# Death Penalty Neg v2.0

## Notes

#### Special thanks to Connor, Jessica, Katherine, MJ, Maddie P., Maddie R and Ruhee for their hard work on this file!

#### The new evidence turned out in the small supplement file right before camp is also included in this file. If a team is using this file now that did not attend the Michigan Debate Institute (or prepare that file during camp) I wanted to have as much evidence centralized as much as possible.

#### The link work for the Movements DA is very applicable to the Abolition Kritik. It was put in one place in the negative file to avoid repetition but those cards should be repurposed if you wish to read the K instead of the disad.

## Case

### AT: Democracy / Racism

#### Their argument is empirically false – racial divisions weren’t lower in 1970s with death penalty moratorium

Conklin, 19 --- Assistant Professor of Business Law, Angelo State University (7/4/19, Michael, Denver Law Review, “A STRETCH TOO FAR: FLAWS IN COMPARING SLAVERY AND THE DEATH PENALTY,” <https://www.denverlawreview.org/dlr-online-article/a-stretch-too-far-flaws-in-comparing-slavery-and-the-death-penalty>, accessed on 5/27/2020, JMP)

Malkani promotes the notion that the death penalty “diminishes us by damaging our democracy, legitimating vengeance, intensifying racial divisions, and distracting us from the challenges [that America faces].”[52] But he provides no evidence to support this claim. After all, if this claim is correct, America would have been more democratic, less vengeful, and less racist in the 1970s (during the death-penalty moratorium) than in the 1990s (when the death penalty sharply increased). Malkani provides no evidence that this is the case.

#### Racism is an endemic to many parts of society – the affirmative is a small token gesture

Worland 20. Justin Worland is a Washington D.C.-based correspondent for TIME covering energy and the environment, ["America's Long Overdue Awakening to Systemic Racism," 6-6-2020, Time, URL: https://time.com/5851855/systemic-racism-america/]

The origins of America’s unjust racial order lie in the most brutal institution of enslavement that human beings have ever concocted. More than 12 million Africans of all ages, shackled in the bottom of ships, were sold into a lifetime of forced labor defined by nonstop violence and strategic dehumanization, all cataloged methodically in sales receipts and ledgers. Around that “peculiar institution,” the thinkers of the time crafted an equally inhumane ideology to justify their brutality, using religious rhetoric in tandem with pseudoscience to rationalize treating humans as chattel. After the Civil War, the arrangements of legal slavery were replaced with those of organized, if not strictly legal, terror. Lynchings, disenfranchisement and indentured servitude all reinforced racial hierarchy from the period of Reconstruction through Jim Crow segregation and on until the movement for civil rights in the middle of the 20th century.

That’s the ugly history most Americans know and acknowledge. But systemic racism also found its way, more insidiously, into the institutions many Americans revere and seek to safe-guard. Established in the 1930s, Social Security helped ensure a stable old age for most Americans, but it initially excluded domestic and agricultural workers, leaving behind two-thirds of black Americans. Federal mortgage lending programs helped white Americans buy homes after World War II, but black Americans suffered from a shameful catch-22. Federal policy said that the very presence of a black resident in a neighborhood reduced the value of the homes there, effectively prohibiting African-American residents from borrowing money to buy a home. And sentencing laws of the past several decades meant that poor black Americans were thrown in prison for decades-long terms for consuming one type of cocaine while their wealthier white counterparts got a slap on the wrist for consuming another.

There’s a straight line between these policies and the state of black America today. The lack of Social Security kept black Americans toiling in old age or forced them to the streets. The obstruction of black homeownership, among other factors, has left African Americans poorer and more economically vulnerable, with the average black household worth $17,000 in 2016 while the average white household was worth 10 times that. “Tough on crime” sentencing policies have ballooned the black prison population, torn apart families and left millions of children to grow up in single-parent homes.

This systemic discrimination is also a matter of life and death, and police violence, which kills hundreds of African Americans every year, is just the start. Look no further than the coronavirus pandemic. The neighborhoods in which black Americans often find themselves confined by a legacy of discriminatory policy are rife with pollution and, in many cases, lack even basic options for nutritious food. This leaves residents more likely to suffer from health ailments like asthma and diabetes, both of which increase the chances of poor outcomes for those infected with COVID-19.

To actually capture all the ways in which the system is skewed against black people would require tome upon tome. But even a short list feels very long: black women are three to four times as likely as white women to die in childbirth, in part because of a lack of access to quality health care; black children are more likely to attend underresourced schools, thanks to a reliance on local property taxes for funding; black voters are four times as likely as white voters to report difficulties voting or engaging in politics than their white counterparts, in part because of laws that even today are designed to keep them for exercising their basic democratic rights; millions more have been disenfranchised because of felony convictions; hurricane flooding has been shown to hit black neighborhoods disproportionately.

Jeh Johnson, a lawyer who served as Obama’s Homeland Security Secretary and was recently tapped to help New York state courts conduct a racial bias review, explained it flatly. “Defined broadly enough, one could say that there’s systemic racism across every institution in America,” he told CNN recently.

With this in mind, it may come as little surprise that black Americans took to the streets in protest following the murder of George Floyd. Nearly 17% of African Americans are unemployed. When the U.S. Bureau of Labor Statistics reported a surprise up-tick in jobs in May, the unemployment rate for African Americans in particular nevertheless remained on the rise. In the U.S., black Americans are dying from COVID-19 at twice the rate of their white counterparts. In some states, the disparity is even sharper.

What’s perhaps more surprising is that the rest of America is apparently waking up to these realities. For decades, the truth of systemic racism has always been swept under the rug, lest it make white Americans uncomfortable and hurt the electoral chances of those with the power to address it. In 1968, the Kerner Commission, initiated by President Lyndon Johnson to study unrest in American cities insisted that “white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.” The results of the Commission were largely ignored.

### AT: Death Penalty = Slavery

#### Comparison to slavery fails --- alienates those who must be persuaded and diminishes those who suffered literal slavery

Conklin, 19 --- Assistant Professor of Business Law, Angelo State University (7/4/19, Michael, Denver Law Review, “A STRETCH TOO FAR: FLAWS IN COMPARING SLAVERY AND THE DEATH PENALTY,” <https://www.denverlawreview.org/dlr-online-article/a-stretch-too-far-flaws-in-comparing-slavery-and-the-death-penalty>, accessed on 5/27/2020, JMP)

For the most part, Malkani does not use the similarities he mentions to lead up to a more profound insight, such as what the anti-death penalty movement can learn from the slavery abolition movement or why he believes the anti-death penalty movement will prevail in the end.

Furthermore, slavery is commonly recognized as America’s most evil act and therefore is frequently utilized as a catch-all comparison to any modern action that someone wants to cast in a negative light. Animal rights activists, those attempting to repeal the Affordable Care Act, proponents of lower taxes, and gun control advocates have all compared their efforts to those of slavery abolitionists (and their opponents to pro-slavery activists). It is unclear how effective these modern-day comparisons to slavery are. Reducing slavery analogies to essentially “things I also don’t like” runs the risk of alienating those on the other side of the issue who the activist should be trying to persuade—to say nothing of diminishing the experience of those who suffered through literal slavery.

Malkani’s selective use of comparisons and refusal to address counterarguments suggests that the primary purpose of comparing the death penalty to slavery is to simply make the death penalty look bad and therefore promote the anti-death penalty agenda. The tactic of comparing a controversial current issue with a settled issue from the past is certainly permissible and can be effective, but when masked as a comparative-historical analysis, it comes across as disingenuous.

#### Death penalty is not analogous to slavery --- culpability and scale

Conklin, 19 --- Assistant Professor of Business Law, Angelo State University (7/4/19, Michael, Denver Law Review, “A STRETCH TOO FAR: FLAWS IN COMPARING SLAVERY AND THE DEATH PENALTY,” <https://www.denverlawreview.org/dlr-online-article/a-stretch-too-far-flaws-in-comparing-slavery-and-the-death-penalty>, accessed on 5/27/2020, JMP)

DIFFERENCES

The starkest difference between slavery and capital punishment is found in the level of culpability. Slaves were blameless in their circumstance. Executed inmates, however, are not. They are convicted of a capital offense by a unanimous, twelve-person jury based on the highest legal burden: beyond a reasonable doubt. These inmates then spend years exhausting all avenues of appeal. This level of culpability presents challenges for death penalty abolitionists as they attempt to draw sympathy for those on death row. While slavery abolitionists faced distinct challenges in gaining sympathy, they did not have to confront the extreme levels of culpability that death penalty abolitionists are attempting to confront today.

There is also a significant difference in the sheer scale of slavery in America when compared to the modern death penalty. In 1860, over twelve percent of the United States population was slaves.[29] In 2016, only 0.00000006% of the population was executed.[30] It is easy to see how the fewer people affected by an issue, the harder it is to gain advocates for that issue. The death penalty does not even make the list of the top forty-six most important problems in America.[31]

Many slavery abolitionists supported a more pragmatic-based “gradualism,” such as that promoted by the Pennsylvania Abolition Society. They proposed legislation that would only allow for the freedom of those born after March 1, 1780.[32] While death penalty abolitionists debate suitable alternatives to the death penalty, there is no real debate as to how quickly they want the death penalty abolished.

#### Dignity based assessment and comparison to slavery is flawed – overlooks proportionality and other counterarguments

Conklin, 19 --- Assistant Professor of Business Law, Angelo State University (7/4/19, Michael, Denver Law Review, “A STRETCH TOO FAR: FLAWS IN COMPARING SLAVERY AND THE DEATH PENALTY,” <https://www.denverlawreview.org/dlr-online-article/a-stretch-too-far-flaws-in-comparing-slavery-and-the-death-penalty>, accessed on 5/27/2020, JMP)

Criticism of Slavery and the Death Penalty: A Study in Abolition

A. Dignity

Malkani compares slavery to the death penalty on dignity grounds. He admits that the Constitution makes no reference to the word “dignity” and that “the idea of dignity is jurisprudentially and philosophically fraught . . . .”[33] Nevertheless, Malkani discusses the issue of dignity at length. Given the amorphous nature of dignity, his entire section on this issue reads more like a subjective opinion on art than a factual comparison. It would have been just as enlightening for Malkani to state that he personally does not like either slavery or the death penalty and present this as another similarity.

The discussion on dignity lacks any significant recognition or analysis of potential criticism. For example, Malkani does not explore the relationship between dignity and the proportionality of punishment—a central counterargument to his position. It could be argued that protecting a criminal from a proportionate punishment denies him his autonomy and therefore is undignified. Likewise, the dignity of murder victims whose attacker was not given a just punishment calls into question dignified treatments as well. Finally, the issue of dignity necessitates an assessment of proportionality of the punishment to the crime. Executing someone for a misdemeanor is clearly undignified; however, it is far less clear whether executing Timothy McVeigh is undignified. Malkani does not interact with notions of proportionality and other counterarguments and the result is an oversimplified and one-sided assessment of the issue.

Malkani’s unbalanced discussion on dignity attempts to equate the lack of dignity afforded to slaves to the lack of dignity afforded to inmates on death row. However, it appears the vast majority of slavery abolitionists did not agree with Malkani that the death penalty is equally undignified. In 1886, when slavery had been abolished for over 20 years, only one state, Wisconsin, did not have the death penalty. And this was the death penalty as practiced in the 1800s.[34] Our modern-day death penalty offers far more protections for the accused. Even the ACLU did not oppose the death penalty for its first forty-three years because it maintained it was not a civil rights issue.[35] Therefore, Malkani’s position that slavery and the death penalty are equally undignified was not shared by many slavery abolitionists.

Malkani’s claim that the death penalty and slavery are equally inhumane would lead to peculiar outcomes if consistently held. Suppose Malkani was given the choice between the inhumanity of executing a convicted murderer who exhausted all appeals or the inhumanity of imposing a lifetime of slavery on an innocent person. Would Malkani really be unable to differentiate between the two?

### AT: Innocents Sentenced

#### **Capital punishment is key to condemning unquestionably guilty killers – outweighs a negligible risk of killing innocents**

Broughton, 17--- Assistant Professor of Law at the University of Detroit Mercy School of Law in Detroit, Michigan, J. Richard (2017, "The Death Penalty and Justice Scalia's Lines," Akron Law Review: Vol. 50 : Iss. 2 , Article 2. Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol50/iss2/2)//MP>

Claims regarding the constitutionality of the death penalty—an issue once thought settled after the Court’s 1976 decision in Gregg v. Georgia50—are making a comeback. There is even a movement among American conservatives to abolish capital punishment, which, though small today, should be taken seriously by every death penalty supporter.51 It is a needle-moving effort. Abolition talk is alive and well. This is despite the fact, as Scalia and others on the Court repeatedly reminded us, that the Constitution expressly acknowledges the existence of capital punishment.52 Of course, whether its use violates the Eighth Amendment may be a separate matter,53 and its recognition in the Fifth Amendment is not conclusive of its validity as to all applications; rather, its recognition in the Fifth Amendment should be a critical factor in determining whether any application of capital punishment is constitutionally permissible. Moreover, abolition talk is increasingly fashionable despite public opinion remaining supportive of capital punishment,54 and despite the fact that a clear majority of American jurisdictions still maintain the death penalty.55 Claims that the death penalty is per se unconstitutional also persist despite the reality that abolition would mean concluding that the Constitution forbids applying the death penalty to any defendant—no matter how heinous, cruel, or depraved the defendant’s crime, no matter how strong the evidence against him, and no matter how powerful the aggravators or how weak the mitigators.56

Arguments for invalidating the death penalty also rely substantially upon claims about the risk of executing innocents.57 Those are, of course, powerful claims. But they do not explain why every death sentence should be forbidden. The risk of executing innocents is simply not the same in every capital case. In some cases, the risk is negligible, or even non-existent.58 Moreover, opposing imposition of the death penalty upon an innocent person tells us very little about the proper punishment for a guilty person. Why should the risk of executing innocents impede the execution of**,** for example, an unquestionably guilty killer like Timothy McVeigh or Dzokhar Tsarnaev? Political life brings risks, risks that sometimes unfortunately implicate innocents. The political community can decide whether to tolerate those risks.59 But it often does (for example, in war, in policing, or in defining the law of self-defense).

#### Ending the death penalty doesn’t stop innocents from being convicted --- it actually INCREASES the likelihood that claims of innocence will be canvassed

Steiker, 14 --- Professor at the University of Texas School of Law (Fall 2014, Jordan, “PANEL THREE: THE WISDOM OF CAPITAL PUNISHMENT (APART FROM MORALITY OR THE RISK OF CONVICTING THE INNOCENT): THE AMERICAN DEATH PENALTY FROM A CONSEQENTIALIST PERSPECTIVE,” 47 Tex. Tech L. Rev. 211, Nexis Uni via Umich Libraries, JMP)

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

[\*214] I do not wish to understate the horror of executing the innocent, nor do I want to understate the horror of lengthy-in most cases lifetime-incarceration for persons wrongfully convicted of murder but not sentenced to death. In sheer numbers, this is a much larger group; it seems to me a complicated empirical question whether the presence of the death penalty leads to more or less "wrongful punishment" over the long term.

### AT: Dignity

#### Strengthening dignity is not enough – overcoming incapacitation as a penal rationale is a pre-requisite to rejecting retribution

Simon, 12 (Jonathan Simon, Jonathan Simon is a professor of law at UC Berkeley and faculty director of the Center for the Study of Law & Society. An expert in criminal justice issues, he is the author of three books: Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990 (Chicago 1993), on the history of the prison parole system; Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (Oxford 2007) and Mass Incarceration on Trial: A Remarkable Court Decision and the Future of American Prisons (New Press 2014). Governing through Crime won the Michael Hindelang Award of the American Society of Criminology in 2010, and the book prize for the American Sociological Association's Section on the Sociology of Law in 2008. "Life without Parole: America's New Death Penalty?" (Chapter 8: Dignity and Risk), NYU Press, https://muse-jhu-edu.proxy.lib.umich.edu/chapter/725357/pdf, 2012, Accessed 6-20-2020 via Umich Libraries) //ILake-JQ

But if the absence of dignity as a central legal value is both implicated and reinforced by an extreme version of incapacitation as a penal rationale, it will take more than a strengthening of dignity within the law to overcome degrading punishments such as LWOP. This is not an argument for abandoning court challenges to LWOP, three strikes, and other extreme sentences. Indeed, the availability and likely expansion of judicial forums to hear these claims is one of the best opportunities at present to wage a broader cultural struggle against total incapacitation. Such challenges enable a rare break in the public presentation of incapacitation as sanitary and effective, and provide a unique space in which to reintroduce a discourse of morality and justice into talk about punishment. But they will have their greatest effect when they can draw parallels with developments in our social and legal culture in which risk and dignity are being reconfigured to place fear under a stronger value of dignity. It is the growing strength of several such areas which provides me optimism that the road to a legal end of LWOP need not be a lifetime away.

### AT: Democracy

#### Judicial abolition usurps the power of the political branches and undermines democracy

Broughton, 17--- Assistant Professor of Law at the University of Detroit Mercy School of Law in Detroit, Michigan, J. Richard (2017, "The Death Penalty and Justice Scalia's Lines," Akron Law Review: Vol. 50 : Iss. 2 , Article 2. Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol50/iss2/2)//MP>

II. SCALIA ON LINES AND THE DEATH PENALTY

For Scalia, the relationship between constitutional rights and the legitimate exercise of constitutional power could prove especially problematic when the right that a court recognizes is either unenumerated or otherwise has no basis in constitutional text, structure, history, or tradition.23 When the judiciary expands the sphere of constitutional protection for rights, it necessarily restricts the sphere of permissible political action. And where the judiciary does so, Scalia believed, illegitimately—such as by adhering to a methodology that views that Constitution as a “living document” that embodies the values of each generation, which unelected judges then endeavor to apply through constitutional adjudication—its restriction of government power can have pernicious effects on democracy and the capacity for good citizens to govern themselves safely and effectively.24 Some things, good or not, are simply not the business of judges in a constitutional republic. So it was, in Scalia’s view, with capital punishment.

A. On Capital Punishment . . . and God Scalia discussed capital punishment extensively in his extrajudicial writings, which is noteworthy because it offers the reader a window into his thinking outside of the context of specific cases and the precise issues presented therein. Also noteworthy is that his own adherence to Catholicism did not lead him to the conventional wisdom about the Church and the death penalty.

He was fond of using capital punishment as an example of his originalism and of the difficulties, and limits, presented by Living Constitutionalism. In his initial essay in A Matter of Interpretation, Scalia noted that three of his colleagues on the Court (Justices Brennan, Marshall, and Blackmun) had concluded that the death penalty was, in all circumstances, cruel and unusual and in violation of the Eighth Amendment.25 But Scalia noted that the death penalty “is explicitly contemplated in the Constitution”26—in the Fifth Amendment’s Due Process Clause (which forbids the government from depriving a person of “life” without due process)27 and its Indictment Clause (which refers specifically to the indictment of “capital” crimes).28 This theme appears prominently in Scalia’s judicial writings on capital punishment29 and was one that he developed even earlier in writing about originalism and constitutional interpretation.30 He thus chided his Living Constitutionalist colleagues for their conclusion that something that the Constitution acknowledges could later “become unconstitutional.”31 The political community may choose to abandon capital punishment, he noted, but the Constitution does not compel such a policy. Nor, he thought, does the vacant concept of “evolving standards of decency” move us closer to such a conclusion.32 Rather than accurately informing us of the moral values of the Eighth Amendment, such a concept merely empowers judges to forever alter criminal sentencing law by imposing on the Nation their own views of moral progress.33

His later essay, God’s Justice, And Ours, more fully explored his views on the subject.34 Although he did not advocate the imposition of capital punishment, he concluded in this essay that it was simply not immoral—an important point, because, in his view, he could not be a judge if he believed his role in the “machinery of death” resulted in his approval of a system that was immoral.35 He said that, for the judge who believes the death penalty to be immoral, the choice is resignation rather than to ignore the law and to sabotage capital cases.36 He openly argued against Pope John Paul II’s 1995 encyclical, Evangelicum Vitae, which viewed capital punishment as limited to “cases of absolute necessity: in other words, when it would not be possible otherwise to defend society.37 Today, however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically nonexistent.”38 As Scalia argued, “[h]ow in the world can modernity’s ‘steady improvements in the organization of the penal system’ render the death penalty less condign for a particularly heinous crime?”39 He cited Saint Paul and Thomas More as authorities on the morality of lawfully constituted authority to impose death as a punishment, alluded to the murders committed by Timothy McVeigh and the perpetrators of the September 11 attacks, and viewed technological advancements as increasing, rather than diminishing, the individual’s capacity for evil.40 “If just retribution is a legitimate purpose (indeed, the principal legitimate purpose) of capital punishment, can one possibly say with a straight face that nowadays death would ‘rarely if ever’ be appropriate?”41

Add to Justice Scalia’s sense of formality and traditionalism the fact that he regularly attended one of two Latin Masses in the Washington, D.C. area.42 It was, therefore, no surprise that he would sarcastically refer to the “latest, hot-off-the-presses version” of the catechism that viewed capital punishment so narrowly as to make it nearly impossible to implement.43 Nor is it surprising that he would conclude that his disagreement with the papal encyclical and the “new” views of the Church did not contradict his obligations as a Catholic. As he said, he had consulted “canonical experts” who informed him that neither Evangelicum Vitae nor the latest catechism was binding on practicing Catholics.44

The essay is rich and revealing. Scalia was willing to challenge the latest views on Christian thought about the death penalty when they would “sweep aside” millennia of Christian teaching.45 His approach to constitutional adjudication took similar form. As he said in his essay, and would repeat on other occasions,46 “the Constitution that I interpret and apply is not living but dead—or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted.”47 As applied specifically to the death penalty, “the constitutionality of the death penaltyis not a difficult, soul-wrenching question. Itwas clearly permitted when the Eighth Amendment was adopted **. . .** And so it is clearly permitted today.”48 If there is to be “evolution” on the acceptability of the death penalty, then “the instrument[s] of evolution” are the legislative branches of government at the federal and state levels, who, at their discretion, may “restrict or abolish the death penalty as they wish.”49

Justice Scalia’s position was that although the morality of the death penalty enabled him to continue to sit on cases involving that punishment, his personal or political views about the death penalty were not relevant to exercising judicial power with respect to constitutional challenges to the death penalty. And his line-drawing in constitutional adjudication involving the death penalty is consistent with the understanding of the judge’s formal role in a capital case that he articulated in these essays.

### AT: Global Adv – Death Penalty Decreasing

#### Even with federal reintroduction, the death is still on a major decline globally and nationally because of state action

Follet, 19 --- MA in Foreign Affairs from the University of Virginia (7/29/19, Chelsea, “Despite Federal Return, Capital Punishment Is Dying Out,” <https://www.cato.org/blog/despite-federal-return-capital-punishment-dying-out>, accessed on 3/13/20, JMP)

The U.S. federal government recently ordered the death penalty to be reinstated for the first time in sixteen years and has scheduled the execution of five death row inmates. This policy change goes against the widespread trend toward fewer executions.

Twenty-one U.S. states, plus the District of Columbia, have totally abolished the death penalty for all crimes. Seven of those states abolished the practice in my lifetime. New Hampshire just officially abolished it in 2019.

In many U.S. states where executions are still legal, none have been carried out for years and the law is mainly symbolic. Kansas, for example, has not executed any prisoners in over forty years. The U.S. federal government, similarly, never officially abolished the death penalty but has had a moratorium on the practice since 2004 – a moratorium ended by the new policy ordered by Attorney General William Barr.

Harvard University’s Steven Pinker has chronicled the decline of capital punishment in his book, The Better Angels of Our Nature. He estimated that the execution rate in the United States has been falling for four centuries, from nearly 3.5 executions per 100,000 people in the 17th century. His graph is pictured below.

**[image of graph omitted]**

Trends against capital punishment can also be observed abroad as well. Consider Europe. Prior to the Enlightenment, European nations once used the death penalty for a vast number of crimes. England, for example, had 222 capital offenses in its legal system well into the 18th century. Until the early 19th century, it deemed many minor crimes, such as stealing anything worth more than four dollars in today’s currency, to be worthy of execution. As the values of the Enlightenment spread, that number of capital offenses shrunk to four by the middle of the 19th century. Today, in Europe, capital punishment remains legal only in Belarus and Russia.

The change extends beyond Europe. This year, Malaysia abolished mandatory capital punishment. Last year, Burkina Faso abolished the death penalty in its new penal code. Moreover, Gambia and Malaysia declared an official moratorium on executions. Last year, Amnesty International noted, at least 690 executions took place in 20 countries. That number was 31 percent lower than in 2017. The vast majority of recorded executions happen in Iran, Saudi Arabia, Vietnam and Iraq.

Then there are China and North Korea. The two communist countries execute more people than other countries and may well execute more people individually than the rest of the world combined. Unfortunately, there are no reliable statistics for those secretive societies.

The move to reinstate capital punishment federally in the United States represents a reversal after more than a decade-long hiatus in the federal use of capital punishment. But opponents of the practice can take heart in the successful abolition of the death penalty in an increasing number of U.S. states and countries around the world.

#### Global death penalty decreasing

Amnesty, 19 (4/10/19, “Death penalty 2018: Dramatic fall in global executions,” <https://www.amnesty.org/en/latest/news/2019/04/death-penalty-dramatic-fall-in-global-execution/>, accessed on 7/7/2020, JMP)

Global executions fell by almost one-third last year to the lowest figure in at least a decade, Amnesty International said in its 2018 global review of the death penalty published today. The statistics assess known executions worldwide except in China, where figures thought to be in their thousands remain classified as a state secret.

Following a change to its anti-narcotics laws, executions in Iran – a country where the use of the death penalty is rife – fell by a staggering 50%. Iraq, Pakistan and Somalia also showed a significant reduction in the number they carried out. As a result, execution figures fell globally from at least 993 in 2017, to at least 690 in 2018.

“The dramatic global fall in executions proves that even the most unlikely countries are starting to change their ways and realize the death penalty is not the answer,” said Kumi Naidoo, Amnesty International’s Secretary General.

“Despite regressive steps from some, the number of executions carried out by several of the worst perpetrators has fallen significantly. This is a hopeful indication that it’s only a matter of time before this cruel punishment is consigned to history, where it belongs.”

#### Global trends conclude negative

Amnesty, 19 (4/10/19, “Death penalty 2018: Dramatic fall in global executions,” <https://www.amnesty.org/en/latest/news/2019/04/death-penalty-dramatic-fall-in-global-execution/>, accessed on 7/7/2020, JMP)

Global trend towards abolition

Overall, 2018’s figures show that the death penalty is firmly in decline, and that effective steps are being taken across the world to end the use of this cruel and inhuman punishment.

For example, Burkina Faso abolished the death penalty for ordinary crimes in June. In February and July respectively, Gambia and Malaysia both declared an official moratorium on executions. In the US, the death penalty statute in the state of Washington was declared unconstitutional in October.

During the United Nations General Assembly in December, 121 countries – an unprecedented number - voted to support a global moratorium on the death penalty. Only 35 states voted against it.

“Slowly but steadily, global consensus is building towards ending the use of the death penalty. Amnesty has been campaigning to stop executions around the world for more than 40 years – but with more than 19,000 people still languishing on death row worldwide, the struggle is far from over,” said Kumi Naidoo.

“From Burkina Faso to the US, concrete steps are being taken to abolish the death penalty. Now it’s up to other countries to follow suit. We all want to live in a safe society, but executions are never the solution. With the continued support of people worldwide, we can – and we will – put an end to the death penalty once and for all.”

At the end of 2018, 106 countries had abolished the death penalty in law for all crimes and 142 countries had abolished the death penalty in law or practice.

### AT: Global Adv – No Modeling

#### No follow-on – China and North Korea circumvent with opaque reporting

Killalea 16 Debra Killalea is a senior journalist with 20 years’ experience working in the national and international press and online media. She has spent the past three years covering international affairs and has a special interest in Asia and the Koreas. [“Amnesty death penalty report: The secret China won’t share with the world,” 04-06-2016, *news.com.au,* URL: <https://www.news.com.au/world/asia/amnesty-death-penalty-report-the-secret-china-wont-share-with-the-world/news-story/f8c406c3301992b28bbfc5d6f8e2eb51>] kly

ASIAN nations are continuing to put thousands of people to their deaths every year.

Yet while the rest of the world is abolishing the death penalty, **China and North Korea refuse to reveal how many people it executes each year.**

China claims its figures are a state secret while North Korea remains uncooperative with human rights organisations.

Information surrounding its figures remain so tight that the world can only sit back and guess how many people they put to death every year.

Once again Asian powerhouse China has been named as the world’s biggest executioner in Amnesty International’s Death Sentences and Executions 2015 report.

In releasing the annual report this morning, the human rights group **said it was impossible to obtain an exact figure on the number of people China has executed**, but it is believed the figure is in the thousands, and is more than all the other countries in the world combined.

Amnesty International Australia spokesman Rose Kulak said the group obtained a rough figure based on non-government agencies, families who’ve had bodies returned to them and activists on the ground.

Ms Kulak, Individuals at Risk Program Coordinator at Amnesty, told news.com.au said the main issue at hand was China’s lack of transparency.

“There is close to 50 crimes that people can get executed for,” she said.

“These crimes include things like embezzlement which in Australia would amount to jail time.

China was also named as the world’s top executioner in 2014, with Amnesty estimating it was at least 1000 — a conservative figure, and one it believes is much higher.

However this year’s report did note, there are indications that the number of executions has decreased since the Supreme People’s Court began reviewing the implementation of the death penalty in 2007.

NOT ALONE

China was not the only nation in the spotlight.

The rogue nation of North Korea was also criticised for its lack of transparency and refusal to co-operate **with human rights organisations, or release figures surrounding its execution rates**.

Amnesty said it continued to receive reports, which it could not independently verify, indicating that executions were carried out and death sentences imposed for a wide range of alleged offences including questioning the leader’s policies.

However, according to media reports, North Korean leader Kim Jong-un has executed 70 officials since taking power in late 2011 in a “reign of terror” that far exceeds the bloodshed of his father.

In 2013, Kim executed his uncle, Jang Song Thaek, for alleged treason. Jang was married to Kim Jong-il’s sister and was once considered the second most powerful man in North Korea.

More recently, South Korean media outlet Yonhap News agency reported 15 high-ranking officials were executed in North Korea prior to April.

Last August, it also reported Vice Premier Choe Yong-gon and Defence Minister Hyon Yong-cool had been executed in May by shooting.

Ms Kulak said it was also a concern that Pakistan, another country in our region, has resumed executions on a massive scale, with 320 killed last year alone.

She said the government’s reasoning of a terror crackdown on militants simply wasn’t justified.

[GRAPH OMITTED]

THE BIG OFFENDERS

The number of executions recorded in **Iran and Saudi Arabia have increased** by 31 per cent and 76 per cent respectively, and **executions in Pakistan were the highest** Amnesty International has **ever recorded in that country**, the report found.

Pakistan recorded a massive rise in executions after lifting a moratorium on civilian executions in December 2014.

More than 320 people were put to death in 2015, the highest number Amnesty International has ever recorded for Pakistan.

Iran put at least 977 people to death in 2015, compared to at least 743 the year before — the vast majority for drug-related crimes.

In Saudi Arabia, executions rose by a whopping 76 per cent compared to 2014’s figures, with at least 158 people being executed last year.

#### China doesn’t comply – the death penalty is too deeply entrenched

Lim 13 ZI HENG LIM is a journalist based in New York City. [“Why China Executes So Many People,” 05-03-2019, *The Atlantic,* URL: <https://www.theatlantic.com/china/archive/2013/05/why-china-executes-so-many-people/275695/>] kly

The death penalty has deeply-entrenched roots in China, and the notion of sha ren chang ming, the Mandarin equivalent to "an eye for an eye", is rife in Chinese literature and tradition. But a judiciary beholden to the interests of the Communist Party arguably has a bigger impact.

"If the case is deemed to be detrimental to social stability, the government might order the courts to issue the **death penalty**," said Liu Weiguo, a Shandong-based rights lawyer. Even some supporters of the death penalty, like Guangzhou lawyer Cheng Zhunqiang, say that its legitimacy depends on the existence of an "extremely fair and just" judiciary, which China lacks. The current judicial system is **unfairly skewed against the disenfranchised**, and the application of the law is **utterly arbitrary**.

Prominent human rights lawyer Liu Xiaoyuan recalled a typical example: Gu Kailai, the wife of disgraced Politburo member Bo Xilai and convicted murderer, was given a suspended death sentence due to mental illness. Meanwhile, a villager from the impoverished southwestern province of Guizhou that Liu represented was refused a psychiatric assessment by the judges who eventually sentenced him to death.

The poor are further disadvantaged because they cannot afford to "buy back" their lives by offering financial compensation to the victim's family in return for them not pressing charges. This issue loomed large in the case of Zhang Jing. "We're just hawkers. We don't have money. We can't afford to compensate. It's impossible," she said.

Besides these legal questions, death penalty opponents contend that the government's **propaganda seeks to convince people that killing is appropriate** in certain circumstances. Six decades of Communist rule have inculcated the idea that an individual life can be sacrificed for the greater good, a belief exemplified by the one-child policy.

There's also a sense, reinforced through propaganda, that killing "bad people" is inherently just. In March, national television ran live footage of the run-up to the execution of four foreign nationals convicted of murdering 13 Chinese sailors on the Mekong River, an event that received international media attention. Shortly after the execution, Hu Xijin, the editor of the nationalistic state-run newspaper Global Times, declared to his 3.6 million followers on Weibo that "it is necessary to resolutely pursue revenge and send a stern warning to those who kill Chinese people."

These efforts appear to be working. A survey of respondents in Beijing, Hubei and Guangdong conducted in 2008 by the Max Planck Institute revealed that almost 60 percent supported the death penalty. Unsurprisingly, capital punishment provides great legitimacy to the Communist Party, which claims to be satisfying popular sentiment and public indignation when it executes corrupt officials. China is one of the very few countries that has the death penalty for economic crime and has shown little mercy with disgraced government officials. And, in a country in which **free speech isn't guaranteed**, the public hears few arguments against the death penalty in the national media.

### AT: Global Adv – Aff Can’t Solve

#### Abolition falls short of symbolizing respect for dignity at the international level – pragmatic concerns and other harsh punishments overshadow any benefit

Steiker & Steiker, 20 --- Professors of Law at Harvard and University of Texas respectively (6/28/20, Carol S. & Jordan M., “The Rise, Fall, and Afterlife of the Death Penalty in the United States,” Annu. Rev. Criminol. pg.313)//MP

However, on a more substantive level, it seems doubtful that American abolition would represent a deeper acceptance of the norm of respect for human dignity that the international consensus on the death penalty embodies. Some experts hope that worldwide abolition of the death penalty will mark the success of an increasingly global postwar international human rights agenda and the general acceptance of the concept of human dignity as part of a new global common law (Novak 2019). But American abolition, if and when it comes, will likely be rooted in more pragmatic concerns, which tend to dominate American discourse on the issue (Steiker & Steiker 2016). Extreme criminal punishments like the death penalty both reflect and reinforce a vision of offenders as less than human (Christie 2014). But even without capital punishment, the vigorous use of other extremely harsh punishments (like LWOP) and the maintenance of degrading conditions of incarceration (such as excessive use of solitary confinement and tolerance of sexual violence) stand in the way of **a full embrace of human dignity** in punishment practices. And although the death penalty may have facilitated the rise of mass incarceration in the United States (Scherdin 2014), the converse does not follow: The dismantling of the death penalty will not immediately or inevitably do much to reverse the massive scale of American imprisonment.

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

### AT: Global Adv – U.S. Can’t be Human Rights Leader

#### COVID, economic collapse, treatment of Native Americans, and racism thump credibility

* withdrawal from international treaties wreck its credibility as a human rights defender

Scheffer, 20 --- Visiting Senior Fellow at the Council on Foreign Relations (6-5-2020, David, "How America’s Credibility Gap Hurts the Defense of Rights Abroad", Council on Foreign Relations, https://www.cfr.org/article/how-americas-credibility-gap-hurts-defense-rights-abroad)//MP

“America the irrelevant.” That is the message the United States risks conveying in the wake of the coronavirus pandemic, economic collapse, and racism dominating 2020. Even before these recent events, Washington was hardly the beacon of stellar governance. But it is fresh incidents of racism, a problem in American society for hundreds of years, that could irreparably harm U.S. credibility to defend fundamental rights abroad.

Slavery and its evil twin, racism, define the past and the present in the United States. Americans struggled to evolve beyond these two legacies, even as adoption of the [Reconstruction amendments](https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm) to the U.S. constitution and a powerful civil rights movement led to legal reform and moral uplifting since the 1950s. Along the way, Jim Crow laws set the stage for racist policies; and segregation, discrimination, mass incarceration, and police brutality have daily violated the bedrock principle that “[all men [humanity] are created equal](https://www.loc.gov/exhibits/creating-the-united-states/interactives/declaration-of-independence/equal/index.html).”

Footage showing the death of George Floyd in the custody of Minneapolis police on Memorial Day could ultimately transform the country, provided that peaceful protests, police reform, legislative initiatives, and principled leadership take hold. But for now, circumstances surrounding Floyd’s death deny the United States the moral high ground.

A Noncredible Actor

Bottom of Form

The racism America struggles with has echoes abroad, not only in racist attitudes and practices but also ethnic discrimination and ethnic cleansing, the latter sometimes devolving into **genocide**. The treatment of Native Americans, which some historians claim as genocide, set a precedent grounded in blatant racism. There are enormous challenges to [overcome racism and slavery](https://www.cfr.org/interactives/modern-slavery/#!/section1/item-1) and associated violence abroad, which is why it is so critical to possess the credibility to influence policies of racism and ethnic discrimination. Despite the legacy of slavery and racism, the United States had developed the means to speak with authority on rights issues following World War II. But that credibility [has been shattered](https://foreignpolicy.com/2020/06/01/protests-trump-soft-power-wanes-racial-injustice-police-violence-george-floyd-world-reaction-police-brutality) with the prominent discord of recent days and the unfinished business to end racism on the United States’ own turf.

What does it mean to lose credibility in the defense of fundamental rights abroad? The millions of oppressed people in foreign societies will face further hardship as authoritarian governments crack down. The sense that the United States remains committed to the rule of law is crucial for foreigners at risk, because they often need the strength of U.S. credibility and influence to protect their own rights. U.S. support for the [Helsinki process](https://www.britannica.com/topic/Helsinki-process), launched in 1975, helped enormously to strengthen the rights of people in Soviet-era Eastern Europe. Sanctions under the [Magnitsky Act](https://www.state.gov/global-magnitsky-act/" \t "_blank" \o "Magnitsky Act) in recent years have been potent weapons to remind foreign leaders of their responsibility for human rights violations. More recently, the United States [took steps](https://www.axios.com/trump-end-hong-kong-special-trade-status-china-violations-adc1b663-9965-4afb-b312-cbd777c5732d.html) to protect the human rights of the people of Hong Kong as China tightened its grip on the city, and that has given them hope. When that influence is greatly diminished, these individuals are at severe risk of losing their fight for the protection of their fundamental human rights, for justice and the rule of law, and even for their survival.

‘Fundamental Freedoms for All’

The [UN Charter](https://www.un.org/en/charter-united-nations/), drafted under American leadership and concluded seventy-five years ago this month, requires the United Nations to achieve international cooperation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

International law thereafter codified the right to life; freedom from torture and slavery; liberty and the security of person; liberty of movement; equal treatment before the courts; the presumption of innocence; freedom of thought, conscience, and religion; the freedoms of expression, peaceful assembly, and association; equal protection of the law; and protection against discrimination on any ground, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, or birth.

Almost three decades ago, the United States joined other nations in defending each of these rights when it ratified the [International Covenant on Civil and Political Rights (ICCPR)](https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx). In 1994, the United States ratified the [International Convention on the Elimination of All Forms of Racial Discrimination](https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx), which should be the final word on racism if nations including the United States took it more seriously.

America in Retreat

Sadly, the American voice abroad has become one of withdrawal from treaties and institutions and abandonment of human rights. Since early 2017, the retreat on human rights, global health, climate change, education and science, nuclear arms control, and the rule of law has been relentless. Each withdrawal undermines the United States’ clout with foreign governments and within major organizations, and this weaker posture [diminishes U.S. influence](https://www.washingtonpost.com/world/2020/06/04/us-rivals-seize-protest-crackdowns-turn-tables-human-rights-criticism/) in the realm of human rights. Notable retreats include:

the decision not to join the [Trans-Pacific Partnership](https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp) trade agreement, which, at earlier U.S. insistence, promoted numerous human rights protections and acted as a counterfoil to China’s anemic human rights agenda;

forfeiture of the U.S. seat on the UN Human Rights Council, the most important human rights forum in the world;

withdrawal from the UN Educational, Scientific, and Cultural Organization, which supports many essential societal platforms for the advancement of human rights;

failure to persuade enough allies and friends to retain the United States’ seat on the Human Rights Committee of the ICCPR, where critical decisions on human rights enforcement are made;

decision to defund the UN Relief and Works Agency for Palestinian Refugees, affecting the rights of millions;

announcement of the intent to defund and withdraw from the [World Health Organization](https://www.cfr.org/backgrounder/what-does-world-health-organization-do), which promotes and defends the right to health worldwide and plays a critical role during pandemics;

withdrawal from the 2015 Paris Agreement on climate, which is aimed at the protection of environmental and associated human rights;

withdrawal from negotiations on the Global Compact for Migration, which protects the rights of migrants; and

an assault on the [International Criminal Court](https://www.cfr.org/backgrounder/role-international-criminal-court), which advances the rule of law globally by holding perpetrators of atrocities accountable in a court of law.

Add to this the impression left with foreign governments that the United States is letting the European Union seize the lead on regulating social media and pursuing worthy objectives to protect human rights. The United States also seems to lag in effectively regulating the internet to prevent Russian and other [covert digital interference](https://www.cfr.org/blog/new-cyber-brief-banning-covert-foreign-election-interference) in elections, which directly assaults fundamental rights of democracy around the globe. The acquiescence to the [rise of authoritarian governments](https://slate.com/news-and-politics/2020/01/authoritarianism-democracy-trump-borders.html), including authoritarian tendencies in Washington, encourages denial of fundamental rights and stokes the flames of racist policies.

### --- XT: U.S. Can’t Lead on Human Rights

#### **Trump’s moved backwards on human rights – racial disparities, over-incarceration, and increased poverty undermine any of the aff’s signaling efforts**

Human Rights Watch, 18 --- (6-12-2018, "World Report 2019: Rights Trends in United States", Human Rights Watch, https://www.hrw.org/world-report/2019/country-chapters/united-states)//MP

**The U**nited **S**tates **continued to move backward on human rights** at home and abroad in the second year of President Donald **Trump**’s administration. With Trump’s Republican party controlling the legislative branch in 2018, his administration and Congress were able to pass laws, implement regulations, and carry out policies that violate or undermine human rights.

Despite Trump signaling support for minimal reforms, his administration rolled back initiatives meant to reduce over-incarceration in the US, implemented an array of anti-immigration policies, and worked to undermine a national insurance program that helps Americans obtain affordable health care, including important reproductive care for women.

The Trump administration also continued to support abusive governments abroad militarily, financially, and diplomatically. Though it has expressed support for some international initiatives aimed at sanctioning individuals and governments committing human rights abuses, overall **administration policy undermined multilateral institutions and international judicial bodies seeking to hold people accountable for egregious human rights violations**.

Harsh Criminal Sentencing

State and federal jails and prisons [continue to hold](https://www.prisonpolicy.org/reports/pie2018.html) over 2 million people, with another 4.5 million on probation or parole. Women are the [fastest growing](https://www.hrw.org/news/2018/09/26/us-devastating-impact-jailing-mothers) correctional population nationwide, increasing by more than 700 percent between 1980 and 2016. Oklahoma incarcerates more women per capita than any other US state. In September, Human Rights Watch [documented](https://www.hrw.org/news/2018/09/26/us-devastating-impact-jailing-mothers) the lasting harm of jailing mothers pretrial, many of whom simply cannot afford bail in that state.

Former US Attorney General Jeff Sessions rescinded [policies](https://www.pbs.org/newshour/politics/for-holder-smart-is-the-new-tough-on-crime) instructing prosecutors to avoid charging crimes that would trigger long mandatory minimum sentences and were aimed at curtailing racial disparities in the federal system. Sessions also [rescinded](https://www.justice.gov/opa/press-release/file/1022196/download) a Justice Department directive giving federal prosecutors discretion to not prosecute marijuana offenses in the 10 states where marijuana has been legalized for adult consumption.

Millions of people [still cannot vote](https://www.brennancenter.org/analysis/state-voting-rights-litigation) due to a patchwork of felony disenfranchisement laws across the country. However, in November, Florida voters approved a ballot initiative during the mid-term elections that restored the right to vote for 1.4 million residents with felony convictions. The initiative was [one of several](https://www.sentencingproject.org/news/state-criminal-justice-reform-2018-midterms/) that states passed that advanced criminal justice reform, including an initiative in Colorado that removed language in the state constitution that permitted convicted criminals to be forced to work in prison without pay or restitution; an initiative in Florida, allowing sentencing reforms to be retroactive; one in Michigan that legalized marijuana for recreational use; and another in Washington state that strengthened police accountability.

The death penalty is still permissible in 30 states. According to the Death Penalty Information Center, 21 people in eight states had been [executed](https://deathpenaltyinfo.org/execution-list-2018) by the end of November, all in the south and midwest of the country. There were 11 executions in Texas. All but one of these executions were committed by lethal injection, the other by electric chair. Trump and administration officials have [called](https://www.hrw.org/news/2018/04/04/end-opioid-epidemic-save-lives-dont-take-them) for the death penalty for drug sellers.

Racial Disparities, Drug Policy, and Policing

**Racial**[**disparities**](https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf)**permeate every part of the US criminal justice system.** Black people are 13 percent of the population but close to 40 percent of those in prisons. They are incarcerated at more than five times the rate of white people. Black people use illegal [drugs](https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states) at similar rates to white people, but suffer drug arrests at significantly higher rates.

According to the Washington Post, police [reportedly shot and killed](https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.fa0d482510ae) 876 people in the US as of the beginning of October. Of those killed, whose race is known, 22 percent were black. Of the unarmed people killed by police, 39 percent were black. The Justice Department [rolled back](https://www.washingtonpost.com/world/national-security/justice-department-ends-program-scrutinizing-local-police-forces/2017/09/15/ee88d02e-9a3d-11e7-82e4-f1076f6d6152_story.html?utm_term=.a1ecb494fcb3) efforts to investigate local police departments following credible reports of systemic constitutional violations. Some state governments have [taken on](https://www.washingtonpost.com/news/post-nation/wp/2018/02/06/san-franciscos-police-force-will-be-under-state-oversight-after-justice-dept-rolls-back-federal-program/?utm_term=.418978207385) this oversight role. Racial [disparities in police use of force](https://www.vox.com/cards/police-brutality-shootings-us/us-police-racism), arrests, citations, and [traffic](http://www.latimes.com/local/lanow/la-me-sheriff-latino-drug-stops-grapevine-20181004-htmlstory.html) stops continue to exist.

Children in the Criminal and Juvenile Justice Systems

According to the Justice Department, the [juvenile arrest rate](https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200) has been declining but dramatic racial disparities persist: [children of color are disproportionately represented](http://www.ncsl.org/research/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-juvenile-justice-system.aspx) at every stage, and [in 37 states](https://www.sentencingproject.org/news/still-increase-racial-disparities-juvenile-justice/) rates of incarceration were higher for black children than for white, according to the Sentencing Project.

According to the Citizens Committee for Children, roughly 32,000 children under 18 are admitted annually to adult jails. All 50 states continue to prosecute some children in adult criminal courts. Approximately [1,300 people have life without parole sentences](https://www.fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-2018-Snapshot1.pdf) for crimes committed under 18, according to the Campaign for the Fair Sentencing of Youth.

In October, the Washington State Supreme Court [ruled](https://www.seattletimes.com/seattle-news/washington-supreme-court-rules-life-sentence-without-parole-for-youth-unconstitutional/) that life sentences without parole for crimes committed below age 18 violated the state constitution. In all, [21 states](https://www.motherjones.com/crime-justice/2018/10/washington-supreme-court-bans-lifers-parole/) and the District of Columbia now prohibit juvenile life without parole. California [passed a law](https://www.davisvanguard.org/2018/10/governor-brown-signs-bill-ending-sentencing-14-15-years-olds-adult-court/) in October that ends the sentencing of 14 and 15-year-olds in adult court. And in April, [New York ended](https://www.themarshallproject.org/2017/04/14/the-fine-print-in-new-york-s-raise-the-age-law) the automatic trial of 16 and 17-year-olds in adult court, although children of these—or younger—ages, who are accused of violent crimes, will still begin their cases in adult court with the possibility of transfer to the juvenile system.

Poverty and Criminal Justice

Poor people accused of crimes are often jailed because judges require money [bail](https://www.hrw.org/news/2018/06/01/q-pretrial-incarceration-bail-and-profile-based-risk-assessment-united-states) as a condition of release, forcing people not convicted of any crime to stay behind bars for long periods of time awaiting trial, and resulting in coerced guilty pleas. A movement to reduce the use of money bail is growing but many states, including California—which [passed a bill](http://www.latimes.com/opinion/op-ed/la-oe-raphling-white-money-bail-reform-20180905-story.html) eliminating [money bail](https://www.thenation.com/article/california-ended-cash-bail-but-may-have-replaced-it-with-something-even-worse/) in August—are replacing money bail with [risk assessment](https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions) tools that could entrench discrimination while failing to lower rates of pretrial incarceration.

Many local jurisdictions impose [excessive fees and fines](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) for even minor violations of law. If unpaid, these **debts can result in** arrests that feed a cycle of **incarceration and increased poverty.** Similarly, some states [privatize](https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor) misdemeanor probation services, which penalizes poor people who commit minor violations and leads to abuses.

#### Sanctions on the ICC are a huge alt cause – erodes US commitment to human rights

Burke-White, 20 –- bachelor’s and law degrees from Harvard University, and a doctorate in international relations from Cambridge University (6-11-2020, William, "The danger of Trump’s new sanctions on the International Criminal Court and human rights defenders", Brookings, https://www.brookings.edu/blog/order-from-chaos/2020/06/11/the-danger-of-trumps-new-sanctions-on-the-international-criminal-court-and-human-rights-defenders/)//MP

In March, the Appeal’s Chamber of the International Criminal Court (ICC) [authorized an investigation](https://www.icc-cpi.int/Pages/item.aspx?name=pr1516) of potential war crimes alleged to have occurred more than a decade ago in Afghanistan, including those by the United States. While the U.S. military under President Obama [did conduct investigations](https://www.nytimes.com/2016/11/15/world/asia/united-states-torture-afghanistan-international-criminal-court.html) of its activities in Afghanistan, there remain concerns that those investigations did not go far enough up the chain of command and did not adequately include conduct by the U.S. intelligence community. In a [post on this blog just after the decision](https://www.brookings.edu/blog/order-from-chaos/2020/03/11/the-trump-administration-misplayed-the-international-criminal-court-and-americans-may-now-face-justice-for-crimes-in-afghanistan/), I argued that the Trump administration’s threats to prevent such a case may have actually pushed the court toward such an investigation.

Today, the Trump administration issued [unprecedented sanctions](https://publicpool.kinja.com/subject-executive-order-on-blocking-property-of-certai-1843993980) against the ICC, as well as the international lawyers and human rights investigators involved in the case. This sanctions regime is fundamentally misguided. It will do little to stop the ICC’s investigation, erodes the U.S. longstanding commitment to human rights and the rule of law, and may undermine one of the most powerful tools in the U.S. foreign policy arsenal — economic sanctions.

WHAT EMERGENCY?

In a moment of real national emergencies — ranging from the COVID-19 pandemic, to police misconduct, to the highest unemployment rate in a generation — the fact that President Trump, in an [executive order on June 11](https://publicpool.kinja.com/subject-executive-order-on-blocking-property-of-certai-1843993980), “declare[d] a national emergency to deal with” the threat posed by the ICC investigation in Afghanistan seems almost farcical. An underfunded court with relatively little to show for two decades of work trying to end impunity would likely be surprised to learn that, in Trump’s view, it has the power to “impede the critical national security and foreign policy work of United States Government and allied officials, and thereby threaten the national security and foreign policy of the United States.” Admitting that a duly authorized investigation of U.S. conduct in Afghanistan constitutes such a threat is both a recognition of the power of international law and a suggestion that the U.S. has something to hide.

Of course, declaring a national emergency is a necessary precondition for the sanctions imposed on the ICC and its officials. While the U.S. has had a complicated history with the ICC — from President Bill Clinton’s signing of its founding treaty to President George Bush’s early efforts to undermine the court — the new sanctions go further than any past U.S. actions in their direct attack on the ICC and its staff. Bush’s [“unsigning” of the Rome Statute](https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty) was largely symbolic. So, too, was the [American Servicemembers Protection Act](https://2001-2009.state.gov/t/pm/rls/othr/misc/23425.htm) that threatened to invade the Netherlands to rescue any U.S. citizens that might be prosecuted in The Hague.

In contrast, today’s sanctions directly target individual international lawyers and investigators working for a legitimate international organization undertaking lawful actions under its statute. More specifically, today’s sanctions seize the property of to-be-designated ICC officials who undertake investigation or prosecution of U.S. personnel and any other foreign nationals who are deemed to have assisted such efforts. So too, the new sanctions prohibit the entry into the United States of such individuals and their immediate family members.

The sanctions language is sufficiently broad that it could, in theory, apply to a victim or witness who provided information incidental to the court’s investigation or an academic whose scholarship the court relied upon in framing a legal argument. This new sanctions regime draws strong parallels to those imposed by the U.S. in the past against [terrorist groups, dictators, and human rights abusers](https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-government-venezuela/). Those same sanctions are now turned on international lawyers and human rights defenders.

EMPTY THREATS

The sanctions imposed today on ICC officials are unlikely to achieve Trump’s objective of blocking the investigation of U.S. conduct in Afghanistan. If anything, the sanctions will redouble those efforts. Unlike most corrupt dictators or terrorist organizations, individuals who choose to work for the ICC or in international human rights more generally are [motivated by conscience, not wealth.](https://heinonline.org/HOL/LandingPage?handle=hein.journals/porril10&div=13&id=&page=) They rarely have significant assets in U.S. bank accounts or meaningful real property for the U.S. to seize. Similarly, the foreign victims of crimes in Afghanistan who might testify before the ICC are not likely to have assets subject to seizure.

Hence, the threat of such a seizure under this new sanctions regime will do little to deter investigation or cooperation. Even blocking ICC employees from entering the U.S. will have minimal impact. Effective investigation of crimes in Afghanistan more than a decade ago does not require on-the-ground presence in the U.S. today. In fact, given the moral compass of most human rights advocates and international criminal prosecutors, treating them like terrorists under this new sanctions regime will more likely be a call to action under the law than an effective threat.

This new sanctions regime is a direct affront to international human rights and, particularly, individuals who have dedicated their lives to enforcing international law and ending impunity. President Trump has a long history of attacking international institutions that he doesn’t like. His recent [criticisms of the World Health Organization are case in point](https://www.politico.com/news/2020/05/29/us-withdrawing-from-who-289799). This new attack on the ICC is, however, different because it targets not just another international institution, but also the individuals who work for that institution. As such, it is an effort to directly sanction human rights defenders and officials of international justice for doing their jobs. The new sanctions regime seeks to punish those individuals, working for an international organization created by a treaty the United States signed in 2000, and undertaking a legal investigation authorized by a panel of international judges. It flies in the face of every [U.S](https://www.state.gov/u-s-support-for-human-rights-defenders/). and [international effort](https://www.osce.org/files/f/documents/c/1/119633.pdf) to protect human rights defenders and offers a powerful example for despots around the world to follow suit.

#### Other U.S. policies prevent us from credibly criticizing China’s human rights

Roth, 20 --- Executive Director of Human Rights Watch (Human Rights Watch, “China’s Global Threat to Human Rights,” <https://www.hrw.org/world-report/2020/country-chapters/global#c2d2ef>, accessed on 7/5/2020, JMP)

The Trump administration is one government that has been willing to stand up to China, best evidenced by its October 2019 imposition of sanctions on the Xinjiang Public Security Bureau and eight Chinese technology companies for their complicity in human rights violations. But strong rhetoric from US officials condemning human rights violations in China is often undercut by Trump’s praise of Xi Jinping and other friendly autocrats, such as Russia’s Vladimir Putin, Turkey’s Recep Tayyip Erdogan, Egypt’s Abdel Fattah al-Sisi, and Saudi Arabia’s Mohammad bin Salman, not to mention the Trump administration’s own rights-violating domestic policies such as its cruel and illegal forced separation of children from their parents at the US-Mexican border.

This inconsistency makes it easier for Beijing to discount Washington’s human rights criticisms. Moreover, the Trump administration’s misguided withdrawal from the UN Human Rights Council because of concerns for Israel has paved the way for the Chinese government to exert greater influence over this central institution for the defense of rights.

### Circumvention

#### State jurisdiction determines whether the plan’s rationale gets properly interpreted – Texas proves states can circumvent

**Steiker & Steiker, 16** --- Professors of Law at Harvard and University of Texas respectively (Carol S. & Jordan M., Courting Death: The Supreme Court and Capital Punishment, ebook from University of Michigan, pg. 127-129) //ILake-JQ

In some extreme cases, state courts not only have underenforced Supreme Court doctrines, they have expressed open skepticism about the wisdom of the Court’s regulation. A little over a decade after Gregg, the Court addressed in a Texas case whether the Eighth Amendment forbids the execution of persons with intellectual disability (formerly “mental retardation”). Given the paucity of states prohibiting the practice, the Court sided with Texas and established no categorical bar. Thirteen years later, the Court, responding to a flood of new states condemning the practice, ruled that the execution of persons with intellectual disability violates prevailing standards of decency. Despite straightforward language in the decision affirming that “death is not a suitable punishment for a mentally retarded criminal,” the Texas Court of Criminal Appeals, as it purported to implement the Court’s decision, doubted whether all persons with intellectual disability should be exempt from execution. Instead, the CCA suggested that it should “define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.”18

The CCA rejected the idea that all persons recognized as having intellectual disability under prevailing clinical norms should be spared, arguing instead that the exemption was more appropriate for persons like the fictional character Lennie in John Steinbeck’s novel Of Mice and Men.19 Accordingly, the CCA created its own, nonclinical approach to assessing intellectual disability with the avowed goal of weeding out offenders with mild intellectual disability whom Texans might regard as sufficiently culpable for execution. The nonclinical approach builds on and reinforces outdated stereo types about intellectual disability, focusing, for example, on whether the off ender can respond “rationally” to questions, lie in his own interest, and engage in planning. The approach explicitly invites the decision maker to consider facts of the capital offense, ostensibly to gauge whether the offense was “impulsive” or involved “forethought.” But critics of the Texas approach argue that the effort to focus on the details of the offense is inconsistent with clinical practice (where the determination of intellectual disability is rooted in assessments of deficits in particular areas of adaptive be havior), and inappropriately encourages decision makers (jurors and judges) to reject the exemption where the circumstances of the crime are highly aggravated and disturbing.20

As a result of Texas’s court- created ad hoc approach to intellectual disability, numerous Texas defendants who satisfy traditional clinical criteria for the diagnosis have nonetheless been sentenced to death and executed. Many of these inmates undoubtedly would be deemed exempt from the death penalty in other jurisdictions, and Texas offenders seeking relief based on intellectual disability have had a far lower rate of success than off enders outside the state.21 The Supreme Court recently moved to rectify a related problem in Florida, where the Florida courts had imposed a strict IQ cutoff for the exemption in conflict with professional clinical norms (which include a “standard error of measurement”). The Texas courts, though, continue to adhere to their nonclinical approach, and the Court of Appeals for the Fifth Circuit has declined to intervene. In fact, the Court of Appeals recently explained that the Supreme Court decision in the Florida case did not call into question the Texas nonclinical approach because “the word ‘Texas’ nowhere appears in the [Supreme Court] opinion.” The underenforcement in Texas of the Court’s prohibition against executing persons with intellectual disabilities demonstrates how constitutional regulation can produce very different outcomes depending on a jurisdiction’s willingness to embrace the principles animating the Court’s intervention.2

### LWOP Turn – Public Pressure Link

#### Public pressures ensure replacement with LWOP

Williams, 17 --- Professor of Law, South Texas College of Law Houston (Kenneth, “Why and How the Supreme Court Should End the Death Penalty,” 51 U.S.F. L. Rev. 271, Nexis Uni via Umich Libraries, JMP)

ii. Life Without Parole

In the past, jurors often voted for death in order to ensure that dangerous defendants remained in jail and were never released on [\*284] parole. 98 Now that most states provide jurors with the option of sentencing the defendant to life without parole ("LWOP"), this concern is eliminated. As a result, jurors are meting out fewer death sentences 99 and the public seems to agree with those decisions. In a recent poll, 52% of the public preferred LWOP, whereas 42% preferred the death penalty. 100 Even among those who support the death penalty, 29% preferred LWOP. The public is increasingly unwilling to accept the risk of executing an innocent person now that they are assured that the perpetrator will never be released from prison.

#### LWOP could be necessary to ensure political support for abolition

Conklin, 19 --- Assistant Professor of Business Law, Angelo State University (7/4/19, Michael, Denver Law Review, “A STRETCH TOO FAR: FLAWS IN COMPARING SLAVERY AND THE DEATH PENALTY,” <https://www.denverlawreview.org/dlr-online-article/a-stretch-too-far-flaws-in-comparing-slavery-and-the-death-penalty>, accessed on 5/27/2020, JMP)

C. Proposed Alternatives

Both abolitionist movements have dealt with the issue of proposed alternatives. The colonization of Liberia was proposed as an alternative to slavery, while LWOP is a commonly proposed alternative to the death penalty. Malkani makes perfectly clear that in his personal opinion neither colonization nor LWOP were suitable alternatives because they are both rooted in the same philosophy of the initial problem: the subjugation and dehumanizing of certain individuals.[22] But not every abolitionist agrees. In 1990, the director of the ACLU National Capital Punishment Project stated that they would “acquiesce” to LWOP as an alternative to the death penalty.[23] Additionally, a former Death Penalty Information Center executive director said, “[LWOP is] a practical alternative to the death penalty that the public may be willing to accept. Having a stated alternative that sounds tough makes a big difference.”[24] Even though Malkani personally opposes LWOP as an alternative to the death penalty, he recognizes that “the availability of LWOP enables political leaders to further the anti-death penalty cause.”[25]

### LWOP Turn – Inhumane & Less Protections

#### LWOP is inhumane and offers fewer protections for the convicted

Conklin, 19 --- Assistant Professor of Business Law, Angelo State University (7/4/19, Michael, Denver Law Review, “A STRETCH TOO FAR: FLAWS IN COMPARING SLAVERY AND THE DEATH PENALTY,” <https://www.denverlawreview.org/dlr-online-article/a-stretch-too-far-flaws-in-comparing-slavery-and-the-death-penalty>, accessed on 5/27/2020, JMP)

A. Unintended Consequences

The slavery and death penalty abolitionist movements have both resulted in unintended consequences. For example, a sharp increase in the death penalty against blacks followed the abolition of slavery.[7] After all, when slavery was legal, many people in power had a financial interest in not killing slave labor. Malkani and other death penalty abolitionists fear that abolishing the death penalty will likewise result in an unintended consequence, namely the increased use of, and entrenchment in, life without parole (LWOP). The concern is not just that LWOP is inhumane but that it offers less protections for the convicted—such as automatic appeals—when compared to the death penalty.

#### Life without parole lacks the heightened review procedures available in death sentence procedures and proves they can’t embrace dignity

Malkani, 18 (Bharat Malkani, Bharat Malkani researches and teaches in the field of capital punishment, and human rights and criminal justice more broadly. He is a member of the International Academic Network for the Abolition of Capital Punishment, and prior to joining academia he helped co-ordinate efforts to abolish the death penalty for persons under the age of 18 in America. "Slavery and the Death Penalty A Study in Abolition", Routledge, 2019, Accessed 6-25-2020) //ILake-JQ

We saw in Chapter Five that the restrictions on the use of capital punishment are designed to ensure that death sentences are only imposed when such sentences are considered proportionate to the gravity of the crime and the moral culpability of the offender. We also saw, though, that the Court has not applied the same proportionality analysis to non-capital cases. Sentences of life without parole are therefore available for a wide range of offenses including non-violent property offenses. In 2005, the US Supreme Court outlawed the death penalty categorically for offenders under the age of 18, but such persons can still be sentenced to life without parole in 31 states, if convicted of murder.68 In fact, as noted above, legislators in Texas specifically introduced LWOP in 2005 in order to ensure that the young offenders spared from execution under Roper v. Simmons would never be eligible for parole.69 And, as Marie Gottschalk has documented, “[i]n a pattern familiar in other states, the list of qualifying crimes for LWOP expanded in Texas” after it was introduced in 2005.70

In addition to the lack of any rigorous proportionality analysis, LWOP is also free from individualized sentencing procedures, except in cases involving juveniles. In Woodson v. North Carolina, the US Supreme Court explained why death sentences must be individualized. Defendants, the Court ruled, must be allowed to introduce mitigating evidence in order to ensure that only the most morally depraved are executed. And in Hurst v. Florida, the Court explained that death sentences could only be imposed by a jury, and not by a judge.71 When we look at LWOP schemes around the country, though, we see mandatory schemes abound. Even in some jurisdictions where the penalty is not mandatory, we see the potential for individuals to be sentenced to LWOP at the discretion of a judge rather than a jury. Consider, for example, the schemes in the seven jurisdictions that have outlawed capital punishment since 2007. In five of these states, LWOP is mandatory for some crimes. In Connecticut, in 2012, a jury-imposed, discretionary death penalty for “capital felonies” was replaced with a mandatory LWOP for offenses of “murder with special circumstances.”72 When the Delaware Supreme Court invalidated the state’s death penalty, it left LWOP as the only punishment available upon a finding of guilt for capital crimes. In Illinois, which abolished the death penalty in 2011, LWOP is mandatory when certain aggravating factors are found, as is the case in New Mexico and New York. Even though LWOP is not mandatorily imposed in Maryland, which abolished the death penalty in 2013, it is nonetheless a decision for a judge to make, rather than a unanimous jury.

In addition to the mandatory application of LWOP in some states, such sentences also lack the sort of procedural safeguards that are applicable in capital cases to ensure that convictions are free from error. Thus, when anti-death penalty advocates encourage the use of LWOP on the grounds that it is a cheaper punishment, they are by implication contributing to what Gottschalk calls “the carceral state”, because prisoners sentenced to LWOP will have less chance of having their sentence reviewed or overturned. In this sense, we can draw parallels with David Walker’s criticism of the American Colonization Society. Walker suggested that the true motives of the ACS were to strengthen the subjugation of black people by removing those who worked most hard for abolition and equality. While it might be implausible to argue that anti-death penalty advocates who champion LWOP are purposively entrenching harsh punishments, the underlying concern is comparable: such an “alternative” has the effect of subjugating the very people it is supposed to help. In some respects, if you are innocent it is better to be sentenced to death and take advantage of the heightened review procedures available, than it is to be sentenced to a lesser-reviewed sentence of LWOP.

By advocating for the imposition of LWOP in its current form (that is, without heightened procedural safeguards), anti-death penalty advocates are normalizing and institutionalizing harsh retributivism. Consider, for example, the reversal rate for capital cases. It currently stands at 68 percent, because of the heightened review procedures. In non-capital cases – including LWOP – the reversal rate is between 10–20 percent, in part due to the relatively weaker safeguards and fewer opportunities for review.73 Capital defendants currently have a right to have their case reviewed by the state’s highest court; but non-capital defendants – even those serving a term of LWOP – do not. Also, as noted above, if a prosecutor wishes to rely on “future dangerousness” as a reason for seeking a death sentence, the jury must be informed of the availability of LWOP as an alternative punishment.74 In other words, the defendant benefits from the jury being informed of alternative, allegedly lesser, punishments. However, in cases where LWOP is the maximum available sentence, juries are not required to be told of alternatives. Thus, there is more scope for a jury to be inclined to sentence someone to LWOP, unaware that there is a less harsh, but just as effective, alternative available.75

The endorsement of LWOP can also contribute to the institutionalization of racism in the criminal justice system. For example, North Carolina’s Racial Justice Act, which has now been repealed, mandated the replacement of a death sentence with a sentence of life without parole in cases in which a prisoner successfully showed that race had impermissibly played a role in the imposition of their death sentence. As a result, it gave legitimacy to sentences of LWOP in cases that had been affected by racial prejudice.

Death penalty abolitionists who criticize life without parole have also pointed to the counter-productivity of those who endorse such sentences, either for moral or strategic purposes. Such sentences are often touted as cheaper than death sentences, but Roger Hood and Carolyn Hoyle highlight the “enormous cost implications of housing increasing numbers of elderly people in prisons who will inevitably need medical and geriatric care.”76

Perhaps more startling than the substantive and procedural shortcomings of LWOP, though, is the observation that even if there has been some decrease in the use of capital punishment as a result of the use of LWOP, this is nothing compared to the increased use of LWOP instead of lesser punishments. That is, it is arguable that people who would ordinarily have been sentenced to a term of imprisonment with the possibility of parole have instead been sentenced to LWOP as the latter has become acceptable. Ashley Nellis has found that “[b]etween 1992 and 2016, there was a 12.7 percent increase in the number of people on death row while over the same period the LWOP population rose 328 percent.”77 It is highly unlikely that all those sentenced to LWOP in that period would have been sentenced to death had the former not been available, and as Carol Steiker and Jordan Steiker note, “…even if the entire decline in death sentencing were (implausibly) attributed to LWOP, the number of capital defendants affected by LWOP’s introduction would still be dwarfed by the number of noncapital defendants affected by its widespread adoption and use.”78 That is, even if the promotion of LWOP has led to a small decline in death sentences, this has been nothing compared to the startling increased use of LWOP instead of lesser sentences. In Nellis’s words: “LWOP’s widespread use in both capital and noncapital crimes has had a normalizing effect on extreme sentences and places an upward pressure on sentences across the spectrum.”79 Indeed, as of 2016, nearly half of all LWOP sentences have been passed in just four states. Florida accounts for 16.7 percent of all LWOP sentences; Pennsylvania 10.1 percent , California 9.6 percent , and Louisiana 9.1 percent .80 All except Louisiana also appear in the list of the five most populous death rows.81

To paraphrase William Lloyd Garrison, then, “the [promotion or acceptance of LWOP] is inadequate in its design, injurious in its operation, and contrary to sound principle.”82 It is inadequate because it fails to account for the problems inherent in LWOP in its current form; it is injurious because it has normalized the use of such sentences in cases that might have otherwise attracted lesser sentences, and subjects people to a lifetime behind bars with no hope of release; and it is contrary to principle because it normalizes and institutionalizes the belief that some people can be permanently excluded from the human community, which is the very wrong that death penalty abolitionists are trying to eradicate in the first place.

### Deters Crime Turn – Incapacitation

#### Death penalty incapacitates criminals even if deterrence is unproven

Conklin, 19 --- Assistant Professor of Business Law, Angelo State University (7/4/19, Michael, Denver Law Review, “A STRETCH TOO FAR: FLAWS IN COMPARING SLAVERY AND THE DEATH PENALTY,” <https://www.denverlawreview.org/dlr-online-article/a-stretch-too-far-flaws-in-comparing-slavery-and-the-death-penalty>, accessed on 5/27/2020, JMP)

Another inaccuracy from Malkani’s coverage of the Willie Horton incident is his claim that Horton “escape[d]” from prison. In reality, Horton was intentionally given an unsupervised weekend furlough from prison (although he did stay out longer than he was supposed to). Further, the famous 1988 Willie Horton campaign advertisement was not “Bush’s most famous racial appeal.” The ad was not even run by the Bush campaign—it was an independent expenditure by the National Security Political Action Committee.[41] Finally, in a comparatively minor inaccuracy, Willie Horton did not “[go] on to rape and murder . . . .” Rather, he tortured and raped a couple.[42] Neither were killed.[43]

This misrepresentation of the facts of the Willie Horton case—whether intentional or accidental—seems to inform Malkani’s understanding of capital punishment as a deterrence. He states that there is a “lack of any reliable empirical research that demonstrates that the death penalty deters potential offenders . . . .”[44] Although not explicitly addressed in the book, this statement evinces a sense of oversight regarding arbitrarily distinguishing between deterrence and incapacity—a common abolitionist tactic. Under this view, an executed murderer is not “deterred” from committing future crimes; rather, he is “incapacitated.” This allows the abolitionist to disregard how executed individuals can no longer commit crimes and instead focus solely on the uncertain deterrent effects the death penalty has on other potential criminals. It is unlikely that the couple Willie Horton raped and tortured would find this distinction to be a meaningful one.

### Deterrence Crime Turn – Alternatives Link

#### Their solvency claim strengthens the link --- would invalidate LWOP and many other punishments

Conklin, 19 --- Assistant Professor of Business Law, Angelo State University (7/4/19, Michael, Denver Law Review, “A STRETCH TOO FAR: FLAWS IN COMPARING SLAVERY AND THE DEATH PENALTY,” <https://www.denverlawreview.org/dlr-online-article/a-stretch-too-far-flaws-in-comparing-slavery-and-the-death-penalty>, accessed on 5/27/2020, JMP)

C. LWOP as Alternative

Throughout the book, Malkani rejects LWOP as a suitable alternative to the death penalty. While criticizing LWOP is easy, presenting a suitable alternative is far more difficult. This is likely why Malkani does much of the former and none of the latter. Additionally, as is common in this book, there is no interaction with potential criticism. For example, the logic employed by LWOP abolitionists, if consistently applied elsewhere, leads to major problems. If LWOP is so abhorrent, then other punishments that are the functional equivalent would also need to be abolished. For example, giving long sentences to older defendants would also need to be banned because such defendants would be likely to die in prison. Implementing legislation to account for life expectancy would pose many problems. Perhaps Malkani would support the implementation of a scale where judges cannot sentence defendants to more than, say, 80% of their remaining average life expectancy. Due to discrepancies in life expectancies this would result in a number of issues, such as a sixty-year-old African-American male receiving far less punishment than a sixty-year-old white female for committing the same crime.[45] Also, people who have already exceeded their average life expectancies would be immune from imprisonment. For these reasons, perhaps Malkani’s decision to not address LWOP alternatives was an intentional, strategic one.

## “Abolish” / “Dignity” PIC

### Notes

The best net benefit to this counterplan is agenda politics (or possibly Trump base) – neither of which currently exist at the camp but will at some point this season. It doesn’t work as well with the nature of the current elections links. The best net benefit for now revolves around backlash. Backlash is a difficult standalone net-benefit to win because the affirmative’s fiat resolves the most threatening impact (reinstatement of death penalty) and the solvency deficit probably outweighs other forms of backlash that are less significant.

### 1nc “Abolition” & “Dignity” PIC

#### The United States federal government should repeal the death penalty, citing pragmatic concerns such as cost and efficacy.

#### The counterplans solves --- framing the plan as repeal instead of abolition and emphasizing pragmatic concerns instead of dignity is critical to build a broad based coalition of support

Steiker & Steiker, 10 --- \*Professor at Harvard Law, AND \*\*Professor of Law at University of Texas School of Law (Summer 2010, Carol S. Steiker and Jordan M. Steiker, “CENTENNIAL SYMPOSIUM: A CENTURY OF CRIMINAL JUSTICE: I. CRIMES AND PUNISHMENT: CAPITAL PUNISHMENT: A CENTURY OF DISCONTINUOUS DEBATE,” 100 J. Crim. L. & Criminology 643, Nexis Uni via Umich Libraries, JMP)

The newfound prominence of the cost argument is undoubtedly traceable to two important recent developments: the escalating costs of capital punishment in the modern era and the economic downturn over the past two years. But the seemingly deep resonance of the cost argument in contemporary debate has other roots as well. The cost argument effectively shifts the focus of anti-death penalty energy from individual rights and humanitarian-based arguments that never commanded wide or overwhelming public support in this country. Whereas European opposition to the death penalty draws heavily from claims about human dignity and concerns about the potential abusive uses of state power (rooted in the memory of genocide, fascism, communism, and ethnic cleansing), there has never been widespread anxiety or ambivalence in this country about entrusting the state with the power to kill or subjecting individuals to this supreme sanction. The states' quick and decisive reaction to Furman - thirty-five states quickly enacted new capital statutes in response to the Court's decision - reflects to some degree the absence in this country of a politically significant coalition organized around deeply held, rights-based opposition to capital punishment.

Thus, while the cost argument's appearance may be the product of changed fiscal realities, it owes its special prominence and power to the way in which it focuses on uncontroversial, instrumental, collective goals rather than contentious claims about disputed individual "rights." The recent effort in Colorado to tie legislative repeal of the death penalty to increased funding for the investigation of unsolved murders is a clear example of the turn from focusing on the condemned to focusing on alternative collective goods. In terms of practical politics, this change in focus toward instrumental argument has created a "bigger tent" for those concerned about capital punishment. To accommodate this broader constituency (including politicians who have no interest in rejecting the death penalty as inhumane), advocates for withdrawal of the death penalty [\*676] have recast their efforts in terms of "repeal" rather than "abolition." The repeal movement - with its focus on pragmatic reassessment of the costs and benefits of the death penalty - has in many respects supplanted the narrower and less successful "abolition" movement, which, as the term connotes, has long been rooted in a moral imperative comparable to the effort to end slavery.

The cost argument also provides a strong counter to the two most prominent "pro-death penalty" positions of the current era: retribution and deterrence. The retributive argument, emphasizing that the death penalty provides the only appropriate moral response to the "worst" offenses and offenders, has become perhaps the most significant justification for the death penalty in recent years as part of the general revival of retributivism as the leading theory of punishment. Like the anti-death penalty argument emphasizing human dignity, the pro-death penalty retributive argument ultimately relies on an abstract moral claim that is not susceptible to empirical argument or instrumental balancing. Against this lofty moral claim, proponents of repeal can insist that we simply cannot afford to base our criminal justice policy on this contested moral claim; the large size of the overall cost differential between capital and non-capital sentencing means that we sacrifice too much in terms of other public goods by retaining the death penalty. As a result, the rhetorical position of abolitionists and retentionists in previous debates gets flipped: abolitionists get to shed the unattractive cloak of soft sentimentality and don the mantle of fiscal responsibility, while retentionists now have to rebut charges that their attachment to the death penalty is a form of unworldly moralism.

The claim of deterrence by death penalty supporters has long been contested. In the era preceding Furman, the claim that deterrence of murder was a justification for retaining capital punishment was generally accepted to be unproven, perhaps even unprovable. 142 More recently, many economists and statisticians have revisited the question whether the death penalty deters, with some studies purporting to find statistically significant deterrent effects. Although these studies have been subject to withering criticism from detractors, opponents of the death penalty have found themselves increasingly on the defensive about the possible value of the death penalty as a deterrent. 143 The cost argument provides a powerful [\*677] rejoinder to the deterrence argument, because the unstated premise of the deterrence claim is that the resources expended on the death penalty are roughly comparable to those incurred via other sanctions. If capital punishment were no more expensive than life imprisonment, then it would seem natural to focus largely on their comparative efficacy as alternative punishment options. But if abolishing capital punishment would result in cost savings above and beyond the costs of lifetime incarceration, the additional money saved could be used for other projects - whether law enforcement initiatives such as Colorado's proposed "cold case" funding or social programs such as funding for early childhood education - that might offer better crime control than the foregone executions. Thus, even granting the claim that the death penalty deters homicide better than life imprisonment, opponents can still argue that the cost savings produced by abolition would yield maximum benefits to public safety. The cost argument thus allows abolitionists to put deterrence in its (subsidiary) place in the larger calculus of crime prevention and to differentiate being "smart on crime" from being "tough on crime."

The power of the cost argument stems not only from its ability to focus political actors and the general public on competing public goods. The concern about costs also indirectly sheds light on numerous pathologies in prevailing capital practice, including the inability of states to satisfy minimum constitutional requirements in capital trials (reflected in high reversal rates), the absence of political will to carry out executions, the arbitrariness wrought by the few executions that in fact occur and the difficulties (both pragmatic and moral) stemming from prolonged death-row incarceration. Cost is not only a way of avoiding anti-death penalty arguments that have less traction (such as concerns about arbitrariness and human dignity); focusing on cost reminds the audience of these problems even as it concentrates attention on the bottom line. Cost is thus a window into the current dysfunction of the American capital system, and it provides a non-ideological, non-controversial shorthand for expressing concern about a myriad of problems.

#### A decision invalidating the death penalty on more pragmatic grounds solves and won’t trigger a “culture war” response

Steiker, 14 --- Professor at the University of Texas School of Law (Fall 2014, Jordan, “PANEL THREE: THE WISDOM OF CAPITAL PUNISHMENT (APART FROM MORALITY OR THE RISK OF CONVICTING THE INNOCENT): THE AMERICAN DEATH PENALTY FROM A CONSEQENTIALIST PERSPECTIVE,” 47 Tex. Tech L. Rev. 211, Nexis Uni via Umich Libraries, JMP)

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

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

Third, a decision invalidating the death penalty at this time would have firmer footing along several dimensions. At the time Furman was argued, there were essentially no judicial precedents suggesting that the death penalty as a practice was constitutionally questionable. States had enjoyed wide, almost unfettered latitude in administering the death penalty and, despite the waning popularity of capital punishment, few observers believed the issue would or [\*220] should be resolved judicially rather than politically. 58 Now, we have had over four decades experience with extensive judicial regulation of the death penalty. 59 The notion that the Constitution supplies important limits on capital punishment is firmly entrenched, and the Court's decisions have generated numerous doctrinal grounds for challenging the death penalty as a continuing practice. Accordingly, a decision invalidating the death penalty would be--and perhaps more importantly, would appear to be--a natural outgrowth of death-penalty doctrines rather than the sort of "lightning bolt" that made Furman vulnerable. Along these lines, the doctrines developed over the past forty years have provided something of a "yardstick" for measuring the acceptability of prevailing capital practice, and a Court decision invalidating the death penalty would fairly be regarded as holding states to the standards and norms essential to the constitutional administration of the death penalty. 60 In addition, given the Court's doctrines, judicial abolition would be less likely to rest on the sort of moral opposition to the death penalty reflected in Justice Brennan's and Justice Marshall's opinions in Furman. A contemporary opinion would tum on many of the pragmatic concerns about the death penalty's administration discussed above rather than insist that capital punishment violates "human dignity" in some more foundational sense, and would thus be less likely to elicit a "culture war" response.

#### Backlash empirically manifests itself in a racially charged tough on crime movement

Goldfarb, 16 --- Professor of Clinical Law, George Washington University Law School (Summer 2016, Phyllis, “Matters of Strata: Race, Gender, and Class Structures in Capital Cases,” 73 Wash & Lee L. Rev. 1395, Nexis Uni via Umich Libraries, JMP)

[\*1410]

1. Departure and Return of the Death Penalty

There is yet more evidence of the racial pedigree of the death penalty in America. Furman v. Georgia, 60 the 1972 U.S. Supreme Court case that temporarily halted America's death penalty, was brought to the Supreme Court by the NAACP Legal Defense Fund, a legal organization founded by Thurgood Marshall and dedicated to the advancement of civil rights and racial justice. 61 Those in the contemporary movement to abolish the death penalty are known as abolitionists, a racial justice echo that voices its link with the abolitionist movement of the nineteenth century that sought to end slavery. 62 As Evan Mandery writes in A Wild Justice, his book about the Furman case, "everyone understood Furman to have been about race." 63 Four years later, when the Supreme Court reinstated the death penalty in the 1976 case of Gregg v. Georgia, 64 it was clear that this retrenchment was tied to backlash against the civil rights movement and the civil rights advances that it had precipitated. 65 This backlash expressed itself in a racially charged tough-on-crime movement. 66 But for the resentment of civil rights [\*1411] progress that led to restoration of capital punishment, the death penalty would have been unavailable to the Virginia courts that imposed it on Joe Giarratano in 1979. 67 Long after its abolition in most Western democracies, the death penalty survived in America, a relic of America's centuries-old and still highly charged racial dynamics. 68

### 2nc Backlash Impact

#### Their framing triggers public and political backlash that worsens criminal policy – New York proves

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NEW YORKERS WORKING on rolling back mass incarceration entered 2020 with a sense that the wind was strongly at their back. The previous year had been a momentous one: For the first time in decades, Democrats controlled both chambers of the legislature as well as the governor’s mansion. Reform advocates had taken the opportunity to pass a historic raft of criminal justice reforms. Money bail was eliminated for most, though not all, defendants. A host of minor offenses would now result in a notice to appear in court, rather than arrest. And a longstanding imbalance that allowed prosecutors to withhold their evidence against a defendant until the day of trial was finally righted.

Passed last spring, these reforms were set to go into effect January 1. In the meantime, the coalition that had helped push through last year’s reforms — community activists, public defense lawyers, civil libertarians — set their sights on what they wanted to accomplish in the new year to keep the momentum going: repeal the law that insulates police conduct from public scrutiny, reduce the use of solitary confinement, and open a legal avenue for people to challenge their wrongful convictions when exculpatory evidence comes to light.

Most of all, the reform advocates were eager to make sure that, beyond the letter of the law, the underlying spirit of the reforms took hold. “We were really thinking about this as a chance to look beyond criminal justice solutions to so many of these problems,” said Scott Hechinger, a senior staff attorney at the Brooklyn Defender Services, a public defense provider in New York City. “These people who would have been thrown in jail before — what are their actual needs in terms of housing, jobs, education, mental health care? What are we going to do with the money we’re saving by not warehousing them out of sight in jail to maybe actually start to address those needs and heal our communities?”

These lofty ambitions, however, hit a snag. It soon became clear that the coalition of reformers had **gravely underestimated the determination of** pro-carceral forces to claw back the gains of last year and the eagerness of news media to cooperate in a statewide campaign of public fearmongering. They’d also underestimated the willingness of their erstwhile allies among Democratic state legislators to betray the poor, black, and brown New Yorkers overwhelmingly affected by the reforms, if it helps Democrats keep their seats.

Far from building on their progress of last year, criminal justice reformers now find themselves exhausted, dispirited, and dismayed, caught in a 24/7 trench battle to defend the compromise measures they only just won.

If they fail, it’s increasingly possible that New York won’t just revert to the pre-reform status quo. The avenging counterreformation of **police unions, police departments, district attorneys, Republicans, and** Facebook **fascists** is currently poised to drive past that line, **winning laws that will give prosecutors something they have never had in New York before**. Under a proposal unveiled by Democratic senators last week, prosecutors would gain the ability to ask for people to be sent to jail before the benefit of a trial, based on speculation about what sort of crimes they might commit in the future.

To reformers’ dismay, the issue has become a political football. State Republicans see the reforms as a chance to win back control of the state Senate by painting Democrats as soft on crime. It’s a return to a well-worn playbook: For decades, Republicans have hammered their opponents with scare campaigns full of racist dog whistles. The tactic reached its apotheosis in George H.W. Bush’s Willie Horton campaign ad and, by the 1990s, Democrats were triangulating, talking about “superpredators” and passing their own brutal crime bills. With New York Senate Democrats’ evident intention to turn tail and disavow their own legislation, history may be repeating itself.

The stakes are high. New York has long been a national bellwether for criminal justice policy. Around the country, opponents of mass incarceration are anxiously watching the backlash in this state of 20 million people. The interests arrayed against New York’s reforms exist everywhere, and something like the counterattack happening in New York can be expected anywhere criminal justice reform makes substantial progress. Have decades of dropping crime rates and a growing awareness of the racist violence baked into our criminal system primed the public to be open to experiment with alternatives to maximal incarceration? Or do the throwback, boogeyman politics of Willie Horton and superpredators hold the same power that they did 30 years ago? In New York, we’re about to find out.

The Compromise Reforms

Critics of last year’s reforms call the measures rushed and poorly thought out. “That’s just wrong,” retorted Justine Olderman, executive director of the Bronx Defenders, a public defender organization that lobbied for the reforms. “We have been having these conversations in Albany literally for years.” The difference, of course, is that in previous years, Republicans controlled the legislature, which meant that police and prosecutors who had their ear could block the reforms. Last year, with Democrats in control, the issues were given a full hearing with input from all sides, and the anti-reform voices couldn’t kill the legislation.

That’s not to say that the reformers rammed their demands through without concession. On the contrary, the negotiations around bail reform were incredibly delicate, and the resulting compromise left some anti-incarceration advocates feeling that altogether too much had been given away.

For reformers, the crux of the negotiations was about finding a way to end money bail without opening the door to some new regime of pretrial incarceration. In New York, the overwhelming majority of people locked up pretrial were behind bars because they couldn’t afford money bail. Being detained on money bail was incredibly damaging to defendants and their communities — coercing guilty pleas, breaking up families, and costing defendants jobs and housing — but it was also unnecessary in achieving its stated goal: making sure defendants return to court for future hearings. Reformers wanted to end money bail not because wealth-based detention is abhorrent to justice (though it surely is), but because money bail was the primary form of pretrial detention in New York, and their numbers showed that in almost every case, pretrial detention of any kind is damaging and counterproductive.

In opening up New York’s bail laws for reform, however, advocates were running a risk. New York had resisted the national trend of expanding judges’ power to include the ability to lock defendants up based on an assessment of their “dangerousness.” The state’s prosecutors and police saw bail reform was an opportunity to correct this. For community activists, public defenders, and civil libertarians, adopting a “dangerousness” standard was untenable. Given the racist history of cash bail, could judges be trusted not to use a dangerousness test to achieve the same result? Even a more technocratic approach to **“dangerousness” decisions** — algorithmically driven “risk assessment tools” — has been disavowed by one of its biggest advocates for **replicating the** race and class imbalances in the criminal justice system.

In the high-pressure negotiations that accompanied the final drafting of the reforms last spring, reformers made a difficult choice: To fend off efforts to introduce a dangerousness standard, they would give up on their goal of completely abolishing money bail. Instead, they agreed to carve out exceptions, for violent felonies and sex crimes, where cash bail could still apply, along with other concessions. To prison abolitionist critics, this was a foolish capitulation.

Even some members of the coalition directly involved in the Albany negotiations admit mixed feelings about the result. “We wanted the legislation passed last year to do more,” said Nick Encalada-Malinowski, the civil rights campaign director for VOCAL-NY, a grassroots group that lobbied for the reforms. “More people out of jail, more due process on the front end.” Still, the reformers told themselves, they had accomplished a great deal. The vast majority of people who would once have been held on money bail would now go free, they had skirted the pitfall of dangerousness, and in coming legislative sessions they could push their agenda even further.

None of them suspected they’d be engaged in the fight of their lives just eight months later, struggling to defend their bitterly won compromise.

The Media Plays Along

Even before the new laws went into effect, there were indications that opponents to the changes wouldn’t be accepting them quietly. In October, news broke that the education arm of the District Attorneys Association of New York, which had strenuously lobbied against the changes, was offering training to prosecutors around the state on how to circumvent the rules and jail people the new laws intended to release.

In November, sheriffs around the state gave coordinated press conferences warning that the new laws would endanger New Yorkers. “We are not fearmongers,” Albany County Sheriff Craig Apple told reporters. “This is going to jeopardize public safety, short and sweet.” In December, John Flanagan, the top Republican in the state Senate, called for the reforms to be repealed even before they went into effect. “I’m not going to go lightly along with the implementation of the law,” Flanagan said, warning that “some type of egregious incident or event” was bound to result.

Late in December, New York tabloids ran stories about Tiffany Harris, a mentally ill woman who slapped several Jewish women. Harris was arrested, arraigned, released, and only a few days later hit another woman, shouting out, “Fuck you, Jews!” The episode resonated in a Jewish community already alarmed about the increasing frequency of anti-Semitic incidents, but the papers also explicitly linked Harris’s case to bail reform. Left unsaid in the furor was the fact that the new bail law gives judges the option of ordering mental health counseling, but Harris’s judge hadn’t done so. Instead, a punitive narrative took hold: Why wasn’t this woman with untreated mental illness in jail?

The real firestorm didn’t hit until this January, as the laws went into effect. Within days, an escalating cycle of fearmongering had established itself. Law enforcement officials would attempt to link frightening incidents to the lassitude of the new reforms. News outlets, whether out of credulity, political sympathy, or lurid sensationalism, would amplify the claim. Republican officials would decry the “egregious” incident or event, and the entire episode would be churned back into a robust social media campaign aggregating a catalog of fear.

The New York Post alone ran four covers in the month of January trumpeting the chaos and danger unleashed by the new reforms. The Daily News also stepped up its coverage of criminal courts, leaving no stone unturned in its search for cases that could be linked to the reforms. In many instances, the purported facts and linkages were strained, or outright false. In one case, a headline said the reforms had set a man free to rape, but the suspect was not charged with any sexual assault crime and the new laws did not affect the case. The New York Times was drawn in too, running a February 5 story quoting prosecutors and police linking the murder of a gang trial witness to discovery reform, another of the justice system changes passed last year. Following objections from reform advocates that the connection was entirely invented, the police commissioner was forced to concede that there was “no direct link between the death of Wilmer Maldonado Rodriguez and criminal justice reform” and the New York Times ran a new story framing the situation as a dispute between the commissioner and the court record.

As these stories accumulated, they were breathlessly disseminated and editorialized over by the social media accounts of Republicans, police unions, and prosecutors. Within days of the new laws going into effect, Washington County Sheriff Jeff Murphy started the Repeal Bail Reform group on Facebook, pumping out stories of the danger posed by the new law to more than 175,000 members. Top Republican operatives, including the state party’s political director, signed on as moderators on the page. (The group came to public attention after reporters noticed that moderators had failed to delete or deal with white supremacist remarks on the page.)

Three weeks after the reforms went into effect, newly installed New York City Police Commissioner Dermot Shea piled on, asserting that upticks in some crimes in New York City were attributable to the new laws. (For many crimes, statistics were down.) Shea lobbied Democratic legislators against the reforms and wrote a New York Times op-ed denouncing them. The New York Police Department has frequently claimed that short-term variations in data are not useful for identifying meaningful trends or analyzing policy — but in this case, Shea chose to build a sweeping policy argument on a few weeks of data. In an especially remarkable move, uniformed New York City police officers began urging citizens at community meetings to contact their legislators and ask them to repeal the reforms.

**The sheer volume of screaming headlines** made a near-Sisyphean task of reformers’ efforts to introduce nuance or correct brazen untruths. Justice Not Fear, a new project launched by the public defender media advisers Zealo.us and racial justice campaigners Color of Change, quickly spun up a rapid-response debunking operation, but that was clearly playing defense. Selling the reforms’ benefits was challenging. For one thing, the new laws are so young that most cases affected by them are still unresolved. The people who are benefiting from the reforms are still criminal defendants, and most are understandably reluctant to volunteer themselves as poster children while their freedom remains in jeopardy.

“We know that there are thousands of people all around the state whose lives are better for these reforms,” said Stan Germán, executive director of the New York County Defender Services. “For every one of these scare stories, there are hundreds of stories where someone is going home to their children instead of going to jail, someone who’s keeping their job instead of going to jail, someone who’s keeping their housing instead of going to jail. But even if you can tell their stories, they’re not sexy news stories like the blood-in-the-streets scare stuff the Post is doing. How do you get the press interested in a story about a guy sleeping in his own bed, about the bad things that didn’t happen?”

The relentless media barrage has had a measurable effect on public opinion. Last April, a statewide poll had found that 55 percent of respondents thought that eliminating money bail for misdemeanors and nonviolent felonies would be good for New York, while 38 percent thought it would be bad. A follow-up poll asking the same question on January 21 found only 37 percent saying the law was good for New York, and 49 percent bad. The polls’ author, Steven Greenberg, remarked, “Certainly, all the attention this new law has gotten across the state has had an impact with voters.”

Democrats Bail

“We always knew that there was going to be some kind of resistance from police, prosecutors, and Republicans,” said Bronx Defenders’ Olderman. “But we were surprised by the way many Democrats have responded.”

Six days into the new year, New York Attorney General Letitia James, a Democrat and former public defender, called for changes to the new law. “Safety should be the priority,” James said. (James’s office did not respond to multiple requests for comment.) The next day, Gov. Andrew Cuomo was already calling the previous year’s signature Democratic achievement a “work in progress” with “other changes that have to be made” and “consequences that have to be adjusted for.” In New York City, Mayor Bill de Blasio echoed his police commissioner in blaming the reforms for an uptick in crime over the first days of the year, calling for a dangerousness standard.

Throughout January and early February, the failure of so many state Democrats to rise to the defense of the new laws was making members of the reform coalition nervous. On February 11, it became clear that some Democrats intended to throw them under the bus. The Democratic leaders of the state Senate announced a plan to completely overturn what they’d passed the previous year. They would eliminate money bail completely, and instead deliver what the reforms’ opponents had wanted all along: a way to lock people up before their trials based on predictions of their future dangerousness.

It was exactly what reformers had carefully skirted in negotiating the compromise last year. And it got worse: Charges for which judges couldn’t set bail under last year’s reforms would now be eligible for being sent to jail. Where the previous law had avoided expanding the use of electronic monitoring ankle bracelets, the new proposal appeared to embrace their broad application. To top it off, the Senate would roll back the previous year’s discovery reforms, which had required prosecutors to promptly turn over their evidence to defendants.

“Our reforms would represent the most progressive justice reforms and justice system in the nation,” Senate Majority Leader Andrea Stewart-Cousins wrote in a statement on the proposal.

For the coalition of reform advocates, the Senate plan was a naked betrayal. Introducing a dangerousness standard was even worse than repealing the reforms. “It’s basically a worst-case scenario,” said Peter Goldberg, executive director of the Brooklyn Community Bail Fund, which is part of the coalition that backed the reforms

### CP Avoids Backlash

#### Pragmatic focus will positively shape the public discourse --- builds common ground and prevents a massive backlash

Steiker & Steiker, 17 --- Professors of Law at Harvard and University of Texas respectively (Spring 2017, Carol S. & Jordan M. “ABOLISHING THE AMERICAN DEATH PENALTY: THE COURT OF PUBLIC OPINION VERSUS THE U.S. SUPREME COURT,” 51 Val. U.L. Rev. 579, Nexis Uni via Umich Libraries, JMP)

The unavailability of human dignity as a constitutional argument likely also contributed to the capital litigation strategy pursued in the [\*594] 1960s and 1970s. When the NAACP LDF formulated its attack on the American death penalty, it decided to attack particular vulnerable practices, such as death-qualified juries, wide discretion in capital sentencing, and unitary sentencing procedures, rather than seeking judicial condemnation of the death penalty as fundamentally unjust in the abstract. Even when the LDF took the next step in challenging the constitutionality of the death penalty as a whole, it emphasized aspects of its administration rather than its inconsistency with human dignity. The Court, in turn, framed its constitutional regulation in light of these challenges, focusing exclusively on state death penalty practices rather than the death penalty itself. The limited protection for human dignity in the American constitutional tradition and the resulting strategic choices in capital litigation created a path of dependence in which the American death penalty continues to be contested on pragmatic, instrumental grounds. Moreover, the Court's resolutely pragmatic focus has likely influenced death penalty discourse in the public sphere, marginalizing further death penalty opposition rooted in deontological principle.

Outside of the Court, opponents of the death penalty have submerged absolutist arguments against the death penalty to find common ground with potential allies who do not share their foundational moral objections. Such opponents have recast efforts to eliminate the death penalty as "repeals" rather than "abolition" to avoid the moralism associated with the latter. It is much easier to find common ground around issues of wrongful conviction and cost than around the much more fraught culture-war question whether states ought to be allowed to execute heinous offenders. The United States has thus become an outlier beyond its mere retention of the death penalty; it is an outlier in the diminishing visibility of human dignity as a basis for death penalty opposition both on and off the Court.

#### Galvanizing popular momentum for the plan prevents southern law-and-order backlash

**Steiker & Steiker, 16** --- Professors of Law at Harvard and University of Texas respectively (Carol S. & Jordan M., Courting Death: The Supreme Court and Capital Punishment, ebook from University of Michigan, pg. 76-77) //ILake-JQ

If the Supreme Court had not temporarily invalidated the death penalty, the backlash that Furman unleashed, strongest in the South, could have been avoided. It is possible that without that galvanizing momentum, the death penalty would have continued to wither, and that death sentences and executions would not have climbed at all, or at least not as rapidly as they did in the two decades following Furman. It is also possible that the death penalty would not have become as much of an issue of states’ rights and the kind of masthead symbol for law-and-order politics or shibboleth in the culture wars that it became when it was so strongly linked with the liberal wing of the Supreme Court—the same Court that had imposed Brown, Miranda, and Roe v. Wade.

#### Shifting the focus to fiscal arguments is critical to build support for abolition --- past emphasis on discrimination and human rights triggered massive backlash

Sarat et al 20 Austin D. Sarat – William Nelson Cromwell Professor of Jurisprudence and Political Science; Associate Provost and Associate Dean of the Faculty; Chair of Law, Jurisprudence, and Social Thought, Charlotte Blackman, Elinor Scout Boynton, Katherine Chen, and Theodore Perez. [“After Abolition: Acquiescence, Backlash, and the Consequences of Ending the Death Penalty,” Hastings Journal of Crime and Punishment Vol. 1 Number 1 Article 4, Winter 2020, URL: <https://repository.uchastings.edu/hastings_journal_crime_punishment/vol1/iss1/4>] kly

What we observed in New Jersey, namely that abolitionists and proponents of the death penalty operate in different argumentative universes, turns out to have been true in all of the states we studied. Looking at all of them reveals that the most frequent types of arguments used by abolitionists were about innocence and economy/cost. In contrast, death penalty supporters tended to focus on arguments about deservedness, particularly those about proportionality or repeat offenses. Very rarely did either side seek to directly refute the arguments made by their opponents. As a result, neither abolitionists nor their opponents were likely to feel that they were heard or that their positions were genuinely understood.

This may be especially true when, as was the case in the four states we studied, abolition of the death penalty came after prolonged periods of investigation by study commissions, political back and forth, and sometimes moratoria imposed by a governor. Unlike the thunderbolt of a Supreme Court decision, political incrementalism allows for gradual adjustment and adaptation by both sides. In addition, decisions on such issues made at the state level may have greater legitimacy than decisions seemingly imposed by the national government.194

Backlash also is most likely when political leaders get too far out in front of public opinion.195 In all of the states we examined elected officials were cognizant of public opinion. They fashioned their own political agendas and reelection campaigns with an eye to what their constituents would accept.

Backlash may turn into concerted political action when, as is the case in many American states, the people can **reverse unpopular decisions through** direct legislation.196 This occurred in Nebraska in the aftermath of legislative abolition. As several Nebraska lawmakers noted right after the vote to end the death penalty, that decision went against the wishes of an overwhelming number of Nebraskans who believe the death penalty should be in place for those who commit the most heinous crimes.197

In general, support for the death penalty across the United States has declined to the lowest level than it has been in many decades.198 Today, as Carol and Jordan Steiker note:

The American death penalty is extraordinarily fragile, with death sentences and executions on the decline. Public support for the death penalty has diminished. The practice is increasingly marginalized around the world . . . Perhaps most important, the coalition against the death penalty is much broader now than in the early 1970s, when opponents focused primarily on discrimination and human rights. Today, conservatives of many stripes have their own concerns about the death penalty— particularly cost, but also consistency on the issue of the sanctity of life. The death penalty is not so clearly a left/right, progressive/conservative debate, which opens a space for further restriction and even abolition.199

This fragility may help explain why, in the post-2007 period, abolition generally did not produce backlash.

In the United States, the thought of abolition today seems to be more troubling to political leaders and citizens than the act of abolition. While polls show that a bare majority still favors the death penalty, Americans may be more ready to accept abolition than they have ever been.200 As a result, political leaders now have considerable room to maneuver and less to fear when they decide that they will “no longer tinker with the machinery of death.”201

### CP Popular With Voters

#### A focus on pragmatic instead of moral concerns is critical to win over skeptical voters

LaChance, 14 (Daniel LaChance, assistant professor of history at Emory University working at the intersection of American legal and cultural history, criminology, and literary studies. "What Will Doom the Death Penalty", The New York Times, https://www.nytimes.com/2014/09/09/opinion/what-will-finally-doom-the-death-penalty.html, 9-8-2014, Accessed 6-30-2020) //ILake-JQ

ATLANTA — TO opponents of the death penalty, recent accounts of botched executions and DNA-based exonerations of death-row prisoners have revived hope that judges and voters will finally see capital punishment for what it is: an intolerable affront to human dignity.

But while such optimism is understandable, it is misplaced. Support for capital punishment is, in fact, in decline — but it’s less the result of a moral awakening on the part of the public than a symptom of a 40-year-plus process of disillusionment.

In 1972, the Supreme Court declared the death penalty unconstitutionally unfair, but left the door open for states to come up with new laws to remedy the arbitrary sentencing criteria it found troubling. Conservatives seized that opportunity to advance a broader agenda of reclaiming a government that, in their minds, had been captured by liberal elites — welfare-oriented bureaucracies and Earl Warren’s Supreme Court — that were intent on using big government to upend traditional values. The timing was right. Violent crime had been rising since the mid-1960s. More and more Americans wanted a government that would vanquish evil rather than manage it. The revival of capital punishment expressed a powerful moral clarity that “time off for good behavior” did not.

When it came to delivering punishment in a timely and dramatic fashion, moreover, the death penalty delivered the goods: As late as 1959, most of those executed spent less than two years on death row. Thus, as states created new death penalty laws, which the Supreme Court approved in 1976, few foresaw the degree to which federal oversight of capital cases would continue.

This, more than wrongful convictions and botched executions, is what is distinctive about the contemporary American death penalty. New layers of appeals and new issues to litigate at both the state and federal levels meant that inmates put to death in 2012 had waited an average of almost 16 years for their execution date. The deeply unsatisfying, decades-long limbo that follows a death sentence today is without precedent. The 3,054 men and women languishing on the nation’s death rows have become the unwitting cast of a never-ending production of “Waiting for Godot.”

A sense of moral solidarity is hard to generate when the devil appears in the execution chamber 20 years later, a middle-aged or elderly man whose crimes have long faded from popular memory. And it’s impossible to generate when he doesn’t appear in the execution chamber at all: A vast majority of those sentenced to death since 1977 were not, or have not yet been, executed.

Efforts to remedy the problem by reforming the appellate process have been unsuccessful. In 1996, when the average stay on death row was approaching 11 years, Congress enacted legislation restricting death-row inmates’ access to federal courts, in order to speed up executions. But it didn’t work; since then, the time between sentencing and execution has grown by over 50 percent.

The problem, it turns out, isn’t foot-dragging by defense lawyers or bleeding-heart judges. It’s money. In California, for instance, the low wages paid by the state to qualified lawyers who take on indigent inmates’ appeals have meant that there aren’t enough lawyers willing to do the work. Inmates wait an average of three to five years after sentencing for a government-appointed lawyer to handle their appeal. And that’s just the beginning of a process — sometimes lasting 25 years or more — that a federal judge recently determined was so protracted that it made capital punishment in California unconstitutionally cruel and unusual.

More money for defense lawyers would reduce the high error rates in capital trials and speed up appellate reviews. But it is unlikely to be forthcoming. The costs of capital trials and appeals overwhelm budgets everywhere, but particularly in places, like the South, where the political will to fund them is the weakest. It has simply become unsustainable to be both pro-death penalty and anti-taxation, as so many Americans are.

Delivering this message to voters, rather than a moralistic one, might change their thinking. A 2012 ballot measure to abolish the death penalty in California, the shrewdly named Savings Accountability and Full Enforcement for California campaign, appealed to voters’ wallets more than their hearts and came tantalizingly close to passing. Importantly, though, that near-win occurred after nearly seven years of no executions in the state, suggesting that it wasn’t just about the financial cost of the death penalty. It was about what that money had stopped delivering to taxpayers: the sense of control, closure and confidence that are the raison d’être of the death penalty.

As depressing as it may be to abolitionists driven by a commitment to human rights, Americans, most of whom are white and live above the poverty line, find it hard to sympathize with members of an indigent, mostly minority death-row population who have been convicted of horrible crimes. Preaching to the congregation rather than the choir, then, ought to focus on the failure of capital punishment to live up to the promise of retributive justice it once held.

Casual supporters of the death penalty can be made to recognize that the death penalty has become inextricably mired in the very bureaucracy and legalism it was once supposed to transcend, and that the only solutions to the problem — an elimination of appellate lawyers for death-row inmates or a financial bailout — are unlikely to be legal or feasible.

Resources for fighting the death penalty are scarce, and for too long, abolitionists have spent them appealing to the humanistic ideals they wished most Americans shared, instead of one they actually do: distrust of government. Arguing that the death penalty is an affront to human dignity just doesn’t work. But portraying it as another failed government program just might.

#### The counterplan is critical to portray death penalty repeal as “smart on crime”

* Framing the plan as repeal rather than abolition and avoiding claims of immorality is necessary to broaden the anti-death penalty movement

Steiker, 14 --- Professor at the University of Texas School of Law (Fall 2014, Jordan, “PANEL THREE: THE WISDOM OF CAPITAL PUNISHMENT (APART FROM MORALITY OR THE RISK OF CONVICTING THE INNOCENT): THE AMERICAN DEATH PENALTY FROM A CONSEQENTIALIST PERSPECTIVE,” 47 Tex. Tech L. Rev. 211, Nexis Uni via Umich Libraries, JMP)

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

### AT: Global Modelling Requires Citing Dignity

#### Citing pragmatic grounds still ensures global modeling --- also strengthens democracy

Steiker & Steiker, 19 --- Professors of Law at Harvard and University of Texas respectively (Carol S. & Jordan M., “19. Global abolition of capital punishment: contributors, challenges and conundrums,” In Comparative Capital Punishment Law, ed. CS Steiker, JM Steiker, <https://doi-org.proxy.lib.umich.edu/10.4337/9781786433251.00030>, pp.407-9, JMP)

One important question for the future of the death penalty is whether worldwide abolition depends on the triumph of an enlightenment consensus in which all nations come to under-stand capital punishment as inconsistent with fundamental human rights. The extraordinary rate of abolition over the past five decades—with more nations jettisoning the death penalty during that period than all abolitions achieved throughout the rest of human history—stemmed in large part from the successful effort to recast the death penalty as an issue of basic human liberty rather than as a discrete issue of criminal justice policy.121 As the issue of the death penalty became an issue of international significance, with a web of treaties and advocacy calling for limits and/or the end of the practice, abolition spread rapidly. There are reasons to be optimistic that the international human rights frame of the capital punishment issue will continue to gather steam, with increasingly less resistance from retentionist jurisdictions.122 But even without such a consensus, worldwide abolition might still be possible, as some jurisdictions might end the death penalty for largely pragmatic reasons.

The U.S. provides one such possibility. The human rights claim against the death penalty has had poor traction in the U.S., especially in recent years—the very same period in which it has gained unparalleled support outside of its borders. Instead of emphasizing the wrongness of state killing, opponents of the death penalty in the U.S. tend to focus on problematic aspects of its administration, including the arbitrariness of its distribution, the prevalence of wrongful convictions, its decreasing utility as a means of incapacitation (given the widespread availability of life sentences without possibility of parole), and its unproven value as a deterrent to violent crime. The new rallying cry against capital punishment in the political sphere focuses on its extravagant cost in comparison to imprisonment, as part of a more general ‘smart on crime’ agenda to rethink punitive policies to protect the public fisc. The pragmatic case against the death penalty dominates not only efforts to repeal capital statutes within individual states, but also efforts to invalidate the death penalty as a matter of federal constitutional law. The current constitutional case against the death penalty does not depend on the claim that the death penalty violates human dignity (a claim that was greeted with little enthusiasm when offered by Justice William Brennan in the 1970s). Rather, the argument asserts that the American death penalty should be deemed ‘cruel and unusual’ because it does not presently serve any demonstrable utilitarian purposes in light of its rare, unpredictable, discriminatory and sometimes inaccurate application. As death sentences and executions continue their rapid decline in the U.S., this sort of pragmatic ground for constitutional abolition becomes stronger.

Ironically, if the U.S. were to abolish the death penalty on pragmatic rather than rights-based grounds, the prospects for worldwide recognition of a moral norm against the death penalty would increase significantly. The U.S. currently poses the greatest obstacle to the recognition of such a norm, given its role as the most powerful and influential constitutional democracy. The continued retention of the death penalty by the U.S. gives plausible deniability to jurisdictions rejecting the frame of capital punishment as a human rights issue. As Hood and Hoyle provocatively query, ‘how could [capital punishment] be [a human rights issue] if the great democratic champion of human rights still retains it?’123 If the U.S. were to join the abolitionist camp, the manner of its abolition would matter less than the fact of its abolition, and there would be mounting pressure on democracies (Japan, India) and non-democracies alike to repudiate the practice.

Would worldwide abolition stick? Some jurisdictions (Turkey, the Philippines) have embraced abolition only to flirt with reinstatement, raising the question whether the movement toward abolition is a one-way ratchet or part of a continuing dialogue. In the U.S., especially in the early 20th century, numerous individual states reinstated capital punishment after repeal in response to renewed fears of crime and increases in lynching.124 Moreover, the death penalty emerged stronger in the U.S. after the Supreme Court invalidated prevailing capital statutes nationwide in the early 1970s, precipitated by an unprecedented backlash against the judicial intervention. Notwithstanding these examples, the same forces that have propelled abolition around the world in recent years seem likely to minimize backsliding by abolitionist jurisdictions. Abolition has been achieved in large part because of increased recognition that the death penalty denies fundamental rights; that recognition has been secured by tireless political and diplomatic advocacy to fulfill the post-WWII commitments in favor of life and against cruel, inhuman or degrading treatment or punishment. Numerous international and regional treaties and conventions seek to limit or outlaw the death penalty, and many provisions specifically preclude reinstatement of the death penalty after repeal.125 A sizable majority of abolitionist jurisdictions have undertaken the commitment not to reintroduce the death penalty,126 which may account in part for the failure of some jurisdictions to reinstate despite continuing political and popular support for the punishment. For most abolitionist countries, the end of the death penalty was not understood to be a choice in domestic policy, but rather a commitment to basic human rights as part of membership in a larger community. If this path to abolition continues, the pressures for particular jurisdictions to remain abolitionist will be overwhelming, reinforced by legal, political, and economic pressures from the outside. William Schabas reminds us not to take the role of international law and institutions for granted in the path to abolition,127 as threats always remain, but the strength of such law and institutions should provide a strong counter to reinstatement.

If worldwide abolition is achieved, what will be its legacies? Andrew Novak highlights how death penalty abolition would be a monumental success of ‘an increasingly global postwar international human rights agenda,’128 one that could be deployed to challenge other criminal justice practices from a human rights perspective. Certainly practices such as solitary confinement and life imprisonment without possibility of parole would be challenged as denying human dignity (such challenges are already underway), and global abolition would provide momentum toward taming harsh punishments through a combination of international negotiation, agreement and pressure. To the extent the death penalty has not just been a byproduct of authoritarian regimes but a sustaining part of them, the end of the death penalty would promote democracy and the recognition of individual liberties. Global abolition would be a consequence of increased democratization and a further contributor to such democratization.

### AT: Repeal Requires Moral Argument

#### Death penalty can be repealed because it is just bad public policy --- its costly, has significant delays and doesn’t accomplished desired objectives

Steiker, 14 --- Professor at the University of Texas School of Law (Fall 2014, Jordan, “PANEL THREE: THE WISDOM OF CAPITAL PUNISHMENT (APART FROM MORALITY OR THE RISK OF CONVICTING THE INNOCENT): THE AMERICAN DEATH PENALTY FROM A CONSEQENTIALIST PERSPECTIVE,” 47 Tex. Tech L. Rev. 211, Nexis Uni via Umich Libraries, JMP)

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

On the one hand, we have endured all of the "costs" associated with regulation. One set of costs has been financial. 23 The increased recognition of "individualized" sentencing has made the death penalty extraordinarily expensive--far more expensive than the alternative of lifetime imprisonment. 24 The lion's share of these costs are borne at trial with [\*215] prolonged investigation, extended proceedings (such as lengthy voir dire or a separate punishment phase), and numerous experts and specialists, all directed at uncovering and litigating any substantial facts calling for a sentence less than death. 25 It is not uncommon for capital-trial costs--including defense investigation--to run into the millions of dollars in individual cases. 26 Death cases also generate much more substantial postconviction costs because states typically provide counsel to condemned, but not other, inmates and federal habeas authorizes the appointment of counsel as of right only in capital cases. 27 Most death-penalty states have also gravitated toward more restrictive death-row confinement (essentially solitary confinement), and such confinement is significantly more expensive than its less restrictive counterpart. For example, California estimates death-row confinement costs are about $ 90,000 per year, per inmate, resulting in an additional $ 60 million per year for the state. 28

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

The prospect of financial costs and significant delays has contributed to the extraordinary decline in death sentencing and executions over the past two decades. The death-sentencing drop is the most dramatic, as the national total [\*216] of death sentences per year has dropped about 75% from the highs in the mid-1990s (about 313 per year from 1994-1996) to the lows of the past three years (about 80 per year from 2011-2013). 34 The drop in death sentencing seems near universal, including Texas, which has not produced more than ten sentences in a year for six consecutive years, after reaching 40 per year in the mid-1990s. 35 The drop in executions nationwide is very significant, but not quite as dramatic, falling from close to 100 per year in 1999 to about 45 per year over the past five years. 36 Both of these declines are likely causally connected, in both directions to the significant decline in popular support for the death penalty, which reflected in recent opinion polls: declining popular support results in fewer death sentences and executions, and the decline in death sentences and executions erodes public confidence in the death penalty. 37

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

Overall, we have a rare practice, which is often applied randomly or invidiously at great financial cost and in a time-consuming process with declining popular support. Suspending "moral questions," as well as the risk of convicting the innocent, the prevailing American death penalty is bad public policy. Given this conclusion, I am not obligated to address the further, somewhat ambiguous question regarding how the death penalty should be "administered" if retained. It is not clear whether "administered" here refers to the broad sense of constructing a capital system or the narrow sense of choosing the method of execution. This confusion is reminiscent of stories, perhaps apocryphal, about some disheartening colloquies on voir dire in a few old Texas [\*217] capital cases. Prospective jurors were routinely asked whether they could "give" the death penalty in an appropriate case as part of the "death-qualification" process to ensure that the jurors were not categorically and irrevocably opposed to the death-penalty option. In a few cases, prospective jurors apparently volunteered that they could "give" the death penalty so long as the court could provide advance notice (so that the jurors could be excused from work) and if prison officials would show them what to do. In other words, these jurors understood the question to ask whether they would be willing to serve as executioners. Needless to say, such jurors were not ideal for the defense side. If "administer" here likewise refers to the process of execution, the question again highlights the present weakness of the American death penalty. The litigation surrounding lethal injection is in many respects a microcosm of the American death penalty, reflecting the widespread ambivalence about the punishment and inefficacy of the present system. Such litigation has contributed to the slowing of executions in the United States, as states have been remarkably reluctant to shift to other execution methods in response to the declining availability of lethal drugs and concerns about the risk of "botched" executions using prevailing protocols. 41 Although use of the firing squad would avoid many of the problems associated with lethal injection, states have thus far resisted such a change given their conflicting desires to punish retributively while avoiding visible infliction of pain to the inmate or damage to the body of the condemned. The fact that lethal injection concerns have managed to stymie execution efforts reflects the increasing ambivalence of government officials and the general public to carry out executions, and that ambivalence in turn renders the American death penalty increasingly expensive, inefficient, and incapable of achieving either deterrence-based or retributive goals.

Happily, I am not required to answer the "administration" question because it is contingent on answering the first question affirmatively--that the death penalty should be retained. But, in the same spirit, I will address how, if the death penalty is to die, it should expire. At this moment in American capital history two paths seem possible. First, the death penalty could continue to wither--with more states joining the repeal/abolitionist ranks--and a continuing decline in capital sentencing and executions in the remaining retentionist states. As of now, thirty-two states have the death penalty on the books, but far fewer are active in death sentencing, and even fewer in executions. 42 In fact, only three states (California, Florida, and Texas) sentenced more than ten inmates to death in the most recent two-year period (2012-2013), and five states (Texas, Virginia, Oklahoma, Missouri, and [\*218] Florida) are responsible for nearly two-thirds (901) of all executions (1,386) in the modern era. 43 Six jurisdictions have abandoned the death penalty over the past decade (New York, New Jersey, New Mexico, Illinois, Connecticut, and Maryland), and several other jurisdictions appear on the cusp--New Hampshire recently failed to repeal by just one vote. 44 This first path would not produce "total" abolition in the short term, but the continued marginalization of the death penalty to a small number of jurisdictions would likely lead to the expiration of the practice in the long term. The second path to abolition would be a dramatic judicial intervention akin to Furman--a pronouncement by the U.S. Supreme Court that the death penalty no longer comports with evolving standards of decency, notwithstanding its retention in a majority of states. Over the past two decades, the Court has actually laid the conceptual groundwork for such a decision. 45 In its proportionality decisions, the Court has deemphasized the sheer number of states that authorize a challenged practice and has instead highlighted other indicia of societal values, including jury verdicts, expert and professional judgments, world practices and attitudes, and opinion polls. 46 These criteria increasingly point toward abolition given the dramatic decline in death sentencing, the American Law Institute's withdrawal of the death-penalty provision of the Model Penal Code, 47 the increasing isolation of the United States among democracies retaining capital punishment, and declining public support in national polling. 48 In addition, several Justices have called attention to the failures of the Court's regulatory efforts to solve some of the practical problems associated with the American death penalty, including its arbitrary and discriminatory application, 49 risk of error, 50 and inability to secure meaningful social benefits 51 Indeed, Justices Blackmun and Stevens, who [\*219] resisted calls for judicial abolition and supported reinstatement of the death penalty post-Furman, subsequently concluded independently that the Court's efforts to regulate the death penalty had failed, rendering the death penalty unconstitutional. 52

### AT: Doesn’t Solve Morality

#### Ending death penalty for pragmatic reasons still implicitly recognizes its moral flaws

Steiker, 14 --- Professor at the University of Texas School of Law (Fall 2014, Jordan, “PANEL THREE: THE WISDOM OF CAPITAL PUNISHMENT (APART FROM MORALITY OR THE RISK OF CONVICTING THE INNOCENT): THE AMERICAN DEATH PENALTY FROM A CONSEQENTIALIST PERSPECTIVE,” 47 Tex. Tech L. Rev. 211, Nexis Uni via Umich Libraries, JMP)

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

I understand the impulse to avoid these foundational questions on the ground that most people are unmovable from their original, often intuitive, commitment. But it seems odd and wrong to regard the purportedly non-foundational issues--"pragmatic" questions of cost, efficacy, and so on--as somehow "non-moral" questions. For many philosophers and policymakers, the morality of the death penalty turns entirely, or at least largely, on its social usefulness; suspending considerations of morality would essentially leave us with nothing to say at all. Perhaps it is even more difficult to suspend consideration of moral questions in the death-penalty context because many of the seemingly practical or prudential utilitarian considerations are especially difficult to sever from moral discourse. For example, some of the more pressing consequentialist concerns in capital practice include whether the punishment is administered in an arbitrary or discriminatory manner, whether the death penalty deters violent crime, and whether the death penalty is [\*212] administered with sufficient accuracy. 3 Each of these consequentialist considerations carries broader moral implications such as the justifiability of a (potentially) useful social practice that is administered arbitrarily or discriminatorily, the permissibility of deterrence as a justification for execution (treating offenders as means rather than ends), and whether error in the ultimate punishment should be tolerated (and if so, how much?).

### AT: Court Limits Backlash

#### Supreme Court can’t solve major backlash – it follows rather than leads public attitudes

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For the first time in a long time, the Supreme Court's most important death penalty decisions have all gone the defendant's way. One gets the sneaking suspicion that the Court's newfound willingness to protect capital defendants is just a reflection of popular support for death penalty reform and will dissipate when needed the most-in less hospitable times. At first glance, the Supreme Court's 1972 decision in Furman allows for optimism, seemingly exemplifying the Court's willingness to play a heroic, countermajoritarian role in the death penalty context. From a historical perspective, however, that view of the decision is inaccurate. If anything, Furman, Gregg, and the events that transpired between them showcase a fundamental flaw in the Supreme Court's role as protector of minority rights-its limited inclination and ability to render countermajoritarian change.

Both Furman and Gregg illustrate the Supreme Court's inherent limitations, but they do so in different ways. Furman shows that even in its more countermajoritarian moments, the Court tends to reflect the social and political movements of its time. Gregg shows that when faced with a genuinely hostile socio-political context, the Court tends to back down, deferring instead to popular sentiment. Taken together, both decisions reveal a Supreme Court that is unlikely to intervene on behalf of unpopular minorities until a substantial (and growing) segment of society supports that intervention. Even then, Furman reminds us that the Court's "help" may do more harm than good, retarding the very cause that the Justices are trying to promote.

Of course, the lessons of Furman and its aftermath still leave the question of how the majoritarian influence of extralegal context interacts with the Supreme Court's majoritarian Eighth Amendment doctrine. Does doctrine drive the Supreme Court's "evolving standards" decisionmaking, or is there still room for extralegal influences? If extralegal influences still play a role, can those influences shape the development of doctrine itself? These are important and as yet unanswered questions that I leave for another day.410 For now, it is enough to know that even without the influence of majoritarian doctrine, extralegal context places intrinsic limits on the Supreme Court's inclination and ability to protect.

We tend to see the Supreme Court as a countermajoritarian hero, our white knight ready and able to protect unpopular, politically powerless minorities who cannot protect themselves.411 Yet this image of the Court is ahistoric. In the death penalty context and beyond, the Court's inclination to protect is profoundly influenced by the social and political setting in which it operates. We ought to recognize that fact and rethink our reliance on the Supreme Court to protect unpopular minorities from the tyrannical potential of majority rule.

### AT: Theory

#### WHEN and HOW the death penalty should be abolished is the core of the debate

Steiker & Steiker, 17 --- Professors of Law at Harvard and University of Texas respectively (Spring 2017, Carol S. & Jordan M. “ABOLISHING THE AMERICAN DEATH PENALTY: THE COURT OF PUBLIC OPINION VERSUS THE U.S. SUPREME COURT,” 51 Val. U.L. Rev. 579, Nexis Uni via Umich Libraries, JMP)

[\*579] I. INTRODUCTION

The American death penalty is newly fragile. About two decades ago, death sentences and executions reached their modern era highs and capital punishment seemed to be an entrenched part of the criminal justice system. Thirty-eight states and the federal government had capital statutes on the books, and political actors at all levels seemed committed to accelerating executions. Emblematic of this commitment was Congress's passage of the Antiterrorism and Effective Death Penalty Act of 1996, which limited federal habeas corpus review of state and federal prisoners with the hope of reducing the time between sentence and execution. But the last fifteen years or so have seen an extraordinary withering of the death penalty. 1 Six jurisdictions have legislatively abandoned capital punishment, with several others on the cusp of doing so. Executions have declined over seventy percent, from their 1999 high of ninety-eight to a low of twenty last year. 2 Those executions are increasingly confined to a handful of states and to a handful of counties within those states. Death sentences have dropped even more dramatically, from a high of 315 per year nationwide in 1996 to a low last year of 30--over a 90 percent decline. 3 Other indications of the weakening of the death penalty abound. Public support for the death penalty, as reflected in opinion polls, has declined substantially over the past twentyfive years. 4 At its recent convention in advance of the 2016 presidential election, the Democratic Party included abolition of the death penalty in [\*580] the party platform for the first time. Over the past several years, even some conservative, evangelical, and victims-advocate groups have voiced their opposition to capital punishment. 5

In light of these developments, the most apt questions surrounding the American death penalty seem to be when and how, rather than whether the death penalty will be abolished. Given our federal structure, the only real prospect for nationwide abolition is a decision by the U.S. Supreme Court finding the practice unconstitutional. Over four decades ago, the Court came close to ending the death penalty in 1972, when it found all prevailing statutes unconstitutional. 6 Four years later, the Court upheld many new statutes passed in the wake of its decision. 7 Since that time, the Court has developed a complicated series of doctrines regulating the operation of the American death penalty but has stopped short of finding the practice unconstitutional. Increasingly though, Justices on the Court have indicated a willingness to revisit the broader issue of the constitutionality of the death penalty writ large. 8

What would constitutional abolition look like? This Essay focuses on the surprising disconnect between some of the most powerful anti-death penalty arguments in the public arena and the arguments most likely to prevail in the Court. Three central abolitionist arguments have had enormous traction among opponents of the death penalty, yet each has fared poorly in Supreme Court decisions and none are likely to provide a dispositive, independent basis for constitutional abolition going forward. The first of these arguments concerns racial discrimination in the administration of the American death penalty. Concerns about racial discrimination were at the forefront of the efforts to regulate and restrict capital punishment in the 1960s, but the Supreme Court declined in numerous cases to hold that discriminatory application of capital punishment requires judicial intervention, much less abolition. 9 Constitutional abolition is thus unlikely to rest on the troubling and continuing role of race in the American capital system. The second major ground of attack focuses on the problem of wrongful convictions and [\*581] executions. The discovery of numerous innocents on death row in the late 1990s is often credited as a major turning point in the stability of the American death penalty, and concerns about wrongful convictions are perhaps the most frequently voiced grounds in contemporary public discourse for jettisoning capital punishment. But the Supreme Court has rejected the idea that federal courts should police the accuracy of capital convictions, refusing to endorse the basic proposition that the Constitution forbids the execution of a convicted inmate who later uncovers evidence disproving or substantially undermining his or her guilt. 10 The Court's lack of solicitude for the claims of wrongfully condemned inmates suggests that the Court is unlikely to hold that inaccuracy in the capital system fatally undermines its constitutional status. The third and most ubiquitous ground for attacking capital punishment rests on some version of human dignity. Concerns about the inhumanity of the death penalty have dominated opposition to capital punishment since the Enlightenment era, both in the United States and around the world. Opposition rooted in human dignity encompasses a number of related but distinct claims, including the assertion that capital punishment denies the worth of the individual, creates an unacceptable power in the State, treats offenders as means rather than ends, and imposes excessive suffering. These types of attacks on the death penalty have been voiced throughout American history, from the earliest days of the anti-gallows movement to the advocacy of contemporary abolitionist groups, such as the National Coalition to Abolish the Death Penalty. Arguments about human dignity provided the most important grounds for abolition in the vast majority of jurisdictions around the world that have jettisoned capital punishment, especially in Europe, and they remain the most compelling and salient bases for challenging the death penalty in continuing efforts to abolish it worldwide. Claims of human dignity, though, have had far less traction in the U.S. courts, particularly the Supreme Court. Although litigants in the 1960s and 1970s pressed the Court to find the death penalty violative of human dignity, the Court sidestepped such an approach and instead focused on the administration of the death penalty rather than its fundamental justice. When it upheld new capital statutes in 1976, it declared that the choice to retain capital punishment belonged to the states, holding that the practice could be justified on retributive or deterrence grounds. Since that time, the Court has scarcely mentioned claims of human dignity, even as it has faced challenges to dubious execution methods. If the Court were to address and endorse a categorical challenge to the death penalty, it would be [\*582] unlikely to rest its case primarily on the intrinsic value of human life or the impermissibility of state involvement in killing.

The first part of this Essay illustrates the ways in which concerns about racial discrimination, wrongful conviction, and human dignity have been marginalized within the Court's extensive constitutional regulation of the death penalty. The second portion traces the Court's most likely path to constitutional abolition given prevailing capital jurisprudence and the subordinate--but still significant--role of such concerns within that jurisprudence.

## Ban Federal Death Penalty CP

### Ban Federal Death Penalty

#### Text: The United States Federal Government should ban the federal death penalty in the form of a statutory adoption of a rule akin to the Petite Policy.

#### Federal prosecution undermines state actors and makes a death sentence more likely – the counterplan solves without restricting state criminal justice systems

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VI. Prescription - Federal Enactment of A Robust Petite Policy

In its present configuration, the federal death penalty has far-reaching implications for individual defendants and for states as sovereign entities accountable to their respective citizens. Although cooperation between federal and state law enforcement entities is desirable on the whole, constitutional doctrines have not kept pace with the modern reality, in which federal and state authorities routinely cooperate. Rather, the constitutional doctrines protect against state obstructionism, and therefore [\*207] do not provide adequate protection for individual defendants faced with successive federal prosecution.

But moreover, the presence of potential federal capital prosecution threatens to undermine the decisions of state and local actors with respect to the death penalty. In jurisdictions where the death penalty is unavailable by legislative decree, this may result in local prosecutors seeking an end-run around state law by actively seeking transfer of the case to the federal system. In other instances, local prosecutors may seek to have a case prosecuted by federal authorities in order to increase the odds of achieving a death sentence, either because federal authorities will seek death whereas the local prosecutor would not, or because the federal jury might be less favorable to the defendant. At the most extreme, a federal capital prosecution might be initiated as a rebuke to a local jury that selected life imprisonment over the penalty of death.

Although the number of federal capital prosecutions is still fairly small in proportion to the number of state murder prosecutions, there are several reasons to think that the problems highlighted in this article may increase over time. First, as described in Section IV.C, states are currently undergoing a reexamination of the death penalty. It is possible that states may follow New Jersey and New Mexico in eliminating the death penalty altogether. The difference between state and federal death penalty policy is at its most extreme - and the effect of the federal death penalty most subversive - in states in which the death penalty has been legislatively abolished. Second, as awareness of the federal death penalty's presence grows, criminal defendants and state juries may alter their behavior. A local jury may be undermined in its sense of finality when making life-or-death decisions. Criminal defendants may be hesitant to strike deals with state prosecutors, knowing that the agreed-upon sentence may be trumped by an ensuing federal prosecution. What began as collaboration may end up having a deleterious effect **on the ability of state law enforcement actors to induce cooperation** on the part of criminal defendants.

A judicial solution is unavailing. The formalism of the doctrines discussed is deeply entrenched. Although general Eighth Amendment principles favor a recalibration of the doctrines in relation to capital cases, in practice the line between a federal prosecution that truly vindicates a federal interest and one that is merely a second bite at the apple or an instance of forum-shopping for a death verdict is difficult to ascertain. At first blush, it may seem that distinctions may be drawn along statutory lines, such that certain offenses are deemed always to touch upon core federal interests - such as treason and crimes against officers of the United States - but one precept of jurisprudence under the Commerce Clause is that every federal criminal statute proscribes behavior that in at least some [\*208] instances will implicate a core federal concern. The awkward asymmetry between this judicial rule, on the one hand, and, on the other, a judicial rule under the Eighth Amendment dictating that some statutes do not present a sufficiently strong federal interest to carry the death penalty, would be great.

The Supremacy Clause militates that this problem can only be dealt with at the federal level. In many respects, this highlights the problem for the states, as the federal government has not demonstrated the capacity for restraint in this area. Federal criminal law is expansive, and there is little reason for Congress to refrain from encroaching on areas of traditional state concern. The Department of Justice's internal policies recognize the potential for encroachment, but they resort to vague and ill-defined terms such as "substantial federal interest." 273 In practice, the standards are malleable and subject to the interpretation of prosecutors in the field.

If one accepts, as argued in Part IV, that states are better at capital policymaking than is the federal government, then the problem becomes how to allow the federal government sufficient room to vindicate its interests without unduly interfering with state policymaking and political accountability. One possible solution is for Congress to enact the substance of Petite Policy as law in relation to all first-degree murder cases. In effect, then, **the federal government would be prevented from undertaking or continuing first-degree murder prosecution once a prosecution under state law arising out of the same act has been initiated**. By situating the instigation of a state prosecution as the triggering point of this federal law, the focus is drawn away from the results of the state proceeding, and the question of whether a state sentence is sufficiently punitive to vindicate federal interests is avoided.

Whereas blanket application of such a restraint in relation to all federal criminal law would not be desirable, its application in the context of homicide is less troubling for several reasons. First, current practice indicates that the states are vigorous in enforcing their proscriptions on human-on-human violence. As states are viewed by citizens as the first line of defense against street crime, political incentives exist for this practice to continue. There exists no potential for state obstruction in this arena, for similar reasons.

Congress has already incorporated similar restraints into federal criminal law in several instances. For example, 18 U.S.C. § 659, which proscribes stealing or tampering with goods in interstate or foreign shipments, provides that "[a] judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under [\*209] this section for the same act or acts." 274 The material differences between the proposed capital-specific restraint and this statute is that the latter nominally creates a race to judgment: until such time as the state proceeding reaches a conclusion, a federal prosecution based on the same acts may proceed. The language of the current, non-binding Petite Policy goes further, in that it bars "the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)." 275 Such a broadly written prohibition, statutorily adopted, would prevent the situations faced by the Carpenter brothers, who faced simultaneous federal and state capital prosecutions for the same acts, as well as the scenario faced by Samuel Ealy, who was prosecuted federally following a state court acquittal after key evidence was suppressed. From a policy standpoint, proscription of the former scenario avoids the inefficiencies of duplicative prosecutions, and avoidance of the latter scenario prevents the diminishment of state courts as a result of federal relitigation of their evidentiary rulings.

However, adoption of the Petite Policy, absent exceptions for "unvindicated federal interests" 276 resulting from the outcomes of state proceedings, would give state courts the ability to exercise an effective veto over federal prosecutions. As explained above, as a general matter the abiding interest of the states in effectively and promptly bringing murder prosecutions would obviate most of the risk associated with allowing for this type of state dominance. However, there may be scenarios in which the murder at issue represents a transgression of the sovereign interests of the United States in a manner such that a federal prosecution is appropriate and necessary. It remains true that "only the federal government can vindicate truly national interests," 277 and when the federal government moves to prosecute, for example, those responsible for the bombing of the federal building in Oklahoma City, the connection between the prosecuting sovereign and the thrust of the criminal act is unambiguous. Another such situation includes a "crime that intrudes upon federal functions, harming entities or personnel acting in a federal capacity, or when it addresses offenses committed on sites where the federal government has territorial responsibility, or when it addresses matters of international crime." 278 The problem, however, is how to draw an exception to the statute that is not so large as to render it useless as a limitation on the operation of the federal death penalty. Clearly, the line may not be drawn coextensively with the [\*210] outer parameters of federal power to enact criminal laws. A better method of line drawing is to identify exceptions based on the specific characteristics of the offense that make it a crime against the sovereignty of the United States. For example, when the victim is an official of the United States and has been targeted in the course of his or her official duties or because of his or her specific relation to the United States, the interest of the United States in prosecuting the offense is clear. 279

Any difficulty in drawing appropriate exceptions may be softened by the fact that a federal prosecution is not proscribed entirely - should the state fail to prosecute, the federal government is free to do so. Similarly, the fact that the United States must in some cases exercise restraint in favor of state prosecutions does not mean that it cannot devote law enforcement or prosecutorial resources in aid of the state proceeding.

The proposed statutory remedy would not eliminate all unfairness to individual defendants because it addresses the federal government only and does not place a limit on the ability of a state to undertake a prosecution subsequent to a federal prosecution. The statute and the restraints of the Double Jeopardy Clause still allow for this. However, the institutional features of state criminal justice systems give reasons to think that the potential for abuse in the dual sovereignty doctrine operates primarily in one direction. Whereas the federal government, which is the less cost-sensitive actor, might undertake a successive prosecution in order to obtain a conviction on the highest possible count or to obtain a death sentence, it is more likely that states would decline to follow a federal prosecution even though the law allows for them to do so.

Perhaps a larger concern arises not over the issue of fairness to individual defendants, but from a process standpoint. As discussed**,** the states are currently engaged in a reevaluation of the costs and benefits of their capital systems**.** Furthermore,public accountabilityfor criminal justice policyis greater in the states than at the federal level. It is possible that the least desirable outcome among the many troubling scenarios presented in this Article is for the existence of the federal death penalty to short-circuit or create an end-run around reasoned and accountable state death penalty policy. This was the case in North Dakota with the Alfonso Rodriguez prosecution. It is important to note, though, that under the proposed statutory remedy, this scenario could only take place with collusion on the part of state officials to specifically bypass state law in order to seek a death sentence. Authorities in North Dakota, or New Jersey, [\*211] or any other state without the death penalty could effectively prevent a federal capital prosecution by initiating a state-level prosecution. Although deliberate bypass of state policies is possible under the proposed remedy, the states are not powerless to stop it. Should state officials request or otherwise invite federal prosecution, the existence of the statutory remedy would make it clear that the officials affirmatively sought federal intervention. This brings an increased level of transparency to the decision-making process, and ultimately enhances the accountability of state actors.

VII. Conclusion

The existence of federal criminal jurisdiction within our system of dual sovereignty is of special concern in relation to capital punishment. The Eighth Amendment jurisprudence of the Supreme Court has required careful procedures by which the discretion and passion of all actors in the criminal justice system are channeled. In spite of these doctrines, the presence of dual jurisdiction over a broad range of capital crimes injects another opportunity for arbitrariness into the system. In addition to creating the potential for unfairness to individual defendants, **the presence of the federal death penalty undermines state policymakers** at every stage, from the drafting of legislation to the charging decisions of local prosecutors, and the functioning of capital juries. This diminishes the capacity of states to realize their preferences in relation to criminal justice outcomes in their territory. The states are currently engaged in a reevaluation of their death penalty systems, and the presence of the federal death penalty threatens to undermine these discussions. A due regard for the primary role of the states in criminal justice administration suggests that federal restraint, in the form of a statutory adoption of a rule akin to the Petite Policy, is in order.

#### Death penalty should be a state’s rights issue --- the counterplan enables state leadership and changes in public sentiment

Rubin, 14 --- J.D. UC Berkeley (5/5/2014, “Federalism is the answer to the death penalty controversy,” https://www.washingtonpost.com/blogs/right-turn/wp/2014/05/05/federalism-is-the-answer-to-the-death-penalty-controversy/, accessed on 7/5/20)//MP

In the 1970s it was routine for conservatives to be vociferously in favor of the death penalty. Crime was high, Democrats were against it (and on the wrong side of public opinion) and courts — despite the clear language of the Bill of Rights, which contemplated capital punishment — were deciding they could judicially extinguish the practice. In 2014 crime is low, most Democrats are not willing to publicly support its repeal and the courts have said the practice per se is not constitutional. Moreover, the hassle — the expense of endless appeals and the problem of obtaining a technique that is fast and humane — and development of DNA testing that has freed some death row inmates have made the death penalty a whole lot less attractive. Add to all that the political reality that some 30 governors are Republicans who must struggle to apply the death penalty in a way that meets muster in the courts and the court of public opinion. You then must wonder how much longer the death penalty will remain the default position even for conservatives.

Conservatives can maintain their constitutional argument that the death penalty is permitted. Pro-life conservatives can maintain the moral distinction between innocent life and execution of heinous criminals, thereby preserving “pro-life/pro-death penalty” as an intellectually honest position. But they can also say in practical terms the death penalty just isn’t worth the hassle.

In some states the death penalty is politically popular and runs rather smoothly. Texas Gov. Rick Perry said on Sunday on “Meet the Press”: “I think we have an appropriate process in place from the standpoint of the appeals process to make sure that due process is addressed. And the process of the actual execution, I will suggest to you, is very different from Oklahoma. We only use one drug. But I’m confident that the way that the executions are taken care of in the state of Texas are appropriate.” He also made a sound point in taking issue with the president’s decision to take a “pause” on executions: “He all too often — whether it’s on health care or whether it’s on education or whether it’s on this issue of how states deal with the death penalty — he looks for a one-size-fits-all solution centric to Washington.”

That is not only a valid criticism of the president, but points to the degree to which issues that once dominated national politics — **death penalty, drug laws and gay marriage — can increasingly be seen as state matters.** Conservatives resist calling a “truce” on social issues, but in fact a geographic truce of a sort is emerging. Texas can have the death penalty, tough drug laws and outlaw gay marriage; Massachusetts can select the reverse on each issue. It is not ideal for advocates who see these issues in strict moral terms (e.g. the death penalty is itself murder; gay marriage is everyone’s fundamental right), but it is a way of managing increased polarization in our political system. And **it does allow changes in public sentiment to happen gradually over time and therefore attain greater political legitimacy.**

This process fails, of course, when federal courts take the decision out of the states and nationalize the issue. No state can outlaw and severely limit abortion, says the Supreme Court. The court invalidated every state death penalty statute in the 1970s. In the case of gay marriage, the Supreme Court took a decidedly different approach. And whatever you think of the muddled jurisprudence of Supreme Court Justice Anthony Kennedy, the Supreme Court said the federal government was neither going to insist on gay marriage everywhere nor deny federal benefits everywhere to gay couples. The states were going to work it out, and they are — with more states adopting gay marriage by legislative action or referenda. Likewise, the Supreme Court in the Voting Rights Act case said the federal government did not have the factual predicate necessary to federalize voting rules in the pre-clearance states. If Congress is going to micro-manage state voting procedures, they’ll have to find real evidence of continued deprivation of voting rights.

If conservatives truly believe in the 10th Amendment, the resurgence in pro-federalism sentiment should be welcomed with open arms. If liberals think the public is on their side in these issues, they should be grateful for the opportunity to put issues into the political arena and let states register approval with them. And if we want to reduce gridlock, paralysis and vicious partisanship at the national level so as to focus on huge national challenges (e.g. growth, debt, national security), federalism is a welcome safety value.

Once again it turns out that the Founders had a pretty good grasp of political “factions” and how to manage them in a diverse democracy. We’d be wise to encourage the federalism fad; it is a crucial aspect of our system for very good reasons.

#### Federal death creates excessive federal intervention that undermines federalism and undercuts local prosecutors

McMaken, 19 --- senior editor at the Mises Institute (8/13/19, Ryan, “Abolish the Federal Death Penalty,” <https://mises.org/wire/abolish-federal-death-penalty#:~:text=After%20almost%20twenty%20years%20without,NPR%20reported%20last%20month%3A&text=Barr%20also%20asked%20the%20prisons,been%20found%20guilty%20of%20murder>,” accessed on 7/5/2020)//MP

After almost twenty years without an execution, the Federal penal system has decided to proceed with a number of executions. NPR reported last month:

U.S. Attorney General William Barr has instructed the Federal Bureau of Prisons to change the federal execution protocol to include capital punishment, the Justice Department said.

Barr also asked the prisons bureau to schedule the executions of five inmates who have been found guilty of murder. According to the DOJ, the victims in each case included children and the elderly. In some of the cases, the convicted murderers also tortured and raped their victims.

Is the Death Penalty Ever Warranted?

I am not an anti-death-penalty absolutist. That is, in some cases where the testimony and physical evidence is overwhelming — and the crimes are particularly heinous — the death penalty could be warranted, at least in theory.

But given police corruption, incompetent prosecutors, and an over-reliance on circumstantial evidence in court, a great many death-penalty cases are built on a pretty shaky foundation. Moreover, it is extremely likely that innocent people have been executed in the United States whether through errors, or through outright fraud on the part of government officials.

In other words, the death penalty is serious business, and given that government bureaucrats can't even run the DMV or the VA competently, there's no reason to assume their criminal-justice skills are anything deserving of our unconditional trust.

Nevertheless, it is conceivable that the death penalty could be justly applied in some cases.

There's No Need for a Federal Death Penalty

When examining the federal death penalty, however, it quickly becomes apparent that it is simply unnecessary — and should be completely abolished.

**State laws already address the need to prosecute violent criminals**. Murder, rape, assault, and other violent crimes are already illegal in every state of the Union. If Smith murders Wilson in, say, Pennsylvania, Smith can be tried for murder under Pennsylvania law. This is true even if Smith employs bombs, airplanes, or other tools associated with international terrorism.

There is no need for an extra layer of federal criminal justice. For example, Timothy McVeigh, who was convicted of the Oklahoma City bombing, was certainly eligible to be tried for murder under Oklahoma law. Those who perpetrated 9/11 were certainly eligible to be tried for murder under New York and Virginia laws. But McVeigh was tried for the federal crime of killing a federal agent. Zacarias Moussaoui was prosecuted in federal court for his role in the 9/11 attacks, specifically "conspiracy to murder United States employees," among other crimes.

Although these sorts of killings are certainly illegal in the states where they occur, the federal government insists on having prerogatives to prosecute defendants under federal law also. This is often done to add an additional layer of possible prosecution, and so that **defendants can be prosecuted more than once** for the same crime. **This is a violation of the Bill or Rights**, of course (as explained by Justice Neil Gorsuch) but federal courts have looked the other way on this loophole for years.

Besides, cases of terrorism or international crime rings are hardly what's behind most capital cases in federal court. We're not talking about Russian crime bosses or domestic supervillains. On the contrary, nearly all defendants in capital cases in federal court are brought to trial for run-of-the-mill crimes involving drug deals, bank robberies, or other acts that are already violations of state criminal statutes.

Moreover, in some cases, federal prosecutors deliberately go against the wishes of local prosecutors.

Lezmond Mitchell, for example, is a Navajo Indian who was convicted of murdering a Navajo woman and her granddaughter on Navajo land. He is now awaiting execution in a federal prison.

But note the murders took place on Navajo land, and Navajo law does not allow the death penalty. Nonetheless, the federal government inserted itself into the case. According to an analysis by The Intercept:

the U.S. government had forced itself onto the case. For one, because the murder alone was not punishable by death under tribal law, seeking the death penalty was “possible only by virtue of the fact that Mitchell and a fellow Navajo, aged 16, stole a car in connection with the murders they committed,” [ Judge Stephen Reinhardt wrote in a legal dissent on the case.] The Anti Car Theft Act of 1992 had made carjacking a federal crime — and the 1994 crime bill had made carjacking resulting in death a crime punishable by death. “In the absence of the carjacking, Mitchell would not have been eligible for the death penalty.”

“Equally important,” Reinhardt went on, “none of the people closely connected to the case wanted Mitchell to be subjected to the death penalty: not the victims’ family, not the Navajo Nation — of which the victims and perpetrators were all members and on whose land the crime occurred — and not the United States attorney whose job it was to prosecute Mitchell.”

No one directly involved with the case who lived within 500 miles of the reservation demanded the death penalty. But then-US Attorney General John Ashcroft intervened to ensure the death penalty was on the table.

Expanding Federal Powers

The fact that a car theft had allowed the federal government to demand jurisdiction in the Mitchell case reflects a longtime strategy used by federal lawmakers to expand federal jurisdiction over time. **By gradually adding more and more federal criminal offenses** to the statute books, **federal policymakers have made it possible for the federal government to insinuate iselfs into an ever growing number of crminal investigations.**

The US Constitution, meanwhile, only mentions three federal crimes: treason, piracy, and counterfeiting. Only piracy involves crimes that necessarily occur beyond the jurisdiction of state laws against violent crime. Counterfeiting, in contrast, is merely a type of fraud. And fraud is already illegal in every state. Treason is only a real problem if it involves violent acts against others — in which case it is already covered by state laws against violent crime.

**All other federal crimes beyond these three are based on tortured legal reasoning** designed to do an end run around the Tenth Amendment. They're justified under the "necessary and proper" clause or the commerce clause. They are redundant and largely function to greatly **expand federal intervention** into each and every American community. Beyond piracy, the entire federal apparatus for criminal prosecutions ought to be abolished. But the federal death penalty is a good place to start.

#### Federal death penalty undermines state accountability and prevents responsiveness to locals --- states should be left to determine their own criminal justice policies

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Even though a primary motivating factor in the centralized capital charging policies is the attainment of national uniformity in law enforcement,225 in most practical senses this goal is illusory.226 All capital trials, even those conducted in federal court by federal prosecutors, will have effects that are primarily local. That crime and its prosecution will remain tethered to a specific locality is inscribed in the Constitution. The Sixth Amendment vicinage requirement guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."227 Current federal law provides for venue in criminal cases "in a district where the offense was committed."228 Thus, the jury will be drawn entirely from within the state, and the family members of the victim and accused are likely to reside within the state. The defense lawyers, especially if the defendant is indigent, will be drawn from the local community within the state, and the judge that hears the case will reside within the state. Likewise, local newspapers and media outlets will cover the trial, guaranteeing that the prosecution will be an event in the consciousness of state and local residents. Lastly, federal law requires states to carry out the execution of a federal prisoner in certain instances.229

If a state acts, as have New Jersey and New Mexico, to abolish the death penalty, it has reached a policy conclusion that is against the weight of special interests and reflects the determination that the death penalty is not justifiable in light of its costs. In the event that the action abolishing (or declining to enact or reenact) a death penalty regime was premised on a consideration of intangible costs, the state is without recourse should the federal government decide to seek death for a crime that occurred within the territorial jurisdiction of the state. By virtue of the Supremacy Clause, the federal government may impose a capital punishment regime in states that have elected not to have one. Unlike other areas of federal regulation, which coerce state compliance with federal policy initiatives or goals through the spending power, the commerce power, or through its powers pursuant to Section Five of the Fourteenth Amendment, the states are not free to decline this particular policy initiative.230 When the federal government seeks participation in a federal program where "state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program."231 However, with a federal death penalty "program," costs will always be externalized to some extent on local actors, and the states and their citizenry will inevitably bear those costs. This undermines the ability of state governments to "remain responsive to the local electorate's preferences,"232 for ultimately their decisions may be overruled by the federal government.

The presence of the federal death penalty in state jurisdictions may decrease state accountability in the opposite direction as well, where the state government or local prosecutors may desire to seek the death penalty in a specific case or as a general matter, but may not have the authorization of state law to do so. In these instances, the availability of the federal death penalty undermines respect for the process by which a political consensus on the death penalty was arrived. Human-on-human killing is an extreme violation of the fabric of civil society, and reactions to such an action will necessarily be inflected with great emotion. In the context of our justice system, we rely on preexisting rules of law to achieve equitable outcomes driven by reason rather than naked emotion; likewise, our democracy is premised on the idea that our legislatures will reflect the "cool and deliberate sense of the community" rather than ideas or positions "stimulated by some irregular passion."233 We have designed our political institutions to protect against instances in which "a number of citizens, whether amounting to a majority or a minority of the whole ... are united and actuated by some common impulse of passion... adverse... to the permanent and aggregate interests of the community."234

It is often the case that the transient impulse of a community may be in favor of the death penalty even when its reasoned position is firmly against capital punishment. As former Attorney General Alberto Gonzales said, in relation to his decision to seek the death penalty in federal cases in Vermont and North Dakota, neither of which has the death penalty under state law, "I believe the fact the state doesn't have the death penalty doesn't mean that the people of the state would not impose the ultimate sanction when the right circumstances dictate that that happen."235 He was proven right by a North Dakota jury, when it returned a verdict of death for Alfonso Rodriguez, Jr., convicted of murdering college student Dru Sjodin.236

The federal prosecution and resulting death sentence registered a sense of community outrage over Rodriguez's crime, but it failed to respect the reasoned conclusion of that same community regarding the undesirability of the death penalty. This conclusion has been reaffirmed multiple times by North Dakota. When North Dakota had the death penalty in the early part of the twentieth century, the penalty was reserved only for those convicted of first-degree murder and who were already serving a life sentence on a prior conviction of first-degree murder.237 The state had not carried out an execution since 1905, when a hanging was botched; North Dakota only carried out eight legal executions as a state.238 The death penalty was taken off the books in 1975.239 In 1995, the state legislature considered a bill that would have reauthorized the death penalty for the murder of a law enforcement or correctional officer, and for murders that occurred in relation to kidnapping or rape.240 The bill was introduced in part as a response to the particularly heinous and newsworthy murder of Donna Maitz, whose sister testified before the senate in favor of the measure.241 The bill was defeated by a vote of thirty-three to fourteen; Senator Wayne Stenehjem,242 who later was elected Attorney General of North Dakota, led the opposition.243 The next time the legislature debated the death penalty was in 2003, in response to the murder of Dru Sjodin,244 but it had little support even in the face of this heinous crime.

Certainly, uniform federal law supplants local rule in numerous instances by design of our federal system. However, given the structural features and institutional capacities favoring states as criminal justice policy actors, there may be good reason to invest state criminal justice policies with favor, and to be cautious in relation to federal criminal justice policies that unseat them.

Additionally, the Eighth Amendment is especially concerned with the policy judgments made by states in the capital arena, as these judgments create the very substance of the Eighth Amendment as it is understood to "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."245 Decisions regarding categorical restrictions on the death penalty rendered by the Supreme Court are based in part on the way in which states have answered the question for themselves.246 If consensus in the states is undermined by the presence of the federal death penalty, so too is the ability of states to register their norms as part of the evolving substance of the Eighth Amendment. The Supreme Court also looks to the behavior of state juries in locations that have the death penalty to ascertain "social consensus" on an Eighth Amendment practice.247 It is not clear how death sentences meted out under federal law in jurisdictions that do not otherwise have or use the death penalty factor into the "social consensus" existing in the state.

#### Federal capital punishment undermines accountability for prosecutors and precludes successful state leadership

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B. THE FEDERAL DEATH PENALTY AND DECREASED ACCOUNTABILITY OF LOCAL PROSECUTORS

In states where the death penalty is authorized, a second order of policy decisions transpires at the county level. Decisions about whether to seek death in any one case are made by local prosecutors.248 There is strong evidence that communities exhibit their preferences regarding the death penalty through the selection of the local prosecutor, because even within states that allow the death penalty, its use varies dramatically by county. A study in the last decade revealed that only 3% of counties account for 50% of the death sentences imposed nationally.249 The federal death penalty rests across a patchwork of counties that composes the national fabric, each subsidiary unit exercising a degree of autonomy within the overarching framework of state law. The federal death penalty has the capacity to override local preferences or undermine the accountability of local prosecutors to the communities that elected them.

A federal death penalty agenda which seeks to initiate capital prosecutions in jurisdictions where local prosecutors, such as Robert Johnson of the Bronx250 and Kamala Harris of San Francisco,251 have a longstanding policy against the death penalty raises questions about the nature of the federal interest vindicated by such prosecutions. As discussed in Part II, the United States Attorney Manual recommends federal abstention from prosecution when concurrent jurisdiction exists with a state, except "when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities."252 One factor that bears on the relative interests of the state and federal governments is "[t]he relative ability and willingness of the State to prosecute effectively and obtain an appropriate punishment upon conviction."253 Similarly, the Petite Policy, which applies where a defendant's conduct already has formed the basis for a state prosecution, precludes federal prosecution based on substantially the same acts unless the matter involves a "substantial federal interest" that has been left "demonstrably unvindicated" by the foregoing prosecution.254 The Department's presumption that a prior state prosecution has vindicated the federal interest "may be overcome even when a conviction was achieved in the prior prosecution... if the prior sentence was manifestly inadequate in light of the federal interest involved."25

The implication, then, when the United States brings capital charges in a district in which the local prosecutor evidences a willingness to pursue first-degree murder charges but not the punishment of death, is that there are instances in which the only appropriate sentence for a given crime is death. Further, that even in instances in which a defendant has been prosecuted by the state, convicted of first-degree murder, and sentenced to life imprisonment without the possibility of parole, this sentence fails to vindicate a substantial federal interest

The suggestion that there are crimes for which death is the only appropriate punishment is manifestly out of step with modern death penalty jurisprudence. Taken together, Furman and Gregg require that the death penalty be imposed only under a statutory scheme that rationally narrows the class of death-eligible defendants and permits a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and circumstances of the crime.256 It seems strange to posit that a federal interest may only be vindicated by a specific outcome when that outcome cannot be guaranteed even in a federal prosecution. A death sentence "is the one punishment that cannot be prescribed by a rule of law" but is instead a moral judgment of the community as to whether "an individual has lost his moral entitlement to live."25

It may be argued that the outcome sought by the federal government is not a sentence of death, but the signaling effect of a capital charge. Thus, a federal interest may not be vindicated when a local prosecutor declines to charge a case capitally despite the availability of the death penalty. This rationale is belied in practice, however, by instances in which the federal government has found the criterion articulated under the Petite Policy to have been met even after the state sought a death sentence.258

#### States should be the leader in capital punishment – best for reevaluation and public accountability --- federal death penalty undermines it

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Perhaps a larger concern arises not over the issue of fairness to individual defendants, but from a process standpoint. As discussed, the states are currently engaged in a reevaluation of the costs and benefits of their capital systems. Furthermore, public accountability for criminal justice policy is greater in the states than at the federal level. It is possible that the least desirable outcome among the many troubling scenarios presented in this Article is for the existence of the federal death penalty to short-circuit or create an end-run around reasoned and accountable state death penalty policy. This was the case in North Dakota with the Alfonso Rodriguez prosecution. It is important to note, though, that under the proposed statutory remedy, this scenario could only take place with collusion on the part of state officials to specifically bypass state law in order to seek a death sentence. Authorities in North Dakota, or New Jersey, or any other state without the death penalty could effectively prevent a federal capital prosecution by initiating a state-level prosecution. Although deliberate bypass of state policies is possible under the proposed remedy, the states are not powerless to stop it. Should state officials request or otherwise invite federal prosecution, the existence of the statutory remedy would make it clear that the officials affirmatively sought federal intervention. This brings an increased level of transparency to the decision making process, and ultimately enhances the accountability of state actors.

#### Juries are the key factor in deciding outcomes of capital trials – federal intervention risks ill-chosen jurors and removes any incentive for mercy

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C. THE FEDERAL DEATH PENALTY AND THE ROLE OF THE CAPITAL JURY

The Sixth Amendment evinces the fundamental nature of the role that the jury plays in criminal trials.259 Nowhere is that role more profound than in a capital trial, where the jury is called upon to decide between life and death. The Supreme Court's death penalty jurisprudence has accorded constitutional significance to the flexibility of a jury to consider a defendant's individual characteristics260 and to render a decision that is essentially a moral one.261

If in fact the federal interest is lacking, and the crime is essentially a local one that happens to have been charged in federal court, then perhaps the relevant community values to be exercised are local, rather than federal. This position was taken by Judge Calabresi, who, in the case of Donald Fell, urged the Second Circuit to consider whether the vicinage requirement of the Sixth Amendment mandates a different jury selection procedure in federal capital cases arising in a state that does not itself have the death penalty. Reasoning that the vicinage requirement embodies a determination by the Framers of the necessity of the jury in maintaining local values in our federal system and in capital sentencing proceedings, Judge Calabresi concluded that "[t]he relevant community values in the instant case are constitutionally defined as those of Vermont."263 He questioned whether the normal rule of capital jury selection, which eliminates from jury pools those jurors with categorical opposition to the death penalty, adequately addresses the fundamental constitutional values at stake.264 Judge Calabresi also questioned whether the imposition of a federal capital sentence "in situations that involve predominately local crimes in non-death penalty states may be sufficiently rare as to be constitutionally prohibited" under the Eighth Amendment.265 Although the circuit declined to rehear the case on the grounds identified by Judge Calabresi, his questions identify poignant and perplexing issues. To further quote Judge Calabresi, In cases from states without the death penalty, the constitutionally salient values are not just the "local" values, like the existence of substantial generalized opposition to capital punishment, but much more fundamentally the value and endurance of federalism itself the recognition that we are part of a country, of a polity, that has to live with both Texan values and Northeastern values.266

Local juries are undermined in another significant way by this application of the federal death penalty. A state capital prosecution that results in a sentence of life in prison without the possibility of parole amounts to an exercise of mercy by a local jury. However, that mercy can be effectively trumped by a successive federal prosecution in which the death penalty is sought. Such a successive prosecution presents questions of fundamental fairness to the individual defendant,267 and it is also troubling in its effects on the jury system as a whole. The Supreme Court has held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."268 In Caldwell v. Mississippi, the jury was told that its decision was essentially not final, because it would be subject to automatic review by the state supreme court.269 The resulting death sentence was deemed "simply not representative of] a decision that the State had demonstrated the appropriateness of the defendant's death."270 The risk in Caldwell was that the jury might render a death sentence with the impression that appellate review could always reduce the sentence to life, and thus the perceived lack of finality of the jury decision prejudiced the defendant.271 Instances of dual prosecution by federal and state authorities may similarly prejudice the capital defendant. Although awareness by the jury of the potential for successive federal prosecution could influence that jury to select life imprisonment because a second jury is available if the death sentence is truly appropriate,272 it is also possible that the first jury, in an effort to protect its verdict, might select a death sentence. The impression of finality is eroded when a successive federal prosecution may essentially appeal, repeal, or overturn an exercise of mercy by a local jury.

#### Federal prosecutions on the death penalty destroy federalist governance by undermining state sentences

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In sum, the above cases indicate that federal prosecutions are not limited to instances in which the states are unwilling or unable to criminalize and prosecute the underlying conduct. Instead, by terms of the Petite Policy, the state sentences in each of these cases were "insufficient." A fair inference is that the federal interest is deemed more substantial than the state interest when a federal prosecution is more likely to produce a death sentence. Congruently, in some instances the federal interest is seemingly vindicated only by a certain sentencing outcome, regardless of whether a state prosecution has resulted in a conviction and lengthy sentence. As one federal judge, critical of the Petite Policy, has written, "I refuse to accept the notion that the federal interest is to demand convictions rather than prosecutions. I see nothing in the Constitution or any statute that so defines our federal interest."96 III. In Search of a Limiting Constitutional Doctrine The above examples illustrate that the federal death penalty in practice does not operate in isolation from state criminal justice systems, nor is it limited in application to defendants and crimes that raise a peculiarly federal interest. In some instances, the impact on individuals is manifestly unfair and intuitively out of step with familiar constitutional norms such as equal protection and double jeopardy. However, an examination of these and other constitutional doctrines reveals that none is sufficient to deal with the contemporary realities of federal and state law enforcement.

#### The death penalty is a subversion of constitutional limitations that cuts against the principals of federalism and creates unlimited federal power

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The constitutional doctrines discussed above did not develop in anticipation of the contemporary landscape and increasing federal and state cooperation in law enforcement and criminal prosecution. As a consequence, each government can accomplish, acting in tandem, what it could not when acting alone. These conditions allow for the subversion or avoidance of constitutional limitations on governmental power and their corresponding safeguards for individuals. These constitutional doctrines do not grapple with and address the realities of concurrent criminal jurisdiction within our dual government. In sum, criminal defendants experience an on-the-ground reality that is starkly different than the operative backdrop against which these doctrines developed. That dual sovereignty results in multiple prosecutions, escalating sentences, and a subversion of individual rights – that cuts against a fundamental and founding precept of federalism that by vesting the power conferred by the people in two spheres of government, state and federal, "a double security arises to the rights of the people."15

## Counterplans

### CP States

#### The states solve and signals court follow on.

Parker 13(Nicholas M. Parker J.D. candidate, Stanford Law School, 2-17-2013, " The Road to Abolition: How Widespread Legislative Repeal of the Death Penalty in the States Could Catalyze a Nationwide Ban on Capital Punishment," https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1044&context=lpb, accessed 6-30-2020//mrul) **\* we don’t endorse the offensive language this evidence and have chosen not to underline or read it**

B. What Constitutes a “National Consensus”?:

The Future of the American Death Penalty Anti-death penalty advocates readily acknowledge that legislative repeal is politically infeasible in a number of states.277 But, as the Supreme Court noted in Enmund v. Florida, the legislative position of the states need not be “‘wholly unanimous’” to justify abandoning the practice because it runs counter to “evolving standards of decency.”278 Rather, the legislative evidence need only “weigh[] on the side of rejecting capital punishment” for the Supreme Court to jettison it.279 Indeed, as the Court pointed out in Atkins, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”280 With regard to legislative repeal of the death penalty, the direction of change is clear: five states have abolished their death penalties since 2004—four of them by statute and the other, New York, by a hybrid judicial/legislative process.281 Meanwhile, no state has permanently reinstituted the death penalty since Kansas in 1994,282 though that state has not actually executed anyone since 1965.283 Thus, in the years since repeal legislation began to take hold, there has been a “complete absence of States passing legislation reinstating the power to conduct . . . executions.”284 And in none of those states that have legislatively abolished capital punishment has a reinstatement bill actually come to a full vote.285

Here, we can draw another parallel to the Court’s reasoning in Atkins. In that case, the Court viewed the fact that executions of mentally ~~retarded~~ defendants were “uncommon” in those states that nominally allowed for the practice in 2002 as a factor counseling for a finding of a “national consensus” against such executions.286 Similarly, executions are rare in many states that currently permit capital punishment: thirteen of the thirty-three states that still have a death penalty on their books have executed fewer than eight people since 1976, when the Supreme Court reaffirmed the constitutionality of capital punishment in Gregg. 287 Two of these states, in fact, have not executed anyone in more than forty-five years.288 An additional five have not executed anyone this century.289 In many of these states, therefore, there is, as there was in Atkins, “little need to pursue legislation barring . . . execution[s].”290 And yet this does not mean that a “national consensus” has not developed, or is not developing, against capital punishment altogether. For anti-death penalty advocates, therefore, nationwide repeal may now be a question of “when” and not “if”—that, at least, is the hope.291

The Supreme Court has never provided a clear definition of what constitutes a “national consensus” for Eighth Amendment purposes; its decisions involving such an inquiry thus provide little guidance on the number of states required to establish a consensus.292 For example, in Graham v. Florida, the Supreme Court determined that the laws of a mere thirteen states constituted a “national consensus” against the imposition of a sentence of life imprisonment with no chance for parole on a juvenile offender who did not commit a homicide.293 But in Stanford v. Kentucky, the Court determined that the laws of as many as twentytwo or even twenty-five states did not constitute a “national consensus” against the imposition of the death penalty on juvenile offenders aged sixteen or seventeen at the time of their crimes.294 The cases for which the Court has canvassed the state legislatures to ferret out the existence of a “national consensus” therefore do not provide a target number or a clear line for death penalty abolition advocates

Such advocates, for their part, do not believe that a simple majority of states is enough to constitute a “national consensus” when it comes to the death penalty.295 Given the Supreme Court’s “national consensus” precedent, they are probably right.296 What, then, might be a reasonable target for abolitionists? Excluding Graham as an outlier, in each case in which the Court has looked to state laws to determine the presence of a “national consensus,” it has required at least thirty states before it will find the existence of such a consensus.297 If thirty is the magic number, then, an additional thirteen states would have to eradicate their death penalties to force the Court’s hand. Another option is borne out of the Constitution itself: perhaps three-quarters of the states must abolish their death penalties before the Supreme Court will determine that a “national consensus” exists against capital punishment altogether.298 If the Court were to use this metric, an additional twenty-one states would have to do away with their capital punishment schemes to constitute a “national consensus.”

#### State legislation solves better – courts decisions can be repealed by congress.

Parker 13 (Nicholas M. Parker is from Stanford Law School, 2-17-2013, " The Road to Abolition: How Widespread Legislative Repeal of the Death Penalty in the States Could Catalyze a Nationwide Ban on Capital Punishment," https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1044&context=lpb, accessed 6-30-2020//mrul)

The idea that legislatures are more institutionally authoritative than courts is central to the American system of government.24 Legislators are, after all, democratically accountable to their constituents while (unelected) judges are not.25 As a result, the notion of “legislative supremacy,” which is written into Article I of the Constitution and is considered a fundamental tenet of statutory interpretation, generally gives lawmakers’ actions more weight than judges’ pronouncements.26

The U.S. Supreme Court’s use of the doctrine of statutory stare decisis illustrates this principle in action: the Court is usually more reluctant to abandon its statutory precedent than it is to overrule its constitutional precedent, and it therefore gives “special force” to its statutory decisions.27 There are a couple of reasons for this. One is practical: in the context of constitutional precedent, “correction through legislative action is practically impossible,”28 but when it comes to statutory interpretation, Congress can respond to a judicial decision by repealing, rewriting or leaving in place the law in question.29 This stems from the idea that Congressional silence in the wake of a judicial decision indicates Congress’s tacit approval of that decision.30 A related but distinct rationale for the doctrine of statutory stare decisis has its origins in legislative supremacy and respect for the separation of powers: legislators, not judges, are democracy’s primary policymakers and changes to issues of statutory interpretation therefore ought to come from legislatures, not courts.31 Scholars generally agree that the latter rationale is stronger than the former, stressing that Congressional silence is often meaningless while separation of powers and legislative supremacy carry great weight.32 And whil0e the roots of statutory stare decisis extend into history, the doctrine is alive and well today, as illustrated by its invocation in two recent Supreme Court decisions.33

Moreover, though the doctrine of statutory stare decisis is generally associated with the U.S. Supreme Court and its relationship with Congress, its logic applies equally to state supreme courts and their relationships with their respective state legislatures.34 Thus, the widely-accepted idea of legislative supremacy (and its treatment as illustrated by the doctrine of statutory stare decisis) indicates that courts—and the U.S. Supreme Court in particular—give more weight to legislative action than to judicial opinions. And while this is certainly true as a general abstraction, it rings particularly true in the context of the death penalty and the Eighth Amendment’s “evolving standards of decency.”

Twice in the last decade, the Supreme Court has struck down specific applications of the death penalty as violative of the Eighth Amendment’s prohibition against cruel and unusual punishment after determining that a “national consensus ha[d] developed against” the relevant application.35 In both cases, the Court made this determination after a thorough review of the legislative activity occurring throughout the states.36 The rest of this Part examines more closely the Supreme Court’s decisions in Atkins and Roper to illustrate how legislative activity in the states can persuade the Court that “evolving standards of decency” are such that particular applications of the death penalty violate the Eighth Amendment. By doing so, it implies that if enough state legislatures ban the death penalty altogether, the Supreme Court eventually will be compelled to issue a blanket ruling banning capital punishment in all cases—an implication confronted head on in Parts II and III.

### CP Constitutional Amendment

#### A constitutional amendment solves by considering what violates human dignity --- would end death penalty and other harsh punishments like solitary confinement

Resnik and Curtis-Resnik 12 (Judith Resnik is a Yale law professor and Jonathan Curtis-Resnik is a student at Wesleyan University., 6-18-2012, "Abolish the Death Penalty and the Supermax, Too," Slate Magazine, https://slate.com/news-and-politics/2012/06/cruel-and-unusual-punishment-abolish-the-death-penalty-and-the-supermax.html, accessed 7-1-2020//mrul)

The Eighth Amendment currently speaks of a ban on the infliction of “cruel and unusual punishment.”

We should expand the text to read:

“The prohibition on the infliction of cruel and unusual punishment requires that neither the state nor the federal government shall impose the death penalty, execute those who have been sentenced to death, or place individuals in prolonged solitary confinement. Further, no person, whether citizen or not and whether held awaiting trial, convicted, or in detention for other reasons, shall be subjected to cruel, unusual, or degrading treatment that violates human dignity. When determining whether such a breach is or has taken place, all branches of the government shall consider evolving standards, both national and international, of human decency.”

We need this amendment because the Supreme Court, which once seemed on the way to understanding the Constitution to prohibit the death penalty and prolonged isolation, has retreated. The United States stands alone among democratic nations in its use of the death penalty, and it also has pioneered a new and alarming kind of prison—the Supermax.

The death penalty saga is familiar. Between 1967 and 1977, no one was executed in the United States, in part because the Supreme Court found that some state laws gave jurors either too much or too little discretion in deciding about whether to send someone to death. A second abolitionist argument was that in light of the world-wide rejection of the death penalty, the Eighth Amendment should incorporate evolving standards. A third abolitionist argument pointed to study after study showing that black defendants accused of killing white victims were more likely to be sentenced to death than when black victims were killed.

But in the fall of 1976, and over objections that Utah’s death penalty statute was unconstitutional, the Supreme Court declined to stay the execution of Gary Gilmore, and capital punishment returned to the United States. Since then, [1,298 people have been executed](http://www.deathpenaltyinfo.org/documents/FactSheet.pdf).

The picture has shifted somewhat lately, as some states ([recently Connecticut](http://www.cbsnews.com/8301-201_162-57421262/connecticut-governor-signs-death-penalty-repeal/)) have repealed their death penalty statutes. The Supreme Court has also held that executing the mentally disabled or those who were juveniles when they committed murder is unconstitutional. But those decisions don’t go far enough, especially given the ongoing evidence of wrongful convictions ([with 101 people who have been sentenced to death exonerated since 1989](http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_summary.pdf)), and of [ongoing racial disparities](http://www.nytimes.com/2012/04/21/us/north-carolina-law-used-to-set-aside-a-death-sentence.html?pagewanted=all). A constitutional ban is the right solution.

Concerns about the harms of solitary confinement go back to the 1890s, when the Supreme Court [objected to this punishment for a murder felon](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=134&invol=160), explaining that “after even a short confinement,” such detention made a prisoner unable to “recover sufficient mental activity to be of any subsequent service to the community.” Almost a century later, in the 1970s, the court said that [Arkansas’ use of indefinite punitive isolation violated the Eighth Amendment](http://www.law.cornell.edu/supct/search/display.html?terms=prison%20or%20prisoner&url=/supct/html/historics/USSC_CR_0503_0001_ZC1.html). In that case, an “average of 4 … prisoners were crowded into windowless 8x10 cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell”).>

During the same decade, however, the federal government developed the Supermax, built to hold people in extreme isolation for extended periods of time. Many states followed suit, and by 2000, more than 25,000 people were held in more than 30 Supermax facilities. Mental health professionals detailed the harms and other countries rejected this U.S. model. [The Supermax experience is like living in a “hellhole,” as one doctor called it](http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande), describing the hallucinations, compulsive behaviors, and psychoses produced when humans, who are innately social, are deliberately deprived of contact.

In 2005, [the Supreme Court heard a case about how prison officials decide whom to put into a Supermax](http://www.law.cornell.edu/supct/html/04-495.ZS.html). Was this an “atypical and a significant hardship,” as the question before the justices was framed? The court’s description of the Supermax itself gave a chilling answer. “Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times … and an inmate who attempts to shield the light to sleep is subject to further discipline.” Also, “cells have solid metal doors … which prevent conversation or communication with other inmates. … It is fair to say inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact … for an indefinite period of time, limited only by an inmate’s sentence.”

It should have been “fair to say” that such conditions are not just a significant hardship, but unconstitutional.That issue was not squarely before the Court, which required only a bit of procedural protection before a person is placed in solitary. Sadly, the court unanimously went further by describing prolonged isolation as likely “necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners.”

Supermax isolation degrades humans, as a first-ever [congressional hearing on solitary confinement](http://solitarywatch.com/2012/06/08/first-congressional-hearing-on-solitary-confinement-to-be-held-june-19/) will outline this week. We should abolish these terms of confinement along with abolishing the death penalty: The Supermax should never be its alternative.

#### A constitutional amendment solves best

Conklin, 19 --- Assistant Professor of Business Law, Angelo State University (7/4/19, Michael, Denver Law Review, “A STRETCH TOO FAR: FLAWS IN COMPARING SLAVERY AND THE DEATH PENALTY,” <https://www.denverlawreview.org/dlr-online-article/a-stretch-too-far-flaws-in-comparing-slavery-and-the-death-penalty>, accessed on 5/27/2020, JMP)

Both slavery and the death penalty are expressly mentioned in the Constitution.[4] This provides comparable challenges to both abolitionist groups who attempt to use the courts to end the practices. The Supreme Court exhibited great hesitance to declare slavery unconstitutional as it played such a significant role in the Constitution. While abolitionists could spotlight slavery using the courts, the drastic constitutional changes they requested ultimately needed to come from the legislature. Justice Scalia once said, “It is impossible to hold unconstitutional that which the Constitution explicitly contemplates.”[5] This sentiment, made during a discussion about the death penalty, highlights the Court’s responsibility of applying the Constitution, not amending it. However, this is certainly not the view of every Justice currently on the Court. Justice Ginsburg has stated that if she had been on the Court for Furman v. Georgia, she “wouldn’t have given us the death penalty back four years later.”[6] Since a constitutional amendment was required for abolitionists to see the change they were seeking, a constitutional amendment may also be required for death penalty abolitionists to likewise see the change they are seeking.

### AT: Supreme Court => Culture Shifting

#### Media spin and preexisting attitudes toward the Court complicate the ability of the Court to shift opinion

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More recent research on this topic—particularly the experimental studies mentioned above—has built upon exciting interdisciplinary insights from the fields of political psychology and political communications to develop more sophisticated and complicated conceptual models. In these new conceptual models, the relationship between a decision of the Court and its eventual possible effect on public opinion is moderated by both the media's (non)coverage of the decision as well as individuals' preexisting attitudes toward the Court (e.g., Linos & Twist 2013). By paying increased attention to the factors that mediate how the public learns about the decision, this new line of research emphasizes that what may appear to be a lack of an observed legitimacy-conferring effect may be a result of a lack of information about the decision or a result of the nature of preexisting attitudes toward the Court. By examining the processes of information transmission and the effects of individuals' preexisting attitudes, the new literature on this topic clarifies the mechanisms through which the Court can legitimize policy.

The first intermediary between the Court and the public is the media; because such a small proportion of the public reads judicial opinions, the media frames the predominant way that Americans learn about judicial decisions. Of course, the media does not cover every US Supreme Court decision, and among those opinions covered by the media, some cases are covered more heavily than others. Indeed, one predominant way of measuring the salience of a case is to observe whether or not the case has been covered in major media outlets (Epstein & Segal 2000).22 The literature on political psychology (Barabas & Jerit 2009, 2010; Jerit et al. 2006) demonstrates that more news coverage generally translates into additional public understanding of public policies.

Beyond the question of whether the media will cover the court's decision, how the media covers the decision also affects the ability of the opinion to confer legitimacy. At the most basic level, sometimes the information promulgated by the media is inaccurate. As the media's response to the US Supreme Court's health-care decision in the summer of 2012 illustrates, sometimes the media simply misreports a court's opinion. Although the health-care example may seem egregious, extant literature on media coverage of the Court shows that such inaccurate reporting is not as rare as one might think (Slotnick & Segal 1998).

Additionally, media coverage varies in the substantive information that it provides about a decision. One of the foundational findings in the field of political psychology is the fact that framing effects affect public opinion (e.g., Druckman 2001), and this literature suggests that individuals exposed to one-sided frames (in other words, one side of the argument) exhibit higher amounts of opinion change than do those exposed to two-sided, competing frames (Chong & Druckman 2007, 2013; see also Simon & Scurich 2011). In other words, when individuals have access to competing arguments, the amount of observed opinion change is less than when they observe only a single-sided argument.

Beyond the arguments that the media chooses to present, the political psychology literature is clear that the entity presenting the arguments also conditions opinion change. In other words, source credibility matters, as Gibson & Gouws (2003) show in their study of the effectiveness of South Africa's Truth and Reconciliation Commission in getting people to accept its version of South Africa's historical truths. This source credibility can operate in multiple ways, as individuals may privilege or discount the information coming from certain networks or newspapers or, at a more micro level, they may vary in the credibility they assign to particular individuals or groups whose views the media explains. For example, interest groups play an important role in communicating the Court's decisions, both on their own through their websites and social media accounts and by making themselves available to journalists so their views are available to the public through print or broadcast media. Whether interest groups are judged to be credible varies across individuals and groups.

Second, even if a case is covered (and covered well) by the media, members of the public vary substantially in their own attention to the media; even if the media decides to cover a decision, the public's variation in its attention to the news creates additional variation in the extent that a Court opinion can influence public opinion. Thus, even if the media covers an opinion, a general inattentiveness to politics may prevent the Court from affecting the views of some citizens. If individuals do not know that the Court made a decision, it is difficult for that decision to affect their opinions.

To complicate matters further, no individual hears about a judicial opinion in a vacuum; rather, individuals have preexisting attitudes toward the Court that shape the effect that any individual Court opinion may have on individual-level public opinion. Indeed, given their fixed attitudes toward the institution, individuals may engage in motivated reasoning to justify the decision (see Lodge & Taber 2013). In other words, holding the outcome of a decision constant, individuals who are generally supportive of the Court are likely to find reasons to believe that the Court's decision is a good one, whereas those who are generally unsupportive of the Court are likely to find reasons to believe that the opinion is a bad one (see Simon & Scurich 2011).

Finally, even absent these processes, the context in which an individual learns about a Court opinion may also affect the effect it has on her opinions. Most notably, Gibson et al. (2014) show that exposure to the symbols of judicial authority has a conditional effect on acceptance of judicial opinions. Being exposed to these symbols, as all who watch televised reports on Court decisions usually are, seems to significantly change the calculus through which citizens decide whether to accept or challenge an unwanted Court ruling.

Thus, this new interdisciplinary approach presents a wealth of innovative hypotheses that must be tested in order to understand fully the extent to which the Supreme Court, through its legitimacy, is able to influence responses to its decisions. By parsing media and framing effects separately from those derived solely from the Court's role as a credible source of persuasion, scholars will be able to isolate the extent to which compliance and opinion change result from judicial legitimacy in contrast to being merely a product of the environment in which citizens learn—or do not learn—about the work of the Court.

### CP Reform

#### Problematic delays in the judicial appeals process doesn’t require abolition to remedy – reforms can address it

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As to Breyer’s arbitrariness claim in Glossip, Scalia reminds us some variation is inevitable in the jurors’ approaches to questions about how to apply their moral judgments.85 And as to Breyer’s claim of inordinate delays, Scalia quite rightly noted that much delay in the system is a product of the extensive process to which capital defendants are entitled.86 Comparatively few delays, then, are solely the product of state action. In a system devoted to ensuring the maximum possible procedural protection for a capital defendant—and one that includes a variety of post-conviction process, opportunity for clemency, as well as direct appeals—some delay in carrying out executions is inevitable.87 But such delays are not the same everywhere.88 Moreover, Justice Breyer fails to explain why the remedy for such delays would be the abandonment of capital punishment. Why would the remedy not be a process in which the state (and judges) must more expeditiously consider petitions from death row inmates? In other words, why is the remedy for inordinate delays the abandonment of capital punishment, rather than to adopt procedures that make that punishment effective?89

## Abolitionism Kritik

### Death Penalty Link

#### The aff is a form of “feel good” politics where politicians walk away grinning while defendants are commuted to die behind bars – **the plan’s lack of revolutionary abolitionism implies hope in the criminal system to provide an “moral” alternative for death row inmates**

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All of this has gotten me thinking about the recent “successes” of the abolitionist movement. On January 11, 2003, Illinois governor George Ryan declared before an audience at Northwestern Law School, [Because of] questions about the fairness . . . in sentencing; because of the spectacular failure to reform the system; because we have seen justice delayed for countless death row inmates with potentially meritorious claims; because the Illinois death penalty system is arbitrary and capricious—and therefore immoral—I no longer shall tinker with the machinery of death. . . . The legislature couldn’t reform it. Lawmakers won’t repeal it. But I will not stand for it. I must act. Our capital system is haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentence of all death row inmates.

46 Governor Ryan’s decision—which in one fell swoop removed 171 Illinois inmates from death row—reverberated beyond Illinois. It brought to national attention the growing reality of wrongful convictions and DNA exonerations. The fact that Governor Ryan had previously seemed steadfast in support for the death penalty added to the significance of his decision. It mattered little that his motivation may have been to deflect attention from a growing corruption scandal. Death penalty abolitionists heralded him. But in heralding the decision to remove 171 inmates from death row, abolitionists seemed untroubled by the fact that the inmates would, for the most part, be removed instead to death behind bars, what we euphemistically call life without parole. 47 Nor was Governor Ryan concerned, stating, “I will sleep well tonight knowing I made the right decision.” 48 If the concern is truly “the demon of error,” then the message appears to be that to sentence someone to die behind bars as a result of error is one thing, but to sentence someone to die by execution as a result of error is another thing entirely. We are willing to play the odds and risk life, but we are unwilling to play the odds and risk death.

Or consider North Carolina’s attempt to address racial discrimination in capital punishment. In 2009, North Carolina enacted the Racial Justice Act, allowing death-row inmates to use statistical data to challenge their sentences on the basis of racial discrimination, including discrimination in jury selection. 49 While the Racial Justice Act has much to commend it, it must be noted that the petitioner who demonstrates racial discrimination does not receive a new trial; rather, he or she receives a commutation of sentence to life imprisonment without the possibility of parole.

50 I have a similar concern with the Innocence Project and what Carol and Jordan Steiker rightfully critique as the “seduction of innocence.” 51 In our binary of guilty or not guilty, the focus on innocence places undue weight on exonerations, lulling us into a kind of indifference with respect to defendants who are guilty but serving unconscionably lengthy sentences. But that is only one shortcoming. The greater shortcoming is that it reifies and legitimizes a binary that should strike us as deeply problematic. As such, the movement to dismantle capital punishment by establishing that some defendants have been wrongfully executed is not a challenge to the system but a buy-in to the system. It allows lawmakers to hold as a goal the prospect of making capital punishment error free. It allows lawmakers to point to examples of actual guilt to justify the imposition of death in particular cases. And it encourages too many of us to accept guilt as sufficient alone for no-further-questions asked imprisonment. 52

When a defendant is sentenced to death behind bars because he was convicted of a noncapital offense and sentenced to LWOP—perhaps he was convicted of a drug crime or under a state’s three-strikes law—we are not even tricoteuses . There is nothing to see, nothing to hold our interest. A few civil libertarians may lament the harshness of the system, but there is no collective hand-wringing. On the other hand, when a death-eligible defendant is sentenced to life without parole, or something amounting to life, because a jury determines that the mitigating factors outweigh the aggravating factors or because of reversal on appeal or as a result of executive clemency, we bring out the champagne. We engage in collective back-slapping. In high-fives. We won. We escaped death. Job well done. We go home. But for the defendant who originally faced life and the defendant who originally faced the possibility of death, the “we” is still a limited “we.” He does not go home. Fresh off our indifference in the former scenario or our victories in the latter, we rarely pause to think through the significance of life without parole. We do not even recognize the irony that death behind bars is called life.

#### The racialization and cruelty inherent to the criminal justice system ensures cooption – plan makes those problems less visible and only the alt solves

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In short, given our history, we are vigilant when it comes to race and the death penalty. But one collateral effect of the turn to life without parole and de facto life as an alternative to death is that it renders race less visible, less pressing, less noticeable in LWOP **cases**. We have yet to bring the kind of concern we have brought to the imposition of the death penalty along racial lines to the imposition of life sentences or of de facto life sentences. Consider California’s three-strike law. African Americans are sentenced under the three-strikes law at ten times the rate of whites.82 Hispanics are sentenced at double the rate of whites.83 We all know that Ewing was sentenced to twenty five years to life for stealing three golf clubs, that Andrade was sentenced to fifty years to life for stealing four videocassettes. What the cases elide is that both defendants are black. We live in a country that, between 1970 and 2005, increased its prison population by 628%.

We live in a country where one in every one hundred persons is behind bars, where our prisons and jails now hold about 2.4 million individuals. This is more than the population of New Hampshire, more than the population of Wyoming, more than the population of Vermont. Part of this increase is attributable to the war on drugs, to be sure, but part is surely attributable to our turn to longer and longer sentences, including life without parole and de facto life. Consider more numbers. Since 1992 and 2009, the number of prisoners serving LWOP sentences has risen from about 12,400 to 41,000, an increase of more than 300%. The number of prisoners serving life sentences is more staggering. As of 2009, one in every eleven prisoners was serving a life sentence. Nationally, 35% of the individuals sentenced to death since Gregg have been black.84 By contrast, nearly 50% of the individuals sentenced to life without parole are black.85 In short, it appears that the turn to life without parole has had racial consequences that we are only beginning to attend to.

All of this makes me think of how we create invisible cities, so that we can live in new cities. It is one thing to ask what it means when the state kills. But it also has to be asked what it means when the state banishes. What does it mean when the state creates prisons that function as banishment zones, as prison cities, as invisible cities, as cities whose occupants become faceless and numbered and forgotten, as cities whose occupants are overwhelmingly black or Hispanic and overwhelmingly poor? And what does it mean for us to live in our newly configured, sanitized, and purged cities? These whiter cities? I have previously written that how we police and what we police perpetuate residential segregation along race lines.86 But it seems that how we imprison and our incarceratory turn also function in ways that have the effect of racially reconfiguring our cities. In short, our new and improved criminal justice system plays a role in “disappearing” those who are black, those who are Hispanic, and those who are poor.87

And all of this brings me back to the link between slavery abolitionists and death penalty abolitionists. It is not only that we have begun to refer to this country’s death penalty as our “new ‘peculiar institution,’”88 when in fact the “peculiar institution” is not the death penalty but our entire criminal justice system. It is not only that others have compared the work death penalty abolitionists do to the work slavery abolitionists did on the Underground Railroad.89 It is the fact that, despite slavery abolitionists’ commitment to ending slavery, many of them accepted the alternative of repatriating blacks90—of banishing blacks. It is my concern that many death penalty abolitionists, in their commitment to ending the death penalty, accept a similar alternative, except this time with more success. Now, we really are repatriating blacks, and Hispanics as well. Along racial lines, we are banishing them and, through disenfranchisement and other collateral moves, marking them as subcitizens. They are cast out to live and die in invisible, racialized prison cities, while we accept the “benefit” of now living in newly purged, whiter cities.

[VI. Rethinking Punishment]

In 2003, when Governor Ryan commuted the death sentence of 171 Illinois death-row inmates, commuting their sentences to LWOP, he backed his decision with the declaration, “I no longer shall tinker with the machinery of death.” His choice of words, of course, was deliberate, recalling Justice Blackmun’s declaration nearly a decade earlier: “From this day forward I no longer shall tinker with the machinery of death.” 91 What lay behind Justice Blackmun’s declaration, and in turn Governor Ryan’s decision, was the realization that achieving the desired level of fairness in the death penalty—fairness from error, fairness from our racialized history, fairness from class disad vantages—was simply not achievable. Justice Blackmun was largely right, of course, as was Governor Ryan, about the “demon of error.” But in an important respect, they were both wrong. In focusing on capital punishment, they were missing the forest for the trees. The problem is not simply the death penalty. Nor is the problem simply the turn to LWOP. The problem is with our entire system of punishment.

Allow me to invoke another Justice. In Baze v. Rees , a case upholding lethal-injection protocols, Justice Stevens posited that capital punishment in America may be the “product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against identifiable benefits.” 92 The same can be said of our entire system of punishment. With 2.4 million persons in U.S. prisons and jails, with the U.S. incarcerating 25% of the world’s prisoners, with our creation of invisible, racialized prison cities, of a nation of subcitizens within our larger nation, the numbers are he argument.

We have reached a point where if someone does something that offends our sensibilities, we arrest him for breaking the law, or if there is no law that prohibits his activity, we create one or bend existing law to serve our purposes. 93 (Consider how we have extended aiding and abetting liability, conspiracy liability, Pinkerton , while at the same time contracting traditional defenses such as insanity, necessity, and entrapment.) If our sentence of imprisonment is not enough to keep him from reoffending, we imprison him again and create stiffer punishments, three-strikes laws, life, LWOP, anything that the Supreme Court, with its Eighth Amendment jurisprudence, will allow. Still dissatisfied, we confine even in the absence of crime, confining preemptively, calling it civil confinement, as we did in Kansas v. Hendricks . 94 And we clamor for more, to the point of logical absurdities. When Bernard Madoff was sentenced to 150 years’ imprisonment without the possibility of parole for carrying out an elaborate Ponzi scheme, many of us still complained that his sentence was too short. And as Jessica Henry observes in her chapter in this book, the Madoff example is but one of many. 95

Indeed, we have reached a point where incarceration is the go-to punishment, even when incarceration cannot possibly address, or even deter, the underlying offense. (Increasing the period of incarceration for someone who commits a hate crime, for example, does nothing to address the underlying hate other than to fuel it. Similarly, incarcerating a drug addict cannot possibly deter other drug addicts from committing crimes to feed their addiction.)

And we have reached a point where the rate that we incarcerate blacks— we incarcerate blacks at a greater rate now than we did at the time of Brown v. Board of Education 96 and at eight times the rate we incarcerate whites— dwarfs other black/white disparities such as in unemployment (2:1), wealth (1:4), out-of-wedlock births (3:1), and infant mortality (2:1). 97 The challenge, then, is not only to rethink the death penalty or LWOP but also to rethink our entire system of punishments. We need to rethink the current alignment of death penalty abolitionists and “tough on crime” advocates when it comes to LWOP and foster a realignment of death penalty abolitionists and sentencing reformers. We need to question, as Rachel Barkow has so eloquently done, 98 the collateral consequences to noncapital sentences as a result of the heightened scrutiny given to death penalty cases. We need to admit where the traditional rationales for punishment—the justifications now offered by the Court for sanctioning “extreme punishments” 99 —fail on their own merits, as Paul Robinson has demonstrated in the case of LWOPs, 100 and how they fail to capture other dynamics at play, such as agitation for stiffer penalties from prison unions, such as race, and such as our mediafueled culture of fear. We need to bring other language to the table, including the language of norm shifting and legitimacy, to reduce the occurrence of crime so that we can spend less time worrying about the punishment for crime. We need to reorient how we teach criminal law, which marginalizes one of the most important consequences of criminal law: how we punish. We need to find common ground. It is one thing to concede life without parole for one who murders. It is another thing to concede life without parole, or its equivalent, for Ewing or for Andrade or for Harmelin or for the thousands like them. We need to be open about race, in the way the Court in Coker v. Georgia could not be. And we need to recognize, as network theorists have long done, 101 that all of this is interconnected.

#### Cosmetic reforms cannot overcome the penal rationale of incapacitation that is entrenched amongst the criminal system – that can only be avoided through disidentification from the state

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However, Whitman’s account may also be overly optimistic because it is not the absence of dignity alone that has promoted degrading punishments such as LWOP in the United States, nor should we expect a rapid weakening of support for degrading punishments simply because dignity begins to become more visible as a value in public law. Our history suggests that other conditions are necessary for the proliferation of degrading punishments, for otherwise we could not account for the rapid growth of such punishments just in the past couple of decades. The intense politicization of crime in the late 20th century has reshaped many aspects of our penal system and produced a form of mass incarceration unknown to earlier and no-less-undignified eras of US history.30 Suspicion of the police remains quite robust,31 but the prisons (and their officials) have largely succeeded in evading American cultural concerns about strong state power, at least so long as it is concentrated on individual offenders (and disreputable classes). More recent scholarship suggests that we need to look more closely at different patterns within the United States and that the role of particular agencies and actors within the states fully explains the extreme turn that (some) American punishment takes.32

This is important not just for historical purposes but also for considering how legal change might come to LWOP and other degrading punishments in the US. Even the European Court of Human Rights has been very cautious in intervening in the penal policy choices of member states. Much of the work that dignity does in Europe it does through the values and purposes it infuses through European penal administrations through the networks of European prison law and policy, such as the Council of Europe’s Committee of Ministers on the Treatment of Long Term Prisoners.33 In a similar way, the expansion of the 8th Amendment to address prison conditions and regimes by federal judges in the 1970s and 1980s built on the influence of rehabilitation and bureaucratic modernization on American corrections through the organized correctional profession and the Federal Bureau of Prisons.34 Currently, however, the collapse of rehabilitation as a form of public policy in many states, and the gigantic scaling up of the prison population into an enduring crisis of management, has limited the ability of federal courts to set limits on the penal populism that has made punishments more degrading.

Today any effort to roll back LWOP through the courts will confront the entrenched resistance of a very different body of law and policy than Europe’s dignity-based human rights law, law shaped by 30 years of war on crime. No less than human rights law, what we might call “war-on-crime” law is also based on a powerful if problematic value. Rather than dignity, the master value of war-on-crime law is the victims, or rather protecting/honoring/recognizing the victim.35 This varies greatly from state to state, and it is possible that courts will be able to accomplish more in those states where penal law remains shaped by 20th-century penal modernism (including New York, Michigan, and Illinois, among others). In California, and many other Sunbelt states,36 the legal struggle against LWOP will confront a body of penal law and policy shaped around the victim. Contrary to common belief, this does not translate predominantly as vengeance, although that is there as well, but in a logic of security which I call “total” incapacitation, to differentiate it from the broader penal rationale of incapacitation or prevention which has long been a feature of modern penology.37

Incapacitation emerged as an explicit penal rationale with the rise of positivist criminology in the late 19th century. Initially the primary focus was on the institutionalized population (both prisons and asylum). Whatever other effects it might have on the general deterrence of crime or on provoking penitence in the punished, imprisonment after the rise of the penitentiary-style prison reliably provided the isolation of the prisoner from the community. This isolation is presumed to relieve the community of at least some of the pressure of criminal behavior. In the first half of the 20th century this was also assumed to produce eugenic benefits, reducing the reproductive pressure of people with criminal propensities on the broader gene pool. But beyond the total institutions of confinement, incapacitation or prevention also applied to new measures, both therapeutic and penal, designed to reduce the personal risk posed by the individuals released from the prison or the asylum, in the form of parole or probation, juvenile probation, social work, and various forms of medication designed to control everything from psychotic symptoms to male sexual drive.

Until the end of the 20th century, incapacitation mainly functioned as the dark and presumptively minor side of the dominant rehabilitative penology (in the sense that most prisoners were presumed capable of rehabilitation). In particular, the indeterminate sentence promised to efficiently move out of prison those who could be effectively and safely reformed while in the community but to hold on indefinitely to those who remained dangerous. At the end of the 20th century, with rehabilitation in retreat in most of the United States and legal elites divided about deterrence and retribution as penal purposes, incapacitation emerged as a penal rationale in its own right and as closely fitting the rise of risk management as the primary narrative of criminal justice.38

The degree of commitment to incapacitation or, perhaps more accurately, the degree of exclusion of other penal purposes varies across the US states, but everywhere, it clearly functions as one of the dominant rationales for prisons generally and especially as the primary justification for penal expansion. California provides an example of a US jurisdiction that has embraced incapacitation virtually to the exclusion of other penal rationales and has embraced such an extreme version of incapacitation that it deserves its own term, one which I call “total” incapacitation to express its distinctions from the broader tradition. If incapacitation generally is the idea that the distribution and length of imprisonment should represent, at least in part, the degree of risk that the particular offender or class of offenders pose to the community, total incapacitation could be defined as the idea that imprisonment is appropriate whenever an offender poses any degree of risk to the community.39

California penal law, policy, and practice express this commitment to total incapacitation in a variety of ways. The distribution of imprisonment, which until recently saw increases across virtually all categories of crime, reflects an imperative that for virtually all felony offenders more imprisonment means more community safety. California’s legal structure allows prosecutors to exercise substantial control through their charging decisions. This varies from county to county in degree, and it is encouraged by the perverse incentive that state prison costs are borne solely by the state of California, whereas probation is largely paid for on a county basis.40 Parole practice also expresses an extreme degree of incapacitation. The vast majority of California prisoners are released not by parole but by expiration of their determinate sentence less good-time credits, but almost all (until recently) were placed on parole supervision for three further years, when they have faced an extremely high likelihood of being returned to prison, even if they avoid arrest for a new crime.41 Parole release, which applies only to lifers (mostly committed for murder or a felony with a third strike) has been applied extremely cautiously by historical and comparative standards and has become a growing issue for the courts that are being asked to order parole dates to be set for many California lifers who could not create stronger profiles for release but who are routinely rejected by the board of prison terms (and in the case of those on a murder commitment, the governor).42

In policy and practice, California is also wed to an extreme version of incapacitation through its administration of penal custody. California prisons have been designed primarily with the aim of holding as many people as inexpensively as possible, with little consideration given to programming of any kind or even to provision of adequate medical care. The only dimension on which prisoners are given deeper scrutiny is their estimated risk. All California prisoners are given a security rating of 1–4 and incarcerated in facilities designed with appropriate security features (and little else). Most experts agree that the system has far too many inmates defined as requiring level 4 custody. Beyond 4, California also assigns prisoners it considers high risk to two very large security housing unit prisons (SHUs), which are “supermax”- style prisons that operate on a total lockdown basis.43 Due to overcrowding, many of its level 4 ordinary prisons also operate on an intermittent lockdown basis.

On the level of law, California evidences an extreme commitment to incapacitation through the combination of the extensive use of life imprisonment and the withering of parole release. California’s death penalty, in both law and practice, are part of this complex as well. Those who are charged with capital (“special circumstance”) murder who do not face a sentence of death are automatically sentenced to LWOP. These LWOP prisoners, along with thousands of lifers with the theoretical possibility but unlikelihood of parole form a large and growing block of indigestible harsh punishment in the very core of California’s vast correctional system. Since relatively few executions are carried out in California, the more than 700 persons on death row are also effectively part of this permanent imprisonment. California adds to this already distended lifer category through its numerous sentence-enhancement laws, particularly the three-strikes law adopted by constitutional amendment through a voter initiative in 1994.44 While states have long had special sentence laws aimed at recidivists, California’s three-strikes law is by far the most far reaching in history. Under its provisions, a person who is once convicted of a violent or serious felony (the latter category includes a growing and broad list of crimes) has special penalties apply for any subsequent felony and ultimately a sentence of 25 years to life for any felony after two previous violent or serious felonies.

How did California become committed to such an extreme version of incapacitation? The success of incapacitation cannot be explained primarily by the strategic behavior of penal elites or by displaced racism. Few politicians in the 1970s saw incapacitation as a productive penal logic to promote. The appeal of getting “tough” on crime was readily apparent as early as 1968 and continued to expand throughout this period, but for most politicians this was expressed primarily through the traditional penal logics of deterrence and just punishment. Violent crime should be punished with much longer prison sentences to deter others and to reflect society’s outrage at the violation of the victim’s rights. Few if any politicians in this era saw the long prison sentence as a way to contain the dangerous on a long-term or permanent basis.

Rather, most politicians came to incapacitation late, after recognizing a new consensus emerging from middle-class homeowners, law enforcement officers, and the media that the new risks of a hyperviolent criminal class required a new and uncompromising commitment to prison as a permanent barrier between potential victims and the dangerous. Racism and the conflicted sentiments of white voters over the dismantling of legal privileges for whites may have been disguised through calls for harsher punishment, but the idea of general incapacitation—that is, long prison sentences to avoid crime that are based on the crime of conviction rather than on the individualized assessment of risk—owed as least as much to civil rights concerns about the discriminatory use of discretion in the legal system.

### LWOP Link

#### Abolishing the death penalty will fuel an expansion of LWOP – the plan cannot wish away “tough on crime” mentality that permeates prosecution

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[II. Life/Death]

As Rachel Barkow, Marie Gottschalk, and several other contributors to this book have observed, the history of life without parole as punishment is incomplete without an understanding of the movement to abolish the death penalty. In short, one consequence of the turn from death has been a turn to life without parole.

This connection between death and life without parole is perhaps most evident in the response to Furman v. Georgia , 11 which effectively invalidated all existing death penalty sentencing regimes. 12 Prior to Furman , the punishment of life without parole was rare. The punishment of life imprisonment existed, but “life” usually meant a term of years and then eligibility for parole. Furman , by removing, at least temporarily, the specter of death, changed that. Unable to sentence defendants to death, states responded in two ways. They scrambled to fashion new capital punishment schemes that might pass constitutional muster. 13 And they enacted “the next best thing”: LWOP statutes.

Consider Alabama. In Alabama life without parole originated as an option in capital cases in the early 1970s, resulting from general public dissatisfaction with murderers serving “life” terms and leaving prison early on parole. No specific, egregious incident sparked the Alabama legislature’s adoption of life without parole. Rather, a general attitude of frustration toward a “revolving door” parole system made worse by Furman , with an increased fear of the paroling of violent murderers, led to Alabama moving quickly to legislate LWOP in the post- Furman era. 14

Other states, similarly frustrated by Furman ’s invalidation of then-existing death penalty schemes, also passed LWOP statutes. 15 But Furman ’s effect extended beyond capital cases. States not only revised their statutes to make life without parole the default punishment for crimes that previously carried the possibility of death. They also added life without parole as punishment for many crimes previously punishable by mere “life.” The result was not just a rise in the number of LWOP sentences for murderers but a rise in the number of LWOP sentences for all defendants.

When the Supreme Court decided Gregg v. Georgia 16 four years later and in effect ended the moratorium on the death penalty, this symbiotic relationship between the death penalty and LWOP statutes continued, but in reverse. Armed once again with the ability to seek death, prosecutors now argued against the adoption of LWOP statutes. 17 The reason for their opposition was simple. In trying to convince sentencing jurors to impose the ultimate punishment of death, it helped that the only alternative included the specter of parole and the risk that the defendant might one day be back out on the street to kill again. 18 In contrast, many defense lawyers and abolitionists urged the enactment of LWOP statutes: with LWOP statutes, defense lawyers could argue for a less scary alternative to death. If future danger to the public was a concern, it need concern jurors no longer; a vote for life would keep the defendant behind bars until death.

The debate over LWOP statutes in Texas illustrates this often counterintuitive relationship—that death penalty advocates would often oppose the availability of tougher incarceratory sentences, while death penalty abolitionists would often support them. In Texas, prosecutors long opposed legislative efforts to pass LWOP statutes, while death penalty abolitionists pushed for such statutes. The fight became particularly intense when an LWOP bill was introduced in the Texas legislature. A local paper explained, “Several big-city prosecutors and victims-rights groups opposed it because it would make death sentences harder to obtain, and civil liberties groups [and others] pushed for its passage to give juries more choices.” 19 What caused the balance to shift decidedly in favor of the bill was a death penalty decision. In 2005, the Supreme Court decided Roper v. Simmons , 20 ruling that the execution of individuals for crimes committed before the age of eighteen was inconsistent with evolving standards of decency. Faced with this contraction of the death penalty, Texas prosecutors softened their opposition to the LWOP bill, ensuring its passage. 21 Many death penalty abolitionists, for their part, celebrated the new “tough-on-crime” measure, since it made the availability of a sentence of life imprisonment a real alternative to the possible sentence of death. The Dallas Morning News joined in the celebration, noting, “Death penalty reformers, including this newspaper, have pushed for life without parole for several years.” 22

In short, arguing that “[t]he sentence of life without parole is a stronger, fairer, and more reliable punishment” 23 and “shamelessly promot[ing] LWOP as the better option,” 24 death penalty abolitionists have often played a consequential role in advocating for LWOP statutes. In an effort to respond to the argument of death penalty advocates and prosecutors that capital punishment is the only way to ensure that rapists and murderers are not released on parole to rape and murder again, 25 many death penalty abolitionists have championed LWOP statutes. The prosecutor’s ace card in urging jurors to vote death (“Do you really want to risk this man being let back out on the street?”) has now given way to a strong defense argument (“Ladies and gentlemen, vote life with the confidence that this man will never be released again and will die in prison”).

But again, it is not just life sentences in lieu of death. The move to enact LWOP statutes as an alternative to capital punishment has also been accompanied by a move for harsher punishments in general. We have moved to life sentences in lieu of lesser sentences. This is not to diminish the role of the so-called war on drugs and other “tough on crime” measures. 26 But this is to suggest that the move to life without parole as a substitute for capital punishment facilitated the normalization of LWOP sentences across the board. By the time the Court rejected a cruel and unusual punishment challenge to the sentence issued in Harmelin v. Michigan , 27 in which a first-time drug offender received a sentence of mandatory life imprisonment without the possibility of parole for the possession of 672 grams of cocaine, tough drug sentences were becoming routine. Life sentences were becoming part and parcel of our incarceratory turn.

### AT: Non Reformist Reform

#### “Non-reformist reforms” will only legitimize a state that is fundamentally opposed to radical abolition

Post, 18 (Charlie Post, Charlie Post is a longtime socialist activist who teaches at the City University of New York. "What Strategy for the US Left?", Jacobin Magazine, https://www.jacobinmag.com/2018/02/socialist-organization-strategy-electoral-politics, 2-23-2018, Accessed 6-20-2020) //ILake-JQ \*\*Titles bracketed for clarity

The heart of Chibber’s vision is his strategy for an anticapitalist transition. Chibber attempts to find an alternative to what he argues are the failed strategic models of the twentieth-century socialist left. His main target is what he calls the “ruptural” strategy associated with the early Communist International and the revolutionary left. The notion that there will be a revolutionary crisis leading to a frontal assault on the existing capitalist state and its replacement with an alternative form of working-class power, he asserts, is simply unrealistic. Since the Second World War, the capitalist state in the Global North has exhibited enduring stability, legitimacy, and institutional strength.

Chibber also wants to avoid replicating the dilemmas of social democracy in the late twentieth century. By the 1950s, most of these parties explicitly renounced the goal of transcending capitalism. Instead, social democracy sought to regulate the system. Independent working-class struggles and postwar prosperity allowed social democracy to take credit for the massive expansion of social welfare and regulation of the labor market. However, the construction of top-down run trade unions and winning elections were incapable of sustaining the welfare state as capitalism suffered one of its periodic crises of profitability in the late 1960s and 1970s, and working-class struggles declined in the 1980s.

By the mid-1980s, the social-democratic parties had become advocates of “reformism without reform” — implementing austerity and a neoliberal deregulation of capitalism.

Chibber’s alternative strategy envisions a socialist movement capable of struggle both inside and outside the existing capitalist state. Mass mobilizations, centered in the workplace, will be crucial to creating the social power that can compel the state to grant substantial reforms. At the same time, the Left will need to “gain power within” the existing state in order to implement “non-reformist” reforms that will effect multiple breaks in the logic and power of capital.

In the immediate future, the main task of the Left will be to reestablish the gains associated with postwar social democracy: extensive social-welfare provisioning, labor market regulation, national collective bargaining, and the like. The ultimate goal will not, according to Chibber, be the abolition of commodity production — a democratically planned economy. The experience of the bureaucratic societies has demonstrated that goal is **utopian**. Instead, socialists should advocate some form of “market socialism” whereby market mechanisms will be combined with democratic planning to insure political pluralism, efficient use of resources, and “putting people before profits.”

Chibber’s vision is provocative, attempting to grapple with the failures and defeats of the socialist left in the long twentieth century. However, this strategic vision will likely, despite his desires, reproduce many of the dilemmas of the last century’s left — a strategy that will neither lead to a break with capitalism, nor be able to win and defend pro-working-class reforms within capitalism. While I will not address his call for “market socialism,” in this essay, his vision of a postcapitalist future is also flawed.

[The Realities of the Capitalist State]

Chibber’s strategy of “gaining power within” the existing state and initiating a series of partial breaks in the logic of capitalism is fundamentally unrealistic. The strategy does not grasp how the “rules of reproduction” of capitalism and the place of the state in capitalism create profound structural limitations on what any party — no matter how programmatically radical — can accomplish through the existing state.

Capitalist growth is driven by competition and profitability. Competition forces every capitalist, on pain of bankruptcy, to specialize output, introduce labor-saving technology, and accumulate surpluses. Competition ensures that capitalists put profits before any and all considerations when making production decisions. If profits are high, capitalist will invest, expand output, and hire workers; when profits are low, capitalists will not invest, output will stagnate or fall, and unemployment and poverty will rise.

Capitalism is also inherently unstable — the same mechanisms that propel periods of high profits and growth inevitably lead to falling profits and stagnation. For capitalists, especially during periods of economic crisis, anything that raises the costs of production — higher wages, shorter hours, restrictions on their ability to reorganize work, obstacles to easily hiring and firing workers, social benefits like health care, housing, and parental leave — lower profits and will be fought tooth and nail.

The capitalist state depends on profitability for both its tax base and its political legitimacy. Without rising profits and “economic growth,” tax revenues will fall and wide segments of the population, suffering from rising unemployment and falling living standards, will question the legitimacy of leading state personnel. This places profound limits on the ability of state personnel, whatever their political and ideological commitments, to implement pro-working-class reforms, especially in a period of stagnant or falling profitability and labor quiescence.

Even the most radical government officials committed to “non-reformist reforms” will face the reality that as long as capitalism exists, any and all improvements for workers depend on the ability of the state to collect taxes. In other words, the ability of socialist governments to deliver higher wages, more social spending, and effective regulation of labor and capital markets requires tax revenues — which are dependent on profitability. The failure of left governments, from Swedish social democracy’s Meidner Plan proposals in the 1970s, through Mitterrand’s socialist government in France in 1981-1983 to Syriza in Greece in 2016, is not the result of a failure of will or tactics, but of a strategy that is not committed to a radical rupture with the logic of capital.

The capitalist state is also a bureaucratic institution, structurally separated from the private sphere of exploitation and accumulation, appearing as an impersonal “public power.” While most contemporary capitalist states are parliamentary democracies, real political power resides in the unelected permanent officialdom — the civil service / executive agencies, judiciary and, ultimately, the military. These institutions, popularly referred to the “deep state,” have historically been the center of resistance to attempts by the socialist left to “use” elected positions within the capitalist state to implement meaningful reforms, much less to break with the logic of capital.

The twin realities of the capitalist state’s dependence on profitability and its bureaucratic institutional structure make the strategy of successive, partial breaks through “non-reformist reforms” unrealistic. This strategy tends to underestimate what Ralph Miliband (one of the leading advocates of this strategy) called “the struggle waged by the dominant class, and the state acting on its behalf, against the workers and subordinate classes.” Each attempt to impose reforms that undermine the power of capital, and with it profitability, will be met by sustained capitalist resistance. Only a decisive rupture in the institutional structure of the state — the dismantling of the old state and the construction of a working-class counterpower — can allow working people to win significant reforms and begin the construction of socialism.

Any decisive break with the logic of capitalism requires the “expropriation of the expropriators.” No matter what the possible balance between planning and markets in a socialist society, private ownership of the means of production must be abolished — and this requires democratic, working-class political power. Whatever the process that builds working-class capacity to the point where taking power is possible, the expropriation of capital will certainly be a political rupture of historic proportions. This cannot be achieved piecemeal — the need to take political power and rapidly consolidate democratic, working-class power flows from the need to expropriate the expropriators and break the logic of capital.

Evoking mass mobilizations outside of the existing state as a compliment to gaining power within the state will not resolve this dilemma. As we will see, even in the struggle for reforms, the logics of building mass movements and winning office through elections are often in conflict. The logic of building mass struggles and new organizations of working-class power (councils in workplaces and communities) and that of administering the capitalist state are even more incongruous.

Ultimately, socialists will have to choose between one or the other as the dominant method of struggle when faced with capitalist resistance to any left government. Put simply, these governments will have to choose between “playing by the rules” of the capitalist state (respecting “constitutional legality,” etc.) or mobilizing working people and building a counterpower to the existing state.

Finally, Chibber argues that the capitalist state today not only has reservoirs of political legitimacy, but has become more institutionally powerful and coherent since the crisis of the 1930s. This fact alone would make a “ruptural” strategy illusory. However, if the state has become so powerful and stable, a strategy of “multiple ruptures” is also rendered utopian. How would an organized socialist left gain power within such a state and turn it against the logic of capital, even in a piecemeal fashion?

[The Struggle for Reforms Today]

Chibber is, of course, correct that a revolutionary crisis of the sort described above has not occurred in the Global North since at least the Portuguese Revolution of 1974-75. Today — and probably up to any revolutionary situation — the main struggle will be for the immediate demands of working people, for reforms. As Robert Brenner argued, “both Revolutionaries and Reformists try to win reforms. In fact, as socialists, we see the fight for reforms as our main business.” However, the division between revolutionaries — consistent advocates of a “ruptural” strategy — and reformists are about how to struggle for reforms. The same structural constraints — capitalist “rules of reproduction,” crises of profitability, and the place and structure of the state under capitalism — make the reformist strategy of winning reforms through electoral politics and legalized collective bargaining unrealistic.

Chibber’s strategy for struggle today calls for the socialist left to combine building powerful social movements with winning power in the state through elections. Unfortunately, the logics of movement building and electoral and legislative politics are often in contradiction to one another. On the one hand, election campaigns whose primary goal is winning office prioritize getting 50 percent plus one votes on the lowest possible political basis. Legislative politics involves coalition building that leads to continual concessions on policy. Neither requires the mass of voters to be active participants in democratically setting program or strategy, and generally discourages confrontation and political radicalism.

By contrast, disruptive social movements — in particular those rooted in the workplace — require building solidarity across the racial and gender divisions capitalism constantly creates and recreates, and taking risks in confronting capital and the state to win the movement’s demands. This requires active participation in a democratic process of crafting demands and deciding tactics. Successful movements always involve rising levels of confrontation with the established political and economic order, and tend to radicalize many of their participants.

Clearly, those committed to the primary task of building mass, disruptive movements have and should engage in electoral politics. However, the goals and forms of this sort of electoral activity are qualitatively different from most election campaigns. As Chris Maisano and Jessie Mannisto recently argued, a socialist electoral strategy must be primarily oppositional rather than ameliorative. Our primary goal should not be winning office, but building our movements — giving them broader resonance, linking them together, and pointing to an alternative to capitalist “politics as usual.”

In fact, successful “oppositional” election campaigns that build, strengthen, and unify social movements and workplace struggles are much more likely to win reforms than an “ameliorative” strategy that seeks to simply win positions in the state. Such election campaigns cannot be pursued through the Democratic Party and will require an independent party based in the labor and social movements whose elected representatives are subject to the collective decision-making of party activists.

>> The relationship of the US labor movement to the National Labor Relations Board (NLRB) provides us with an example of how non-electoral attempts to use the existing state institutions to promote pro-worker reforms in a non-revolutionary period lead to a dead ends. Since 1937, the biggest unions in the US have relied on the NLRB to regulate relations with employers — organizing elections for union recognition and compelling employers to bargain in good faith.

This reliance makes perfect sense for the full-time officials of the unions — the NLRB guarantees the institutional stability of the union: its ability to collect dues and maintain a substantial paid staff. However, reliance on the NLRB has undermined the ability of unions to act as fighting organizations of rank-and-file workers. As Joe Burns points out in Reviving the Strike, the NLRB framework has progressively weakened workplace organization and militancy through the ban on strikes during the life of a contract; prohibited solidarity strikes and secondary boycotts; and fragmented industrial unions through the establishment of multiple bargaining units within a single industry or firm.

## Movements DA

### 1nc DA Movements

#### \*\*\*This version of the disad should not be read vs the death penalty affirmative --- see other version below

#### Grassroots movements now are key to sustainable improvements in criminal justice --- “quick wins” like the plan undercut it.

Jones and Sayegh 19 (Lorenzo Jones is co-executive directors of the Katal Center for Health, Equity, and Justice, Gabriel Sayegh is co-executive directors of the Katal Center for Health, Equity, and Justice, “Grassroots Movements Are Needed To End Mass Incarceration,” <https://www.katalcenter.org/grassrootsnyc>, //mrul)

History shows that achieving meaningful change against systemic racism and injustice requires the work of social movements built from the ground up. Too many people – overwhelmingly Black and brown people, and poor people — are caught in the racialized system of criminalization and mass incarceration. Over the last 20 years, a growing grassroots movement – national in scope and local in character – has made reform mainstream while winning policy and political changes inside of local neighborhoods, city councils, and state legislatures around the country. Earlier this year in New York, legislators, working closely with the grassroots movement, passed one of the most significant criminal justice reform packages in the nation, including urgently needed bail reform — a huge victory resulting from years of relentless organizing.

But increasingly in New York and around the country, grassroots groups are at risk of being marginalized by monied interests seeking quick wins. Such wins often come through watered-down, insider deals which require sidelining the pesky local groups who are doing the sometimes slower work of building consensus and power with their members in the community and demanding transparency and systemic change. Quick wins can be appealing: sometimes they free people, and that is never a small thing. But such wins have proven transient when the political winds shift and the money that won them isn’t there to defend them against backlash. Policy changes can be won through many avenues, but only grassroots movements make them durable.

After the historic justice reforms won by grassroots groups earlier this year, the next steps for tackling mass incarceration in New York are clear: ending solitary confinement; enacting parole reform to free elders, speed up the parole process, and stopping the cycle of reincarceration for technical violations; restoring voting rights and access to higher education to people in prisons; holding police accountable for misconduct; legalizing marijuana the right way; expanding alternatives to incarceration; expunging records; closing more prisons and local jails like Rikers Island; investing in community needs like housing; and more.

These are just a portion of the robust agenda developed by the grassroots movement to end mass incarceration and win real structural change. For legislators gathering this week in Westchester: dig into the issues. Take any opportunity to learn, especially when visiting the prison. Look for principled openings to strengthen longstanding fights for justice. And don’t let the glitz and glam of billionaires and celebrities distract us from the path to change carved for so long by the local groups building the grassroots movement in our state. Because when it comes to securing justice, money is good, but the people are always better.

#### Incremental reforms entrench and legitimize the system --- saps movements pushing for more radical social change

Steiker and Steiker 14 (Carol S. Steiker is the Henry J. Friendly Professor of Law and Faculty Co-Director of the Criminal Justice Policy Program at Harvard Law School. & Jordan M. Steiker is a professor and director at the Capital Punishment Center at the University of Texas School of Law, “SYMPOSIUM ARTICLE: LESSONS FOR LAW REFORM FROM THE AMERICAN EXPERIMENT WITH CAPITAL PUNISHMENT.", Southern California Law Review, 87, 733, March, 2014, Nexis Uni via Umich Libraries, Accessed 6/21/20//mrul)

In any movement for social change, there is always some tension [[\*749]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d)

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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) It thus addressed the concern [[\*750]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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 retardation [71](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) and for juvenile offenders, [72](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d)

[[\*751]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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

[[\*752]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d)

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 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 - itself 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d)

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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) - worked against widespread acceptance of the view [[\*754]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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.

#### Criminal justice movements are critical to create structural change that also addresses racism, sexism, religious discrimination, LGBTQ discrimination, environment and international peace

Enid 17 (Enid O., 12-13-2017, "The U.S. Criminal Justice System: A Role for Radical Social Work," from Taylor & Francis via umich libraries, accessed 6-24-2020//mrul) \*\*\*RSW = Radical Social Work

Linking criminal justice action organizations to RSW efforts

Fortunately, many CJ action organizations have stated goals and action programs congruent with structural change and RSW. The examples below include selected faith-based organizations, organizations that use legal approaches, and emerging grassroots youth-based organizations.

Faith-based organizations, grounded in the civil rights movement, define spirituality as inclusive (without discrimination against religions worldwide) and see work for peace and social justice as an integral aspect of their faith. Such organizations are very important to current movement building, particularly in light of the present-day promotion of exclusive religious beliefs and religious discrimination. Specifically, this growing movement acknowledges the need for a revolution of values against racism (and discrimination against other oppressed groups), materialism, and militarism.

An excellent example of such an organization is the Spirit House Project, which is a national organization that uses the arts, research, education, action, and spirituality to bring diverse peoples together to work for racial, economic, and social justice, as well as spirituality. This program and the Chicago Freedom School share goals and strategies in youth education. Youth are encouraged to (a) analyze personal experiences in the context of the larger social structure, (b) learn about the history of social movements, and (c) visualize possible future-change movements. Additionally, they promote civic engagement and provide training in leadership skills.

The American Civil Liberties Union, the National Association for the Advancement of Colored People, and the National Friends Service Committee, supplemented by other organizations that provide legal advocacy on targeted issues, compose one of the most powerful groups of resistance and change. Currently, the issues of increasing criminalization of poverty, homelessness, and undocumented immigrants are acute. Many social workers are directly serving persons threatened by these changes. Policies that support carrying out street sweeps, confiscating personal property (e.g., bedding, clothes, papers, and medications), criminalizing groups feeding homeless people, and ordinances enforcing hygiene are flourishing (National Coalition for the Homeless, [2014](https://www-tandfonline-com.proxy.lib.umich.edu/doi/full/10.1080/10428232.2017.1399035)).

Numerous social justice action organizations developed by young activists are addressing CJ issues as an integral part of their overall goals. Many of these organizations include opportunities for the training of young people for leadership in social justice movements. These organizations are composed of young people from diverse backgrounds. The connection to the arts and music is a constant theme; hundreds of young (and some old) social justice-oriented musicians, poets, and painters have joined these movements. Saul Williams, a poet, filmmaker, and musician, has contributed much to political consciousness and hope. The Peace Poets have become a voice for and to many prisoners. Mainstream, Lady Gaga has a constant stream of social justice support in her work (e.g., her albums Born This Way and Angel Down, in reference to the tragic death of Trayvon Martin). Such work educates and inspires (see Internet Encyclopedia of Philosophy, [n.d.](https://www-tandfonline-com.proxy.lib.umich.edu/doi/full/10.1080/10428232.2017.1399035)). The movement #BlackLivesMatter continues to expand its support base to address police-related abuse and deaths focused on Black people as well as aggressive policing of minority and/or poverty areas and militarization of the domestic police force. This movement has also expanded its agenda to include not only racism throughout the CJS but also the many social justice issues seeking change in the larger political economic system (see Black Lives Matter, [n.d.](https://www-tandfonline-com.proxy.lib.umich.edu/doi/full/10.1080/10428232.2017.1399035); Jones, [2016](https://www-tandfonline-com.proxy.lib.umich.edu/doi/full/10.1080/10428232.2017.1399035)).

The Sanders-inspired Our Revolution represents a social justice action group that has goals suggesting the economic justice (including the right to health care, a living wage, education, etc.) of a democratic socialism. Their agenda is inclusive and aims to end racism, sexism, religious discrimination, and discrimination against persons in the LGBTQ population, immigrants, and other oppressed populations. Additionally, they are actively supporting other groups with similar goals and continue to expand their base in an effort to be part of a growing mass movement. Many long-term national and international economic and social justice organizations and groups that support people in prison, community corrections, or released and their families are also actively focused on such linkages. The struggle for a safe environment and for international peace is also a central issue. These movements and many smaller related movements, such as the Million Hoodies Movement for Justice (available from millionhoodies/net/about) and Sistas and Brothas United (available from youthorganizingdc.wikifoundry.com/page/Sistas+and+Brothas=United+-+Fighting+for+Change!), provide a strong base for the work of RSWs trying to address injustice within the CJS and connect these efforts to the need for structural change.

### 1nc DA Movements vs Death Penalty

#### Grassroots movements now are key to sustainable improvements in criminal justice

Jones and Sayegh 19 (Lorenzo Jones is co-executive directors of the Katal Center for Health, Equity, and Justice, Gabriel Sayegh is co-executive directors of the Katal Center for Health, Equity, and Justice, “Grassroots Movements Are Needed To End Mass Incarceration,” <https://www.katalcenter.org/grassrootsnyc>, //mrul)

History shows that achieving meaningful change against systemic racism and injustice requires the work of social movements built from the ground up. Too many people – overwhelmingly Black and brown people, and poor people — are caught in the racialized system of criminalization and mass incarceration. Over the last 20 years, a growing grassroots movement – national in scope and local in character – has made reform mainstream while winning policy and political changes inside of local neighborhoods, city councils, and state legislatures around the country. Earlier this year in New York, legislators, working closely with the grassroots movement, passed one of the most significant criminal justice reform packages in the nation, including urgently needed bail reform — a huge victory resulting from years of relentless organizing.

But increasingly in New York and around the country, grassroots groups are at risk of being marginalized by monied interests seeking quick wins. Such wins often come through watered-down, insider deals which require sidelining the pesky local groups who are doing the sometimes slower work of building consensus and power with their members in the community and demanding transparency and systemic change. Quick wins can be appealing: sometimes they free people, and that is never a small thing. But such wins have proven transient when the political winds shift and the money that won them isn’t there to defend them against backlash. Policy changes can be won through many avenues, but only grassroots movements make them durable.

After the historic justice reforms won by grassroots groups earlier this year, the next steps for tackling mass incarceration in New York are clear: ending solitary confinement; enacting parole reform to free elders, speed up the parole process, and stopping the cycle of reincarceration for technical violations; restoring voting rights and access to higher education to people in prisons; holding police accountable for misconduct; legalizing marijuana the right way; expanding alternatives to incarceration; expunging records; closing more prisons and local jails like Rikers Island; investing in community needs like housing; and more.

These are just a portion of the robust agenda developed by the grassroots movement to end mass incarceration and win real structural change. For legislators gathering this week in Westchester: dig into the issues. Take any opportunity to learn, especially when visiting the prison. Look for principled openings to strengthen longstanding fights for justice. And don’t let the glitz and glam of billionaires and celebrities distract us from the path to change carved for so long by the local groups building the grassroots movement in our state. Because when it comes to securing justice, money is good, but the people are always better.

#### The Courts are a hollow hope --- they are controlled by the right and deplete movement resources that are more useful in other venues

McElwee, 18 --- writer and researcher based in New York City and a co-founder of Data for Progress (10/25/18, Sean, “The Fight For The Supreme Court Is Just Beginning,” <https://www.huffingtonpost.com/entry/opinion-supreme-court-progressives_us_5bd09cd4e4b0a8f17ef34d1c>, accessed on 12/19/18, JMP)

Brett Kavanaugh is an associate justice of the Supreme Court, his confirmation solidifying a five-vote majority for the court’s extreme conservatives. Progressives are bracing themselves for the effects of a fully empowered right-wing court, and so they should. Yet most Americans are unaware of how deeply the court has already damaged American society, even without a conservative majority.

Over the past two decades, the extremist court has resegregated schools, made it easier for abusive cops to avoid punishment, weakened protections for survivors, poisoned children, empowered racist vote suppressors and even thrown elections ― including the presidency ― to the Republican Party. Now, the limited restraints offered by Justice Anthony Kennedy have disappeared, and the threat is even greater.

There is, however, one difference between the past two decades and now: Progressives are finally paying attention.

The Supreme Court has rarely been a force for progress. In its most famous and popular decisions — such as Brown, Griswold and Obergefell — the court largely hedged its bets and acted after social movements had already paved the way. It has rarely acted, much less acted effectively, without support from the legislative and executive branches. Of course, the court can and sometimes does promote progressive change, but it’s a narrower avenue for change than many people assume. And pursuing that change in court often means investing less in other tactics because lawsuits are costly and resources are limited.

Nonetheless, progressives have waged their battles primarily before the court ― clinging to what Gerald Rosenberg called The Hollow Hope ― instead of taking issues directly to voters. Measures like Amendment 4 in Florida to restore voting rights, automatic voter registration in Alaska and right-to-work repeal in Missouri suggest that taking our issues directly to voters is effective. Across the country, direct democracy and organizing have reaped rewards, while the courts — and in particular the Supreme Court — have remained a “hollow hope.”

The costs of over-investing in this uphill legal strategy have been immense but largely unseen. Money that pays high-priced lawyers can’t fund canvassers and signature collectors. And talented progressives who go to law school generally don’t become organizers; many, burdened by student debt, get stuck on the corporate track, where they may well perpetuate injustice by defending corporate interests.

Meanwhile, the right, knowing that its agenda is deeply unpopular, has turned to the courts to override the popular will, aggressively filing lawsuits that will be ruled on by radical right-wing judges. And while the right has recruited and empowered armies of political operatives to wage war on behalf of Trumpist judges and judicial nominees, the left has relied largely on members of the academy. When soldiers battle scholars, the soldiers win.

#### Independently, the death penalty spotlights systemic problems with the criminal justice system --- abolition will undermine progressive transformations

Steiker & Steiker, 20 --- \*Professor at Harvard Law, AND \*\*Professor of Law at University of Texas School of Law (January 2020, Carol S. Steiker and Jordan M. Steiker, “The Rise, Fall, and Afterlife of the Death Penalty in the United States,” <https://www.annualreviews.org/doi/full/10.1146/annurev-criminol-011518-024721>, accessed on 6/1/2020, JMP)

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

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

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Fortunately, many CJ action organizations have stated goals and action programs congruent with structural change and RSW. The examples below include selected faith-based organizations, organizations that use legal approaches, and emerging grassroots youth-based organizations.

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An excellent example of such an organization is the Spirit House Project, which is a national organization that uses the arts, research, education, action, and spirituality to bring diverse peoples together to work for racial, economic, and social justice, as well as spirituality. This program and the Chicago Freedom School share goals and strategies in youth education. Youth are encouraged to (a) analyze personal experiences in the context of the larger social structure, (b) learn about the history of social movements, and (c) visualize possible future-change movements. Additionally, they promote civic engagement and provide training in leadership skills.

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### 2nc Uniqueness

#### Grassroots movements are mobilizing now to address criminal justice concerns --- they could foster a national network of campaigns

Ziegelheim 18 (Danielle Ziegelheim, 8-14-2018, "Grassroots Organizations Are Leading the Way on Criminal Justice Reform," Pacific Standard, https://psmag.com/social-justice/the-grassroots-organizations-leading-criminal-justice-reform, accessed 7-4-2020//mrul)

This past Independence Day, 150 St. Louisans gathered downtown to [protest](http://news.stlpublicradio.org/post/activists-launch-campaign-close-workhouse-reduce-st-louis-jail-population#stream/0) on behalf of those who couldn't—inmates at the St. Louis Medium Security Institution, a jail more commonly known as the "Workhouse." Over the past two summers, these protests have become annual occurrences. In 2017, for instance, reported triple-digit temperatures inside the jail ignited the protests. Even though the city responded by installing temporary air conditioning units, rodent and insect infestations, pervasive mold, broken toilets, guard-perpetrated violence, and medical negligence still plague Workhouse inmates.

Across the country, jails are, all too often, used as holding pens for people who can't afford to pay bail. The Workhouse in St. Louis is no exception to this phenomenon. In July of 2017, [almost all](http://news.stlpublicradio.org/post/what-s-workhouse-here-s-what-you-need-know-about-st-louis-medium-security-institution#stream/0) of the 836 inmates were awaiting trial, with only a handful having actually been convicted. Given that, historically, criminal justice reform has only rarely come from the [city's prosecuting attorney](http://www.stlamerican.com/news/political_eye/mcculloch-will-try-to-keep-his-job-as-county-prosecutor/article_43ad9922-53f7-11e8-a6a2-3f034c7cc0aa.html), community members have taken matters into their own hands. These local-led efforts are part of a gradual reform movement—one that, on closer inspection, reveals the enduring importance of local organizing not only in St. Louis, but across the entire country.

The St. Louis community, as a whole, is affected by the facility and the systemic injustices that regularly lead inmates to the jail. Enter Close the Workhouse, a grassroots campaign dedicated to permanently closing the jail—without opening a new one in its place. The movement is the product of collaboration between a number of St. Louis' legal and activist organizations. This includes Arch City Defenders, a non-profit law firm specializing in defending marginalized people from the local criminal justice system; Missourians Organizing for Freedom and Empowerment, an economic justice and community-organizing group; and the Saint Louis Action Council, a black-led group seeking social and political reform. The Bail Project, a national bail fund, also joined forces with these groups to try to close the Workhouse.

These grassroots efforts have already achieved incremental success for the St. Louis prison and criminal justice reform movement. In addition to the quick-fix temporary air conditioners the government installed last summer in response to protests, this August, St. Louis city residents will vote on [Proposition 1](https://www.stltoday.com/news/local/govt-and-politics/voters-will-decide-if-st-louis-borrows-million-for-things/article_67412497-e2ad-58ee-8ed6-e0d20346984a.html)—a $50 million bond that would allocate nearly $6.5 million to repair basic infrastructure, such as air conditioning and plumbing, inside the Workhouse. While some activists argue that these temporary changes distract from the ultimate goal of closing the Workhouse, Proposition 1 represents the progress of grassroots reform efforts.

The success of the Close the Workhouse protesters fits into a storied history of grassroots organizing in St. Louis. African-American St. Louisans, in particular, have long mobilized to effect change in the city. Following city-wide protests last October, in response to the [Stockley verdict](https://www.stltoday.com/read-the-verdict-in-the-jason-stockley-murder-case/pdf_57b2d12c-83d8-53a0-ba1f-18b659a7e569.html" \t "_blank), which acquitted St. Louis police officer Jason Stockley of allegedly [murdering Anthony Lamar Smith](https://www.stltoday.com/news/local/crime-and-courts/stockley-not-guilty-verdict-not-a-surprise-based-on-history/article_65eaeafa-7267-5e6e-93d7-409ad6f94915.html), St. Louis magazine published [an overview](http://projects.stlmag.com/the-history-of-protests-in-st-louis) of St. Louis' citizen-driven protests, which include the unsuccessful 1819 movement to prevent Missouri from becoming a slave state (it ultimately did in 1820), campaigns to coerce all-white companies to hire African-American workers in the '40s, and the efforts of the Civic Alliance for Housing to secure fair low-income rent and welfare support in the '60s.

Similar attempts to organize for criminal justice reform have stretched across the country. This month, Louisiana became the second-most incarcerated state in the country—a drop from its long-held position at the top of the list—due partly to grassroots organizations. Louisianans for Prison Alternatives, the Louisiana Youth Justice Coalition, Operation Restoration, and the Foundation for Louisiana were among the many advocacy groups that sought to reform several facets of the state's criminal justice system. These efforts [included](http://www.doc.la.gov/media/1/Justice%20Reinvestment%20Task%20Force/la_final.package.summary_2017-6-7_final.pdf) reinstating voting rights for formerly incarcerated citizens, using alternative punishment for non-violent crimes, increasing parole eligibility, and changing the punishment for court fine delinquency.

In 2017, these organizations aided in the passage of a [package of 10 criminal justice reform bills](http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/louisianas-2017-criminal-justice-reforms#0-overview) in the Louisiana state legislature. The bills aimed to reduce the population of incarcerated non-violent offenders, decrease recidivism rates, save taxpayers' money, and re-invest 70 percent of the savings into programs that would benefit both crime victims and justice-involved people. According to a [report](http://gov.louisiana.gov/assets/docs/JRI/LA_JRI_Annual_Report_FINAL.PDF)by the Louisiana Department of Public Safety and Corrections and the Louisiana Commission on Law Enforcement, one year after the programs began, the state's total prison population decreased by 7.6 percent, and the number of people imprisoned for non-violent crimes dropped by 20 percent. (In contrast, while the Workhouse currently operates at roughly 70 percent capacity, Missouri is on track to be over its total inmate capacity by 2,351 beds by the end of 2021, according to a [2017 report](https://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/4/e9/4e9f77d6-65b8-5fea-a519-8a9dccf46c4b/5a4e651684e27.pdf.pdf) commissioned by former Governor Eric Greitens.)

Other cities have seen success with closing specific jails too, due in no small part to grassroots advocacy. In Philadelphia, for instance, Mayor Jim Kenney [announced](http://www.philly.com/philly/news/pennsylvania/philadelphia/house-of-correction-closing-department-of-prisons-20180418.html) in April that the House of Correction, colloquially known as the Creek, will be closed by 2020. Like the Workhouse, inmates at the Creek are subjected to subpar conditions, including extreme temperatures, exposed pipes, structural decay, and inadequate access for inmates and visitors with disabilities. The jail also has a manual lock system, which poses a major threat to inmates in the case of fire.

Kenney's announcement comes after Philadelphia experienced a [33 percent decrease](https://www.washingtonpost.com/news/true-crime/wp/2018/04/23/justice-reforms-take-hold-the-inmate-population-plummets-and-philadelphia-closes-a-notorious-jail/?utm_term=.747ec04d6789) in its prison population in two years. Philadelphia's reform stems from the grassroots campaign Close the Creek, a coalition formed by the No215 Jail Coalition and the Coalition for a Just DA, with support from the Center for Returning Citizens, the Youth Art and Self-Empowerment Project, and the Frontline Dads. But the city's sweeping criminal justice reform can't be attributed solely to grassroots efforts; a new, reform-minded district attorney, who was supported by [grassroots campaigns](https://wagingnonviolence.org/feature/prisoners-organized-elect-larry-krasner-philadelphia-district-attorney/) inside and outside prisons, and a [$3.5 million grant](https://www.phillymag.com/citified/2016/04/13/macarthur-grant-philadelphia-prison-population/) from the MacArthur Foundation Safety and Justice Challenge, also contributed significantly to Philadelphia's success.

Why does this sort of reform appear to be so effective?

For one thing, grassroots organizations' unique place within communities allows them to learn and adapt on the ground. Their expertise is important not only for governments, but also for national organizations with local chapters. Though the local nature of grassroots efforts often denies them national media attention that can garner support for the cause and place pressure on local officials, partnering with national organizations like the American Civil Liberties Union, the National Association for the Advancement of Colored People, the Southern Poverty Law Center, the Bail Project, and JustLeadershipUSA can provide funding, manpower, and the national spotlight that local organizations typically lack.

New York City's #CloseRikers campaign offers a good example of such a partnership. While led by the communities directly affected by the notoriously [violent and inhumane](http://www.closerikers.org/facts/) Rikers Island jail complex, #CloseRikers has also partnered with over 150 national and grassroots organizations, ranging from the Bronx Freedom Fund and the Brooklyn Movement Center to the Innocence Project and JustLeadershipUSA. It's important, however, that local campaigns retain the agency to do local work: educating local communities, engaging with local elected officials and power players, and providing local oversight capabilities. Critically, collaboration between different networks of local movements can allow organizations to share best practices, learn together from stagnation or failures, and offer a wider support system while maintaining their autonomy.

In the future, this spirit of collaboration ought to be applied not only within cities, but across the entire country. Indeed, these distinct hubs of criminal justice reforms, whether in St. Louis or in New York City, can foster a national network of grassroots campaigns—ones that, despite their different local needs, reach toward similar goals.

#### Recent protests spark possibility of real change – spurs broader criminal justice transformation

Cummings 6/1/20 (William Cummings is a Political Reporter for USA TODAY's NOW team, 6-1-2020, "'This moment can be a real turning point': Obama hopeful George Floyd's death will spur reform," from ProQuest database, accessed 6-22-2020//mrul)

Former President Barack Obama called on a "new generation of activists" to channel the outrage sparked by the death of George Floyd – an African-American man who died after a Minneapolis police officer restrained him by placing a knee on his neck – into "real change."

In an essay published Monday on Medium, Obama said many people had asked him how the momentum from the protests over Floyd's death could lead to a movement to solve "the ongoing problem of unequal justice."

In response, Obama offered some advice rooted in past experience.

"First, the waves of protests across the country represent a genuine and legitimate frustration over a decades-long failure to reform police practices and the broader criminal justice system in the United States," Obama wrote.

He said the "overwhelming majority of participants have been peaceful, courageous, responsible, and inspiring," adding they "deserve our respect and support, not condemnation."

But "the small minority of folks who’ve resorted to violence in various forms, whether out of genuine anger or mere opportunism, are putting innocent people at risk" and "compounding the destruction of neighborhoods that are often already short on services and investment and detracting from the larger cause."

So let’s not excuse violence, or rationalize it, or participate in it. If we want our criminal justice system, and American society at large, to operate on a higher ethical code, then we have to model that code ourselves."

Analysis: Consoler in chief or confronter in chief? Combination of crises tests Trump's leadership

The former president also warned against giving up on political participation out of the belief that only protest can bring about change.

"The point of protest is to raise public awareness, to put a spotlight on injustice, and to make the powers that be uncomfortable," Obama said. "But eventually, aspirations have to be translated into specific laws and institutional practices – and in a democracy, that only happens when we elect government officials who are responsive to our demands."

Obama said too many people focus on national politics, while "the elected officials who matter most in reforming police departments and the criminal justice system work at the state and local levels."

"Unfortunately, voter turnout in these local races is usually pitifully low, especially among young people – which makes no sense given the direct impact these offices have on social justice issues," he wrote.

The former community organizer said that if people "want to bring about real change, then the choice isn't between protest and politics. We have to do both."

Obama: George Floyd's death shouldn't be 'normal'

And he said it was important to make concrete demands for criminal justice reform that recognize the needs for change are not universal and vary across different communities.

"The more specific we can make demands for criminal justice and police reform, the harder it will be for elected officials to just offer lip service to the cause and then fall back into business as usual once protests have gone away," he said.

Obama steered aspiring activists to an "advocacy toolkit" put out last year by The Leadership Conference on Civil and Human Rights on how to create a "vision of public safety that respects and protects human life and lifts up those most affected by harmful police policies." He also shared a link to an Obama Foundation webpage that directs people to relevant resources and organizations.

"I recognize that these past few months have been hard and dispiriting – that the fear, sorrow, uncertainty, and hardship of a pandemic have been compounded by tragic reminders that prejudice and inequality still shape so much of American life. But watching the heightened activism of young people in recent weeks, of every race and every station, makes me hopeful," Obama wrote.

"If, going forward, we can channel our justifiable anger into peaceful, sustained, and effective action, then this moment can be a real turning point in our nation’s long journey to live up to our highest ideals."

Obama also addressed Floyd's death on Friday, sharing his thoughts and conversations on the latest police killing of an unarmed black man in a statement shared on social media.

"This shouldn't be 'normal' in 2020 America," the nation's first black president said. "If we want our children to grow up in a nation that lives up its highest ideals, we can and must be better."

'An enormous red flag': After George Floyd's death, some call for a broader federal investigation

This article originally appeared on USA TODAY: 'This moment can be a real turning point': Obama hopeful George Floyd's death will spur reform

### 2nc Uniqueness / Link

#### Sequencing matters – top-down single issue reforms inevitably fail unless proceeded by broad based reexaminations of the carceral state spurred by grassroots movements.

Platt 19 (Tony Platt is a Distinguished Affiliated Scholar at the Center for the Study of Law & Society, University of California, Berkeley., 3-31-2019, "The Perils of Criminal Justice Reform," No Publication, <http://historynewsnetwork.org/article/171611>, accessed 7-4-2020//mrul)

Historically, the overwhelming majority of reforms are top-down, state-engineering initiatives that are never intended or designed to expand the rights or improve the well being of their recipients. One of the earliest examples was the Progressive Era’s child-saving movement that formally did away with due process for juvenile delinquents. It recruited social workers, public health personnel, police, and urban reformers to send thousands of European immigrant youth to punitive reformatories, and Native American youth to boarding schools where they were punished for “speaking Indian.” In the 1940s, the Preston School of Industry in California was “organized like the military,” a former prisoner recalled. “We marched everywhere, and were always on ‘Silence’.”

The child-saving movement was a model for many other government reforms that, in the words of historian Lisa McGirr, came loaded with “strong doses of coercive moral absolutes,” such as forcing the children of Jehovah’s Witnesses to salute the flag during World War I in the name of spreading patriotism, and then criminalizing their parents when they refused. In the 1920s, the federal Prohibition Bureau, with five times more staff than the FBI, saved the drinking poor from the scourge of alcohol by arresting them, while the wealthy drank in private clubs or bribed their way out of arrest. Between the world wars, government agencies compelled the sterilization of some 60,000 working class women in the name of purifying motherhood. Similarly, in the 1950s, “protecting the family” supposedly justified purging gay men from government jobs and subjecting them to the kind of systematic harassment by police that young African American men routinely experience.

We see the same kind of coercive benevolence at work today when local governments and professional functionaries invoke civility codes to tear down homeless encampments and in cities such as Irvine, California, run beggars out of town in order to “keep our streets safe.”

The second type of reform has a democratic impetus and is intended to expand the rights of the disenfranchised and improve people’s everyday lives. Pursuing this kind of grassroots initiative requires the stamina of a marathon runner, for there is a long history of trying to substantially reform criminal injustice operations that typically does not end well.

Take, for example, the 1963 U. S. Supreme Court decision in Gideon v. Wainright that required states to provide attorneys to defendants in criminal cases if they cannot afford counsel; and the bail reform movement that achieved passage of the Federal Bail Reform Act of 1966 that granted release on own recognizances (OR) to federal defendants in noncapital cases.

The Gideon case represented a victory for activists who had struggled for decades to bring some balance to an adversary system of criminal justice that is heavily weighted in favor of the prosecution. “Thousands of innocent victims,” wrote W. E. B. Du Bois in 1951, “are in jail today because they had neither money, experience nor friends to help them.” The provision of government-funded defense lawyers was supposed to rectify this wrong.

However, the underfunding and understaffing of public defenders, and pressures from criminal court bureaucracies to process cases expediently resulted not in more trials and more pleas of innocence, but in a decline of trials and increase in guilty pleas. How can clients get a “reasonably effective defense” in Louisiana, for example, if a single public defender is expected to carry a caseload of 194 felony cases? “No majesty here, no wood paneling, no carpeting or cushioned seats,” writes James Forman, Jr. about his experience as a public defender in Washington, D. C. It wasn’t unusual for him to want to cry in frustration at the railroading of his clients. “Sometimes the only thing that stopped the tears,” he says, “was another case or client who needed me right then.”

The Federal Reform Bail Act met a similar fate. Much of the legislation’s provisions were destroyed by the Nixon and Reagan governments as new legislation eliminated OR for dangerous defendants, a proviso that ultimately included people arrested on drug-related and non-violent behavior, meaning just about everybody. Today, more than sixty percent of people confined in the misery of local jails are there because they are unable to make bail and do dead time, a travesty of “presumed innocent.”

Too often when progressive reforms are passed, they stand alone as single issues and are generally ineffective because they lack sustained and wide support, or they are whittled away to the point of ineffectiveness. A similar process is at work with the recent First Step Act, Congress’ tame effort at federal prison reform. This legislation originated in the efforts of reformers during the Obama presidency to dramatically reduce mass incarceration nationwide. By the time of the Trump presidency, the libertarian Right dominated the politics of reform and put their stamp on the Act: no relief for people doing time for immigration or abortion or violence-related crimes; the privileging of religious over secular programs; and a boost for the electronic shackling industry.

Too often, substantial reform proposals end up politically compromised and require us to make a Sophie’s choice: release some “non-violent offenders” and abandon the rest, including tens of thousands of men who used a gun during a robbery when they were in their 20s. Or give public welfare relief only to carefully screened “worthy recipients,” while subjecting millions of women and children to malign neglect. Or, potentially, provide the immigrant Dreamers with a path to citizenship while making their parents and relatives fair game for ICE.

It’s not for lack of trying that substantial reforms are so difficult to achieve. There are structural, multifaceted reasons that undermine our effectiveness.  “America is famously ahistorical,” a sardonic Barack Obama observed in 2015. “That’s one of our strengths – we forget things.” In the case of efforts to reform prisons and police, we remember the experiences of Malcolm X, George Jackson, Attica, and the Black Panther Party, but then amnesia sets in.

We need to reconnect with the writers, poets, artists, activists, and visionaries who generations earlier took on the carceral state and forged deep connections between the free and un-free. Let’s remember Austin Reed, a young African-American incarcerated in ante-bellum New York, who told us what it was like to “pass through the iron gates of sorrow.” And the Socialist and labor leader Gene Debs, imprisoned many times for his activism, who made sure his comrades in the 1920s knew that his fellow nonpolitical prisoners were “not the irretrievably vicious and depraved element they are commonly believed to be, but upon average they are like ourselves.” And the young Native American women and men, forcibly removed to boarding schools, who reminded us of their resistance, as in the words of a Navaho boy: “Maybe you think I believe you/ But always my thoughts stay with me/ My own way.”

Revisiting this long historical tradition is important, not out of nostalgia for what might have been or to search for a lost blueprint of radical change, but rather to learn from past reform efforts and help us to understand the immense challenges we face – to “bring this thing out into the light,” as the civil rights leader Fannie Lou Hamer used to say.

In addition to a deep history, we also need a wide vision in order to see that state prisons and urban policing are components of a much larger and more complex private and public social control apparatus that plays a critical role in preserving and reproducing inequality, and in enforcing injustices. No wonder that structural reforms are so difficult to achieve and sustain when carceral institutions are sustained by private police, public housing and education, the political system, immigration enforcement, and a vast corporate security industry that stokes what Étienne Balibar calls the “insecurity syndrome.”

Struggles for equality in the United States have usually been uneven and precarious, with improvements in rights and quality of life for one group often coming at the expense of others – not consciously, but in effect. Our challenge is to rebuild a social and political movement that bridges the divide between a panoply of activists in the same way that post-World War II civil rights and black liberation organizations incorporated prisoners and victims of brutal policing into the Movement. Important single-issue campaigns – to eliminate cash bail, to restore voting rights to millions of former prisoners, and to make American prisons comply with global human rights standards – will have a better chance of success if backed by a multi-issue, grassroots campaign.

We should not give up on big ideas and structural reforms. We never know when a spark will light a fire and energize a movement. Let's remember that it was protests against a police killing in a place like Ferguson that led to the Black Lives Matter movement and compelled a meeting with the president; and it was a high school student protests for gun reform in Florida that prompted a former Supreme Court Justice to call for the abolition of the 2nd Amendment.

The Right has been extraordinarily effective in promoting a dystopia that anchors and propels its law and order policies. We need a comparably progressive vision.  In this moment of resistance and defense, to articulate an ideal of social justice might seem like pie-in-the-sky and a waste of energy. But to get support for progressive policies will require widespread endorsement, and this will only happen if we speak to people’s deeply held anxieties and aspirations. Without a movement and long-term vision that engages people, good policies wither.

It will take nothing short of a broad-based movement, a revitalized imagination, and reckoning with a historical legacy that bleeds into the present to make the criminalized human again and end the tragedy of the carceral state.

### 2nc Cooptation

#### Criminal justice reform papers over the capitalism and white supremacy that drives the inherent oppression of the legal and criminal system – the plan gets coopted to reinforce the worst features of the system

Karakatsanis, 19 --- JD from Harvard Law, founder of Civil Rights Corps (11/9/2019, Alice Speri interview of Alec Karakatsanis, “THE CRIMINAL JUSTICE SYSTEM IS NOT BROKEN. IT’S DOING WHAT IT WAS DESIGNED TO DO,” <https://theintercept.com/2019/11/09/criminal-justice-mass-incarceration-book/?comments=1>, accessed on 3/17/20, JMP)

ALEC KARAKATSANIS’S “Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System” should be assigned reading for every first-year law student. Published last month by The New Press, the book is an unusually blunt takedown of a system the author never once refers to as a criminal “justice” system. Litigated with the intellectual vigor of someone who has won a number of landmark fights in federal court, “Usual Cruelty” clearly lays out a case for why our criminal legal system is not broken, but doing exactly what it was designed to do.

At a time when talk of justice reform has become mainstream but risks becoming hollow, and phrases like “progressive prosecutor” contribute to the deception that we are, in fact, making progress, Karakatsanis is clear-eyed about the bigger picture. But while “Usual Cruelty” is ultimately an abolitionist book that calls on people to imagine a world with fewer laws and in which jails and prisons aren’t the default response to all social problems, Karakatsanis is also keenly aware of how lawyers can use the law’s tools to fight the law’s harm. At Civil Rights Corps, the nonprofit he founded, Karakatsanis takes on cases challenging systemic injustices in the legal system — like cash bail and the systems of fines and fees that keep poor people in jail — which he says have become so “normalized and entrenched” they barely give us pause.

This interview was edited for length and clarity.

Who is this book for?

Much of the book is written for people who don’t know a lot about our criminal punishment bureaucracy and who generally care about issues of social justice, but don’t know much about how the criminal system works, and especially all the pain that it constantly inflicts for no good reason. But it also has a lot of deep analysis and reflection for people who have been working in the system, whether they’re public defenders or social workers or prosecutors or judges.

It’s really meant to touch anyone who’s worked in the system and get them to reevaluate, come to the system with fresh eyes and see, here’s what we’ve been doing to people and their families and their bodies. Let’s ask ourselves some really hard questions about why we’ve been inflicting so much pain. This book is also meant to be an acknowledgement of the real failure of lawyers in our vision, in our understanding of politics, our understanding of organizing, our understanding of power, the way that we’ve tried to use the legal system to change what is really a problem of capitalism and white supremacy in power. And it’s meant to reach out and say we actually need a really different approach: a mass power-building movement that lawyers should not be leading.

Some people go to law school with these grand ideas about changing the world. But your book makes a strong case that it’s not through lawyering that things are going to change.

The American legal system has never been an institution of radical social change. To the contrary, it has been an instrument of ruling class oppression. The legal system, from its founding, was about preserving distributions of wealth and property and white supremacy. If you go back and read old Supreme Court cases, you’ll see in every era the Supreme Court and the federal courts and the state courts are reproducing the sort of power dynamics of that era into what’s called legal decision-making, and passing it off as legal reasoning.

We need to build a movement that changes the power dynamics so that our society demands that our legal system create different rules. The best example of this might be Brown v. Board of Education, maybe the most celebrated legal decision in American Supreme Court history. Sixty years after Brown, you have schools that are just as segregated, if not more segregated, in some parts of the country than they were before Brown. Why? Because if you don’t attack the underlying systems of oppression that lead to a problem, a court ruling isn’t going to solve them.

A contrary example might be same-sex marriage. Very smart lawyers brought those cases 40 years ago, and they essentially lost everywhere, including in the U.S. Supreme Court. Then years after that, other lawyers, and actually some of the same lawyers, using the same words, challenged same-sex marriage bans again. This time, they prevailed. It wasn’t because the 14th Amendment changed, or because they became better lawyers. It was because there had been a movement in our society that changed the way we think about same-sex marriage. What we in the criminal system need to understand is that we need to be part of a social movement that changes the way we think about human caging. And until we are part of that movement, I don’t suspect that the courts are fundamentally going to alter this architecture of mass incarceration.

You write about the need for lawyers to remain “human” and to find creative ways to re-sensitize themselves. How do you stay human when working in a system that is designed to dehumanize daily, and on a mass scale?

We often find ourselves using the language of a bureaucracy as opposed to the language of humanity when we’re in court. The things that we write, the arguments that we make, it’s almost like reading from police reports; we use words like “suspect,” “defendant.” And we use propagandistic terms like the “Department of Justice” or the “criminal justice system.” We even use the word “hold” to describe someone who’s in a cage, which is such a strange thing to say. You hold someone you love; holding is a term of care. Or we use terms like “law enforcement,” which make it seem like we enforce all laws against all people, when in fact law enforcement in this country just enforces some laws against some people. The language that we use is really important.

As a lawyer, you can also change the narratives that are presented in a courtroom. I would always ask my clients to be unshackled while in court, and I would ask the U.S. marshals to allow my clients’ children to come hug them before sentencing. Little acts like these may not be significant in the broader sense, in the sense that they’re not taking down capitalism or white supremacy, but they change the way that this mass assembly-line bureaucracy is able to process human beings: It slows it down, it makes everybody a little bit more sensitized to the cruelty that they’re about to inflict on a child or on a parent, on a human being.

I found that the sentences started to get lower when we did those things. I think lawyers can be doing this throughout every aspect of a case: help to create space for their clients to tell their stories. Our punishment bureaucracy is only able to do what it’s doing because the pain that it’s causing has not been sufficiently explored in the popular consciousness.

We prosecute and incarcerate so many people that it becomes impossible to give each a fair process, so we end up with shortcuts like the mass plea bargaining system. You write that we created a system that would collapse were it to offer “too much justice.”

Anyone who observes court in the U.S. or works in the system understands that there is simply no way to process two million human beings from their families, homes, jobs, communities and into cages without coming up with shortcuts at every single step in the process. It’s just a really significant bureaucratic achievement to transfer that many people and their bodies and their lives into government-run cages. And to do that, the system basically has to ignore the main constitutional rights that are provided for in the Bill of Rights, because those documents were not written with a world of mass incarceration in mind. In fact, they were written precisely to avoid mass human caging.

You write about defendants appearing in court in Roxbury being made to stand behind glass cages — and people only realizing how dehumanizing that is when a bunch of white baseball fans were arrested after the Red Sox won the World Series. Do we tolerate the cruelty of the system because of the people it usually affects?

There is no way that much of what happens in the punishment bureaucracy would be tolerated if it were happening to people who looked different or had more power. The idea of drug laws being enforced on Yale’s campus, for example, in the same way that they are enforced down the street in the rest of New Haven would be laughable. And this goes for virtually any law you can think of. The way that law is enforced reflects distributions of power in our society. It’s the same way that people are routinely arrested and jailed for street gambling, but it’s totally acceptable to gamble over international currencies and global supply of wheat, even though gambling over the global supply of wheat has caused starvation for tens of millions of people. These same activities, depending on who’s doing them, are seen as morally culpable or morally praiseworthy, even.

I think even those who don’t work closely with the criminal justice system have some sense, by now, that it actually doesn’t have much to do with justice. Why is it that ideas like “the rule of law” and “justice” itself continue to wield incredible power?

I think that there are very powerful forces in our society that benefit from people having faith in what’s thought of as “the rule of law.” I always use that term in quotes because it’s a joke. Those forces have invested a great deal into a kind of propaganda about what our legal system is about. We’re told that our legal system is about public safety and human flourishing, but if you think that our legal system is really about creating a society of equality and justice and liberty and public safety, all you have to do is look around to understand that it’s failing miserably at that. That’s why you hear so many people, from all over the spectrum, saying the criminal justice system is “broken.”

But it’s only broken if you think that those are its purposes. If you actually think that its purpose is controlling certain populations, oppressing certain people, conserving the hierarchies of wealth and power, then it’s actually functioning very well. And the people who’ve been running our criminal legal system for decades aren’t stupid. They weren’t trying to do one thing but woefully failed, they were trying to do what the system has been doing, which is to keep certain people controlled.

Which brings me to the question of criminal justice “reform.” What is wrong with criminal justice reform?

I think we are at a very dangerous moment in what’s called the criminal justice reform movement. There is some popular energy, meaningful energy, to change the criminal punishment system, and the people who created and profited from the punishment bureaucracy understand that and they’re trying to co-op that reform. What’s at stake now is whether we will actually make big changes to dismantle mass incarceration, or whether we’ll make little tiny tweaks that curb off some of its most grotesque flourishes but preserve the architecture of the punishment bureaucracy and of mass human caging.

There are a lot of people with a lot at stake in this, whether it’s police and correctional unions or prosecutors and the elite class that benefits from keeping people controlled, the private companies at every stage of the process — from those that make all of the handcuffs and the Tasers and the guns to the private probation companies, the bail bond companies, the private prison companies, all of the companies that contract for health care and telephones and video calling in jails. And of course, all of the defense lawyers and judges and probation officers. It’s a massive bureaucracy, and what do bureaucracies do? They try to expand and preserve themselves.

I’m really interested in reorienting our discussion about what our criminal punishment system should look like to the question of whether we should have one, and whether it should look anything like what we have now, and how do we build the power that’s necessary to demand that our society do something drastically different.

### 2nc Court Links

#### Social change precedes progressive court rulings, not the other way around

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[CONCLUSION]

In 1896, most white Americans approved of racial segregation, and most of the justices of the Supreme Court thought that it was plainly constitutional. In 1954, the justices unanimously invalidated segregation, and about half of all Americans agreed with that ruling. How should we understand this dramatic shift in popular and legal opinion? How much was it attributable to extralegal factors and how much to law?

Clearly, changes in the social and political context of race relations preceeded and accounted for changes in judicial decision making. This is not to say that the Court decisions did not matter, only that they reflected social attitudes and practices more than they created them. The justices in Brown understood this, commenting on the “spectacular” advances, the “great changes,” and the “constant progress” being made in race relations. In the absence of such changes, Brown would not have been decided as it was, as the justices themselves observed.

What caused these fundamental changes in the racial attitudes and practices of U.S. society? This book has identified a wide variety of political, economic, social, demographic, ideological, and international caused of racial change. They cannot be ranked in terms of importance, because history is not science, and repeat experiments controlling for particular variables are impossible. Still, one may be able to say something useful, even if it cannot be scientifically verified, about the long-term causes of racial change. lt is helpful to divide causal factors into those that were internal to the South and those that were external to it. Both sorts of factors played important roles in producing racial change. Because southern whites were generally resistant to changes in racial practices, pressure was required to effect them. Southern blacks supplied some of that pressure, aided by improvements in education, the growth of a black middle class, greater militancy resulting from World War II, and the more tolerant racial norms that existed in the urban, as opposed to the rural, parts of the South. But Jim Crow was so ruth- less and pervasive that internally generated change was difficult to accomplish. Because southern whites did not permit blacks to become very well educated, there were few black lawyers available to challenge the system in court. Because southern blacks were generally not permitted to vote, internal change through politics was nearly impossible. Because whites controlled the livelihood of most blacks, protest generally resulted in severe economic reprisals. The system was ultimately secured by the threat and the reality of physical violence against those blacks (and whites) who dared to challenge it. As the NAACP noted in the mid-1930s, “|I]t is the fear of lynching and physical violence, which more than anything else cripples our progress and prevents our taking a more active part in the fight against the injustices heaped upon us.”

It is nearly impossible to change such a system without external pressure. That was supplied by the NAACP and, eventually, by national public opinion and the intervention of the federal government. NAACP political campaigns for federal antilynching Icgislation induccd southern states to take action against lynching. During and after World War II, lawsuits and the threats of them induced southern states to begin equalizing spending on black education and permitting blacks to register to vote. Pressure by the national government helped to create an environment in which southern blacks could engage in racial protest with some measure of physical security. Ultimately, landmark civil rights legislation in the 1960s supplied coercive mechanisms that accelerated the downfall of formal Jim Crow. External pressure was produced by a combination of factors: the Great Migration, the rising prosperity and political clout of northern blacks, the ideology of World War II, and the Cold War imperative for racial change.

Wars have proved instrumental in advancing progressive racial change. The Civil War emancipated slaves and inspired postwar constitutional amendments that protected the civil and political rights of blacks. Though these amendments were notoriously unenforced in the South for decades, they did enfranchise northern blacks, which had important long-term consequences. NAACP membership increased tenfold during both the First and the Second World Wars —conflicts that fostered greater civil rights militancy among blacks. These wars created political and economic opportunities for black advancement and had egalitarian ideological implications, which induced some whites to reconsider long-held racial assumptions. Though southern whites were able to squelch black militancy after World War I, conditions had changed too much by the time of World War LI to permit a repeat performance?

The Second World War proved to be a watershed in the history of U.S. race relations. Returning black veterans became the vanguard of the modern civil rights movement. The ideological ramifications of the war against fascism, combined with the ensuing Cold War imperative for racial change, profoundly influenced the racial views of millions of white Americans. As huge numbers of blacks migrated to the North to take advantage of novel economic opportunities, northern blacks began to exert considerable influence over national racial policy.

Apart from war, long-term forces such as urbanization, industrialization, and better education fostered progressive racial change. Urbanization enabled blacks to become better educated, thus ensuring eventual challenges to Jim Crow. Urban blacks commanded greater economic resources, which provided more funds for social protest, dramatized the disparities between the economic and the social status of blacks, and created a weapon —economic boycotts — with which to extract changes in racial practices. Urban blacks created institutions, such as churches and colleges, which helped to overcome collective-action barriers to social protest, which better urban transportation and communication also facilitated. More relaxed racial mores in critics opened space for black protest by reducing the threat of physical violence. Most southern cities had NAACP branches, which shared information about racial conditions elsewhere, offered legal expertise for challenging rights violations, and spread the risks and the costs of racial protest. The relatively open access to voting enjoyed by urban blacks created a modicum of political influence, which helped foster the physical security that was necessary for social protest to occur. No civil rights movement was possible at a time when most blacks picked cotton on southern plantations.

Better-educated whites in the South were less intensely committed to preserving traditional racial practices. Moreover, as the South became less insular, racial change became harder to resist. World War II exposed millions of southerners, white and black, to novel racial attitudes and practices. The growth of the mass media exposed millions more to outside influences, which tended to erode traditional racial (and other) mores. Media penetration also prevented white southerners from limiting outside scrutiny of their treatment of blacks. Northerners had not seen southern lynchings on television, but Bull Connor’s brutalization of peaceful black demonstrators came directly into their living rooms. The spread of NAACP branches into more remote parts of the South also made it more difficult to insulate racial atrocities from media attention.

Long-term international trends also advanced the cause of progressive racial change in the United States. The decolonization of Africa inspired American blacks to demand their political and civil rights. Postwar competition with the Soviet Union for the allegiance of nonwhite 'Third World nations forced Americans to improve their domestic racial practices in order to demonstrate that democratic capitalism was not synonymous with white supremacy. This Cold War imperative influenced the racial policies of presidential administrations from the 1940s to the 1960s and may have influenced the justices who were most preoccupied with national security concerns.

Finally, a decrease in white-on-black violence in the South was critical to progressive racial change. The heightened black militancy that grew out of World War T was crushed by a crescendo of white violence, including scores of lynchings and several racial massacres. In 1919, Texas whites could maim the NAACP’s national secretary, John Shillady, and go unpunished. A southern civil rights movement was almost inconceivable in such an environment, and even litigation challenging racial injustice was difficult to sustain. By contrast, in 1959, state officials in Mississippi intervened to keep local segregationists from arresting Roy Wilkins, the NAACP’s executive secretary, on trumped-up charges; the officials feared negative publicity and the likely intervention of the national government. In the 1960s, demonstrators could generally engage in direct-action protest in the South without risking serious physical violence, at least in most southern cities and towns. School desegregation litigants incurred economic reprisals and threats, but usually not actual violence.?

Ironically, the relative decline in white-on-black violence, which made civil rights protest possible, ensured that any residual violence would stand out, especially with the assistance of the national media. White southerners lynched a hundred blacks a year around 1900, yet most northerners showed little concern. But isolated lynchings in the 1950s— Emmett 'I'll’s in 1955, Mack Parker’s in 1959—appalled most northerners (and many southerners too) and rallied support for civil rights legislation. Street demonstrations were possible in Birmingham in 1963 partly because greater constraints on white violence had created a more secure physical environment. As Martin Luther King, Jr., put it, “The striking thing about the nonviolent crusade of 1963 was that so few felt the sting of bullets or the clubbing of billies and nightsticks.” Yet law enforcement brutalization of peaceful protestors, piped directly into American homes by television, profoundly influenced national opinion and led directly to the enactment of transformative civil rights legislation.\*

What does the Court’s racial jurisprudence from Plessy to Brown tell us about the nature of judicial decision making? How much is it a product of legal factors, such as text, original intent, and precedent, and how much of political factors, such as the values of judges, social and political context, and external political pressure? We have seen that all judicial decisions arc products of the intersection between the legal and the political axes. When the legal sources are relatively determinate, the justices tend to adhere to them, unless their political preferences to the contrary are very strong. ‘The justices invalidated the grandfather clause in Guinn (1915) and the phony false-pretenses law that supported peonage in Bailey (1911) because these were transparent evasions of constitutional constraints, because the justices had no personal inclination to reach contrary results, and probably because they believed that public opinion supported the outcomes. Had the Fourteenth Amendment explicitly barred segregation, Plessy might well have come out the other way.

#### This conservative court is a unique threat to movements.

Heitzeg 15(Nancy A Heitzeg, 2-4-2015, "CI: The Supreme Court and the Shape of Social Movements," Critical Mass Progress, <https://criticalmassprogress.com/2015/02/04/ci-the-supreme-court-and-the-shape-of-social-movements/>, accessed 6-28-2020//mrul)

I spend too much time thinking about the Supreme Court (although one could argue that[others do not do so](http://www.huffingtonpost.com/nancy-kaufman/supreme-court-appointments_b_2012270.html) enough), and more now too, in light of recent events. There is a lot that i could say about the insanely unchecked power of nine robed people, their [shadowy grip](http://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html?hp&action=click&pgtype=Homepage&module=c-column-top-span-region&region=c-column-top-span-region&WT.nav=c-column-top-span-region) over the entirety of all our legal endeavors,  and the insidious death star that is the[Roberts Court](http://www.scotusblog.com/case-files/terms/ot2014/) – about to knee-cap[Obamacare,](http://www.usatoday.com/story/news/nation/2015/02/03/supreme-court-obama-health-care/22539859/) rule [Gay Marriage](http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html)a state’s right issue, destroy the legal protections against discrimination afforded by  [“disparate impact,”](http://www.scotusblog.com/case-files/cases/texas-department-of-housing-and-community-affairs-v-the-inclusive-communities-project-inc/)  allow states to [torture condemned prisoners to death](http://www.scotusblog.com/case-files/cases/glossip-v-gross/)with any old randomly mixed drug cocktail, additionally [constrict women’s protections](http://www.nwlc.org/resource/supreme-court-preview-2014-2015-term) against discrimination in employment and reproductive matters, and ensconce, even further, the[flow of corporate “persons” $$$ into all arenas of politics](http://www.npr.org/2015/01/20/377784225/should-judicial-candidates-be-allowed-to-solicit-campaign-money), while simultaneously [diluting the votes](http://thinkprogress.org/justice/2014/10/02/3575068/the-supreme-court-just-took-a-case-that-could-make-partisan-gerrymandering-even-worse/)of real flesh and blood people.

But I won’t.

Instead, a word about the impact of the Supreme Court on social movements. In the midst of [Black History Month](http://www.whitehouse.gov/blog/2015/02/03/kicking-black-history-month-white-house-blackhistorymonth), screenings of[Selma](http://www.imdb.com/title/tt1020072/), and [current movements](http://fergusonaction.com/demands/)against racialized police state violence, we must remember the significance of [Brown v the Board of Education, Topeka Kansas](http://www.pbs.org/wnet/supremecourt/rights/landmark_brown.html) (1954). Despite the [practical limits of Brown in effecting desegregation](http://www.urbanedjournal.org/archive/volume-3-issue-1-fall-2004/bell-d-2004-silent-covenants-brown-v-board-education-and-unfulfil) or the failure to implement the [directives of Brown II](http://www.oyez.org/cases/1950-1959/1954/1954_1/), there can be no denying that the ruling – “separate but equal is inherently unequal” – created a over-arching legal framework that emboldened the Civil Rights Movement.

The repudiation, at the Federal last word level, of the [Jim Crow machinery set up in Plessy](http://www.pbs.org/wnet/jimcrow/stories_events_plessy.html)freed the[Civil Rights Movement](http://www.pbs.org/wgbh/amex/eyesontheprize/) to pursue direct action civil disobedience with the confidence of victory. Certainly, there was the omnipresent risk/reality of brutal police response, extra-legal violence and death. But segregation could now be challenged at the local and state levels — the[buses in Montgomery](http://www.montgomeryboycott.com/), the [lunch counters in Greensboro](http://www.northcarolinahistory.org/commentary/299/entry), the [beaches in Florida](http://www.floridasbigdig.com/uploads/ColoredBeachWadeInTequesta0001.pdf), everything in [Birmingham](http://www.bcri.org/) – with the assurance that should the cases wend their way through the Federal Courts, the protesters would prevail. The highest Court in the land was 9 – 0, unanimously, on their side.

There are no such assurances today. To the contrary. The [Roberts Court](http://www.washingtonpost.com/wp-srv/nation/supreme-court-roberts/roberts.html), in a series of [heavily partisan 5-4 decisions](http://www.theatlantic.com/politics/archive/2014/08/john-robertss-dream-of-a-unifying-court-has-dissolved/379220/), has largely undone the major legislative and judicial achievements of the Civil Rights Era, and dragged us back towards an Ante-Bellum landscape of extreme state’s rights. Read: state’s right to discriminate.

At the inspiring, poignant end of [Selma](http://www.theguardian.com/film/2015/feb/02/selma-martin-luther-king-john-patterson), the teletype across the screen updates us as to the fate of protagonists. But missing is the fate of the signature legislation which resulted from the many [bloody sundays, mondays, tuesdays](http://nyupress.org/books/9780814743317/). The [Voting Rights Act of 1965](http://www.ourdocuments.gov/doc.php?flash=true&doc=100) too lies dead – disemboweled by the Roberts Court in [Shelby County v Holder](http://www.law.cornell.edu/supremecourt/text/12-96) (2013). The victory and sacrifice of so many, undone, by mere paper.

All of this is not to discourage the movements of this moment, but rather to say, [Know the Terrain](http://criticalmassprogress.com/2014/10/15/ci-on-birmingham-ferguson-and-the-meaning-of-movement/). The Supreme Court offers now no umbrella of support for demands of equality, inclusion, protection from State violence. [We will not be saved.](http://www.nytimes.com/1987/10/11/books/equality-is-not-enough.html)Our tactics, our strategies, our protests must take account of the current legal landscape. They must be bold imaginative, [community-centered](http://www.democracynow.org/2015/1/30/vanguard_of_the_revolution_new_film), and untethered to any expectation of sanctuary in the courts. They must operate outside the frame.

This is to say too, even to those who eschew electoral politics, keep a [close eye on those nine robed judges](http://womensenews.org/story/campaign-trail/000816/the-new-slogan-its-the-supreme-court-stupid) and to the possibility of who may appoint them. It matters; their decisions shape the space for movements for decades, for generations not yet born, and mean the difference between raw repression and a small bit of [breathing room](http://criticalmassprogress.com/2012/10/24/ci-breathing-room/).

And finally, this is to say that [progress](http://www.thenation.com/article/optimism-uncertainty) is not an uninterrupted forward motion, that no victory is guaranteed forever, Whatever we win today, we must be prepared to defend and re-defend without tire. For the long haul.

#### Court decision create backlash – death penalty proves

Steiker and Steiker 14 (Carol S. Steiker is the Henry J. Friendly Professor of Law and Faculty Co-Director of the Criminal Justice Policy Program at Harvard Law School. & Jordan M. Steiker is a professor and director at the Capital Punishment Center at the University of Texas School of Law, “SYMPOSIUM ARTICLE: LESSONS FOR LAW REFORM FROM THE AMERICAN EXPERIMENT WITH CAPITAL PUNISHMENT.", Southern California Law Review, 87, 733, March, 2014, Nexis Uni via Umich Libraries, Accessed 6/21/20//mrul)

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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d)

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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) According to these skeptical accounts, judicial decisions in each of these [[\*742]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d)

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 untrammeled "death qualification" of capital juries in Witherspoon in 1968 [30](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d)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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d)

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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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 murder [34](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) - bumped up sharply right after Furman, almost certainly in response to the decision. [35](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) The strongest indicator of the [[\*743]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d)

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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) The possibility of this kind of predictive error is especially strong with regard to issues, like [[\*744]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) and more recently (only one year prior to Furman), Swann v. Charlotte-Mecklenburg Board of Education, [43](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) Moreover, not only was the Furman decision heralded by a [[\*745]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) "most journalists understood "randomness,' which had been discussed at some length [in the other opinions], to have been a code word for discrimination." [48](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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 [[\*746]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) New York Times headline. [50](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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 [\*747] 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) required the (in)famous Miranda warnings in 1966, [59](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) and incorporated the right to trial by jury to apply to the states in Duncan v. Louisiana in 1968, [60](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d), 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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. [2](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) The direct impact of criminal justice decisions on the fates of individual defendants is thus a [[\*748]](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d)

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](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) Thus, backlash will inevitably prompt further reactions that themselves may have unforeseen effects; backlash is never the end of the story. [65](https://advance-lexis-com.proxy.lib.umich.edu/document/?pdmfid=1516831&crid=b834aa4a-1265-4b5c-a3fc-6ad17e556484&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5CNT-KRY0-02BM-Y1MM-00000-00&pdcontentcomponentid=7375&pdteaserkey=sr4&pditab=allpods&ecomp=kb63k&earg=sr4&prid=ed3e1ad4-268d-4b71-9095-b5cc5ce32b7d) 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.

#### This court will undermine our democracy.

Drutman and Wallner 18 (Lee Drutman is a senior fellow in the Political Reform Program at the New America Foundation think tank and James I. Wallner is a senior fellow at the R Street Institute, where he is a member of its Governance Project team and Legislative Branch Capacity Working Group, 7-10-2018, "Perspective," Washington Post, https://www.washingtonpost.com/news/posteverything/wp/2018/07/10/why-filling-the-vacant-supreme-court-seat-is-bad-for-the-country/, accessed 6-29-2020//mrul)

With Monday night’s announcement that he’s nominating D.C. Circuit Court Judge Brett Kavanaugh to fill the seat vacated by Anthony M. Kennedy, President Trump moves one step closer to [shifting the direction of the Supreme Court for a generation or more](https://www.washingtonpost.com/politics/courts_law/a-more-conservative-supreme-court-could-step-not-lurch-to-the-right/2018/07/09/48997ae6-83a4-11e8-8553-a3ce89036c78_story.html?utm_term=.044b73925310&itid=lk_inline_manual_2). As the swing vote in closely divided cases, Kennedy single-handedly decided some of the most controversial issues in the United States. Trump’s decision to tap Kavanaugh leaves Republicans hopeful that more of those cases will be decided in their favor.

It’s not hard to see where this is headed. Republicans are already preparing to spend millions of dollars on a political battle to help cement a 5-to-4 conservative majority on the Supreme Court by confirming Trump’s nominee. Liberals will, in turn, lose their minds. When Democrats next gain unified control of government, they could [pack the courts](https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court). It’s the logical tit for tat for the “stolen” seat President Barack Obama nominated Merrick Garland to fill. But then what happens? Play another round of tit for tat, and the future looks unsustainable. That so much is riding on one Supreme Court seat is a testament to how broken our politics are.

There is only one way to get out of the vicious cycle ahead of us: We need to stop thinking of the Supreme Court as the final arbiter of every controversial issue in U.S. politics. Short of that, we must make it harder for the court to act decisively in controversial cases. This could be done by requiring an even number of justices picked by a majority and a minority in the Senate. Let the court deadlock more, and let democracy do the hard work of politics, instead of lawyers and judges.

[There’s no conspiracy between Trump and Kennedy. There’s just the swamp.](https://www.washingtonpost.com/news/posteverything/wp/2018/07/03/theres-no-conspiracy-between-trump-and-kennedy-theres-just-the-swamp/?utm_term=.b3f986127871&itid=lk_interstitial_manual_6)

The reality of a deadlocked Supreme Court means that lower court decisions stand, even when they conflict. But that isn’t the end of the world. Even with nine justices, the Supreme Court chooses to hear [only about 80 cases each year](https://www.supremecourt.gov/about/justicecaseload.aspx). Most of the judiciary’s work occurs at the district and circuit court levels. And while it’s true that an evenly divided court won’t be able to resolve circuit splits, such divisions among the nation’s jurists are a sure sign that we have on our hands a political, not a legal, question. Which means a job for Congress, not the courts. And we’ve survived periods in which the Supreme Court was evenly divided in the past: Most recently, the court had only eight justices between the death of Antonin Scalia and the confirmation of Neil M. Gorsuch. Still, the republic didn’t collapse.

An even balance on the court would make it less likely that any one justice will again possess the disproportionate dominion on U.S. politics that Kennedy had at the end of his career. And it would leave more issues to Congress, lower courts and the states to decide. The Supreme Court will instead be left to decide two sets of cases: (1) genuine constitutional questions, where the legal issues transcend current policy fights; and (2) questions where conservatives are able to convince liberals, and vice versa.

That would leave the court to preserve its legitimacy to act authoritatively to interpret the Constitution when it absolutely needs to. And it would encourage more creativity and coalition-building among justices and legal scholars, who should seek new ways of litigating complex social and political questions.

Deputy editorial page editor Ruth Marcus and columnist Megan McArdle debate the legal merits and value of keeping the Supreme Court decision. (Adriana Usero/The Washington Post)

The quickest way to create deadlock on the court would be to not fill Kennedy’s seat. But to add fluidity and dynamism to the court in the future, each subsequent Congress (starting with the 116th) could add two justices, one agreeable to the Senate majority and one agreeable to the minority, each for an 18-year term, until the court is at 16 members. As the court grows, let a random draw of four justices picked by Republicans and four picked by Democrats decide each case. Regularizing appointments would further drain the stakes of any one nomination and ensure that, as Chief Justice John G. Roberts Jr. [once put it](https://www.nytimes.com/2005/07/30/politics/politicsspecial1/white-house-memos-offer-opinions-on-supreme-court.html?_r=0) while arguing for 15-year term limits, “federal judges would not lose all touch with reality through decades of ivory tower existence.”

[Lawyers alone can’t save us from Trump](https://www.washingtonpost.com/news/posteverything/wp/2017/06/27/the-supreme-courts-travel-ban-order-shows-that-lawyers-cant-save-us-from-trump/?itid=lk_interstitial_manual_14)

The case for a detente in the confirmation wars accepts that the “the other side started it” is a [turtles-all-the-way down argument](https://en.wikipedia.org/wiki/Turtles_all_the_way_down), with the turtles sitting on top of the Judiciary Act of 1789, which first set the number of justices at six. Or maybe the Judiciary Act of 1801 (repealed in 1802), which appointed a slew of “midnight” Adams administration judges and shrunk the number of justices down to five, so the incoming Jefferson administration wouldn’t be able to appoint a justice. Or maybe Marbury v. Madison (1803), which expanded the power of the courts to nullify legislation on constitutional grounds.

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Or maybe it was the [Tenth Circuit Act of 1863](https://www.loc.gov/law/help/statutes-at-large/37th-congress/session-3/c37s3ch100.pdf), which upped the Supreme Court to 10 justices (from nine, following an 1837 law), or the subsequent Judiciary Act of 1869, which put the number back to nine. Or maybe it was Franklin Roosevelt’s plan to pack the courts that politicized the judiciary. Or the litany of landmark decisions by the Warren court (1953 to 1969), or Roe v. Wade (1973), that gave liberals the [hollow hope](https://www.amazon.com/gp/product/0226726711?ie=UTF8&tag=washpost-20&camp=1789&linkCode=xm2&creativeASIN=0226726711) that the courts would be their savior and mobilized conservatives into seeing the judiciary as the antidemocratic battering ram of too-fast social change. Then Bork. Then Garland. Then the end of the judicial filibuster. And now, well, you get the idea.

Letting this moment pass without reforming the way we pick Supreme Court justices could have dire consequences for our democracy by continuing to divert the most controversial fights to the place where their ultimate arbitration is least likely to generate legitimacy — the courts.

For decades, conservatives have complained about judicial supremacy intruding onto politics, leaving decisions that belonged in the hands of the people and their elected representatives to nine lifetime appointees. Liberals, now for the first time in 80 years, are coming to understand why that’s such a problem.

We’re at a unique moment when everyone should be open to change. It’s a moment for senators to bind together and think about the political legacy they’re leaving. Now is the moment to defuse the hypertrophy of the Supreme Court as the final arbiter of complicated political fights and return politics to where it belongs: the public.

### Death Penalty Link

#### Abolition will reduce attention and pressure to resolve remaining problems in criminal justice system

Steiker & Steiker, 19 --- Professors of Law at Harvard and University of Texas respectively (Carol S. & Jordan M., “19. Global abolition of capital punishment: contributors, challenges and conundrums,” In Comparative Capital Punishment Law, ed. CS Steiker, JM Steiker, <https://doi-org.proxy.lib.umich.edu/10.4337/9781786433251.00030>, pp.409-10, JMP)

But the end of the death penalty might also diminish attention toward domestic criminal justice practices. No other criminal justice practice currently generates as much critical engagement, and concerns about arbitrariness and error in the administration of criminal law have been traceable in part to the presence of the death penalty. Novak suggests that the use of empirical scholarship to evaluate criminal justice practices will be an important legacy of the death penalty abolition effort,129 but it is also possible that empirical engagement will suffer when the target of the death penalty is removed. Global abolition might paradoxically relieve the pressure to adopt fair and reliable procedures in criminal cases, because the absence of the death penalty minimizes the human rights dimension of the underlying criminal proceedings.

### AT: Abolition Will Improve Criminal Justice System

#### The criminal system will reshape itself after the plan --- frees up resources that get deployed to benefit the broader system

Steiker & Steiker, 20 --- \*Professor at Harvard Law, AND \*\*Professor of Law at University of Texas School of Law (January 2020, Carol S. Steiker and Jordan M. Steiker, “The Rise, Fall, and Afterlife of the Death Penalty in the United States,” <https://www.annualreviews.org/doi/full/10.1146/annurev-criminol-011518-024721>, accessed on 6/1/2020, JMP)

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

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

#### And, abolition won’t dismantle other parts of the system like mass incarceration, solitary confinement and tolerance of sexual violence

Steiker & Steiker, 20 --- \*Professor at Harvard Law, AND \*\*Professor of Law at University of Texas School of Law (January 2020, Carol S. Steiker and Jordan M. Steiker, “The Rise, Fall, and Afterlife of the Death Penalty in the United States,” <https://www.annualreviews.org/doi/full/10.1146/annurev-criminol-011518-024721>, accessed on 6/1/2020, JMP)

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

However, on a more substantive level, it seems doubtful that American abolition would represent a deeper acceptance of the norm of respect for human dignity that the international consensus on the death penalty embodies. Some experts hope that worldwide abolition of the death penalty will mark the success of an increasingly global postwar international human rights agenda and the general acceptance of the concept of human dignity as part of a new global common law (Novak 2019). But American abolition, if and when it comes, will likely be rooted in more pragmatic concerns, which tend to dominate American discourse on the issue (Steiker & Steiker 2016). Extreme criminal punishments like the death penalty both reflect and reinforce a vision of offenders as less than human (Christie 2014). But even without capital punishment, the vigorous use of other extremely harsh punishments (like LWOP) and the maintenance of degrading conditions of incarceration (such as excessive use of solitary confinement and tolerance of sexual violence) stand in the way of a full embrace of human dignity in punishment practices. And although the death penalty may have facilitated the rise of mass incarceration in the United States (Scherdin 2014), the converse does not follow: The dismantling of the death penalty will not immediately or inevitably do much to reverse the massive scale of American imprisonment.

### AT: Abolition => Expanded Mitigation Strategies

#### No widespread adoption of mitigation strategies post abolition

Steiker & Steiker, 20 --- \*Professor at Harvard Law, AND \*\*Professor of Law at University of Texas School of Law (January 2020, Carol S. Steiker and Jordan M. Steiker, “The Rise, Fall, and Afterlife of the Death Penalty in the United States,” <https://www.annualreviews.org/doi/full/10.1146/annurev-criminol-011518-024721>, accessed on 6/1/2020, JMP)

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

### 2nc Movements Key to Human Rights

#### Social movements are critical building lasting change centered around defending of human dignity

Halpin and Cook 10(John Halpin Senior Fellow; Co-Director, Politics and Elections and Marta Cook Research Assistant, 2010, " Social Movements and Progressivism," Center for American Progress, https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/progressive\_social\_movements.pdf, accessed 7-6-2020//mrul)

Social movements for equality rest squarely on America’s most cherished principles. They draw heavily from religious teachings about human dignity and solidarity, Enlightenment thought about human autonomy, and formative political documents such as the Declaration of Independence. The most complete and cumulative expression of these values in modern times was expressed in Article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Given the deep foundations of these beliefs, it is not surprising that social movements designed to correct injustices associated with legal and societal oppression have been some of the most passionate and hard fought in American history. From abolition and women’s suffrage to civil rights movements for African Americans, immigrants, and gays and lesbians, progressives have been at the forefront of defending human liberty and equality against efforts to treat certain groups of people as second-class citizens. Their combined efforts helped make America a more diverse, tolerant, and socially mobile nation.

#### Movements are key to restore US human rights.

Thompson 8 (R.J. Thompson is an attorney at the Lesbian, Gay, Bisexual & Transgender Community Center in New York City., 2008, "Human Rights: The Key to Progressive Cross-Movement Building in the United States," https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1068&context=hrbrief, accessed 6-30-2020//mrul)

The time is now for the lesbian, gay, bisexual & transgender liberation movement, along with all other social justice movements in the United States, to understand our struggles as human rights struggles, our organizations as human rights organizations and envision a world where all human rights of all peoples are respected, protected and promoted. A progressive, people-centered human rights movement has true revolutionary potential in the context of the United States. Popular education around human rights has the potential to transform the mainstream culture of the United States. Human rights frameworks, language, messaging and strategies are needed for the individual and collective liberation of our communities. Activists in the United States can no longer afford the luxury of geographic, issue-based or identity-based isolationism and must no longer unwittingly mirror the exceptionalism of our own government. Human rights are universal, interdependent, indivisible, inalienable and intersectional. The human rights framework demands that rights be protected, promoted and respected, and that violations of rights be addressed proactively, not just retroactively. The human rights framework understands that for any scheme of rights protection and promotion, those most directly impacted must have a place at the table at all levels of policy creation, implementation and enforcement. Finally, a people-centered human rights framework teaches that both the state and non-state actors have affirmative obligations to respect, protect and promote civil, political, economic, social, cultural, sexual, environmental and developmental rights. U.S.-based activists are understanding and implementing human rights domestically more and more with each passing day. Our challenge is to continue to educate ourselves and our colleagues about the revolutionary potential of a human rights vision and agenda; and to simultaneously craft our public messaging, media campaigns, and legal arguments in the language and principles of human rights as part of a long-term movement building and culture shifting effort, so that one day the masses in this country demand government accountability for human rights obligations and expect that the full spectrum of their human rights be respected, protected, and promoted by all segments of society.

### 2nc Movements Solve the Case

#### Movements are empirically successful in shaping society by catalyzing change from the bottom up

Halpin and Cook 10 (John Halpin Senior Fellow; Co-Director, Politics and Elections and Marta Cook Research Assistant, 2010, " Social Movements and Progressivism," Center for American Progress, https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/progressive\_social\_movements.pdf, accessed 7-6-2020//mrul)

A rich history of social movements shaped progressive thought throughout the 19th and 20th centuries. Historian Sidney Milkis characterizes the accomplishments of the original Progressive Era as “momentous reconstructions of politics,” a description that equally applies to the numerous social movements that aimed to better align America’s political and social order with its ideals of liberty, equality, and opportunity for all.1

Progressivism as a reform tradition has always focused its moral energy against societal injustice, corruption, and inequality. Progressivism was built on a vibrant grassroots foundation, from the Social Gospel and labor movements to women’s suffrage and civil rights to environmentalism, antiwar activism, and gay rights. The activists and leaders of these movements believed deeply in the empowerment and equality of the less privileged in society, the primacy of democracy in American life, and the notion that government should safeguard the common good from unchecked individual and commercial greed. They challenged government to eliminate its own legal injustices and also harnessed the force of government as a vital tool for advancing human freedom and establishing the “more perfect union” envisioned by the Founding Fathers.

Central to all progressive social movements is the belief that the people do not have to wait for change from the top down—that people themselves can be catalysts for change from the bottom up. Many social movement activists came from middle- or working-class backgrounds and possessed the courage and skill to organize others, risking great personal sacrifice and danger. Nonviolent themselves, many of these activists faced ridicule, violence, and other hardships in their efforts to push their fellow citizens toward more enlightened positions in line with the country’s stated values.

Mainstream political parties often ignored social movement activists who engaged in public education and took to the streets to demand justice and political equality. Through direct action campaigns and political organizing they asked other Americans to join their cause as a matter of conscience and duty to their fellow human beings. As Martin Luther King Jr. famously stated in his “Letter from Birmingham Jail”:

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial “outside agitator” idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.2

The relationship between political progressivism—as expressed in the platforms and actions of political parties and leaders—and social movements has not always been harmonious or cooperative. Social movements, by definition, arise from a committed minority of citizens working together to shape larger public consciousness about particular injustices in addition to working for concrete political change. Social movements have invariably advanced moral and political causes surrounding gender, racial, and class equality with much greater force and consistency than those in mainstream politics. The ideas of social movements, such as expanded suffrage and civil rights protections, often become uncontested parts of mainstream politics after prolonged struggles. In other cases, social movements band together to create new political institutions to challenge the partisan status quo from the outside as seen with the early farmers’ alliances who formed the People’s Party and social reformers and dissident Republicans of the early 1900s who formed the Progressive Party.

Progressive leaders themselves learned from the principled activism of social movements. Many mainstream progressive political leaders in the past were reactionary on issues of race and gender. At the same time, the seeds of the great civil rights triumphs of the 20th century came from within progressivism itself. An interracial coalition of progressives joined together to create the NAACP and many leading progressives emerged from the fight for abolition and women’s suffrage. The collective efforts of these movements eventually helped to turn progressivism itself into a stronger vehicle for human equality, social tolerance, and political rights for all people.

Progressive social movements are divided into two main categories for the purposes of this essay: movements for equality and individual rights, and movements for economic justice. This division presents two questions: What, if anything, ties these movements together, and how do they fit within the larger intellectual and political tradition of progressivism?

• First, each of the movements developed in response to a grave injustice in American life that directly or indirectly affected a significant segment of society—for example, the formal inequality of women, African Americans, immigrants, and gays and lesbians led to various movements for civil rights; the poor working conditions and poverty-level subsistence of wage earners led to the rise of the labor movement.

• Second, each of these social movements worked as independent checks on mainstream progressive politics and functioned as internal factions within the progressive tradition itself.

• Third, in terms of shared values, many of these movements were grounded in the moral and philosophical inspiration of the early American tradition—particularly the Declaration of Independence, the preamble to the U.S. Constitution, and other civic republican and democratic ideals—as well as longstanding religious principles expressed in Protestant, Catholic, and Jewish faiths.

• Fourth, each of these movements in one way or another advanced the values of progressivism described in the opening essay: freedom in its fullest sense; a commitment to the common good; pragmatic reform; human equality; social justice; democracy; and cooperation and interdependence. Although sometimes radical for their times, the movements described here lie clearly within the reform tradition of American politics and many, if not all, of their original goals have been integrated into mainstream American society and government over time.

The relationship between social movements and progressivism is ultimately one of shared learning and activism in pursuit of common values. These brief summaries are not meant to be exhaustive accounts of all the major players or all the landmark events of the various movements, but rather to provide an illustrative sampling of a rich tradition that continues to shape progressivism today. Other important social movements including environmentalism, consumer protection and antiwar activism will be explored in future essays.

### 2nc Social Movements Key to Change Public Attitudes

#### Social movements solve – they can shift public opinion.

Rust-Tierne 15(Diann Rust-Tierne is the Executive Director National Coalition to Abolish the Death Penalty, 2015, "LEGAL CHANGE: LESSONS FROM AMERICA’S SOCIAL MOVEMENTS," https://www.brennancenter.org/sites/default/files/publications/Legal\_Change\_Lessons\_from\_America%27s\_Social\_Movements.pdf, accessed 6-27-2020//mrul)

I f the death penalty is to be outlawed in the United States, the Supreme Court must find it falls outside of “evolving standards of decency that mark the progress of a maturing society” — in short, that it violates the Eighth Amendment.

The Court’s view of that evolving standard is not static. The Eighth Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes more enlightened by humane justice.”

1 However, the Supreme Court will not lead this inquiry. It will assess and then follow.

In McCleskey v. Kemp, a case raising an unsuccessful constitutional challenge to Georgia’s racial pattern of death sentencing, the Court reasoned: “It is not the responsibility–or indeed even the right–of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are ‘constituted to respond to the will and consequently the moral values of the people.’ [emphasis added]”2 45 \* I’d like to thank Elena Dennis for her incredible research assistance while drafting this essay. 46 Legal Change Consequently, in our democratic form of government, advocates seeking to change the status quo must succeed in the court of public opinion and then in state houses and offices and conference rooms of public officials. To end the death penalty in the United States we must (1) educate the public and policymakers on the flaws that are inherent in the practice, (2) identify policymakers who will challenge the status quo and inertia, and (3) engage and connect community stakeholders in a process that enables them to work with policymakers to affect the change.

More than in other contexts, Eighth Amendment criminal justice advocates must use a multi-disciplinary approach to change policy. The more significant the change contemplated, the more important it is to include and engage the participation of a wide range of actors.

Educate the Public and Policymakers Justice Thurgood Marshall was right when he said: “Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand.”3

Justice Marshall was pointing out that most people know little about capital punishment. Support is largely support in the abstract. Capital cases account for only a small percentage of all homicide cases. Few people have direct knowledge or experience with capital punishment in practice. Until more recently, individual executions failed to even garner significant media attention.

Recently, public attitudes about the death penalty have shifted dramatically. Polls by the Pew Research Center and CBS News indicate that support for capital punishment is at 56 percent — a 40-year low. Opposition to the practice has increased to 38 percent. Support for the death penalty among women has declined by 10 points since 2011. Fifty-six percent of Democrats now oppose the death penalty. Just four years ago, 49 percent of Democrats supported the death penalty and 43 percent opposed it.4 While support for the death penalty has declined overall, there are still marked differences based on race. Sixty-three Rust-Tierney 47 percent of whites favor the death penalty compared with 34 percent of African Americans and 45 percent of Hispanics. Finally, numerous polls find that support shifts away from the death penalty when the public is presented with a range of alternatives to the practice.5

Public skepticism of capital punishment is reflected further in its limited use.6 Only 2 percent of the counties in the United States have been responsible for the majority of cases leading to executions. In 2014 there were only 72 new death sentences nationwide and only 35 executions were carried out. Eighty percent of the executions in 2014 took place in three states: Texas, Florida, and Missouri.7

How to Shift Attitudes? Understanding more about what issues concern the public most and have the most impact on public opinion provides some guidance for our continued efforts.

One of the most significant issues in public discourse about the death penalty is the risk of executing an innocent person. Eighty-four percent of those who oppose the death penalty say there is a risk of executing someone who is innocent.8

The Troy Davis case exposed many to the harrowing reality that people can be executed despite doubt of guilt. Troy Anthony Davis was sentenced to death and executed for murdering Officer Mark McPhail, despite recantations from seven of the nine witnesses, evidence pointing to another suspect, and no reliable physical evidence linking him to the crime. Millions of people for whom the death penalty had been just an abstraction focused on the practice and its problems because Troy Davis and his beautifully determined and brave family made it real — up close and personal. The Davis case forced death penalty supporters to rethink their position. Moreover, death penalty opponents demonstrated that they could mobilize by the millions. The Troy Davis effort provides a model for coordinated grassroots communications that can enhance the reach of our current public education efforts.

Similarly, the way in which information is conveyed is also important. Stories about men and women who were condemned, often 48 Legal Change told in their own voices, have heightened the public’s uneasiness with capital punishment.9

Finally, botched executions and controversies surrounding the extremes to which some state officials will go to conduct an execution has repeatedly cast the death penalty in a negative light.

All of this suggests that we have been on the right track in pressing “the Marshall thesis.” Our task is to increase and intensify the public’s exposure to the many flaws inherent with the administration of capital punishment, including, and most importantly, its failure to enhance public safety overall.

Enlist Sympathetic Policymakers Even the most educated and engaged public is powerless to make significant policy change without political leadership that has the courage, wisdom, and work ethic to tackle complex and emotionally difficult topics.

Policymakers have labored under the false impression that they will be punished politically for opposing capital punishment or articulating a thoughtful critique of the practice. However, a consistent body of research demonstrates that the public will not vote against a lawmaker solely because he or she expresses concern or opposition to the death penalty.10

The successful bipartisan effort to end the death penalty in Nebraska demonstrates that there is a broad base of opposition to capital punishment.11 Similar efforts under way in states like Kansas further indicate that opposition to the death penalty has become mainstream opinion.

The increased visibility and engagement of people representing a broad spectrum of political views will go a long way toward helping policymakers rethink faulty assumptions. Moreover, consistent concern and opposition to the death penalty from victims’ family members demonstrates that there is not a monolithic view on this issue among survivors of homicide.

We must continue to mobilize a broad and growing constituency to challenge and change the outdated “political wisdom” on capital punishment.

The environment in which the death penalty policy debate is taking place has changed dramatically. Sadly, recent instances of racially motivated violence, police abuse, and overreaching have forced a broader conversation about race, power, and privilege on a reluctant country. We are asking questions about overly-harsh criminal sanctions, mass incarceration, and disparate treatment of survivors of crime. Other features of the current system are coming under greater scrutiny too, including the use of solitary confinement and felony disenfranchisement.12 Communities are discussing the ways in which barriers to employment and the denial of access to state educational, housing, and subsistence income assistance programs undermines our goals of rehabilitation — a core value and objective underlying criminal justice policy.

These concerns about the way in which other aspects of the criminal justice system undermine respect for human dignity apply with equal force to capital punishment. Advocates for ending the death penalty will need to continue to align with people of color and communities that have been marginalized and abused by the current system.

Said another way: Reforms in other areas of criminal justice policy — such as reductions in mass incarceration, police abuse, or conditions of confinement — will be incomplete if the death penalty is left out of the equation. We cannot truly celebrate a shift to a more enlightened approach to criminal justice if ending capital punishment is not central to that effort as well.

The change we seek is as much or more a cultural change as it is a legal change.

Legal change happens when advocates persuade policymakers that a practice or institution does not work and that popular will supports change.

We have four decades of empirical evidence to support the conclusion that the death penalty experiment licensed by the Supreme Court has failed.13 The death penalty is as arbitrary, biased, and prone to error as it ever was.14 Justice Harry Blackmun chronicled his unsuccessful effort to reconcile the aspirational goals of fairness and predictability expressed in Gregg v. Georgia with the nitty-gritty reality of the death penalty in practice. 50 Legal Change He finally admitted defeat in a dissent from the Court’s denial of a petition for certiorari challenging a capital murder conviction in Callins v. Collins. He wrote, “I shall no longer tinker with the machinery of death.”15

An active and engaged constituency for repeal can force even reluctant politicians to take Justice Blackmun’s journey and examine the facts and the failures of the current system.

#### ONLY social movements send a public awakening to solve.

Gaskins 15 (Keesha Gaskins Program Director of the United States Rockefeller Brothers Fund, 2015, "LEGAL CHANGE: LESSONS FROM AMERICA’S SOCIAL MOVEMENTS," https://www.brennancenter.org/sites/default/files/publications/Legal\_Change\_Lessons\_from\_America%27s\_Social\_Movements.pdf, accessed 6-27-2020//mrul)

Increasingly, Americans no longer see government as the primary way to change the policies that guide the way we live. Constituent communities, however, still place enormous pressure on government, and have higher expectations for social justice groups, organizers, and advocates to be effective as policy influencers and movement builders. To frame this discussion, I would first like to outline the trajectory, or the “arc of change,” of a movement. An arc of change must have three elements: (1) a public awakening to a problem, (2) a change in the law or legal parameters, and (3) a cultural and behavioral reformation, where the actions and attitudes by both individuals and institutions change to conform to both the letter and intention of the law. Some arcs are relatively short, others take decades. There are several 20th century movements exemplifying the “arc of change.” The civil rights, women’s equality, gay rights, and environmental movements were primarily counter-majoritarian, organized around specific goals where populations that constituted a numerical minority sought concessions from the larger power structure. Today, however, much of the current political and populist energy is focused on elevating the “99 percent,” a very different base. The “99 percent” is diverse, culturally fragmented, and majoritarian. Any attempt to bring a majority of U.S. residents together challenges the fundamental conceptions of identity politics, partisan allegiances, and class identification that many 20th century models for movement-building depended upon. Simply importing historical models may be insufficient to effect change today. New organizing, advocacy, and communications strategies are needed for engaging a significant majority who share economic self-interest, but are often politically, socially, and culturally divided. This essay discusses four distinct challenges for social change movements focused on reforming public policy in the United States today. Harnessing Disruption To be “disruptive” is often the focus of organizations or individuals seeking transformative change. Disruptive action seeks to shift the current distribution of power, undermine structural racism, or subvert economic inequality. Disruption is an important tactic, distinct from infrastructure development. Political and economic systems, like nature, abhor a vacuum. Absent a replacement for an effectively disrupted system, opportunists will take advantage of any void created by disruptive action. Those opportunists will likely represent change, but any change is not necessarily better than no change. Disruptive action must be accompanied by a way to leverage power to fill the void created by the disruption. Disruption without a clear demand for meaningful, discrete change may create a moment of energy and important attention, but will ultimately be unable to create long-term change. This is not to say that disruptive moments are not important. Indeed, those moments are essential, but taken alone they are not enough to create the opportunities for structural, transformational change. To paraphrase Rashad Robinson of ColorofChange.org, organizing strategies must evolve from creating cultural presence to leveraging cultural power toward a specific goal. Gaskins 137 Occupy Wall Street (OWS), the movement that began on September 17, 2011 in Zuccotti Park in New York City’s financial district, is an important example of a contemporary disruptive protest movement. OWS received global attention, spawning a worldwide Occupy movement and creating a populist moment for people who believe the current state of economic inequality is unsustainable. According to a June 2015 statement, Micah White, the co-creator of OWS, believes that attracting millions of people to the streets no longer guarantees the success of a protest. He has asserted that learning to use social networks to benefit social movements is one of the greatest challenges of activism. Importantly, White understands that protest is reinvented all the time. According to him, every generation experiences its own moments of revolution. In the 21st century, we are now living through a time when tactical innovations are happening much more often because people can see what others are doing around the world and innovate in real time. In comparison, another important organization to evaluate is #BlackLivesMatter. According to its website, #BlackLivesMatter was created in 2012 after the vigilante George Zimmerman was acquitted for the murder of an unarmed 17-year-old black teenager, Trayvon Martin. Rooted in the experiences of black people in this country who actively resist our dehumanization, #BlackLivesMatter identifies itself as a call to action and a response to the virulent anti-black racism that permeates American society. #BlackLivesMatter operates as a national organization with 26 chapters working to address foundational legal, cultural, and behavioral change in communities across the country. #BlackLivesMatter works to give meaning to the promises made by the laws passed during the civil rights movement in the United States by changing the culture and behavior related to the dehumanization of black lives. This organization has a broad and wide cultural presence and continues to strive to leverage that presence to create discrete change. Certainly, #BlackLivesMatter as a hashtag and organizing tool is important, but the organization creates the vehicle for structural change. In short, there is great potential for disruption to be little more than a distraction. Disruptive protest must do more than destabilize loci of power. It must be part of a pathway toward transformation. 138 Legal Change Maximizing Opportunities in the Digital Age In our highly mobile and digital society, there are increasing opportunities to organically elevate issues unconstrained by temporal and geographic limitations. Opportunities for digital media and traditional offline organizing spaces do not rely upon singular leadership, but in fact take on multi-nodal models of leadership. Indeed, organizationally branded ideas are often less trusted than those that arise organically. The ability to create cultural moments through online presence has become meaningful in the last 15 years through Twitter, Facebook, Instagram, and other platforms utilizing online petitions like MoveOn.org, or through crowdsourcing efforts for fundraising. Messages, memes, and campaigns move quickly, but are often short-lived. Despite these engagement trends, policy reform and political infrastructure remain geographically based. As new styles of leadership and organization bring about governmental policy reforms, effective leaders consider the limitations and benefits of leveraging decentralized actors on geographically-focused systems of governance. Dysfunctional government is also a problem. The inability of government to respond to citizens in the digital space is very much part of the exasperation with government felt by many. Digital visionary Micah Sifry of Civic Hall in New York City has noted that the online interface of most government agencies mimics a brick-and-mortar building rather than creating truly interactive environments to address constituent needs. Moreover, legislative bodies at the municipal, county, state, and federal levels should be far more transparent and effective at integrating digital participation in the legislative process. Certainly, organizations like Code for America have seen the need for government systems to create interactive spaces where citizens and residents can interact with government, not just to meet service needs, but also to participate in public deliberation. Increasingly, emerging social justice leaders see corporations as key drivers for social change. These leaders push corporations to be leaders through environmental sustainability programs, wellness programs for employees, higher wage standards, and corporate responses to Gaskins 139 disfavored public policies. Corporations themselves are finding a public voice in the fight against economic inequality by pushing for a model of “sustainable capitalism.” Corporations can lead trends, push governments to act (or cease acting), serve as philanthropic support for programs, and take on contracts for traditional public-service areas, like prisons, schools, and roadways. Corporations, however, should not take the place of elected officials in a representative democracy. Corporations can lead and influence, but cannot create public policy in place of formal governance systems. Moreover, corporate leadership has little incentive to create spaces for alternative economic systems reliant upon collective ownership, and non-market solutions to problems that present unique opportunities for economic reform. Ultimately, the ability of reformers to influence policy will depend on their ability to leverage a digital presence into genuine political will. This is not to suggest that traditional boots-on-the-ground grassroots organizing models will not matter — to the contrary, the need to touch people individually will remain as important as it always has been. The challenge is to effectively integrate online organizing with face-to-face grassroots organizing to influence change.

### 2nc Movements Spillover

#### Social movements spill over to hybrid movements.

Heaney 14(Michael T. Heaney, January 2014, "Hybrid Activism: Social Movement Mobilization in a Multimovement Environment1," American Journal of Sociology, https://www-journals-uchicago-edu.proxy.lib.umich.edu/doi/10.1086/674897, accessed 6-27-2020//mrul)

Research on hybrid organizations in some organizational fields (such as the feature film industry) points to the challenges that actors experience when they possess hybrid identities. However, within the domain of social movements, intermovement dependency mitigates the illegitimacy discount for hybridization. For social movement organizations, blending organizational categories is an expected strategy rather than an aberration from the norm. The legitimacy or illegitimacy of these organizations is more likely to be determined by other factors, such as the authenticity with which they represent intersectional identities.

Our analysis deepens the understanding of intermovement dependency by illuminating how hybrid organizations are a vital part of the mobilization process for peace. These organizations have a noticeable role at the individual and organizational levels. Hybrid organizations help people with backgrounds in other social movements to connect with the antiwar movement. Possessing hybrid identities enables organizations to serve as intermovement representatives in coalitions, to occupy central positions within networks, and to get people into the streets at antiwar demonstrations. As a result, the antiwar movement would likely have encountered difficulties sustaining mobilization if it had not been able to connect with other movements through hybrid organizations.

The antiwar movement in the United States during the 2000s did not stop U.S. wars in Iraq or Afghanistan. Still, it would be premature to conclude that the antiwar movement did not have significant consequences for American politics and society. The movement stimulated interaction among social movements in the United States. It educated new activists. It provided a testing ground for new organizing modes and tactics, particularly those linked to the rise of the Internet (Nah et al. [2006](https://www-journals-uchicago-edu.proxy.lib.umich.edu/doi/10.1086/674897#rf109); Rojas [2009](https://www-journals-uchicago-edu.proxy.lib.umich.edu/doi/10.1086/674897#rf123)). Indeed, the social and political consequences of the antiwar movement of the 2000s are likely to be borne out in the coming decades as hybrid organizations that grew out of the movement after 9/11—such as the ANSWER Coalition, Code Pink: Women for Peace, and World Can’t Wait—apply their experiences to a wide range of political developments. The quick mobilization of these organizations against a potential U.S. attack on Syria in 2013—while most of the antiwar movement of the 2000s remained quiescent—testifies to the enduring power of intermovement hybridization as a strategy for antiwar mobilization.

## Japan DA

### 1nc DA Japan

#### Despite coronavirus, Abe is hanging on as the head of the LDP --- the alternative is unstable factions

Sakaguchi, 6-26-20 (Yukihiro Sakaguchi, Sakaguchi is a Nikkei staff writer. "Race to replace Abe threatens stability of Japanese politics", Nikkei Asian Review, https://asia.nikkei.com/Politics/Inside-Japanese-politics/Race-to-replace-Abe-threatens-stability-of-Japanese-politics, 6-26-2020, Accessed 7-7-2020) //ILake-JQ

Despite the hit to his popularity, Abe remains the favorite within the LDP to lead the party in an election. "An election under a post-Abe leader would be tough for the LDP," said a lower house lawmaker. "The LDP will want to hold the election under Abe's leadership." Abe has traditionally performed well in elections. He led the LDP to victory in the past five national elections. His term as head of the LDP will end in September 2021, and the current lower house term will end in October 2021. However, two years and eight months -- just one month short of the actual average term -- of the current term have already passed.

An electoral win would shore up Abe's ability to influence who will be his successor, but a poor showing or stagnant economic growth could benefit some dark horses. In a recent opinion poll, Shigeru Ishiba, a former defense minister and LDP secretary-general, was the top choice to succeed Abe. Ishiba, a vocal Abe critic, has seen his support rise as disapproval of the administration has grown.

But Ishiba lacks support within the party. His own party faction counts just 19 members, one short of the 20 recommendations needed to run in the LDP leadership election. He has courted support from the current LDP secretary-general, Toshihiro Nikai, and lawmakers from other party factions, and he has adopted a more solicitous attitude toward younger politicians in a bid to gain their support.

Other politicians are also jockeying for position. On June 11, a new group was formed under the initiative of former Education Minister Hakubun Shimomura and former Defense Minister Tomomi Inada, both of the Hosoda faction. The group, which was to discuss society after COVID-19, attracted 136 members. It was focused on the same topic that Kishida asked Amari to lead on. Within the Hosoda faction, Shimomura, Inada and Yasutoshi Nishimura, who doubles as minister of state for economic and fiscal policy and minister in charge of economic revitalization, are seen as strong candidates to lead the LDP.

Foreign Minister Toshimitsu Motegi, a member of the Takeshita faction and another party heavyweight, and Defense Minister Taro Kono of the Aso faction are also considered to be likely candidates. Secretary-General Nikai recently praised Ishiba as a "rising star," but he also regularly shares information with Chief Cabinet Secretary Suga. Suga himself is another post-Abe possibility. The complex personal relationships developing within the LDP make it difficult to see who will emerge strongest.

Since the start of his administration, Abe has generally enjoyed strong popularity thanks to expanded employment and other benefits from the Japanese economic recovery he led. But now the coronavirus has brought the economy to a halt. Distrust in the political process may grow if anxiety over employment increases, especially if the ruling party cannot get behind a new leader. With the LDP divided and many politicians restless after Abe's long turn at the helm, Japanese politics may become much less stable in the near future.

#### The plan puts pressure on Japan to abolish the death penalty

Johnson 20. David T Johnson is part of the faculty in the Department of Anthropology at UH Mānoa, offering expertise on Criminology, Law & Society, [“Why Does Japan Retain Capital Punishment?”, 2020, In: The Culture of Capital Punishment in Japan. Palgrave Advances in Criminology and Criminal Justice in Asia, Chapter 10, URL: <https://link.springer.com/chapter/10.1007/978-3-030-32086-7_1>] RN

In many respects, Japan remains committed to a model of law and government that considers “self-sufficiency” a virtue and that resists and resents attempts at outside influence. Japan is also ruled (once again) by a Liberal Democratic Party, some of whose members believe that human rights are not universal. Of course, Japan does follow America’s lead in some matters of foreign policy. Indeed, Japan’s subordination in this sphere is sometimes so extreme that it has been called a “puppet state.” In this sense, Japan’s retention of capital punishment may depend on American retention, for when a superpower that sees itself as the archetypal liberal democracy continues to kill its own citizens, it provides cover and legitimacy for other nations that want to do the same. If the United States abolishes capital punishment, as some analysts predict,23 Japan could continue to resist pressure to conform to the emerging norm of abolition, as it has done with respect to whaling ever since the International Whaling Commission’s moratorium on commercial whaling went into effect in 1986. But in my view, a more likely response to American abolition would be for Japan to do what it has often done in its modern history: adapt to the changing circumstances of its external environment24—and abolish capital punishment. But of course, this possibility is premised on the big “if” of American abolition. As of 2019, that has not happened, and Japanese leaders perceive little pressure to abolish, either from foreign actors and abolitionists or from their own domestic constituencies. Unlike Europe, Asia has no regional organizations to nudge Japan toward abolition, as the European Union and the Council of Europe did to countries in Central and Eastern Europe after the Cold War ended. In the geopolitics of capital punishment, Asia is not Europe, and Japan is not Latvia or Lithuania.

#### Public support for capital punishment high – abolition would cause backlash to party leadership

Johnson 20. David T Johnson is part of the faculty in the Department of Anthropology at UH Mānoa, offering expertise on Criminology, Law & Society, [“Why Does Japan Retain Capital Punishment?”, 2020, In: The Culture of Capital Punishment in Japan. Palgrave Advances in Criminology and Criminal Justice in Asia, Chapter 10, URL: <https://link.springer.com/chapter/10.1007/978-3-030-32086-7_1>] RN

In Japan, too, capital punishment persists partly because it performs positive functions. For prosecutors, it is a practical instrument that enables them to harness the power of death in the pursuit of criminal convictions, harsh punishments, and public support. For politicians, it is a way to gain votes, stay in office, and receive publicity—that is, it is a tool to be used in electoral games that are played before viewing and voting audiences. For the media, it is a prurient entertainment and a morality play that pits good against evil. For the public, it is an opportunity to express emotions (such as anger, hatred, and vengeance) that normally are prohibited. And for victims and survivors of crime, capital punishment is believed to be a mechanism for achieving retribution, atonement, and deterrence. Although these beliefs are founded as much in faith as in fact, they are sociologically and practically significant because they are subjectively meaningful to the believers.41

In short, the retention of capital punishment in Japan stems partly from the positive functions it performs for various actors and audiences. Opponents of capital punishment would be wise to recognize this reality. At the same time, Japanese retention reflects what is not found in and around the institution of capital punishment. As I will show in the rest of this book, Japan has not operationalized the principle that death is a different kind of criminal punishment requiring special procedures and protections (Chapter 2). A lay judge panel can convict and condemn a defendant to death by a vote of 5 to 4. Does this reflect the “caution” about capital punishment that Ministers of Justice routinely emphasize in their post-execution pronouncements? Similarly, the Japanese state is not open about how it kills (Chapter 3). In fact, the main purpose of the secrecy surrounding Japanese executions is the protection of capital punishment from protest and criticism that would occur if executions were announced in advance. Is this transparent and democratic? And Japan has not discovered many wrongful convictions (Chapter 4). Is this because Japanese criminal justice produces few of them, or because the system is ill-equipped to find them? In all of these respects, what Japan does not do can be contrasted with the United States, where markedly more death penalty reform has occurred as the result of concerns about due process violations, botched executions, and the revelation of wrongful convictions.

Although Japan is retentionist “in its own way,” there are some ways in which other retentionist countries resemble it. In Singapore, which long has employed one of the most aggressive death penalty systems in the world and which is far from a model of due process, an article in the country’s leading law journal claims that “no sweeping reforms are necessary” to reduce the risk of wrongful conviction.42 That claim is claptrap. In Taiwan, where the number of executions dropped dramatically as the country democratized but where executions have rebounded in recent years, death is not different as a matter of law or practice, and major mistakes have been made in the administration of capital punishment—including the wrongful execution of an innocent man (Chiang Kuo-ching), which Taiwan’s government acknowledged in 2011.43 And in the People’s Republic of China, the world’s biggest user of capital punishment, debate about the death penalty has deepened in recent years, yet its death penalty system remains shrouded in secrecy, including a prohibition on disclosing how many executions are performed each year.44

The Karenina principle suggests that success at abolishing capital punishment requires avoiding many separate causes of failure. It also implies that the road to abolition is not merely a positive path embracing the “human rights dynamic” and “leadership from the front” in the face of public support for capital punishment, though these have been important causes of change in many death penalty nations. The road to abolition is also a “negative path”—what the ancient Greeks called via negativa—leading away from doctrines and practices that present obstacles to ending the death penalty.45 As in the pursuit of happiness and professional success, so too, perhaps, in the pursuit of a world free from state killing: negative knowledge (what not to do) can be as potent as positive knowledge (what to do). In the end, thinking about what makes Japan “retentionist in its own way” might have the welcome effect of improving our understanding of why the death penalty endures in one of the world’s most developed countries.

#### Japan-China relations stable under Abe – the plan undermines security initiatives by replacing him

Shiraishi 20. Takashi Shiraishi served as president of the National Graduate Institute for Policy Studies, [“Shinzo Abe is redefining Japan's China policy for a generation”, 2-12-20, Nikkei Asian Review, URL: <https://asia.nikkei.com/Opinion/Shinzo-Abe-is-redefining-Japan-s-China-policy-for-a-generation>] RN

Japan's position in Asia has changed significantly since the end of the Cold War. The most important logistics base for the U.S. then, Japan now finds itself at the forefront of the U.S.-China rivalry, with far less resources at its disposal than it used to have.

While Japan's military spending was more than twice China's at the end of the Cold War, Chinese military spending is now more than five times larger than Japan's. Even though Japan has the third largest economy in the world, China's economy is now two-and-a-half times larger than Japan's.

The U.S.-China rivalry has expanded from geopolitics to the contest for technological supremacy and the trade war. China has emerged as a serious competitor with the U.S. in emerging technology development, and China is now Japan's most important export market.

All of this explains how Japan's security and foreign policies have evolved in line with the changing distribution of wealth and power in Asia and why they must keep evolving.

The National Security Secretariat was established in 2013 in the prime minister's office. Its first-ever national security strategy emphasizes Japan's "proactive contribution to peace," enhancing the Japan-U.S. alliance and networking with partner states, especially Australia, India and ASEAN states.

It says that Japan engages China on the basis of their mutually beneficial strategic relationship to encourage China to play a responsible and constructive role for the region.

Building on the policy initiatives of the Democratic Party of Japan-led government, Prime Minister Shinzo Abe's administration released the new defense program guidelines in 2013. Revised in 2018, they emphasize building up a defensive posture in Japan's southwest. The government also revised its policies for the transfer of defense equipment and technology and established a new agency in 2015 for weapons procurement and development.

In 2015, parliament passed a set of national security laws to allow Japan to exercise the right of collective self-defense under certain, though limited, circumstances. Article nine of Japan's constitution, of course, "forever renounce[s] war as a sovereign right of the nation and the threat or use of force as means of settling international disputes."

More recently, in light of U.S. measures to tighten security control over Chinese investment in U.S. businesses and put telecoms company Huawei and other Chinese companies on its entity list which restricts exports to them, the Japanese government decided to shut out Huawei from Japan's fifth-generation, or 5G, wireless network.

Judging by his state visits over the years, Abe has expanded the geopolitical arena for Japan's engagement from Asia-Pacific to Indo-Pacific. The implications are clear: because China under President Xi Jinping is likely to create its own sphere to achieve the China Dream of restoring its former glory and becoming hegemonic in the region and beyond, Japan has to work together with the U.S., Australia, India and ASEAN countries to keep the Indo-Pacific region free and open.

This explains why Abe took time to bring back Japan-China relations to an even keel. The relationship was frosty when he came to power, owing to the DPJ-led government's decision in 2012 to purchase the disputed Senkaku Islands, which Beijing claims and calls the Diaoyu, from a private person.

But when China held the first Belt and Road Initiative summit in Beijing in 2017, to promote its trillion-dollar infrastructure program, Abe sent his chief private secretary and his party's secretary-general. China's Prime Minister Li Keqiang visited Japan in May 2018; Abe visited China in the fall of 2018; and Xi is expected to visit Japan this year.

On the foreign economic policy front, Japan under Abe concluded a free-trade agreement with Australia and the 12-party Trans-Pacific Partnership, and after President Donald Trump opted out of the TPP, Australia and Japan tried to save it.

Japan has also concluded the Japan-E.U. Free Trade Agreement and more recently the Japan-U.S. Free Trade Agreement. Although Japan decided not to join the China-led Asia Infrastructure Investment Bank, Abe announced that Japan will join China to fund BRI projects if certain conditions are met.

All these policy initiatives indicate that Japan under Abe is responding to the changes in the balance of power and wealth by deepening and expanding the U.S.-Japan alliance, aligning itself with its partners to build a network for security cooperation and expanding its regional framework from the Asia Pacific to the Indo-Pacific.

Aware that China cannot be contained, Japan, with the U.S. and its allies and strategic partners, continues to hedge the risk of China's unilateral attempt to change the regional order by force while engaging China in multilateral norm- and rule-building. It is also promoting cooperation in areas of mutual and regional benefits, including infrastructural development.

There is now a broad consensus in Japan on foreign and national security policies, as demonstrated by the unanimous parliamentary approval of the revision of the foreign exchange law and the more than 80% public support for government tightening of sensitive technology exports.

#### Weak Sino-Japan relations causes conflict – draws in US

Harding 17. Brian Harding is Director for East and Southeast Asia for the National Security and International Policy team at the Center for American Progress, [“The U.S.-Japan Alliance in an Age of Elevated U.S.-China Relations”, 3-17-17, Center for American Progress, URL: <https://www.americanprogress.org/issues/security/reports/2017/03/17/426709/u-s-japan-alliance-age-elevated-u-s-china-relations/>] RN

Many experts in our workshops also noted that China saw these developments in similar ways, often assessing U.S.-Japan relations as even smoother than did Tokyo and Washington.18 It was also clear that China felt threatened by the strength of U.S.-Japan relations and that there was a need for a modus vivendi with China to minimize friction. Several U.S. and Japanese participants also noted the paradox that closer U.S.-Japan relations have the ability to create the exact kind of Chinese policies that both the United States and Japan seek to avoid.19

China-Japan relations

Our workshop discussions also reached the clear conclusion that China-Japan relations are by far the weakest side of the U.S.-China-Japan trilateral relationship. Participants agreed that China-Japan relations began to deteriorate acutely in 2012 after Japan nationalized the Senkaku Islands.20 However, our discussions also revealed sharp disagreements concerning the facts of certain events surrounding the nationalization—whether the government of Japan sought to diffuse tensions by nationalizing the islands and whether China truly imposed an export ban on rare-earth metals in retaliation.21

Japanese experts reflected that developments in China-Japan relations demonstrate that long-held confidence that economic interdependence would ensure political relations stay on track, or at least mitigate the effects of political tension, have proved to be misplaced. As Chinese, American, and Japanese participants described, the relationship is increasingly characterized by “cold economics, cold politics” as China’s economy slows, labor costs increase, and political conflict intrudes into the economic sphere.22

Participants observed that China has five concerns for China-Japan relations: a strengthened U.S.-Japan alliance, which China sees as a mutual deterrence against China; Japan’s more proactive stance in the South China Sea, especially with U.S. support; Japan’s relationship with Taiwan; Japan’s maritime rule of law campaign; and historical problems and a lack of trust among the public.23 Chinese experts are pessimistic about the bilateral relationship’s prospects because of structural problems arising from the U.S.-Japan relationship, which China perceives as intended to deter China.24

American participants argued that unstable Japan-China relations are a major concern for Washington, as this dynamic makes the entire region less stable. Most acutely, tensions surrounding the Senkaku Islands are a concern, as U.S. alliance commitments could draw the United States into direct conflict with China in the East China Sea.25 More broadly, weak Japan-China relations reduce the likelihood that the two can come together to address issues of common concern, including adapting to the impacts of climate change, building greater regional connectivity, and deepening economic integration.

### 2nc Uniqueness / AT: Corona Thumper

#### Abe’s popularity is rebounding

Reuters, 6/21/20 (“Japan PM Abe's support rebounds despite ex-justice minister's arrest,” <https://www.straitstimes.com/asia/east-asia/japan-pm-abes-support-rebounds-despite-ex-justice-ministers-arrest>, accessed on 7/7/2020, JMP)

TOKYO (REUTERS) - Public support for Japanese Prime Minister Shinzo Abe's Cabinet rose by nine percentage points to 36 per cent despite the recent arrest of his former justice minister on suspicion of vote-buying, a poll by the Mainichi Shimbun daily showed on Sunday.

The approval rating had fallen to 27 per cent in the paper's previous survey conducted soon after a senior Tokyo prosecutor who was seen close to the premier resigned in late May for gambling during Japan's coronavirus state of emergency.

A drop in voter support below 30 per cent is often seen as a danger sign.

The Mainichi report on its latest survey does not give specific reasons for the rebound in support, but 55 per cent of those polled welcomed the government's decision last Thursday (June 18) to lift curbs on domestic travel.

That compares with 32 per cent of those surveyed who said the restrictions should have remained in place.

Prosecutors last Thursday arrested former justice minister Katsuyuki Kawai, a one-time foreign policy adviser close to Mr Abe, and Kawai's lawmaker wife, Anri, on suspicion of vote-buying in a 2019 upper-house election.

Although support for Mr Abe's government rebounded, 59 per cent of those surveyed believe the prime minister has heavy responsibility for the matter.

Mr Abe has apologised to the public over the scandal, saying he felt his responsibility strongly for his appointment of Kawai to the post.

The Mainichi survey also showed that 59 per cent of those polled do not believe the Tokyo Olympics, originally scheduled for July and August this year but postponed by one year due to the coronavirus pandemic, can be held next year. Only 21 per cent believe the event can be held in 2021.

Japan has not suffered the explosive surge of coronavirus infections seen in some other countries, with about 18,000 confirmed cases and 954 deaths, according to public broadcaster NHK.

#### Corona virus has put Abe on the brink BUT he has stayed strong enough to prevent his own party from speaking out against him

Dooley 20. Ben Dooley reports on Japan’s business and economy for The New York Times, with a special interest in social issues and the intersections between business and politics, [“Shinzo Abe, Japan’s Political Houdini, Can’t Escape Coronavirus Backlash”, 3-10-20, New York Times, URL: <https://www.nytimes.com/2020/03/05/world/asia/japan-abe-coronavirus.html>] RN

Mr. Abe has skated past several political scandals that would have wiped out most other politicians in Japan, where even seemingly insignificant improprieties, like giving potatoes to constituents, can end in resignation.

Over the past year alone, a pair of cabinet ministers have resigned, Mr. Abe’s government has been accused of destroying records related to the possible misallocation of public funds, at least two members of his party have been linked to bribes from a Chinese gambling company, and prosecutors raided the offices of a close political ally over

Through it all, the public hardly batted an eye. Mr. Abe has long enjoyed the benefit of the doubt among Japanese voters, who in 2012 put him in office for a second time after a short, undistinguished stint starting in 2006.

His most recent rise to the prime minister’s office followed a period of instability in the country’s leadership that sapped the national appetite for politics. He was the seventh prime minister in seven years, and at the time of his elevation, just a year after what was seen as a bungled government response to the Fukushima disaster, he was widely considered the best of a bunch of bad options.

But he surpassed expectations, managing to lead the economy into a period of modest and relatively steady expansion, presiding over a winning Olympic bid, and skilfully finessing mercurial relationships with both Mr. Xi and Mr. Trump.

His handling of the coronavirus, however, has rapidly drained the reservoir of good will he had built up over seven years in office.

Unlike his past scandals, the virus response “affects the health of all the people,” said Mieko Nakabayashi, a professor at Waseda University in Tokyo and a former member of the Japanese Parliament for a rival party. “It is something that is related to each individual.”

“These kinds of mistakes make people question his priorities, whether he’s mature or a strong leader,” she added.

The problems began in January, when the government appeared slow to react to the explosion of coronavirus cases in neighboring China, just as Japan expected a flood of tourists from the country.

The situation quickly worsened in early February, when the government mismanaged the quarantine of the Diamond Princess, allowing the virus to circulate among the more than 3,700 crew members and passengers who were waiting out a two-week isolation period in the port city of Yokohama.

On shore, the government seemed incapable of keeping up with the growing demand for coronavirus tests. While other countries in the region quickly ramped up their diagnostic capacity, Japan has struggled to conduct the examinations.

Even as the problems mounted, though, Mr. Abe seemed uninterested. He made only brief appearances at strategy meetings, and spent his evenings wining and dining friends and cabinet ministers, appearing at parties even as the government called on people to avoid public gatherings.

That apparent complacency made his decision a week ago to call for closing the country’s schools seem all the more shocking. Japanese politicians and parents questioned its scientific basis and demanded to know how they were expected to both work and care for their children.

Mr. Abe has also drawn some alarm by pushing for a law that would grant him emergency powers to deal with the virus.

Within his own party, however, few feel safe speaking out against him, even in his weakened state, said Amy Catalinac, an assistant professor of politics at New York University.

“Abe has to an extraordinary degree made it difficult to mount criticism of him within the party,” she said, adding, “I don’t even know how low his support rating would have to go before the party would desert him.”

That is a crucial question as Mr. Abe considers his political future.

### 2nc LDP Sustains Capital Punishment Now

#### Japanese capital punishment is upheld by the ruling Liberal Democratic Party now

Johnson 20. David T Johnson is part of the faculty in the Department of Anthropology at UH Mānoa, offering expertise on Criminology, Law & Society, [“Why Does Japan Retain Capital Punishment?”, 2020, In: The Culture of Capital Punishment in Japan. Palgrave Advances in Criminology and Criminal Justice in Asia, Chapter 10, URL: <https://link.springer.com/chapter/10.1007/978-3-030-32086-7_1>] RN

Second, the persistence of capital punishment in Japan after the occupation ended can be explained by the long and conservative hegemony of the Liberal Democratic Party and by the inability of other political parties to change death penalty policy and practice when they briefly controlled government.19 The LDP gained control of Japan’s central government in 1955, three years after the Occupation ended. Over the following 60 years it maintained control for all but 50 months. The first interregnum lasted only 8 months (in 1993–1994), and the coalition government of seven parties was too brief and fractious to enable reform of capital punishment. The second interruption of LDP rule started in August 2009, when the Democratic Party of Japan gained control of central government and kept it until it lost power in the landslide election of December 2012. In this period, too, there was no move toward abolition or a moratorium on executions despite DPJ promises to proceed more cautiously with capital punishment than the LDP had done. In 2010, after signing two execution warrants and attending those executions, DPJ Minister of Justice Chiba Keiko opened the gallows in Tokyo to select members of the media and formed a death penalty study team in her Ministry, but the gallows were not in use when reporters visited, the research team produced no concrete proposals for action on capital punishment, and Chiba provided no clear explanation for her decision to order executions after having publically opposed capital punishment during the quarter-century or so that she served in the Diet before becoming Minister. I will return to this episode in Chapter 6, where I discuss the relationship between public opinion and political leadership in death penalty policymaking. Two of Chiba’s seven successors as Minister of Justice under the DPJ (Ogawa Toshio and Taki Makoto) also authorized executions. In total, these three Ministers ordered 16 executions during the 40 months of DPJ rule. European experience suggests that abolition is more likely to occur under the leadership of a liberal party than a conservative one (see Austria, Great Britain, and France), and something similar can be said of the recent moratoria on executions in South Korea and Taiwan.20 In the United States as well, abolition has seldom occurred in conservative states, though in 2015 Nebraska did become the first predominantly Republican state to abolish the death penalty in 40 years. In comparative perspective, the durability of Japan’s death penalty reflects not only the long-term hegemony of its ruling party but also the fact that the other parties that have held power were almost indistinguishable from the conservative LDP in their policy preferences and commitments. In short, conservative politics has contributed to the conservation of capital punishment in Japan.

### 2nc Link – Public Perception

#### Japanese citizens perceive executions as critical to maintaining social order and repressing violent crime

Bae, 11 (Sangmin Bae, Sangmin Bae is Professor of Political Science at Northeastern Illinois University (Chicago, IL). She received her BA and MA in Political Science from Ewha Womans University (Seoul, Korea) and her Ph.D. from Purdue University (West Lafayette, IN). "International Norms, Domestic Politics, and the Death Penalty: Comparing Japan, South Korea, and Taiwan on JSTOR" (P. 46-47), City University of New York, https://www.jstor.org/stable/pdf/23040657.pdf?refreqid=excelsior%3A52b8c7a9da7fb89840b30077e1d2fda5, 2011, Accessed 7-6-2020) //ILake-JQ

Though Japan uses the death penalty sparingly, it appears to be increasing its imposition of death sentences in recent years. There was just one death sentence in 1992, but ten years later in 2002 the figure climbed to 18. In 2004 the number reached 42; in 2007 it climbed to 47—the largest number since at least 1980—and came down to 27 in 2008. The number of actual executions has also increased in the past few years, with 1 execution in 2005, 4 in 2006, 9 in 2007, 15 in 2008—the highest annual total in 33 years—and 7 executions in 2009.27 At the end of 2009, there were 104 death row inmates compared to 51 a decade ago. Japan's Supreme Court seems to be straying from its effort to reexamine capital punishment two decades earlier. When it overturned the life sentence imposed on a man convicted of robbery and murder in December 1999, it was the first time since 1983 that the Supreme Court had recommended replacing a life sentence with the death penalty. That decision has been followed by several rulings in recent years in which appeals courts have granted prosecution requests to overturn life sentences in favor of the death penalty.28 Meanwhile, the Diet members who sponsored the 2004 bill calling for a three-year moratorium on executions stopped further proceedings as the prospects for success looked dim.

The pattern of executions is also distinct in Japan. All executions take place in extreme secrecy and silence.29 Neither prisoners nor their families are given advance warning of executions. The Ministry of Justice, for inconsistent reasons, announces hangings only after they have taken place. The names of those executed were made public for the first time only in December 2007. Over the years, prosecutors in the Ministry of Justice have tended to assign execution dates strategically during the parliamentary recess and holiday periods, apparently in order to minimize publicity and avoid a parliamentary reaction. Such bureaucratic secrecy has served to make the death penalty less salient in the public consciousness and to suppress public debate.30 Violent crime is relatively rare in Japan, which has one of the lowest overall crime rates among industrial nations. Yet Japan, along with the United States, is one of the few advanced industrial democracies that still use the death penalty.

Public opinion surely matters to elected officials in any democracy. A common problem facing abolition of the death penalty in East Asian countries and elsewhere is the public's perception that social order would decay and the country would become more dangerous because of rising crime rates. A public perception that the streets are not safe is not a very fertile ground for abolition of the death penalty. In Japan, since extensive polling started in 1953, support for the death penalty has never fallen below 50 percent. The crime wave of the 1990s in Japan and the sensational media coverage of violent crimes have perhaps led to a public clamor for tougher measures. Despite ups and downs over time, pro-death penalty opinion managed to rise above 70 percent, reaching 80 percent at times (79.3 percent in 1999 and 81 percent in 2005, for instance).31 In December 2009 public support for the death penalty was a record high 85.6 percent, while only 5.7 percent of respondents opposed the death penalty for all circumstances.32

#### Core East Asian values of communalism are incompatible with an elevation of individual human rights

Bae, 08 (Sangmin Bae, Sangmin Bae is Professor of Political Science at Northeastern Illinois University (Chicago, IL). She received her BA and MA in Political Science from Ewha Womans University (Seoul, Korea) and her Ph.D. from Purdue University (West Lafayette, IN). "IS THE DEATH PENALTY AN ASIAN VALUE?" (P. 52-53), Taylor & Francis, https://www.tandfonline.com/doi/abs/10.1080/03068370701791899?needAccess=true&journalCode=raaf20, 9-18-2008, Accessed 7-6-2020) //ILake-JQ

As summarized by Xiaorong Li, Professor of Philosophy and Public Policy at the University of Maryland, one of the key arguments of Asian values advocates is that “the importance of the community in Asian culture is incompatible with the primacy of the individual, upon which the Western notion of human rights rests”.22 If we accept this value as typically Asian, it helps to explain the reluctance of Asian governments to sacrifice what they perceive as protection of the “community” for the sake of the individual right to life, including that of convicted criminals. The notion that cultures with Asian values prioritize the security of the community over individual rights includes the belief that protection of the community and the rights of the individual are mutually exclusive. As Li points out, however, this assumption oversimplifies Asian values. Treating the state and the community as identical may allow the state to mask its legal or moral shortcomings with the claim that it is protecting the community or maintaining social order. In Singapore, one is supposed to value society above oneself, and yet recognition of individual rights is also a tenet of the country’s values, as shown by the third value in the “White Paper on Shared Values” which is “community support and respect for the individual”.23 Singapore’s extensive use of capital punishment may follow the value of maintaining national order at the expense of the individual, but such rationalization contradicts the idea of a community-based mechanism for respecting the rights of the individual.

According to a majority of human rights scholars, the claim that previous definitions of universal human rights reflect only Western thought and tradition, particularly due to Western domination of the process that resulted in the Universal Declaration of Human Rights (1948), is not justified. Sumner Twiss states that the first true attempt to build international consensus on universal human rights, the Universal Declaration of Human Rights, actually involved “a pragmatic process of negotiation between representatives of different nations and cultural traditions”.24 Paul Gordon Lauren echoes this view, arguing that the tenets of international human rights have evolved through the support of non-Western nations and newly decolonized countries.25 “All the countries of the Asian region are party to the U.N. Charter. None has rejected the Universal Declaration.”

The most prominent proponents of Asian values are nonetheless from nations that are still formally committed to this set of universal rights, defined in a significant and productive cross-cultural exercise which took place 45 years before the Bangkok Declaration. This suggests that if distinct Asian values do exist, they are not incompatible with universal human rights: those rights are not just the products of the West. Furthermore, the participation of Asian nations in the rights-defining dialogue means that universal human rights can include seemingly separate sets of values.

We should remain cautious, however, in recognizing the possible disagreements over definitions and implicit restraints in the rights of the Universal Declaration. According to Article 5 of the Declaration, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Most abolitionist countries consider the death penalty to be cruel, inhuman, or degrading, but some Asian countries believe there are systemic differences in definitions of terms across cultures. Interpretations of the meaning of universal human rights may also differ. Governments may claim that criminals do not deserve the same rights as the common population. They can therefore argue that the death penalty does not violate the right to life because convicted criminals have lost this right in favour of the community’s right to safety. Former Malaysian Prime Minister Mahathir Mohamad provides some insight into this position: “If an individual tramples on the rights of the community, that person is really stealing from the rights of the majority and selfishly pursuing his own rights.”

### 2nc Link – Legitimacy

#### The plan erodes the legitimacy of Japan’s political institutions – that leads to non-compliance and backlash to the rule of law

Sato, 14 (Mai Sato, Mai is an Associate Professor at the School of Regulation and Global Governance (RegNet). Before joining RegNet in February 2019, Mai worked for the School of Law, University of Reading (2015-2018 as Lecturer; 2018-2019 as Associate Professor); the Centre for Criminology, the University of Oxford (2011-2015 as research officer); and the Institute for Criminal Policy Research, Birkbeck, University of London (2008-2014 as Post-doctoral research fellow). "The Death Penalty in Japan" (P. 29-30), Springer VS, https://www.springer.com/gp/book/9783658006778, 2014, Accessed 7-5-2020 via Umich Libraries) //ILake-JQ

On a practical level, critics who question the relevance of public opinion to the death penalty also argue that, historically, public opinion has never been the driver for abolition. Rather, almost all countries that abolished the death penalty did so through judicial or political leadership – despite public support for it (Hood & Hoyle, 2008; Johnson & Zimring, 2009; Hodgkinson, 2005; Hood, 2009).16

However, this does not mean that public opinion can be completely ignored and will have no consequences. The interdependence of law and public opinion, and the need for legal systems to command popular support, have long been recognised (Robinson, 2009; Robinson & Darley, 1995). Public perceptions of the legitimacy of governmental policies or laws are key determinants of public acceptance of, and compliance with, these policies and laws. When public perspectives are enshrined in institutions and reflected in the actions of authorities, this should build institutional legitimacy (Tyler, 2006a, p. 284). Criminologists have also argued for the importance of maintaining legitimacy, and warned against disregarding public opinion (Garland, 2009; Roberts & Hough, 2005; Roberts, Feilzer & Hough, 2012).

Therefore, if the public does not accept the penal policies pursued by its government, this could erode the subjective legitimacy both of the justice system and, more broadly, of the country’s political institutions, with consequent damage to the rule of law (Tyler, 2007). For example, in Mexico there was a significant loss of public trust in the criminal justice system, leading to the establishment by activists of a new grass-roots system operating outside the formal legal structure. The Community System for Security, Justice Administration, and Reeducation (CSSJAR) is a popular justice movement in Mexico, where unpaid volunteers act as police, court and penal system (Ibid.). It is inevitably of some concern to governments that their penal policies – including, in Japan’s case, abolition of the death penalty – do not erode public perceptions of the legitimacy of the criminal justice system. Such erosion can result in non-compliance with the law, lack of cooperation with the criminal justice system, and vigilantism. The clearest example of a country where the death penalty policy was claimed to be central to popular trust in the criminal justice system was the case of the Philippines. The government explained to the UN Human Rights Committee that the abolition of the death penalty had “undermined the people’s faith in the Government and the latter’s ability to maintain peace and order in the country” (UN Human Rights Committee, 2002, para. 494).

### 2nc Link – Death Penalty Popular

#### Japanese resistance towards ending capital punishment is at an all time high

Itabashi, 20 (Hiroyoshi Itabashi, Hiroyoshi Itabashi is a staff writer at Asahi Shimbun, "Survey: 80.8% approve of death penalty, while 9% opposed: The Asahi Shimbun", Asahi Shimbun, http://www.asahi.com/ajw/articles/AJ202001190021.html, 1-19-2020, Accessed 7-5-2020) //ILake-JQ

Although the global trend is toward abolishing capital punishment, the ratio of Japanese who find the death penalty “unavoidable” remains high, edging up to 80.8 percent in the latest survey.

The figure for those opposing the death penalty dropped to 9.0 percent.

Japan carried out three executions in 2019 and 15 in 2018.

The results of the survey, released Jan. 17 by the Cabinet Office, showed that 56.6 percent of those who approve of capital punishment cited "the feelings of victims and their relatives” as a reason.

It was followed by “perpetrators of heinous crimes should atone with their own lives,” at 53.6 percent, and “perpetrators of heinous crimes continue to pose a risk of committing similar crimes if they are allowed to live,” at 47.4 percent.

The finding marked the fourth survey in a row that found more than 80 percent in favor of executions.

The survey on the death penalty marked the sixth by the Cabinet Office since 1994.

In the face-to-face poll, conducted every five years, respondents were allowed to pick more than one from a set of answers. Those answers remained almost identical in each survey.

The latest poll, conducted in November, contacted 3,000 males and females across Japan age 18 or older. Valid responses were received from 1,572, or 52.4 percent of the total.

The previous polls involved adults 20 years or older.

The 80.8 percent supporting the death penalty represented an increase of 0.5 percentage point from the previous survey in 2014.

The 9.0 percent opposing capital punishment marked a drop of 0.7 point from the last survey.

Opponents of the death penalty cited that “it is irreparable if a court ruling was flawed,” at 50.7 percent, up by 4.1 points from the 2014 survey.

The next most common response was “convicts should be allowed to live to atone for their crimes,” which was cited by 42.3 percent.

The survey found that a majority of respondents view capital punishment as an effective crime deterrent.

It showed that 58.3 percent said the abolition of the death penalty would lead to an increase in heinous crimes.

The three inmates executed in 2019 marked the eighth consecutive year that Japan has carried out the death penalty.

#### Despite international pressures, public support for death penalty remains

AFP 19. AFP is a staff writer for Bangkok Post, [“Calls to abolish death penalty in Japan as Francis visit looms”, 11-22-19, Bangkok Post, URL: <https://www.bangkokpost.com/world/1799834/calls-to-abolish-death-penalty-in-japan-as-francis-visit-looms>] RN

TOKYO - On the eve of a visit by Pope Francis to Japan, activists called Friday on the government to declare a moratorium on executions as part of an Olympic truce to mark Tokyo 2020.

The pope is expected to shine a spotlight on the death penalty in Japan, where it enjoys considerable popular support despite criticism from rights groups.

He may meet Iwao Hakamada, who spent nearly 50 years on death row after being accused of robbing and murdering his boss along with his boss's wife and two teenage children, before burning down their house.

Hakamada, who is waiting for a Supreme Court decision over a possible retrial, was freed from prison in 2014 decades after doubts emerged about his guilt. He has been invited to attend a Mass held by the pontiff, but it is unclear whether the two men will meet.

Mario Marazziti, co-founder of the World Coalition Against the Death Penalty, told Japanese MPs and reporters that he was calling for "an Olympic truce, a 2020 moratorium in the year of the Olympic Games."

"The death penalty adds another death to other deaths. It's not justice," stressed Marazziti.

Osamu Kamo, from the Japan Federation of Bar Associations, which also campaigns against executions, said they would be closely watching what message Francis brought on the death penalty.

"The death penalty is not just a matter for the Japanese. If foreigners commit murders in Japan, they could also be sentenced to death. It's an international affair," he said.

Capital punishment has broad public support in Japan with few calls to abolish it.

Since World War II, successive governments, including the current administration of Prime Minister Shinzo Abe, have cited broad public support as a reason to maintain capital punishment.

A 2014 government survey of around 1,800 people showed 80 percent thought capital punishment was "unavoidable", with only one in 10 in favour of abolishing it.

#### Empirics prove political activism concerning abolition causes public backlash

Kazuyoshi 15. Harada Kazuyoshi is a staff writer for Nippon’s editorial department, [“The Capital Punishment Debate in Japan”, 4-16-15, Nippon, URL: <https://www.nippon.com/en/features/h00101/>] RN

Low Support for Abolition

The Cabinet Office of Japan has conducted regular surveys on capital punishment since 1965, including every five years since 1989. The most recent survey was conducted in November 2014. The results, based on the 60.9% of responses received from the 3,000 adults surveyed, showed relatively little change in the very high overall support in Japan for the death penalty. It found that 80.3% of respondents were comfortable with the continuation of the death penalty, and only 9.7% supported abolishing capital punishment in Japan.

The survey delved into the reasons for respondents’ views on the death penalty. A plurality of those who wished to see the death penalty abolished indicated that they were concerned about errors in the legal process and wrongful conviction (46.6%), a significant problem given the irreversible nature of the sentence once carried out. Almost a third of them (31.6%) thought the use of the death penalty was unsavory and inhumane, even for convicted murders. A further 29.2% of the respondents thought that there would be no risk of heinous crimes increasing due to abolition of the death penalty. And 28.7% believed that because even the most brutal criminals could be rehabilitated, this justified avoiding the use of the ultimate punishment.

For the 80.3% of respondents who were comfortable with the death penalty, two particular reasons given stand out. A majority of respondents indicated that if the death penalty were abolished, then the families of the victims of heinous crimes would not get emotional closure (53.4%). A further 52.9% indicated simply that perpetrators of atrocious crimes should pay their moral debts with their lives.

Split Views on Deterrent Value

When asked whether they thought the death penalty was a deterrent against crime, 57.7% of all respondents indicated that they thought that heinous crimes would indeed increase if the death penalty was abolished. Only 14.3% of respondents decisively thought that such crimes would not increase, while a further 28.0% either did not know or could not say definitively one way or another. Compared with the previous survey five years ago, however, it was notable that there was a 4.6 point decrease in the proportion of respondents who thought that heinous crimes would increase if the death penalty was abolished. There was also a corresponding 4.7 point increase in the number who decisively thought such crimes would not increase after abolition.

Respondents were also asked in the most recent survey whether they thought the death penalty should be abolished if a new system of life imprisonment without parole was introduced. While 37.7% indicated that abolition would be preferable if such a system was introduced, a majority of respondents (51.5%) indicated that it would still be better to keep the death penalty even if such a system was introduced.

Government Support for Maintaining the Death Penalty

Given these results and general public attitudes, the Ministry of Justice takes the position that the death penalty should not be abolished in Japan. Because of this stance, the Japanese government has neither signed nor ratified the second optional protocol to the International Covenant on Civil and Political Rights. This protocol was adopted in a 1989 United Nations General Assembly resolution and commits signatory nations to abolish the death penalty except in certain wartime situations.

There has been debate and political activism promoting the abolition of the death penalty in Japan, however. In 1994, a cross-party parliamentarians group was inaugurated to promote the abolition of capital punishment. The chairman of this parliamentary league is independent lawmaker and former National Police Agency official Kamei Shizuka, who has long been a vocal opponent of executions in Japan. As an alternative to the death penalty, this league has worked toward promoting the implementation of a lifelong incarceration penalty—which would not allow for parole, as all current imprisonment options do—to be applied to serious crimes.

Societal sentiments in Japan work against such activism, however. In particular, opinions that emphasize the rights of victims and the feelings of victims' relatives in the punitive process have attracted support since the start of this century. While there has been a consistent reduction in the number of crimes in Japan, as well as a reduction in the murder rate to the lowest ever level, the media coverage of heinous crimes, such as the murder of children, has frequently shaken Japanese society. This has led to increased public concern about such crimes and the maintenance of high levels of support for severe punishments like execution.

#### Public support high – surveys show

Johnson 16. David T Johnson is part of the faculty in the Department of Anthropology at UH Mānoa, offering expertise on Criminology, Law & Society, [“Retention and Reform in Japanese Capital Punishment”, 2016, 49 U. MICH. J. L. REFORM 853, URL: <https://repository.law.umich.edu/mjlr/vol49/iss4/4>] RN

Fourth, public support for capital punishment in Japan has not softened as it has in the United States. In fact, support for capital punishment in Japan has been increasing for about twenty years, though it did take a small dip in November 2014.133 Even with that dip, more than eighty percent of respondents said that having the death penalty is “unavoidable,” while less than ten percent said that it should be abolished (the latter figure is a rise of four percentage points since the previous poll in 2009).134 Japan’s death penalty surveys are methodologically flawed, for the questions are leading and simplistic and the samples are not random.135 Survey results also find firmer support for capital punishment than more nuanced measures suggest.136 When Japanese citizens assess the propriety of capital punishment in the context of particular cases and with a choice set that includes harsh alternative sanctions (such as life imprisonment), their support softens—some.137 But even when these more sophisticated measures are employed, public support for capital punishment remains strong.138 In a democracy, this form of continuity in capital punishment can be fundamental. The stability in public support over time is partly explained by the secrecy that surrounds capital punishment in Japan, which makes the death penalty a low salience issue,139 and by media reporting about capital punishment characterized by the themes of avoidance and ambivalence.140

### 2nc Link – Japan Follows On

#### The plan would build pressure on Japan to also abolish its death penalty

Steiker & Steiker, 19 --- Professors of Law at Harvard and University of Texas respectively (Carol S. & Jordan M., “19. Global abolition of capital punishment: contributors, challenges and conundrums,” In Comparative Capital Punishment Law, ed. CS Steiker, JM Steiker, <https://doi-org.proxy.lib.umich.edu/10.4337/9781786433251.00030>, pp.407-9, JMP)

Ironically, if the U.S. were to abolish the death penalty on pragmatic rather than rights-based grounds, the prospects for worldwide recognition of a moral norm against the death penalty would increase significantly. The U.S. currently poses the greatest obstacle to the recognition of such a norm, given its role as the most powerful and influential constitutional democracy. The continued retention of the death penalty by the U.S. gives plausible deniability to jurisdictions rejecting the frame of capital punishment as a human rights issue. As Hood and Hoyle provocatively query, ‘how could [capital punishment] be [a human rights issue] if the great democratic champion of human rights still retains it?’123 If the U.S. were to join the abolitionist camp, the manner of its abolition would matter less than the fact of its abolition, and there would be mounting pressure on democracies (Japan, India) and non-democracies alike to repudiate the practice.

#### Japan follows international trends

Labat de Hoz 19. Carla Labat de Hoz is an MA in the Transcultural Studies Program at Heidelberg University, [“The Death Penalty Debate in Japan”, 5-7-19, Electronic Journal of Contemporary Japanese Studies, Vol. 19 Issue 1, URL: <https://www.japanesestudies.org.uk/ejcjs/vol19/iss1/labat.html>] RN

Meanwhile, those who oppose the death penalty in Japan also make use of another argument which indirectly contradicts the one of ‘atonement through death’: the need to follow international trends. Even if such assertion makes use of political means rather than spiritual ones for supporting its standpoint, it seems to be a powerful tool for those who oppose the maintenance of the judicial execution system. In 2013, the former leader of the Social Democratic Party Fukushima Mizuho (2013) claimed that ‘while the abolition of the death penalty is becoming a common intention of the international community, the Japanese government is turning away from the repeated indications and continues to ignore the flow of the world towards the end of the death penalty system’. In an editorial, The Asahi Shimbun (2016) concluded its plea to the Japanese Government for further discussion on the abolition of the death penalty by defending its necessity as a mean of avoiding the ‘risk of lagging behind changing times and global trends’. Moreover, institutions such as FORUM 90 or Amnesty International Japan have made statements which do not differ much to the ones made by the mentioned newspaper (Murakoshi 2016). In the latter’s 2006 report, special attention must be paid to Suki Nagra’s assertion that ‘by abolishing the death penalty Japan would provide leadership to the Asia-Pacific region, which is currently bucking the global trend towards abolition’ (Amnesty International Japan 2006b).

This statement not only conveys the need of internationalisation but also the supposed leadership of Japan in East Asia. Such an appealing argument has been repeatedly used by the detractors of the death penalty: Juan Masiá (2016), chairperson of the Japan Catholic Council for Justice and Peace section for the Abolition of Capital Punishment, wrote an appeal to the Government in which he even implored it to ‘protect life and human rights in the world’. The relevance that this kind of arguments could have in the development of the debate on the death penalty in Japan should not be underestimated. The rushed execution of the last Aum Shinrikyo cultists in July 2018 only half a year after the conclusion of the Aum-related trial has been regarded as a strategy of the Government to avoid its coincidence with the 2020 Tokyo Olympics (The Asahi Shimbun 2018). Host countries are expected to fulfil some provisions on human rights and the executions could have negatively affected the celebration of the Games if they had been conducted in the proximities to the event (Olympic.org 2018).

The conclusion that can be drawn from this section is that the discourse of the death penalty’s maintenance or abolishment is also conducted in terms of tradition and modernity in the Japanese context. While those who defend its necessity make use of the spirituality behind the concept of ‘atonement through death’ to defend their posture, the opposing group has been trying to disable such argument by frame transformation through the inverted concept of ‘atonement through living’. Moreover, they have also called for Japanese modernisation and leadership in the Asian region in which regards the capital punishment debate. This argument could be reinforced in the context of the 2020 Tokyo Olympics, as executions could be regarded by some participant countries and the organising committee as a practice against basic human rights. Political and economic interests could be therefore effectively mobilised by the detractors of the death penalty in Japan.

### 2nc Impact – U.S. Japan Relations

#### Abe is key to sustain US-Japan relations – critical to resolve a multitude of security concerns.

Hornung 17 (Hornung, Jeffrey W Hornung, Ph.D. in political science, George Washington University; M.A. in international relations (Japan studies), Johns Hopkins University-School of Advanced International Studies; B.A. in political science; international affairs, Marquette University, 8-21-2017, "Japan's Election Matters for U.S. Interests," No Publication, https://www.rand.org/blog/2017/10/japans-election-matters-for-us-interests.html, accessed 7-7-2020//mrul)

A politically strong and secure Shinzo Abe has a large impact on the United States.

This exposed a critical point: A politically strong and secure Shinzo Abe has a large impact on the United States and its interests in the Asia-Pacific region.

The United States has gotten used to having a strong partner in Abe to cooperate with in tackling the region's security challenges, including threats emanating from North Korea and China, as well as piracy, WMD proliferation, terrorism, and natural disasters.

The United States cannot face these challenges alone, making forward basing and allied support critical ingredients to U.S. success; Japan provides both. Japan hosts nearly 50,000 forward-deployed U.S. military personnel, more than any other regional ally.

This includes the U.S. Navy's Seventh Fleet and its only forward-stationed Carrier Strike Group; the Marine Corps' III Marine Expeditionary Force; and significant U.S. Air Force assets, including the largest combat wing in the U.S. Air Force. Japan also pays approximately $2 billion annually to host these forces.

Importantly, Abe is a strong supporter of U.S. strategic objectives and consistently utilizes Japan's significant economic and diplomatic clout toward these same ends. Importantly, Japan's Self-Defense Force, or SDF, is an advanced force and enjoys significant interoperability with U.S. forces.

While it is true that the U.S.-Japan alliance generally enjoys bipartisan support, Abe has strengthened ties in unprecedented ways. He has positioned Japan to play a more proactive security role through the establishment of new legal and policy frameworks.

Abe has strengthened Japan's ties with the United States in unprecedented ways.

In only five years, he drafted Japan's first national security strategy; relaxed weapons export laws; reversed a decade-long trend of shrinking defense budgets; aggressively promoted international law in the maritime domain; invested in a diversified set of security partnerships with key regional states such as Australia, India, Vietnam, and the Philippines; and expanded the roles and functions of the SDF within the context of the U.S.-Japan alliance.

Most politically controversial was his [decision to reinterpret Japan's constitution](https://www.rand.org/blog/2017/06/giving-japan-a-military.html) to allow the SDF to exercise limited forms of collective self-defense. And while some of these changes remain controversial in Japan and raise questions with Japan's immediate neighbors as to whether a more assertive Japan is emerging, these changes were possible because Abe was politically strong enough to challenge conventional wisdom and policies that many considered untouchable.

These changes enabled Japan's SDF to engage in new types of activities and make it easier for Tokyo to work with Washington in any future conflict. While none of these changes allow Japan to fight side-by-side with the United States in missions far from Japan, it is now capable of taking on expanded security roles and increased cooperation with the United States.

This positions Japan as an important check on China's great-power ambitions and raises the expectations that Japanese forces will play a pivotal role in any regional contingency. Abe has also strongly supported a plan to relocate a U.S. Marine base within Okinawa that has at times languished due to the lack of strong support by his predecessors.

This brings us back to why Abe's political strength matters. The region's security challenges are not going away. Countering them requires leadership that wants to—and can—play a proactive role alongside the United States. Only Japan can currently provide this.

The longevity that Abe has enjoyed enables him to craft a strategy and implement policies to carry it out. He has been able to focus on the long-term challenges facing the region, not just his own short-term political survival. The result is a stronger and more capable Japan and a U.S.-Japan alliance that has expanded its shared strategic objectives.

It is common to hear about the importance of the United States to other countries, like Japan, while it is almost unheard of to hear how important Japan is to the United States. When considering how to respond to the range of security challenges in the region, it is crucial to recognize that U.S. Asia policy begins and ends with this critical alliance.

The U.S.-Japan alliance is the only regional vehicle the United States has to pursue a multifaceted and cooperative approach while retaining crucial kinetic requirements to deter and, if necessary, defeat any regional challenger.

With a weakened Abe, or an inexperienced successor, it is possible that the United States could find itself in a weaker position to meet today's security challenges. This is why Japan's election promises to have an impact on America's regional leadership and security.

### 2nc Impact – Abe Key to Stabilize China

#### **Abe’s statecraft and business skills compensate for the decline of American input in balancing Chinese ambitions**

McCarthy, 7-8-20 (John McCarthy, John McCarthy is a former ambassador to the United States, Indonesia and Japan. "**Why Japan's balancing act on China is more sure-footed**", Australian Financial Review, https://www.afr.com/world/asia/why-japan-s-balancing-act-on-china-is-more-sure-footed-20200707-p559pf, 7-8-2020, Accessed 7-7-2020) //ILake-JQ

Japanese Prime Minister Shinzo Abe with Chinese President Xi Jinping in the Great Hall of the People in Beijing. Abe has spent much of his time as leader trying to repair his country’s relationship with China. AP

It is more than that. Japan and Australia have led the way in the creation and growth of the major regional organisations such as APEC. Our countries revived the Trans-Pacific Partnership regional trade agreement when it was abandoned by the United States.

We have a successful and growing program of bilateral defence co-operation. In the past 15 years, the military contingent in our Tokyo Embassy has grown from two to about a dozen. Joint exercises and policy exchanges have proliferated.

For Australia, the projection of American power, even under Trump, remains the prime factor in preserving strategic equilibrium in Asia. But we need better to appreciate Japan’s significance in maintaining that equilibrium.

In this connection, we understand Japan’s role as a host of American forces, its military competence, its continuing wealth and its democracy. However, there is insufficient recognition in this country of two other factors

The first is Japan’s example in managing China. In this task it is more mature and sure-footed than Australia or the United States, especially given the harsh realities of the Sino-Japanese relationship.

Japan’ statecraft and business skills provide a balance to China in south-east Asia, compensating for America’s dramatic loss of reputation.

Any Japanese government has to shape its China policy in the context of its deep-rooted historical differences with China, including contested claims to the Senkaku islands in the East China Sea and festering issues from World War II – impediments with which Australia does not have to deal.

Japan also has to accommodate a range of internal views on China – from those of anti-Chinese nationalists to the pacifists, including those in the government’s junior coalition partner, the New Komeito Party.

Tough but circumspect

Japan’s approach towards China has varied. But particularly during the tenure of prime minister Junichiro Koizumi (2001-06) and Abe's second term (from 2012), it has been tough-minded, but not confrontational.

In 2015, for example, Japan reinterpreted its constitution to permit “collective self-defence” – giving it greater freedom of action to act as an ally of the United States if the latter were attacked.

These periods have cost Japan in its dealings with China, but it has sought to maintain a balance in its relationship with its neighbour. Abe made an official visit to China in 2018 and a reciprocal visit by Chinese President Xi Jinping remains on the cards for later this year.

The Japanese are also careful about the tone and context of public statements about China, and the company in which these are made. For example, they have not sought publicly to sheet home the blame for COVID-19 to China.

In response to the recent passage by China of the National Security Law on Hong Kong, Japan chose to express concern not – although invited – in one of the two Anglosphere statements (both involving Britain, Canada and Australia and one also including the United States). Rather it chose to express its views in its own statement and in a G7 communique.

Moreover, even in difficult times for government-to-government dealings, Japan’s ruling Liberal Democratic Party has maintained associations with the Chinese Communist Party and there remains a plethora of personal, political, academic and business links – which noted China scholar Richard McGregor refers to as “catacombs of communication” – between China and Japan.

By contrast, in Australia there is criticism of those in business who argue for restraint in our dealings with China, and denigration of those organisations such as China Matters, which seek to assist the propagation of unbiased knowledge about China. If China is indeed to be our enemy, let us at least, like Japan, know it.

The second factor we tend to ignore here is that Japan’s statecraft and business skills provide a balance to China in south-east Asia, compensating in some measure for America’s declining diplomatic input and dramatic loss of reputation in that region over the past decade.

Japan is no longer seen in Asia as the high-handed regional actor of the 1970s and '80s. Abe made a point of visiting all 10 ASEAN members in the first year of his second term. A poll of ASEAN attitudes six months ago by the Singapore think tank, the ISEAS-Yusof Ishak Institute, placed Japan as the most trusted extra-regional power, with twice as many positive responses as the United States and four times as many as China.

### 2nc Impact –Senkaku Islands

#### Japan control over the Senkaku islands low now – Ishiba wants to increase it

Reynolds and Hirokawa 12. Isabel Reynolds and Takashi Hirokawa are journalists for Bloomber, [“LDP’s Ishiba Says Japan Should Build on Islands Claimed by China”, 9-7-12, Bloomberg, URL: https://www.bloomberg.com/news/articles/2012-09-07/ldp-s-ishiba-says-japan-should-build-on-islands-claimed-by-china

Former Japanese defense chief Shigeru Ishiba, the most popular choice to win this month’s race to head the main opposition party, said the government must step up its control of islands claimed by China by building on them.

Ishiba, former head of policy research for the Liberal Democratic Party, said in an interview today that Japan should build a harbor to offer shelter for fishing vessels and station personnel there if necessary. Prime Minister Yoshihiko Noda’s government is in talks to buy the chain, called Senkaku in Japanese and Daioyu in China, from a private Japanese owner.

“I don’t think it’s right for the country to buy them and leave them as they are,” Ishiba said. “We should raise our level of control over the islands.”

Relations between Asia’s two biggest economies have soured over the islands, sparking anti-Japanese protests and imperiling a meeting this weekend between Noda and Chinese President Hu Jintao. While Noda has called for calm in dealing with the issue, the LDP is seeking to unseat his ruling Democratic Party of Japan in elections that could come as soon as next month.

#### Japanese control over the Senkaku islands is a flashpoint for conflict

Takenaka 12. Kiyoshi Takenaka is a journalist for Reuters, [“Japan buys disputed islands, China sends patrol ships”, 9-11-12, Reuters, URL: <https://www.reuters.com/article/us-japan-china/japan-buys-disputed-islands-china-sends-patrol-ships-idUSBRE88A0GY20120911>] RN

TOKYO (Reuters) - Japan brushed off stern warnings by China on Tuesday and bought a group of islands that both sides claim in a growing dispute that threatens to deepen strains between Asia’s two biggest economies.

China rained warnings on Japan in the wake of the island purchase announcement and official media said Beijing had sent two patrol ships to reassert its claim.

The Chinese military’s top newspaper accused Japan of “playing with fire”, and the Ministry of Defense warned that more, unspecified steps could follow.

“The Chinese military expresses its staunch opposition and strong protest over this,” Defense Ministry spokesman Geng Yansheng said in remarks posted on the ministry’s website (www.mod.gov.cn).

“The Chinese government and military are unwavering in their determination and will to defend national territorial sovereignty. We are closely following developments, and reserve the power to adopt corresponding measures.”

Tokyo insisted it had only peaceful intentions in making the 2.05 billion yen ($26.18 million) purchase of three uninhabited islands in the East China Sea, until now leased by the government from a Japanese family that has owned them since early 1970s.

Foreign Minister Koichiro Gemba repeated Japan’s line that the purchase served “peaceful and stable maintenance of the islands”.

“We cannot damage the stable development of the Japan-China relationship because of that issue. Both nations need to act calmly and from a broad perspective,” he told reporters.

A Chinese patrol ship Haijian 46 sails near the disputed islands in the East China Sea, known as Senkaku in Japan or Diaoyu in China, in this handout file photo taken by the Japan Coast Guard in December 2008. Japan brushed off stern warnings by China and bought a group of islands on Tuesday that they both claim, in a growing dispute that threatens to deepen strains between Asia's two biggest economies. Chinese official media said Beijing had sent two patrol ships to waters surrounding the islands to reassert its claim and accused Japan of "playing with fire" over the long-simmering row. The Japanese Coast Guard could not confirm the report. Japanese media identified the two patrol ships as the Haijian 46 and the Haijian 49, citing Chinese official media sources.

The Japanese Coast Guard will administer the islands, called Senkaku in Japan and Diaoyu in China, which are near rich fishing grounds and potentially huge maritime gas fields.

Geng accused Japan of “using all kinds of excuses to expand its armaments, and repeatedly creating regional tensions”.

Beijing has avoided sending military forces into disputed seas at the heart of quarrels with neighbors, including Japan, instead using civilian government vessels to stake its claims.

China’s Xinhua news agency reported that two China Marine Surveillance (CMS) vessels reached the waters around the islets on Tuesday morning. The government force is in charge of enforcing law and order in China’s waters, but operates separately from the navy.

CHINESE ANGER

The tensions with Japan come while China’s ruling Communist Party is preoccupied with a forthcoming once-in-a-decade leadership change, as well as slowing economic growth.

China’s focus on domestic politics and the economy will not deter a potentially strong response to Japan, said Sun Cheng, a professor specializing in Japan at the China University of Political Science and Law in Beijing.

“Chinese people won’t disregard territorial disputes just because of the economy and the Party Congress,” said Sun. “And if China is too soft on this issue, I don’t think the Chinese people will abide by that.”

The news triggered small-scale protests in front of the tightly guarded Japanese embassy in Beijing. Microbloggers on China’s popular Twitter-like service Sina Weibo also reported small anti-Japanese protests in the eastern city of Weihai and the southwestern city of Chongqing.

“We strongly urge Japan to fully grasp the dangerousness of the present situation and step back from the edge of a precipice over the Diaoyu islands issue,” the foreign affairs committee of China’s national parliament said in a statement read out on a state television news broadcast.

Protesters carrying a photo of the disputed Senkaku, or Diaoyu islands, and a Chinese national flag chant anti-Japan slogans, as they protest against Japan's purchase of several disputed islands, outside the Japanese consulate in Hong Kong September 11, 2012. Japan brushed off warnings by China and bought a group of islands on Tuesday that both claim, in a growing dispute that threatens ties between Asia's two biggest economies. The placard reads, "Demons." REUTERS/Bobby Yip

The long-running territorial dispute flared last month after Japan detained a group of Chinese activists who had landed on the islands. And the row appears to be having an economic impact, with a Chinese official saying Japanese car sales in the world’s biggest auto market may have been hit.

Japanese Prime Minister Yoshihiko Noda, in an address to senior military officers, made no direct reference to the islands dispute, but pointed to China’s growing military clout as one of challenges Japan had to contend with.

The Japanese foreign ministry said it was sending its Asia department chief to Beijing on Tuesday for talks to “avoid misunderstanding and lack of explanation on the issue”.

The government bought three of five islets that it has been leasing from the Kurihara family, which bought the islands in 1972 from another Japanese family that had controlled them since the 1890s. The government has owned one of the remaining islets and continues to lease one from the Kurihara family.

Noda floated the plan to buy the islets in July to head off what appeared to be a much more provocative bid by Tokyo governor Shintaro Ishihara, a harsh critic of China, to purchase them and make the islands available for development.

### 2nc Impact – Opposition Foreign Policy Fails

#### The LDP’s progressive opposition has no coherent foreign policy vision – it’s try or die to keep Abe

Miura, 19 (Lully Miura, Lully Miura is a political scientist and the president of Yamaneko Research Institute. She is a visiting executive fellow at Platform for Social Innovation and was a member of an advisory panel to the prime minister on the National Defense Program Guidelines. "What's behind Japan's political stability?", Japan Times, https://www.japantimes.co.jp/opinion/2019/09/27/commentary/japan-commentary/whats-behind-japans-political-stability/#.XwTwxChKhyw, 9-27-2019, Accessed 7-7-2020) //ILake-JQ

On one hand, these questions were the critical fissure that divided the LDP from the opposition as far back as the enactment of the alliance treaty in 1959. Bitter reminiscences, muscle memory, and support from their political base have all combined to keep these concerns central to the foreign policy worldview of Japan’s left. Yet this has meant that the opposition’s discussions about Japan’s global role have been frozen in time since that moment. Japan’s progressives have little to say about Japan’s response to China’s rise (notwithstanding the Japanese Communist Party’s rebuke of its Chinese counterpart), American wobbliness in the Asia Pacific, or Japan’s future in the liberal order. To be fair, a key reason for the lack of progress on those questions is that Japan’s progressives simply haven’t been asked them; it’s been far safer and more pragmatic to stake out opposition to the LDP line and attack the ruling party’s competency. This constant and reflexive opposition combined with loyalty to historical battles, however, has frozen out more proactive thinking.

This is unfortunate because there is more to work with than it may appear. If Japan’s progressives have a foreign policy of their own it could best be called “constitutionalism”. At a surface level, this means ensuring adherence to the spirit and letter of the pacifist Article 9 of Japan’s constitution in the face of attempts at revision that may allow Japan a more expansive military role. At a deeper level, this position communicates more of a worldview than it may appear, as rather it being a simple check on revision, it advances the role of Japan as a “peace state” – pacifist but not passive, with a proactive role to play in advancing the cause of global peace. This perspective offers an innovative foundation upon which to construct a coherent, alternative foreign policy vision.

A major problem, however, is that constitutionalism has largely been formulated as a response to perceived attacks upon the constitutional status quo – and as such, being a constitutionalist loses its gravity once the most overt challenger of that status quo, Abe Shinzō, exits the scene. Even if Abe’s eventual successor similarly hopes to revise the constitution, it is unlikely that their will to do so will be remotely as fundamental or as personal as the hope which guided Abe – and it’s also quite possible that his successor, cognizant of how a failure to launch the revision process dogged Abe’s lengthy tenure, may simply let the matter lie entirely. As a result, one likely effect of the departure of revisionism’s key champion will be increasingly strident calls from revisionist backbenchers determined to ensure that their prime goal isn’t forgotten. In other words, constitutional revision will lose its most prominent voice, but the background clamor will get louder and receive disproportionate attention.

With low prospects of being in power any time soon, the opposition will struggle to construct meaningful foreign policy

The second problem is that constitutionalism doesn’t hold answers for every question set before Japan. The constitution itself does not, on its own, suggest much on international economics, climate change, or more abstract questions like the international order. That’s not to say that Japan’s progressives are empty vessels on these issues – a progressive government would likely find more political space to move away from coal energy, for example, and the fact that the DPJ initiated Japan’s entry into the Trans-Pacific Partnership hints at the cohort of liberal internationalists in the opposition ranks. As a practical matter, however, uniting its disparate groups under the constitutionalist tent would take more political capital than the opposition has. While the range of differing perspectives within the LDP may be even greater than those among the opposition, its long tenure in power has built up enough capital to plaster over most of the cracks.

This speaks to the biggest challenge to Japan’s progressives developing a coherent foreign policy vision – namely the structural factors that keep any ambitions they may have in the foreign policy realm firmly on paper. With only slim prospects of returning to power in the near to medium future, there is no practical reason for Japan’s opposition leaders to think much beyond their base on foreign policy questions. Even if there are opportunities to use foreign policy concerns to reach out to new stakeholders and potential supporters, it’s hard to overcome the problem that with low prospects of becoming a ruling force in the near future, the opposition has little reassurance to offer to prospective stakeholders that their interests will be served anytime soon.

More generally, the problem that progressive foreign policies have faced worldwide is that they focus on repudiating the status quo – but once in power, it’s hard to maintain that position, as policy in practice leans more closely to the status quo because of a combination of path dependencies by bureaucracies and constraints from the international system. A lack of alternative vision to the structural status quo combined with the practical issues of governance have stunted most attempts at a progressive foreign policy so far.

### AT: Covid Thumps the Impact

#### Abe’s foreign policy on China during corona keeps relations strong

Silverberg 20. Elliot Silverberg is an Asia-focused international relations/public policy analyst, [“Better ties with China: Japan's coronavirus silver lining?”, 4-1-20, Japan Times, URL: <https://www.japantimes.co.jp/opinion/2020/04/01/commentary/japan-commentary/better-ties-china-japans-coronavirus-silver-lining/>] RN

In foreign policy, COVID-19 has caused surprisingly little damage to bilateral relations with China. In fact, this important pillar of Abe’s foreign policy — a relative oasis in the tense geopolitics of Asia — has been reaffirmed in unexpected ways.

True, the virus has stirred feelings of animosity toward China, with scientists suggesting that the spread of the virus could have been checked if Beijing had not delayed its response to the outbreak for three weeks.

Japan’s tourism industry, which is heavily dependent on Chinese visitors, has been badly hit by travel curbs. Abe’s next meeting with Chinese President Xi Jinping, originally slated for this month, has been postponed.

But unlike U.S. President Donald Trump, Abe has refrained from blaming China for the virus to score cheap diplomatic points, or shift attention from public criticism of his domestic response.

Trump has called COVID-19 the “Chinese virus” or “Wuhan virus,” needlessly reminding regional observers of the nativist pathology informing his “America First” foreign policy. His tone is partly China’s doing, certainly.

## Elections DA

### Biden Will Abolish the Death Penalty

#### Biden abolishes the death penalty

MacDougall 7/6 Mark MacDougall, a partner with Akin Gump Strauss Hauer & Feld in Washington, D.C., has defended indigent clients facing the death penalty in South Carolina, Missouri and Florida since 2000. [“The Future of the Death Penalty: Do All Black Lives Really Matter?” 07-06-2020, *Law.com*, URL: <https://www.law.com/nationallawjournal/2020/07/06/the-future-of-the-death-penalty-do-all-black-lives-really-matter/?slreturn=20200607181557>] kly

Legal scholars may debate the reasons but, as this week’s U.S. Supreme Court decision makes clear, the death penalty as an artifact of racism in America will not end in a courtroom any time soon. The only other way to begin the process of eliminating what Justice Harry Blackmun called in his 1994 dissent in Callins v. Collins “the machinery of death” from our national life is at the ballot box. For the first time in modern history, the presumptive presidential candidate of a major party—Joe Biden—has committed to seek the legislative elimination of capital punishment, starting with the federal death penalty. As we rename buildings and purge Confederate symbols, the question of race and the death penalty should be asked of candidates at all levels—and should weigh on the minds of voters in November.

## Progressive Opposition DA

### Death Penalty Link

#### The plan will help revitalize public confidence in the Court --- allows it to be perceived as being fair

Thomsen, 19 (4/23/2019, Jacqueline, “Supreme Court sees more serious divide open on death penalty,” <https://thehill.com/regulation/court-battles/440089-supreme-court-sees-more-serious-divide-open-on-death-penalty>, accessed on 6/5/2020, JMP) **\*Kent Scheidegger is the legal director of the Criminal Justice Legal Foundation, \*\*Elisabeth Semel is the director of the Death Penalty Clinic at UC Berkeley’s law school**

Sunlight is falling on divisive fights in the Supreme Court over the death penalty that are normally kept behind closed doors since the confirmation of President Trump's two picks for the court, underscoring the justices' deep divisions on the issue.

In one recent example, Chief Justice John Roberts signed on to a majority opinion written by one of two justices appointed to the court by Trump — Neil Gorsuch — that concluded that the Eighth Amendment, which prohibits cruel and unusual punishments by the federal government, does not guarantee a painless execution.

In another example, liberal Justice Stephen Breyer excoriated the court over the conservative majority’s decision to reject an Alabama man’s appeal of his execution without a full, in-person discussion by the nine justices.

The court’s other three liberal justices signed their names to Breyer’s dissent, an unusual move that made the disagreement highly public.

In both instances, the debate illustrated how the court has shifted to the right with the confirmations of Gorsuch and Brett Kavanaugh, the other justice nominated by Trump, and the departure of Anthony Kennedy — formerly the court’s swing vote.

And it has inflamed discussions surrounding the death penalty at a time when opponents feel they would have momentum to end the practice — but for the conservative court.

Some see a message in the decisions by the conservative majority that it intends to hold the line on the capital punishment.

“[The court] is sending some very strong messages, that it is opposing these broader efforts to involve the court in restricting, if not eliminating the death penalty,” said Richard Broughton, an associate professor of law at the University of Detroit Mercy who used to advise federal prosecutors on death penalty issues.

The Eighth Amendment fight concerned the case of a Missouri man, Russell Bucklew, who had been convicted of murder and sentenced to death.

He argued that he would suffer “excruciating pain” if he was put to death through lethal injection because of a rare medical condition that would cause him to choke on his own blood, and that this was unconstitutional.

Gorsuch, writing for the majority, argued that it was Bucklew’s responsibility to suggest an alternative to lethal injection if he truly wanted to avoid the pain, and accused the inmate of simply seeking to delay his execution. Separately, Justice Clarence Thomas said the punishment was not cruel because the state did not intend for it to be cruel to Bucklew.

In the minority dissenting opinion, Breyer accused the majority of issuing a ruling that “violates the clear command of the Eighth Amendment.”

He also opposed Gorsuch’s assertion that death row inmates challenging their form of execution must offer up an alternative to the court, calling it “an insurmountable hurdle.”

In the Alabama case, Breyer called out conservatives on the court for voting to authorize an execution without calling the full court to order.

In a scorching dissent issued shortly before 3 a.m. last Friday, Breyer said that he had asked the court to take no action until it met as scheduled later that day, but was denied the request.

Alabama had already held off on the execution, citing “practical” reasons. And the order wasn’t issued until after the midnight deadline, meaning the sentence would have been put off regardless.

Opponents of the death penalty argue that Gorsuch’s opinion not only set a dangerous precedent by stating that that a prisoner opposing their state’s form of execution needed to provide an alternative, but that it was cruel in stating the pain caused to the prisoner was irrelevant.

“In a decision that seemed out of touch with basic principles of compassion and human decency, the court matter of factly said that execution need not be painless and then created and then reiterated an impossible standard for prisoners to meet to avoid obviously torturous executions,” said Robert Dunham, the executive director of the Death Penalty Information Center. He called the opinion “astonishing for its harshness and cruelty.”

Kent Scheidegger, the legal director of the Criminal Justice Legal Foundation and a contributor for the conservative think tank The Federalist Society, acknowledged the tough language but said he believed Gorsuch’s opinion was in line with the Constitution.

He also said it was good news for supporters of the death penalty.

“That was the strongest opinion on the death penalty as an opinion of the court” in recent history, Scheidegger said.

Elisabeth Semel, the director of the Death Penalty Clinic at the University of California, Berkeley’s law school, said that new conservative justices like Gorsuch and Kavanaugh appear to be trying to make sure fewer cases on the form of execution come before the court’s review.

Brandon Garrett, a professor at Duke Law, echoed that point. He said that inmates are still going to appeal their cases up to the Supreme Court, forcing them to confront these issues. But he said the recent ruling points to an attempt to limit the kinds of death penalty cases that can be considered.

“They don’t want to look at these claims,” Garrett said. “They’ve set up a standard that’s making it impossible to even consider execution claims.”

More states in recent years have taken steps to eliminate or minimize capital punishment. California Gov. Gavin Newsom (D) earlier this month signed an order suspending executions in the state for the duration of his term, impacting 737 prisoners on death row.

Polling shows mixed views on the death penalty, which opponents have long said puts a disproportionate number of minority and poor people to death.

A Gallup poll released last October showed that only 49 percent of respondents believed that the punishment was applied fairly, a new low in the poll. But 56 percent said they still supported the penalty.

A player to watch on the issue going forward is Roberts.

While he has generally sided with conservatives on the death penalty, he’s also an institutionalist constantly monitoring the court’s standing.

“If there comes a point where the court’s procedural handling of these cases starts to make the court seem arbitrary or unfair,” Broughton said he might break with conservatives.

Roberts has sided with the liberal minority in one death penalty case so far this year, signing onto an opinion that the court wasn’t the right body to consider whether a man claiming that seizures caused him to forget his crimes could still be executed.

The ruling wasn’t about the death penalty itself, however, and experts say it’s unlikely that Roberts would change his opinion on the issue.

Ryan Owens, a professor of political science at the University of Wisconsin-Madison, said there could be death penalty cases where Roberts might “cast a counter-ideology vote.”

“But I don’t think we’re going to see some major leftward drift by the chief in these cases, and certainly as we move forward we’re not going to see that,” he said.

Scheidegger called the scenario of Roberts ruling against the overall constitutionality of the death penalty a “borderline impossibility.” But he didn’t rule out the potential that Roberts could side with the liberal minority of the court on the more technical aspects of capital punishment cases.

Semel said Breyer’s dissent revealing that the conservatives blocked the full court from debating the Alabama execution raises red flags about how seriously the justices are taking death penalty cases, and that Roberts could step in to try and correct that perception.

“The public’s confidence in the reliability and accuracy and above all fairness of decision-making really depends on transparency,” she said. “And this appears to be a majority of the court that is not interested in those principles.”

### AT: Roberts Will Moderate Court

#### Roberts unlikely and unable to stop conservative Court

Epps, 19 --- Professor of constitutional law at the University of Baltimore (4/2/19, Updated on 4/4/19, Garrett, “Will John Roberts Block the Triumph of Legal Conservatism? His hesitations about moving the Court to the right are only a question of pace,” <https://www.theatlantic.com/ideas/archive/2019/04/john-roberts-isnt-really-moderate/586273/>, accessed on 6/13/2020, JMP)

Despite his direct rebuke to Trump, however, it is not obvious that Roberts can or would resist the transformation of the Court into an extension of the Republican Party.

John Roberts is perhaps the most enigmatic figure in national politics and government today. As the crisis of American democracy engulfs the Court, now is a good time to ask who Roberts is and what he believes. Readers seeking answers to those questions should turn first to Joan Biskupic’s fine new biography of Roberts, The Chief: The Life and Turbulent Times of Chief Justice John Roberts. Biskupic, who has covered the Supreme Court for The Washington Post, USA Today, and Reuters, is now a full-time legal analyst for CNN. Her years of experience and scrupulous fairness have given her access to the Court’s inner circle—top appellate lawyers, lower-court judges, former clerks, some of the justices themselves, and even the chief—that provides the best view of Roberts we are likely to have for years to come.

Biskupic documents the career of a young conservative whose ideas were formed during the exhilaration of the “Reagan revolution”; in the four decades since, he seems (like the Bourbon dynasty in the apocryphal quote from Talleyrand) to have learned nothing and forgotten nothing.

Roberts is not a “movement conservative”; Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch are proud members of the conservative Federalist Society and ostentatiously bask in its adulation. Roberts has never fully identified with the society and tends toward greater decorum in his public appearances. During his confirmation hearing, he described the work of an Article III judge in the American system as that of a baseball umpire who calls “balls and strikes,” rather than determining who scores and who wins. He strives publicly to cut a smaller-than-life figure.

Yet Roberts is absolutely not a legal technocrat who seeks to further only process and separation-of-powers values. Anyone who has studied the record knows that Roberts came to Washington with a set attitude on a number of core issues—hostile toward civil-rights statutes like the Voting Rights Act and affirmative-action programs; solicitous of wealth in areas like labor relations and campaign finance; deferential to executive and military authority and correspondingly contemptuous of the legislative branch; socially conservative on matters of reproduction and sexuality; antagonistic to environmental protection, economic regulation, and government health-care programs. His public career before rising to the bench was entirely devoted to extending the power of the executive branch—an instinct on display in his early memos in the Ronald Reagan White House and fully embodied in his obsequious 2018 opinion in Trump v. Hawaii, upholding the administration’s anti-Muslim “travel ban.”

#### Roberts is committed to slowly moving the Court and country to the right

Epps, 19 --- Professor of constitutional law at the University of Baltimore (4/2/19, Updated on 4/4/19, Garrett, “Will John Roberts Block the Triumph of Legal Conservatism? His hesitations about moving the Court to the right are only a question of pace,” <https://www.theatlantic.com/ideas/archive/2019/04/john-roberts-isnt-really-moderate/586273/>, accessed on 6/13/2020, JMP)

Since the retirement of Justice Anthony Kennedy last summer, Roberts has become the Court’s “median justice,” the member whose vote will usually determine the outcome of a closed case. More than ever before, Roberts’s view of current politics and law carry enormous weight. Thus, for example, when the Fifth Circuit approved a Louisiana antiabortion “health” law almost identical to one that the Court had struck down in 2016, it was only Roberts’s decision to vote with the liberals that blocked that appeals-court panel from defying the Supreme Court. When a Texas state court appeared to be ignoring the Court’s instructions in a death-penalty case, Roberts joined the Court’s Democratic appointees to overrule its decision. A week later, he again joined the four liberals to stay the death sentence of an inmate so demented, he could no longer remember the crime he had committed.

Roberts, however, is not by temperament a “swing” justice. His hesitations about moving the Court (and the country) to the right, it appears, are largely a question of pace; he believes that it is better to proceed slowly toward dismantling the New Deal, legislative protection of civil and voting rights, environmental protections, the remaining regulation of campaign finance, and the remaining shreds of the right of reproductive choice.

This solicitude for constitutional etiquette and the nonpartisan image of the federal courts is the most important thing that separates Roberts from the Trump administration, the other four conservative judges, and the extremists ensconced by Trump on the lower courts. What these other players have coveted for a generation, and now have, is power, and they are eager to use it.

The administration and the lower courts are stuffing the Court’s in-basket with cases that beg the justices to scrap liberal precedents; see, for example, this summary by Linda Greenhouse of the abortion rulings from the lower federal courts that approve direct assaults on reproductive choice—showing contempt for Roberts-style caution, and in effect daring him to cross party lines.

In the case of the Affordable Care Act, Roberts of course did cross party lines, interposing himself between the far right and victory in 2012. He was ostracized and ridiculed by his former allies, and denounced by Donald Trump before and during the 2016 campaign for his defection.

Now the Trump administration is going to offer the Roberts Court the opportunity to get back into line with right-wing ideology. A federal judge in Texas has held that the Affordable Care Act is unconstitutional after all, and Trump—unable to undo the act legislatively—will apparently ask the Court to deliver the coup de grace. “If the Supreme Court rules that Obamacare is out, we’ll have a plan that is far better than Obamacare,” he said Wednesday. Its fate is up to the Court yet again.

Roberts might have to decide whether to sacrifice his conservative credibility a second time to protect the Court from the opprobrium of scuttling the nation’s health-care system. There’s little doubt that the other four conservatives would be delighted to take the act down, consequences be damned. Adding complexity: By the time the case reaches the Supreme Court, Roberts may no longer even be the swing vote. It’s quite possible that Trump will fill another Supreme Court vacancy before 2021. If that happens, or if Trump is reelected, Roberts will assuredly have to choose either to join his Court’s rapid move to the right or to condemn himself to irrelevance. His record suggests he is unlikely to remain a solitary figure seeking to block the triumph of legal conservatism.

## Court Capital DA

### 2nc Roberts is Swing Vote

#### \*\*\*note when prepping file – there was also another link card for this in the original starter packet file

#### Roberts is constantly monitoring the Court’s standing --- he is the likely swing vote on death penalty cases

Thomsen, 19 (4/23/2019, Jacqueline, “Supreme Court sees more serious divide open on death penalty,” <https://thehill.com/regulation/court-battles/440089-supreme-court-sees-more-serious-divide-open-on-death-penalty>, accessed on 6/5/2020, JMP) **\*Kent Scheidegger is the legal director of the Criminal Justice Legal Foundation, \*\*Elisabeth Semel is the director of the Death Penalty Clinic at UC Berkeley’s law school**

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In another example, liberal Justice Stephen Breyer excoriated the court over the conservative majority’s decision to reject an Alabama man’s appeal of his execution without a full, in-person discussion by the nine justices.

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In both instances, the debate illustrated how the court has shifted to the right with the confirmations of Gorsuch and Brett Kavanaugh, the other justice nominated by Trump, and the departure of Anthony Kennedy — formerly the court’s swing vote.

And it has inflamed discussions surrounding the death penalty at a time when opponents feel they would have momentum to end the practice — but for the conservative court.

Some see a message in the decisions by the conservative majority that it intends to hold the line on the capital punishment.

“[The court] is sending some very strong messages, that it is opposing these broader efforts to involve the court in restricting, if not eliminating the death penalty,” said Richard Broughton, an associate professor of law at the University of Detroit Mercy who used to advise federal prosecutors on death penalty issues.

The Eighth Amendment fight concerned the case of a Missouri man, Russell Bucklew, who had been convicted of murder and sentenced to death.

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He also opposed Gorsuch’s assertion that death row inmates challenging their form of execution must offer up an alternative to the court, calling it “an insurmountable hurdle.”

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“The public’s confidence in the reliability and accuracy and above all fairness of decision-making really depends on transparency,” she said. “And this appears to be a majority of the court that is not interested in those principles.”

### AT: Kavanaugh = Swing Vote

#### Kavanaugh’s a locked in conservative vote—he’s in line with the Federalist Society

Mencimer 19 – staff reporter (Stephanie, 7-5-2019, “Kavanaugh's first term went exactly as his Federalist Society backers had hoped”, Mother Jones, https://www.motherjones.com/politics/2019/07/kavanaughs-first-term-a-reliable-conservative-vote-with-a-few-surprises/, accessed 6-6-2020) //DYang

Now that Kavanaugh has finished his first term on the bench, it’s clear how much he’s hewed to the right and shifted the court in the way his benefactors had hoped he would. There have been a couple of surprising votes, including one that put him on the opposite side from President Donald Trump, but nothing that’s really put him at odds with the Federalist Society. Leonard Leo, the group’s vice president and friend of Kavanaugh, recently told Time approvingly, “Brett Kavanaugh has seen how unforgiving the Left can be…So Justice Kavanaugh has every incentive to basically do what he wants to do and ignore the Left.”

Kavanaugh’s predecessor, Anthony Kennedy, was a Republican appointee who was an unpredictable swing voter on significant social issues like LGBT and abortion rights, positions that drove conservatives crazy. His vote was critical to the legalization of same-sex marriage and the preservation of abortion rights. In his first term on the court, Kavanaugh has already proven that he’s no Anthony Kennedy.

In 2014, Louisiana passed a law virtually identical to the Texas one the Supreme Court would strike down in 2016. Like the Texas law, it would have closed most of the state’s abortion clinics. The lower courts blocked the Louisiana law, invoking the 2016 Supreme Court case, and in February, it landed at the Supreme Court, where Kavanaugh had taken Kennedy’s seat.

During his confirmation hearing, Kavanaugh had sought to reassure senators, especially moderate Republicans like Maine’s Susan Collins, that he would respect the court’s precedent, suggesting that he considered the court’s landmark ruling in Roe v. Wade to be settled law. But when the four liberal justices, joined by Chief Justice John Roberts, voted to block the Louisiana law, Kavanaugh dissented, arguing that he would have allowed the law to take effect.

“Kavanaugh went out of his way to write this opinion that gave a very crabbed reading of abortion rights precedent,” says David Gans, civil rights director at the liberal Constitutional Accountability Center. Gans notes that Kavanaugh also voted with the conservative bloc to overturn a 40-year-old precedent in an unrelated case that Justice Stephen Breyer warned could have dangerous implications for the court’s other landmark rulings, like Roe.

Last week, in one of the biggest cases of the term, Kavanaugh voted with the conservative majority to bar federal courts from ruling on partisan gerrymandering cases. Many of these challenges to skewed maps had been invigorated because of Kennedy, who for more than a decade held out the possibility that the Supreme Court might clamp down on partisan gerrymandering. After Kennedy [first said in 2004](https://www.oyez.org/cases/2003/02-1580) that the court might be open to such challenges if presented with a manageable standard for assessing them, plaintiffs repeatedly tried to come up with a case that might satisfy the swing justice.

In the North Carolina case that led to last month’s Supreme Court decision, Republicans had intentionally drawn legislative districts to [ensure GOP domination](https://www.nytimes.com/interactive/2018/11/29/us/politics/north-carolina-gerrymandering.html) of 10 of the state’s 13 congressional seats, even though in 2018, the party barely won 50 percent of the statewide popular vote. Kennedy might have proven a crucial swing vote in that case. Instead, it was Kavanaugh who provided the critical fifth vote with the conservatives to entrench GOP political power. University of California Irvine law professor Rick Hasen says that by the time the gerrymandering issue was “perfectly teed up” for Kennedy, the octogenarian justice “was out of gas, more conservative, and generally ended his final term very grumpy. It is no surprise that his replacement with Kavanaugh led directly to this.”

Kavanaugh has also demonstrated his conservative bona fides on criminal justice, voting to make it easier for police officers to arrest people for insulting them, and on church-and-state issues, voting to allow a 40-foot cross to remain on public space in Maryland and to take a case that could expand the use of taxpayer-funded vouchers for private religious schools.

Kavanaugh has also raised eyebrows for recent actions that have nothing to do with his voting record. In a contentious First Amendment case involving a public access TV station, he wrote, “It is sometimes said that the bigger the government, the smaller the individual.” The aphorism struck legal blogger Michael Dorf as odd. He [traced its origins](https://twitter.com/dorfonlaw/status/1140682108945489922) through the Twitter feed of the Ayn Rand-inspired Atlas Society and concluded that it was most recently popularized by the right-wing talk radio host and YouTube star Dennis Prager. Dorf suggested that Prager was a highly unusual source for a Supreme Court reference, and[evidence that Kavanaugh shares a world view](http://www.dorfonlaw.org/2019/06/liberty-and-polarization-in-yesterdays.html) “with the people who get their news and opinion from right-wing media.”

Then there’s his staffing: Kavanaugh recently hired the daughter of Yale law professor Amy Chua as a clerk for the coming term. Chua had written an op-ed in the Wall Street Journal defending him during his confirmation hearing, even as she insisted that it was not intended to help advance her daughter’s career.

But Kavanaugh’s first term has not been entirely predictable. He wrote the majority opinion in [Flowers v. Mississippi](https://www.scotusblog.com/case-files/cases/flowers-v-mississippi-2/?wpmp_switcher=desktop), in which the court reversed the conviction of a black man on death row who had been tried six times for the same crime—each time by the same prosecutor, who had booted a total of 41 of 42 prospective black jurors from the jury pool before finally securing a death sentence. “Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process,” Kavanaugh wrote for a 7-2 majority.

Kavanaugh also voted with the court’s liberals to allow an antitrust case against Apple to proceed. Most notably, in mid-June, he voted with the majority in [Gamble v. United States](https://www.scotusblog.com/case-files/cases/gamble-v-united-states/?wpmp_switcher=desktop) to preserve the ability of both a state and the federal government to prosecute someone for the same crime. The case could hold implications for Trump and some of his associates prosecuted by special counsel Robert Mueller as part of his investigation into Russian meddling in the 2016 election. Trump has threatened to pardon a number of people Mueller has convicted, including his former campaign manager, Paul Manafort. Even if he does so, under current law, states like New York could still prosecute those people under their own laws. That led some liberal pundits [to worry last fall](https://news.bloomberglaw.com/us-law-week/manafort-shadow-looms-over-supreme-court-double-jeopardy-case) that the Senate was rushing Kavanaugh’s confirmation so that he could provide the deciding vote in Gamble to ban states from prosecuting people Trump pardoned.

As it turned out, the vote on Gamble wasn’t even close—7 to 2—and Kavanaugh was in the majority that voted against Trump’s interests to uphold the centuries-old precedent, leaving liberal justice Ruth Bader Ginsburg and conservative Neil Gorsuch as the odd-couple dissenters. But on the whole, Kavanaugh has proven to be the reliably conservative justice the Federalist Society desired when it pushed Trump to nominate him, [**voting almost in lockstep**](https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/) with Chief Justice John Roberts and Justice Samuel Alito. And he’s just getting started.

The court has already accepted more than 50 cases for the coming term, and Kavanaugh will have a chance to weigh in on more of the country’s thorniest issues, including one case involving the Affordable Care Act, another that could decide the fate of “Dreamers”—the undocumented immigrants brought to the United States as children—and most likely more abortion cases. During his confirmation hearing, Kavanaugh repeatedly said that he was an optimist who lived “on the sunshine side of the mountain.” Liberal court watchers aren’t so hopeful about the outcome of those contentious cases.

“To those of us who studied his record, Brett Kavanaugh was a known quantity when he got to the Supreme Court and he’s living up to his hard-right reputation,” says Nan Aron, president of the liberal advocacy group Alliance for Justice. “Kavanaugh came to the Court with a record of hostility to health care and reproductive rights. Like his fellow Trump appointee Neil Gorsuch, he’s shown plenty of willingness to strike down longstanding precedents. So no, we aren’t seeing anything to be optimistic about in terms of how he’ll rule in the future.”

### Lack of Health Care Turns Dignity

#### Inadequate access to health care compromises the dignities of marginalized populations

Morden, 17 (Stella Morden, Stella Morden has her PHD from Duquesne University. "The Ethical Right to Healthcare in the Affordable Care Act", Duquesne University, https://dsc.duq.edu/cgi/viewcontent.cgi?article=1140&context=etd, May 2017, Accessed 6-22-2020) //ILake-JQ

i. The Intrinsic Value of Every Human Being.

Human dignity is generally known as the foundation of human rights. It is concerned with the respect for intrinsic value of every human being and the entire humanity. Human existence must also be perceived from the spiritual dimension in order to understand that dignity cannot simply rely on the interpretation from genetics.71 It does not change its level or degree when a person becomes ill, disabled, or disfigured. Dignity is not earned or gained by labor or achievement; it is simply related to being humans.72 It means humans naturally inherit rights to all necessities to sustain living. It then provides human rights with the protection of life, freedom, and property. It further extends to protect against oppression and unequal treatment.73 These reasons justify equal access to health care for the purpose of eliminating diseases that disrupt health.74 That means medical goods and services should be guaranteed to all members in society to sustain their existence regardless of race, socio-economics, and religion.75

ii. Life is Sacred.

Christian theory supports human life is sacred because of its dignity, destiny, and integrity.76 Human beings are created in God’s image and participate in God’s holiness. Humans are the symbols of God, and the sacraments of God are revealed in them. God chooses His created beings as a people, a chosen race, and a society. Humans are commanded by God to keep charge of the earth, which strongly indicates the superior value of human beings. The recognition of sanctity of life brings the import of supporting a reasonable degree of quality of life. That implies the rightness to preserve life through using health care services. More clearly, it is the life preservation of the poor and the rich without partiality. It is not to advocate providing unlimited resources on each person. Rather, the quality of each life must be considered.77

b. Personal Autonomy

Justifying the right to health care involves personal autonomy and the freedom to self-rule.

i. The Right to Make Choices.

Personal autonomy is free from the control of others and from the limitation of making preferred choices. An autonomous person has the freedom to act on his own values and carry out his self-chosen plan without the interference by others. This is in line with Aristotle’s perspective that humans act by choice generated from the inner personal will as opposed to outside force.78 It indicates natural free will to determine action for self. Immanuel Kant explains simply the logic of the right for human determination. To be a moral agent is to take responsibility for one’s own actions. To be a responsible agent is to be able to choose freely. To choose freely is to be autonomous.79 This concept of human determination is significant in individuals’ decision-making regarding health care choices. It reflects the state of independent self-governance as being able to consider the good of health care and make the decision to obtain it without the controlling interference of others.80 This is the nature of autonomy applied in health care. In contrast, individuals, such as prisoners and persons with retardation, who cannot make decisions often are controlled by others. As seen in health care, these people often receive inadequate health care services. In these cases, it is said that their liberty in autonomy is denied.81

ii. Self-governance.

Self-governance allows people to manage their own life including the decision on healthcare. The principle of respect for autonomy demands the acknowledgement of people’s right to self-rule and make choices based on their personal values.82 Daniels claims in the strong assumption that individuals should be given the freedom to pursue economic advantage from their physical condition even when they are ill and disabled.83 Relating it to health care, the emphasis is on respecting one’s freedom to have health care services as he wants84 to the extent that physicians have an obligation to help patients make sound medical decisions by overcoming their obstacles such as medical impediments.85 Even autonomous persons who have self-governing capacities of their health might have constraints caused by illness, depression, coercion, or other conditions that restrict their options.86 Not receiving health care service during illness is one of the times that restrict people’s options. In most people, illness prompts the desire to seek treatment for relief of physical suffering. Respect for autonomy involves maintaining people’s autonomous choice and eliminate conditions that destroy autonomous action. In contrast, disrespect of autonomy involves actions that ignore and inattentive to autonomous choice.87 The case of not providing health treatment when needed falls in the latter condition.

2. Beneficence & Non-Maleficence

The topics of the right to treatment and the right to forgo treatment are discussed using the principles of beneficence and non-maleficence.

a. Right to Treatment

Using tax money to provide health care for members of society raises that question whether each one is obligated to do good to others.

i. The Obligatory Action to Give Benefit.

In the United States, the lack of coverage of health care to a large number of people compels a discussion on the right to treatment. Morality requires people to do good to others, and beneficence demands taking actual actions to benefit others’ welfare.88 Beneficence is associated with acts of mercy, kindness, charity, and humanity. The principle of beneficence specifically stresses the moral obligation to act for the benefit of others. In a broader sense, these obligations can apply to support the provision of healthcare to everyone securing basic protection of treatment. The act of beneficence is particularly pronounced when giving healthcare access to those who cannot afford it. The core element of the moral theory demands obligatory actions to give benefit, to prevent and remove harms, and to consider the goods and harms of an action.

ii. Health Services for All Americans.

The moral right to healthcare advocates health for all members in society in support of fair opportunity. This is only possible through government-funded health services, which means a national health policy is needed.89 With millions of people in the United States without health insurance coverage primarily due to unemployment, poverty, and limited government-funded health resources, national health policies that include equal distributions of health services are essential.90 The policy should guarantee necessary care to prevent illness, diagnose and treat disease, treat injury, improve disability, or health conditions associated with avoidable morbidity and mature mortality.91 This is the aim of ACA.

## Abortion DA

### Abortion DA Links

#### **The court’s claim of intrinsic value to life is used to override women’s decisional authority on abortion.**

Seigel 13 Reva Siegel, Yale University - Law School ; University of California, Berkeley - Berkeley Center on Comparative Equality & Anti-Discrimination Law ["Dignity and the Duty to Protect Unborn Life," 07-26-2013, *SSRN*, URL: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298275>] kly

Appeals to dignity in debates leading to constitutionalization of abortion

In the 1960s, public health arguments for liberalizing access to abortion began to spread in Western Europe and North America. Critics argued that **poor women unequally suffered the health harms of criminalization**, and doctors sought freedom to practice in circumstances in which the criminal law was erratically enforced.4 By the end of the decade, however, a newly mobilizing women’s movement had joined public health advocates in challenging the criminalization of abortion. No longer were reformers satisfied with liberalizing indications for abortion (exceptions to criminal bans on abortion, typically determined in the individual case by permission of a committee of doctors). They now sought repeal of indications legislation, and, at the very least, enactment of periodic legislation that would give to women capacity to decide whether to carry a pregnancy to term during the early months of pregnancy— legislation sometimes termed ‘on demand’, because it shifted control of the decision whether to carry a pregnancy to term to the pregnant woman who was no longer obliged to plead her case to a committee of doctors. 5

Feminists challenged the criminalization of abortion on new grounds, arguing that laws criminalizing abortion violated women’s dignity. The claim was both practical and symbolic. Under prevailing social arrangements, they argued, laws criminalizing abortion took from women decisions about their health, sexual relations, family needs, economic independence, and political participation. Laws criminalizing abortion thus reflected and perpetuated status-based controls over women’s lives. These associations, once identified, escalated the practical and symbolic stakes of the abortion debate and transformed it into a site of struggle over women’s citizenship.6 In 1969, Betty Friedan, president of the newly formed National Organization of Women, mobilized these arguments in a call for the repeal of laws criminalizing abortion, in the process fatefully reframing American policy debate over abortion reform.7 Friedan insisted: ‘[T]here is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process … The real sexual revolution is the emergence of women from passivity, from thing-ness, to full self-determination, to full dignity …’8

This feminist claim to dignity in making decisions about bearing children would be publicized through speak-outs and through civil disobedience. In France, 343 women declared that they had had abortions in a manifesto published in Le Nouvel Observateur in April 1971.9 Two months after publication of the French manifesto, Aktion 218, a women’s organization in West Germany named for the code provision criminalizing abortion, published in Der Stern the names of 374 women who had had abortions. They denounced the law criminalizing abortion because it ‘branded them as criminals’, and in their manifesto declared: ‘I am opposed to Paragraph 218 and for desired children.’10 In other nations, similar speak-outs followed.

Opponents of abortion reform appealed to dignity as well. In appealing to human dignity, opponents were not seeking abortion laws that would express respect for **women’s decisional authority but instead** sought abortion laws that would express respect for the value of life itself. In 1970, the Central Committee of German Catholics, an association of Catholic laypersons, argued that decriminalizing abortion would violate West German constitutional guarantees of dignity: ‘**If becoming life is not protected, including with the means of the criminal law, unconditional fundamental principles of a society founded on human dignity are not assured for long.’11**

During the 1970s, these national and transnational debates led to the enactment of legislation in a number of countries that liberalized access to abortion. Those frustrated in politics increasingly brought their claims to court, leading to the first constitutional judgments on abortion. 12

Claims on dignity in the German abortion decisions

Beginning with the West German judgement in 1975, and accelerating over time, claims on dignity played an increasingly important role in the constitutional law of abortion. The West German judgement famously interpreted constitutional protection for human dignity to require protection for unborn life. Less appreciated is the way in which the court’s judgement also reflected an engagement with the dignity claims of the West German women’s movement. In what follows, I consider how dignity figured in two German abortion judgements set almost twenty years apart. The first German judgement, from 1975, appealed to dignity as respect for life to strike down periodic legislation adopted in response to the Aktion 218 campaign. In 1993, after reunification, the Federal Constitutional Court qualified its judgement in ways that acknowledged competing claims on dignity.

In 1975, the Federal Constitutional Court held that West Germany’s 1974 law, which decriminalized abortion during the first twelve weeks of pregnancy for women who received abortion-dissuasive counselling, violated the Basic Law.13 The court reasoned that the duty of the state to protect unborn life was derived from the Basic Law’s protection for life and for dignity: ‘**Where human life exists, human dignity is present to it;** it is not decisive that the bearer of this dignity himself be conscious of it and know personally how to preserve it.’14 Without deciding whether the unborn held a right to life, the court concluded that there was an objective dimension to the right to life that government was obliged to respect by law.15

The court famously justified its decision to strike down the 1974 statute liberalizing access to abortion by invoking the Holocaust.16 Less well known is the court’s engagement with feminist claims; the 1975 decision expressly repudiated feminist dignity claims. The Federal Constitutional Court warned the legislature not to ‘acquiesce’ in popular beliefs about abortion that might have developed in response to ‘passionate discussion of the abortion problematic’.17

The court expressly rejected the parliament’s efforts to devise a framework that respected the dignity of both women and the unborn. It rejected the view of legislators who sought to identify a period during pregnancy to respect ‘the right to self-determination of the woman which flows from human dignity vis-à-vis all others, including the child’s right to life’, on the grounds that it was ‘not reconcilable with the value ordering of the Basic Law’.18 **Given the overriding importance of the dignity of human life, the court concluded, ‘the legal order may not make the woman’s right to self-determination the sole guideline of its rulemaking**. The state must proceed, as a matter of principle, from a duty to carry the pregnancy to term.’19

The Federal Constitutional Court not only rejected the parliament’s efforts to coordinate dignity concerns of women and the unborn; the opinion went further, and denied that pregnant women had claims of deliberative autonomy concerning motherhood. The court recognized a constitutional duty to protect life that required government to ‘proceed … from a duty to carry the pregnancy to term’, that is, to enforce women’s duty to mother. The court derived these duties from nature, reasoning that the duty to protect life was ‘entrusted by nature in the first place to the protection of the mother. To reawaken and, if required to strengthen the maternal duty to protect, where it is lost, should be the principal goal of the endeavours of the state by the protection of life.’ **The duty to protect life obliged government** to ‘strengthen the readiness of the expectant mother to accept the pregnancy as her own responsibility’.20 On this view, women naturally choose to protect unborn life; where nature falters, law must enforce choices women ought naturally to make.

#### The legal precedent of dignity can be used to place restrictions on abortion – Germany proves

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The construction of dignity as empowerment is subjective, prioritising individual values, rather than seeking to establish a universal human dignity. However, as Deryck Beyleveld and Roger Brownsword recognise, dignity can also operate to deny individual choice when constructed as constraint. The U.S. Supreme Court adopted a very different interpretation of dignity in Gonzales v Carhart52 where it upheld the Partial Birth Abortion Ban Act. Having provided an extremely graphic and emotive description of how a so-called ‘partial birth’ abortion is performed, the majority of the Supreme Court recognised that dignity is engaged in relation to the foetus’ life as well as the woman’s choices. Thus, upholding the constitutionality of the Partial Birth Abortion Ban Act Kennedy J stated that it ‘expresses respect for the dignity of human life.’53 Unfortunately, he failed to develop his analysis of dignity as life and gave no explicit consideration to the dignity of the pregnant woman. Kennedy J emphasised the need for a woman’s decision to abort to be fully informed, the purpose of the information being to protect women from the seemingly inevitable regret that some women will feel after choosing to undergo an abortion.54 However, as Reva Siegel argues, the suggestion that women should be protected from making a decision that they will later regret is a very different view to the conception of dignity as equality and autonomy set out in Casey.55 Given that the Act contains no exception safeguarding the health of the woman, it is suggested that Kennedy’s understanding of dignity can at best be characterised as one-sided. Moreover, the conclusion that the Act express-es respect for the dignity of human life is somewhat surprising when one considers that the legislation prohibits a particular method of procuring an abortion, rather than the termination of pregnancy itself, suggesting that the respect expressed is extremely limited in nature. Indeed, given that the focus of the prohibition is upon the method utilised to procure an abortion, the only constraint would appear to be upon medical practice.

The German compromise: the protection of dignity, life and liberty interests in the regulation of abortion

Whilst the U.S. Supreme Court and the Hungarian Constitutional Court have primarily adopted a conception of dignity focused upon choice and recognising a woman’s agency in relation to abortion, the German Bundesverfassungsgericht linked the protection of human dignity to both the woman’s right to self-determination and the foetal right to life, conceptualising dignity as both liberty (in the sense of decisional autonomy promoted in Casey) and constraint, in so far as it requires the woman’s liberty interests to be restrained in order to protect the foetus. The court has twice found abortion legislation to be unconstitutional and thus invalid, in decisions handed down shortly after the U.S Supreme Court decided *Roe and* Casey. 56 Despite the proximity in time, the German decisions differ significantly from their U.S. counterparts, holding that the constitutional guarantee of human dignity, and the right to life, apply to the foetus in and of itself.57

The right to life is guaranteed by Article 2 II section 1 GG, protecting the physical-biological existence of human beings.58 Unlike the Irish Constitution59 the German Constitution does not expressly state that the right to life applies to prenatal life, but the legislative history of the Grundgesetz demonstrates that the legislature intended the right to life to apply prior to birth60 and the judges in each of the abortion decisions were unanimous in holding that the right to life is not limited to life extant, stating ‘The protection of human existence from state interference would be incomplete if it did not include the preliminary stage of “completed life”, prenatal life.’61 Indeed, as Rupp v Brünneck and Simon JJ point out in their dissenting opinion, the question is not whether, but how the right applies to the foetus.62 Although the Bundesverfassungsgericht recognised that the pregnant woman’s rights to life and bodily integrity, to personality and her dignity are engaged, it held that she owes a duty to her foetus throughout pregnancy, a duty to continue the pregnancy to full term.63 That being the case, her rights must be curtailed to the extent necessary to protect the foetus, unless her choice to terminate the pregnancy can be justified. As the court stressed, in all but the most serious situations a woman’s failure to continue the pregnancy will not be capable of justification and thus must be categorised as unlawful.64

A fundamental difference in approach in the American and German constitutional philosophies can be readily discerned in the abortion juris-prudence. The U.S. Supreme Court recognised that the state had an interest in prenatal life and that it could (should it so choose) intervene to protect that interest from the beginning of the third trimester (in Roe), or through-out pregnancy provided that in doing so the state did not pose an undue burden upon the woman’s right to elect a previability abortion (in Casey). By contrast, the Bundesverfassungsgericht held that the foetus is protected by both the right to life and the constitutional guarantee of human dignity and that the state is under a duty to take positive action to protect foetal life from implantation onwards. It stated ‘The state’s duty to protect is compre-hensive. Self-evidently it does not only prohibit direct state interference in the developing life, but also requires the state to take a stance protecting and promoting this life, … above all, to protect it from unlawful interference from others.’65 Therefore, the Bundesverfassungsgericht recognised that the state has an affirmative duty to protect and promote foetal life, including protecting the foetus from the pregnant woman herself.66

Thus, two years after the US Supreme Court had emphasised the liberty of the individual and the limits of state action infringing upon the exercise of that liberty in Casey, the German court stressed the communitarian nature of rights, emphasising that pregnancy involves a ‘Zweiheit in Einheit’ (duality in unity), rather than merely a pregnant woman and underlining the social and relational aspects of pregnancy.67 Whilst the US Supreme Court found that the foetus is not a person within the meaning of the constitution,68 the Bundesverfassungsgericht recognised that the right to life applies to prenatal life, holding that the foetus is an independent legally protected value (Rechtsgut) that ‘does not develop into a human being, but as a human being.’69 In seeking to reconcile the conflicting rights of the woman and the duty to protect foetal life, the court attributed a pivotal role to the protection of human dignity, holding in Abortion I that in weighing the conflicting constitutional values reference must be made to their relationship with the protection of human dignity, the epicentre of the constitutional value system.70 Nevertheless, the court adopted a very one-dimensional view of dignity in the first decision, adopting the formulation of dignity as restraint by stressing that the protection of dignity requires the protection of human life, and that such protection will out-weigh the woman’s right to self-determination throughout the pregnancy.71 It failed to consider the impact of dignity on the weight to be accorded to her right to self-determination. In Abortion II the Bundesverfassungsgericht emphasised the link between human dignity and the consequent duty to protect foetal life,72 stressing that ‘where human life exists, human dignity is accorded to it.’73 The court described the right to life ‘as the most elemen-tary and inalienable right derived from human dignity,’74 and emphasised that ‘The duty to protect prenatal life is based upon individual life, not just on human life in general. Compliance [with the duty] is a fundamental condition of orderly cohabitation in the state.’75 The court’s finding that the foetus benefits from the guarantee of human dignity remains controversial, not least because it failed to explain why the existence of prenatal life will in and of itself will automatically engage the protection of human dignity. As Horst Dreier argues ‘Life is the condition sine qua non not the sine per quam for the applicability of Article 1 I GG.’76 Nevertheless, it is suggested that Jörn Ipsen is correct to argue that the foetus is protected by the guaran-tee of human dignity operating as an objective fundamental constitutional principle, rather than at a subjective level, with the foetus a designated holder of human dignity.77 In this manner the foetus’ prospective dignity interest can be protected, without endowing the foetus with rights.

The German constitution expressly recognises that the right to life is not absolute,78 but human dignity is guaranteed as inviolable (unantastbar), it is an absolute value, the infringement of which cannot be justified in any circumstance.79 If dignity is construed as life, it constitutes a trump card80 for those seeking to prohibit abortion, but the termination of pregnancy per se is not necessarily contrary to human dignity, rather in order to establish a breach of Article 1 I GG, it must be demonstrated that the extinguishing of foetal life is contrary to human dignity in the context in which it takes place. For example, gender-based abortion for the purpose of family bal-ancing rather than on medical grounds, could be found to be contrary to human dignity, but it is the motivating factor, rather than the termination of foetal life, that makes it so.81 It is submitted that in recognising the sym-biotic nature of the relationship between the right to life and the guarantee of human dignity, the Bundesverfassungsgericht underlined the significance of the right to life within the hierarchy of fundamental rights and the need for restraint in abrogating that right,82 it also broadened the scope of avail-able protection substantially, permitting itself significantly more leeway to determine that the abortion legislation in question was unconstitutional.