
LESSONS FOR LAW REFORM FROM THE AMERICAN EXPERIMENT WITH CAPITAL PUNISHMENT

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I. INTRODUCTION

The American death penalty is often described as anomalous, distinctive, or exceptional in the sense that at present, in the early years of the twenty-first century, the United States is the sole Western democracy that retains the practice of capital punishment. However, a second aspect of American exceptionalism in this context has largely escaped notice. The United States has chosen not merely to retain the death penalty while its

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peer nations have abolished it; rather, the United States has embarked on nearly 40 years (since 1976) of intensive, top-down, constitutional regulation of the practice by the federal courts, led by the U.S. Supreme Court. The choice of regulation in the place of mere retention has produced a complex web of interactions among the federal judiciary and state and local legislatures, executive officials, courts, and of course activists on both sides of the issue and the general court of public opinion. Close study of these interactions generates a compelling and dynamic story that sheds a great deal of light on the death penalty itself—on its functions and meanings in American society and politics, on its history, and on its future.

In addition to offering insights about the American death penalty, the story of the experiment with constitutional regulation of capital punishment offers compelling insights into the challenges and limits inherent in any scheme of legal regulation, both as a general matter and in the particular mode of judicial regulation under the Constitution. This Article will draw out and generalize such insights about the project of legal regulation from the specific, deeply contextual story of judicial regulation of the death penalty. One theme that runs through many of our observations is unpredictability: the abolitionist activists who generated the regulatory project through a concerted campaign of constitutional litigation in the 1960s surely did not intend or foresee that their partial success would play a role in entrenching and stabilizing the death penalty as an American practice. Moreover, the reformist Justices of the Court who promoted the middle path of regulation rather than complete abolition or unregulated retention, surely did not see the ways in which their reforms were planting seeds that would grow to threaten the stability of capital punishment in future decades.

There is a large and varied theoretical literature about the ways in which complex bureaucratic organizations often produce consequences unintended by any individual actors within such organizations. This literature tends to discuss these phenomena in a stylized, abstract fashion, using terms like bureaucratic dysfunctions,¹ goal displacement,² and unanticipated consequences.³ The project of this paper is essentially the inductive inverse of abstract sociological theory: we start with a thick, specific story and look for more general lessons about the limits

1. ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 251–54 (3d ed. 1968).

2. Philip Selznick, *An Approach to a Theory of Bureaucracy*, 8 *AM. SOC. REV.* 47 (1943).

3. Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 *AM. SOC. REV.* 894 (1936).

surrounding the regulatory enterprise.⁴ Our goal is to use the intricate story of constitutional regulation of capital punishment to illustrate in an illuminating fashion the many and varied ways in which complex systems may fail to achieve their stated goals and, indeed, often achieve something entirely antithetical to those goals. Identifying these recurring dynamics will offer insight not only into many apparent dysfunctions of past regulatory efforts, but also—we hope—into the future.

II. LAW'S CENTRAL TENSION

The Supreme Court's regulation of capital punishment has posed in heightened, constitutionalized form the central dialectic of all law—the tension between adhering to rule-of-law values (consistency, predictability, and horizontal equity across cases) and responding appropriately to the unique circumstances of each individual case. Whether they are legislatures drafting rules of general applicability, administrative agencies exercising their delegated authority, or individual officials attempting to apply general standards to specific cases, legal actors can never avoid the need to mediate between the twin goals of preventing unwarranted disparities in treatment and addressing relevant differences in context.

At first, the Court did not approach the constitutional issues surrounding capital punishment with this dialectic in mind. Rather, the Court's initial impetus to regulate the death penalty under the Constitution derived overwhelmingly from rule-of-law concerns. The NAACP Legal Defense Fund ("LDF") lawyers who drove the litigation campaign that culminated in the temporary abolition of capital punishment in 1972 in *Furman v. Georgia*⁵ primarily emphasized the inadequacy of the procedures used to impose it and the troubling patterns of its distribution.⁶ The primary challenges raised in the years leading up to *Furman* were to the practice of death qualification of capital juries by which prosecutors could strike all jurors with any moral qualms about the death penalty, the broad reach of many capital statutes to include nonhomicidal crimes (such as rape, robbery, and burglary), the racial disparities in the distribution of death sentences (especially for the crime of rape), and the lack of any

4. Thus, our project is closer (though not identical) to the one sociologist Philip Selznick undertook in his study of the Tennessee Valley Authority, in which he sought to draw sociological insight from a close study of one particular context. See PHILIP SELZNICK, *TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* (1953).

5. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

6. See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 248–52 (1973) (describing the essential themes and arguments employed by LDF lawyers responsible for arguing *Furman* and its companion cases).

guidance to sentencing juries to structure their sentencing deliberations. Although death penalty opponents won a major victory in 1968 in *Witherspoon v. Illinois*,⁷ where the Court significantly cabined the practice of death qualification, they lost the more far-reaching challenge to standardless sentencing discretion in 1971 in *McGautha v. California*,⁸ where the Court rejected the argument under the Due Process clause.

One year later, however, the Court in *Furman* accepted the same standardless sentencing discretion argument under the Eighth Amendment's Cruel and Unusual Punishments Clause and invalidated the death penalty as it was then practiced across the country.⁹ Although *Furman*'s holding is difficult to identify with any precision, given that the five Justices in the majority issued five different opinions, the crucial votes were those of Justices Stewart and White, who had ruled in favor of the death penalty in *McGautha* one year earlier. Their opinions in *Furman* emphasized the standardless discretion of sentencing juries and the resulting arbitrariness of sentencing results, especially in light of the breadth of capital statutes and the rarity of death sentences.¹⁰ This procedural reading of *Furman*'s essential holding is supported both by the widespread legislative reactions to *Furman*, which resulted in a raft of new capital statutes specifically designed to address the problem of standardless sentencing discretion exercised across too broad a field of eligible defendants, and by the Court's subsequent constitutional validation of several of the new "guided discretion" statutes in its 1976 decisions reauthorizing capital punishment in *Gregg v. Georgia*¹¹ and its quartet of accompanying cases.¹²

The Court's countervailing concern regarding individualized sentencing came about only as the by-product of some states' reactions to the Court's mandate in *Furman*. If the primary problem with pre-*Furman* capital sentencing regimes was unguided discretion, then the obvious solution was to eliminate sentencing discretion entirely—to enact mandatory capital sentences. This solution was so obvious that it was noted (not necessarily approvingly) both by majority and dissenting Justices in *Furman* itself.¹³ Not surprisingly, ten states responded to *Furman* by

7. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

8. *McGautha v. California*, 402 U.S. 183, 196–208 (1971).

9. *Furman*, 408 U.S. at 240.

10. *Id.* at 309 (Stewart, J., concurring); *id.* at 312–13 (White, J., concurring).

11. *Gregg v. Georgia*, 428 U.S. 153 (1976).

12. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

13. See *Furman*, 408 U.S. at 257 (Douglas, J., concurring) ("Any law which is nondiscriminatory

enacting mandatory capital sentencing statutes,¹⁴ and two of the five new statutory schemes considered by the Court in 1976 were of this mandatory nature. While the Court upheld the three statutes (from Georgia, Florida, and Texas) that provided guidance to capital juries in their sentencing deliberations, the Court struck down the two mandatory statutes (from North Carolina and Louisiana). The Court concluded that just as too much discretion violated the Eighth Amendment, so did too little discretion. The plurality explained that mandatory capital sentencing violated evolving standards of decency because longstanding historical trends were against it, because it would not prevent juries from exercising unbridled discretion by refusing to convict on capital charges in order to avoid death sentences in some cases, and because a sentencing process that fails to consider “mitigating factors stemming from the diverse frailties of humankind” impermissibly “treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”¹⁵

Hence, by 1976, the Court had established the foundations of the twin pillars of its death penalty jurisprudence—that capital sentencing juries must be guided in the exercise of their sentencing discretion, but that they must also give capital defendants individualized consideration. Over the next few decades, the Court elaborated extensively on both of these commands. With regard to constitutionally mandated sentencing guidance, the Court issued decisions addressing how clear and narrow “aggravating factors” or their equivalent must be in order to perform their guiding function¹⁶ and what remedy appellate courts should offer in cases where

on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.” (citation omitted); *id.* at 401 (Burger, C.J., dissenting) (“Real change [in the prevailing discretionary system of sentencing in capital cases] could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today’s ruling, I would have preferred that the Court opt for total abolition.”).

14. See *Woodson*, 428 U.S. at 313 (1976) (Rehnquist, J., dissenting) (“The plurality concedes, as it must, that following *Furman* 10 States enacted laws providing for mandatory capital punishment.” (citing CHARLES DOYLE, CONG. RESEARCH SERV., STATE CAPITAL PUNISHMENT STATUTES ENACTED SUBSEQUENT TO *FURMAN V. GEORGIA* 17–22 (1974))).

15. *Woodson*, 428 U.S. at 304 (plurality opinion).

16. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 428, 432–33 (1980) (plurality opinion) (indicating that the states are constitutionally obligated to “channel the sentencer’s discretion by ‘clear

the sentencing jury invoked an insufficiently clear or narrow sentencing factor in the course of returning a death verdict.¹⁷ With regard to individualized sentencing, the Court ultimately concluded that statutory schemes could not limit sentencers' consideration of any potentially mitigating evidence, either by restricting mitigating factors to a statutory list,¹⁸ or by excluding full consideration of some potentially relevant mitigating evidence.¹⁹

Inevitably, these dual requirements came to be seen as increasingly in conflict with one another. The tension came to a head in the early 1990s,

and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death,'" and holding that Georgia's "outrageously or wantonly vile, horrible, or inhuman" aggravating factor did not conform to these criteria (footnotes omitted); *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (finding no constitutional problem in having the sole aggravating factor found at the sentencing phase repeat an element of the definition of capital murder found at the guilt phase); *Maynard v. Cartwright*, 486 U.S. 356, 363–66 (1988) (holding Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor unconstitutionally vague, as it offered "no more guidance" than Georgia's aggravator invalidated in *Godfrey*); *Arave v. Creech*, 507 U.S. 463, 473–75 (1993) (ruling that Idaho's "utter disregard for human life" aggravating factor, as interpreted to reflect a "cold-blooded, pitiless slayer," satisfies the Constitution's narrowing requirement); *Tuilaepa v. California*, 512 U.S. 967, 980–81 (1994) (Souter, J., concurring) ("I join the Court's opinion because it correctly recognizes that factors adequate to perform the function of genuine narrowing, as well as factors that otherwise guide the jury in selecting which defendants receive the death penalty, are not susceptible to mathematical precision; they must depend for their requisite clarity on embodying a 'common-sense core of meaning[]'" (quoting *Jurek*, 428 U.S. at 279 (White, J., concurring))).

17. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 881–91 (1983) (holding that in a nonweighing sentencing scheme like Georgia's, the finding of a single valid aggravating factor is sufficient to support a death sentence, even if the sentencing jury also found one or more invalid factors); *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990) (holding that a state appellate court may preserve a death sentence that was based, in part, on an invalid aggravating circumstance, either by reweighing the aggravating and mitigating evidence or by harmless error review); *Brown v. Sanders*, 546 U.S. 212, 220–25 (2006) (holding that the sentencing jury's consideration of two invalid aggravating factors did not render the defendant's death sentence constitutionally infirm, where the jury had found two additional aggravating factors that sufficed to make the defendant death-eligible under California's death penalty statute).

18. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (footnote omitted); *Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987) (reversing a Florida death sentence where "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances").

19. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."); *Penry v. Lynaugh*, 492 U.S. 302, 327–28 (1989) (holding that, in imposing the death penalty, "the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense").

when two Justices with widely divergent views both invoked the conflict between the two pillars of the Court's Eighth Amendment jurisprudence as a reason to reject the constitutional edifice in whole or in part. In 1990, Justice Scalia wrote a separate opinion in *Walton v. Arizona* to argue that the doctrine—or “counterdoctrine”—of individualized sentencing “exploded whatever coherence the notion of ‘guided discretion’ once had.”²⁰ Justice Scalia rejected the view that the two doctrines were merely in tension rather than flatly contradictory:

To acknowledge that “there perhaps is an inherent tension” [between the two doctrines] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing “twin objectives” is rather like referring to the twin objectives of good and evil. They cannot be reconciled.²¹

As a result, Justice Scalia (later joined by Justice Thomas), decided to choose between the irreconcilable commands and rejected the requirement of individualized sentencing as without constitutional pedigree: “Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer’s discretion has been unlawfully restricted.”²²

Four years later, Justice Blackmun came to the same recognition of the essential conflict between the two doctrines, but reached a different conclusion. Justice Blackmun found himself at a loss to imagine any sort of reform that could mediate between the two conflicting commands:

Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer’s discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would “thro[w] open the back door to arbitrary and irrational sentencing.”²³

Unlike Justices Scalia and Thomas, however, Justice Blackmun did not resolve to jettison either constitutional command—not merely because

20. *Walton v. Arizona*, 497 U.S. 639, 661 (1990) (Scalia, J., concurring in part and concurring in the judgment).

21. *Id.* at 664 (citations omitted).

22. *Id.* at 673.

23. *Callins v. Collins*, 510 U.S. 1141, 1155 (1994) (Blackmun, J., dissenting from denial of certiorari) (alteration in original) (citations omitted).

of the demands of stare decisis, but also “because there is a heightened need for both in the administration of death.”²⁴ Consequently, Justice Blackmun concluded:

[T]he proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.²⁵

The conflict between rule-of-law values and individualized consideration reached this level of dramatic tension in the death penalty context because capital sentencing was held to require a heightened level of each of the two attributes as a matter of constitutional law. In more ordinary contexts of legal regulation, neither attribute is heightened, and the appropriate constitutional analysis is the more forgiving and all-things-considered balancing test of Due Process doctrine. But the capital context helps to illuminate the ways in which the goals of procedural regularity and individualized justice are always in tension and how efforts to promote one goal will generally undermine the other, leading to difficult tradeoffs. While these tradeoffs might not rise to the level of constitutional concern in other contexts, they still exist, often below the surface, and the dramatic capital context helps to unearth and flesh out the essential contours of the conflict.

In rejecting the challenge to standardless capital sentencing discretion under the Due Process Clause in *McGautha*, Justice Harlan presciently explained how difficult it would be to try to standardize the capital sentencing process through rule-like guidance. His conclusion—rejected the following year in *Furman*—stands as thoughtful warning about the inevitable trade-offs between standardization and individualization:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

....

... For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either

24. *Id.*

25. *Id.* at 1157.

meaningless “boiler-plate” or a statement of the obvious that no jury would need.²⁶

Justice Harlan’s warning about the challenges of rationalizing complex choices through rule-like formulations and the inevitable need for the exercise of discretion was particularly apt in the elusive area of the death penalty. However, many of the features that make the death penalty context so “elusive”—the fact that the relevant considerations are numerous, difficult to identify ahead of time, difficult to quantify, and often incommensurable with one another—characterize, to varying degrees, many other areas of legal regulation. Thus, the Court’s struggle with the Eighth Amendment’s central tension stands as a cautionary tale about the limits of judicial (or other) attempts to ameliorate the ubiquitous tension between rule-of-law values and individualized consideration.

III. BACKLASH

Seeking social change through one-time judicial decree or ongoing, court-driven constitutional regulation is a questionable undertaking. On the one hand, our constitutional scheme seems to presume a role for counter-majoritarian judicial review to protect disfavored minorities and fundamental rights from the possible tyranny of the majority. On the other hand, many have questioned whether courts can or ever do effectively lead the polity on social issues, arguing for some version of the old quip that “the Court follows the election returns.”²⁷ The skeptics often point to the major court interventions for social change of the past century—with regard to civil rights, abortion, gay marriage, and of course the death penalty—as proof that courts cannot get too far ahead of the polity.²⁸ According to these skeptical accounts, judicial decisions in each of these

26. *McGautha v. California*, 402 U.S. 183, 204, 208 (1971).

27. See FINLEY PETER DUNNE, MR. DOOLEY’S OPINIONS 26 (1901) (“[N]o matter whether the constitution follows the flag or not, the supreme court follows the election returns.”). For a more scholarly rendition of this aphorism, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (concluding from empirical data that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States”).

28. 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* 15 (2009) (“[O]ver time, with what is admittedly great public discussion, but little in the way of serious overt attacks on judicial power, the Court and the public will come into basic alliance with each other.”); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336–43 (1991) (concluding that American courts are incapable of effecting social change without the support of the people); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 440–45 (2005) (arguing that the Supreme Court’s more progressive decisions on important social issues were only possible in the wake of changing social attitudes regarding those issues).

areas were of limited efficacy because of the primary check on court-driven social change—political backlash, through which disgruntled majorities reassert their preferences.²⁹

The Court's abortive abolition of the death penalty in *Furman* and chastened reauthorization of a new era of capital punishment in *Gregg* and its companion cases certainly fits the classic backlash story. Although the LDF's litigation strategy had been ongoing since the mid-1960s, leading to the major victory against untrammelled "death qualification" of capital juries in *Witherspoon* in 1968³⁰ and to an effective moratorium on executions since 1967, the Supreme Court's decision in *Furman* nonetheless was delivered and received as a thunderclap. The *New York Times* gave the decision a six-column banner headline—"as large and as bold as when, equally improbably, men had landed on the moon in 1969."³¹ The pronouncement was greeted with tremendous outrage and resistance from many quarters, but especially in the South. For example, Lester Maddox, Georgia's lieutenant governor, called the decision a "license for anarchy, rape, murder,"³² while some state and federal legislators immediately promised to introduce new legislation and even to propose a federal constitutional amendment to reauthorize capital punishment.³³ Public opinion in support of capital punishment, which had been trending downward—reaching the lowest point ever recorded in U.S. history in 1966, when a Gallup poll revealed that more people opposed than supported it for murder³⁴—bumped up sharply right after *Furman*, almost certainly in response to the decision.³⁵ The strongest indicator of the

29. See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–63 (2004) [hereinafter KLARMAN, JIM CROW TO CIVIL RIGHTS] (describing the numerous barriers to implementing the Court's school desegregation decisions at the local level in the aftermath of *Brown*); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 165–82 (2013) [hereinafter KLARMAN, FROM THE CLOSET] (identifying the ways in which court decisions on social issues can provoke intense backlash).

30. See *supra* text accompanying note 7.

31. EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA, at ix (2013).

32. MELTSNER, *supra* note 6, at 290 (internal quotation marks omitted).

33. *Id.* at 291.

34. The Gallup Poll conducted in 1966 revealed that 47 percent opposed and 42 percent favored the death penalty for murder, while 11 percent were undecided. Robert M. Bohm, *American Death Penalty Opinion, 1936–1986: A Critical Examination of the Gallup Polls*, in THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH 113, 116 (Robert M. Bohm ed., 1991).

35. See MANDERY, *supra* note 31, at 265. In discussing this sudden spike in support for the death penalty, Mandery notes that, "[a]lmost uniformly, academics point to the *Furman* decision itself as the inciting force for the public backlash." *Id.* at 265–66 (citing Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT:

public's rejection of *Furman*'s abolition was the overwhelming support for passage of new death penalty statutes: thirty-five states and the federal government passed such legislation in the four years between *Furman* and *Gregg*.³⁶ As the Supreme Court itself noted in *Gregg*: "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*."³⁷

The Court's journey from *Furman* to *Gregg* and beyond, however, offers more than a simple textbook example of the backlash thesis. The death penalty story, when considered more fully in context, offers some important nuances to the simple schematic of the backlash thesis. The Court's death penalty trajectory suggests a number of specific factors that influenced the degree and nature of the backlash that its constitutional intervention precipitated. Moreover, the backlash itself led the Court to turn onto a path that may yet be more successful than its initial intervention in undermining the practice of capital punishment nationwide, illustrating that backlash, too, can yield unanticipated consequences.

One aspect of the phenomenon of backlash that the death penalty story illustrates well is the difficulty—at least some of the time—of accurately gauging the future trajectory of public opinion. At the time of the decision in *Furman*, the Court as a whole, and in particular the key swing voters Byron White and Potter Stewart, had some powerful reasons to think that the tide of public opinion was turning against the death penalty. There was of course the groundbreaking 1966 Gallup poll; but even closer in time to the *Furman* decision, the news media on both the left and the right, along with academic observers, were all noting "mounting zeal for abolition" and predicting the likely eventual success of the abolition movement.³⁸ According to one well-researched, behind-the-scenes account of the *Furman* decision, it was this apparent surge of public opinion against the death penalty that moved Potter Stewart to agree with Byron White to make up the *Furman* bare majority, and that would also move Justice Stewart years later to express anger at how wrong the expert reports about the trajectory of public opinion had turned out to be.³⁹ The possibility of this kind of predictive error is especially strong with regard to issues, like

REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 27, 31 (James R. Acker et al. eds., 2d ed. 2003)); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 108 (2002).

36. *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976).

37. *Id.* at 179.

38. MANDERY, *supra* note 31, at 234 (quoting Donald Zoll of the *National Review* and citing other sources).

39. *Id.* at 235.

capital punishment, about which public opinion tends to fluctuate significantly over time. Indeed, current death penalty opponents like to capture this predictable volatility with the expression that “support for the death penalty is a mile wide, but just an inch deep.”⁴⁰ Not every issue of public controversy shares this instability. For example, in sharp contrast to the death penalty context, the future of public opinion on gay marriage seems assuredly favorable as a result of strong demographic trends, even though the issue remains highly controversial in the present moment.⁴¹ The death penalty story illustrates how the risk of backlash in response to court intervention may be especially strong when the direction of public opinion cannot be confidently gauged.

A feature of the death penalty context that may help to explain the unexpected intensity of the backlash that *Furman* engendered, especially in the South, is the significance of the decision’s “messenger”—that is, the lawyers that litigated and won *Furman* (and its companion cases) in 1972. The NAACP LDF was the same organization that had litigated *Brown v. Board of Education*,⁴² and more recently (only one year prior to *Furman*), *Swann v. Charlotte-Mecklenburg Board of Education*,⁴³ which upheld a court-ordered desegregation plan involving the busing of students in a North Carolina school district. The continuing Southern resistance to school integration, which was pursued largely through constitutional litigation spearheaded by the LDF, likely helped to fuel anger at the LDF’s parallel constitutional litigation targeted at capital punishment. It surely did not help that the death penalty litigation had an apparent Southern focus: two of the three cases decided in 1972 were from Georgia and one was from Texas,⁴⁴ while a fourth case in the initial *Furman* litigation involving a California defendant was mooted before the *Furman* decision was issued by the California Supreme Court’s invalidation of that state’s death penalty (later reversed by state constitutional amendment through ballot initiative).⁴⁵ Moreover, not only was the *Furman* decision heralded by a

40. See Dahlia Lithwick, *The Life of a Death Penalty Lawyer*, N.Y. TIMES (Feb. 11, 2010), <http://www.nytimes.com/2010/02/14/books/review/Lithwick-t.html> (quoting death penalty abolitionist Sister Helen Prejean) (internal quotation marks omitted).

41. KLARMAN, FROM THE CLOSET, *supra* note 29, at 196, 197–203 (“If any social change seems inevitable, it is the growing acceptance of gay equality generally and gay marriage specifically.”).

42. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

43. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

44. *Furman v. Georgia*, 408 U.S. 238, 239 (1972).

45. See MELTSNER, *supra* note 6, at 281 (discussing the California Supreme Court’s decision in *People v. Anderson*, 493 P.2d 880 (Cal. 1972), which abolished the death penalty as unconstitutional under the state constitution’s prohibition of cruel or unusual punishment). This decision was overturned by the passage of Proposition 17 in that same year. See CAL. CONST. art. 1, § 27.

hated messenger, but the ruling also had a not-very-submerged subtext of racial equality. From the start, the LDF had targeted the death penalty as an issue of racial justice because of its history as a tool of racial oppression in the South.⁴⁶ Although the only Justice to rule against the death penalty primarily on the grounds of racial discrimination in its application was William O. Douglas,⁴⁷ “[m]ost journalists understood ‘randomness,’ which had been discussed at some length [in the other opinions], to have been a code word for discrimination.”⁴⁸ One has to wonder whether Southern backlash would have been as intense if constitutional abolition had been won in litigation brought in a Northern death penalty state by a mainstream, nonmovement lawyer.⁴⁹ Surely, the risk of backlash is stronger when the controversial subject of litigation is yoked, either explicitly or implicitly, to other issues of hot contestation.

Another contributor to the strength of the *Furman* backlash was the weakness of the Court’s majority. Not only was the decision that of a bare majority, but quite unusually, there was no majority opinion or even plurality opinion. Rather, each of the five Justices in the majority wrote his own opinion, and none of them joined in any of the others’ opinions—not even close compatriots William J. Brennan and Thurgood Marshall, nor Byron White and Potter Stewart, who had conferred and collaborated prior to the decision. As a consequence, it was difficult to discern the essential grounds for the judgment, and the decision lacked the moral authority that a strong majority (or the unanimous Court like the one that Earl Warren had mustered for the *Brown* decision) might have carried. Indeed, the decision had the very opposite of moral authority as a consequence of its patently political underpinnings. The four dissenters were all recent Nixon appointees, and their voting as a bloc was significant enough to make a

46. See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 312–26 (1997) (describing the empirically supported linkage between race and capital sentencing in rape cases); GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* 346–51 (2012) (discussing growing public anger and NAACP LDF pressure toward state politicians who attempted to ignore racial disparities in capital sentencing).

47. See *Furman v. Georgia*, 408 U.S. 238, 256, 244–57 (Douglas, J., concurring) (holding the death penalty unconstitutional because of its racially disproportionate imposition, despite its facial neutrality, reasoning that “[a] law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same” (footnote omitted)).

48. MANDERY, *supra* note 31, at 242.

49. See Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 779–82 (2012) (reviewing DAVID GARLAND, *PECULIAR INSTITUTION: AMERICAN’S DEATH PENALTY IN AN AGE OF ABOLITION* (2010)) (comparing *Furman* to the abolitionists’ earlier partial victory in Illinois, which had been litigated by a mainstream, nonmovement lawyer, in *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

New York Times headline.⁵⁰ The politics of the voting pattern no doubt underscored a theme that the dissenters all pressed in various ways in their four dissents—that the decision to strike down the death penalty was based on the policy preferences of the Justices in the majority rather than compelled by the Constitution.⁵¹

Moreover, the intensity of the backlash to *Furman* was driven not only by the perceived politics of the decisionmakers, but also by the political incentives the decision created going forward for those running for office. The Republican Party had already begun, prior to *Furman*, to deploy its so-called Southern Strategy of attempting to appeal to white southerner Democrats who were conservative on social issues to switch party affiliation.⁵² Criminal justice issues proved to be a powerful component of the Southern Strategy, not least because of the ways in which concerns about crime dovetailed with resentments and fears about race.⁵³ Within the realm of criminal justice issues, the death penalty was one of extremely high salience everywhere, as it worked as effective shorthand for “tough on crime” politics. In the South, with its long-held fears of black-on-white violence and especially rape, the death penalty offered a particularly potent rallying cry for politicians to use to marshal support. The power of the death penalty as a political issue in the years following *Furman* is striking at all levels of government.⁵⁴ Indeed, it continued to exert force well into the 1980s and 1990s at the highest levels, helping to defeat Governor Michael Dukakis in his 1988 presidential bid, from which Governor Bill Clinton learned an important lesson in 1992, during which he returned to Arkansas from the presidential campaign trail in order to publicly preside over the execution of a mentally disabled prisoner who had murdered a police officer.⁵⁵ In short, the backlash did not merely spontaneously

50. Fred P. Graham, *Court Sparer 600: 4 Justices Named by Nixon All Dissent in Historic Decision*, N.Y. TIMES, June 30, 1972, at 1.

51. See MELTSNER, *supra* note 6, at 296–99 (noting that the dissenters in *Furman* rejected the reasoning of the majority Justices because they perceived the Court as infringing on the role of the legislature).

52. See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* 238–44 (2010) (examining the development and deployment of the “Southern strategy” platform).

53. See *id.* at 240 (“Crime became a short-hand *signal*, to crucial numbers of white voters, of broader issues of social disorder, tapping powerful ideas about authority, status, morality, self-control, and race.” (quoting THOMAS BYRNE EDSALL WITH MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 224 (1991)) (internal quotation marks omitted)).

54. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 216–27 (2006) (discussing the effects of *Furman* on public sentiment and politics).

55. Steiker, *supra* note 35, at 112.

happen; rather, the flames of backlash were fanned by political actors who found in *Furman*'s flaws a campaign gift.⁵⁶

Another factor that made the death penalty even more salient as a political issue and thus helped to fuel the *Furman* backlash was the timing of the decision. Although the death penalty had been on the Supreme Court's radar since at least 1963, with Justice Goldberg's dissent from denial of certiorari in *Rudolph v. Alabama*,⁵⁷ the almost decade that passed between 1963 and *Furman*'s constitutional abolition in 1972 produced two developments that undermined acceptance of the decision. The first was the Court's controversial criminal procedure revolution, in which it extended the right to counsel for indigent defendants in *Gideon v. Wainwright* in 1963,⁵⁸ required the (in)famous *Miranda* warnings in 1966,⁵⁹ and incorporated the right to trial by jury to apply to the states in *Duncan v. Louisiana* in 1968,⁶⁰ among other decisions. Thus, at the time of *Furman*, the Court had already engendered significant backlash from the law enforcement community and from "tough on crime" politicians, a wave of organized resistance that helped to give *Furman*'s backlash the momentum of a running start.

Second, crime rates—including homicide rates—rose precipitously throughout the 1960s, increasing public fears and enhancing incentives for politicians to promote their "tough on crime" policies.⁶¹ The Court's decision in *Furman* prompted the highly visible release into the ordinary prison population of hundreds of feared and despised death row prisoners, including mass murderer Richard Speck, among others.⁶² The direct impact of criminal justice decisions on the fates of individual defendants is thus a

56. The gay marriage litigation proved to be a powerful mobilizing force for Republicans, as diverse blocks of voters were opposed to these decisions and so Republicans could encourage them to choose between political candidates based on their stance on gay marriage. See KLARMAN, FROM THE CLOSET, *supra* note 29, at 183–86.

57. See *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari).

58. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

59. *Miranda v. Arizona*, 384 U.S. 436 (1966).

60. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

61. See WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 230–34 (2011) (discussing nationwide data demonstrating that "[a]fter 1963, homicide rates rose . . . everywhere, though [the trend was] more extreme in the North than in the South").

62. Carol S. Steiker, *Furman v. Georgia: Not an End, but a Beginning*, in DEATH PENALTY STORIES 95, 106 (John H. Blume & Jordan M. Steiker eds., 2009). Charles Manson and Sirhan Sirhan had won their reprieves from California's death row by the California Supreme Court's decision invalidating the state's death penalty while the *Furman* decision was pending. JOAN M. CHEEVER, BACK FROM THE DEAD: ONE WOMAN'S SEARCH FOR THE MEN WHO WALKED OFF AMERICA'S DEATH ROW 52 (2006).

two-edged sword: the Court is uniquely powerful in the criminal context with its power to reverse convictions or sentences (in contrast to, for example, the context of school desegregation), but the Court is also uniquely accountable for these results. Given the intensity of the fears about violent crime, especially homicide, in the early 1970s, one has to wonder whether the backlash against constitutional abolition of the death penalty would have been as intense had the decision occurred instead in the early 1960s.⁶³

Although the *Furman* backlash was intense and prompted the Court's face-saving retreat from constitutional abolition a mere four years later, the nature of the Court's retreat was driven by the nature of its original intervention in *Furman*. It would have been difficult for the Court simply to abandon the concerns that it had raised so recently in *Furman* or to declare them instantaneously solved by legislative innovation. Thus, the most natural and legitimate retreat from *Furman* was not simply to replace abolition with retention, but rather to do exactly what the Court did—to take up the project of constitutional regulation of capital punishment. As we shall see, however, the project of regulation itself has, over time, planted the seeds of the current destabilization of the practice of capital punishment that may yet yield its ultimate abolition.⁶⁴ Thus, backlash will inevitably prompt further reactions that themselves may have unforeseen effects; backlash is never the end of the story.⁶⁵ The particular story of the backlash to *Furman* and the ongoing chain of events that it set in motion thus teach some generalizable lessons about the phenomenon of backlash in response to judicial intervention ahead of the political sphere. The variety of factors influencing the nature and extent of the backlash to *Furman* suggests that the simple schematic of the backlash thesis needs to be nuanced by consideration of the many relevant but contingent conditions that attend any judicial intervention, and the possibility that backlash itself is part of a continuing story of unpredictable effects.

IV. ENTRENCHMENT AND LEGITIMATION

In any movement for social change, there is always some tension

63. See Steiker, *supra* note 49, at 780–81 (speculating that a Court decision abolishing capital punishment issued in the 1960s might have produced less backlash given the political and social context of the time).

64. See *infra* Part VII.

65. Cf. KLARMAN, *JIM CROW TO CIVIL RIGHTS*, *supra* note 29, at 421–42 (arguing that Northern indignation at the violence of the Southern backlash to *Brown* ultimately led to the major successes of the Civil Rights Movement, rather than *Brown* itself).

between incremental and more radical interventions. It is often not possible to achieve the entirety of a desired change all at once, and thus reformers may promote small improvements toward an ultimately larger goal. The tension arises because small improvements may sap a movement's energy for larger change, as some within and outside the movement may conclude, correctly or not, that enough progress has been made that further efforts or changes are neither necessary nor worthwhile. At least two separate phenomena may be at work in such situations. One phenomenon, which we call entrenchment, occurs when incremental reform unequivocally offers improvements along some key dimension or dimensions of the problem and thus makes the case for larger-scale change less urgent. The other phenomenon, which we call legitimation, occurs when incremental reforms promote an exaggerated or false confidence (in the reliability, fairness, wisdom, etc.) of the system or practice subject to reform.⁶⁶ We use the term legitimation here not in its dictionary sense of formal validation or normative justification, but in its sociological sense, via Max Weber and Antonio Gramsci, of an individual or group's *experience or belief* in the normative legitimacy of a social phenomenon, such as a set of relationships, a form of organization, or an ongoing custom or practice, whatever might "really" be the case.⁶⁷

The American experiment with the legal regulation of capital punishment illustrates well the operation of the dynamics of entrenchment and legitimation. One of the Court's most significant regulatory interventions after its reauthorization of capital punishment in the 1976 cases was its decision one year later in *Coker v. Georgia*,⁶⁸ rejecting the death penalty as a constitutionally disproportionate punishment for the crime of the rape of an adult woman. This intervention either immediately or eventually addressed several troubling features of American death penalty practice. Its immediate effect was to suggest by its reasoning that the death penalty was unlikely to be considered a proportionate punishment for ordinary crimes other than murder, a suggestion that became a firm holding three decades later, when the Court rejected the death penalty even for the crime of aggravated rape of a child.⁶⁹ It thus addressed the concern

66. See Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 421–24 (2002) (distinguishing between entrenchment and legitimation).

67. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429–30 (1995) (discussing Weber's and Gramsci's work in defining legitimation).

68. *Coker v. Georgia*, 433 U.S. 584 (1977).

69. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

of many, both on and off the Court, that the American death penalty was much too broad in its potential scope. Moreover, although the Court's opinion did not mention the issue of race, the decision also had the immediate effect of ending the use of the death penalty in the context in which racial disparities were most evident and most extreme, with many jurisdictions in the South applying capital punishment virtually exclusively to rape cases with black defendants and white victims. When the Court considered a constitutional challenge based on racial disparities in the use of the death penalty a decade after *Coker*, the statistical study at issue did not include the stunning disparities evident in rape cases, which were no longer relevant to the operation of the death penalty.⁷⁰ The ban on the use of the death penalty for rape likely also decreased the rate of erroneous capital convictions before the advent of DNA testing might have brought them to light, given the history of often-dubious prosecutions for interracial rape in the South. Finally, *Coker* planted the jurisprudential seeds for a robust proportionality jurisprudence that eventually did away with capital punishment for offenders with mental retardation⁷¹ and for juvenile offenders,⁷² two groups of defendants also prone to erroneous conviction and generally less likely to evidence the greatest culpability for their crimes.

Coker and its progeny together offer an excellent example of the phenomenon of entrenchment in that the Court's intervention ameliorated—undeniably—several of the problems that both critics and supporters of capital punishment found most troubling. The genuine improvements produced by these reforms may well have taken some of the steam out of the abolitionist movement by making the ongoing practice of capital punishment in America less obviously objectionable and the need for wholesale abolition less immediately acute. Moreover, these reforms undoubtedly made later arguments about racial disparities (and probably wrongful convictions as well) less powerful than they would have been in the absence of the earlier reforms. In addition, some of *Coker*'s jurisprudential progeny made the United States less of an outlier in the broader context of international practice—especially the elimination of the death penalty for juvenile offenders, which no other nation (even among those that actively practice capital punishment) officially accepts.⁷³

70. *McCleskey v. Kemp*, 481 U.S. 279, 286–87 (1987).

71. *Atkins v. Virginia*, 536 U.S. 304 (2002).

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

73. *See id.* at 575 (“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in

The constitutional regulation of capital punishment, however, is even more powerfully an illustration of the phenomenon of legitimation as a result of the gap between the appearance and the reality of the Court's regulatory efforts. Starting in 1976 with the constitutional reauthorization of capital punishment, the Court continuously revised its death penalty jurisprudence, granting certiorari every Term to a number of capital cases entirely disproportionate to the role of capital punishment in the American criminal justice system. Moreover, as the Court developed its death penalty doctrine, it reversed a considerable number of death verdicts, requiring state courts and legislatures to revise their own practices and statutes. Indeed, each of the three statutory schemes upheld in 1976 was later partially constitutionally invalidated by the Court on grounds that it had not perceived in granting its initial imprimatur.⁷⁴ This ongoing practice of reconsideration and reversal by the Court created considerable instability as states seeking to impose and carry out death sentences attempted, not always successfully, to adapt their practices to meet the Court's changing requirements. The resulting dynamic also lengthened the time between the imposition of capital sentences and the carrying out of executions, even in jurisdictions assiduously committed to the practice of capital punishment. In states and localities in which discretionary actors were more ambivalent about the practice, the Court's developing jurisprudence facilitated reconsideration of death verdicts and delay of executions. This pattern of reversal, reconsideration, and concomitant delay led many observers to conclude that the American death penalty was highly regulated—indeed, over-regulated—by the federal courts, led by the Supreme Court.⁷⁵

the world that continues to give official sanction to the juvenile death penalty.”)

74. Compare *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia's death penalty statute), with *Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980) (striking down as unconstitutionally broad and vague Georgia's statutory aggravating factor for “outrageously or wantonly vile, horrible or inhuman” murders). Compare *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding Florida's death penalty statute), with *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (striking down Florida's death penalty statute's exclusive list of mitigating factors as unconstitutionally limiting a jury's ability to consider relevant mitigating evidence). Compare *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas's death penalty statute), with *Penry v. Lynaugh*, 492 U.S. 302 (1989) (striking down a Texas statute's “special issues” that did not allow full consideration of mental retardation and childhood abuse as unconstitutionally limiting a jury's ability to consider relevant mitigating evidence).

75. See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (criticizing constitutional criminal procedure generally); H.R. REP. NO. 104-23, at 10 (1995) (“The result of this system [of federal review of capital punishment] has been the virtual nullification of state death penalty laws through a nearly endless review process.”); 141 CONG. REC. S4593 (daily ed. Mar. 24, 1995) (statement of Sen. Specter) (“Federal habeas corpus is a complex and arcane subject. Its difficult and restrictive rules simply delay imposition of the death penalty and render it useless as a deterrent.”); William F. Buckley, Jr., *The War Against Capital Punishment*, NAT'L REV., June 25, 1990, at 62, 62 (opining that America's enthusiasm for execution “has generated the longest juridical foreplay in history”).

Despite this widespread and apparently plausible perception, the nature of the Court's constitutional regulation, especially in the first two decades of its project of constitutional regulation, turned out to be remarkably undemanding in its particulars when examined as a whole.⁷⁶ A constitutional capital verdict required at least one "objective" aggravating factor—but there was no limit on the number or breadth of aggravators that a state could adopt,⁷⁷ and the "objectivity" of a factor did not need to be clear from the text of a statute, but rather could be provided by fairly minimal limiting constructions by state courts.⁷⁸ The Court ultimately concluded that states also were required to permit full consideration of all relevant mitigating evidence, which essentially ensured that the process of capital sentencing deliberations would resemble, to a disconcerting degree, the pre-*Furman* regime of unguided, standardless capital sentencing.⁷⁹ Moreover, despite its repeated mantra that "death is different," the Court imposed few (and fairly idiosyncratic) special procedural requirements on the capital justice process.⁸⁰

Thus, despite the appearance of intensive, intrusive, and demanding constitutional regulation, the ultimate result of the Court's regulatory efforts was to require fairly minimal departures from the pre-*Furman* regime—departures that were unlikely to actually achieve the regulatory goals of predictability, fairness, and accuracy that the Court had articulated in 1972 and 1976. As a result, actors within the capital justice process (such as sentencing juries, trial and appellate judges, and governors with the power of pardon and clemency) were likely to feel more comfortable than was in fact justified in imposing and approving capital sentences, secure in their (false or exaggerated) beliefs that their individual roles constituted merely one small part of a new and impressive regulatory apparatus. Similarly, the public at large was likely to conclude, again without true

76. We describe in detail the first two decades of the Court's regulatory project in Steiker & Steiker, *supra* note 67.

77. DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 268 n.31 (1990) (finding that approximately 86 percent of the murder convictions in Georgia in the five years after Georgia adopted its post-*Gregg* death penalty statute were included as capital murders under the new statute).

78. See, e.g., *Arave v. Creech*, 507 U.S. 463, 469–71 (1993) (approving "cold-blooded, pitiless slayer" as an adequate narrowing construction for the unconstitutionally vague aggravator of "exhibit[ing] utter disregard for human life").

79. Steiker & Steiker, *supra* note 67, at 389–93. We concluded that "the past twenty years of intricate litigation over states' fulfillment of the individualization requirement is coming to an end only because states have voluntarily reproduced the open-ended consideration of mitigating factors that was a central feature of the pre-*Furman* statutes." *Id.* at 390.

80. *Id.* at 397–401. We concluded that "the Court's death-is-different doctrine is nothing more than a modest, ad hoc series of limitations on particular state practices." *Id.* at 401.

justification, that any death sentences and executions produced by such a complex and time-consuming system must be more than fair enough. Moreover, the most common form that state statutory innovations took in response to the Court's interventions—imposing some sort of process by which juries compared “aggravating” and “mitigating” factors in their capital sentencing deliberations—itsself helped both to distance jurors from the essentially moral task of deciding life or death and to cloak their decisions for public consumption in an aura of scientific computation rather than essentially free discretion.⁸¹

At the same time that the Court's slowly evolving capital jurisprudence was helping to stabilize through entrenchment and legitimation the reauthorized American death penalty, Europe was quickly converging on continental abolition founded on an emerging consensus that capital punishment violated norms of international human rights.⁸² The Supreme Court's constitutional intervention reauthorizing the American death penalty helped to legitimate capital punishment in the United States in an additional way by offering a form of domestic inoculation against the emerging human rights consensus in Europe. Quite apart from the gap between the apparent rigor of the Court's regulatory effort and its negligible effects, the simple fact that the Supreme Court found nothing in our vaunted Constitution invalidating as a general matter the use of capital punishment helped to undermine international arguments that the death penalty violated a fundamental, universal human right. The role of the American Constitution as an embodiment of our deepest values—as a kind of “civil religion”⁸³—worked against widespread acceptance of the view

81. See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 385 (discussing how the Court's current capital punishment law permits such institutional actors “to reassure themselves that the sanctions they inflict follow inevitably from the demands of neutral, disinterested legal principles, rather than from their own choice and power”).

82. See, e.g., Brief for The European Union as Amicus Curie Supporting Petitioner, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648609, at *5–6 (“The EU is also part of the forty-three member states of the Council of Europe, which have stated that the death penalty can no longer be regarded as an acceptable form of punishment from a human rights perspective.” (quoting Dorean Marguerite Koenig, *A Death Penalty Primer: Reviewing International Human Rights Development & the ABA Resolution for a Moratorium on Capital Punishment in Order to Inform Debates in U.S. State Legislatures*, 4 ILSA J. INT'L & COMP. L. 513, 523 (1998)) (internal quotation marks omitted)). See generally WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (2d ed. 2002) (documenting the death penalty abolition movement in the context of evolving European and international human rights norms).

83. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 10 (2011) (describing American “civil religion” as “that web of understandings, myths, symbols, and documents out of which would be woven interpretive narratives both placing within history and normatively justifying the new American community coming into being following the travails of the Revolution”).

that a right not recognized by our Constitution could be of such a magnitude. This kind of legitimation effect is likely in every context in which the Supreme Court rejects some claimed fundamental right as a matter of constitutional law. But the more particular death penalty story of the gap between the appearance and reality of regulation and the apparently scientific papering over of discretionary authority is also clearly generalizable to other large-scale judicial (or other) regulatory attempts to rationalize decisionmaking processes and control discretionary authority.

V. NATIONAL NORMS, LOCAL ENFORCEMENT

One of the central motivations for regulation is the desire to achieve uniformity—to make practices more “regular.” This motivation was central to the Court’s decision to enter the capital punishment fray, as members of the Court no doubt believed that federalizing capital punishment law would bring some consistency and stability to American death penalty practices. What the Court and observers likely underestimated, though, was the fact that regulation of complex social phenomena creates extraordinary opportunities for divergence—the possibility that the regulation will mean quite different things in different places. Regulation is filtered through numerous actors—legislatures, multiple courts, executive officials—and affords numerous opportunities for avoidance of the regulatory norms as well as determined internalization of the norms. In the modern era, we have witnessed both extremes, with some jurisdictions resisting federal intervention and others using the fact of regulation to defeat the underlying practice of capital punishment. As a result, the shape of contemporary death penalty practice is in many respects less regular than the practice it replaced. The divergence, though, is less evident in the distribution of capital sentences than in the willingness and capacity of states to translate capital sentences into executions. Some death penalty jurisdictions execute a substantial percentage of those sentenced to death, whereas others carry out virtually no executions.⁸⁴ Overall, we have largely replaced a lottery for death sentences with a lottery for executions, and the engine behind that change is regulation itself.

The divergence between “executing states” and “symbolic states” is a defining feature of the contemporary American death penalty and has important implications for the future of the practice.⁸⁵ Prior to the modern

84. *Executions per Death Sentence*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-death-sentence> (last visited Mar. 9, 2014).

85. See generally Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV.

era, states with substantial numbers of death sentences invariably had substantial numbers of executions. Indeed, prior to the modern era, “execution rates” referred exclusively to the number of executions relative to the number of homicides,⁸⁶ and no one thought it useful to calculate executions relative to death sentences; the simple truth was that a very large percentage of those sentenced to death were executed, irrespective of jurisdiction.

Today, only a small number of states execute a significant percentage of their condemned. At the top end, Virginia and Texas have managed to convert more than half of their death sentences into executions; together they have carried out 620 executions in the modern era, close to half of the executions carried out nationwide (1369) during this period.⁸⁷ This is true despite the fact that the two states account for only about one-seventh of the death sentences obtained during this period (about 1100 of the nation’s 7400 or so death sentences).⁸⁸ At the other end of the spectrum, California and Pennsylvania, with more death sentences than Virginia and Texas (over 1200), have executed only sixteen offenders, or just over 1 percent of those sentenced to death within their jurisdictions.⁸⁹ Between these extremes, two other states with at least fifty death sentences—Missouri and Oklahoma—have execution rates above .30 (producing about one execution for each three death sentences), five others have execution rates around .20 (Arkansas, South Carolina, Indiana, Georgia, and Louisiana), while the majority of such death penalty states have execution rates below .10, including Florida, with an execution rate of about .08 (sixty-eight executions, almost 900 death sentences).⁹⁰ Many of the states that now have significant numbers of death sentences but trivial numbers of executions routinely executed offenders before the modern era. California executed 502 inmates in its state penitentiary (1893–1967),⁹¹ Pennsylvania executed 351 inmates (1915–1962),⁹² and Tennessee executed 134 inmates (1909–1960).⁹³ Today, these jurisdictions have large death rows but

1869 (2006) (examining the “execution gap” in the United States and offering several explanations for its existence).

86. See, e.g., WILLIAM J. BOWERS WITH GLENN L. PIERCE & JOHN F. MCDEVITT, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982*, at 25–29 (1984).

87. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Mar. 10, 2014).

88. *Executions per Death Sentence*, *supra* note 84.

89. *Id.*

90. *Id.*

91. BOWERS WITH PIERCE & MCDEVITT, *supra* note 86, at 407.

92. *Id.* at 490.

93. *Id.* at 502.

offenders face no realistic prospect of execution in the short term. Execution is only the third leading cause of death for a death-sentenced inmate in California (behind natural causes and suicide).⁹⁴

Some of the variation in death sentencing is attributable to the ability of states to choose different means to satisfy national regulatory ends. Thus, state capital statutes differ widely in their design, in their choice of aggravating factors that render defendants death eligible, in their choice whether to identify mitigating factors, and so forth. States also differ in how they structure and fund the capital defense function, with some jurisdictions relying wholly on statewide offices for trial representation, and others relying on more decentralized systems of local court appointment and funding. Local politics will also influence which cases are charged and pursued capitally.

Differences of these sorts—in the scope and structure of capital statutes, in the basic institutional designs surrounding capital trial litigation, and in the political climate at the local level—account for some of the differences in the flavor of capital practice across the country and produce some meaningful variation in capital “outcomes”—whether measured in terms of the frequency of capital prosecutions or the number of convictions. But these differences are relatively small in comparison to the prevailing radical divergence among states in their capacity to consummate death sentences with executions. Differences along these lines—in execution rates—are attributable to variation in procedural values and practices, commitment to national norms, and political will.

With the advent of constitutional regulation, numerous federal constitutional questions surround every capital prosecution and must be resolved prior to execution. States, in turn, have to provide mechanisms for such litigation, and those mechanisms will have a strong bearing on the speed to execution. The modern era has witnessed varying levels of “process” within capital jurisdictions, with staggeringly different results in terms of the path to execution. In California, for example, cases move extremely slowly on direct appeal, in part because of mundane matters such as the time spent producing and certifying the trial transcript.⁹⁵ In addition, the “culture” surrounding direct appeal practice in California includes an expectation of lengthy briefing by the parties and an extended time before

94. *Death Row Suicide Highlights Executions' Delays*, FOXNEWS.COM (June 9, 2012), <http://www.foxnews.com/us/2012/06/09/death-row-suicide-highlights-executions-delays/>.

95. Steiker & Steiker, *supra* note 85, at 1877–78.

decision by the California Supreme Court.⁹⁶ California also requires the appointment of qualified appellate counsel on direct appeal, whereas other states presume continuity of trial counsel's representation through the direct appeal;⁹⁷ the heightened expectations of capital appellate representation make it difficult for California to find sufficient willing and capable attorneys to handle the crush of cases working their way through the California system.⁹⁸ In contrast, cases on direct appeal move quickly in Texas, with much lower expectations in terms of direct appellate advocacy (with some defense lawyers even "waiving" their right to present oral argument) and relatively quick decisionmaking by the Texas high criminal court.⁹⁹ Similar differences in design, standards, and expectations affect the processing of cases in state postconviction review, with some jurisdictions (like Texas) moving cases much more quickly than others, in part because of more demanding deadlines and in part because of the infrequency of meaningful judicial review (for example, the use of evidentiary hearings to resolve contested issues of fact).¹⁰⁰ Federal habeas review likewise differs across jurisdictions. Although the content of federal constitutional norms is ostensibly dictated by decisions of the U.S. Supreme Court, the various Courts of Appeals differ extensively in their implementation. Claims of ineffective assistance of trial counsel, for example, are much more likely to succeed in some circuits than others, reflecting different understandings of the Sixth Amendment requirements as well as divergence in the underlying norms of practice within the states covered by those courts.¹⁰¹

Differences in process likely reflect general differences in legal culture among capital jurisdictions as well as specific differences in attitudes respecting the death penalty. States outside of the South are more likely to have internalized "due process" values in both civil and criminal contexts,¹⁰² and those values make it more difficult to push capital cases to the brink of execution. In addition, the depth of support for capital punishment (especially among judges and statewide officials) varies across jurisdictions, and those sorts of differences will translate into varying levels

96. *Id.*

97. *Id.* at 1878–79.

98. *Id.* at 1879.

99. *Id.* at 1876–79.

100. *Id.* at 1882–89.

101. *Compare, e.g.,* *Belmontes v. Ayers*, 529 F.3d 834 (9th Cir. 2008) (ruling in favor of capital defendant's ineffective assistance of counsel claim), *rev'd per curiam*, *Wong v. Belmontes*, 130 S. Ct. 383 (2009), *with* *Porter v. Attorney General*, 552 F.3d 1260 (11th Cir. 2008) (*per curiam*) (ruling against capital defendant's ineffective assistance of counsel claim), *rev'd per curiam*, *Porter v. McCollum*, 130 S. Ct. 447 (2009).

102. *Steiker & Steiker, supra* note 85, at 1914–18.

of pressure for cases to move through the system. Executions require an extraordinary amount of coordination, and resistance at any point—in state trial courts, state appellate courts, federal courts, district attorneys’ offices, attorney generals’ offices, governors’ offices—can prevent executions from occurring.

The influence of process and politics is evident in the recent experience with lethal injection litigation, which illustrates the enormous differences in states’ capacity and willingness to execute—and the possibilities for divergence opened by the fact of regulation. Beginning in the early 2000s, inmates began challenging the common lethal injection protocol used in virtually every death penalty jurisdiction; opponents to the protocol argued that the common three-drug cocktail created an unnecessary and substantial risk of undetected suffering on the part of the condemned. The U.S. Supreme Court decided to address the issue after only a few years of its percolation in the lower state and federal courts; the timing of the Court’s intervention led many observers to suspect that the Court wanted to nip the challenge early and clear the way for executions to proceed. The Court’s resulting opinion, in *Baze v. Rees*,¹⁰³ upheld the use of the protocol in Kentucky and established a high bar for future challenges to execution methods and protocols. Nonetheless, concerns surrounding lethal injection protocols have slowed executions substantially in some jurisdictions, while other jurisdictions have continued to execute without significant interruption. Texas, Oklahoma, and Virginia carried out executions within weeks of the Court’s decision, while many other states are still mired in lethal injection litigation.¹⁰⁴ Again, the difference in reactions has less to do with the content of federal regulation (which is actually quite minimal) than with the legal and cultural norms within the different jurisdictions as well as the surrounding politics. In some states, demanding administrative laws make it cumbersome to alter execution protocols,¹⁰⁵ whereas in other states, the autonomy of prison officials to “adapt” to drug shortages or potential protocol problems is the norm.¹⁰⁶

103. *Baze v. Rees*, 553 U.S. 35 (2008).

104. Jerry Markon, *Va. Executes Man, Ending De Facto Moratorium*, WASH. POST (May 28, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/27/AR2008052702257.html>; *Lethal Injection: Stays Granted*, DEATH PENALTY INFO. CTR., www.deathpenaltyinfo.org/lethal-injection-stays-granted (last visited Mar. 10, 2014); *Upcoming Executions*, DEATH PENALTY INFO. CTR., www.deathpenaltyinfo.org/upcoming-executions (last visited Mar. 10, 2014).

105. Julia Cheever, *Court in SF Hears Bid to Reinstate Lethal Injection Protocol*, S.F. APPEAL (Apr. 16, 2013, 8:21 PM), sfappeal.com/2013/04/court-in-sf-hears-bid-to-reinstate-lethal-injection-protocol/.

106. Brandi Grissom, *Texas Will Change Its Lethal Injection Protocol*, TEX. TRIB. (July 10, 2012), www.texastribune.org/2012/07/10/texas-changing-its-lethal-injection-protocol/.

States also differ in the extent to which legislative and executive officials have sought to study protocol alternatives, with some states seeking quick resolution to facilitate executions and others moving much more slowly. The experience with lethal injection litigation provides a window into the ways regulation is filtered through layers of culture, law, and politics; those layers give actors with qualms about the death penalty the means of avoiding executions, and allow those deeply committed to the death penalty to express their support.

The failure of death-sentencing states to execute offenders has important ramifications for the future of the death penalty. Several of the states which recently abolished the death penalty had substantial death row populations but very low numbers of executions (Maryland, Illinois, New Jersey),¹⁰⁷ and the inability to translate death sentences into executions raises substantial policy concerns about the wisdom of retention. In addition, prolonged death row incarceration raises serious constitutional questions about cruelty along at least two dimensions. Inmates subjected to decades-long solitary confinement endure the multiple punishments of painful imprisonment, psychological trauma, and execution (if ultimately imposed); more broadly, states that retain the death penalty but do not execute can hardly claim to secure the deterrent or retributive purposes of capital punishment, and the rare executions in those states might fairly be challenged as excessive because unproductive. In addition, variation in execution rates creates a new and potentially unconstitutional form of arbitrariness: just as inequality in the selection of the condemned raised important constitutional questions about the sustainability of capital punishment in the pre-*Furman* era, so the prevailing arbitrariness in the distribution of executions among the condemned implicates constitutional concerns. Regulation has shifted rather than solved the lightning-like quality of the American death penalty.

VI. SUBSTANCE AND PROCEDURE

One of the longstanding debates in American law focuses on the interaction between “substance” and “procedure.” Procedural interventions can perform an agenda-setting function, particularly when more direct substantive paths are unavailable. Procedural reforms, though, can also be at odds with more encompassing reform by entrenching prevailing

107. *Executions per Death Sentence*, *supra* note 84; *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar. 10, 2014).

practices, especially if the focus on procedure becomes fetishized and the broader underlying reality is ignored. Substantive reform, on the other hand, offers the clearest and most direct route to change. But substantive reforms are the hardest to secure and can be undermined—even fatally—if the procedural mechanisms for their enforcement are inadequate. The history of contemporary death penalty regulation reflects the large kernels of truth captured by these propositions, but more than that, the contemporary regulatory course illustrates the complicated, interconnected, and unpredictable paths of procedural and substantive approaches. Indeed, the modern experiment to tame the American death penalty through law reveals the difficulty of making confident generalizations about the benefits and shortcomings of “substantive” versus “procedural” interventions.

As described above, the road to contemporary regulation began with an explicit procedural strategy to defeat the death penalty. Abolitionist lawyers at the NAACP LDF were emboldened to challenge the death penalty by the U.S. Supreme Court’s signal in 1963 that the death penalty might be unconstitutional as applied to rape.¹⁰⁸ The suggestion by three members of the Court (in their dissent from denial of certiorari) that the Federal Constitution might place any meaningful constraints on the reach of the death penalty was something of a lightning bolt, an unprecedented invitation to embark on a legal (as opposed to a political) strategy. But the newness of the federal constitutional dimension to the abolitionist cause cautioned against a direct assault on the death penalty as a legitimate punishment. Instead, the LDF sought to grind the capital system to a halt via a variety of procedural challenges against its imposition.¹⁰⁹ The LDF challenged state procedures for “death-qualifying” jurors, arguing that the exclusion of jurors who harbored doubts about the death penalty inappropriately skewed the decisionmaking process as to both guilt and punishment.¹¹⁰ The LDF also opposed the common practice of “unitary” capital trials in which the defendant was required to offer any bases for withholding death at the same time that the jury would decide whether the defendant was in fact guilty of the underlying offense.¹¹¹ In its most sweeping assault, the LDF criticized the absence of any meaningful standards to guide the life-versus-death decision; virtually every state

108. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari).

109. See MELTSNER, *supra* note 6, at 60–72, 106–25 (describing the LDF’s moratorium strategy and the procedures it targeted).

110. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

111. *McGautha v. California*, 402 U.S. 183 (1971).

afforded unfettered discretion to the sentencer in choosing between various lengths of imprisonment and death.¹¹²

More broadly, the goal of the LDF was to raise these and any other conceivable claims to prevent any executions going forward. This “moratorium strategy” was premised on the belief that the prevailing capital system was manifestly unfair and discriminatory, but that a direct substantive challenge to the death penalty was not yet ripe.¹¹³ LDF lawyers wanted to take advantage of and extend new Warren Court precedents demanding procedural reform of the criminal justice system. But they were wary of seeking an outright declaration of the unconstitutionality of the death penalty because of the virtual absence of any precedential groundwork supporting such a decision (in comparison, say, to the lengthy litigation culminating in the landmark decision in *Brown v. Board of Education*).¹¹⁴ The hope was twofold: Preventing executions on procedural grounds might demonstrate to American politicians, and the American public, that society could function without the death penalty and thus advance the abolitionist cause. In more practical terms, requiring states to overhaul their procedures would give abolitionists a chance to prevail in the legislative process, as most states simply had not considered (or reconsidered) their capital statutes in more than a generation. In this respect, LDF lawyers believed that by advancing procedural challenges and securing procedural obstacles to executions, they could undermine the entrenched substantive commitment to the death penalty. At the heart of their strategy was the belief that the prevailing death penalty was an anachronism tolerated only because of the absence of sustained attention to its inhumanity. The focus on deficient procedures would perform an important agenda-setting function, with the expectation that when the death penalty was finally confronted, it would be vulnerable to broader attack.

In the short term, the LDF moratorium strategy was remarkably successful. By 1968, the national moratorium was in place, as lawyers throughout the country, with the benefit of LDF’s stock pleadings in the form of “last aid kits,”¹¹⁵ managed to halt executions as the various procedural challenges worked their way through the state and federal courts. Two of the earliest cases to the Supreme Court resulted in important procedural victories; the Court invalidated a federal provision that permitted the imposition of the death penalty for certain crimes only

112. *Id.* at 205.

113. MELTSNER, *supra* note 6, at 66–67.

114. *Id.*

115. *Id.* at 112–13.

against defendants who pled not guilty and asserted their right to trial by jury,¹¹⁶ and the Court struck down a state provision, common throughout the country, that gave judges broad authority to exclude from capital trials potential jurors who harbored any misgivings about the death penalty.¹¹⁷ Neither of these decisions amounted to a direct attack on capital punishment, but they provided important momentum. They reflected a new sensibility on the Court regarding safeguards in capital cases; they prevented the imposition of death sentences in particular cases or, at a minimum, required resentencing proceedings; and the death-qualification decision promised to even the playing field in capital trials, preventing prosecutors from seating only those jurors already predisposed to impose the death penalty. But the Court subsequently rejected two of the broadest procedural claims—holding that the Due Process Clause does not forbid standardless discretion in capital schemes, and the Fifth Amendment does not require bifurcated proceedings in which defendants can make their appeals for mercy in a separate punishment phase after a finding of guilt.¹¹⁸

The Court's decision to rehear the standardless discretion claim in *Furman* under the Eighth Amendment seemed like a second bite at the apple; if LDF prevailed on that claim, the procedural defect in the administration of the death penalty would require all death penalty states to start from scratch if they were to retain the death penalty. But the framing of the question in *Furman* blended substance and procedure. Instead of focusing exclusively on the problem of standardless discretion, the Court asked more globally whether "the imposition and carrying out of the death penalty in [the cases] constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."¹¹⁹ The resulting decision striking down prevailing statutes was a mix of substance and procedure. All five Justices supporting the judgment worried about the arbitrariness created by the prevailing statutory schemes; but only Justices Brennan and Marshall went so far as to condemn the death penalty as a punishment.¹²⁰ The strategy of seeking procedural relief in many respects invited the more limited holding. And many of the Justices likely believed that this procedural intervention would spell the end of the death penalty because states would be unwilling to recraft their capital statutes, especially given the uncertainty about whether the procedural defects could be cured.

116. *United States v. Jackson*, 390 U.S. 570 (1968).

117. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

118. *McGautha v. California*, 402 U.S. 183 (1971).

119. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam).

120. *Id.* at 286 (Brennan, J., concurring); *id.* at 369–70 (Marshall, J., concurring).

Ultimately, though, the procedural strategy wrought only procedural fruit, and when the states resoundingly responded to *Furman* with new statutes addressing the defect of standardless discretion, the Court made clear that *Furman* did not preclude the continued use of the death penalty in the United States. Moreover, the states' resounding response was in part the result of the shift from procedural to substantive argument in the *Furman* litigation. If the broader public had understood the Court to be merely extending necessary procedures to the capital context, the reaction would likely have been relatively modest; but with some of the advocates insisting that the death penalty as a practice was barbarous and inconsistent with prevailing standards of decency, and some members of the Court embracing similar sort of critiques, the largely "proceduralist" decision in terms of its holding was received by many as a judicial condemnation of the death penalty as a punishment.

As recounted above, the next two decades of judicial regulation of the death penalty focused overwhelmingly on procedures and provided extremely modest substantive protection.¹²¹ The Court refused to exempt many offenders based on proportionality concerns, allowing the continued execution of juveniles,¹²² persons with mental retardation,¹²³ and certain nontriggermen.¹²⁴ The Court also insisted that *Furman* did not authorize relief based on discriminatory outcomes, and that its review was limited to the procedures states crafted to prevent discrimination.¹²⁵ Although the web of judicially imposed procedural requirements resulted in many reversals of capital sentences, the minimalist nature of those requirements did little to improve the underlying practices. Worse still, the high visibility of the procedural interventions made the death penalty more secure and stable than it had been prior to the course of procedural regulation. Overall, then, the procedural strategy had failed. LDF had successfully put the issue of capital punishment before the courts and the legislatures. But when the substantive challenge to the death penalty was rejected in both of these arenas, the remaining husk of procedural regulation left the death penalty stronger and less vulnerable to substantive attack. By the mid-to-late 1990s, death sentencing and executions reached their modern-level highs, and the

121. See Steiker & Steiker, *supra* note 67, at 357–59 (discussing criticism of the Court's death penalty doctrine).

122. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

123. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

124. *Tison v. Arizona*, 481 U.S. 137 (1987) (concluding that the Eighth Amendment does not prohibit a death sentence for a major participant in a felony-murder whose mens rea was one of reckless indifference to human life).

125. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

moribund American death penalty of the 1960s had been supplanted by the most active and visible death penalty system in the Western world. The LDF's procedural victories had yielded a substantive nightmare.

Over the past fifteen years, though, the death penalty has become increasingly fragile. Politically, concerns about cost and wrongful convictions, as well as the precipitous drop in violent crime and the widespread adoption of life-without-possibility-of-parole sentencing alternatives, have changed the dynamics of the public debate, resulting in abolition of the death penalty in six jurisdictions.¹²⁶ On the judicial side, the Supreme Court has, for the first period in its history, embraced significant substantive proportionality limits on the reach of the death penalty. Reversing earlier decisions, the Court has exempted juveniles¹²⁷ and persons with mental retardation,¹²⁸ in addition, the Court has extended its limits on punishing certain nonhomicidal crimes with death, invalidating recent statutes authorizing death for the rape of a child.¹²⁹ These developments represent the clearest path to the ultimate reform of the death penalty. In crafting proportionality limits, the Court has developed a methodology conducive to judicial abolition—a methodology that privileges professional and elite opinion as well as actual sentencing practices, in contrast to previous cases which relied almost exclusively on the “consensus” reflected in prevailing state statutes.¹³⁰ In this respect, substantive judicial interventions provide the groundwork for the most likely path to judicial abolition.

But the move to substance has not been without difficulties. The Court's decision announcing a proportionality limit against executing persons with mental retardation did not specify the procedures governing its enforcement. In some jurisdictions, the procedures plainly underenforce the Court's categorical ban. In Texas, for example, the highest state criminal court has openly doubted whether all offenders who meet professional standards for mental retardation are sufficiently less culpable to deserve exemption from the death penalty.¹³¹ Accordingly, that court has

126. *States With and Without the Death Penalty*, *supra* note 107.

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

128. *Atkins v. Virginia*, 536 U.S. 304 (2002).

129. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

130. 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, 242–43 (2012).

131. *Ex Parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004) (suggesting that categorical ban should be limited to those offenders with mental retardation who would be deemed worthy of protection by a consensus of “Texas citizens”).

created its own, nonscientific, test for mental retardation that defeats the Court's categorical ban,¹³² and thus far the federal courts have permitted Texas's departure from widely recognized professional standards.¹³³ In other jurisdictions, courts have imposed procedural defaults to prevent litigation of strong claims of mental retardation, insisting that the federal habeas statute's escape valve for claims of "actual innocence" does not extend to claims of exemption based on proportionality limits or categorical ineligibility.¹³⁴ In addition, some states have structured the burden and standard of proof on the issue of mental retardation so as to deny protection to inmates who likely satisfy professional standards but are unable to assert an airtight claim. Georgia, for example, which had embraced the categorical exemption prior to the Court's decision declaring the constitutional ban, still requires a capital defendant to establish his or her mental retardation "beyond a reasonable doubt" to be exempt from execution.¹³⁵ As a result of all of these procedural impediments, the substantive commitment to protecting persons with mental retardation from execution in reality has become a commitment only to protecting persons who obviously or unquestionably have mental retardation. Whereas the Court's decision exempting juveniles from execution has afforded blanket protection (because of the difficulties of undermining the protection via procedural rules), the Court's invitation for states to "develop[] appropriate ways to enforce the constitutional restriction"¹³⁶ in this context has made it impossible to assert that the United States no longer permits the execution of all persons with mental retardation.¹³⁷

Some of the lessons from the regulatory experience with the death

132. *Id.* at 7–9 (crafting nonprofessional criteria ("Briseno factors") for assessing whether offender qualifies for protection under *Atkins*).

133. *See, e.g.,* *Chester v. Thaler*, 666 F.3d 340 (5th Cir. 2011) (upholding Texas court application of *Briseno* factors as basis for withholding relief under *Atkins*).

134. *See, e.g., In re Hill*, 715 F.3d 284, 291–301 (11th Cir. 2013) (imposing a default to preclude consideration of petitioner's claim of exemption under *Atkins* and rejecting applicability of "innocence" gateway).

135. GA. CODE ANN. § 17-7-131(c)(3) (West 2013); *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (en banc) (upholding application of Georgia standard which requires offender to prove mental retardation beyond a reasonable doubt to receive exemption).

136. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416 (1986)) (internal quotation marks omitted).

137. In many respects, the Court's underenforcement of its categorical ban on executing persons with mental retardation has followed a similar approach to the Court's underenforcement of its ban on executing inmates who are "insane" at the time of their execution; there, too, the Court left to the states the procedures for implementing the ban, with the result that inmates with unquestioned severe psychiatric impairments are nonetheless eligible for execution. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986).

penalty find illuminating parallels in other contexts. The capacity for procedural reforms to shield the underlying practice from meaningful review is evident in the broader Warren Court constitutional criminal procedure revolution of the 1960s. That revolution extended numerous procedural protections to state inmates, including the Court-crafted exclusionary rules for evidence secured via illegal searches and interrogations, the right to counsel, jury trial, and so forth. Like the Court's interventions in the death penalty context, these decisions were designed to curb outlier practices, primarily in the South, that contributed to the arbitrary and discriminatory treatment of poor, often minority, offenders. And like the Court's intervention in *Furman*, the Warren Court revolution generated a backlash as well. A new coalition of Republicans and Southern Democrats demonized the Court's efforts as reflecting a naïve sympathy for criminals, and President Nixon's "law and order" platform successfully inaugurated a politics of crime that carried well into the twenty-first century. As the underlying "substance" of American criminal law became increasingly punitive—with longer sentences for virtually all offenses, less opportunities for parole (including the advent of life-without-possibility-of-parole sentences), harsh recidivist provisions, and the general abandonment of "rehabilitation" as an aspiration of American prisons—the narrative of American criminal justice continued to focus on the leniency of American criminal procedure. Media portrayals in film and television of offenders escaping punishment because the constable blundered seemed to triumph over the reality that the American prison population was growing exponentially. At the same time, the seemingly vast procedural "rights" recognized during the Warren Court revolution were undercut both by judicially crafted "exceptions" to their reach and by the underlying reality that the combination of harsh punishments and overclogged dockets ensured that most criminal defendants would waive their procedural protections to secure plea bargains. The constitutionalization of American criminal procedure, like the constitutionalization of the death penalty, managed to shift attention away from the growing harshness of American criminal punishments to the complicated, costly, and time-consuming procedural mechanisms surrounding their enforcement. The fact that in both contexts the procedures have accomplished little in terms of preventing arbitrary, excessive, or discriminatory punishment ultimately matters less than the fact (or perception) that the federal courts are understood to be keeping a watchful eye over police and prosecutors.

The capacity for procedural reforms to shape substantive rights is reflected in the current battle over abortion. On the pro-life side, the movement's ability to challenge abortion directly is undercut by the

Court's protection of the "core" of *Roe v. Wade*,¹³⁸ which assigns the decision whether to terminate an early pregnancy to the pregnant mother. As a result, pro-life groups and politicians have sought to regulate outside the core (requiring waiting periods, parental notification and consent for minors, compelled disclosures about fetal age, etc.) in order to make abortions more expensive, more cumbersome, and therefore less common. More recently, states have imposed onerous requirements on facilities that provide abortions (e.g., Texas's recent law requiring clinics receive certification as ambulatory surgery centers) with the avowed goal of forcing them to close their doors.¹³⁹ Procedural victories, though they cannot prohibit abortion rights outright, can erode the practice within particular jurisdictions and create continued opportunities for the judiciary to reconsider the underlying substantive right.

VII. INCREMENTAL CHANGE AND LONG-TERM DESTABILIZATION

The most surprising aspect of the Court's regulatory endeavors is the extent to which its largely toothless procedural interventions crafted in the two decades post-*Furman* have influenced the present landscape. Writing in the mid-1990s, we lamented how the Court's intricate web of capital doctrines had created the "worst of all possible worlds."¹⁴⁰ On the one hand, the doctrines demanded little of states in terms of actually rationalizing the administration of the death penalty; and yet, on the other, they gave the appearance of intensive regulation that stabilized and legitimized prevailing practice. What we failed to appreciate at that time is the extent to which the entire project of constitutional regulation would transform capital practice—not by directly demanding meaningful change, but by creating institutional structures that, would in turn exert pressures toward a higher level of practice and impose extraordinary costs on state capital systems.

First, the experience with *Furman* and *Gregg*, by constitutionalizing state capital practices, generated a demand for "death penalty lawyers" who would litigate these cases at trial and in postconviction. At the time of *Furman* and *Gregg*, the standard of trial practice in capital cases was quite poor. Most death penalty trials were defended by "generalist" lawyers

138. *Roe v. Wade*, 410 U.S. 113 (1973).

139. See, e.g., Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES (July 18, 2013), www.nytimes.com/2013/07/19/us/perry-signs-texas-abortion-restrictions-into-law.html?_r=0 (discussing Texas's recent abortion regulations).

140. Steiker & Steiker, *supra* note 67, at 438.

without any special expertise in capital litigation, and these lawyers approached their cases with the same strategies operative in their other serious felony cases—aim for an acquittal or a conviction on a lesser-included offense.¹⁴¹ The prevailing statutory schemes in the 1960s had discouraged development and presentation of mitigating evidence, with many states forbidding the introduction of such evidence except to the extent it bore on the underlying question of guilt or innocence.¹⁴² The Court's rejection of mandatory schemes, though, generated a new interest in mitigation. Both trial lawyers and postconviction lawyers began to focus on more extensive investigation and development of mitigation. Indeed, by the late 1980s to early 1990s, a new specialty emerged for "mitigation specialists" who would coordinate the development of wide-ranging evidence, including a defendant's medical history, educational history, special education needs, military service, employment and training history, family and social history, and religious and cultural influences.¹⁴³ Though the Court had not directly required such intensive trial-phase efforts, the new state statutory schemes triggered by *Furman* highlighted the importance of mitigation, and the growing cadre of death penalty lawyers and related specialists began to focus on the newly required "punishment phase" in bifurcated trials. Through the 1980s and 1990s, the Court had never found trial counsel ineffective for failing to develop and present mitigating evidence, but the level of practice was nonetheless changing. In 1989, the American Bar Association ("ABA") promulgated detailed standards for the appointment and performance of counsel in capital cases,¹⁴⁴ and those standards reflected the new and higher expectations regarding mitigation; the fast-moving nature of the standard of care is reflected in the ABA's decision to promulgate revised, more demanding standards just fourteen years later in 2003.¹⁴⁵ Ultimately, the Court changed course and, beginning in 2000, the Court referred to the ABA standards in a trio of cases reversing death sentences based on inadequate mitigation

141. Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 137.

142. WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 74 (1991).

143. Carol S. Steiker, *Darrow's Defense of Leopold and Loeb: The Seminal Sentencing of the Century*, in *TRIAL STORIES* 117, 142–45 (Michael E. Tigar & Angela J. Davis eds., 2008).

144. ABA, *GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES* (1989), available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf.

145. ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 916 (2003).

investigations.¹⁴⁶ By mandating procedures in capital cases in *Furman*, the Court heralded a new era of capital litigation that took on a life of its own.

On the postconviction side, by the late 1980s Congress statutorily recognized a right for indigent death-sentenced inmates to receive representation in federal habeas proceedings,¹⁴⁷ notwithstanding the absence of such a right for all other state inmates. States, too, gradually recognized that they would be better served by providing lawyers to death-sentenced inmates in state postconviction. In the 1980s, it was not uncommon for states to limit postconviction funding to less than a few thousand dollars (if they provided representation at all).¹⁴⁸ By the 2000s, virtually every state recognized a right to counsel in state postconviction and increased the resources available to such lawyers, in part to secure the benefits of the “opt-in” provisions of the federal habeas statute,¹⁴⁹ which promised to streamline cases in federal court for states that provided effective representation in their own collateral proceedings. As with the change to capital trial practices, the changes in state and federal habeas had less to do with constitutional commands than the internal logic of a *regulated* system. The mere fact of regulation created a growing constituency of death penalty lawyers, and those lawyers fought for better practices and increased resources.

The changes in trial practices and postconviction representation altered the American death penalty in two fundamental respects: they exponentially increased the costs of obtaining and defending capital verdicts and substantially extended the time between conviction and execution. Before the modern era, “cost” had been a prodeath penalty argument, as defenders of capital punishment queried whether the state should bear the incarceration costs of nondeath sentenced inmates.¹⁵⁰ Over the past ten years, “cost” has become a decisively antideath penalty argument, as state studies reveal the mind-numbing expenses associated with the administration of the modern death penalty.¹⁵¹ In addition, the new

146. *Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

147. 21 U.S.C. § 848(q)(4)(B), *repealed by* Pub. L. No. 109-177, § 222(c), 120 Stat. 192, 232 (2006).

148. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1853 (1994).

149. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §§ 2261–2266 (2012).

150. Steiker & Steiker, *supra* note 141, at 131–32.

151. *See, e.g., JOHN ROMAN ET AL., THE COST OF THE DEATH PENALTY IN MARYLAND 3* (2008), available at www.urban.org/UploadedPDF/411625_md_death_penalty.pdf (“[W]e estimate the total cost of the death penalty to Maryland taxpayers . . . between 1978 and 1999 to be at least \$186

procedural structures for reviewing capital convictions, including mandatory state and habeas postconviction litigation, have prevented most states from carrying out executions for many years—even decades—after the pronouncement of sentence, undermining many of the proffered justifications for the death penalty. This remains true even when the underlying “substantive law” is not particularly protective. For example, in response to inmates’ objections to states’ lethal injection protocols, the Court adopted a highly deferential standard that affords states significant deference in designing and implementing execution methods.¹⁵² However, lethal injection litigation in state and federal courts still manages to stymie executions in numerous jurisdictions, including traditionally “active” executing states.¹⁵³ In some respects, the “moratorium” strategy of the 1960s has become institutionalized and permanent, with hundreds (instead of dozens) of capital lawyers seeking to invoke whatever procedural claims are available to extend the lives of their clients. Overall, procedural reforms, though they are not in and of themselves particularly demanding, have made the death penalty much less desirable as a social practice over time. And it is fair to say that many of the states which have revisited the wisdom of the death penalty were prompted less by an emerging appreciation of the “inhumanity” of executions than by practical concerns of cost and inefficacy attributable to the incremental growth of death penalty procedures.

VIII. REGULATION CREATES ITS OWN YARDSTICK

As noted above, when the question of the death penalty’s constitutionality made its way to the Court in the early 1970s, few precedents could be invoked to support such a dramatic intervention. Abolitionists relied on a mix of empirical and anecdotal evidence pointing to its arbitrary and discriminatory administration, as well as indications of its decreasing popularity and use. One of the greatest strengths on the abolitionist side was the fact that state capital statutes appeared to be anachronistic in their breadth and lack of standards. It was apparent that states had put little energy into rationalizing the administration of the death penalty, especially in contrast to the death penalty provisions of the Model Penal Code (“MPC”), adopted by the American Law Institute (“ALI”) in

million.).

152. See *Baze v. Rees*, 553 U.S. 35, 50–51 (2008) (plurality opinion) (rejecting petitioners’ proposed “unnecessary risk” standard for the more deferential “substantial risk of serious harm” standard to challenge the constitutionality of a state’s execution method).

153. *Death Penalty in Flux*, DEATH PENALTY INFO. CTR., www.deathpenaltyinfo.org/death-penalty-flux (last visited Mar. 19, 2014).

1962,¹⁵⁴ which recommended limiting the reach of the death penalty to certain aggravated offenses, embraced proportionality limits on its use, provided for bifurcated guilt/punishment proceedings, and enumerated relevant mitigating circumstances. But this strength was also a weakness. The absence of any state efforts to improve the death penalty suggested a middle course between the stark choices of maintaining the status quo and abolition. When the Court was confronted with the overwhelming legislative response to *Furman*, it chose that middle course: constitutional regulation.

Over time, the experience with regulation has provided a new vantage point for assessing the American death penalty—the extent to which the reforms have actually improved its administration along several dimensions. The potential of regulation to raise expectations for the underlying practice has been an important part of the modern American death penalty story. Indeed, several important institutional actors—many of whom were agnostic about the death penalty (or at least about the constitutional status of the death penalty) before the advent of constitutional regulation—have quite visibly challenged the status quo by highlighting the perceived inadequacy of prevailing regulation to achieve its avowed goals.

The first illustration of this dynamic was Justice Blackmun’s repudiation of the American death penalty in one of his final dissents from denial of certiorari.¹⁵⁵ In *Furman*, Justice Blackmun had been a dissenter, registering his personal repugnance toward capital punishment (“I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty”¹⁵⁶) yet finding no sound legal basis for its constitutional abolition (“[t]he Court has just decided that it is time to strike down the death penalty”¹⁵⁷ and “[a]lthough personally I may rejoice at the Court’s result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement”¹⁵⁸). Over the next two decades, Justice Blackmun embraced the regulatory project, but became increasingly disillusioned with its internal contradictions (described above) as well as the Court’s weakening of its constitutional oversight. By the end of his career, his perception of the failure of the regulatory experiment led him to

154. MODEL PENAL CODE § 210.6 (1962) (withdrawn 2009).

155. *Callins v. Collins*, 510 U.S. 1141, 1443–45 (1994) (Blackmun, J., dissenting from denial of certiorari).

156. *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

157. *Id.* at 408.

158. *Id.* at 414.

repudiate the death penalty as a constitutional punishment. Declaring that the Court's efforts to balance guidance and discretion had been "futile"¹⁵⁹ and that the Court had "abdicat[ed] its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States,"¹⁶⁰ he announced that he would "no longer tinker with the machinery of death."¹⁶¹ In the remaining capital cases that came to the Court during his time as Justice, he mirrored the previous practice of Justices Brennan and Marshall by dissenting from denial of certiorari in each capital case. The subtle difference in the language of their dissents is revealing. Whereas Justices Brennan and Marshall viewed the death penalty as an impermissible punishment because of its inconsistency with evolving standards of decency and therefore a "cruel and unusual punishment," Justice Blackmun's language pointed more broadly to the defects of its administration and failure to achieve the Court's regulatory goals; his dissent from denials repeatedly noted "that the death penalty cannot be imposed fairly within the constraints of our Constitution."¹⁶² For Justice Blackmun, then, his raw distaste for the death penalty could not support a constitutional decision invalidating its use, but two decades of failed efforts to rationalize its administration left no other constitutional option.

Justice Stevens's trajectory on the death penalty is in some sense more notable than Justice Blackmun's. Justice Stevens joined the Court after *Furman*, and when the 1976 cases came to the Court, he made clear to his colleagues that he had "no doubt that capital punishment is a permissible penalty under the Constitution."¹⁶³ He allied himself with Justices Stewart and Powell in writing the decisive opinion in the 1976 cases upholding the "guided discretion" statutes and invalidating the mandatory ones.¹⁶⁴ More than any other Justice over the next two decades, Justice Stevens seemed committed to legal regulation as the means of salvaging the death penalty. He defended the simultaneous commitments to "guidance" and "individualization" against attack from both the abolitionist wing and deregulation wing of the Court, insisting that sentencer discretion to show mercy at the punishment phase is consistent with a rule that forbids

159. *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of certiorari).

160. *Id.*

161. *Id.*

162. *See, e.g., Lambright v. Arizona*, 510 U.S. 1185, 1185 (1994) (Blackmun, J., dissenting from denial of certiorari).

163. MANDERY, *supra* note 31, at 403.

164. *Id.* at 408–10.

unguided discretion in the selection of the death eligible.¹⁶⁵ Toward the end of his tenure, though, Justice Stevens came to view the Court's regulatory efforts as insufficient to prevent bias, error, and discrimination. In the Court's decision upholding Kentucky's lethal injection protocol,¹⁶⁶ Justice Stevens took the opportunity to reflect on the Court's broader efforts to police the American death penalty. He lamented the Court's decisions limiting its regulatory role, but focused mostly on what he perceived to be unacceptable results. Noting that Justice White's opinion in *Furman* was rooted primarily in his "extensive exposure to countless cases for which death is the authorized penalty,"¹⁶⁷ Justice Stevens cited his own extensive experience with the Court's regulatory efforts as compelling his change of heart. Quoting Justice White, Justice Stevens declared that he now believed that the "death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes,'" and that a "penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment."¹⁶⁸ For Justice Stevens, like Justice Blackmun, the death penalty was not itself an unconstitutional punishment, but the failure of the Court's regulation to fulfill its rationalizing promise rendered the death penalty excessively arbitrary and error-prone and thus unconstitutional.

Both the ALI and the ABA have likewise shifted their stances on the prevailing use of the American death penalty in light of the perceived failings of contemporary regulation. The resuscitation of the death penalty in 1976 was attributable in part to the reform efforts of the ALI more than a decade before.¹⁶⁹ There is some irony to this development. When the ALI embarked on the MPC, its advisory committee voted overwhelmingly to recommend the abolition of capital punishment.¹⁷⁰ But the ALI's council and membership concluded that the MPC could be more influential if the organization remained agnostic about retention of the death penalty and instead focused on ways to improve the administration of the death penalty

165. *Walton v. Arizona*, 497 U.S. 639, 718 (1990) (Stevens, J., dissenting) ("A rule that forbids unguided discretion at the base is completely consistent with one that requires discretion at the apex.").

166. *Baze v. Rees*, 553 U.S. 35 (2008).

167. *Id.* at 86 (Stevens, J., concurring in the judgment).

168. *Id.* (alteration in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

169. 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, 357 (2010).

170. MODEL PENAL CODE § 210.6 cmt. 1 (1980).

in those jurisdictions that retained it.¹⁷¹ Nonetheless, states essentially ignored the reforms embodied in the MPC approach over the next decade, until the Court's condemnation of standardless discretion in *Furman* left states searching for new capital statutes that would satisfy the confusing Court mandate.¹⁷² Then, the death penalty provisions of the MPC served as a blueprint for many of the new statutes, and when the Court upheld the guided discretion statutes in 1976, it highlighted the similarities between the new statutory schemes and the MPC approach.¹⁷³ The work of the ALI appeared to contribute to the Court's decision to uphold three of the new statutes and to permit narrowed use of the death penalty going forward. In this respect, the MPC provisions not only offered guidance for "improving" the American death penalty, but they also were instrumental in saving it from constitutional abolition.

When the ALI embarked on a new sentencing project several decades later, some members sought reexamination of capital punishment, particularly given the organization's indirect role in constitutional reinstatement and the perception that the "new" death penalty had not been a success.¹⁷⁴ Ultimately, the ALI chose (again) not to take a position on retention or abolition of capital punishment. But it concluded that the modern effort to regulate the death penalty was deeply flawed and the MPC's statutory blueprint had not cured the defects surrounding its administration. A report commissioned by the ALI highlighted the inadequacies of constitutional regulation, including the tension between guided discretion and individualized sentencing, continuing racial disparities in its administration, insufficient safeguards to prevent wrongful convictions, and ubiquitous problems in capital representation.¹⁷⁵ Perhaps most importantly, the report signaled that the efforts to tame the death penalty through statutory reform and constitutional regulation had not fulfilled their promise, and that the prospects for additional, more

171. *Id.*

172. *Id.*

173. *See* *Gregg v. Georgia*, 428 U.S. 153, 193 (1976) (citing the MPC to reject the claim that standards to guide a capital jury's sentencing deliberations are impossible to formulate); *Jurek v. Texas*, 428 U.S. 262, 270 (1976) (recognizing that Texas's action in statutorily narrowing the categories of murder for which the death penalty could be imposed served essentially the same purpose as the list of aggravating circumstances promulgated by the MPC); *Proffitt v. Florida*, 428 U.S. 242, 247-48 (1976) (noting that the Florida statute in question was patterned after the MPC).

174. Steiker & Steiker, *supra* note 169, at 358-59

175. *Id.* at 354-64; Carol S. Steiker & Jordan M. Steiker, *Part II: Report to the ALI Concerning Capital Punishment*, 89 TEX. L. REV. 367, 375-88 (2010) [hereinafter Steiker & Steiker, *Report to the ALI Concerning Capital Punishment*].

successful reforms were dim.¹⁷⁶ In the end, the ALI voted to withdraw the MPC death penalty provisions “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”¹⁷⁷ Accordingly, the same organization whose institutional prestige had helped sustain the death penalty at a time of constitutional crisis now has aligned its prestige with growing doubts about its prevailing administration.

The ABA, like the ALI, has declined to take a position on the death penalty as a punishment. Over the past twenty years, though, the ABA has repeatedly criticized the prevailing administration of capital punishment in the United States. In 1997, the ABA urged all capital jurisdictions to halt executions until they could “ensure that death penalty cases are administered fairly and impartially, in accordance with due process” and “minimize the risk that innocent persons may be executed.”¹⁷⁸ The ABA followed its moratorium resolution with a project devoted to close study of particular capital jurisdictions, highlighting the deficiencies in need of correction; to date, none of the jurisdictions studied has satisfied the criteria necessary to lift the recommended moratorium.¹⁷⁹ In addition, the ABA has promulgated various policies seeking additional death penalty reforms, ranging from standards for representation in capital cases, redress of race discrimination in capital litigation, and protection of juvenile, intellectually disabled, and mentally ill offenders.¹⁸⁰ The ABA’s body of work reflects its dissatisfaction both with the regulatory standards established by the courts and the states’ compliance with those standards.

The experience with regulation over the past four decades has shifted the debate from the death penalty as a punishment in the abstract to the adequacy of the American death penalty in practice. This shift, in turn, has

176. Steiker & Steiker, *supra* note 169, at 360; Steiker & Steiker, *Report to the ALI Concerning Capital Punishment*, *supra* note 175, at 367.

177. Steiker & Steiker, *supra* note 169, at 354, 359 (quoting *Message from ALI Director Lance Liebman*, AM. LAW INST., www.ali.org/_news/10232009.htm (last visited Mar. 20, 2014)) (internal quotation marks omitted).

178. ABA, RECOMMENDATION NO. 107, at 1 (1997), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/aba_policy_consistency97.authcheckdam.pdf.

179. *Death Penalty Due Process Review Project: Death Penalty Assessments*, ABA, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments.html (last visited Mar. 20, 2014) (providing death penalty assessments of twelve states, including Virginia and Texas).

180. See *Death Penalty Due Process Review Project: Policy*, ABA, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/policy.html (last visited Mar. 20, 2014) (providing the various policies and reports).

made the death penalty more vulnerable to constitutional and political attack, given the highly visible failures of the prevailing system (e.g., wrongful convictions, continued arbitrariness and discrimination, inadequate lawyering, etc.).

IX. REMEDIES DRIVE RIGHTS

Apart from raising expectations generally regarding the overall rationality, fairness, and accuracy of the capital system, the choice to regulate has also created specific expectations about the amenability of particular pathologies to legal resolution. Prior to the Court's regulatory approach, actors both within and outside the capital system essentially had to accept the hard truths about the prevailing system: that the death penalty would be applied inconsistently, unfairly, and discriminatorily. Too many actors had unreviewable discretion to expect otherwise, and prosecutors, jurors, and executive officials routinely exercised their discretion in ways that frustrated norms of equal treatment. As discussed above, the Court's major regulatory intervention was to require statutory standards that would specify the circumstances under which the death penalty could be imposed (in contrast to the standardless discretion characteristic of the pre-*Furman* statutes). In addition, the Court nodded to the aspiration of "heightened reliability" of capital proceedings and developed a body of law demanding greater supervision of states' capital schemes.

Death penalty opponents were skeptical that the new statutes would solve the problems of arbitrariness and discrimination, and they accordingly shifted their focus from procedures to outcomes; they hoped to find empirical support for their claim that the American death penalty could not be fairly administered. The most significant post-*Furman* effort in this regard—the Baldus study—offered substantial ammunition. Financed in part by the LDF, the Baldus study sought to identify the extent to which race and other illegitimate characteristics influenced death sentencing in post-*Furman* Georgia.¹⁸¹ Using sophisticated multivariate regression analysis, the Baldus team concluded that race continued to play a significant role in capital sentencing post-*Furman*. Interestingly, the study found strong race-of-the-victim effects but diminished and relatively less significant race-of-the-defendant effects.¹⁸² The most widely noted finding in the Baldus study was that the presence of a white victim made it 4.3 times as likely that a defendant indicted for murder would actually receive

181. BALDUS, WOODWORTH & PULASKI, *supra* note 77, at 45.

182. *Id.* at 184–85.

a death sentence.¹⁸³ The Baldus study became the basis for a constitutional challenge to the administration of the death penalty in Georgia; in *McCleskey v. Kemp*,¹⁸⁴ a black defendant sentenced to die for killing a white police officer argued that the tenacious role of race in Georgia capital sentencing rendered his sentence unconstitutional.

The findings of the Baldus study seemed particularly important given the Court's regulatory interventions. If states could be required to recraft their statutes in light of fears of arbitrary or discriminatory applications of the death penalty (or largely anecdotal evidence of such problems), surely rigorous empirical proof of such discrimination would require additional court intervention. But that logic did not prevail and part of the reason for its failure is the difficulty of remediating system-wide discrimination through constitutional litigation.

The major thrust of the Baldus study was the persistent failure to treat minority-victim murders as seriously as white-victim murders. For opponents of the death penalty, the obvious response was for the Court to declare that Georgia had forfeited its ability to punish offenders with death; if the death penalty could not be administered in a racially even-handed matter, it should not be a penal option. But this "remedy" posed problems of its own.

First, the Baldus study showed differing "race effects" in different parts of the state. Why should the presence of race discrimination in some regions condemn the practice altogether? Moreover, for abolitionists who saw this litigation as the potential end of the death penalty nationwide, the same question was implicated: why should demonstrable discrimination within one state (or even several states) provide a grounds for denying other states (perhaps homogenous ones without any significant history of race disparities in their administration of capital punishment) the ability to use the death penalty? Second, why should system-wide discrimination provide grounds for relief in a particular case? McCleskey's showing that Georgia devalued minority victims did not suggest that he was undeserving of the death penalty, or that he would have been spared death had Georgia implemented its capital law in an even-handed manner. Prior to the Court's regulation of the death penalty via the Eighth Amendment, McCleskey's best hope for success would have been a challenge via the Fourteenth Amendment's Equal Protection guarantee; but as the Court observed in

183. *Id.* at 316.

184. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

McCleskey,¹⁸⁵ the Court's prevailing equal protection jurisprudence offered little basis for granting individual relief based on proof of generalized discrimination, especially where the discriminatory "actors"—presumably prosecutors and jurors—were spread throughout many counties and often involved in only one case or a very small number of cases; the fact that different prosecutors and different jurors reacted in dissimilar ways to purportedly similar cases was unsurprising, even if statistical tools could demonstrate that race appeared to be an important variable in the decisionmaking as a whole.

Third, if Georgia consistently "underprotected" minority victims by not securing capital verdicts in minority-victim cases, how would withholding the death penalty in white-victim cases be responsive to the "real" underlying problem—the seeming indifference of prosecutors and jurors to minority victims?¹⁸⁶ The more appropriate response to such indifference would be to compel greater solicitude of minority victims, which would require increased application of the death penalty. That remedy, too, poses problems, because the failure to seek or secure death sentences in minority-victim cases is attributable to institutionally irreducible exercises of discretion. Prosecutorial discretion to reject capital charges is widely regarded as essential to fairness and a defining feature of our system of checks and balances, and courts (rightly) lack the power to command executive officials to seek death in particular cases; sentencer discretion to return nondeath verdicts is one of the central pillars of contemporary death penalty jurisprudence—an essential corollary to the idea that defendants must be able to present, and sentencers must be able to credit, any mitigating evidence that calls for a sentence less than death.¹⁸⁷ Lastly, other proposed "remedies" to the evidence of widespread race discrimination—such as increased narrowing of the death-eligible pool or robust review to detect race-influenced death verdicts—seem problematic as well. The Baldus study appeared to indicate that most of the race effects disappear in highly aggravated cases,¹⁸⁸ suggesting that if states were to truly narrow their capital statutes, the resulting verdicts would reflect the circumstances surrounding the offense rather than the race of the participants.

185. *Id.* at 292–97.

186. See generally Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988) (discussing the difficulties surrounding the remediation of race-of-the-victim discrimination).

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

188. BALDUS, WOODWORTH & PULASKI, *supra* note 77, at 320–21.

The problem, though, is that states have shown little willingness or ability to meaningfully narrow the reach of their statutes, and in many jurisdictions a hefty percentage of murders remain death eligible. More importantly, courts are ill equipped to mandate such narrowing, partly because the choice of which murders to treat as capital (terror-related? mass-killings? high status victims such as peace officers?) is undoubtedly a legislative function, and partly because the question whether a state scheme is sufficiently narrowed involves complicated empirical assessments beyond the ordinary judicial role. The other possible solution—enacted legislatively in North Carolina though recently repealed¹⁸⁹—would be to invigorate efforts to detect the presence of race discrimination in particular cases. Such efforts are salutary (and in North Carolina yielded significant evidence of widespread discriminatory use of peremptory challenges¹⁹⁰), but they fail to address the problem of racially influenced nondeath verdicts—cases in which the presence of a minority victim contributed to the decision not to impose death. It is obviously important to provide a remedy to offenders where race contributed to their death sentence, but an exclusive focus on the universe of death-sentenced offenders is unlikely to solve widespread discrimination against minority victims or to ensure a system in which race does not influence the distribution of capital punishment.

Concerns about race discrimination were undoubtedly central to the Court's decision to embark on the regulatory enterprise. The shape of the Court's early regulatory efforts—mandating that states adopt standards reflecting the “worst” offenses—reflected the Court's concern that the death penalty not be administered in a racially discriminatory fashion. But having gone down this path, the Court was ill-equipped to regulate further when the procedural reforms proved unsuccessful. Rigorous empirical demonstration of the influence of race in capital decisionmaking cried out for a judicial response, especially after the Court had concluded that the possibility of race discrimination justified invalidating all prevailing capital statutes. The Court, though, was much better equipped to demand procedural reform than to respond to substantive inequality. Where states had not even tried to rationalize their capital systems, the Court was on strong ground in demanding that they rework their antiquated statutes.

189. North Carolina Racial Justice Act, N.C. GEN. STAT. §§ 15A-2010 to -2012 (repealed 2013).

190. *RACE: After Judge Finds Statewide Racial Bias in Jury Selection, North Carolina Legislators Move to Repeal Racial Justice Act*, DEATH PENALTY INFO. CTR., www.deathpenaltyinfo.org/race-after-judge-finds-statewide-racial-bias-jury-selection-north-carolina-legislators-move-repeal-r (last visited Mar. 22, 2014).

Once those reforms were in place, the Court lacked clear tools to confront the reality of persisting discrimination. Abolition seemed like an extreme remedy, as well as unresponsive to the “underenforcement” dimension of the problem. Individual relief to death-sentenced offenders who killed white victims likewise appeared to be ill-matched to the race-of-the-victim discrimination, as well as potentially unjustified from a culpability perspective. Efforts to protect minority-victims via court-mandated vigorous use of the death penalty in minority-victim cases seemed impractical at best and dangerous at worst. In short, regulation of the death penalty soon revealed the enormous limits of the regulatory enterprise, and generated the uncomfortable paradox that the Court is often better suited to address the risk of evil than evil itself.

X. DISCOURSE EFFECTS

The Supreme Court’s constitutional regulation of capital punishment has had two obvious audiences—state and federal legislators who have redrafted their capital statutes to conform to the Court’s new requirements, and state and federal court judges who have interpreted those statutes and who also have modified any court-driven procedures that might conflict with prevailing constitutional norms. However, judicial regulation—and especially high-profile constitutional regulation regarding controversial social issues—inevitably seeps into the wider arena of public discourse and helps to frame the terms of public contestation. The substantial shifts in emphasis and rhetoric that we have seen in the controversy about the morality, legality, and wisdom of capital punishment from the 1970s to the present have reflected (and also no doubt have reinforced) the nature of the Court’s regulatory project.

In the United States in the 1960s and early 1970s—and in the human rights consensus that emerged in Europe in the 1980s and 1990s—the debate about capital punishment was commonly framed as a moral question regarding the demands of human dignity and the nature of civilization. However, in *Furman* itself, only two Justices—Brennan and Marshall—argued against the per se permissibility of the practice of capital punishment as a matter of human dignity or civilization. The Court’s reauthorization of the American death penalty in the 1976 cases based on an entirely procedural reading of *Furman* constituted a decisive and public repudiation of the per se moral approach as a matter of constitutional doctrine. This repudiation both reflected and reinforced some broader trends in American punishment discourse. First, the Court’s rejection of moral arguments against the death penalty dovetailed with the revival of

retributivism as the fundamental moral justification for punishment, reflecting a widespread belief that state imposition of punishment in proportion to individual desert was a fundamental moral duty.¹⁹¹ Many retributivists insist that the only proportionate punishment for murder is death, and their insistence is itself based on a particular view of human dignity, in that inflicting proportionate punishment on an offender respects the offender's dignity by treating him as the autonomous author of his own punishment.¹⁹² Second, the Court's approach to capital punishment supported the emerging "victims' rights" movement of the 1980s and 1990s, which emphasized the dignitary interests of crime victims as opposed to defendants.¹⁹³ Thus, supporters of the practice of capital punishment and of the growing punitiveness of the American criminal justice system (groups with significant overlap) found theoretical support for their foundational beliefs in the Court's constitutional doctrine.

At the same time, the consequences of the Court's regulatory project created new incentives for death penalty abolitionists, too, to reframe the debate about capital punishment. As described in more detail above, the Court's new procedural requirements for constitutional capital punishment schemes both raised the cost of capital prosecutions relative to noncapital homicide prosecutions and considerably lengthened the time between the imposition of death sentences and executions.¹⁹⁴ These developments, along with mounting proof of the risk of erroneous convictions provided by the DNA revolution, provided abolitionists with some powerful alternatives to unavailing arguments based on the human rights or constitutional rights of convicted murderers. Abolitionists could instead assert the inability of such uncertain and delayed executions to serve the purposes of the capital justice system. Moreover, abolitionists could focus on the interests of the community by emphasizing the necessity of cost cutting and the alternative collective goods that inevitably compete with capital punishment for funding. In Colorado, for example, abolitionist activists sought to tie legislative repeal of the death penalty to increased funding for the

191. See David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 (1992) (describing the "vigorous . . . revival" of retributivism to dominance as a theory of criminal punishment after the 1960s).

192. See, e.g., Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFFAIRS 115, 122–25 (1985) (describing Hegelian and Kantian retributivism as based on the human attributes of equality and rationality, which together are aspects of human dignity).

193. See generally Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255 (describing successes of the victims' rights movement and arguing for further expansions).

194. See *supra* Part VII.

investigation of unsolved murders (“cold cases”).¹⁹⁵ Arguments such as these allowed abolitionists to claim the dictates of sound public policy, rather than contestable moral judgments, as foundational support for their positions. The result is the inversion of the rhetorical position of abolitionists and retentionists in previous debates: “[A]bolitionists get to shed the unattractive cloak of soft sentimentality and don the mantle of efficient crime control, while retentionists now have to rebut charges that their attachment to the death penalty is a form of unworldly moralism.”¹⁹⁶

On the Court as well, a new generation of Justices has taken up the cause of Justices Brennan and Marshall, but with important rhetorical differences that both reflect and reinforce the rhetorical changes in the abolitionist movement. Justice Blackmun adopted the same dissenting rhetoric as Justices Brennan and Marshall during his last year on the bench, repeatedly “adhering” to his 1994 dissent from denial of certiorari in *Callins v. Collins*,¹⁹⁷ explaining his conclusion that the death penalty was unconstitutional in all circumstances. Yet Justice Blackmun’s view, as elaborated in his *Callins* dissent, stemmed not from the failure of capital punishment to respect essential human dignity, but rather from the inability of the Court to frame an adequate procedural solution to promote the twin constitutional imperatives of heightened procedural regularity and individualized justice.¹⁹⁸ Justice Stevens, too, prior to his retirement from the bench, ultimately concluded that the death penalty was unconstitutional in all cases, though he declined to vote to vacate every death sentence that came before the Court (in contrast to Justices Brennan, Marshall, and eventually Blackmun) out of respect for stare decisis.¹⁹⁹ Justice Stevens, too, asserted multiple failures of adequate process in capital cases, emphasizing both the risk of erroneous convictions and the inability of the American death penalty in practice to promote adequately its purported

195. See Morgan Carroll & Paul Weissmann, Op-Ed., *Revisit Death Penalty Bill*, DENVER POST (May 21, 2009, 1:00 AM), www.denverpost.com/opinion/ci_12413922.

196. Steiker & Steiker, *supra* note 141, at 154. As a consequence of this rhetorical inversion, death penalty supporters are often in the tenuous position of arguing that no price is too high for capital punishment. For example, in one county in Texas, after a death sentence was set aside by the U.S. Supreme Court, the prosecutor maintained that he would seek a second death sentence, even though a retrial was estimated to cost as much as \$500,000, stating that “if I have to bankrupt this county, we’re going to bow up and see that justice is served.” Jordan M. Steiker, *Penry v. Lynaugh: The Hazards of Predicting the Future*, in DEATH PENALTY STORIES, *supra* note 62, at 277, 301–02 (quoting Steve Brewer, *Penry Likely to Face Retrial, Officials Say*, HUNTSVILLE ITEM, July 1, 1989, at 3A).

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

198. See *supra* text accompanying notes 16–18.

199. *Baze v. Rees*, 553 U.S. 35, 86–87 (2008) (Stevens, J., concurring).

goals.²⁰⁰ In a similar vein, Justices Souter and Breyer each have penned opinions in death penalty cases noting at length the myriad flaws in the administration of capital punishment in the United States, though stopping short of calling for constitutional abolition.²⁰¹ All of this second-generation skepticism about the American death penalty on the Court is based on process rather than morality—both echoing the main strains of abolitionist advocacy in wider public discourse while simultaneously reinforcing those approaches.

The substantial shift in the nature of arguments about capital punishment in the United States from the 1960s to the present no doubt reflects other changes in American society and public policy debates only tangentially, if at all, related to the work of the Supreme Court. But the parallel—and often precedential—trajectory of the Court’s framing of the issues suggests that we must be careful to try to assess the impact of constitutional regulation on public framing, discourse, and rhetoric as well as on the particulars of doctrine, statutes, and procedures.

XI. CONCLUSION

About a half-century ago, opponents of the death penalty were emboldened to turn to the courts when the Supreme Court suggested for the first time that the Constitution might meaningfully constrain state capital practices. The immediate litigation strategy focused on regulating the death penalty, with the hope that close judicial attention to capital practices would quickly reveal their undesirability and unworkability going forward. When the moratorium on executions in the late 1960s was followed by *Furman*’s invalidation of prevailing statutes, the strategy appeared to succeed. But the ensuing decades proved the wisdom of taking care what you wish for: the strategy of seeking regulation of the death penalty ultimately achieved precisely that—an unprecedented extended experiment in judicial regulation of capital punishment, an experiment that in many respects revived the moribund American death penalty.

The experience with judicial regulation has illustrated some dynamics familiar to regulatory efforts in other contexts, such as the difficulty of reconciling a commitment to the rule of law and justice in individual cases, the risk that certain types of regulatory measures can stymie more encompassing reforms, and the potentials and hazards of procedural versus

200. *Id.* at 82–86.

201. *Kansas v. Marsh*, 548 U.S. 163, 204–11 (2006) (Souter, J., dissenting); *Ring v. Arizona*, 536 U.S. 584, 614–15 (2002) (Breyer, J., concurring).

substantive regulatory interventions. The past four decades have also revealed some pitfalls unique (or at least more common) to judicial regulation, such as the prospects for “backlash” by political constituencies, the difficulty of structuring remedies responsive to the identified evil, and the complications of enforcing judicial norms when so many diffuse actors are responsible for their enforcement.

Perhaps the most striking characteristic of the experiment has been the sheer unpredictability of the course of regulation. After initially appearing to stabilize and legitimate American capital punishment (itself a somewhat unexpected turn), regulation now appears to pose extraordinary problems for the continued retention of the death penalty. And those problems are less attributable to the content of the regulation than the fact of regulation itself. Regulation has generated new and lasting institutions necessary to the enterprise (particularly specialists in the capital defense field), which in turn have imposed substantial costs on the capital system and created a feedback loop calling for additional regulatory restrictions. In addition, the presence of regulation has raised expectations for the rationality of the practice at the same time that it has facilitated a new, and newly troubling, arbitrariness regarding executions as opposed to sentences.

Most observers view the American death penalty as an outlier given the status of the United States as the sole Western democracy that has retained the punishment. Understanding how and why the United States came to occupy such a position, especially in light of the United States’ outlier status in the opposite direction during its early history, is undoubtedly valuable. Nevertheless, a deep understanding of the American death penalty on its own terms requires focused attention on the other distinctive feature of the United States—as the only jurisdiction perhaps in history to embark on a sustained effort to regulate comprehensively the administration of capital punishment. The lens of regulation helps explain the peculiar shape of prevailing American capital practice, the reasons for its continued retention, and the prospects for its abolition. Moreover, the experience with regulation of the death penalty also sheds light on the promise and limits of regulatory approaches more generally, as well as the deep ironies and contradictions that accompany any effort to “regularize” contested practices.