* be enough.[23] The hope is—or was before Justice Kennedy's retirement announcement—that if American jurisdictions sufficiently throttled down their capital punishment activity, then there might have materialized something like a critical anti-mass of death penalty support.[24] Upon critical anti-mass, a suitably composed Court could reconsider its position on whether the Constitution tolerates the death penalty.

The data are, in a sense, deceptive. American capital punishment activity—by which I mean both capital sentencing and executing—is indeed slowing down.[25] People such as Frank Baumgartner, Brandon Garrett, Rob Smith, and myself have all documented some aspect of this phenomenon.[26]

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18. *See* Roberts v. Louisiana, 428 U.S. 325, 331 (1976); Woodson v. North Carolina, 428 U.S. 280, 284–85 (1976); Jurek v. Texas, 428 U.S. 262, 268 (1976); Proffitt v. Florida, 428 U.S. 242, 247 (1976); Gregg v. Georgia, 428 U.S. 153, 168–87 (1976).

19. *See* Wegman, *supra* note 16.

20. *See id.*

21. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (documenting the failure of the Supreme Court to deviate too far from public opinion); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006) (arguing that federal courts generally reflect, rather than stray from or produce, public opinion).

22. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). The Court-as-frontrunner theory is one of the central claims in Professor Klarman's book. *See id.* His book synthesized a series of earlier law review articles in which Professor Klarman made some version of that argument. *See, e.g.*, Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10 (1994) ("[F]rom a long-range perspective[,] . . . racial change in America was inevitable owing to a variety of deep-seated social, political, and economic forces. These impulses for racial change, I shall suggest, would have undermined Jim Crow regardless of Supreme Court intervention; indeed, the *Brown* decision was judicially conceivable in 1954 only because the forces for change had been preparing the ground for decades.").

23. *See* Rubin, *supra* note 4.

24. *See* Lithwick, *supra* note 5.

25. Brandon L. Garrett et al., *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561, 564 (2017).

26. *See* Frank R. Baumgartner et al., *Event Dependence in U.S. Executions*, PLOS ONE 1, 5 (2018), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0190244; Garrett et al., *supra* note 25, at 563; Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L.J.

Yearly activity levels are falling precipitously,[27] and the death penalty is retained primarily in the interest of a few capitally active cities.[28] The number of executions has fallen from nearly 100 per year in the late '90s to the low 20s now.[29] There has been a similarly precipitous drop in death sentences.[30] During the period of 1996–2000, 509 counties in 36 states imposed death sentences;[31] during the period of 2011–2015, only 183 counties in 26 states imposed them.[32] Seven states have abolished the death penalty since the turn of the twenty-first century.[33]

This reduced activity, however, was never going to be enough to precipitate wholesale reconsideration of capital punishment's constitutionality—at least under the existing Eighth Amendment framework—even as applied by a Supreme Court with Justice Kennedy as its median voter. After the recent spate of abolition, there still remain 30 retentionist states.[34] Moreover, the Trump administration has signaled that it will use the death penalty more aggressively.[35] President Trump himself implausibly suggested that the death penalty would be used for drug dealers,[36] but his Justice Department's willingness to override the preferences of local United States Attorneys and seek the death penalty in marginal cases

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259, 281–82 (2016); Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 230–38 (2012).

27. *See* Garrett et al., *supra* note 25 ("The American criminal justice system is imposing fewer death sentences than at any point in the past three decades."); *Executions by Year*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions-year (last updated Dec. 14, 2018) [hereinafter *DPIC Executions by Year*].

28. *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2761, 2775–78 (2015) (Breyer, J. dissenting) (citing Robert J. Smith's *The Geography of the Death Penalty and Its Ramifications* article for the proposition that "[b]etween 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide"); Garrett et al., *supra* note 25 ("Even within the biggest death penalty states, death sentences now come from a shrinking group of individual counties . . . ."); Kovarsky, *supra* note 26, at tbl.4, 5 (reporting three different indexes for increasing capital sentence and execution concentration).

29. *See DPIC Executions by Year*, *supra* note 27.

30. *See* Garrett et al., *supra* note 25.

31. *See* Kovarsky, *supra* note 26, at 273.

32. *See id.*

33. *See States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., https://death penaltyinfo.org/states-and-without-death-penalty (last updated Oct. 11, 2018) (these recently abolishing states are Washington (2018), Delaware (2016), Maryland (2013), Connecticut (2012), Illinois (2011), New Mexico (2009), New Jersey (2007), and New York (2007)).

34. *See id.*

35. *See* Tessa Berenson, *President Trump Suggests Executing Drug Dealers*, TIME (Mar. 1, 2018), http://time.com/5181830/president-trump-execut-drug-dealers-opioid-crisis/.

36. *Id.* I say this is unrealistic because of the constitutional constraints on executing people for offenses that do not result in death. *See* Kennedy v. Louisiana, 554 U.S. 407, 437 (2008). Under the so-called Drug Kingpin Statute, however, a federal court can order a death sentence when drug kingpin activity—with that term defined in the statute itself—results in a killing. *See* 21 U.S.C.A. § 848(e) (2006).

is very real.[37] The most recent Pew Research Center poll detected a nontrivial uptick in the support for capital punishment.[38]

Topline activity levels, moreover, are simply a poor predictor for the breadth of legislative retention, which is the most important variable under the existing Eighth Amendment framework.[39] Most state jurisdictions experiencing topline activity reductions will retain the death penalty in the interest of urban localities where the political economy remains favorable.[40] And the Supreme Court's current Eighth Amendment doctrine would not permit a conclusion that the death penalty is unconstitutional unless a sufficient number of states abolish it.[41] Specifically, the applicable Eighth Amendment framework is a "proportionality" inquiry,[42] which asks whether a particular punishment practice remains within the compass of society's "evolving standards of decency . . . ."[43] The framework is unsurprisingly contentious, with many perceiving it as a doctrine designed to give wide berth to the subjective preferences of judges.[44]

The existence of contention notwithstanding, one could still be reasonably confident in predicting capital punishment's fate under the

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37. *See* Ian Eppler, *The Federal Death Penalty Under Trump*, TAKE CARE (Apr. 27, 2017), https://takecareblog.com/blog/the-federal-death-penalty-under-trump (discussing the power of the Justice Department to authorize more capital prosecutions).

38. *See* Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RES. CTR. (June 11, 2018), http://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/ (in the last two years, support rose from 49% to 54%).

39. *E.g.*, Roper v. Simmons, 543 U.S. 551, 564–65 (2005) (counting the number of states opposed to the death penalty for juveniles or are in the process of declaring it unconstitutional); *see* Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion) (discussing that constitutional amendments draw their meanings from society's "evolving standards of decency"); DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 287–93 (2010); Lee Kovarsky, *supra* note 26, at 313–15.

40. *See* GARLAND, *supra* note 39.

41. *E.g.*, *Roper*, 543 U.S. at 564–65 (counting the number of states opposed to the death penalty for juveniles or are in the process of declaring it unconstitutional); *see Trop*, 356 U.S. at 100–01 (discussing that constitutional amendments draw their meanings from society's "evolving standards of decency").

42. Atkins v. Virginia, 536 U.S. 304, 321 (2002). In fact, the most well-developed Eighth Amendment proportionality rules limit the application of the death penalty based on attributes of the offense and offender. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (prohibiting the death penalty for nonhomicide offense of rape of child); *Roper*, 543 U.S. at 568 (prohibiting the death penalty for juvenile offenders under eighteen at time of crime); *Atkins*, 536 U.S. at 321 (prohibiting the death penalty for intellectually disabled offenders); Enmund v. Florida, 458 U.S. 782, 801 (1982) (prohibiting the death penalty for a person who aids and abets but does not kill, attempt to kill, or intend to kill); Coker v. Georgia, 433 U.S. 584, 599 (1977) (prohibiting the death penalty for the crime of rape of an adult woman).

43. *Trop*, 356 U.S. at 101. The phrase originally traces to *Trop v. Dulles*. *Id.* It has been the catchphrase for the proportionality doctrine since then. *See Kennedy*, 554 U.S. at 419 (quoting *Trop*, 356 U.S. at 101); *Roper*, 543 U.S. at 561 (quoting *Trop*, 356 U.S. at 101); *Atkins*, 536 U.S. at 312 (quoting *Trop*, 356 U.S. at 101); Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) (quoting *Trop*, 356 U.S. at 101).

44. *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 905 (2011).

prevailing framework—even had Justice Kennedy been voting—because insufficient legislative abolition was likely to have been dispositive. The proportionality inquiry formally has "objective" and "subjective" components, but the Supreme Court has never actually held that they point in different directions.[45] In other words, when it has found an Eighth Amendment proportionality violation, it has determined that the objective and subjective planks of the inquiry both favored discontinuation of the punishment practice;[46] in cases where it has found no such violation, it has determined that both planks favor retention.[47] Whatever ambiguity remains in the doctrine, suffice it to say that the Court consistently treats the objective plank as its expressed starting point.[48]

If the objective prong is the most important part of the inquiry, and if the objective index of penal consensus is largely determined by state-level retention, then abolitionists never had much reason for optimism. In evaluating what it usually refers to as objective indicia of penal consensus, the Court generally looks at the fraction of jurisdictions that retain a punishment practice and at the volume of capital punishment activity nationally.[49] And, as explained above, thirty states still formally retain the death penalty, and enthusiasm for death sentences might be rising.[50]

In short, under the current Eighth Amendment framework, the single most important factor in the proportionality inquiry is the fraction of states that legislatively retain a punishment practice. The problem for abolitionists —aside from the fact that the median vote now belongs to Chief Justice Roberts—is that states can retain the practice even as usage falls.[51] The theoretical possibility of retention in the face of reduced activity, moreover, maps almost perfectly onto *what has actually happened* since the turn of the

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45. *See* BRANDON L. GARRETT & LEE B. KOVARSKY, THE DEATH PENALTY: CONCEPTS AND INSIGHTS 87 (2018).

46. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 465 (2012) (barring juvenile life-without-parole sentences (LWOP)); Graham v. Florida, 560 U.S. 48, 74 (2010) (barring juvenile LWOP for non-homicide offenses).

47. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 1009 (1991) (permitting LWOP for possession of 672 grams of cocaine); Rummel v. Estelle, 445 U.S. 263, 285 (1980) (permitting life sentence with possibility of parole under Texas three-strikes law, where strikes one and two involved a total of $230 worth of fraud).

48. *See, e.g.*, *Atkins*, 536 U.S. at 312 (holding that objective factors should inform Eighth Amendment determination "to the maximum possible extent," and that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures") (internal citations and quotation marks omitted).

49. *See* GARRETT & KOVARSKY, *supra* note 45, at 86.

50. *See States With and Without the Death Penalty*, *supra* note 33 (showing a rise in support for the death penalty).

51. *See* John Gramlich, *11 States That Have the Death Penalty Haven't Used It in More Than a Decade*, PEW RES. CTR. (Aug. 10, 2018), http://www.pewresearch.org/fact-tank/2018/08/10/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade (showing a decline in uses of the death penalty but states still retaining it).

twenty-first century.[52] Nonzero use of the death penalty keeps a jurisdiction on the retention side of the ledger, and the political economy of the death penalty gooses demand for capital punishment in many large, urban localities.[53] In such areas, the death penalty remains especially durable as a means of producing professional benefits for local stakeholders: police unions, prosecutors, judges, and other political officials.[54] If judicial abolition happens, then it will almost certainly happen not because the Supreme Court applies the current framework, but instead because the Court changes the framework itself.

## III. MISREADING JUSTICE KENNEDY

Blue-state fantasies about the Supreme Court's capital punishment jurisprudence were, for most intents and purposes, blue-state fantasies about Justice Kennedy. Death penalty issues, including retention, tend to produce intuitive Justice orderings.[55] The Justices generally align on a traditional left-right (liberal-conservative) axis,[56] with Justice Kennedy in the middle.[57] For that reason, as with any hot-button cultural issue, there was always considerable angst associated with Justice Kennedy's votes in death penalty cases.[58] Especially on the day's most pressing social issues, Justice Kennedy was a potential pick-up for the liberal coalition.[59]

That pattern of pickups produced an atmosphere that combined with some of his language on criminal justice matters to produce unwarranted optimism. There is a Justice Kennedy that exists in the imagination of abolitionists and other reformists, which is the Justice Kennedy of *Casey v.*

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52. *See States With and Without the Death Penalty*, *supra* note 33 (showing an uptick in support and that thirty-one states still have the death penalty).

53. *See Executions by County*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions-county (last updated Jan. 1, 2013) (showing that the top five counties in number of executions from 1976–2013 are all major metropolitan areas).

54. *See* GARLAND, *supra* note 39, at 289.

55. *See generally* Howard, *supra* note 6, at 292–316.

56. *See generally* Tom C. Clark et al., Politics from the Bench? Ideology and Strategic Voting in the U.S. Supreme Court (Aug. 15, 2018) (unpublished manuscript), https://static1.squarespace.com/static/58d3d264893fc0bdd12db507/t/5b7c0df0352f53dadbb8d39f/1534856689688/ClarkMontagnesSpenkuch.pdf. I am aware that referring to Justices as "liberals" and "conservatives" is crude and that a more appropriately nuanced explanation would refer to them as, for example, "Justices appointed by Presidents of [X] Party." Nor do I mean to suggest that Justices appointed by Democratic presidents always vote for liberal outcomes and that Justices appointed by Republican presidents vote for conservative ones. It just so happens to be the case that, with respect to the current Supreme Court, what one might call the judicial "body language" respecting major death penalty decisions reasonably tracks the liberal-conservative spectrum.

57. *See generally* Howard, *supra* note 6, at 292–316.

58. *See* Marcus, *supra* note 7.

59. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (striking down certain restrictions on abortion); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (declaring a constitutional right to marry for same-sex couples).

*Planned Parenthood*,[60] *Lawrence v. Texas*,[61] *Roper v. Simmons*,[62] *Boumediene v. Bush*,[63] and *Obergefell v. Hodges*.[64] Justice Kennedy wrote famous majority opinions in all of these landmark cases, but they did not effectively predict his votes across categories of his jurisprudence—and they certainly did not predict his capital punishment jurisprudence. There are two big reasons—other than garden-variety cognitive bias—why abolitionists, and others favoring heavy capital punishment restrictions, sometimes felt as though Justice Kennedy's vote of reformist solidarity was just around the corner. First, Justice Kennedy exhibited increasingly grave concerns over harsh punishment of juvenile offenders, which surface in death penalty cases.[65] Second, he expressed more vocal disapproval of extended solitary confinement, which involves a set of concerns that also tend to surface in capital punishment disputes.[66]

Taking these in turn, people took the wrong lessons about Justice Kennedy from *Roper* and other cases involving juvenile culpability. In *Roper*, Justice Kennedy wrote for the Court, striking down the death penalty for homicide offenders whose crimes were committed when they were children.[67] True to what some would characterize as form, Justice Kennedy's *Roper* opinion includes evocative passages capable of being interpreted as a broader ideological commitment than what is necessitated by the outcome in the case: appeals to wisdom that "any parent knows," combined with skepticism about whether the death penalty for juvenile offenders deters crime and whether courts can reliably give mitigating effect to features of a juvenile offender's background.[68]

Justice Kennedy's opinion for the Supreme Court in *Roper*, however, was a narrower commitment to a set of principles about juvenile culpability than it was an expression of broader skepticism about the "system's" ability to sort those who are morally deathworthy from those who are not. Indeed, Justice Kennedy had a well-documented interest in scientific work on the brain development of children, which presumably affected his views both of

60. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

61. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

62. *See* Roper v. Simmons, 543 U.S. 551 (2005).

63. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

64. *See Obergefell*, 135 S. Ct. at 2584.

65. *See infra* notes 67–75 and accompanying text (describing Justice Kennedy's authored opinions in cases relating to harsh punishments for juvenile offenders).

66. *See infra* notes 81–83 and accompanying text (describing Justice Kennedy's outlook on solitary confinement as a punishment for criminal offenses).

67. *Roper*, 543 U.S. at 578–79.

68. *Id.* at 569–72. Perhaps the most famous Kennedy quotation associated with this tendency is from *Planned Parenthood v. Casey*: "Liberty finds no refuge in a jurisprudence of doubt." Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992).

their culpability and how well they can age out of violent criminality.[69] Although the importance of the case has since been eclipsed by *Miller v. Alabama*—which held that sentences of life without the possibility of parole (LWOP) was simply an unconstitutional punishment for juvenile offenders, without respect to the nature of the offending criminality[70]—Justice Kennedy also wrote for the Court in *Graham v. Florida*,[71] which held that the Eighth Amendment forbids LWOP for juvenile non-homicide offenders.[72]

*Graham* reinforced what many observers, including myself, believed about Justice Kennedy's position in *Roper*.[73] He became extremely interested in neuroscientific advances that disclosed major differences between juvenile and adult brains.[74] His evolution implicated not only discretionary sentencing practices but also things like when a juvenile can consent to a search, when a juvenile's confession is voluntary, the sufficiency of *Miranda* warnings given to minors, and the efficacy of problem-solving courts.[75] But *Graham*, like *Roper*, did not represent a major paradigm shift on most death penalty issues. Justice Kennedy's attitude toward the death penalty writ remained largely unchanged—even as to certain issues, like a potential exemption for serious mental illness or sentencing rules for young adults—and seemed to be predicated on the same neuroscientific propositions as *Roper* and *Graham*.[76]

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69. *See Roper*, 543 U.S. at 566, 569 (citing scientific and scholarly articles discussing juvenile developmental psychology). In *Roper*, the American Psychological Association filed an amicus brief arguing the major planks of what would become the position of Justice Kennedy and the Court. *See* Brief for the American Psychological Association, and The Missouri Psychological Association as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447. The "APA" Brief was particularly effective in collecting and synthesizing the state of leading neuropsychological literature. *Id.* at *9–12.

70. Miller v. Alabama, 567 U.S. 460, 485–86, 489 (2012).

71. Graham v. Florida, 560 U.S. 48, 82 (2010).

72. *Id.*

73. *See generally Graham*, 560 U.S. 48. In many respects, *Graham* represented an even more aggressive embrace of neuropsychology than did *Roper*. *See id.* at 68 ("As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").

74. *See id.* at 68.

75. *See* Lizzie Buchen, *Science in Court: Arrested Development*, NATURE (Apr. 18, 2012), https://www.nature.com/news/science-in-court-arrested-development-1.10456 ("Many scientists and advocates for juveniles considered the result a triumph for neuroscience in the [C]ourt. . . . Just as [*Brown v. Board of Education*] is thought to mark the modern era of the [C]ourt's use of scientific research, [*Roper v. Simmons*] was believed to herald the era of neuroscience in the [C]ourt. Emboldened by the [*Roper*] decision, advocates and attorneys have increasingly called on neuroscience research when arguing that juveniles should be spared the harshest punishments.").

76. *See, e.g.*, Kelsey B. Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. CRIM. L. & CRIMINOLOGY 667, 670 (2014) (urging application of *Roper* logic to generate rule for young adults); Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 792 (2009) (arguing that "although severe mental illness in itself should not categorically disqualify an offender from capital punishment, in cases in which it

*Roper*, in short, was a case reflecting "[what] any parent knows" about their kids more than it was an institutional critique of the death penalty.[77] It did not herald some new world in which Justice Kennedy was increasingly willing to consider abolition or impose broad death penalty restrictions; it was simply an entry into a growing set of cases in which he voted for more lenient juvenile sentencing practices or otherwise recognized youth as a salient consideration when deciding what consequences attach to human decisions.[78]

Abolitionists and other hopeful reformists also inferred too much equivocation about the death penalty from Justice Kennedy's increasingly conspicuous concerns about extended solitary confinement.[79] For example, Justice Kennedy penned a separate opinion in *Davis v. Ayala*—a case in which parties had not even presented the issue—simply to express his frustration with the isolation of inmates on California's death row.[80] Observing that the "human toll wrought by extended terms of isolation long has been understood[] and questioned" and that "[y]ears on end of near-total isolation exact a terrible price," he struck a somber, concluding note by quoting Dostoyevsky: "The degree of civilization in a society can be judged by entering its prisons."[81] Nor has Justice Kennedy limited his expression of concern over solitary confinement to the pages of the United States Reporter.[82] In a 2015 hearing before a House Subcommittee, Justice Kennedy questioned why the United States failed to address the problems of solitary confinement in the way some of its national peers did and remarked that "[s]olitary confinement literally drives men mad."[83]

As was the case with respect to juvenile culpability in which wishful-thinking reformists confused Justice Kennedy's concerns about solitary confinement, which happen to show up in death penalty cases, with concerns about the broader merit of capital punishment.[84] One way of

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produces functional impairments at the time of the offense that significantly reduce culpability and deterrability, Eighth Amendment principles should preclude the death penalty").

77. Roper v. Simmons, 543 U.S. 551, 569 (2005).

78. *See generally id.* Although he did not write the opinion, Justice Kennedy joined Justice Sotomayor's opinion in *J.D.B. v. North Carolina*, which held that the age of a defendant is relevant in determining whether a person is "in custody" for the purposes of administering *Miranda* warnings. J.D.B. v. North Carolina, 564 U.S. 261, 265 (2011).

79. *See* Davis v. Ayala, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring) (writing separately to express concern over the solitary confinement marking California's death row). Justice Kennedy made remarks along these same lines before the House Committee on Appropriations in 2015. *See Financial Services and General Government Appropriations for 2016: Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't of the H. Comm. on Appropriations*, 114th Cong. 122 (2015) (statement by Kennedy, J.) [hereinafter *Kennedy Appropriations Testimony*].

80. *See Ayala*, 135 S. Ct. at 2208–10.

81. *Id.* at 2210 (quoting THE YALE BOOK OF QUOTATIONS 210 (Fred R. Shapiro ed., 2006)).

82. *See Kennedy Appropriations Testimony*, *supra* note 79.

83. *See id.*

84. *See* Lithwick, *supra* note 5; Rubin, *supra* note 4.

disentangling Justice Kennedy's views about the two penal phenomena involves the Supreme Court's treatment of so-called *Lackey* claims—claims that are not yet cognizable but that were regularly made subject of auxiliary opinions by Justice Breyer.[85] A *Lackey* claim alleges that the delay between a death sentence and the execution is sufficiently long in that it constitutes cruel and unusual punishment under the Eighth Amendment.[86] Many death-sentenced prisoners wait in solitary confinement—61% of death row inmates are isolated for at least twenty hours per day—and some litigants build the experience of that isolation into the *Lackey* claim.[87]

The reason *Lackey* claims provided insight into Justice Kennedy's views about the relationship between solitary confinement and the death penalty is that, to my knowledge, Justice Kennedy never joined an opinion suggesting receptivity to *Lackey* relief—even when the form of lengthy death row incarceration at issue is solitary confinement. In other words, he never went on record drawing any connection between the conditions-of-confinement problem and an abolitionist remedy. Given the tone and context of Justice Kennedy's expressed position, he simply appeared to view solitary confinement as a form of penal excess that happens to touch the death penalty—presumably one most appropriately addressed through regulatory reform, the legislative process, or conditions-of-confinement litigation under 42 U.S.C. § 1983.[88]

I do not mean to suggest that reformists misread everything about Justice Kennedy. Although they generally overestimated his potential to join a coalition of anti-death-penalty Justices, they correctly observed that he never jumped at the chance to author or join outlier opinions on the most conservative side of the decisional spectrum.[89] For example, even early in his

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85. *See, e.g.*, Boyer v. Davis, 136 S. Ct. 1446, 1447 (2016) (Breyer, J., dissenting) (dissenting from denial of certiorari); Glossip v. Gross, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting); Valle v. Florida, 564 U.S. 1067, 1067 (2011) (Breyer, J., dissenting) (dissenting from denial of stay); Thompson v. McNeil, 556 U.S. 1114, 1114–16 (2009) (Breyer, J., dissenting) (dissenting from denial of certiorari); Baze v. Rees, 553 U.S. 35, 78–81 (2008) (Stevens, J., concurring); Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting) (dissenting from denial of certiorari).

86. Russell L. Christopher, *Death Delayed Is Retribution Denied*, 99 MINN. L. REV. 421, 425 n.32 (2014). The argument takes its name from an opinion respecting the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995). *See generally id.* at 430–40 (analyzing *Lackey* questions under retributivist moral framework).

87. *See* Gabriella Robles, *Condemned to Death — and Solitary Confinement*, MARSHALL PROJECT (July 23, 2017, 10:00 PM), https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement. In the interest of full disclosure, I litigated such a theory myself on behalf of now-deceased inmate Rolando Ruiz, who had spent almost twenty years in solitary confinement prior to his execution in 2017. *See* Ruiz v. Texas, 137 S. Ct. 1246, 1246 (2017) (Breyer, J., dissenting) ("Petitioner Rolando Ruiz has been on death row for 22 years, most of which he has spent in permanent solitary confinement.").

88. *See* Davis v. Ayala, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring); *Kennedy Appropriations Testimony*, *supra* note 79.

89. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 419–27 (1993) (O'Connor, J., concurring).

career, in *Herrera v. Collins*, and even though he supported the result in the case, he did not join Justice Scalia's opinion rejecting the possibility that new evidence of innocence might constitutionally entitle an inmate to a federal habeas forum.[90] Instead, he joined Justice O'Connor's concurrence to make clear that the Constitution required such a forum in certain circumstances.[91] Justice Kennedy seemed to relish the opportunity to write opinions like *Roper* but had little appetite for writing the most polarizing opinions in favor of death sentences.[92]

Setting aside his distaste for the most polarizing pro-death penalty opinions, however, there was never much evidence that Justice Kennedy seriously contemplated abolition—or even major restriction. He frequently sided with the conservative bloc of the Court on 5–4 votes in capital post-conviction cases, which can expose some of the most egregious death penalty practices.[93] This very term, he refused to join a statement regarding the denial of certiorari in *Hidalgo v. Arizona*—a case in which the liberal Justices expressed concern that the Arizona death penalty reached too broad a spectrum of criminality to be consistent with its 1976 Cases.[94] Those hoping to abolish or substantially reform the death penalty were always going to have to look somewhere else; there was never a death-penalty remake of *Obergefell v. Hodges* in the works. For people with that constitutional agenda, Justice Kennedy's retirement is not quite the lost opportunity that some might believe it to be.

## IV. THE TWO ROBERTS COURTS

In Part IV, I want to be specific about what abolitionists and other reformists lost when Justice Kennedy announced his retirement.[95] That loss is, as I have argued throughout, less than meets the eye. In the interest of brevity, I assume that the swing vote on death penalty issues does not shift again for what I am calling the "medium term"—an assumption that could turn out to be wrong if a Republican president fills a vacancy created by the retirement of one of the more liberal Justices, or if a Democratic president fills a vacancy created by the retirement of one of the conservatives. In other words, my assumption is that four Justices will sit to the left of Chief Justice Roberts, and four Justices, including Justice Kavanaugh, will sit to his right.

For ease of discussion, I adopt two related terms, which are necessary to distinguish two different phases of the Supreme Court helmed by John

90. *Id.* at 427–29 (Scalia, J., concurring).

91. *Id.* at 419 (O'Connor, J., concurring).

92. *See generally* Roper v. Simmons, 543 U.S. 551 (2005).

93. *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015) (denying relief on the claim that the execution method violated the Eighth Amendment).

94. *See* Hidalgo v. Arizona, 138 S. Ct. 1054, 1055–58 (2018) (Breyer, J., concurring) (respecting denial of certiorari).

95. *See infra* Section IV.A (addressing the impact of Justice Kennedy's retirement).

Roberts. I shorthand each phase by the name of the Chief followed by the name of the median vote, and so the forthcoming Republican appointment will transform the Roberts–Kennedy Court into a Roberts–Roberts Court. John Roberts will be both the Court's Chief Justice and, at least on criminal justice issues (including the death penalty), its swing vote. Relative to the Roberts–Kennedy Court, the Roberts–Roberts Court will be a less hospitable forum for people facing the death penalty—but not by as much as people think.

### *A. The Roberts–Kennedy Court*

A Supreme Court with Justice Kennedy as its swing vote was going to continue to be what it has been for most of the post-1976 era: an institution largely uncommitted to policing the death penalty's major structural problems. It was going to largely confine itself to review of outlier practices —that is, the particular outlier behavior of judges and prosecutors who touch third rails, like race, in impermissible ways.[96] For example, a case like *Foster v. Chatman*, decided in 2016, was representative of the Roberts–Kennedy Court's focus.[97] In *Foster*, the Court found an Equal Protection violation when the prosecution marked a "B" next to black men on juror lists and wrote "if we had to pick a black juror" next to the black juror it apparently considered most favorable.[98] The egregiousness of the prosecutors' behavior in *Foster* is typical of conduct necessary to get the Court to enforce *Batson v. Kentucky*, the case establishing the modern Equal Protection rules against raced-based jury strikes.[99] The first of the two most important pre-*Foster Batson* decisions was *Miller-El v. Cockrell*, a case in which a prosecutor's office, with history of racialized jury selection techniques, repeatedly "shuffled" the venire to avoid a trial jury that included too many black jurors, read a graphic script to black jury panelists that was designed to elicit disqualifying reactions, and otherwise treated white and black venirepersons quite differently.[100] (The second of the two most important pre-*Foster Batson* decisions was also in Thomas Jo Miller-El's case, *Miller-El v. Dretke*, which largely repeated the reasoning from *Miller-El v. Cockrell* in a slightly different procedural posture.[101]) In *Miller-El*, the Court was unwilling to grant habeas relief for the petitioner for what appeared to be post-hoc pretext

96. *See generally* Foster v. Chatman, 136 S. Ct. 1737 (2016).
97. *See generally id.*
98. *Id.* at 1744.
99. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986).
100. Miller-El v. Cockrell, 537 U.S. 322, 331–35 (2003).
101. Miller-El v. Dretke, 545 U.S. 231, 266 (2005).

for what were, at the time they were made, racially motivated jury strikes.[102] The author of *Miller-El*—Anthony Kennedy.[103]

On criminal justice issues, Justice Kennedy did not vote as reliably in the State's favor as did the other Justices appointed by Republican presidents.[104] In terms of issues that regularly appear in death penalty cases, Justice Kennedy wrote or joined a slew of opinions siding with inmates asserting Sixth Amendment ineffective-assistance-of-counsel (IAC) claims.[105] Of course, Justice Kennedy also wrote or joined a slew of opinions siding with the government, and the Supreme Court's IAC rules were almost destined to mimic his voting behavior.[106] His record on prosecutor conduct issues tilts even more heavily against inmates, as he joined only one majority opinion siding with a death-sentenced inmate's argument that the prosecution violated *Brady v. Maryland* by failing to disclose exculpatory evidence.[107] Moreover, he joined Justice Scalia's key dissent in *Kyles v. Whitley*, an important case holding that the materiality of unlawfully suppressed evidence was to be considered cumulatively.[108] (His most interesting *Brady* vote is probably the least consequential: his decision to join Justice Souter's partial concurrence in *Strickler v. Greene*, in which Justice Souter argued that the

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102. *Id.* In *Miller-El v. Dretke*, the Court was unwilling to indulge what appeared to be post-hoc pretext for what were, at the time they were made, racially motivated jury strikes. *See id.* (stating that the state's excuse "blinks reality").

103. *Id.* at 235.

104. *See, e.g.*, Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017) (holding that Sixth Amendment rights trumped common law rules barring jurors from impeaching their verdict with affidavit or live testimony). *See generally* Stephanos Bibas, *Justice Kennedy's Sixth Amendment Pragmatism*, 44 MCGEORGE L. REV. 211 (2013) (exploring what Professor Bibas calls Justice Kennedy's Sixth Amendment pragmatism).

105. *See, e.g.*, Buck v. Davis, 137 S. Ct. 759, 767 (2017) (joining the Chief's opinion for the Court certifying appeal when defense team put on an expert to testify that defendant was more likely to recidivate because he was a black man); Trevino v. Thaler, 569 U.S. 413, 415 (2013) (joining Justice Breyer's opinion for the Court holding that deficient state post-conviction representation excuses procedural default of a trial-phase IAC claim); Sears v. Upton, 561 U.S. 945, 945 (2010) (per curiam) (joining the per curiam opinion holding that there could be an IAC violation even when trial counsel introduced nontrivial mitigation); Porter v. McCollum, 558 U.S. 30, 30 (2009) (per curiam) (joining per curiam opinion criticizing lower courts for failing to meaningfully engage with the effects of trial counsel's ineffectiveness); Wiggins v. Smith, 539 U.S. 510, 514 (2003) (joining Justice O'Connor's opinion for the Court holding that trial counsel could be ineffective for failing to follow up on important threads of mitigating evidence); Williams v. Taylor, 529 U.S. 362, 399 (2000) (joining Justice O'Connor's controlling opinion granting penalty-phase relief in an IAC death case for the first time).

106. *See, e.g.*, Davila v. Davis, 137 S. Ct. 2058, 2062 (2017) (joining Justice Thomas's opinion for the Court holding that deficient state post-conviction representation cannot excuse the procedural default of a claim that appellate counsel was ineffective on direct review of the proceedings); Rompilla v. Beard, 545 U.S. 374, 396 (2005) (Kennedy, J., dissenting) (penning the lead dissent arguing that trial counsel should not have the obligation to review all documents in the case file of a prior conviction).

107. *See* Banks v. Dretke, 540 U.S. 668, 698 (2004) (joining Justice Ginsburg's opinion for the Court holding that police were to be treated as part of "the state" for *Brady* purposes); Brady v. Maryland, 373 U.S. 83 (1963).

108. Kyles v. Whitley, 514 U.S. 419, 456–60 (1995) (Stevens, J., dissenting).

other seven Justices had wrongly determined that the suppressed evidence was immaterial as to the sentencing decision.)[109]

This voting behavior reveals less about Justice Kennedy's death penalty jurisprudence than about how he would apply the rules in question across capital and noncapital cases alike. In other words, for Justice Kennedy, these were questions about the prosecutor and defense functions generally, and not about capital punishment per se.[110] With respect to most issues that appeared across the spectrum of criminal litigation, his voting behavior did not differ radically depending on whether a case was capital or not. For example, in *Martinez v. Ryan*, he cast his vote in favor of permitting deficient state post-conviction lawyering to excuse default of a noncapital inmate's IAC claim before he did the same thing in a capital case, *Trevino v. Thaler*.[111] Justice Kennedy's coolness to *Brady* remedies in death penalty cases is in line with his skepticism about the restrictions imposed by *Brady* generally. For example, he joined Justice Thomas's opinion for the Court in *Connick v. Thompson*, a high-profile *Brady* case in which the Court refused to permit a damage award against the leadership of a habitually offending office.[112]

As mentioned in Part IV, Justice Kennedy did set the margin for the Supreme Court's Eighth Amendment proportionality cases.[113] He cast important votes and wrote major opinions in favor of offense-based exceptions for nonhomicides and in favor of offender-based exemptions for juveniles and intellectually disabled defendants.[114] The two potential rules sitting on the proportionality frontier, however, are exemptions in which Justice Kennedy evinced no interest whatsoever.[115] Justice Kennedy's retirement does not represent a lost opportunity, at least on these questions, because Justice Kennedy was never going to vote for any exemptions in the offing.

In terms of offenders, the next exemption on the proportionality frontier involved a death ineligibility rule for inmates with serious mental illness

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109. Strickler v. Greene, 527 U.S. 263, 296–97 (1999) (Souter, J., concurring in part and dissenting in part).

110. *See supra* notes 97–108 and accompanying text (discussing Justice Kennedy's voting trends in capital cases).

111. Trevino v. Thaler, 569 U.S. 413, 415, 429 (2013); Martinez v. Ryan, 566 U.S. 1, 4, 13 (2012).

112. *See* Connick v. Thompson, 563 U.S. 51, 54 (2011).

113. *See supra* Section IV.A (discussing Justice Kennedy's role in expanding the Court's Eighth Amendment proportionality doctrine).

114. *See* Kennedy v. Louisiana, 554 U.S. 407 (2008) (writing the opinion for the Court barring the death penalty for the nonhomicide offense of rape of a child); Roper v. Simmons, 543 U.S. 551 (2005) (writing the opinion for the Court barring the death penalty for juvenile offenders); Atkins v. Virginia, 536 U.S. 304 (2002) (joining Justice Stevens's opinion for the Court barring the death penalty for intellectually disabled—mentally retarded—offenders).

115. *See* Winick, *supra* note 76, at 788; s*ee also infra* notes 117–122 and accompanying text (discussing serious mental illness as an exception to death penalty application).

(SMI).[116] An SMI exemption is widely discussed in academic literature and is frequently litigated in lower courts.[117] An SMI rule would fit neatly within the matrix of constitutional law governing the way severe cognitive and mental impairment affects the scope of available punishment.[118] There are already constitutional rules that preclude the trial of a mentally incompetent offender,[119] bar a death verdict against a defendant that is intellectually disabled,[120] and prohibit the execution of an inmate so incompetent he does not understand the retributive link between his capital punishment and his crime.[121] Moreover, almost every American jurisdiction has some version of an insanity defense.[122] Despite the intuitive appeal of an SMI exemption, and its consistency with the emphasis on neuroscience evident in *Roper*, there is no evidence whatsoever that Justice Kennedy was ever interested in adopting it. It would have been presented to the Court in dozens of certiorari petitions—if not hundreds—and not a single one drew a word from Justice Kennedy.

The story is about the same for offense-based exemptions. The Supreme Court has barred the death penalty for any offense that does not result in a killing, so new offense-based proportionality rules—at least those relating to the death penalty—must involve the types of offenses that result in killings that can be punished capitally.[123] The exemption that would almost certainly be at issue involves the so-called felony murder scenario: when there is a killing that occurs in the course of committing a felony—including scenarios in which offenders 1 and 2 jointly commit a felony, where a death results from offender 2's conduct during the course of the felony, and where offender 1 is tried capitally.[124] Although *Enmund v. Florida*, decided in 1982, appeared to impose a constitutional rule conditioning death eligibility on the

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116. Winick, *supra* note 76, at 788.

117. In terms of court cases, *see, e.g.*, *In re* Neville, 440 F.3d 220, 221 (5th Cir. 2006) (holding that *Atkins* and *Roper* did not synthesize a constitutional rule against executing those with serious mental illness). For academic articles, *see* Christopher Slobogin, *What* Atkins *Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003) (arguing that an SMI exemption would fall under the Equal Protection Clause); Scott E. Sundby, *The True Legacy of* Atkins *and* Roper*: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WM. & MARY BILL RTS. J. 487 (2014) (arguing that mentally ill defendants would be protected under the Eighth Amendment).

118. *See, e.g.*, Sundby, *supra* note 117, at 511 (asserting that a mental illness exception is consistent with traditional mitigation factors considered in capital cases).

119. *See, e.g.*, Dusky v. United States, 362 U.S. 402 (1960) (per curiam).

120. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002).

121. *See, e.g.*, Panetti v. Quarterman, 551 U.S. 930 (2007).

122. PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW VARIATIONS ACROSS THE 50 STATES: CH. 14 INSANITY DEFENSE 2 (Faculty Scholarship at Penn Law ed., 2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2720&context=faculty_scholarship (mapping the status of the insanity defense in all fifty states).

123. *See* Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

124. *See, e.g.*, Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1188 (2017).

presence of offender 1's *intent*, the Supreme Court walked back that reading of *Enmund* five years later in *Tison v. Arizona*.[125] *Tison* held that a jury could impose a death sentence as long as offender 1 "substantial[ly] participat[ed]" in the felony and had at least a "reckless indifference to human life . . . ."[126] Rules allowing the death penalty for offender 1 have always been moral outliers because offender 1's culpability can be *far* below what is traditionally associated with a capital offense and have come under withering attack in academia for that reason.[127]

Imagining that Justice Kennedy was ever going to step to this frontier of offense-based exemptions is particularly difficult given the number of times that he declined. Moreover, to my knowledge, he has written nothing and made no speeches calling on litigants to explore the question. Indeed, the scientific advancements that apparently drove his interest in questions of juvenile culpability are not capable of producing similar insights about felony-murder culpability, which is more straightforwardly the province of moral theory.

A Roberts–Kennedy Court was going to stay on the same incrementalist course that the Supreme Court has been on since 1976. It was going to continue to enforce constitutional rules aggressively in outlier cases—particularly those in which flagrantly racist behavior influenced outcomes.[128] It would have continued to devote some efforts directed at bolstering the Sixth Amendment right to counsel and, to a lesser extent, the Fifth and Fourteenth Amendment constraints on the behavior of prosecutors.[129] The Roberts–Kennedy Court was never very likely to announce any new categorical restriction on the death penalty. In evaluating what Justice Kennedy's retirement means for the future of the Court on capital punishment, it is *this* path that must serve as the baseline for the assessment—not a path estimated by a blue-state fantasy about what Justice Kennedy would have been willing to do.

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125. Tison v. Arizona, 481 U.S. 137, 150, 157 (1987); *see* Enmund v. Florida, 458 U.S. 782, 801 (1982) ("Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.").

126. *See Tison*, 481 U.S. at 154, 158 ("Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.").

127. *See* Binder et al., *supra* note 124, at 1145–51. For a particularly thorough survey and treatment of the felony murder rule, *see generally id.*

128. *See, e.g.*, Buck v. Davis, 137 S. Ct. 759 (2017); Foster v. Chatman, 136 S. Ct. 1737 (2016).

129. *See supra* notes 107–109 and accompanying text (discussing the Roberts–Kennedy Court's efforts to bolster the Sixth Amendment right to counsel and the Fifth and Fourteenth Amendment constraints on the behavior of prosecutors).

### *B. The Roberts–Roberts Court*

On the post-Kennedy Supreme Court, Chief Justice Roberts will be the median vote on many issues and will almost certainly be the swing vote in death penalty cases.[130] Supreme Court appointments have become the crown jewel of otherwise compromised political movements, and it is a time of unprecedented opportunity to impose ideological discipline over that process—at least on the Republican side by the Federalist Society.[131] Under such conditions, and in the wake of some conservatives' harsh treatment of Chief Justice Roberts and Justice Kennedy, a modern Republican nominee will likely have a predicted voting profile closer to that of Justices Thomas, Alito, Gorsuch, and Kavanaugh than to Justice Kennedy (or Chief Justice Roberts).[132] That is, a future appointee of a Republican president is more likely to be a law-and-order Justice hewing to Federalist Society orthodoxy, exhibiting less of the iconoclasm than some of the prior Republican appointees.[133]

The Roberts–Roberts Court will be less of a change on death penalty issues than people expect, but it will still be a change. Notwithstanding some distance between the Chief and some of the Associate Justices to his right,[134] a Roberts–Roberts Court will impose fewer constitutional restrictions on the death penalty than a Roberts–Kennedy Court would have and will police existing restrictions less aggressively. A Roberts–Roberts Court, for example, will shed Justice Kennedy's potentially decisive vote in favor of thicker Sixth Amendment IAC constraints. And whatever chance there was that a Roberts–Kennedy Court would move to the frontier of Eighth Amendment proportionality jurisprudence is obviously gone.[135]

There are, however, some areas in which a Roberts–Roberts Court would look a lot like a Roberts–Kennedy Court and would differ from a Supreme Court in which the median vote belonged to Justices Thomas, Alito,

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130. *See*, *e.g.*, Adam Liptak, *Chief Justice John Roberts Amasses a Conservative Record, and Wrath from the Right*, N.Y. TIMES (Sept. 28, 2015), https://www.nytimes.com/2015/09/29/us/politics/chief-justice-john-roberts-amasses-conservative-record-and-the-rights-ire.html.

131. *See* Jennifer Bendery, *Trump Isn't Remaking the Supreme Court. Leonard Leo Is*, HUFFINGTON POST (July 2, 2018, 5:33 PM), https://www.huffingtonpost.com/entry/leonard-leo-supreme-court-federalist-society_us_5b354230 e4b0f3c2219f4082.

132. *See, e.g.*, Liptak, *supra* note 130.

133. *Cf.* Barry, *supra* note 5, at 533 ("Should he do so within the next three years, the populist and pro-death penalty president, Donald Trump, will almost certainly replace Kennedy with a conservative Justice unlikely to support judicial abolition.").

134. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206 (2018) (showing a Fourth Amendment decision in which the Chief Justice joined the liberal Justices, and Justice Kennedy voted with the other conservative Justices in dissent); *see infra* notes 138–143 and accompanying text (discussing Chief Justice Roberts's voting patterns).

135. *See* Barry, *supra* note 5; *see also supra* note 133 and accompanying text (discussing the next nominee's likelihood to oppose judicial abolition).

or Gorsuch. For example, the Chief voted with the majority in *Martinez*, breaking from Justices Scalia and Thomas, ensuring that there is at least one forum for inmates to enforce their Sixth Amendment right to counsel.[136] Even more recently, in *McCoy v. Louisiana*, the Chief voted with the majority and split with Justices Thomas, Alito, and Gorsuch by holding that the Sixth Amendment does not permit trial counsel to admit guilt over the objection of the defendant she represents.[137]

Additionally, a Roberts–Roberts Court will likely continue to use its certiorari review to police outlier racial practices in state and lower federal courts. Chief Justice Roberts voted with the majority in *Buck v. Davis*, holding that trial counsel was ineffective for presenting expert testimony that the capital defendant was more likely to recidivate because he was black.[138] He also joined the majority in *Foster v. Chatman*, discussed above, in which the prosecution engaged, rather blatantly, in race-based jury selection.[139] Not only did the Chief join the majority in *Buck* and *Foster* but *he assigned the opinions to himself*.[140] In those opinions, he deployed uncharacteristically strong language condemning the racialized behavior.[141] In *Buck*, for example, he rejected an argument that the effect of the racist testimony was negligible by remarking, "[s]ome toxins can be deadly in small doses."[142] In *Foster*, the Chief expressed something approaching anger with the State's insistence that its jury selection was not influenced by race by describing the number of references to race in the prosecution's jury selection materials as "arresting," and by referring to the State's position before the Court as a mashup of "shifting explanations [and] misrepresentations of the record . . . ."[143]

Nobody should declare a Roberts–Roberts Court a friendly forum for capital litigants. At the same time, such a scenario is not quite the death penalty free-for-all that some reformists fear. Chief Justice Roberts appears at least partially committed to the *Martinez* project and to policing the worst racial excesses of capital prosecutions. Those who viewed the Supreme Court as a vehicle for reforming American criminal justice practices correctly perceive the futility of such a strategy as litigated to a Roberts–Roberts Court, but they probably misperceived its viability as litigated to the Roberts–Kennedy lineup.

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136. *See* Martinez v. Ryan, 566 U.S. 1, 17 (2012).
137. *See* McCoy v. Louisiana, 138 S. Ct. 1500, 1511 (2018).
138. *See* Buck v. Davis, 137 S. Ct. 759, 777 (2017).
139. *See* Foster v. Chatman, 136 S. Ct. 1737, 1754 (2016).
140. *See Buck*, 137 S. Ct. at 759; *Foster*, 136 S. Ct. at 1737.
141. *See generally Buck*, 137 S. Ct. 759; *Foster*, 136 S. Ct. 1737.
142. *See Buck*, 137 S. Ct. at 777.
143. *See Foster*, 136 S. Ct. at 1754–55.

## V. CONCLUSION

I appreciate the invitation to participate in this Symposium, and so I feel especially obligated to underscore the extreme uncertainty that marks a predictive endeavor like this one. Short-to-medium term predictions about the judicial fate of the death penalty are intricately bound up in the composition of the Supreme Court and entail some half-baked, tea-leaf reading about the voting behavior of Justices who might find themselves in possession of the median vote.[144] I cannot help but suggest that the judicial fate of capital punishment is dependent on what one might call "known unknowns."[145] And those known unknowns depend, in turn, like so many things in American life, on the preferences ultimately expressed at the ballot box in the next two elections.

Having issued that disclaimer, the odds of accurately predicting the Supreme Court's near-term median voter are much higher than they were just before Justice Kennedy retired.[146] As both the Chief Justice and the likely swing vote, Chief Justice Roberts will be one of the most powerful jurists in American history.[147] With his ascent to that status, many rightly perceive the end of the road for major judicial reform.[148] I merely suggest that they should have seen the end of the road sooner; Justice Kennedy was never going to venture near any of the rulings that abolitionists and other reformists dreamed about in their blue-state fantasies.[149]

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144. *See supra* note 15 and accompanying text (discussing various predictions about the death penalty's future regardless of Chief Justice Roberts as the swing vote).

145. *See* Matt Ford, *The Known Unknowns of Lethal Injection*, ATLANTIC (Jan. 16, 2015), https://www.theatlantic.com/politics/archive/2015/01/the-known-unknowns-of-lethal-injection/384589.

146. *See supra* Section IV.B (discussing how Chief Justice Roberts will be the median vote). One of two things would have to happen for the Chief Justice *not* to have swing status on death penalty issues. Either President Trump would have to lose the 2020 presidential election and a Democratic president would have to appoint a replacement for one of the conservative Justices, or a Republican president (including Trump) would have to appoint a replacement for one of the liberals.

147. *See supra* Section IV.B (discussing how in a post-Kennedy Supreme Court, Chief Justice Roberts will be the swing vote on many issues).

148. *See supra* Section IV.B (discussing how a Roberts–Roberts Court will not create a substantial change on death penalty issues).

149. *See supra* Section IV.A (discussing how Justice Kennedy did not vote as expected in regard to capital punishment).