

## THE AMERICAN DEATH PENALTY FROM A CONSEQUENTIALIST PERSPECTIVE

*Jordan Steiker\**

We are asked whether the death penalty should be retained “without regard to issues of morality and without regard to the risk of convicting the innocent.”<sup>1</sup> Should we answer affirmatively, we are asked further how the death penalty should be administered. Like most law professors, I begin my answer by challenging the question: how is it possible to strip away “moral questions” when considering capital punishment? This question seems analogous to debating abortion while suspending consideration of the status of a fetus as a human life or the liberty interest attaching to a pregnant woman. There are certainly many practical or pragmatic questions surrounding abortion apart from these foundational moral questions, but most people and policy makers involved in the conversation would feel like something is missing. Similarly, in the death-penalty context, two foundational moral questions dominate capital-punishment discourse: whether retributive considerations permit or require the punishment of death, and whether some conception of human dignity or limit on state power precludes its imposition.<sup>2</sup>

I understand the impulse to avoid these foundational questions on the ground that most people are unmovable from their original, often intuitive, commitment. But it seems odd and wrong to regard the purportedly non-foundational issues—“pragmatic” questions of cost, efficacy, and so on—as somehow “non-moral” questions. For many philosophers and policymakers, the morality of the death penalty turns entirely, or at least largely, on its social usefulness; suspending considerations of morality would essentially leave us with nothing to say at all. Perhaps it is even more difficult to suspend consideration of moral questions in the death-penalty context because many of the seemingly practical or prudential utilitarian considerations are especially difficult to sever from moral discourse. For example, some of the more pressing consequentialist concerns in capital practice include whether the punishment is administered in an arbitrary or discriminatory manner, whether the death penalty deters violent crime, and whether the death penalty is

---

\* Judge Robert M. Parker Endowed Chair in Law; Professor, The University of Texas School of Law; J.D., Harvard School of Law; B.A., Wesleyan University.

1. This was the question posed by Professor Arnold Loewy at the 2014 Texas Tech Criminal Law Symposium regarding homicide (on file with the *Texas Tech Law Review*).

2. See Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 752 (2005).

administered with sufficient accuracy.<sup>3</sup> Each of these consequentialist considerations carries broader moral implications such as the justifiability of a (potentially) useful social practice that is administered arbitrarily or discriminatorily, the permissibility of deterrence as a justification for execution (treating offenders as means rather than ends), and whether error in the ultimate punishment should be tolerated (and if so, how much?).

It is also worth observing that suspending consideration of moral questions at this moment in the death-penalty debate is actually more problematic for the pro-death-penalty side. Whereas at earlier points in U.S. history opponents of the death penalty focused significantly on the wrongness of the death penalty as a moral matter based on some conception of human dignity, today the most prominent anti-death-penalty arguments are practical and prudential.<sup>4</sup> Among the staple of contemporary anti-death-penalty arguments are considerations of financial cost, risk of error, absence of deterrence, rarity of executions (and corresponding lack of significant social benefits), and the adequacy of life without possibility of parole as a sentencing alternative. In fact, many opponents of the death penalty have self-consciously recast their ambition “in terms of ‘repeal’ rather than ‘abolition’” of prevailing capital statutes.<sup>5</sup> They have done so precisely to broaden the appeal of the anti-death-penalty movement by avoiding the contested claim that capital punishment is immoral as a practice; instead, the thrust of the contemporary movement is that our death penalty—the prevailing American practice—is simply too costly along several dimensions with insufficient benefits to justify retention. Thus, the modern campaign against the death penalty has resisted emphasizing the human-rights or human-dignity dimension that dominates European death-penalty discourse.<sup>6</sup> Instead, opposition to the death penalty is couched in “smart on crime” rhetoric that highlights the concrete social benefits of using alternative sanctions such as life without possibility of parole sentences.<sup>7</sup>

On the pro-death-penalty side, deterrence remains a weak argument. Empirical researchers have had enormous difficulties establishing a deterrent effect, in part because of the rarity of capital sentences and executions.<sup>8</sup> The famous Ehrlich study, which played a significant role in the revitalization of the death penalty in the 1976 landmark cases, is widely viewed as deeply flawed; the purported deterrent effect—which Ehrlich identified as operative during the 1933–1969 study period—disappears if the last five years of the time series are

---

3. *See id.*

4. *See* Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 661–77 (2010) [hereinafter *Capital Punishment: A Century of Discontinuous Debate*] (discussing contemporary anti-death-penalty arguments).

5. *See id.* at 676.

6. *See id.* at 675–76.

7. *See id.* at 677.

8. *See* JAMES R. ACKER, QUESTIONING CAPITAL PUNISHMENT: LAW, POLICY, AND PRACTICE 51 (2014).

removed.<sup>9</sup> More recent studies face similar methodological problems.<sup>10</sup> Even if the death penalty *could* serve as a deterrent—or more precisely, yield a greater marginal deterrence than life without possibility of parole—it hardly so functions where such a small (and rapidly declining) number of murderers receive death sentences, and an even smaller number face any realistic risk of execution.<sup>11</sup> Given the precariousness of the deterrence argument, it is unsurprising that the most promising, and most commonly voiced, contemporary pro-death-penalty argument is some form of the retributive claim that moral considerations require or justify some especially heinous offenders to forfeit their lives. If *that* argument is removed from the pro-death-penalty side, there is precious little supporting retention.

Before moving forward, I will offer a brief comment on suspending concerns relating to convicting and executing the innocent. This concern has undoubtedly contributed significantly to the decline in support for and use of capital punishment over the past fifteen years. I remain something of a skeptic about the strength of the argument from innocence (in comparison to other anti-death-penalty or pro-repeal claims).<sup>12</sup> In particular, I regard the argument as rooted in an overly optimistic view about the error-correcting potential of our criminal-justice system. That claim might sound odd because the argument from innocence appears to rest on the fallibility of human endeavors, including the administration of criminal punishment. But, lurking beneath the argument from innocence is the somewhat naïve view that without the death penalty, significant errors and false convictions would be discovered and corrected. So, the argument goes, if someone is sentenced to life imprisonment rather than death, there is always the possibility of vindication. What this view ignores is the disturbing fact that non-death-sentenced inmates rarely have any meaningful review of their convictions.<sup>13</sup> They lack lawyers to investigate and present “newly-discovered” evidence in state and federal postconviction proceedings, and fundamental errors, including wrongful conviction, are unlikely to come to light.<sup>14</sup> In fact, the presence of the death penalty seems to increase the likelihood that claims of innocence will be canvassed.<sup>15</sup> More resources, judicial attention, and public concern flow to claims of innocence asserted by condemned inmates than to those asserted by inmates merely facing lengthy confinement.<sup>16</sup>

---

9. *Id.* at 47–50.

10. *Id.* at 50–52.

11. *See Capital Punishment: A Century of Discontinuous Debate*, *supra* note 4, at 683.

12. *See generally* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005) (discussing drawbacks of innocence critique).

13. *See id.*

14. *See id.* at 606.

15. *See id.* at 605–06.

16. *See id.* at 605–08.

I do not wish to understate the horror of executing the innocent, nor do I want to understate the horror of lengthy—in most cases lifetime—incarceration for persons wrongfully convicted of murder but not sentenced to death. In sheer numbers, this is a much larger group; it seems to me a complicated empirical question whether the presence of the death penalty leads to more or less “wrongful punishment” over the long term.

I now turn to the central issue: the wisdom of the death penalty from a pragmatic perspective (suspending considerations of “morality” and the risk of executing the innocent). I want to begin by noting that the choice is not between simple abolition or retention of the death penalty. Rather, the choice is between abolition and the prevailing reality of extensive regulation of the death penalty. Over the past forty years, the U.S. Supreme Court has sought to rationalize and tame the American death penalty via an elaborate set of doctrines.<sup>17</sup> The Court has sought to limit state definitions of capital murder to ensure that the punishment is reserved for the “worst of the worst.”<sup>18</sup> At the same time, the Court has insisted on a broad right to individualized sentencing to permit capital-charged defendants to invoke any reasonable grounds supporting a non-death sentence.<sup>19</sup> The Court has recognized heightened responsibilities of trial counsel to ensure mitigating evidence is discovered and presented.<sup>20</sup> And the Court has crafted proportionality limits on the reach of the death penalty, exempting non-homicidal offenses<sup>21</sup> and certain vulnerable offenders<sup>22</sup> from the capital realm. Notwithstanding these interventions, virtually no one would characterize the modern regulatory effort as anything but a colossal failure.

On the one hand, we have endured all of the “costs” associated with regulation. One set of costs has been financial.<sup>23</sup> The increased recognition of “individualized” sentencing has made the death penalty extraordinarily expensive—far more expensive than the alternative of lifetime imprisonment.<sup>24</sup> The lion’s share of these costs are borne at trial with

---

17. See Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 224–35 (2012) [hereinafter *Entrenchment and/or Destabilization?*] (discussing reforms of modern era).

18. See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting); *Godfrey v. Georgia*, 446 U.S. 420, 432–33 (1980) (invalidating the application of vague aggravating circumstance in Georgia’s capital scheme).

19. See *Tennard v. Dretke*, 542 U.S. 274, 284–85 (2004).

20. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 377 (2005); *Wiggins v. Smith*, 539 U.S. 510, 521–23 (2003); *Williams v. Taylor*, 529 U.S. 362, 396–97 (2000).

21. See generally, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting the application of the death penalty for the offense of raping a child and concluding that the death penalty is disproportionate as applied to any non-homicidal ordinary offense); *Coker v. Georgia*, 433 U.S. 584 (1977) (prohibiting the application of the death penalty for the offense of raping an adult woman).

22. See generally, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the application of the death penalty against juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the application of the death penalty against persons with intellectual disabilities).

23. See, e.g., *Entrenchment and/or Destabilization?*, *supra* note 17, at 233.

24. See *id.* at 231–33.

prolonged investigation, extended proceedings (such as lengthy voir dire or a separate punishment phase), and numerous experts and specialists, all directed at uncovering and litigating any substantial facts calling for a sentence less than death.<sup>25</sup> It is not uncommon for capital-trial costs—including defense investigation—to run into the millions of dollars in individual cases.<sup>26</sup> Death cases also generate much more substantial postconviction costs because states typically provide counsel to condemned, but not other, inmates and federal habeas authorizes the appointment of counsel as of right only in capital cases.<sup>27</sup> Most death-penalty states have also gravitated toward more restrictive death-row confinement (essentially solitary confinement), and such confinement is significantly more expensive than its less restrictive counterpart. For example, California estimates death-row confinement costs are about \$90,000 per year, per inmate, resulting in an additional \$60 million per year for the state.<sup>28</sup>

A related, but distinct, “cost” is delay. Our system of regulation has extended the time between sentence and execution.<sup>29</sup> Throughout much of our history, this time period was trivial, occupying weeks or months.<sup>30</sup> Now, the gap between sentence and execution can be years or decades and, in some jurisdictions, seemingly indefinite.<sup>31</sup> Regulation of capital punishment requires extraordinary coordination to produce executions, and in some jurisdictions, death-sentenced inmates face no realistic prospect of execution.<sup>32</sup> One telling fact is that “execution” is only the third leading cause of death on California’s death row—following suicide and natural causes.<sup>33</sup> Delay undermines the already diminished credibility of capital punishment as a deterrent and erodes public confidence in the criminal-justice system more broadly. Delay also invites a new and troubling problem: the death-row phenomenon. Death-sentenced inmates now endure essentially two punishments—lengthy incarceration under extremely harsh conditions followed by the punishment of death.

The prospect of financial costs and significant delays has contributed to the extraordinary decline in death sentencing and executions over the past two decades. The death-sentencing drop is the most dramatic, as the national total

---

25. See generally Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117 (discussing the costs attributable to the constitutional regulation of the death penalty).

26. See *id.* at 120–21.

27. *Id.* at 143–45.

28. *Id.* at 119.

29. See *id.* at 143–45.

30. See Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 178–84 (1998).

31. Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 756–59 (2014) [hereinafter *Lessons for Law Reform*] (discussing variation at the state level in translating death sentences to executions).

32. *Id.*

33. See *id.* at 756.

of death sentences per year has dropped about 75% from the highs in the mid-1990s (about 313 per year from 1994–1996) to the lows of the past three years (about 80 per year from 2011–2013).<sup>34</sup> The drop in death sentencing seems near universal, including Texas, which has not produced more than ten sentences in a year for six consecutive years, after reaching 40 per year in the mid-1990s.<sup>35</sup> The drop in executions nationwide is very significant, but not quite as dramatic, falling from close to 100 per year in 1999 to about 45 per year over the past five years.<sup>36</sup> Both of these declines are likely causally connected, in both directions to the significant decline in popular support for the death penalty, which reflected in recent opinion polls: declining popular support results in fewer death sentences and executions, and the decline in death sentences and executions erodes public confidence in the death penalty.<sup>37</sup>

Despite the dramatic drop in death sentencing, there is little evidence that the few sentences produced are in fact imposed on the worst of the worst offenders. Death eligibility under prevailing statutes remains quite broad, yet courts generate an exceedingly small number of death sentences from this large pool.<sup>38</sup> Death sentences are increasingly confined to a small number of counties within death-penalty states.<sup>39</sup> This dynamic suggests that the nature of the offense and the offender are routinely less important than the location of the crime in determining whether death will be imposed. Moreover, in some jurisdictions, we continue to see significant race-of-the-victim effects, as researchers have replicated the findings of the famous Baldus study outside of Georgia; the new studies suggest that the problems revealed in the Baldus study are both widespread and difficult to eradicate.<sup>40</sup>

Overall, we have a rare practice, which is often applied randomly or invidiously at great financial cost and in a time-consuming process with declining popular support. Suspending “moral questions,” as well as the risk of convicting the innocent, the prevailing American death penalty is bad public policy. Given this conclusion, I am not obligated to address the further, somewhat ambiguous question regarding how the death penalty should be “administered” if retained. It is not clear whether “administered” here refers to the broad sense of constructing a capital system or the narrow sense of choosing the method of execution. This confusion is reminiscent of stories, perhaps apocryphal, about some disheartening colloquies on *voir dire* in a few old Texas

---

34. *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Oct. 10, 2014).

35. *See id.*

36. *Executions by Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/executions-year> (last visited Oct. 10, 2014).

37. *See* Jeffrey M. Jones, *U.S. Death Penalty Support Lowest in More Than 40 Years*, GALLUP (Oct. 29, 2013), <http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx>.

38. *See, e.g.*, ACKER, *supra* note 8, at 215–17.

39. *See id.*

40. *See id.* at 212–13.

capital cases. Prospective jurors were routinely asked whether they could “give” the death penalty in an appropriate case as part of the “death-qualification” process to ensure that the jurors were not categorically and irrevocably opposed to the death-penalty option. In a few cases, prospective jurors apparently volunteered that they could “give” the death penalty so long as the court could provide advance notice (so that the jurors could be excused from work) and if prison officials would show them what to do. In other words, these jurors understood the question to ask whether they would be willing to serve as *executioners*. Needless to say, such jurors were not ideal for the defense side. If “administer” here likewise refers to the process of execution, the question again highlights the present weakness of the American death penalty. The litigation surrounding lethal injection is in many respects a microcosm of the American death penalty, reflecting the widespread ambivalence about the punishment and inefficacy of the present system. Such litigation has contributed to the slowing of executions in the United States, as states have been remarkably reluctant to shift to other execution methods in response to the declining availability of lethal drugs and concerns about the risk of “botched” executions using prevailing protocols.<sup>41</sup> Although use of the firing squad would avoid many of the problems associated with lethal injection, states have thus far resisted such a change given their conflicting desires to punish retributively while avoiding visible infliction of pain to the inmate or damage to the body of the condemned. The fact that lethal injection concerns have managed to stymie execution efforts reflects the increasing ambivalence of government officials and the general public to carry out executions, and that ambivalence in turn renders the American death penalty increasingly expensive, inefficient, and incapable of achieving either deterrence-based or retributive goals.

Happily, I am not required to answer the “administration” question because it is contingent on answering the first question affirmatively—that the death penalty should be retained. But, in the same spirit, I will address how, if the death penalty is to die, it should expire. At this moment in American capital history two paths seem possible. First, the death penalty could continue to wither—with more states joining the repeal/abolitionist ranks—and a continuing decline in capital sentencing and executions in the remaining retentionist states. As of now, thirty-two states have the death penalty on the books, but far fewer are active in death sentencing, and even fewer in executions.<sup>42</sup> In fact, only three states (California, Florida, and Texas) sentenced more than ten inmates to death in the most recent two-year period (2012–2013), and five states (Texas, Virginia, Oklahoma, Missouri, and

---

41. See Austin Sarat et al., *Botched Executions and the Struggle to End Capital Punishment: A Twentieth-Century Story*, 38 LAW & SOC. INQUIRY 694, 697–98 (2013) (discussing botched executions).

42. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Oct. 10, 2014); *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 34.

Florida) are responsible for nearly two-thirds (901) of all executions (1,386) in the modern era.<sup>43</sup> Six jurisdictions have abandoned the death penalty over the past decade (New York, New Jersey, New Mexico, Illinois, Connecticut, and Maryland), and several other jurisdictions appear on the cusp—New Hampshire recently failed to repeal by just one vote.<sup>44</sup> This first path would not produce “total” abolition in the short term, but the continued marginalization of the death penalty to a small number of jurisdictions would likely lead to the expiration of the practice in the long term. The second path to abolition would be a dramatic judicial intervention akin to *Furman*—a pronouncement by the U.S. Supreme Court that the death penalty no longer comports with evolving standards of decency, notwithstanding its retention in a majority of states. Over the past two decades, the Court has actually laid the conceptual groundwork for such a decision.<sup>45</sup> In its proportionality decisions, the Court has deemphasized the sheer number of states that authorize a challenged practice and has instead highlighted other indicia of societal values, including jury verdicts, expert and professional judgments, world practices and attitudes, and opinion polls.<sup>46</sup> These criteria increasingly point toward abolition given the dramatic decline in death sentencing, the American Law Institute’s withdrawal of the death-penalty provision of the Model Penal Code,<sup>47</sup> the increasing isolation of the United States among democracies retaining capital punishment, and declining public support in national polling.<sup>48</sup> In addition, several Justices have called attention to the failures of the Court’s regulatory efforts to solve some of the practical problems associated with the American death penalty, including its arbitrary and discriminatory application,<sup>49</sup> risk of error,<sup>50</sup> and inability to secure meaningful social benefits.<sup>51</sup> Indeed, Justices Blackmun and Stevens, who

---

43. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 10, 2014).

44. Katharine Q. Seelye, *Measure to Repeal Death Penalty Fails by a Single Vote in New Hampshire Senate*, N.Y. TIMES (Apr. 17, 2014), [http://www.nytimes.com/2014/04/18/us/in-new-hampshire-measure-to-repeal-death-penalty-fails-by-a-single-vote.html?hpw&rref=us&\\_r=1](http://www.nytimes.com/2014/04/18/us/in-new-hampshire-measure-to-repeal-death-penalty-fails-by-a-single-vote.html?hpw&rref=us&_r=1).

45. *Entrenchment and/or Destabilization?*, *supra* note 17, at 241–43.

46. See *Roper v. Simmons*, 543 U.S. 551, 556 (2005) (emphasizing isolation of the United States in authorizing execution of juveniles); *Atkins v. Virginia*, 536 U.S. 304, 307 (2002) (finding confirmation for consensus against executing persons with intellectual disabilities in expert opinion, world attitudes, jury practices, and opinion polls).

47. Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 360 (2010) (discussing the process culminating in repeal of the death-penalty provision of the Model Penal Code and the potential significance of the repeal).

48. Jones, *supra* note 37.

49. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 614–19 (2002) (Breyer, J., concurring) (cataloguing defects in prevailing capital practice and insisting that jurors—rather than judges—should make the ultimate decision as to whether death should be imposed).

50. *Kansas v. Marsh*, 548 U.S. 163, 207–10 (2006) (Souter, J., dissenting) (calling for a new capital jurisprudence responsive to the increasing evidence of wrongful convictions).

51. *Baze v. Rees*, 553 U.S. 35, 71 (2008) (Stevens, J., concurring) (questioning whether the death penalty continues to serve any useful social purpose in light of its infrequent application and attendant problems).



resisted calls for judicial abolition and supported reinstatement of the death penalty post-*Furman*, subsequently concluded independently that the Court's efforts to regulate the death penalty had failed, rendering the death penalty unconstitutional.<sup>52</sup>

An odd but important question is whether death-penalty opponents should welcome a "*Furman II*," invalidating the American death penalty. The first *Furman* decision generated enormous backlash and ultimately reinvigorated what seemed to be a dying practice.<sup>53</sup> Then, like now, the United States experienced a significant decline in death sentencing and executions, as well as legislative momentum to repeal or restrict the death penalty.<sup>54</sup> Arguably the Court's intervention stalled some of that momentum—though other factors, including increasing rates of violent crime and the increased politicization of criminal-justice policy, might have independently contributed to the resurrection of the American death penalty.

Would a Court decision today herald the true eradication of the death penalty, or would it risk the sort of backlash and reinvigoration that followed *Furman*? Several factors suggest that contemporary circumstances are more conducive to permanent abolition via judicial decision. First, violent crime rates have decreased substantially over the past two decades, and we have witnessed a corresponding decline in the use of criminal-justice concerns as "wedge" issues in both state and federal elections.<sup>55</sup> We are two decades removed from the dramatic use of the death penalty in a presidential or gubernatorial race (as in Michael Dukakis's failed bid in 1988 or Governor Mario Cuomo's reelection loss in 1994).<sup>56</sup> Second, and relatedly, the politics of the death penalty have also changed substantially, with some political conservatives voicing doubts about the State's power to kill, and increasing fragmentation of the views of victims regarding the desirability of the death penalty—in contrast to the seemingly united "pro-death penalty" front of the victims' rights movement of the 1970s and 1980s.<sup>57</sup>

Third, a decision invalidating the death penalty at this time would have firmer footing along several dimensions. At the time *Furman* was argued, there were essentially no judicial precedents suggesting that the death penalty as a practice was constitutionally questionable. States had enjoyed wide, almost unfettered latitude in administering the death penalty and, despite the waning popularity of capital punishment, few observers believed the issue would or

---

52. *Id.*; *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

53. *Lessons for Law Reform*, *supra* note 31, at 741–48.

54. *See supra* notes 43–45 and accompanying text.

55. *See generally* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283 (2008) (describing the transition in political views of capital punishment in the United States).

56. Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in *BEYOND REPAIR? AMERICA'S DEATH PENALTY* 7, 42–43 (Stephen P. Garvey ed., 2003).

57. *See* Smith, *supra* note 55 and accompanying text.

should be resolved judicially rather than politically.<sup>58</sup> Now, we have had over four decades experience with extensive judicial regulation of the death penalty.<sup>59</sup> The notion that the Constitution supplies important limits on capital punishment is firmly entrenched, and the Court's decisions have generated numerous doctrinal grounds for challenging the death penalty as a continuing practice. Accordingly, a decision invalidating the death penalty would be—and perhaps more importantly, would *appear* to be—a natural outgrowth of death-penalty doctrines rather than the sort of “lightning bolt” that made *Furman* vulnerable. Along these lines, the doctrines developed over the past forty years have provided something of a “yardstick” for measuring the acceptability of prevailing capital practice, and a Court decision invalidating the death penalty would fairly be regarded as holding states to the standards and norms essential to the constitutional administration of the death penalty.<sup>60</sup> In addition, given the Court's doctrines, judicial abolition would be less likely to rest on the sort of moral opposition to the death penalty reflected in Justice Brennan's and Justice Marshall's opinions in *Furman*. A contemporary opinion would turn on many of the pragmatic concerns about the death penalty's administration discussed above rather than insist that capital punishment violates “human dignity” in some more foundational sense, and would thus be less likely to elicit a “culture war” response.

Fourth, retention of the death penalty increasingly creates tension with our allies in the international community. The European community is clearly troubled by American retention, and cooperation in strategic ventures—including the “War on Terror”—might be compromised by allies' concerns about the availability of the death penalty in American criminal trials.<sup>61</sup> One illustration of the potential for conflict was reflected in President Bush's efforts to compel Texas to comply with international obligations and provide an effective remedy for non-citizens denied their right to consular notification in state capital prosecutions.<sup>62</sup> The symbolism of George W. Bush—the former Texas Governor who presided over more executions than any of his predecessors—insisting as President of the United States that Texas provide a remedy for a violation of an international treaty points to the international pressures and new sort of fragility the American death penalty encounters.<sup>63</sup>

Overall, then, despite some important similarities, the present moment differs substantially from the time of *Furman*, and there is considerably less risk that backlash would follow a Court decision invalidating the death

---

58. *See id.* at 287–88.

59. *See Entrenchment and/or Destabilization?*, *supra* note 17, at 241–43.

60. *Lessons for Law Reform*, *supra* note 31, at 770–76.

61. *See How the Death Penalty Weakens U.S. International Interests*, CAPITAL PUNISHMENT PROJECT (Dec. 2004), available at [http://www.aclu.org/files/FilesPDFs/idp\\_report.pdf](http://www.aclu.org/files/FilesPDFs/idp_report.pdf) (describing the foreign view of the American death penalty and its overall effect on American foreign policy).

62. *Medellin v. Texas*, 552 U.S. 491, 498 (2008).

63. *See id.*

penalty.<sup>64</sup> Accordingly, given the unattractiveness of the death penalty from a consequentialist perspective, judicial abolition should be welcomed in favor of the slow, seemingly inexorable decline of this unnecessary and costly anachronistic punishment.

---

64. See *supra* text accompanying notes 54–59.

