# Aff

## Notes

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

#### The 1ac should be supplemented by the framing evidence you wish to defend. Two cards to consider are at the top of the case extensions. Also Brandon Stras turned out an excellent updated framing file for EHJPSS lab that has a 1ac module.

#### 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.

#### There are still important parts of the affirmative that could use more development including the following:

* Global modeling – specifically the advantages (or disadvantages) of other countries like Japan, India and authoritarian countries ending their use of the death penalty as a response to the plan. Students were able to put together a version of a Japanese politics disadvantage based on modeling that has some promise depending on how the political situation unfolds in Japan with respect to Abe. There is literature to write a Japanese soft power adv/addon based around the credibility it would gain from abolishing its use of the death penalty.
* Implications of grounding abolition in dignity, especially as it relates to other social issues that would possibly be implicated as a result of the precedent established to the plan. Depending on the precedent set by the plan this could possibly extend to other positive rights like a right to housing, healthcare, education, and a clean environment to name a few.

#### 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.

## 1ac

### 1ac Plan v2.0

#### The United States federal government should abolish the death penalty because it is a violation of human dignity.

### 1ac Adv – Human Dignity v3.0

#### Federal death penalty can be triggered by 60 different offenses and the DOJ is intervening to take over state cases --- federal cases receive weaker review and disproportionately target blacks

Segura, 19 --- award-winning investigative journalist covering the U.S. criminal justice system, with a longtime focus on harsh sentencing, the death penalty, and wrongful conviction (7/29/19, Liliana Segura, “WITH FEDERAL EXECUTIONS LOOMING, THE DEMOCRATS’ DEATH PENALTY LEGACY IS COMING BACK TO HAUNT US,” <https://theintercept.com/2019/07/29/death-penalty-federal-executions/>, accessed on 4/14/2020, JMP)

WHEN ATTORNEY GENERAL William Barr announced last week that the Trump administration would restart executions after more than a decade and a half, it was news that capital defense attorneys had been dreading for years. “It was like a gut punch,” said Indiana federal public defender Monica Foster, who got the email just as she was about to visit a client at the federal supermax prison in Florence, Colorado.

As word spread, attorneys and advocates moved past the shock and into action. “We were always prepared for this,” Madeline Cohen, a Boulder-based veteran capital defense lawyer, said on Thursday night, after a long day spent fielding phone calls, including from clients. “We’ve been prepared for this since the beginning of the administration.”

Though they are scattered across the country, the lawyers who represent people on federal death row are part of a close-knit legal community. After the 2016 election — and Donald Trump’s choice of Jeff Sessions as attorney general — many had braced themselves for the U.S. government’s execution machinery to restart. As time passed, the lawyers kept their heads down, focusing on their clients and cautious not to make public waves. But the looming threat was never far from anyone’s mind.

The de facto moratorium on federal executions could be traced to problems with lethal injection that have destabilized the death penalty for years. The last execution at the federal supermax prison in Terre Haute, Indiana, was carried out in 2003, using the prevailing formula at the time: a three-drug protocol starting with the anesthetic sodium thiopental, followed by a paralytic to stop respiration, and culminating in a fatal dose of potassium chloride, to cause cardiac arrest. In 2005, three men on federal death row challenged the method as cruel and unusual in D.C. District Court, providing numerous examples of executions dating back to the 1980s that had caused visible suffering. The lawsuit also raised questions unanswered by the government’s protocol, including about the qualifications and training among those tasked with carrying out executions.

The litigation over lethal injection brought federal executions to a halt. Although the U.S. Supreme Court would uphold the same three-drug protocol in response to a state challenge in 2008, another obstacle soon followed. The sole U.S. manufacturer of sodium thiopental ceased production of the drug, in large part due to pressure by human rights activists. This prompted a desperate search for new sources — and eventually, new drugs. In March 2011, then-Attorney General Eric Holder wrote back to states requesting sodium thiopental from the federal government, explaining that the administration had no reserves and was “facing the same dilemma.”

At the heart of Barr’s announcement on Thursday is a new one-drug protocol using pentobarbital — the same method currently used by Texas, Missouri, and Georgia. The protocol is summarized in two pages that, like similar state documents, provide for the anonymity of executioners while offering no information about the origin of the drug. Although Barr notes that “14 states have used pentobarbital in over 200 executions,” evidence has shown that it is neither reliable nor humane for lethal injection. Dwindling supplies have led states to seek out compounding pharmacies, whose lack of regulation heightens the risk that the drug will be contaminated or ineffective. Just as states have kept these sources under wraps, the Barr memo makes clear that the government intends to ignore longstanding federal law — the Administrative Procedures Act — that is supposed to ensure that such government powers are subject to a public rule-making process. To many lawyers, this lawlessness is one of the most galling parts of last week’s news. “That will really cut off the public’s ability to know what’s happening,” Cohen said.

It is also clear that the first five men scheduled to die were carefully chosen. All were convicted of crimes against children or elderly people — offenses likely to dampen public outrage as their execution dates approach. And none of the condemned men are parties to the lethal injection lawsuit, showing that the government intends to circumvent the ongoing litigation. When it comes to race, Foster points out, the list “was curated in a really cynical way.” Three of the five are white men — the first set to die is a white supremacist — which belies the extent to which federal death row is racially skewed. If executions proceed and continue, she said, “it’s going to be black person after black person after black person.”

With five executions now set to take place in quick succession beginning December 9, Americans are being confronted for the first time in years with a system that is largely abstract and unfamiliar. Many of the assumptions that persist about capital punishment at the state level — including that it is reserved for the “worst of the worst” — are mirrored by perceptions of capital punishment at the federal level. One is the belief that the federal death penalty targets terrorists. In fact, of the 62 people on federal death row, only one, Dzhokhar Tsarnaev, was convicted on terror charges.

Another is the notion that the federal system is somehow superior to what exists in the states, a myth repeated by Hillary Clinton on the campaign trail in 2016. “People think the federal death penalty is the gold standard,” said Foster, who has handled state and federal cases from coast to coast. “That is absurd.”

Cohen recalls her surprise when she first started handling federal cases. As jaded as she had become after decades of capital defense on state cases, she said, “I thought the federal cases would be cleaner. I thought they would involve really good defense lawyers and really careful judging and really smart prosecutors and lots of judicial review. And I was really shocked to find that it is not that way.” In any close examination of federal death penalty cases, “you will find trauma, you will find mental illness, you’ll find procedural disasters, you’ll find junk science, you’ll find all kinds of problematic stuff because the federal death penalty is plagued by the same problems that have caused people to move away from the death penalty in the states.”

Many have noted that the move to restart executions defies national trends showing the death penalty moving toward extinction. Given Trump’s longtime zeal for capital punishment, it is understandable that his critics see the decision as yet another low point in his tenure. But while Trump’s Democratic opponents have condemned his actions — and even responded with new abolition legislation — it is only very recently that the party began to turn away from capital punishment. The 2020 race is the first time in decades that all major Democratic candidates are on record as opposing it.

Particularly notable is Joe Biden, who came out against the death penalty just two days before Barr’s announcement last week. The tough-on-crime senator of the 1980s and ’90s was instrumental in pushing legislation that expanded federal death sentences — the vast majority of people on federal death row today were sentenced under the now-notorious 1994 crime bill. The law “caused a cascade of problems that we’re only now reckoning with,” Cohen said. “And we haven’t reckoned with the death penalty aspects of that set of statutes until now.” If Trump’s opponents are truly sincere about grappling with the federal death penalty, they can start by confronting the Democrats’ role in building it.

A Cascade of Problems

Just over a month before Barr’s announcement, on June 18, a U.S. District Court judge vacated the federal death sentence of a man named Bruce Webster. One of five men convicted in the abduction, rape, and murder of a 16-year-old girl named Lisa Rene in Arlington, Texas, Webster had been on federal death row since 1996. There was evidence from the start that he was less culpable than others involved in the crime — most importantly, IQ tests introduced by his attorneys that suggested he was “mentally retarded.” But prosecutors accused Webster of faking his answers to escape the death penalty. In 1996, a judge in the Northern District of Texas sentenced him to die.

Webster would likely not have ended up on federal death row if not for legislation passed just days before his crime. In September 1994, President Bill Clinton signed the Violent Crime Control and Law Enforcement Act, otherwise known as the 1994 crime bill. The sweeping legislation included the Federal Death Penalty Act, which vastly expanded federal death sentences. Overnight, 60 new offenses became punishable by death. Among them were crimes like “kidnapping resulting in death,” one of several felony murder crimes that made it easier to convict multiple people for one killing. Federal prosecutors initially said they were considering seeking death sentences against all five men. But ultimately, they would target Webster and his co-defendant Orlando Hall — the “first death penalty case filed under the new crime bill in the nation,” as one U.S. attorney announced. The three other defendants would plead guilty in exchange for lesser sentences.

Hall was tried first, in 1995. Prosecutors described him as the mastermind, while defense attorneys said he’d never meant to abduct Lisa Rene and that “things got out of hand, with Bruce Webster in charge.” By contrast, Webster’s attorneys gave no opening statement at trial. Emotions ran high as jurors began deliberating on his fate in June 1996; newspapers reported that Lisa Rene’s sister had “accidentally” seen “gruesome, poster-sized” images of Rene’s face in court earlier that day, screaming and having to be helped off the witness stand. The trial judge denied a motion for a mistrial. After 75 minutes, the jury convicted Webster, later recommending a death sentence.

Six years after Webster was sent to death row, the U.S. Supreme Court issued a landmark ruling, Atkins v. Virginia, which prohibited death sentences for people with intellectual disabilities. Still, his sentence remained intact. When the Bush administration set an execution date for Webster in 2006, a clemency petition circulated by Amnesty International detailed the horrific abuse Webster and his siblings experienced at the hands of their father, a common component of death penalty cases. The treatment included such torture as forcing his children to eat human waste, subjecting them to electrical shocks and burns from a hot iron, and “forced sex between the children.”

Webster ultimately won a temporary reprieve by joining the ongoing federal lethal injection lawsuit. Then, in 2009, his federal habeas attorneys discovered a slew of files that had never been released by the state. Among them were records showing that government psychologists had examined Webster in 1993 — a year before the crime that sent him to die — and concluded that he had an intellectual disability. Other records showed that Webster had taken special education classes, despite testimony claiming the opposite at trial. But perhaps most unsettling were Social Security forms Webster had filled out to apply for disability benefits. In his June order overturning Webster’s death sentence, the judge quoted excerpts from the documents. Webster’s answers were “incomprehensible,” he wrote, and indicative of his “significant limitations” in intellectual and conceptual functioning.

Foster, the Indiana-based attorney, was on Webster’s legal team when the new evidence was found. “When you look at all of these records and when you look at his application for Social Security — oh my God,” she recalled. Like all attorneys who represent people facing execution, the problem of intellectual disability is one she has seen repeatedly across the board. But there is an additional problem at the federal level. Whereas state death penalty convictions are subject to layers of review, first at the state level and then by the federal courts, federal convictions only get the latter. Despite the role these courts are supposed to play in theory — and thanks in part to another sweeping Clinton-era law curtailing federal review — many cases receive little meaningful scrutiny.

Cohen points out that the U.S. Supreme Court has taken virtually no federal death sentences on direct review. And while in theory, clients are entitled to evidentiary hearings in the same District Courts where they were convicted — a chance to raise the kinds of violations often found in capital cases, such as ineffective assistance of counsel — “there are a huge number of guys, including people who are now scheduled for execution, who got no evidentiary hearing.” This was true of Webster until the new evidence got him back into court. If not for that discovery, Webster may well have been on the list of people facing execution.

Federal Intrusion on State Cases

There is no question that the crime for which Webster was convicted — like those of the five men facing execution dates — was horrific and disturbing. But neither was there any compelling reason that it had to be handled by the federal government. A major effect of the 1994 crime bill was to encourage the Department of Justice to take over cases that could have been prosecuted at the state level. When the federal death penalty was resurrected in 1988, its scope was ostensibly limited to “drug kingpins” and trafficking-related crimes. But now practically any murder involving additional felonies is fair game.

As federal prosecutions ramped up in the mid- to late 1990s, evidence of racism became unmistakable. By the time Timothy McVeigh was executed in 2001, federal death row was made up of 14 black men, three Latinos, and two white people. The population has more than tripled since then, more than half people of color. According to the Death Penalty Information Center, of the 62 people on federal death row today, 26 are black, seven are Latino, one is Asian, and one is Native American. In the 5th Circuit, where Webster was convicted, the problem is especially stark: Fifteen of the 20 defendants who have received a federal death sentence there have been people of color.

In a law review article published in 2010, defense attorneys Ben Cohen and Rob Smith revealed one possible explanation for the pronounced racial disparities on federal death row. Just as a small number of counties are responsible today for new death sentences at the state level, federal death sentences quickly became concentrated in a relative handful of federal jurisdictions. A “disproportionate number of federal death sentences are located in districts where the decision to prosecute federally transformed the jury pool from predominantly black to predominantly white,” Cohen and Smith found. This is because most federally prosecuted capital crimes have taken place in locations largely populated by black residents but surrounded by white-dominated suburbs. “As the jury pools get whiter, the opportunity for implicit race bias increases (and minority group defendants suffer the consequences).”

In a supposed effort to make death sentences more evenly applied, the federal government’s intrusion into state cases was taken to a new level by the Bush administration. Then-Attorney General John Ashcroft, a death penalty true believer, pursued a deliberate policy of taking over cases in states that did not have capital punishment in place. In a number of cases, he overruled the decisions of his own U.S. attorneys, overriding plea deals that had already been worked out.

The first to be targeted by this policy was Lezmond Mitchell, whose execution is scheduled for December 11. Mitchell, who is the only Native American on federal death row, was convicted in Arizona in 2003 for murdering a 63-year-old woman, Alyce Slim, and her 9-year-old granddaughter, Tiffany, members of the Navajo Nation. It was a brutal crime; the pair were driving to New Mexico to see a medicine man when they were attacked; their dismembered bodies were later discovered buried on the reservation. As the Farmington Daily Times reported last week, the Navajo Nation made it clear from the start that it opposed the death penalty for Mitchell. In one letter to the U.S. attorney for the District of Arizona, the Navajo Nation’s chief justice urged the federal government to reconsider its punishment. “Capital punishment is a sensitive issue for the Navajo people,” he wrote. “Our laws have never allowed for the death penalty.”

The 9th Circuit Court of Appeals upheld Mitchell’s death sentence in 2015. But in a forceful dissent, the late Judge Stephen Reinhardt decried the decision, recounting how 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,” he wrote. 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.” The U.S. attorney at the time, a Bush appointee named Paul Charlton, had declined to seek the death penalty in light of the opposition expressed by the Navajo Nation and the victims’ relatives. But “in the words of the victims’ family,” Reinhardt wrote, “the request that the federal government not seek the death penalty was ultimately ‘ignored and dishonored.’ Attorney General John Ashcroft overruled Charlton and forced a capital prosecution.”

Charlton would be overruled on the death penalty again, this time by Alberto Gonzales, and later lose his job — one of nine prosecutors ultimately purged by the Bush Justice Department in what became known as the U.S. attorneys scandal. (Another fired U.S. attorney, Margaret Chiara of Michigan — a state that abolished the death penalty in 1963 — had also clashed with the Justice Department over the issue.) The role of the death penalty was largely lost in the controversy, in part because Democratic politicians who vocally criticized the U.S. attorney purge had little to say about the Bush Justice Department’s strong-arming prosecutors to bring the death penalty to their states.

The politicization of the Bush Justice Department has long been eclipsed by the larger crisis of Trump’s flagrant lawlessness. But his administration has continued the tradition, seeking death sentences in states like Illinois, which abolished the death penalty years ago over concerns about wrongful convictions. “Since Trump took office, those of us in the capital-defense community have seen a sharp spike in capital prosecutions of state crimes by the federal government,” veteran capital defense attorney Andrea Lyon recently wrote. As men like Mitchell approach their execution dates, it bears remembering that the death penalty has long been weaponized — by presidents, politicians of both parties, and prosecutors who speak for victims even when grieving families ask that it not be used in their name. Barr may claim that “we owe it to the victims and their families” to restart federal executions this winter, but he has already proven that his only real loyalty is to Trump himself.

#### Federal executions will resume this month

Wamsley 6/29/20 – is a reporter for NPR's News Desk who reports breaking news for NPR's digital coverage, newscasts, and news magazines, as well as occasional features. She earned a B.A. with highest honors from the University of North Carolina at Chapel Hill, where she was a Morehead-Cain Scholar and holds a master's degree from Ohio University, where she was a Public Media Fellow (Laurel, National Public Radio, “Supreme Court Clears Way For Federal Executions To Resume”, 6/29/20, https://www.npr.org/2020/06/29/884656127/supreme-court-clears-way-for-federal-executions-to-resume)//mj

The Supreme Court has declined to hear a challenge to the federal death penalty method, allowing the executions of four men scheduled in the coming weeks to go forward. They would be the first uses of the death penalty in federal cases since 2003.

The court's order was posted Monday. Justices Ruth Bader Ginsburg and Sonia Sotomayor indicated that they would have considered the case.

Daniel Lee, Wesley Purkey and Dustin Honken are to be put to death in about two weeks; Keith Nelson is scheduled to be executed on Aug. 28. Each man was convicted of murdering one or more children or minors.

"The Supreme Court today rightly rejected yet another attempt by four death row inmates to escape justice," according to a statement released by the White House press office Monday evening.

Ruth Friedman, director of the Federal Capital Habeas Project, is an attorney for Lee. She says there's a myth that the federal death penalty is the "gold standard" of capital punishment systems.

"The federal death penalty is arbitrary, racially biased, and rife with poor lawyering and junk science. Problems unique to the federal death penalty include over-federalization of traditionally state crimes and restricted judicial review," Friedman said in a statement Monday.

"Despite these problems, and even as people across the country are demanding that leaders rethink crime, punishment, and justice, the government is barreling ahead with its plans to carry out the first federal executions in 17 years."

Federal executions have been rare since the government reinstated them in 1988. There have been three such executions since then, all during the George W. Bush administration. One of those put to death was Timothy McVeigh, convicted of the Oklahoma City bombing in which 168 people were killed.

As NPR has reported, President Barack Obama ordered a review in 2014 of how the death penalty is applied in the U.S. after a bungled state execution in Oklahoma. In that case, medical officials had difficulty inserting an IV, and it ultimately took more than an hour after the execution was scheduled to start for the man to die.

Attorney General William Barr indicated last summer that he intended to resume the use of the death penalty at the federal level, using the drug pentobarbital.

The federal government's plan to use that single drug is contested. Attorneys for the four inmates have argued that the use of a single drug, rather than the three-drug cocktail required in many states, is a violation of a mandate that federal executions be carried out "in the manner prescribed by the law of the State in which the sentence is imposed."

"The American people, acting through Congress and Presidents of both political parties, have long instructed that defendants convicted of the most heinous crimes should be subject to a sentence of death," Barr said in a statement this month. "The four murderers whose executions are scheduled today have received full and fair proceedings under our Constitution and laws. We owe it to the victims of these horrific crimes, and to the families left behind, to carry forward the sentence imposed by our justice system."

The executions are scheduled to take place at the U.S. Penitentiary in Terre Haute, Ind. The Justice Department said that "additional executions will be scheduled at a later date."

Sister Helen Prejean, the author of Dead Man Walking, declared that the high court has "abdicated its legal and moral responsibilities."

"This means that the federal government will likely execute four people beginning [next] month using an untested lethal injection protocol during a global pandemic without any real oversight from the Supreme Court. All of this is against the wishes of at least one [victim's] family," Prejean wrote on Twitter.

#### Independently, some states will continue killing themselves unless they are forced to stop by the federal government

NYT, 17 (12/31/17, The Editorial Board, “Capital Punishment Deserves a Quick Death,” <https://www.nytimes.com/2017/12/31/opinion/capital-punishment-death-penalty.html?_r=0>, accessed on 4/2/20, JMP)

Leaving it up to individual states is not the solution. It’s true that 19 states and the District of Columbia have already banned capital punishment, four have suspended it and eight others haven’t executed anyone in more than a decade. Some particularly awful state policies have also been eliminated in the past couple of years, like a Florida law that permitted non-unanimous juries to impose death sentences, and an Alabama rule empowering judges to override a jury’s vote for life, even a unanimous one, and impose death.

And yet at the same time, states have passed laws intended to speed up the capital appeals process, despite the growing evidence of legal errors and prosecutorial misconduct that can be hidden for years or longer. Other states have gone to great lengths to hide their lethal-injection protocols from public scrutiny, even as executions with untested drugs have gone awry and pharmaceutical companies have objected to the use of their products to kill people.

Last summer, Justice Ruth Bader Ginsburg suggested that the death penalty would eventually end with a whimper. “The incidence of capital punishment has gone down, down, down so that now, I think, there are only three states that actually administer the death penalty,” Justice Ginsburg said at a law school event. “We may see an end to capital punishment by attrition as there are fewer and fewer executions.”

That’s a dispiriting take. The death penalty holdouts may be few and far between, but they are fiercely committed, and they won’t stop killing people unless they’re forced to. Relying on the vague idea of attrition absolves the court of its responsibility to be the ultimate arbiter and guardian of the Constitution — and specifically of the Eighth Amendment. The court has already relied on that provision to ban the execution of juvenile offenders, the intellectually disabled and those convicted of crimes against people other than murder.

There’s no reason not to take the final step. The justices have all the information they need right now to bring America in line with most of the rest of the world and end the death penalty for good.

#### Capital charges, death sentences and executions are all inherently torturous and violate human dignity --- the prohibition against torture should be absolute AND no circumstance can be used to justify it

Bessler, 19 --- Associate Professor, University of Baltimore School of Law (Winter 2019, John D., “Torture and Trauma: Why the Death Penalty Is Wrong and Should Be Strictly Prohibited by American and International Law,” 58 Washburn L.J. 1, Nexis Uni via Umich Libraries, JMP)

IV. Conclusion

The concepts of torture and trauma are distinct from one another, but an examination of both concepts makes clear that capital charges, death sentences, and executions inflict severe trauma and bear the clear indicia of torture. The process of state-sanctioned killing adversely affects a wide variety of individuals and, as an inherently torturous activity, constitutes an affront to human dignity and the right to be free from torture and cruelty. 534 Not only are capital defendants and death row inmates subjected to continuous and, ultimately, imminent threats of death (and, for some, death itself), 535 but capital [\*98] litigation also affect judges and jurors, prosecutors and defense lawyers, crime victims' families, and the loved ones of capital defendants. 536 Because credible threats of death are torturous in nature, they should not be allowed; death sentences, at bottom, are death threats - only they are made by state actors instead of private actors. 537 A death sentence, whatever the impulse beyond it, Christopher Hitchens once emphasized, writing in the foreword to Machinery of Death: The Reality of America's Death Penalty Regime, "mutates into a protracted, depressing, degrading torture." 538 If war or the threat of war cannot justify military commanders resorting to torturous practices, 539 then surely legislators, judges, and juries should not be permitted to authorize or make use of torturous death sentences and executions either.

America and the rest of the civilized world have already renounced torture, declaring that the prohibition against torture is absolute. Indeed, under international law, no circumstance - no public emergency or other event - can be used to justify torture. 540 Torture is a deliberate and intentional act, and when it is used, it is the torturer - not the object of the torture - who is morally responsible for it. Whereas the crimes of heinous killers and other offenders are reprehensible and cannot be undone, the State's response to such crimes is always a conscious choice. The State has a duty and an indispensable obligation to keep the public safe, and the State has a right to punish - and to incarcerate offenders - to carry out that very legitimate governmental objective. But the State crosses a line when it veers into the realm of torturous conduct - government action that strips offenders of their humanity; that traumatizes, stigmatizes, and tortures; 541 and that, plainly put, reflects poorly [\*99] on the societies that authorize it and the State officials who carry it out. 542 Because the death penalty is not necessary, 543 especially in this, the twenty-first century, 544 and because it has the immutable characteristics of torture, it must be rejected in all its forms.

Although American and international law both contain "lawful sanctions" carve-outs to torture, the bar on torture is intended to be a universal one. 545 If [\*100] America and the world are truly serious about the idea that certain rights, such as the rights to be free from cruelty and torture, are universal rights, then even those who have committed heinous acts must not be subjected to acts of torture, whether physical or mental. In fact, any practice that bears all the indicia of torture should not be permitted under any circumstances. The fact that a punishment has, through time, been considered a "lawful sanction," should not insulate that punishment from scrutiny for all time. That would be an absurd result, and it would fly in the face of Enlightenment thought, which focused on human progress, whether in science, medicine, or law. Indeed, a number of now-abandoned punishments that were once lawful - from the pillory and the whipping post to ducking and ear cropping - are no longer tolerated in modern life. 546 If a country that has committed itself to eliminating torture is allowed to continue to use a torturous practice under the guise of the "lawful sanctions" classification, then whatever a country says is lawful - no matter how torturous in nature - would be, effectively, immune from scrutiny. Such an approach would render a country's international obligations - and its public commitments to end torture - a nullity. 547

The death penalty has, for centuries, been authorized and inflicted by various governments around the world under the auspices of being a legitimate tool. 548 But since the Enlightenment, 549 and especially since the end of World War II and the promulgation of the Universal Declaration of Human Rights, civilized societies have turned away from capital punishment and recognized that some rights are universal in nature. 550 In this, the twenty-first century, especially in light of everything that is known now about the punishment of death and its effects, 551 death sentences and executions should consequently be [\*101] declared unlawful, strictly forbidden under American 552 and international law, 553 and classified as torture. 554 Just as various non-lethal punishments have passed from the scene, 555 capital punishment should also be relegated to the history books. 556 Torture is wrong, and because the death penalty and the process by which it is administered bear all the characteristics of torture, 557 the use of capital punishment is just as wrong and morally reprehensible. 558

#### This must be rejected in all instances because every human life has value --- death is irreversible and steals the opportunity for improving

Davis, 19 --- policy analyst at Libertas Institute (7/29/19, Molly, “Don’t Strengthen The Death Penalty, Abolish It; In a criminal justice system subject to human error, capital punishment is the opposite of justice. The government must protect the most sacred right: life,” <https://thefederalist.com/2019/07/29/dont-strengthen-death-penalty-abolish/>, accessed on 3/11/20, JMP+DYang)

The U.S. government will officially resume executions of federal death row inmates this December. This comes after Attorney General William Barr directed the Federal Bureau of Prisons to adopt an addendum to the Federal Execution Protocol that allows it to move forward with capital punishment in order to bring “justice to victims of the most horrific crimes.”

Execution never results in justice. It may feel good to sentence the worst of society’s criminals to death, but this will never right the wrongs of the crimes those convicted people have committed. Not only is it a barbaric mechanism for a modern government to use, but it is used in a wholly imperfect justice system, prone to human error. The justice system lacks the capability to correctly identify perpetrators with 100 percent accuracy. These downfalls are enough to repeal the death penalty entirely.

Death Row Inmates Have Been Exonerated

A perfect criminal justice system does not exist and probably never will. And with human life on the line, the government can no longer risk executing the wrong person in the name of justice — it’s far too dangerous.

It’s easy to believe that everyone convicted of a crime must be guilty, but it simply isn’t true. Since 1973, the government has exonerated all charges from 166 death row inmates. All of those people could have been wrongfully killed for crimes they did not commit. There could be more. Organizations such as Innocence Project work to free innocent people from wrongful incarceration, and despite the group’s success in freeing 365 people to date, its caseload isn’t getting any smaller.

Wrongful convictions happen due to a number of factors, many of which are honest human mistakes. The single nationwide leading cause, for example, is eyewitness misidentification. This is due to human memory errors, which lapse and misremember important details about events.

Other contributing factors, according to the University of Michigan Law School, include junk science, false confessions, government misconduct, faulty snitches, and bad lawyering. No person is immune from fallibility. These errors have forced hundreds of people into wrongful imprisonment, and it could happen to anyone, even you.

10 Guilty Should Go Free Rather Than 1 Unjustly Killed

The government claims to prioritize protecting the safety of our great nation above all else, yet it doesn’t value its own citizens enough to protect them from the potential errors of the justice system. As egregious as wrongful incarceration is, at least a wrongfully imprisoned person has the potential to be set free. The government has a chance to learn from the mistakes and, in some states, pay compensation to the wrongfully convicted. But death steals that opportunity, ridding these people of their constitutional right to due process.

The basis of human life is enough of an argument to repeal the death penalty nationally and in every state. Would it not be better to have 10 guilty people spend life in prison than accidentally end one innocent life?

Morally, this makes sense. But it’s better financially as well. Numerous studies conclude that pursuing capital punishment is more costly than the alternative sentence of life in prison. This means states that choose to pursue the safer option by abolishing the death penalty are also on track to save money in the long run, a win-win situation for both government and citizens.

It’s easy to look at the national death penalty cases before us — five inmates convicted by the courts on terrible charges involving rapes and murders of innocent children — and make a quick and vindictive judgment about how they deserve to die. But you cannot teach a society that killing is wrong by killing. The taking of another life can never demonstrate justice — only vengeance, disgracefully disguised as justice.

It’s Tyranny for Government to End a Life

Allowing the government to decide when to end a person’s life based on the criminal laws it writes is one of the most tyrannical powers a society can grant a central authority. And keeping the death penalty as a legitimate and lawful form of punishment leaves the door open for politicians to more easily apply it as a penalty for other crimes in the future, beyond the current offenses for which it is used. This is alarming, as government power only continues to grow, and even recent history demonstrates that power can easily shift from one party to another with the changing of years.

In prisons, staff must abide by a number of legal standards to uphold the health and safety of every inmate, regardless of the crimes committed. These standards are in place because Western societies have generally agreed torturing citizens is wrong, and taking away people’s basic rights while under the state’s care is inhumane. Why, then, is it justified to take away the right to life, the most sacred right? Anyone who believes in personal liberty should oppose capital punishment.

By clearing the way for capital punishment to proceed, the federal government has declared that vengeance is more important than the safety of its citizens. It should instead recognize that every human life is valuable, and risking even one potentially innocent person’s life is not worth the retribution some believe the death penalty provides.

#### Prioritize ethics --- the violation of human dignity and moral disengagement at the heart of the death penalty are the same that facilitates genocide and cleansing the world of those deemed unsafe

Johnson 18 --- professor of justice, law and criminology at American University (Robert, Condemned to Die: Life Under Sentence of Death, ebook from University of Michigan, pg.122-125, JMP)

Institutional Dynamics of Torture

Torture is normally thought to comprise extreme physical or psychological brutality, the object of which is to produce a range of harmful effects: suffering for its own sake; conversion to an ideology, religion, or cause; confession of guilt or inadequacy; the betrayal of trust. To inflict torture is therefore conceived as an intended event; torture also implies active harm rather than passive indifference or neglect. Yet torture, as we have seen, need not be restricted to situations in which physical or psychological brutality is consciously employed to achieve an end. Standard instances of torture and death row confinement have in common an assault on the person that both causes him intense suffering and violates his integrity as a human being by treating him as if he were a mere animal or object. That either or both of these conditions is not intended as torture is irrelevant. The palpable fear and ever-present threat of deterioration and decay stands as proof that they have suffered real harm far in excess of that required by sentence and have been victims of real brutality. Thus, for all intents and purposes, a death sentence amounts to death with torture in a society that has explicitly renounced torture as a remnant of barbarism.

Moreover, death row prisoners are exposed to conditions that will typically, if not inevitably, produce a torturous regime. Research on institutionalized violence suggests that moral restraints against brutality are removed or seriously weakened when officials are authorized to harm in the service of a belief to which they subscribe (such as justice or law and order or ethnic cleansing) and hence are committed followers of directives; when procedures to impose harm are made routine and hence become shared personal habits undertaken without much reflection on their deeper meaning; and when prospective victims are dehumanized and, as damaged or deficient creatures, seen as morally deserving of harm both as members of a defiled group and as sullied individuals. Several execution team officers with whom I have spoken over the years emphasized that the condemned prisoner, by his flawed choices and brutal actions, placed himself among the worst murderers and earned a berth in the death house. “He put himself in the death house” is a common refrain among execution team members.101

Conditions that foster institutional violence operate with particular salience and impact on death row. Correctional personnel responsible for death row are explicitly and unambiguously authorized by laws and policies they respect to warehouse prisoners awaiting execution as a punishment for serious crimes. Guards and their superiors can readily view themselves as impersonal instruments of an authority, in this case, the law, to which they are committed agents; as such, they bear no individual moral responsibility for the actions necessary to maintain an orderly death row or for the executions that may take place under their auspices. These actions, in the eyes of the officers, are virtuous because they are just and deserved, given the enormity of capital crimes. As many officers contend, the condemned prisoner condemned himself by his actions; the officers thus are passive players in the deadly process of execution. And since routine is almost blindly relied upon to structure each day, and especially each execution day, correctional personnel come to normalize the daily round of life on death row, and hence are further removed from the human consequences of the policies they implement. Indeed, this preoccupation with routine stimulates enthusiasm to achieve technical proficiency at the various tasks attendant to death work and discourages more thoughtful examination of the nature and import of these activities. Finally, death row inmates are effectively isolated from one another and the larger world, and hence are denied the personal and group support necessary to retain their autonomy in the face of overwhelming authority, a suffocating routine, and a degrading existence. Thus, their dehumanization emerges as the culmination of instruments of authority acting within stipulated routines on condemned prisoners rendered as dehumanized entities to be stored and ultimately dispatched in the execution chamber in service of law and, no doubt, justice.102

**\*\*\*start of footnote #102\*\*\***

102 In making these assertions, I am drawing on a large body of research and theory. For a general review of these materials, see Johnson (1986) and Haritos-Fatouros (2003). There are lively debates in the area of institutional violence. Broadly speaking, one school of thought focuses on how one’s conscience must be neutralized in order to carry out violence against a person who poses no immediate threat to one’s welfare. Moral disengagement and objectification of others are key considerations. This view, perhaps best exemplified in the work of Milgram (1963); Bandura, Ross, and Ross (1961); and Haney and Zimbardo (1998), separates objectification from dehumanization. See Bandura (1999) for a comprehensive review. Other scholars, like Haslam (2006), Bastian and Haslam (2010), and Haslam and Loughnan (2014), think of objectification as a species of dehumanization, which includes seeing the person as an object, or animal, or morally degraded creature outside the normal moral discourse or social community. Rafter (2016: 2215), in her seminal research on genocide, exemplifies the view that one’s conscience must be neutralized to allow for the atrocities that are part and parcel of genocide:

My answer to the “How could they do it?” question runs as follows: psychological mechanisms involved in moral disengagement lead to a temporary and selective shutdown in empathy and identification with others; and that shutdown leads to the objectification that enables individuals to commit genocide. This is the splitting process. First comes moral disengagement, then neutralization of empathy, and finally the objectification that makes victims seem like objects, things we can get rid of rather than individuals like ourselves.

Other scholars, like Fiske and Rai (2015) focus on institutional violence as an example of virtuous violence, which it to say, violence of which one should be proud, not ashamed. The challenge here is to neutralize repugnance to the often gory physical act of violence; the motivation to engage in violence is a largely settled matter. In the case of virtuous violence, persons believe they are doing good and feel obligated to carry out acts of violence. The agents of virtuous violence are committed followers of beliefs that justify the violence in which they engage. This does not mean that virtuous violence is easy. It isn’t. Agents who inflict virtuous violence will likely be repelled by the acts of violence themselves, which often involve victims who beg, plead, collapse, or react with eerie stolidity or unseemly emotion when brutal pain is inflicted upon them. These reactions can be construed to validate the degraded status of the victims, but reactions to violence among victims are tangibly visible human reactions. It is one thing to embrace and, in one’s work, validate an abstract belief and another to carry out a concrete act in violation of a flesh-and-blood individual. We are socialized to abhor violence and most of us do. Paradoxically, rising to the occasion to inflict virtuous violence can be one measure of commitment of the person carrying out such violence. Fiske and Rai (2015: 515) write: “Now, for the most part, people hate hurting others. It is extremely distressing to directly kill or injure another person face-to-face, no matter how socioculturally justified or legally obligatory it is . . . Like many other moral acts, killing or hurting others can be difficult, requiring training, social support and modeling, effort, practice, and experience before it becomes second nature. Few people become unambivalently dedicated to moral violence or do it easily, but that is true of many difficult moral practices other than violence—people often resist or fail to do what is morally required of them, even when they have no doubt about whether they should do it.”

There is overlap in these perspectives. Whether one is a passively or reluctantly obedient participant or an actively engaged agent of violence, support for one’s violence is helpful. This support may come from peers or authority figures or organizational structures. Authorizations from organizations to engage in violence, especially when embraced by one’s peers, give permission and hence a degree of reassurance that one is in the right when one is called upon to use violence. Training and institutional routines can make violence more palatable, whether one thinks of the violence as virtuous or as a repugnant but necessary evil. Dehumanization—socialization or training that allows actors to see the target of violence as an object, animal, or morally degraded creature—can create a motive for violence (protection from dangerous, animal-like others) or can smooth the way to work in service of what one takes to be virtuous beliefs (cleansing the world of others who would contaminate it or make others unsafe). Persons who are ridding the world of dangerous and unregenerate criminals in service of legal and other institutions they trust presumably need less to mute their conscience than they would under other circumstances. None of the execution team officers I interviewed expressed guilt, remorse, or regret, at least before, during, or after the executions they conducted and that I studied firsthand (Johnson, 1998). Socialization and training of persons engaged in institutional violence is meant to indoctrinate them in the value of what they do. To the degree persons have doubts about the virtue of the enterprise, some degree of neutralization of conscience may be sought by the individual or promoted by the organization.

**\*\*\*end of footnote #102\*\*\***

Persons engaged in executions are strongly disposed to treat the condemned as dead or dying—as the living death suffered by death row prisoners so vividly attests. Albert Camus may thus have been correct when he maintained that capital punishment killed the offender twice: once on death row while awaiting execution and once again in the death chamber. This punishment is excessive, even by the hard reckoning of the person who demands the life of the murderer in return for the life of the victim. Quoting Camus on this point:

As a general rule, a man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second, whereas he killed but once. Compared to such torture, the penalty of retaliation seems like a civilized law. It never claimed that the man who gouged out one of his brother’s eyes should be totally blinded.103

It could be argued, of course, that some murderers cold-bloodedly claim multiple victims or torture their victims, and thus deserve the additional suffering inflicted by death row confinement. Experience with capital punishment laws indicates that it would be impossible to reliably identify such persons; terms like “heinous” or “atrocious” are liberally construed by judges and juries, and hardened offenders are frequently wise enough to plea bargain and thus obtain prison terms instead of death sentences. Moreover, the closer one gets to murderers whose acts approach the unemotional calculation of state-sanctioned killing, the more likely it is that serious mental health problems are indicated. Capital punishment is then inapplicable because the subject of punishment must freely choose his crime and hence deserve his punishment, and the mentally impaired offender cannot rightly be said to exercise free choice. It is doubtful, in any event, that the state should seek to imitate the cruelty of some criminals in order to afford them justice.

The suffering of prisoners on death row has significant implications for the justice of the death penalty. As a practical matter, the administration of capital punishment involves torture; any justification of capital punishment must therefore include a justification for torturing capital offenders, not simply taking their lives. It is difficult to envision any such justification. Certainly none is provided in the voluminous philosophical or legal literatures on punishment or in the U.S. Constitution, which expressly forbids the use of torture under the Eighth Amendment ban against cruel and unusual punishments. Even the philosopher Immanuel Kant, for whom only capital punishment would “satisfy the requirements of legal justice” in the case of murder, acknowledged that, to be just, “the death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it.”104 The abomination of the prisoner’s humanity, we now know, is part and parcel of the culture of harm that flowers with special vigor in isolated prison housing units like death row and is central to the dread evoked by the threat of execution; an execution that, as a seen by condemned prisoners, amounts to an impersonal state-sanctioned homicide.105 The destructive personal impact of death row confinement in service of executions provides the basis for a complete moral argument in opposition to capital punishment.

It is my contention that no reform—however well intended, from housing condemned prisoners in regular maximum-security prisons (which often feature their own distinctive brutality) to reducing the rigors of death row in ways we have discussed in this book—can change the fundamental realities of the confining-and-killing process as they unfold in our prisons. Reforms matter, particularly to the condemned prisoners, but cruelty endures. Jamie Fellner, noted human rights authority, captured this point well:

Even if those condemned to die have the same conditions of confinement as other prisoners (conditions that can be appalling in any event) or even if they are confined in “kinder, gentler” death rows, the cruelty of awaiting execution would remain. I see no way around the conundrum— being condemned by a court to die means being condemned to a painful period of waiting. From a human rights perspective, both are intolerable. 106

The key and enduring point, Fellner argues, is this: “from a human rights perspective” both the penalty of death and the waiting in confinement under the threat of death are “intolerable.”107 Is solitary confinement under sentence of death uniquely cruel? Yes. Extensive social science research proves this point, a point developed at length in this book.108 Is regular prison confinement generally less cruel than solitary confinement? Yes, but regular confinement, given all we know about the warehousing dynamics of prisons, is cruel as well. Is a “kinder, gentler” death row, such as embodied in the reform suggestions made in this book, likely to be less cruel than solitary confinement under sentence of death? Yes, but reformed death rows, given all we know about the distinctive dynamics of life under sentence of death—with the feelings of abandonment, vulnerability, and emotional emptiness that ensue—are still cruel.109 With the death penalty, cruelty endures. Degrees of cruelty matter greatly to condemned prisoners, I want to reiterate. But from a moral and legal perspective, the essential point made by Fellner is that, even in the best of conditions available in the real world of modern prisons, “the cruelty of awaiting execution would remain.”110

#### A respect for human dignity is necessary to sustain the essential meaning of being human --- without it tyranny, war and ecological collapse are inevitable

Weiwei, 19 --- leading contemporary artist, activist and advocate of political reform in China (1/1/2019, Ai, “Human dignity is in danger. In 2019 we must stand as one to survive,” <https://www.theguardian.com/commentisfree/2019/jan/01/human-dignity-danger-ai-weiwei>, accessed on 5/1/2020, JMP)

What does it mean to be human? That question sits at the core of human rights. To be human has specific implications: human self-awareness and the actions taken to uphold human dignity – these are what gives the concept of humanity a special meaning.

Human self-awareness and human actions determine the interplay between individual thought and language and the wider society. It is our actions as humans that deliver economic security, the right to education, the right to free association and free expression; and which create the conditions for protecting expression and encouraging bold thinking. When we abandon efforts to uphold human dignity, we forfeit the essential meaning of being human, and when we waver in our commitment to the idea of human rights, we abandon our moral principles. What follows is duplicity and folly, corruption and tyranny, and the endless stream of humanitarian crises that we see in the world today.

More than two centuries have passed since the concept of human rights was first developed. During that time humanity has gone through various stages of history and the world has seen enormous changes. In Europe, what was once a collection of colonialist, autocratic states has transformed into a democratic society with a capitalist orientation, establishing a mechanism that protects individual rights. Other societies are also seeing structural changes, and the concept of human rights is facing grave challenges.

In part these challenges stem from the disparate demands of countries in different stages of development, with contrasting economic situations and competing interests. But challenges also come from divergent conceptions and understandings of human rights, human dignity, morality and responsibility, and from different interpretations and applications of the core principles of human rights. In the contemporary world, as our grasp of the fundamental values and principles of human rights and humanitarianism weakens, we risk losing our rights, responsibilities and our power to uphold human dignity.

History shows that a moral failure is always accompanied by painful realities, visible everywhere. The global refugee crisis is worsening daily, and 70 million refugees have been forced to leave their homes by war and poverty. Our living environment is constantly being degraded, and the ecological balance is ever more fragile. Armed conflicts persist and potential political crises lurk; regional instabilities grow more acute; autocratic regimes brutally impose their will, while democratic governance is in decline. Unreasoning and unrestrained expansion under a nationalist, capitalist order is exacerbating the global gap between rich and poor. Our views of the world have become more divided and more conflicted than ever.

Individuals in many countries and regions lack the opportunity to receive an education, to access information or communicate freely. They have no chance to exercise their imagination and creativity or fulfil their ideals; no chance to enjoy freedom of belief and freedom of association. Such rights and freedoms pose a fatal threat to autocracy and authoritarianism. This is why, in so many places, lawyers have been imprisoned, journalists have been disappeared and murdered, why censorship has become so pervasive, why religious and non-governmental organisations have been ruthlessly suppressed. Today, dictatorships and corrupt regimes continue to benefit from reckless arms sales, and enjoy the quiet support of capitalist nations. Religious divisions, ethnic contradictions and regional disputes all feed into primitive power plays. Their logic is simple: to weaken individual freedoms and strengthen the controls imposed by governments and dominant elites.

The end result is that individuals are deprived of the right to live, denied freedom from fear, and freedom of expression, or denied the rights to maintain their living environment and develop.

The concept of human rights needs to be revised. Discussions of human rights used to focus on the one-dimensional relationship between the state’s rights and individual rights, but now human rights involve a variety of relationships. Today, whether demands are framed in terms of the rights of the individual or the goals pursued by political entities and interest groups, none of these agendas exists in isolation. Historically, the conditions governing human existence have never been more globally interdependent.

The right of children to grow up and be educated, the right of women to receive protection, the right to conserve nature, the right to survival of other lives intimately connected with the survival of the human race – all these have now become major elements in the concept of human rights. As science and technology develop, authoritarian states invade privacy and limit personal freedom in the name of counter-terrorism and maintaining stability, intensifying psychological manipulation at all levels. Through control of the internet and command of facial recognition technology, authoritarian states tighten their grip on people’s thoughts and actions, threatening and even eliminating freedoms and political rights. Similar kinds of controls are being imposed to varying degrees within the global context. From this we can see that under these new conditions human rights have not gained a common understanding, and if discussion of human rights becomes narrow and shortsighted, it is bound to become nothing more than outdated, empty talk.

Today, Europe, the US, Russia, China and other governments manufacture, possess and sell arms. Pontificating about human rights is simply self-deluding if we fail to curb the dangerous practices that make armed conflict all the more likely. Likewise, if no limits are placed on capitalist global expansion and the pervasive penetration of capital power, if there is no effort to curb the sustained assault by authoritarian governments on natural human impulses, a discussion of human rights is just idle chatter. Such a blatant abdication of responsibility can lead to no good outcome.

Human rights are shared values. Human rights are our common possession. When abuses are committed against anyone in any society, the dignity of humanity as a whole is compromised. By the same token, it is only when the rights of any individual and rights of the people of any region receive our care and protection that humanity can achieve a shared redemption.

Such is the principle of human rights, in all its stark simplicity. But a shared understanding of that truth still eludes us. Why so? Could it be that we are too selfish, too benighted, too lacking in courage? Or, perhaps, we are insincere, we don’t really love life enough: we con ourselves into imagining we can get away without discharging our obligation to institute fairness and justice, we fool ourselves into thinking that chaos is acceptable, we entertain the idea that the world may well collapse in ruin, all hopes and dreams shattered.

If we truly believe in values that we can all identify with and aspire to – a recognition of truth, an understanding of science, an appreciation of the self, a respect for life and a faith in society – then we need to eliminate obstacles to understanding, uphold the fundamental definition of humanity, affirm the shared value of human lives and other lives, and acknowledge the symbiotic interdependency of human beings and the environment. A belief in ourselves and a belief in others, a trust in humanitarianism’s power to do good, and an earnest recognition of the value of life – these form the foundation for all human values and all human efforts.

#### Centering abolition around dignity allows anti-death penalty efforts to continue the project of radical slavery abolitionists --- it is the only strategy that addresses the root of injustice in the criminal justice system and affirms that no life is worth less than another

Dr Bharat Malkani, 18 - 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, Google books, p. 219-224//DH

On February 6, 1837, Senator James Calhoun described slavery as the "peculiar institution of the South". Calhoun was defending slavery in the face of, in his words, an abolitionist "crusade" which had drawn attention to the fact that the rest of the country, like the rest of the world, had turned its back on involuntary bondage.1 His description inspired the title of Kenneth Stampp's monograph on slavery- in the antebellum South, published in 1956.2 Over 50 years later, David Garland co-opted the term "peculiar institution" to describe capital punishment in the US, on the basis that the death penalty is primarily practiced in the Southern and former Confederate states, in contrast to the current national and global trend towards abolition.3 Garland did not use a phrase associated with slavery for mere rhetorical purposes. As we have seen, America's death penalty is steeped in the country's history of racial subjugation and degradation. Both slavery and the death penalty are institutional manifestations of the belief that some people's lives are worth less than others.

In this book, I have argued that just as slavery and capital punishment were, and are, "peculiar institution[s]”, so abolition of the death penalty in America will be "peculiar" because the process and outcome of abolition will be tied to America's particular history of racial subjugation, and efforts to tackle such degradation. It is hardly unusual for a country's path towards the abolition of capital punishment to be paved by that country's unique history. West Germany, for example, repealed its death penalty in the years following World War Two because of the specter of Nazism. There were those who believed that if the country were to cleanse itself of its fascist past, it would have to outlaw all the cogs that had kept the machinery of Nazism turning, which included the death penalty. There were others who were sympathetic to Nazis, and wanted the death penalty- abolished so that Nazi officials standing trial for war crimes and crimes against humanity would be spared the punishment of death.4 Likewise, it is difficult to extricate South Africa's experience of abolition from its experience of racial Apartheid. On February 2, 1990, President F.W. de Klerk announced a moratorium on all executions in the same speech in which he declared an end to Apartheid, and the release of Nelson Mandela.5 When the South African Constitutional Court ruled the punishment unconstitutional in 1995 - just one year after the first general election in which people of all races were allowed to vote - Justices Chaskalson and O'Regan explicitly referred to the punishment's association with Apartheid.6

When America does abolish the death penalty, then, abolition must be understood within the context of the country's historical modes of racial subjugation such as slavery, and historical efforts to eradicate racial subjugation. This history, I have argued, requires contemporary anti-death penalty efforts to be understood as the continuation of the project that was put in place by the radical slavery abolitionists, which was to end practices that are not compatible with the idea of dignity. It is in this sense that I have argued that abolition should be centered on the idea of dignity, rather than on pragmatic and conservative anti-death penalty discourses.

Not all historians or commentators would support the idea that the radical slavery abolitionists are to be emulated. Andrew Delbanco, for example, has recently taken the slavery abolitionists to task for their moral absolutism, claiming that the radicals were not only a significant cause of the Civil War, but also influenced the divisiveness of contemporary political discourses in America.7 He therefore advocates the path of centrism and compromise in reform efforts, cautioning against the idealism and utopianism of the radical abolitionists. Delbanco, though, fails to acknowledge that the radical abolitionists rejected centrism precisely because they recognized that slavery was a symptom of a greater ill, and that anything short of a radical approach would enable the illness to thrive. The experience of emancipation and its aftermath suggests that the radicals were not wrong to fear this. A number of other scholars have outlined how centrist, moderate anti-slavery voices entrenched racial divisions to the point that they find expression in all features of American life today, including in the country's adherence to capital punishment.8 It is for these reasons that a radical approach to death penalty abolition is preferable. A non-radical approach risks entrenching the very values that are at the root of the problem with capital punishment. The slavery abolitionists recognized this root to be a failure to regard each and every life as innately valuable, and thus a radical approach to abolition must be centered on the idea of dignity.

In this concluding chapter, I want to address two potential criticisms of my central thesis. First, I imagine that some readers will remain unconvinced about the feasibility of the radical approach to abolition that I have proposed. It might be believed that the US Supreme Court, let alone the broader public, will never embrace the idea that those who commit the most horrific crimes imaginable should be treated with respect for their dignity, or that the imposition of capital punishment demeans the wider community and the legal system. Second, there may be some readers who think that I have not taken the radical approach far enough. Peter Hodgkinson, for example, writes that abolitionism should avoid piecemeal reform of capital punishment. In his words, "when opposition to the death penalty is restricted to some injustice in its administration, usually characterised by such concerns as prosecutorial bias, ineffective assistance of counsel, race, mental illness, mental impairment, youth, physician participation and mode of execution...the 'abolition' activities concentrate on a particular concern and, once corrected, cease."9 As Hodgkinson argues, this incremental approach to abolition "could considerably delay the process of replacing the death penalty for all crimes in all circumstances and is in any event achieved at the expense of unacceptable compromises. Such a piecemeal approach offers governments an opportunity for delay in confronting the total removal of the death penalty."10 On both counts, the work of prison abolitionists - who also draw on the ideas of the slavery abolitionists - is instructive.

Angela Davis and other prison abolitionists, such as the organization Critical Resistance, draw explicit connections between slavery, death penalty, and prison abolitionism. Vincenzo Ruggiero, for example, describes the "ancestors of contemporary [prison] abolitionists" as "the women and men who fought against slavery, and after the campaigners who battled, and continue to do so, for the abolition of the death penalty."11 Prison abolitionists take issue with the widely held assumption that prisons are necessary for dealing with crime, and they lament - like Hodgkinson does in the context of capital punishment - the overriding focus on "prison reform", rather than abolition. In Davis's view, the idea of reform serves to legitimize imprisonment in the abstract, which therefore perpetuates the legacy of slavery in America, given the historical linkages between enslavement and incarceration.

In response to the claim that the outright abolition of prisons is infeasible, Davis reminds us that it once seemed infeasible to speak about ending slavery.12 This, in my view, is the crux of radical abolitionism. It is not the contention that wholesale change can or even should be brought about overnight, but rather to develop the mindset and framework for bringing about such changes in the future.13 We have seen that, in the context of slavery, William Lloyd Garrison himself accepted that immediatism was more a rhetorical device than a practical measure, which was needed to shake anti-slavery activists out of their comfort zone. Discussions of "prison reform" stifle the development of a mindset that helps us look beyond punitiveness. It is only when we think in the language of "abolition", Davis writes, that we can wholeheartedly set about creating "an array of social institutions that would begin to solve the social problems that set people on the track to prison, thereby helping to render the prison obsolete."14

In the context of the death penalty, pragmatic and conservative approaches to abolition risk entrenching the very values that drive support for capital punishment in the first place. The radical approach, on the other hand, with its emphasis on the idea of dignity, serves as a constant reminder that although capital punishment today is perhaps the most extreme manifestation of the beliefs that the slavery abolitionists were trying to eradicate, it is just one manifestation. We see examples of these beliefs throughout the criminal justice system. It appears in other harsh punishments such as life without parole, solitary confinement, and lengthy mandatory minimum terms of imprisonment. It is embodied in the phenomenon of mass incarceration - particularly the mass incarceration of black people and the poor. And it manifests itself in the killings of Eric Garner, Tamir Rice, Philandro Castile, Michael Brown, Alton Sterling, and so many other people at the hands of law enforcement personnel.15

Throughout this book, we have seen how contemporary anti-death penalty efforts offer the prospect of radical changes to a criminal justice system that currently revolves around the idea that some lives are not as valuable as others. The focus on innocence has shed light on prosecutorial misconduct, leading to the elections and appointments of prosecutors who have argued for lower levels of incarceration, and a retreat from punitiveness.16 Two such prosecutors, in fact, have vowed never to seek capital punishment during their tenure. On March 16, 2017, Aramis Ayala declared that she would never seek the death penalty while she was District Attorney for Orange and Osceola counties in Florida.17 After a lengthy court battle instigated by Governor Rick Scott's decision to reassign all capital cases to another attorney, Ayala eventually agreed to seek the death penalty in future cases, but only when a panel of seven prosecutors unanimously agree that the facts of the case warrant such action.18 On November 7, 2017, Larry Krasner was elected District Attorney for Philadelphia, Pennsylvania, after a campaign in which he vowed to radically reform approaches to criminal justice. In his victory speech, he linked the end of capital punishment to broader reforms: "If you, like us, believe it's time to end the death penalty. If you think it's time to end mass incarceration. If you think it's time to stop making prisoners of poor people by using cash bail...," Krasner said, "We hope to hear from you."19 Prosecutors such as Krasner will, one hopes, provide much needed institutional overhaul.

The cost argument has meant that the concerns of Murder Victims' Families for Reconciliation that were outlined in Chapter Six have been taken on board. When Maryland abolished the death penalty, the legislature ensured that the money saved would be spent on helping families of homicide victims, going some way to ensure that such families are treated with dignity.20 We also saw in Chapter Seven that the abolition of capital punishment for offenders under the age of 18 sparked both a political and judicial trend away from imposing sentences of life without the possibility of parole on young persons, with Justice Kennedy invoking the idea of respect for dignity as central to Eighth Amendment analysis. While there appears to be little prospect of abolishing life without parole for adults in the near future, we can forecast the use of anti-death penalty' discourses to attack such sentences as incompatible with the constitutional requirement that all persons, even those convicted of the most horrific offenses, are treated with respect for their dignity.

In End of its Rope, Brandon Garrett also argues that the fight against the death penalty offers hope for addressing broader issues with the criminal justice system. Death penalty abolitionism, Garrett writes, has drawn attention to issues such as the fallibility of justice, the importance of well-trained and resourced defense teams, and the necessity of checks on prosecutorial power. With this in mind, he calls for "mercy in criminal justice",21 stating that communities need to "rethink how we treat mentally ill, poor, innocent, and poorly represented defendants generally. We can all share the responsibility - and the credit - for moving past the most punitive era in American history."22 The subtitle to his book is How Killing the Death Penalty Can Revive Criminal Justice, suggesting that contemporary efforts to end capital punishment are thus indeed more radical than conservative.

The legacy of slavery also rears its head beyond the realm of prisons, capital punishment, and the criminal justice system. On August 12, 2017, Heather Heyer was killed by a Neo-Nazi during a "Unite the Right" rally that took place in Charlottesville, Virginia.23 White supremacists, members of the Ku Klux Klan, and other far-right groups were protesting against the removal of a statue of General Robert H. Lee, who had commanded the Confederate Army of Northern Virginia in the Civil War. They were also opposed to the re-naming of Lee Park, where the statue stood, to Emancipation Park. The rally drew a counter-protest from those opposed to fascism and racism. Heyer, a 32-year old legal assistant with a keen interest in civil rights, was struck by a car that was driven into the crowd of counter-protesters. A 20-year old named James Alex Fields Jr, a known far-right extremist, was arrested on suspicion of causing her death. President Donald Trump's reaction bccame the subject of intense scrutiny. He took 48 hours to issue a statement, in which he condemned violence on both sides of the protest. When Republicans and Democrats alike urged him not to draw a moral equivalence between Neo-Nazis and anti-racists, he pointedly said: "Racism is evil. And those who cause violence in its name arc criminals and thugs, including the KKK, neo- Nazis, white supremacists, and other hate groups that are repugnant to everything we hold dear as Americans."24 However, on August 15, 2017, he reverted to his original position, stating: "I think there's blame on both sides. And I have no doubt about it". He explicitly condemned the anti-fascists and anti-racists tor being "very violent": "And you have - you had a group on one side that was bad, and you had a group on the other side that was also very violent, and nobody wants to say that, but I'll say it right now."25

President Trump's comments must be understood in the context of the perennial backlashes that have followed the successes of anti-racists. His election in November 2017 has been explained by some as the inevitable backlash to the election of the first black president, Barack Obama, eight years previously.26 Trump has repeatedly endorsed white supremacists, and the events in Charlottesville, including his response, are a stark reminder that America is far from achieving the ideals of equality and liberty - or, as Justice Brennan put it, the constitutional aspiration towards respect for dignity of all persons - that the radical slavery abolitionists fought for. The legacy of slavery has its tentacles firmly wrapped around all facets of American life, and although abolishing the death penalty might only unwrap one of those tentacles, if the process and act of abolition is framed in the language of dignity', then it could be the precursor to the unwrapping of many others.

#### The plan will fortify the doctrinal significance of dignity at the center of criminal sentencing law --- creates a precedent to invalidate mass incarceration, solitary confinement and life-without-parole sentences

Barry, 17 --- Professor, Quinnipiac University School of Law (January 2017, Kevin, “The Death Penalty & the Dignity Clauses,” 102 Iowa L. Rev. 383, Nexis Uni via Umich Libraries, JMP)

V. After the Death Penalty

Judicial abolition of the death penalty will have important implications for dignity under the Eighth Amendment and the Constitution more generally. This Part considers a few of them.

First, with respect to the Eighth Amendment, abolition may do for criminal sentencing law what Lawrence did for LGBT rights. In Lawrence, the Court invalidated laws criminalizing same-sex intimacy but expressly declined to reach the issue of same-sex marriage. 373 Justice Scalia predicted that the Court's decision could not be cabined, and he was right. 374 Twelve years later, in Obergefell, the Court explicitly relied on Lawrence to invalidate laws prohibiting recognition of same-sex marriage: "While Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." 375

A decision abolishing the death penalty could well be the criminal law's Lawrence - a giant "step forward" toward "the full promise" of dignity under the Eighth Amendment. 376 For example, if it violates dignity to sentence people of color to death in disproportionate numbers, perhaps it also violates dignity to incarcerate them in disproportionate numbers. 377 Similarly, if it violates dignity to require death row prisoners to spend much of their lives in solitary confinement awaiting execution, 378 perhaps solitary confinement is, itself, a violation of dignity. Justice Kennedy has strongly signaled as much, calling solitary confinement "a further terror," one that may bring prisoners "to the edge of madness, perhaps to madness itself." 379 And if the death penalty violates dignity, perhaps LWOP - "the second most severe penalty [\*441] permitted by law" 380 - does as well. The Supreme Court has already prohibited or severely restricted LWOP in the juvenile context; 381 abolition of the death penalty may pave the way for extending this prohibition to adults. 382

Second, judicial abolition of the death penalty has implications beyond the Eighth Amendment. In a thoughtful article written over a decade ago, Professor James Whitman praised Justice Kennedy's invocation of dignity in Lawrence but wondered whether such dignity talk, which lacked a "doctrinal hook," had much of a future in American law. 383 Windsor and Obergefell leave little doubt that dignity has a doctrine, and a future, under the Fourteenth [\*442] Amendment. 384 But abolition of the death penalty will do even more for dignity. By protecting dignity's most basic principle - the value of life - abolition will confirm the salience of dignity in our constitutional scheme, fortifying its doctrinal significance and pushing it beyond the Eighth and Fourteenth Amendments toward its rightful place at the center of American constitutional law. Dignity will not be an aberration to be later distinguished, or what Professor Samuel Moyn has called "an essentially contested notion of little use to further debate and a possible distraction from it," 385 but instead a concept as central to our laws as it is to our humanity.

Lastly, judicial abolition of the death penalty will demonstrate dignity's interpretive force in the modern era - toppling an institution older than the Republic itself. 386 To appreciate the significance of this feat, consider the Supreme Court's impotence in addressing another infamous American institution: slavery. Prior to Congress's adoption of the Thirteenth Amendment in 1865, the Constitution expressly contemplated the institution of slavery. 387 Significantly, in all those years, the Supreme Court never seriously questioned its constitutionality. 388 Instead, for nearly a century, the Court sat idly by:

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of … laws [regarding slavery]. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted. 389

In short, it was the Union Army and a constitutional amendment that ended slavery - not the Court.

The death penalty is expressly contemplated by the Constitution, 390 as slavery once was. But times have changed. In the late 18th and early 19th centuries, dignity was without a doctrine, scarcely appearing in judicial opinions. 391 Judicial abolition of the death penalty at the beginning of the 21st century will demonstrate how far that doctrine has come. This time [\*443] around, it is the Justice's pen, not the Framer's precise words, that controls. 392 The Constitution does not countenance indignity - not even indignities expressly contemplated by its authors. Justice Kennedy's opinion in Obergefell is a case in point and a fitting rejoinder to the reasoning of Dred Scott:

The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. Thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking. 393

VI. Conclusion

The day will soon come when the words "death penalty" will be considered an oxymoron. 394 "Death vs. life" will take its place alongside notorious debates of old, like "slavery vs. freedom," "segregation vs. integration," "defense of marriage vs. freedom to marry." 395 When that day comes, dignity will play a decisive role. This Article has offered four insights on dignity and the death penalty.

First, the concept of dignity embodies three primary concerns - life, equality, and liberty - with life at its center. We have intrinsic value as human beings (dignity of life), we have equal value to other human beings (dignity of equality), and we also have certain freedoms as human beings (the dignity of liberty).

Second, the concept of dignity finds expression under the Eighth and Fourteenth Amendments. It is a unifying principle in the Supreme Court's LGBT rights and death penalty jurisprudence, as demonstrated by the Court's decisions striking down prohibitions on same-sex intimacy, marriage, and civil rights protections for LGBT people, and prohibiting inhumane execution methods, arbitrary imposition of the death penalty, and imposition of the death penalty for certain less culpable offenders and nonhomicide crimes.

[\*444] Third, the triumph of LGBT rights under the Fourteenth Amendment and the persistence of the death penalty under the Eighth Amendment expose a tension in dignity doctrine: the most basic aspect of dignity (life) receives the least protection under the law. By declaring the death penalty unconstitutional, the Supreme Court will bring a long-awaited coherence to dignity doctrine.

And lastly, judicial abolition of the death penalty has important implications for dignity doctrine - loosening the linchpin that currently sustains racially disparate sentencing, solitary confinement, and life without the possibility of parole, and situating dignity at the center of American constitutional law.

As Justice Brennan once wrote:

I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the [condemned] and transgresses the prohibition against cruel and unusual punishment. That day will be a great day for our country, for it will be a great day for our Constitution. 396

And for Kelly Gissendaner, wherever she is, it will be a new reason to sing.

#### A focus on human dignity will challenge retribution AND brings U.S. into sync with the global anti-death penalty movement

Kleinstuber, et. al, 16 --- assistant professor of Justice Administration and Criminology at the University of Pittsburgh at Johnstown (Ross Kleinstuber, Sandra Joy – professor of Sociology at Rowan University, and Elizabeth A. Mansley – associate professor of Criminology at Mount Aloysius College, “INTO THE ABYSS: THE UNINTENDED CONSEQUENCES OF DEATH PENALTY ABOLITION,” 19 U. Pa. J.L. & Soc. Change 185, Nexis Uni via Umich Libraries, JMP)

Lastly, abolitionists need to adopt a broader view of their goals and change the framework. They cannot simply accept the same "tough-on-crime" rhetoric that has led to America's incarceration binge, and they cannot simply focus on the costs of the death penalty. If they want to make any sustained progress against the inhumanity and brutality of American penal policy, then they need to adopt a frame that explicitly focuses on human rights and attacks the philosophical tenets that justify capital punishment and other excessively punitive penalties. Otherwise, even if they accomplish complete abolition, they will simply be left with another cruel, degrading, inhumane, and ineffective punishment in its place - one that is used far more often, with significantly less judicial oversight, and for substantially less severe crimes. 135 Only by adopting a human rights framework will it be possible to see offenders as fellow human beings, question the goal of punishment, and alter the retributive focus of the current American penal state. We acknowledge that many Americans view retribution as the primary goal of [\*205] punishment, but when abolitionists succumb to this temptation, they end up inadvertently supporting the expansion of the penal state and the dehumanization of offenders and drastically reduce their means of challenging other draconian penalties. Therefore, it is critical that death penalty opponents attack the retributive tenets upon which the current carceral regime is built and instead focus on the humanity and redeemability of offenders. This is not to suggest that there is no room for retribution in sentencing policies, but it should not be the primary sentencing rationale.

In most of the rest of the world, the anti-death penalty movement has already adopted a human rights framework and successfully used it to challenge not just the death penalty, but a whole host of other harsh punishments. As mentioned above, LWOP is unavailable for juvenile offenders anywhere in the world outside the United States, and in 2013, the European Court of Human Rights ruled that LWOP sentences for adults violate the European Convention of Human Rights because they constitute "inhuman or degrading treatment or punishment." 136 Several European and Latin American nations have even outlawed life with parole because such punishments are considered a violation of human rights. 137 Getting to this point, however, requires a fundamental reframing of the narrative. It requires a focus on the inherent humanity of offenders and on the possibility for reform:

The arguments in favor of having no life sentence at all and the arguments for having a fixed minimum period after which release must be considered have essentially the same foundation: No human being should be regarded as beyond improvement and therefore should always have the prospect of being released. 138

Some abolitionists in the US have already adopted this human rights frame. For example, Human Rights Watch (HRW) opposes "the death penalty in all cases as inherently cruel." 139 This approach allows HRW to criticize other "disproportionately severe" penalties in the US as violative of "human rights laws binding on the United States that prohibit cruel, inhuman or degrading treatment or punishment..." 140 Senator Ernie Chambers, who sponsored Nebraska's 2015 death penalty repeal justified his position by referring to "human dignity," 141 and in Maryland, which abolished the death penalty in 2013, Governor Martin O'Malley utilized a human rights perspective when he urged the legislature to repeal capital punishment in 2009: "freedom, justice, the dignity of the individual, equal rights before the law - these are the principles that define our character as a people. And so we must ask ourselves: are these principles compatible with the "civil' taking of human life?" 142

[\*206] Furthermore, although the primary focus of the final report of the Maryland Commission on Capital Punishment was on pragmatic issues such as discrimination, cost, the risk of executing the innocent, and the severity of LWOP and its capability of "gravely punishing the guilty defendant," 143 the report also included a section on religious views on capital punishment. Written by two religious leaders, this section discussed "the sanctity of human life" that prohibits retributive homicide and even compared capital punishment to other "cruelties … whose time has come and gone, noting that it persists mostly in societies with which we hesitate to identify ourselves," such as torture, mutilation, and the public display of executed bodies. 144 The two religious leaders went on to argue that even if capital punishment could be applied without error or racial bias "we should not resort to the death penalty, not even in the case of one who takes the life of another human being..." 145

Adopting this human rights frame will allow abolitionists to view convicted killers as fellow human beings. It will empower abolitionists to continue attacking the death penalty without having a negative ripple effect on the rest of the justice system, in a way that opens up doors to attacking other excessively punitive sanctions and expands opportunities to challenge and discover wrongful convictions of all kinds. This is not a criticism of the current abolitionist movement. The abolitionists' embrace of LWOP is understandable given its ability to garner support for abolition. However, this position is akin to hiding under a tall tree during a thunderstorm. It may make intuitive sense, but upon further examination of the facts, it turns out to be counterproductive. As we have pointed out here, LWOP is essentially the same as a death sentence, but it is not accompanied by the same due process protections or opportunities to challenge the accuracy of the conviction, and it has become used far more frequently than death ever was and for far less serious offenses. Like the death penalty, LWOP sentences deny the humanity of offenders and give up on any hope of rehabilitation. This denies society the opportunity to be repaid by and to benefit from the positive contributions offenders may make in the future. As such, we should not replace one death sentence with another. That is not progress.

## Case – Top Level

### Framing – Probability First

#### Chains of potentialities overestimate probability – disadvantages are pure propaganda to protect the status quo

Piatelli-Palmarini, 94– professor of Cognitive Science, Linguistics, & Psychology at the University of Arizona (Massimo, Inevitable Illusions: How Mistakes of Reason Rule Our Minds, p. 134-136

As the narrative unfolds one event is linked with another, making for a script that seems plausible—always admitting, of course, that each stage has really been preceded by another. In the end, don't we think that the probability of a U.S. invasion is somewhat higher than one in a million?

Here we leave statistics behind and enter the domain of pure fiction. Look a bit closer, and one can see that we are not yet out of the realm of cognitive science, for these questionnaire-experiments, just like real life, have countless times shown us that a plausible and well-told story can lead us to hold as "objectively" probable events that, just minutes before, we would have considered totally improbable. The notorious "Protocols of Zion," a pure fabrication of the czar's anti- Semitic propaganda taken up by the Nazi regime raised an anti-Semitic storm. It did little good to show that it was a pure invention. What the propagandists sought to do, in order to seize power, was to make imaginatively presentable the probability of a worldwide Jewish conspiracy, and in so doing they succeeded admirably, at least in the minds of those uncritically committed to hatred. I will not waste space on other instances, but limit myself to the purely cognitive aspects of the phenomenon.

Offering a "plausible" sequence of events that are causally linked one to another has the effect of immediately raising our estimate of probability. It suffices that the links between these "events" should hold from one to the next for our minds lo approach the final link in the chain. For, as we have seen, that which we can readily imagine is ipso facto more probable. Even if the probability of the very first link in this chain is very low, the fact is soon forgotten. Say "Iet's suppose that . . .” and them "plausible" enough. I put "plausible" in quotation marks because true plausibility, in effect, depends wholly on that initial "Let's suppose . . ." Once the first link in the chain of our script is "supposed," then all the rest of the links "hold" one to another.

Rationally speaking, however, and having regard to the calculation of probabilities, we are in the domain of what is known as "compound probabilities," or, more restrictively, "conditional probabilities." (What is the likelihood that B will be true, supposing that A has proven to be true?) The probability of the last link in the chain being true is calculated on the basis of a series of conditional probabilities being true, and that in turn is obtained by combining the probabilities of each link in the chain, from the first to the last. Probabilities being, by their nature, less than one, the probability of the entire chain (or the last link) being true is *always and without exception* *less probable than the probability of the least probable link in the chain*. We fail to notice this progressive attenuation of probability. The story takes over from reality. The last link seems ever truer to our mind, and our increased facility in representing or imagining makes that last link seem ever more probable. The trick—which is one of the oldest in the book—is to find the narrative path by which the last, and most implausible, link can be made imaginatively compelling. My Othello effect depends on this perverse use of the imagination.

#### A probability-centric framework best protects future generations

Karnofsky, 14 – Executive Director of the Open Philanthropy Project degree in Social Studies from Harvard University (Holden Karnofsky, 7/3/14, “The Moral Value of the Far Future” <https://www.openphilanthropy.org/blog/moral-value-far-future>)

In Astronomical Waste, Nick Bostrom makes a more extreme and more specific claim: that the number of human lives possible under space colonization is so great that the mere possibility of a hugely populated future, when considered in an “expected value” framework, dwarfs all other moral considerations. I see no obvious analytical flaw in this claim, and give it some weight. However, because the argument relies heavily on specific predictions about a distant future, seemingly (as far as I can tell) backed by little other than speculation, I do not consider it “robust,” and so I do not consider it rational to let it play an overwhelming role in my belief system and actions. (More on my epistemology and method for handling non-robust arguments containing massive quantities here.) In addition, if I did fully accept the reasoning of “Astronomical Waste” and evaluate all actions by their far future consequences, it isn’t clear what implications this would have. As discussed below, given our uncertainty about the specifics of the far future and our reasons to believe that doing good in the present day can have substantial impacts on the future as well, it seems possible that “seeing a large amount of value in future generations” and “seeing an overwhelming amount of value in future generations” lead to similar consequences for our actions.

Catastrophic risk reduction vs. doing tangible good

Many people have cited “Astronomical Waste” to me as evidence that the greatest opportunities for doing good are in the form of reducing the risks of catastrophes such as extreme climate change, pandemics, problematic developments related to artificial intelligence, etc. Indeed, “Astronomical Waste” seems to argue something like this:

For standard utilitarians, priority number one, two, three and four should consequently be to reduce existential risk. The utilitarian imperative “Maximize expected aggregate utility!” can be simplified to the maxim “Minimize existential risk!”.

I have always found this inference flawed, and in my recent discussion with Eliezer Yudkowsky and Luke Muehlhauser, it was argued to me that the “Astronomical Waste” essay never meant to make this inference in the first place. The author’s definition of existential risk includes anything that stops humanity far short of realizing its full potential - including, presumably, stagnation in economic and technological progress leading to a long-lived but limited civilization. Under that definition, “Minimize existential risk!” would seem to potentially include any contribution to general human empowerment.

I have often been challenged to explain how one could possibly reconcile (a) caring a great deal about the far future with (b) donating to one of GiveWell’s top charities. My general response is that in the face of sufficient uncertainty about one’s options, and lack of conviction that there are good (in the sense of high expected value) opportunities to make an enormous difference, it is rational to try to make a smaller but robustly positive difference, whether or not one can trace a specific causal pathway from doing this small amount of good to making a large impact on the far future. A few brief arguments in support of this position:

I believe that the track record of “taking robustly strong opportunities to do ‘something good’ ” is far better than the track record of “taking actions whose value is contingent on high-uncertainty arguments about where the highest utility lies, and/or arguments about what is likely to happen in the far future.” This is true even when one evaluates track record only in terms of seeming impact on the far future. The developments that seem most positive in retrospect - from large ones like the development of the steam engine to small ones like the many economic contributions that facilitated strong overall growth - seem to have been driven by the former approach, and I’m not aware of many examples in which the latter approach has yielded great benefits.

I see some sense in which the world’s overall civilizational ecosystem seems to have done a better job optimizing for the far future than any of the world’s individual minds. It’s often the case that people acting on relatively short-term, tangible considerations (especially when they did so with creativity, integrity, transparency, consensuality, and pursuit of gain via value creation rather than value transfer) have done good in ways they themselves wouldn’t have been able to foresee. If this is correct, it seems to imply that one should be focused on “playing one’s role as well as possible” - on finding opportunities to “beat the broad market” (to do more good than people with similar goals would be able to) rather than pouring one’s resources into the areas that non-robust estimates have indicated as most important to the far future.

The process of trying to accomplish tangible good can lead to a great deal of learning and unexpected positive developments, more so (in my view) than the process of putting resources into a low-feedback endeavor based on one’s current best-guess theory. In my conversation with Luke and Eliezer, the two of them hypothesized that the greatest positive benefit of supporting GiveWell’s top charities may have been to raise the profile, influence, and learning abilities of GiveWell. If this were true, I don’t believe it would be an inexplicable stroke of luck for donors to top charities; rather, it would be the sort of development (facilitating feedback loops that lead to learning, organizational development, growing influence, etc.) that is often associated with “doing something well” as opposed to “doing the most worthwhile thing poorly.”

I see multiple reasons to believe that contributing to general human empowerment mitigates global catastrophic risks. I laid some of these out in a blog post and discussed them further in my conversation with Luke and Eliezer.

For one who accepts these considerations, it seems to me that:

It is not clear whether placing enormous value on the far future ought to change one’s actions from what they would be if one simply placed large value on the far future. In both cases, attempts to reduce global catastrophic risks and otherwise plan for far-off events must be weighed against attempts to do tangible good, and the question of which has more potential to shape the far future will often be a difficult one to answer.

If one sees few robustly good opportunities to “make a huge difference to the far future,” the best approach to making a positive far-future difference may be “make a small but robustly positive difference to the present.”

One ought to be interested in “unusual, outstanding opportunities to do good” even if they don’t have a clear connection to improving the far future.

### Framing – AT: Future Generations / Other Risks Outweigh

#### Prioritizing other risks endorses the complete annihilation of disposable populations. Life maximization for its own sake is self-defeating because it reduces existence to bare life.

Morton, 16– Rita Shea Guffey Chair in English at Rice University, holds a D.Phil. from Magdalen College, Oxford (Timothy, “The First Thread”, Dark Ecology: For a Logic of Future Coexistence, p. 46-54, <https://www.academia.edu/38094905/Dark_Ecology_For_a_logic_of_future_and_coexistence_-_Timothy_Morton>

The three axioms of agrilogistics. We live inside a philosophy alongside worms, bees, plows, cats, and stagnant pools. But the philosophy is silent or, as Anne Carson might say, “terribly quiet”; it betrays itself in the movements of Tess in the field and in the form of the field itself, but agrilogistics is a dumb show so familiar that it’s almost invisible: the silent functioning of metaphysics. One goal of Dark Ecology is to make agrilogistic space speak and so to imagine how we can make programs that speak differently, that would form the substructure of a logic of future coexistence.

The agrilogistic algorithm consists of numerous subroutines: eliminate contradiction and anomaly, establish boundaries between the human and the nonhuman, maximize existence over and above any quality of existing. Now that the logistics covers most of Earth’s surface, even we vectors of agrilogistics, Mesopotamians by default, can see its effects as in a polymerase chain reaction: they are catastrophically successful, wiping out lifeforms with great efficiency. Three philosophical axioms provide the logical structure of agrilogistics:

(1) The Law of Noncontradiction is inviolable.

(2) Existing means being constantly present.

(3) Existing is always better than any quality of

existing.

We begin with axiom (1). There is no good reason for it. We shall see that there are plenty of ways to violate this law, otherwise we wouldn’t need a rule. This means that axiom (1) is a prescriptive statement disguised as a descriptive one. Formulated rightly, axiom (1) states, Thou shalt not violate the Law of Noncontradiction. Axiom (1) works by excluding (undomesticated) lifeforms that aren’t part of your agrilogistic project. These lifeforms are now defined as pests if they scuttle about or weeds if they appear to the human eye to be inanimate and static. Such categories are highly unstable and extremely difficult to manage.83

Axiom (1) also results in the persistent charm of the Easy Think Substance. Agrilogistic ontology, formalized by Aristotle about ten thousand years in, supposes a being to consist of a bland lump of whatever decorated with accidents. It’s the Easy Think Substance because it resembles what comes out of an Easy Bake Oven, a children’s toy. Some kind of brown featureless lump emerges, which one subsequently decorates with sprinkles.

In Tom Stoppard’s play Darkside, which magically lets Pink Floyd’s The Dark Side of the Moon speak its implicit ecological philosophical content, a cynical philosophy teacher explains the famous trolley problem. If there are lots of people on a train heading over a cliff, it is ethical to switch the points to divert the train, even if the train runs over a single person stuck on the track onto which the train diverts. When a sensitive student asks the teacher about the experiment (“Who was on the train?” “Who was the boy?”), the teacher insists that it’s merely a thought experiment, that there’s no point in knowing. Yet this perceived irrelevancy is normative: it is what generates the utilitarianism in the first place.

The girl student, dismissed as insane, asks the teacher, “Who was on the train?” The teacher responds, “We don’t know who was on the train, it’s a thought experiment.” 84 The humor compresses an insight: this nondescription of Easy Think passengers implies an unexamined thought that gives no heed to the qualities of the people on board. Only their number counts, the fact that they merely exist. Existing is better than any quality of existing, according to axiom (3). It doesn’t even matter how many more people there are. Even the sheer quantity of existing is treated as a lump of whatever. Say there were three hundred people on the track and three hundred and one people in the train. The train should divert and run over the people on the track. More to the ecological point, imagine seven billion people on the train and a few thousand on the track. This represents the balance (or lack thereof) between the human species and a species about to go extinct because of human action. This amazing pudding of stuff isn’t even a fully mathematizable world. Counting itself doesn’t count. For a social form whose new technology (writing) was so preoccupied with sheer counting, as surviving Linear B texts demonstrate, this is ironic.

The lump ontology evoked in axiom (1) implies axiom (2): to exist is to be constantly present, or the metaphysics of presence. Correctly identified by deconstruction as inimical to thinking future coexistence, the metaphysics of presence is intimately bound up with the history of global warming. Here is the field: I can plough it, sow it with this or that or nothing, farm cattle, yet it remains constantly the same. The entire system is construed as constantly present, rigidly bounded, separated from nonhuman systems. This appearance of hard separation belies the obvious existence of beings who show up ironically to maintain it. Consider the cats and their helpful culling of rodents chewing at the corn.85 The ambiguous status of cats is not quite the “companion species” Haraway thinks through human coexistence with dogs.86 Within agrilogistic social space, cats stand for the ontological ambiguity of lifeforms and indeed of things at all. Cats are a neighbor species.87 Too many concepts are implied in the notion of “companion.” The penetrating gaze of a cat is used as the gaze of the extraterrestrial alien because cats are the intraterrestrial alien. Cats just happen. “Cats happen” would be a nicely ironic agrilogistic T-shirt slogan.

More to the point, consider bees again. Their symbiotic relationship with humans (let alone plants and the sexual facilitation thereof) could not be more obvious or more significant. Bees are moved en masse to where agrilogistics requires them; they are fed high-fructose corn syrup, a sick irony that could almost evoke a gallows-humor type of a laugh were it not so painful to think about. Monsanto’s genetically modified, pesticide-coated seeds are causing Indian farmers to kill themselves and bees to die in their millions: the pesticides are fatal, but so is the modification of the plant structure itself, causing bees’ intestinal walls to weaken. Global warming is forcing bumblebees north of their habitual pathways by about three miles a year, and they don’t like it. The summer of 2014 was particularly bad, with about 42 percent of the U.S. bee population dying. The magic-bullet approach to getting rid of “pests” has resulted in this feedback loop: a range of pesticides called neonicotinoids are to blame. In response, it has not been very obvious to agrilogistics that improving the bees’ conditions would help, because there is a general anthropocentric doubt that bees have conditions at all.88 Instead, approaches such as Monsanto’s war against the Varroa destructor mite infecting bees will only exacerbate the feedback loop. Axiom (3) (just existing is always better than any quality of existing) affects nonhumans too.

The agrilogistic engineer must strive to ignore the bees and the cats as best as he (underline he) can. If that doesn’t work, he is obliged to kick them upstairs into deity status. Meanwhile he asserts instead that he could plant anything in this agrilogistic field and that underneath it remains the same field. A field is a substance underlying its accidents: cats happen, rodents happen, bees and flowers happen, even wheat happens; the slate can always be wiped clean. Agrilogistic space is a war against the accidental. Weeds and pests are nasty accidents to minimize or eliminate.

Consider the accident of an epidemic, which ancient Greek culture called miasma. Miasma is the second human-made hyperobject—the first was agrilogistic space as such, but miasma was the first hyperobject we noticed. You consider yourself settled and stable, although it would be better to describe your world as metastable: the components (humans, cows, cats, wheat) keep changing, but the city and the walls and the fields persist. You can observe miasmic phenomena haunting the edges of your temporal tunnel vision. You see them as accidental and you try to get rid of them. For instance, you move to America and start washing your hands to eliminate germs. Then you suffer from an epidemic of polio from which you had been protected until you started to police the temporal tunnel boundaries even tighter. This is the subject of Philip Roth’s novel Nemesis and a good example of a strange loop.89 The global reach of agrilogistics is such that antibiotic-resistant bacteria may now be found throughout the biosphere: “in environmental isolates, soil DNA…secluded caves…and permafrost,” in “arctic snow” and the open ocean.90 When you think it at an appropriate ecological and geological timescale, agrilogistics actually works against itself, defying the Law of Noncontradiction in spite of axiom (1).

The push to achieve constant presence in social and physical space requires persistent acts of violence, and such a push is itself violence.91 Why? Because the push goes against the grain of (ecological) reality, with its porous boundaries and interlinked loops. Ecological reality resembles the shimmering, squiggly space of marks and signs underwriting the very scripts that underwrite agrilogistic space, with its neatly plowed lines of words, many of their first lines accounting for cattle —a lazy term as we have seen for anything a (male) human owns. Preagrilogistic “oral” social formats were not more present, as in the primitivist myth, itself a by-product of agrilogistics. Preagrilogistic social and conceptual space has far less to do with presence than agrilogistic space. Logocentrism—the idea that full presence is achievable within language, typified by the mythical utopian image of face-to-face communication—is an agrilogistic myth. This is why the deconstruction of logocentrism is a way to start finding the exit route.

Agrilogistic existing means just being there in a totally uncomplicated sense. No matter what the appearances might be, essence lives on. Ontologically as much as socially, agrilogistics is immiseration. Appearance is of no consequence. What matters is knowing where your next meal is coming from, no matter what the appearances are. Without paying too much attention to the cats, you have broken things down to pure simplicity and are ready for axiom (3):

(3) Existing is always better than any quality of existing.

Actually we need to give it its properly anthropocentric form:

(3) Human existing is always better than any quality of existing.

Axiom (3) generates an Easy Think Ethics to match the Easy Think Substance, a default utilitarianism hardwired into agrilogistic space. The Easy Think quality is evident in how the philosophy teacher in Stoppard’s Darkside describes the minimal condition of happiness: being alive instead of dead.92 Since existing is better than anything, more existing must be what we Mesopotamians should aim for. Compared with the injunction to flee from death and eventually even from the mention of death, everything else is just accidental. No matter whether I am hungrier or sicker or more oppressed, underlying these phenomena my brethren and I constantly regenerate, which is to say we refuse to allow for death. Success: humans now consume about 40 percent of Earth’s productivity.93 The globalization of agrilogistics and its consequent global warming have exposed the flaws in this default utilitarianism, with the consequence that solutions to global warming simply cannot run along the lines of this style of thought.94

Jared Diamond calls Fertile Crescent agriculture “the worst mistake in the history of the human race.” 95 Because of its underlying logical structure, agrilogistics now plays out at the spatiotemporal scale of global warming, having supplied the conditions for the Agricultural Revolution, which swiftly provided the conditions for the Industrial Revolution. “Modernity once more with feeling” solutions to global warming—bioengineering, geoengineering, and other forms of what Dark Ecology calls happy nihilism—reduce things to bland substances that can be manipulated at will without regard to unintended consequences.

Planning for the next few years means you know where the next meal is coming from for some time. Who doesn’t want that? And existing is good, right? So let’s have more of it. So toxic and taboo is the idea of undoing axiom (3), one automatically assumes that whoever talks about it might be some kind of Nazi. Or that, given that we have seen population growth and food supply grow tougher, the one who doubts the efficacy and moral rightness of axiom (3) is simply talking “nonsense.” 96 Nonsense or evil. Courting these sorts of reaction is just one of the first ridiculous, impossible things that ecognosis does. So much ridicule, so little time. Even more ridiculously, perhaps, we shall see that ecognosis must traverse Heideggerian-Nazi space, descend below it: through nihilism, not despite it.

It was based on increasing happiness, but within the first quarter of its current duration agrilogistics had resulted in a drastic reduction in happiness. People starved, which accounts for pronounced decreases in average human size in the Fertile Crescent. Agrilogistics exerted downward pressure on evolution. Within three thousand years, farmers’ leg bones went from those of the ripped huntergatherer to the semisedentary forerunner of the couch potato. Within three thousand years, patriarchy emerged. Within three thousand years, what is now called the 1 percent emerged, or, in fact, the 0.1 percent, which in those days was called king. Desertification made swaths of the biosphere far less habitable. Agrilogistics was a disaster early on, yet it was repeated across Earth. There is a good Freudian term for the blind thrashing (and threshing) of this destructive machination: death drive.

Something was wrong with the code from the beginning. More happiness is better, such that more existing, despite how I appear (starving, oppressed), is better. We could compress this idea: happiness as existing for the sake of existing. A for its own sake that agrilogistics itself regards as superfluous or evil or evil because superfluous: nonsense and evil again, the way the aesthetic dimension haunts the Easy Think Substance. It sounds so right, an Easy Think Ethics based on existing for the sake of existing. Yet scaling up this argument unmasks a highly disturbing feature. Derek Parfit observes that under sufficient spatiotemporal pressure Easy Think Ethics fails. Parfit was considering what to do with pollution, radioactive materials, and the human species. Imagine trillions of humans spread throughout the Galaxy. Exotic addresses aside, all the humans are living at what Parfit calls the bad level, not far from Agamben’s idea of bare life.97 Trillions of nearly dead people, trillions of beings like the Muselmänner in the concentration camps, zombies totally resigned to their fate. This will always be absurdly better than billions of humans living in a state of bliss.98 Because more people is better than happier people. Because bliss is an accident, and existing is a substance. Easy Think Ethics. Let’s colonize space—that’ll solve our problem! Let’s double down! Now we know that it doesn’t even take trillions of humans spread throughout the Galaxy to see the glaring flaw in agrilogistics. It only takes a few billion operating under agrilogistic algorithms at Earth magnitude.

There is a “very large finitude” in the shape of a specific, gigantic object (Earth) on which humans cooperate (and refuse to cooperate) with one another and with other lifeforms. There is also indeterminate futurity—how many future generations should we take into consideration? The combination of massive yet finite spatiality and massive and indeterminate time generates a very specific “game board” on which cooperation and its opposite play out. It seems clear in mathematics that a well-structured game board would ensure the best cooperation.99 But the extremely minimal utilitarianism and ontology (Easy Think) implied by agrilogistics does next to nothing to determine the quality of the game board. The result is predictable: at any particular moment in the indeterminate time line it always seems better to destroy as much of the very large finitude as possible.

### AT: Federal DP Held up in Courts

#### **The Supreme Court declined to hear challenges to the death penalty – it’s resuming in July**

CBS News 6/29 (Melissa Quinn, CBS News, “Supreme Court gives green light to Justice Department for resuming federal executions”,6/29/20, https://www.cbsnews.com/news/supreme-court-allows-federal-death-penalty-justice-department-executions/)//mj

Washington — The Supreme Court on Monday turned away a challenge to the Trump administration's efforts to resume federal executions, paving the way for the Justice Department to end its effective freeze on capital punishment next month.

Justices Ruth Bader Ginsburg and Sonia Sotomayor said they would take up the appeal from four death-row inmates.

The Justice Department announced nearly a year ago that it would restart federal executions in death penalty cases after a 16-year lapse, as the Bureau of Prisons had adopted a new execution protocol. The department then scheduled executions starting in December for five death-row inmates who were convicted of murdering children.

But the Trump administration's attempts to resume capital punishment became the subject of court challenges, as four inmates sought to block the use of the new protocol in their executions. Last year, a federal judge in Washington blocked the Justice Department from carrying out the executions, ruling the protocol did not comply with the Federal Death Penalty Act, a 1994 law that requires the federal government impose a death sentence "in the manner prescribed by the law of the state in which the sentence is imposed."

A three-judge panel on the U.S. Court of Appeals for the District of Columbia Circuit and the Supreme Court declined to lift the hold late last year, temporarily blocking the Trump administration from ending the informal freeze on capital punishment. But in April, the D.C. Circuit tossed out the lower court's order.

Earlier this month, Attorney General William Barr directed the Bureau of Prisons to schedule new dates for executions of four death-row inmates, three of whom were involved in the case before the Supreme Court, starting in mid-July.

In refusing to take up the appeal from four of the prisoners, the Supreme Court leaves in place the ruling from the D.C. Circuit in favor of the Trump administration.

### AT: Death Penalty Declining

#### The death penalty is alive and well – its entrenched in state politics and the conservative court

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

It is tempting to believe that the death penalty in America is in a state of terminal decline. A statistical comparison of capital punishment today compared to the late 1990s reveals the extent to which the use of, and support for, the death penalty has reduced since the turn of the century. In 1999, there were 98 state-sanctioned executions – the highest annual number since the United States Supreme Court ruled in 1976 that the death penalty is not per se unconstitutional.7 Since 1999, the annual rate of executions has declined sharply, with just8 20 people executed in 2016. Thirty-one new death sentences were handed down in 2016, considerably fewer than the post-1976 high of 315 that were imposed in 1996. Throughout the 1990s, opinion polls suggested that 75–80% of the population supported capital punishment. The latest Gallup poll puts that number at just 55%.9 And whereas 40 out of the 52 jurisdictions in the USA retained capital punishment on their statute books at the end of the 1990s, that number has declined to 33 at the time of writing.10 These numbers led the New York Times to run an editorial on October 24, 2016, titled “The Death Penalty, Nearing its End”.11 Almost a year to the day earlier, the now late Justice Antonin Scalia – who had been a fervent supporter of capital punishment – said that “it would not surprise” him if the US Supreme Court soon outlawed executions, given the increasing number of anti-death penalty opinions emanating from the Bench.12 Academic researchers have also confidently predicted the imminent demise of executions, with Brandon Garrett asserting in 2017 that “[t]he death penalty in the United States is at the end of its rope. We can abolish it not in a matter of generations, but in a matter of years.”13

Despite this apparent trend towards abolition, it is also arguable that state-sanctioned executions are entrenched in the law, politics, and local cultures of many jurisdictions across America, and that abolition will not occur soon. On November 8, 2016, just two weeks after the New York Times editorial, the death penalty was on the ballot in Nebraska, California, and Oklahoma. In all three states, pro-death penalty measures succeeded. In Nebraska, the electorate voted to restore the punishment after state legislators had repealed it the year before.14 In Oklahoma, voters approved an amendment to the state constitution to prevent state courts from outlawing capital punishment.15 And in California, the electorate voted to speed up the appeals process so that those facing execution have fewer opportunities to challenge their sentences.16 On the same day, pro-death penalty Donald Trump prevailed in the presidential elections, dashing any hopes that the seat left vacant on the Supreme Court by the death of Justice Scalia would be filled by a judge sympathetic to the abolitionists’ cause. These election results led Andrew Cohen to assert in The Marshall Project the next day that “The Death Penalty is Alive and Well.”17 The ensuing months have done little to contradict Cohen. On April 10, 2017, Neil Gorsuch was sworn into office on the Supreme Court, and he has given every indication that he will uphold the constitutionality of capital punishment.18 Later that same month, the Governor of Arkansas announced what was described as a “killing spree” by death penalty opponents, as state authorities attempted to carry out eight executions over the course of just 11 days.19 In fact, Gorsuch’s first vote was in a death penalty case emanating from this announcement. On April 20, 2017, he voted to deny a stay of execution for Ledell Lee, who had requested a chance to pursue claims relating to innocence, intellectual disability, and ineffective assistance of counsel.20 Lee was executed later that evening. In July, Ohio followed Arkansas’s lead, revealing plans to execute 27 people over a four-year period.21 It is perhaps more accurate, then, to describe the death penalty in the US as being in a state of flux. There are myriad reasons why opponents of capital punishment have struggled to bring about nationwide abolition in an era in which every other Western liberal democracy has outlawed the practice,22 and this is the context in which it is worth examining the strategies, tactics, and discourses of the anti-death penalty movement.

### AT: Court Rulings Not Followed

#### The Supreme Court can use lower courts to carry-out and leverage its rulings

Hall 14 - a Professor of Political Science and Law at the University of Notre Dame. He specializes in empirical legal studies and American political institutions (Matthew, American Politics Research, “Testing Judicial Power: The Influence of the U.S. Supreme Court on Federal Incarceration”, 6-19-2014, Vol. 43(1), p. 85-86, https://journals-sagepub-com.proxy.lib.umich.edu/doi/pdf/10.1177/1532673X14534063)//mj

All of these factors suggest that lower-court judges should be the most faithful adherents to Supreme Court rulings. Legally trained officials are the most capable of understanding the Court’s decisions and the most likely to recognize the Court’s authority. Lower-court judges are also subject to reversal by the High Court and relatively insulated from other political pressures (Baum, 2001, p. 235, 238, 239). Thus, it is unsurprising that these lower courts overwhelmingly (though imperfectly) adhere to Supreme Court policies (Gruhl, 1980; Hoekstra, 2005; Songer, Segal, & Cameron, 1994; Westerland, Segal, Epstein, Cameron, & Comparato, 2010).

In many policy domains, the Supreme Court’s control over lower courts is insufficient to secure policy implementation. Instead, the Court often requires the cooperation of non-judicial officials, who do not carry out the Court’s policies as faithfully as judges (Baum, 2001; McGuire, 2009; Rosenberg, 2008; Sweet, 2010). However, lower-court judges enjoy unique powers with regard to implementing the High Court’s criminal justice rulings. These judges can often prompt implementation by simply refusing to convict defendants unless law enforcement officials comply with the Court’s policies. As a result of this institutional leverage, the Supreme Court’s power is particularly potent in the domain of criminal justice (Hall, 2011; see also Hall, 2014).

#### **Supreme Court decisions create ripple effects that affect every level of government**

Hall 14 - a Professor of Political Science and Law at the University of Notre Dame. He specializes in empirical legal studies and American political institutions (Matthew, American Politics Research, “Testing Judicial Power: The Influence of the U.S. Supreme Court on Federal Incarceration”, 6-19-2014, Vol. 43(1), p. 89-90, https://journals-sagepub-com.proxy.lib.umich.edu/doi/pdf/10.1177/1532673X14534063)//mj

How might U.S. Supreme Court decisions such as these affect the federal incarceration rate? The most likely causal mechanism between Court rulings and incarceration is the Court’s direct and indirect influence over other actors in the criminal justice system. Supreme Court decisions initiate a series of reactions from lower-court judges, prosecutors, attorneys, and police, which in turn shape the incarceration rate. First, and most directly, the Court influences decision making by lower federal courts. Studies of judicial compliance suggest that lower courts generally adhere to Supreme Court precedent (Brent, 1999; Gruhl, 1980; Songer et al., 1994; Songer & Sheehan, 1990); in fact, court of appeals judges actually anticipate Supreme Court preferences when making decisions (Westerland et al., 2010), and district court judges anticipate the behavior of court of appeals judges (Randazzo, 2008). Of course, lower court compliance is not perfect; judges sometimes exercise considerable discretion when making decisions (Baum, 1978; Scott, 2006). However, defying the Supreme Court tends to be the exception rather than the rule, and recent studies have found that the Court’s “hierarchical control appears strong and effective” (Westerland et al., 2010, p. 891). If district courts respond to Supreme Court decisions, the High Court’s rulings should directly influence the frequency with which district courts sentence criminal defendants to federal prison. Second, the changing behavior of lower federal courts alters the behavior of prosecutors and defense attorneys. These actors strategically anticipate the probability of success when deciding whether to prosecute a case, appeal a decision, or plea bargain (Albonetti, 1987; Lederman, 1999; Taha, 2010; Wedeking, 2010). Accordingly, as the Supreme Court expands criminal rights and lower courts comply, prosecutors become less likely to initiate a prosecution and less likely to appeal a loss. Similarly, defense attorneys may become more likely to appeal a loss. The contraction of criminal rights likely produces the opposite effects. Finally, as the behavior of lower-court judges and federal prosecutors changes, federal law enforcement officials may adjust their behavior to increase the odds of conviction. For example, studies of Supreme Court decision making with regard to the exclusionary rule, Miranda rights, and warrantless eavesdropping eventually produced significant changes in police behavior, including arrests and clearance rates (Hall, 2011). Thus, Supreme Court rulings might also indirectly influence incarceration by altering the behavior of law enforcement officials.

#### The Supreme Court decisions can result in lower incarceration rates

Hall 14 - a Professor of Political Science and Law at the University of Notre Dame. He specializes in empirical legal studies and American political institutions (Matthew, American Politics Research, “Testing Judicial Power: The Influence of the U.S. Supreme Court on Federal Incarceration”, 6-19-2014, Vol. 43(1), p. 88-89, https://journals-sagepub-com.proxy.lib.umich.edu/doi/pdf/10.1177/1532673X14534063)//mj

The Supreme Court and Federal Incarceration

There are several reasons to suspect that courts generally, and the U.S. Supreme Court in particular, may influence federal incarceration. The Supreme Court ultimately resolves a wide range of questions related to criminal justice policy, including the interpretation of common law principles, federal statutes, and constitutional rights. By expanding or contracting the substantive protections afforded to criminal suspects and defendants, the justices may be able to significantly alter the rate at which Americans are put behind bars. Yet, despite the intuitive link between the Court and the criminal justice system, no previous study has considered Supreme Court rulings as one of the driving forces behind the incarceration rate.

The Supreme Court’s history is replete with decisions that may have affected federal incarceration. During the 1960s, the Warren Court engaged in a criminal rights “revolution.” As McCloskey (2010) notes, “[t]he Warren Court undoubtedly read the Constitution more generously than did prior Courts in terms of the formal legal rights offered criminal defendants” (p. 165). Although its most famous decisions involved state law, the Court also expanded the rights of federal criminal defendants related to searches and seizures (Rios v. U.S., 1960), self-incrimination (Marchetti v. U.S., 1968), and wiretapping (Katz v. U.S., 1967). Many scholars, politicians, and activists contend that expanded criminal rights detracted from the ability of police investigators to solve crimes and prosecutors to obtain convictions (e.g., Canon, 1974; Cassell & Fowles, 1998; Donohue, 1998; Nagel, 1965). Consequently, the Warren Court’s criminal rights “revolution” may have substantially limited federal incarceration.

#### **The Supreme court can leverage its influence to shape the criminal justice system**

Hall 14 - a Professor of Political Science and Law at the University of Notre Dame. He specializes in empirical legal studies and American political institutions (Matthew, American Politics Research, “Testing Judicial Power: The Influence of the U.S. Supreme Court on Federal Incarceration”, 6-19-2014, Vol. 43(1), p. 100-101, https://journals-sagepub-com.proxy.lib.umich.edu/doi/pdf/10.1177/1532673X14534063)//mj

The present study offers several important contributions to our understanding of American politics and policy impact. First, my findings suggest that scholars should consider policy impact at the macro level. Micro-level studies offer valuable insight into the concrete realization of particular policy enactments; however, these studies may fail to capture the total influence of numerous policymaking decisions over time. In contrast, a macro approach facilitates an understanding of policymakers’ aggregate influence over broad social and political outcomes. The ability of policymakers to broadly shape public policy outputs in this manner is essential for a properly functioning political system. Accordingly, researchers should consider the myriad of ways policymakers may influence social and political outcomes through aggregate decision making.

Second, this study contributes to a growing literature that contends the U.S. Supreme Court has significant influence over social and political outcomes (Hall, 2011; Howard & Steigerwalt, 2012; Keck, 2009). Not only do individual Court rulings prompt the implementation of specific policies, aggregate decision making also shapes broad policy outputs over time. The Court appears to have significantly altered the nature of the federal penal system over the last half-century and, in so doing, indirectly influenced the subsequent social, economic, and political changes. However, scholars should be cautious in applying these conclusions to other policy domains; the Court may be particularly powerful in the realm of criminal justice (Hall, 2011).

### AT: Abolition Won’t Spur Other Improvements in CJR

#### Still vote aff even if other system-wide improvements don’t materialize

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)

AMERICAN CRIMINAL JUSTICE IN THE WAKE OF ABOLITION

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

### AT: LWOP Turn – Abolition => Reassessment of LWOP

#### Abolition will trigger reassessment of LWOP --- the death penalty normalizes extreme sentences

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)

The abolition of the death penalty would also open up the possibility of more frank and skeptical assessments of other extremely harsh punishments—most notably, the sentence of LWOP. Public opinion polls have indicated that support for capital punishment declines when LWOP is available as an alternative sentence (Garrett 2017). As a result, antideath penalty advocates have tended to support, or at least not oppose, the introduction of LWOP sentences as an alternative to the death penalty. Over a period of several decades, LWOP sentences have become firmly entrenched in the American penal landscape and are now available in every state except for Alaska—yet another way in which the United States has become an outlier (exceptional) in its punishment practices (Hood & Hoyle 2015, Mauer & Nellis 2018). In addition to muting opposition to LWOP from the abolitionist community, the continued existence of the death penalty has also worked to normalize other extreme sentences, such as ordinary (parole-eligible) life sentences and lengthy terms of years. It can be difficult to mount a convincing case that LWOP is too extreme and cruel a sentence when its imposition is celebrated as a victory in capital cases. The eradication of the death penalty would free abolitionists from their reluctant support of LWOP and allow a more honest assessment of the cruelty of LWOP and other extraordinarily harsh sentences. Anti-LWOP advocates are already setting the stage for such a discussion when they refer to LWOP as a sentence of death in prison—implicitly analogizing it to capital punishment (Ridgeway & Casella 2014). Furthermore, the end of capital punishment would raise the question of whether some aspects of the especially protective procedural regime currently reserved for capital prosecutions should be extended to prosecutions seeking LWOP or other extreme sentences (Mauer & Nellis 2018).

### AT: Death Penalty Deters Crimes

#### Death penalty doesn’t effectively deter --- several reasons

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)

The Court has also held that the death penalty would be cruel and unusual punishment in the event that it failed to serve a penological purpose. 215 A strong argument can be made that the current administration of the death penalty fails to serve a penological purpose. The argument that the death penalty serves as a deterrent has been long debated. 216 Scholars generally agree that the deterrent value of the death penalty is dependent upon sentencing that is frequent, swift, and provides some level of certainty as to which offenders will [\*299] receive the punishment. 217 The deterrence rationale, however, is undermined by the fact that only a small number of murderers are actually sentenced to death. 218 The deterrence rationale is further undermined by the long delays in carrying out the death penalty. An individual contemplating whether to commit a capital crime is not likely to be deterred by the prospect of being executed many years later.

### AT: Death Penalty Key to Retribution

#### Death penalty fails for retribution --- worst killers often escape execution

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)

Retribution is another acceptable penological purpose that the death penalty could serve. 219 Many argue that the death penalty should be retained as a punishment for the "worst of the worst." However, the retributive justification is undermined by the fact that death sentences are frequently not meted out to the most egregious killers. 220 The retribution theory does not comport with evidence indicating that the individuals frequently sentenced to death are not the worst killers in society and, therefore, are not as deserving of death. The long delays 221 in carrying out the death penalty further undermine the retributive rationale for the death penalty.

### AT: Criminals Deserve It

#### People on death row have a constitutional right to dignity despite crimes

Barry 17. Kevin Barry is a Professor at Qunnipac University School of Law, [“The Death Penalty & the Dignity Clauses”, 2017, 102 Iowa L. Rev. 383, URL: [https://ilr.law.uiowa.edu/assets/Uploads/ILR-102-2-Barry.pdf](about:blank), Date Accessed: 6-21-20] RN

2. Dignity Should Not Be Given to Murderers

Some might argue that people who commit murder (as opposed to, say, innocent gay and lesbian people) do not deserve dignity and, therefore, the law should not provide it. By devaluing others' lives, the argument goes, the value of murderers' lives is net zero; they are something less than human, and so have forfeited their birthright. 313 The dignity of life simply does not apply to them by dint of their crime.

As Chief Justice Roberts stated in another context, "whatever force that belief may have as a matter of moral philosophy, it has no … basis in the Constitution … ." 314 There is no "Except for Murderers" Clause. The Eighth [\*431] Amendment accords those who commit murder some dignity of liberty (e.g., freedom from barbaric punishments) and some dignity of equality (e.g., assurance that their sentence is not imposed arbitrarily). 315 It is, of course, a lesser dignity than the dignity accorded innocents; punishment - by definition - involves the deprivation of liberty and also differential treatment. 316 But it is dignity nonetheless. If people who commit murder retain some dignity of liberty and equality under the Constitution, it does not follow that they somehow forfeit the dignity of life under the Constitution.

### AT: Deters Those Already Sentenced to Life-in-Prison

#### Death penalty is no better at deterring those already sentenced to life-in-prison

* long delays and arbitrary imposition undercut deterrence in this case too
* correctional authorities possess far more effective administrative sanctions than the threat of capital punishment to deter prison violence

Covey, 12 --- Associate Professor, Georgia State University College of Law (Summer 2012, Russel D., Georgia State University Law Review,“Death in Prison: The Right Death Penalty Compromise,” 28 Ga. St. U. L. Rev. (2013), <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2696&context=gsulr>, accessed on 3/13/20, JMP)

One of the most frequently advanced arguments by death penalty advocates is that at least for one class of persons—those already sentenced to life-in-prison—the death penalty is essential to provide some marginal deterrent.49 On closer inspection, however, this argument too appears specious. First, for reasons already discussed, the long delays and arbitrary imposition that characterize the death penalty likely undercut the penalty’s deterrent function for this group as well. Second, there is no evidence that homicide rates among life-sentenced prisoners are any greater in states with no death penalty than in states with a death penalty.50 The likely reason is that correctional authorities possess far more effective administrative sanctions than the threat of capital punishment to deter prison violence. For example, corrections officers may use detention in solitary confinement cells and loss of institutional privileges. Indeed, studies show that prisoners serving life sentences are far less violent as a class than those serving definite terms.51

### AT: Necessary to Prevent Anarchy / Lynch Mobs

#### Death penalty isn’t necessary to prevent dangerous mobs or push for anarchy

Covey, 12 --- Associate Professor, Georgia State University College of Law (Summer 2012, Russel D., Georgia State University Law Review,“Death in Prison: The Right Death Penalty Compromise,” 28 Ga. St. U. L. Rev. (2013), <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2696&context=gsulr>, accessed on 3/13/20, JMP)

2. Delay and Retribution

This systemic delay robs the death penalty of much of its ability to serve as an effective retributive institution. To many, justice delayed is justice denied. After delays of one or more decades, a community may long have forgotten the details or the emotional excitement that accompanied the crime. The prosecutors, judges, and jurors who participated in the capital trial may well have moved away, retired or died. The community may have changed, or they may have tired of the matter. For example, while most of the world was transfixed by the events leading up to the execution in 2011 of Troy Davis, who had been convicted and sentenced to death in 1991 for the murder of a Savannah police officer, some Savannah residents stated their preference to “move on” and claimed to pay little attention to the controversy.35 “It’s fresh around the world, but it’s old news to us,” one resident stated, adding that “[a]bout half [of local residents] are interested and the other half are over it and just want to turn on the game.”36

Given the routine delays between sentence and execution, many retributive justifications for the death penalty appear spurious. One such justification is based in an acknowledgement of a proper place for vengeance in criminal punishment. In affirming the constitutional validity of the death penalty in Gregg v. Georgia, the Supreme Court reasoned that retention of the death penalty was a necessary concession to man’s baser instincts.

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a free society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they “deserve,” then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.37

The notion that the state’s choice is between mob lynching and state execution may have had some historical basis, at least in certain parts of the American South.38 But given the routinely long delays between sentence and execution that are characteristic of the modern death penalty, it is hard to take this idea seriously today. Certainly, it is hard to see how the uncertain prospect of an execution ten or more years in the future would satisfy the supposed bloodlust of a vigilante mob so impatient for justice that it cannot even wait for a conventional trial and appeals process to conclude. The claim that capital punishment is necessary to quell the impulse of the mob, moreover, is further diminished by the experience of the fourteen states that have abolished the death penalty without any apparent epidemic of vigilante justice. There is no reason to believe that sentences of death-in-prison would provide insufficient retribution or fail to neutralize the community’s thirst for vengeance and prevent a return to the bad old days of lynching.

### AT: Key to Closure for Victims

#### Death penalty hurts victims even more --- drags their families through appeals, writs and possible retrials

Bala & Rizer, 18 --- \*criminal justice senior fellow with the R Street Institute and a former Baltimore public defender, AND \*\*former federal prosecutor and served as a law enforcement officer for 20 years, currently director of criminal justice and national security policy with the R Street Institute (4/5/2018, Nila & Arthur, “Trump's death penalty for drug dealers proposal is bad policy,” <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0406-dealer-death-20180404-story.html>, accessed on 4/18/2020, JMP)

In fact, that is one reason why the Supreme Court has continually cabined the death penalty in the last 50 years, including protecting children and the mentally-disabled from its reach. It is also why death penalty defendants are uniquely afforded far more process in the court system, including lengthy trials and appeals. The additional process makes death penalty cases incredibly expensive. According to the Death Penalty Information Center, the average trial in a federal death penalty case costs more than $600,000 — eight times more than a trial where the death penalty is not sought.

For the most heinous of crimes, life without parole meets the justice system’s goals without wasting resources and further hurting victims. Take the case of serial killer Rodney James Alcala, who murdered at least five young women. Thanks to the additional process the system affords capital-punishment defendants, the mother of one of the young women, Robin Samsoe, had to go through the pain of 30 appeals, writs and a retrial. The judge involved now wishes he’d given Rodney Alcala the option of life, to spare Ms. Samsoe that pain.

#### Long delay undercuts any benefit in bringing closure to victims

Covey, 12 --- Associate Professor, Georgia State University College of Law (Summer 2012, Russel D., Georgia State University Law Review,“Death in Prison: The Right Death Penalty Compromise,” 28 Ga. St. U. L. Rev. (2013), <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2696&context=gsulr>, accessed on 3/13/20, JMP)

Another frequent and powerful retributive justification for capital punishment has emerged from the victims’ rights movement. According to some, the chief benefit of capital punishment is the sense of “closure” it brings to the victim’s loved ones.39 But here, too, the purported benefits of the death penalty are defeated by the long delay between crime and execution. Far from providing closure, a death sentence often portends years of uncertainty for victims’ families, who wait throughout the long appellate and collateral review process for the ultimate punishment to be inflicted. Family members may suffer extreme anxiety and emotional upheaval when executions are scheduled and then stayed by courts, sometimes repeatedly, over many years.40 Family members are often compelled to testify in subsequent court proceedings and before clemency boards who review applications for relief by the condemned prisoner. They are interviewed by the media, and are asked again and again to relive what is likely the worst experience of their lives.41 This experience must feel nothing like justice to anyone who lives through it, but rather a kind of mindless bureaucratic torture.42 Finally, when executions do occur, family members usually express, more than anything else, a sense of numb relief that the long ordeal is over. Indeed, this relief is often followed by bouts of depression brought about by the realization that the execution of the perpetrator will not bring back a loved one or change the circumstances of that family member’s life.43

Death-in-prison promises to deliver more closure to grieving family members than the dysfunctional death penalty ritual. Because punishment is imposed immediately upon sentence, whatever “closure” the community obtains from punishment will be experienced at the moment of sentencing, not years later. Family members of victims need not spend years waiting to see if the penalty will finally be carried out, nor feeling cheated of justice when the execution—for whatever reason—does not occur. Indeed, many family members currently consent, when consulted by prosecutors, to a plea bargain rather than demand a death penalty trial for the perpetrator precisely because they believe that such a path offers a quicker route to “closure.”44 By consolidating trial, sentence, and the imposition of sentence, healing might commence sooner and communities might heal faster than they do in jurisdictions where executions are carried out years, and often decades, after the crime.

### AT: Can Escape Prison

#### Escape risk really low and can be mitigated

Covey, 12 --- Associate Professor, Georgia State University College of Law (Summer 2012, Russel D., Georgia State University Law Review,“Death in Prison: The Right Death Penalty Compromise,” 28 Ga. St. U. L. Rev. (2013), <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2696&context=gsulr>, accessed on 3/13/20, JMP) **\*\*\*Footnote Number 100**

100. Of course, unlike executed prisoners, imprisoned defendants can, in theory, escape from prison. The odds of escape are sufficiently remote, however, to make the threat almost entirely insubstantial. Moreover, because condemned prisoners currently spend such long periods in prison awaiting execution, the marginal risks posed by withholding executions are extremely minimal. Death-row prisoners currently pose the same escape risks as LWOPers during the decade or more wait for execution, and presumably both the risk of escape and the risk that the prisoner poses to society only diminishes as the prisoner gets older. In addition, prisoners who pose heightened risks of escape can always be housed in heightened security, supermax-type, facilities from which escape is virtually impossible. For all these reasons, most commentators acknowledge that there is no significant difference between lifetime imprisonment and a death sentence from an incapacitation standpoint.

## Dignity Adv

### Death Penalty => Fundamentally Immoral

#### Death penalty is fundamentally immoral --- it assumes absolute guilt on the part of the offender and absolute innocence on the part of the society

Johnson 18 --- professor of justice, law and criminology at American University (Robert, Condemned to Die: Life Under Sentence of Death, ebook from University of Michigan, pg.125-127, JMP)

Imperfect Justice

Other aspects of the condemned prisoners’ experience with the administration of capital punishment, particularly in the courts, suggest a related moral argument against the death penalty. The essence of this position is that an imperfect justice system operating in an imperfect world is not morally qualified to exact the ultimate punishment of death, which requires absolute guilt on the part of the offender and absolute innocence on the part of the society that stands in judgment of one of its own. Imperfections in the justice system, let alone in the larger society, were obvious to the condemned prisoners and served to underscore their beliefs about the injustice of both death row confinement and the death penalty.

The frailty of human beings and their judgments seems painfully apparent to condemned prisoners. Absolute judgments, they know, terminate lives that might be rehabilitated and allowed to make partial reparations for the harms they have caused. Though none of the prisoners spoke of having read Camus on the crucial link between the moral status of judges and the morality of their judgments, the intuitive validity of Camus’ arguments would be apparent to them. They stand squarely on the moral terrain of which he writes.

There are no just people—merely hearts more or less lacking in justice. Living at least allows us to discover this and to add to the sum of our actions a little of the good that will make up in part for the evil we have added to the world. Such a right to live, which allows a chance to make amends, is the natural right of every man, even the worst man. The lowest of criminals and the most upright of judges meet side by side, equally wretched in their solidarity. Without that right, moral life is utterly impossible. None among us is authorized to despair of a single man, except after his death, which transforms his life into destiny and then permits a definitive judgment. But pronouncing the definitive judgment before his death, decreeing the closing of accounts when the creditor is still alive, is no man’s right. On this limit, at least, whoever judges absolutely condemns himself absolutely.111

**\*\*\*start of footnote #111\*\*\***

111 Camus (1969: 221): The human basis of social institutions is intentionally distorted by some, who argue that their very imperfections must be shielded by a cloak of false majesty. Perversely, the death penalty is advanced as a means of securing popular support for the fiction that law and government are grounded in an immutable moral order. For example, “Capital punishment . . . serves to remind us of the majesty of the moral order that is embodied in our law and of the terrible consequence of its breach. The law must not be understood to be merely statute that we enact or repeal at our will and obey or disobey at our convenience, especially not the criminal law. Wherever law is regarded as merely statutory, men will soon enough disobey it, and they will learn how to do so without any inconvenience to themselves. The criminal law must possess a dignity far beyond that possessed by mere statutory enactment or utilitarian and self-interested calculation; the most powerful means we have to give it that dignity is to authorize it to impose the ultimate penalty.” Thankfully, “only a relatively few executions are required to enhance the dignity of the criminal law” (Berns, 1979: 183).

**\*\*\*end of footnote #111\*\*\***

Compare Camus’ observations with those of a condemned prisoner recorded in the following interview excerpt. Once again there is a recognition of human fallibility—of the capacity to make mistakes, including lethal mistakes. There is also a faith in the possibility for change and reform inherent in every man—if only his fellow man would show tolerance and mercy. There is, finally, the belief that absolute judgments reflect man’s arrogance and folly, and defile the judge more than the object of judgment.

I think about the execution. I question myself. I say, “Now are you that corrupt that you should be killed?” “You don’t believe that you could go back out there into society and make some contribution? Do you feel that you are a wild man?” You know you are going to be killed. And the people say that you should be executed to death for the crime that you did, that to kill a man you have got to be stoned corrupt. You have got to go ahead and get rid of him because he ain’t no good to himself and he ain’t no good to nobody else . . .You think about it—I think about it all the time. I know I’m not that corrupt. I ain’t crazy, you know. I say I know I ain’t that corrupt to whereas I can’t go around nobody unless I’m going to kill them, you know. As for me to say “Kill you,” you have got to be mighty corrupt, you know. Because everybody can change. There’s a chance to change for everybody, you know . . . I feel within the depths of our hearts that you can’t show a court—a real court—where a man is that corrupt. I feel that court that sentences us to death is corrupt.

The collective wisdom of the condemned concerning the justice of the death penalty might be summarized as follows: absolute judgments require absolute guilt of the offender and absolute innocence of the society. To render a sentence of death—a cool, calculated, and irrevocable social judgment—demands no less than this.112 The implication of a death sentence is that the offender deserves death because he is irredeemably corrupt and that society has the right to reach this verdict because it bears no responsibility for the offender’s moral corruption or immoral actions. Society assumes a mantle of innocence; the capital offender, personifying evil, forfeits his humanity. Executions proceed with impunity. When would such conditions be met? Probably never, and surely not with today’s capital offenders, who are invariably drawn from the ranks of the underprivileged and inadequate. Each and every one of these persons can point to mitigating circumstances that relieve them of full culpability for their crimes and partially implicate society in their actions.

**\*\*\*start of footnote #112\*\*\***

112 Life and death decisions necessarily made in the heat of the moment, such as by police officers effecting an arrest of an armed and dangerous suspect or by soldiers or citizens engaged in wartime combat, do not fall into this category when the elements of deliberation and choice are absent, or when the exercise of deliberation or choice would be unduly dangerous. Policemen sometimes have no choice but to fire their weapons in self-defense. Soldiers, similarly, must defend themselves when under attack, and sometimes must launch attacks and counterattacks if they are to carry out their mandate as soldiers. Citizens in time of war sometimes must look to their own lives, even if this requires them to kill invading enemies. None of these extenuating circumstances applies in the case of sentencing criminals. There is always a safe alternative to the death penalty in our perennial war against crime and criminals, namely, a natural life sentence.

**\*\*\*end of footnote #112\*\*\***

To be sure, serious crime cannot be excused or minimized. To speak of mitigating circumstances is not to deny guilt, and to strive for a justice system based on mutual restitution and service is not to dismiss punishment as a response to crime. As a practical matter, justice systems must attempt to dispense justice, even though they may do so imperfectly, punitively, and sometimes inaccurately in the context of unjust societies. The defense for these anomalies may lie in balancing matters of equity, redress, and obligation. Fair procedures must be sought to minimize the likelihood of arbitrary harm at the hands of the law. Final judgments must be withheld so that room remains to correct errors or compensate losses. Some effort must be made to assess a person’s overall debt to society in terms that reflect material benefits bestowed by the society (like wealth and education), rather than solely in terms of obligations incurred as a consequence of crime. The condemned prisoners’ experiences, however, have indicated that the justice system too readily accepts guilt when street crime and criminals are involved; that it is biased against the poor, and especially poor people of color; and that it is susceptible to pressure for convictions in order to allay community fears. The total indebtedness of capital offenders to the society is taken for granted, even in the face of evidence that these men typically received little guidance, support, or even sustenance from the society that now stands in absolute judgment over them (see Chapter 2).

Condemned prisoners have few illusions about human nature or human institutions. They believe that the rubric of legal punishment does nothing to alter the inhumanity of the death sentence. A number of them contemplate suicide as their final response to the justice system, and indeed the suicide rate on death row is high.113 In so doing, they reflect sentiments shared by every prisoner on death row.

What we’re up against is legalized killing. I mean, they give it a name, but I don’t feel they have a right to do this. And judging from the attitudes of the people around here, they are more than anxious to strap somebody in that chair. So I feel that if I can deprive them of this, then in a way I’ve struck back . . . Suicide is just my way of depriving them of something that they lust for.

The tragedy is that these bitter sentiments reflect basic truths about capital punishment. What is capital punishment if not legal homicide? What is death row if it is not a repository for victims of state-sanctioned violence? Is this not a macabre and chilling enterprise, an affront to humanity sufficient to make suicide a rational rejoinder to one’s keepers?

Some would respond that condemned prisoners deserve to die, that those who murder innocent men and women lose the right to live. Any added punishments undergone in the process of carrying out executions, such as those inflicted on death row, are considered unfortunate corollaries of the sometimes ugly and arduous task of doing justice. Now some murderers may in fact forfeit their right to live, though the pathways to death row we have reviewed in this book suggest that they would be few and far between. Arguments about the right to life, sometimes clear in principle, are inevitably murky and complex when one considers individual cases in the real world. In any event, no definitive account of this matter is sought in this book. For even if some murderers do forfeit their right to live, they need not be put to death. 114 There is no duty to take the lives thus forfeited in consequence of crime, particularly in light of the egregious failures of social and legal justice that occur regularly in our society. Indeed, the sparing of life in this context may constitute both a recognition of the awesome violence in which death row confinement and the death penalty implicate us all, and a modest refusal to seek perfect justice in an imperfect world.

#### It's morally indefensible, especially in the current system

Shook 11 John Shook was Director of Education and Senior Research Fellow at the Center for Inquiry–Transnational in Amherst, N.Y., and Research Associate in Philosophy at the University at Buffalo, since 2006. He has authored and edited more than a dozen books, is a co-editor of three philosophy journals, and travels for lectures and debates across the United States and around the world. [“The Humanist Case Against Capital Punishment,” 09-24-2011, *Center for Inquiry,* URL: <https://centerforinquiry.org/blog/the_humanist_case_against_capital_punishment/>] kly

**Humanism cannot support the death penalty**.

Humanism stands for a social ethics of equality, individual human rights, justice for everyone, and government that defend their citizens.

Death penalty supporters appeal to these principles, too. But they narrowly interpret them to justify government killings, and they coldly apply them to the weakest among us. The pro-death side behaves as if some people’s value is higher than others, the rights of the victim outweigh the rights of the accused, the desire for retribution should dictate just punishment, and that the government needn’t defend everyone equally.

The pro-death camp will admit that trials can deliver wrong verdicts. There’s no way to ignore how many defendants get poor legal counsel, and how death-row inmates can be proven innocent on fresh evidence. Yet pro-deathers prefer a criminal system that kills all the murderous guilty along with some innocents over a criminal system that might let a single guilty murderer escape death. The rights of the victims far outweigh the rights of the accused, in their estimation. The blood of the victim on the ground cries out for retribution — any retribution available — and the government’s overriding duty becomes the delivery of that retribution.

Dominated by that vengeful spirit, the criminal justice system encourages prosecutors to chase a conviction of whoever they can, rather than the truly guilty; it distracts jurors from the lofty standard of reasonable doubt; and it lets supervisory courts forget their supreme duty of justice for all. In that heated atmosphere of swift vengeance, the criminal “justice” system mostly executes the poor, the disadvantaged, and racial minorities. Evidently, the pro-death camp is satisfied with a system that can’t value some lives as much as others.

Pro-deathers should broaden their principles. Governments exist not merely to deliver criminal justice, but to protect and defend the lives and rights of everyone. **When a government executes an innocent person, it violates the ultimate justification for its own existence**. The death penalty permits the government to mutate into a loathsome tyrant over its own people, rather than its protector. Other punishment options, especially the life sentence without parole, are sufficient to protect the population and signal disapproval of murder.

Pro-deathers should look inside to ponder this drive to vengeance toward other human beings. The pro-death argument exalts death-retribution as an exemplary valuing of human life. Humanism replies that the rational way to respect human life is to stop killing people. The pro-death side fears weakness in the face of violence against society. Humanism replies that the true strength of a society lies in its commitment to social justice. Pro-deathers are quick to judge who should die and who should live, as if they were a god. Would they want to be on the receiving end of an all-too-human system passing judgment on them?

Humanism stands for **valuing the lives of all, individual human rights, justice for everyone, and governments that defend all of their people**. These grounds alone **are sufficient for abolishing the death penalty**. Humanism also stands for elevating human dignity and pursuing the nobler virtues of common humanity. Even if some perfected criminal system could execute only the truly guilty, such murderous machinery is still unworthy of us. Any institution that still encourages vengeance and retribution over equal social justice and protection of everyone is a decrepit perversion of civilization.

Humanism looks forward to a time when society consistently respects humane virtues. But a day of execution is day of sadness and shame. May we have mercy on us all.

#### **The death penalty is morally bankrupt and justifies other cruel state-sanctioned acts of violence.**

Steiker 5 Carol S. Steiker Henry J. Friendly Professor of Law & Faculty Co-Director of the Criminal Justice Policy Program, Harvard Law School [“No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty,” *Stanford Law Review*, Dec., 2005, Vol. 58, No. 3 (Dec., 2005) pp. 751-789, URL: <http://www.jstor.com/stable/40040280>] kly

Sunstein and Vermeule want to dance to a very different tune. They start with some recent statistical studies of the impact of capital punishment on homicide rates - studies that claim to find strong deterrent effects after controlling for potentially confounding variables with multiple regression analysis. Sunstein and Vermeule do not purport to vouch for the validity of this recent spate of studies, acknowledging that "it remains possible that the recent findings will be exposed as statistical artifacts or found to rest on flawed econometric methods."3 This is a prudent concession, given the powerful reasons that are offered by John Donohue and Justin Wolfers in this Issue,4 along with many other experts,5 to reject this body of work as the basis for any public policy initiative. Rather, Sunstein and Vermeule argue that if such deterrent effects could ever be reliably proven or even if the evidence demonstrated a "significant possibility" that the use of capital punishment saves a substantial number of lives by preventing future murders, then consequentialists and deontologists alike should join in supporting the retention and vigorous use of the death penalty.6 Indeed, they contend that under such conditions, capital punishment should be considered not merely morally permissible (as any consequentialist would hold) but actually "morally obligatory."7 What Sunstein and Vermeule add to prior debates between consequentialists and deontologists regarding the death penalty is their insistence that recognition of the inapplicability of the act/omission distinction to the government as a distinctive kind of moral agent should strengthen the consequentialist argument in favor of capital punishment and undermine deontological objections to capital punishment, under the stipulated conditions of deterrence from which the argument proceeds.8

This argument neatly sidesteps some of the central wrangles in the typical death penalty debate described above. First, under the terms of Sunstein and Vermeule' s argument, there is no need to "draw the line" excluding some extreme punishments (like torture), because the argument **denies the existence of any** such **categorical line prohibiting extreme punishments as a moral matter**;9 the only question is whether the government can prevent more suffering inflicted by future offenders than it metes out as punishment on current offenders. Second, there is no need to address the vexing issue of how to weigh innocent lives of murder victims against (usually, but not always) guilty lives of convicted capital defendants because the argument holds that the government is equally responsible for the harms that flow from its failure to impose the death penalty and for those that flow from its imposition. Thus, all lives (innocent or guilty) are counted equally, and all that remains to do is count: if more private murders would be prevented than executions imposed, the balance favors executions. Third, the argument insists that the distributional problems of arbitrary or invidious infliction of the death penalty disappear as moral problems, at least when there is reason to believe that private murders are at least equally arbitrary or invidious in their distribution. Sunstein and Vermeule contend that the belief that there is a categorical prohibition of extreme punishments or the belief that arbitrariness, discrimination, or error in the distribution of capital punishment count as distinctive moral failures are examples of the operation of a "moral heuristic" - by which they mean a form of moral shorthand that leads to error.10 Specifically, they refer to error arising from the failure to fully appreciate the distinctiveness of the government as am moral agent that must treat the death penalty as an example of a "life-life tradeoff."1

The problem with Sunstein and Vermeule's argument is not their general premise regarding the government's distinctive moral agency, which, as they acknowledge, is likely to be far more congenial to the political opponents of capital punishment than to its supporters. Rather, Sunstein and Vermeule's argument runs into serious problems when they attempt to transplant their insight about government agency from the arena of civil regulation to the arena of **criminal justice**. Sunstein and Vermeule's assertion that the state's execution of murderers is equivalent to its failure to adequately deter murders by private actors ignores the ways in which the construction of a governmental choice as a "life-life tradeoff in the regulatory context does not map congruently onto the criminal justice context, either as a matter of morality or as a matter of justice. As a matter of morality, Sunstein and Vermeule fail to grapple adequately with the fact that for their argument to succeed in the criminal context, they must jettison not only **the act/omission distinction in the context of government action** but also - and less convincingly - **the distinction between purposeful wrongdoing on the one hand and merely reckless** or even knowing wrongdoing **on the other.** Even more problematic is Sunstein and Vermeule's failure to acknowledge the social and political fact that executions are not mere fungible "killings" but rather are part of a practice of state punishment that can be unjust in ways quite distinct from the general wrongness of killing. Sunstein and Vermeule's reduction of the deontological objections to capital punishment to some version of the moral intuition that "killing is wrong"13 thus evades and fails even to acknowledge long-standing and widely discussed deontological objections to capital punishment qua punishment. Moreover, despite their protestations to the contrary,14 Sunstein and Vermeule's argument in favor of capital punishment presents some conceptual slippery slopes upon which only the deontological arguments that they evade can offer some purchase. Their argument is unable to explain why we might not, under conceivable circumstances, be morally obligated to adopt punishments far more brutal and extreme even than execution, or to inflict similarly brutal and extreme harms on innocent members of an offender's family (as punishment of the offender, not of the innocent), or to **extend the use of capital punishment** to contexts in which many deaths result from behavior far less culpable than murder, such as highway fatalities due to drunkenness or negligence. From their moral position, the only arguments available to Sunstein and Vermeule against any of these practices are unsatisfactorily contingent on prudential considerations, which will not always provide plausible reasons to avoid such practices.

Sunstein and Vermeule wish to avoid making an exclusively consequentialist argument that appeals only to precommitted consequentialists. Thus, they insist that their argument not only puts consequentialist justifications for capital punishment on a surer footing but also should be persuasive to some deontologists (at least if the number of lives saved by capital punishment reaches a certain level). Here, too, they fail to see that the context of criminal punishment changes arguments about "threshold" deontology - the acknowledgement by some deontologists that at some "threshold" of catastrophic consequences, categorical moral prohibitions should give way to consequentialist concerns. Perhaps most surprising, it is not only deontologists who will fail to be moved by Sunstein and Vermeule's arguments. If one applies to the question of how deterrence works (when it does) some of the same nuanced consideration of the operation of human cognition upon which Sunstein and Vermeule seek to draw to make their argument in favor of capital punishment, one sees that even committed consequentialists should not be convinced by Sunstein and Vermeule's argument for the retention and use of capital punishment, even under the hypothetical conditions of deterrence that they assume. This response proceeds in five Parts. Parts I and II explain why executions and private murders cannot be viewed as "life-life tradeoffs" either as a matter of morality (Part I) or justice (Part II). Part III explores some of the conceptual slippery slopes that Sunstein and Vermeule cannot avoid. Part IV explains why "threshold" deontologists should not be persuaded by Sunstein and Vermeule's argument, and Part V explains why even their "base" of precommitted consequentialists should not be persuaded, either.

### Death Penalty => Dehumanizing

#### Death row is dehumanizing --- human spirit is destroyed and prisoners essentially die twice

Johnson, 14 --- professor of justice, law and criminology at American University (Robert, Seattle Journal of Social Justice, “Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House,” <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1754&context=sjsj>, accessed on 5/2/2020, JMP)

DEATH ROW AND THE CRUCIBLE OF DEHUMANIZATION

Among America’s high security prisons, the setting that is the most profoundly dehumanizing is death row. Condemned prisoners are warehoused for execution on death row in what amounts to solitary confinement.23 American states with high rates of executions, such as Texas, have the most repressive regimes of solitary confinement on their death rows.24 Research on the experience of death row confinement reveals widespread demoralization in the face of objectively dehumanizing conditions. That demoralization, in turn, is the end result of conditions of death row confinement that render prisoners powerless, vulnerable, and alone, deprived of opportunities to make decisions that affect the course of their lives in any meaningful way. In the words of the prisoners, the condemned are “the living dead”; death row, in turn, is a “living death.”25

To put the matter another way, prisoners on death row are relegated to a kind of existential limbo, existing as entities in cold storage rather than living as human beings with even a modicum of self-determination.26 Thus, for years, and more often decades, condemned prisoners are contained and constrained in solitary cells on death row, knowing that one day they will likely be moved to another cell, this one in the death house, and then finally to the death chamber, the last cell in the modern execution sequence. The death penalty as a penal sanction, though waning in popularity and declining in practice,27 is nevertheless here to stay, at least in the important sense that this penalty has repeatedly passed constitutional muster in relation to most offenders convicted of aggravated capital murder.28 The prisoners thus convicted, waning and declining in their circumscribed lives on death row, are in jeopardy. The threat of execution for them is quite real. At the end of this grim legal procession—from court to prison to death chamber—the condemned are, we know from ethnographic research on male prisoners, “defeated men, men worn down by time and pressure and isolation on death row.”29

The condemned, male and female alike, are well-versed in a dark etiquette of submission. They are, to quote execution team officers from ethnographic research on the modern execution process, “humbled” by force of impending death, making up a class of the “walking dead.”30 These humbled creatures, with very rare exceptions, are more dead than alive; they offer no resistance, instead following the execution script in every morbid detail. Passive acquiescence from persons once considered “the worst of the worst” by the juries that sentenced them to death31 is the essential contribution of death row confinement to the killing process, destroying the human spirit of the prisoners and, in effect, grooming them for the execution chamber. As adumbrated in the profound reflections on the guillotine rendered years ago by the noted French philosopher Albert Camus, “As a general rule, a man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second[.]”32

### Death Penalty => State Sanctioned Murder

#### The death penalty is state-sanctioned murder --- it imbues the State with the supreme moral authority and power

Murphy, 5 (3/21/2005, Stephanie, “Diagnosis: State-Sanctioned Murder,” <https://www.lewrockwell.com/2005/03/stephaniemurphy/state-sanctioned-murder-2/>, accessed on 4/25/2020, JMP)

Some liken the death penalty to killing in self-defense, since, they argue, violent criminals have both the capacity to repeat their crimes and the potential to escape from or be released from prison. Therefore, they pose a threat to society, and must be eliminated. It may be morally legitimate for Bob to kill Ed in the event that Ed directly and immediately threatens Bob's life. However, violent criminals who are executed are not directly threatening anyone when they are put to death. Execution and self-defense are different situations. Moreover, the very fact that the execution is carried out on behalf of the State makes it illegitimate — because the State is not a person, no one can threaten its life, and therefore it does not have a reason to kill in self-defense.

Many states which employ the death penalty also have laws which prohibit physician-assisted suicide. The morality of suicide, physician assisted or self-inflicted, raises an entirely new debate. Regardless, the existence of these contradictory laws essentially declares it permissible for the State to slay an individual while maintaining that an individual may not choose to end his own life. This transfers an individual's very life into the State's exclusive jurisdiction, eroding self-ownership and free will.

The death penalty deifies the State. Many religions explicitly denounce killing as one of the worst possible human behaviors, a pronouncement which is said to originate directly from God. However, the State may engage in murder without consequence; furthermore, many people tolerate State sanctioned killing as moral, necessary, and even humane — thus, the State is implicated as the supreme moral authority and power. Killing a criminal implies that his life has less value than the lives of non-criminals, or of criminals who are "not as bad." But many religions also place an equal value on every human life, and caution that the only true judge is God.

Death penalty proponents cite several benefits of capital punishment. They argue that it acts as a deterrent to violent criminals. They consider it the only just punishment for murderers; they also maintain that it delivers retribution and closure to the families of victims. They deny that sentencing is discriminatory or that the execution may be painful to offenders.

While they may concede that innocents have received death sentences in the past, death penalty proponents increasingly cite DNA evidence as an absolute method of linking violent criminals with their crimes — ensuring that innocent people no longer receive death sentences. Many believe that violent criminals cannot be rehabilitated, and that they have a chance to escape and hurt others as long as they are left alive. Some death penalty proponents also argue that the high monetary cost of the long appeals process necessary before a prisoner can be executed is well justified because of this potential for criminals to escape and cause harm.

Opponents counter that the death penalty doesn't really deter violent criminals. Furthermore, one cannot assume that every family of a violent crime victim would feel closure or relief if a perpetrator were executed. Some consider the death penalty unacceptable retribution. For instance, Coretta Scott King said in a 1981 address to the National Coalition to Abolish the Death Penalty, “An evil deed is not redeemed by an evil deed of retaliation. Justice is never advanced in the taking of a human life. Morality is never upheld by a legalized murder.” Some families of victims may even wish to forgive criminals as part of the healing process.

It is a matter of debate whether violent criminals can ever be rehabilitated or reintegrated with society. The argument about the potential for criminals to escape, however, only addresses prisons' degree of success at keeping criminals under lockdown. It contributes little to a moral justification for State endorsed killing.

Additionally, death penalty opponents say that the possibility of sentencing innocent people to death precludes it from ever being morally acceptable. Unfortunately, the application of the death penalty is irreversible and cannot be rectified if applied in error. Additionally, opponents make the egalitarian argument that certain groups of people — especially those with inferior (i.e., state-assigned) legal council — disproportionately receive death sentences.

None of these arguments, however, truly address the contradiction which lies at the heart of capital punishment: why do we consider it unacceptable for an individual to kill, while simultaneously viewing State killing as both appropriate and necessary?

Central to the issue of State-sanctioned killing is power and autonomy. Granting the State a literal license to kill places every individual's life within the grip of the State executioner's icy hand. Though it may be improbable, it is certainly possible for anyone who lives in a place which practices capital punishment to be wrongly accused, sentenced to death, and executed. That possibility grants the State enormous power — the power to end any individual's life, potentially including innocents. When one stops to consider it fully, this is an egregious concept.

The term "death penalty" is simply a euphemism for the act of State sanctioned murder, ironically carried out under the pretense of justice.

This is not to imply that violent criminals should go unpunished; however, their punishment need not involve the cession of a very dangerous power — the power to inconsequentially end a human life — to the bungling, bloodthirsty, Leviathan State.

### Death Penalty => Torture

#### Death penalty is torture --- its a violation of universal human rights that is unacceptable even to prevent terrorism

Bessler, 18 --- Associate Professor, University of Baltimore School of Law (John D., SAINT LOUIS UNIVERSITY LAW JOURNAL, “WHAT I THINK ABOUT WHEN I THINK ABOUT THE DEATH PENALTY,” <https://www.slu.edu/law/law-journal/pdfs/issues-archive/v62-no4/john_bessler_article.pdf>, accessed on 5/14/2020, JMP)

IX. THE UNIVERSALITY OF RIGHTS

The Universal Declaration of Human Rights states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”136 If nations are forbidden to torture ordinary citizens but are allowed to torture convicted offenders or prisoners, then what the world really has is the Almost Universal Declaration of Human Rights not the Universal Declaration of Human Rights. Rulings of courts themselves have confirmed that no one—not even heinous offenders—should be subjected to acts of cruelty or torture. For example, in 2012, the Grand Chamber of the European Court of Human Rights emphasized and reiterated in discussing the European Convention on Human Rights: “The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned.”137 In other words, consistent with the idea that freedom from torture is a universal, non-derogable right, no one is to be subjected to torturous practices.

To date, the U.S. Supreme Court has been narrowly focused on whether executions carry a risk of excruciating physical pain at the very moment of an inmate’s death. In Baze v. Rees and Glossip v. Gross, the U.S. Supreme Court upheld the constitutionality of lethal-injection protocols in Kentucky and Oklahoma.138 In both of those decisions, the members of the Court focused on whether there was a substantial risk of a physically painful execution if the first drug in a three-drug cocktail was not administered properly at an execution.139 That narrow focus, however, totally ignores the severe psychological torment associated with confinement on death row140 and that associated with death sentences and executions (e.g., the issuance of multiple death warrants in individual cases).141 Capital charges and death sentences involve definitive and clear-cut threats of death, and condemned inmates clearly experience tremendous fear and anxiety and have an awareness of their impending deaths, a critical aspect of declarations of “psychological torture” in the non-state actor context (e.g., pertaining to “torture-murder” determinations).142

### Dignity Solves War

#### **Human dignity solves war – breaks down the principles and justifications for violence and provides productive alternatives**

Hasenclever 14 Professor of Peace Research and International Politics at the University of Tübingen. ["47 - Human dignity and war," from Part V - Conflicts and violence, The Cambridge Handbook of Human Dignity, March 2014, *Cambridge University Press*, DOI: https://doi.org/10.1017/CBO9780511979033.054] kly

**War** as sustained combat between political communities is a **moral evil** (Walzer 2006; Levy and Thompson 2010). War signals the breakdown of law and order and develops a deadly dynamic of its own. Conflicts are no longer settled by moral reasoning, legal adjudication or political negotiation, but by well organized armed forces. War always goes along with death and destruction. Troops are moved strategically to overcome violent resistance and to defeat an enemy. As a rule, not only fighters are victimized on the battlefield, but entire societies suffer. The number of non-combatants dying from the direct and indirect consequences of sustained combat such as economic shortages, famines, displacement or disrupted healthcare and social security systems by far exceeds military casualties. Additionally, warfare goes along with the categorization, and, in most cases, dehumanization of opponents. Adversaries are no longer considered individual human beings but enemies who may be killed without further justification. Given the recent increase in ethnic conflicts, the traditional distinction between combatants and non-combatants blurs even further. War was never restricted to the battlefield, but today’s wars more than ever target civilian populations. Depending on the severity of the fighting and the number of atrocities committed, it takes a generation or more to overcome the social disruptions of war and to re-establish a robust peace among former combatants and their successors.

Human dignity, by contrast, requires the peaceful settlements of disputes among as well as within societies (Gewirth 1996: 1–70; Steigleder 1999: 157– 75). Individuals and groups should be treated according to **established human rights standards**. They are entitled to **life in peace** and their legitimate interests should be protected by appropriate institutions. The distribution of rights and obligations within as well as among societies should be clearly specified and generally respected. In cases of transgression, a public authority should intervene to restore justice and to punish the offender if appropriate and reasonable. As such, **the settlement of conflicts by well-recognized human right standards contradicts their settlement by the use of well-organized armed forces**. In fact, human dignity requires the abrogation of war.

Even though war is a moral evil and should be avoided, throughout history respected scholars and practitioners maintain that under strict conditions war might be the lesser evil (Walzer 2006; Fisher 2011). In cases of external or internal aggression, victims might have a right to collective self-defence including the use of armed forces. Additionally, under certain circumstances third parties are entitled, if not required, to intervene militarily and to advance peace and justice. To decide whether war in fact should be considered the lesser evil a number of criteria have been developed which are summarized under the heading of the so-called ‘just war tradition’ (Rengger 2002).

In the following, I summarize the basic principles of the just war tradition. I argue that these principles are of a formal nature and that it is necessary to link them to a substantive conception of morality. In a second step, I elaborate on the emergence of human dignity and the corresponding human rights as core values of the international system. Finally, I discuss whether warfare might be under certain conditions an appropriate instrument to protect population from large-scale and systematic human rights violations. In my opinion this is rarely the case. While **respect for human dignity entitles threatened persons to be rescued** under conditions of mass atrocities, **military intervention** more often than not is inappropriate to sustainably improve the human rights record in the target region.

#### Renders justifications for war impermissible – addresses the root causes

Hasenclever 14 Professor of Peace Research and International Politics at the University of Tübingen. ["47 - Human dignity and war," from Part V - Conflicts and violence, The Cambridge Handbook of Human Dignity, March 2014, *Cambridge University Press*, DOI: https://doi.org/10.1017/CBO9780511979033.054] kly

War for the protection of human rights?

Let us assume that a government commits mass atrocities against its own people. Let us further assume that a military intervention would stop the killing, that enough troops are available and that the UN Security Council had already sanctioned their deployment under Chapter VII of the UN Charta. To justify a military intervention from a human rights perspective, however, two further requirements must be met: the use of force clearly has to be the lesser evil and the use of force must help to re-establish peace and justice on the affected territory. As to the first requirement, since warfare always kills non-combatants, it is still an open debate how to balance the benefits of military protection against the unavoidable loss of innocent life. On the one hand, proponents of the just war doctrine answered this question with reference to the so-called ‘principle of double effect’ (Orend 2006: 115–18; Walzer 2006: 153). To protect a population from mass atrocities, innocent civilians might be harmed if harm occurred as the unintended consequence of otherwise legitimate and necessary military activities. The benefits of the use of force, however, must clearly outweigh the collateral civilian casualties. Additionally, we should have strong reasons to believe that the beneficiaries of the intervention do prefer the risks that are associated with the deployment of troops over the continuation of the status quo ante. Or, as Teson ( ´ 2003: 121) has put it: ‘Citizens of a state would ideally agree that humanitarian intervention should be allowed for extreme cases of injustice even at the cost of the deaths of some innocents, and even if some of those citizens will inevitably be those persons.’

On the other hand, a growing number of scholars doubt whether military necessity in facthas the power to override individual human rights even if the use of force serves to repel aggression and to restore justice (Fiala 2008; Hidalgo 2009). For them, any armed protection of endangered populations cannot be but tragic. Warfare always implies the loss of innocent life and it is hard to justify why some persons must die for other persons to be rescued. From this perspective, just war considerations ultimately rest on a consequentialist calculus even though this calculus is necessarily related to the human rights discourse and the entitlement of all persons to life in a ‘community of rights’ (Gewirth 1996). In cases of just wars, the creation of public goods and the defeat of a criminal government outweigh individual rights at least to the extent that the recognition and enjoyment of individual rights presuppose a well-ordered society. Therefore, it might be more appropriate not to focus on military necessity but on political necessity when it comes to decide to what extent force should be used in an emergency situation – if it might be used at all.

For the second condition to hold, warfare has to advance peace and justice. Fundamental human rights must be better protected after a just use of force than without it. While it is always possible to cite individual cases of success such as the outcome of the Second World War, most of the time warfare does not result in a decent and stable political order (Chenoweth and Stephan 2011; Wallensteen 2012). This is especially true for internal armed conflicts that represent the dominant form of contemporary warfare. First of all, recent research shows that civil resistance has a far better success record than armed struggle even under comparable conditions. Second, civil wars tend to recur. The risk of a new armed conflict after the settlement of an old one is desperately high. Moreover, the prospects of democracy after a civil war are very limited. This is also the case for military interventions with the explicit goal of advancing democracy in target countries. Similarly**,** military interventions tend to undermine the respect for core human rights in the target country. What is even more frustrating, the success rate of multilateral peace operations by the United Nations and other international organizations is far from satisfactory. While the prospects of stability are somewhat higher than in cases without a peace mission, the root causes of violence are rarely addressed, leading to so-called ‘no war, no peace’ situations (MacGinty 2010). As a consequence, not only are the odds for a new outbreaks of violence high, it also remains questionable whether the protection of human rights was enhanced to the degree necessary to justify the loss of innocent lives by the military operation.

Even though the track record of multilateral peace operations might be considerably improved by better funding and stronger leadership, until today the international community evidently lacks the political will to promote the necessary reforms. In the end, therefore, more and more scholars argue that the resources used for multilateral interventions might be better invested in development projects and the prevention of armed conflicts. By these means, the global human rights record might be better served than by the use of force. Given the tragic nature of military intervention, what counts in the end is the comparative advantage or disadvantage of the use of force for the provision of utterly needed public goods.

Conclusion

In principle, the use of armed forces to repel aggression and to protect endangered populations from mass atrocities can be morally justifiable within strict limits. The bar, however, is high if human dignity and the corresponding human rights are accepted as the guiding criteria. This is especially true for humanitarian interventions. While the genocides in Rwanda and Darfur cried for outside help that did not materialize, the experiences with those military interventions that did occur after the end of the Cold War are not encouraging. In most cases, they failed to accomplish their mission successfully. Either the civilian death toll was very high or the political situation on the ground remains unstable. Given both the prevalent reluctance among military powers to use their armed forces in clear cases of mass atrocities and the disappointing record of those missions that tried to advance peace and justice in war-torn societies, two lessons have to be drawn. First, the international community in general and the industrial countries in particular should increase their engagement for crisis prevention and the peaceful settlement of conflicts. Additionally, they should target the root cause of violence, namely, poor economic performance and bad governance. Second, the member states of the United Nations should make the world organization fit for successful military intervention when everything else has failed to protect endangered populations from mass atrocities. However, as long as there is no clear progress in both dimensions, it remains disputable whether powerful states really care for the responsibility to protect when they intervened militarily in armed conflicts beyond their borders – even if they maintain the contrary. In the final analysis, therefore, the principles of the just war tradition should be used more as a critical tool for the assessment of contemporary wars and military intervention than as an instrument to legitimize the use of force.

### Dignity Solves Climate / Environment

#### Human dignity key to climate activism

Amnesty 19. Amnesty International is a global movement of more than 7 million people who take injustice personally, they campaign for a world where human rights are enjoyed by all, ["Announcing the first ever global summit on human rights and climate change," 7-9-2019, *Amnesty International*, URL: https://www.amnesty.org/en/latest/news/2019/07/announcing-peoples-summit-on-climate-rights-and-human-survival/] RN

Real solutions to the climate breakdown must place people and our fundamental rights at the core. This is an invitation to all those who value human dignity and wellbeing to fully throw their weight behind the call for global climate justice. And to those working to protect our planet to center their efforts in communities, particularly the people most impacted and least responsible for the climate crisis.

The human rights community can bring key constituencies, power and skills to the fight for climate justice. The strength of a collective movement to overcome the climate crisis needs to match the gravity of the problem. Our organisations are coming together to make it happen, and we are urging the environmental and human rights communities to join us.

To meet the challenge we, the people, must be more connected with each other and more committed to our planet than ever before. This is a matter of survival. Rampant carbon emissions have triggered unprecedented, dangerous and destabilising changes in our climate. Corporate and governmental neglect has already exposed millions to increasingly extreme weather disasters. We must reverse course now; the window of opportunity to act is closing.

Make no mistake. The impacts of climate change already hinder our rights to health, food, water, housing, work and even life itself. These impacts are even more severe for people already in vulnerable situations in places impacted by severe weather, poverty or oppression. Our societies cannot keep on like this. People need access to justice, governments must work for the people and corporations need to be accountable for their actions.

Now is the time to act. The signs of a shared will to do so are everywhere. Students are taking to the streets to call for a safe future. Indigenous Peoples are speaking up for the defense of land, water and communities’ rights. Workers are demanding safe and well-paying jobs in better, cleaner industries. Women’s rights activists are putting forward a wealth of feminist solutions. Religious leaders are calling on us to protect communities and nature. Scientists are gathering and sharing evidence to guide us out of the crisis.

We know the challenge, and the answers are there. Solutions are available now, including renewable energy sources, respect for fundamental rights and traditional knowledge, and a true focus on the needs of the people over corporate greed.

All of our organisations work on climate change already, some more explicitly than others. But now is the moment for us to connect the dots between our causes and join forces. A climate emergency is upon us, and we must act now.

Environmental human rights defenders, Indigenous Peoples and local activists have long risked everything to fight environmental degradation. They are now joined in their struggle by growing mass movements such as the school climate strikes, Extinction Rebellion and campaigners calling for a Green New Deal.

In this new era of climate activism, the human rights community cannot remain on the sidelines. It is more urgent than ever that we step up by working together to protect the communities and individuals on the frontlines of the climate struggle.

That is why 150 non-governmental leaders and activists from different communities are coming together on September 18 and 19 for the 'Peoples' Summit on Climate, Rights and Human Survival’. Our organisations will be there along with the UN Human Rights Office to support people demanding immediate and ambitious climate action from their governments to protect communities. We believe in unleashing the potential of a diverse movement to safeguard present and future generations. We are united to demand climate justice.

#### Focus on dignity accelerates climate change action

Kingo 18. Lise Kingo is CEO & Executive Director United Nations Global Compact, [“Human rights as a driver of climate action and sustainable development”, *GreenBiz*, 12-6-18, URL: <https://www.greenbiz.com/article/human-rights-driver-climate-action-and-sustainable-development>] RN

The rights set out in the Universal Declaration are simultaneously straightforward and expansive — encompassing, for instance, the right to life, the right to work and the right to an adequate standard of living, including food, clothing and housing. The declaration establishes the essential framework necessary for human dignity. Conversely, climate change threatens not just individual rights but the very foundations necessary for individuals and communities to survive and flourish.

Businesses around the world are rising to the challenge of building a low-carbon economy. Thousands have made commitments towards the Paris Climate Agreement, and hundreds have set science-based targets in line with that agreement. But we should not be putting out the fire while ignoring the people affected. As companies accelerate action on climate change, it remains vital that such action is founded on respect and support for human rights.

Solar panels in Liberia

Climate change, together with the actions we take to combat it, is fundamentally transforming how we live and work. Even as green job opportunities continue to increase, other individuals and even whole communities are struggling with the fast pace of change. We are at risk of exacerbating poverty and inequality if we don’t seek to build a low-carbon future that works for all of us. On the other hand, this moment of enormous change also presents us with an opportunity to build a future that is good for the environment, the economy and society simultaneously — the world envisaged in the 2030 Agenda for Sustainable Development.

A distinctly human rights-based agenda, the 2030 Agenda and its 17 Sustainable Development Goals light the way forward to creating the world we all want. And while Goal 13 is specifically on climate action, the interconnectedness of these Global Goals underscores how a healthy planet also leads to thriving communities and an inclusive economy. However, the urgency of climate change, as evidenced by the latest IPCC report, among many others, has put Goal 13, together with the Paris Agreement, in the spotlight.

But respect for human rights does not mean slowing down our actions to combat climate change. If anything, it is essential that we move even faster toward a zero carbon economy: as the Office of the United Nations High Commissioner for Human Rights (OHCHR) has observed, "The negative impacts of climate change are disproportionately borne by persons and communities already in disadvantageous situations owing to geography, poverty, gender, age, disability, cultural or ethnic background, among others, that have historically contributed the least to greenhouse gas emissions."

### Dignity Solves Root of Terrorism

#### Framework of dignity in the government solves root cause of terrorism

United Nations 15. ["Human Rights, Participation ‘Among Our Most Powerful Weapons’ against Terrorism, Says Secretary-General in Remarks to Summit on Violent Extremism," 2-19-15, *United Nations*, URL: https://www.un.org/press/en/2015/sgsm16537.doc.htm] RN

No cause or grievance can justify such crimes. I commend Member States for their determined political will to defeat terrorist groups. We must do all we can to neutralize this threat. That means responding decisively and concretely. But it also means being mindful of the pitfalls.

Many years of our experience have proven that short-sighted policies, failed leadership and an utter disregard for human dignity and human rights have caused tremendous frustration and anger on the part of people who we serve.

We will never find our ways by discarding our moral compass. We need cool heads. We need common sense. And we must never let fear rule.

In that spirit, I see four imperatives for our common efforts to protect people and uphold human dignity.

First, preventing violent extremism demands that we get to the roots. Looking for the motivations behind extremism is a notoriously difficult exercise.

Yet we know that poisonous ideologies do not emerge from thin air. Oppression, corruption and injustice are greenhouses for resentment.

Extremist leaders cultivate the alienation that festers. They themselves are pretenders — criminals, gangsters, thugs on the farthest fringes of the faiths they claim to represent.

Yet they prey on disaffected young people without jobs or even a sense of belonging where they were born. And they exploit social media to boost their ranks and make fear go viral.

Extremists have a strategy for hate. We need a comprehensive strategy for harmony, meaningful integration and peace.

Second, preventing violent extremism and promoting human rights go hand in hand.

Time and again we have seen that the most effective recruiting agents for extremists are the very actions taken against them. All too often, counter-terrorism strategies lack basic elements of due process and respect for the rule of law.

Sweeping definitions of terrorism are often used to criminalize the legitimate actions of opposition groups, civil society organizations and human rights defenders. Governments should not use the fight against terrorism and extremism as a pretext to attack one’s critics.

Extremists deliberately seek to incite such over-reactions. And we must not fall into those traps.

Third, preventing violent extremism requires an all-out approach.

Military operations are crucial to confront real threats. But bullets are not the “silver bullet”.

Missiles may kill terrorists, but good governance kills terrorism. We must remember that.

Human rights, accountable institutions, the equitable delivery of services and political participation — these are among our most powerful weapons.

We must also teach our children compassion, diversity and empathy. Education will play a decisive role — in school and home alike — in winning the battle for the minds of future generations.

#### Lack of human dignity is root cause of terror

Lagon and Arend 14. Mark P. Lagon is Chief Policy Officer at Friends of the Global Fight Against AIDS, Tuberculosis and Malaria, as well as Distinguished Senior Scholar in the Walsh School of Foreign Service, Georgetown University, Anthony Clark Arend is Professor of Government and Foreign Service at Georgetown University, [“Human Dignity and the Future of Global Institutions”, *Georgetown University Press*, 2014, Project MUSE, URL: muse.jhu.edu/book/35215] RN

V. The International Community Needs to Address the Root Causes of Terrorism

Whereas much of the focus in recent years has been on counterterrorism and efforts to prevent terrorist attacks and capture individual terrorists, a human dignity perspective suggests that the international community should seek to understand and address the root causes of terrorism. By addressing the root causes, it is hoped that the incidence of terrorism could be greatly reduced, even if it’s never eliminated. But what causes human beings to become terrorists? In order to attempt to answer this question, it is important to recognize distinctions among different types of terrorism and different types of terrorists.

When continental Europe was being hit with a wave of terrorist activities in the 1970s, the German scholar Claus- Dieter Kernig drew the distinction between what he called “terrorism with a goal” and “terrorism without a goal” (Kernig 1978). Into the first category, he placed groups that had clear, identifiable policy goals. These groups adopted terrorist tactics as a means to achieving those goals. Thus, for example, ETA, the Basque group, had the explicit goal of establishing an in de pen dent Basque state. The Palestine Liberation Organization and the IRA had similarly concrete goals. Indeed, when Al Qaeda was created, its leadership articulated a series of demands that undergirded their raison d’être.

The designation of the second type of terrorism, terrorism without a goal, should not be taken too literally. If the leaders of these groups were to be asked, they would undoubtedly describe a series of goals. The main difference here is that the goals these groups articulate seem to translate into a desire for a complete overhaul of the entire established political, economic, or social system. Such groups would include the Baader-Meinhof Group, the Red Brigade, the Red Army, Aum Shinrikyo, and even the Symbionese Liberation Army. These groups seemed to engage in terrorism to rage against the system as a whole. Even if public officials wanted to respond to address their concerns, there would be no way to effectively address their demands.

Another critical distinction to make when attempting to understand the root causes of terrorism is the distinction between the leadership and the foot soldier. On one side are the Osama Bin Ladens and the Mullah Omars, and on the other is the fifteen-year old with a bomb strapped to her body. Although the leaders may be motivated by an established ideology or clear political goals, foot soldiers may not be. Foot soldiers may be coming from a society that is ungoverned and rife with poverty, unemployment, and political corruption. They might feel disenfranchised and lost. Indeed, to use the theme of this book, such people may feel that their human dignity has been stripped. They may feel a loss of agency and the inability or unwillingness of society to grant recognition to their personhood. Then, into such people’s seemingly hopeless lives comes a group that promises to give life meaning and a sense of belonging. Although it is impossible to draw a definitive conclusion, such a motivation could indeed be an important reason that many join a terrorist cause.

In efforts to address the causes of terrorism, these distinctions need to be considered. First, for groups that have concrete political goals, international institutions and states need to seek to understand these goals. And although they should not feel an obligation to yield to terrorist blackmail, they should realistically deliberate on the political goals that have led groups to engage in terrorist tactics and seek a resolution that is ultimately just and fair. Second, given that many foot soldiers may be less motivated by a concrete ideology or specific political goals and more inspired by their need to reclaim their human dignity, the international community needs to address the conditions in society that have led persons to feel powerless and without dignity.

Recommendations for Global Institutions

One of the implications of these propositions is that in order for human dignity to be given effect, institutions— both traditional and emerging— must take a holistic approach to the problem. In the past, states and IGOs have understandably tended to focus their attention on the more immediate aspect of terrorism— counterterrorism—and have not focused on the more systemic problems that lead to terrorism. To effectively promote human dignity in the wake of terrorism, however, both the immediate challenge and the underlying problems must be addressed. Accordingly, I would make these recommendations for action by a variety of global institutions.

### Can’t Violate Human Dignity

#### \*\*\*this answers the argument that death penalty is justified because murder, etc was a violation of another person’s human dignity

#### Death penalty kills a person twice --- violates human dignity which all other rights flow from

Johnson, 14 --- professor of justice, law and criminology at American University (Fall 2014, “SEATTLE JOURNAL FOR SOCIAL JUSTICE: Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House,” 13 Seattle J. Soc. Just. 583, Nexis Uni via Umich Libraries, JMP)

A central premise of human rights thinking is that each and every human being has an innate dignity that must be respected. Respect for one's human dignity is the original human right from which other human rights [\*584] flow. 1 This begs two closely related questions: "What does it mean to be a human being?" and "What does it mean to respect a person's human dignity?" In sketching an answer to these questions, I will offer what might be called a working definition of human nature and the human dignity possessed by all human beings by virtue of their status as human beings. Using this working definition, I will argue that the death penalty is inherently dehumanizing and hence is a violation of human dignity and human rights.

HUMAN NATURE AND HUMAN DIGNITY

At its core, the answer to the question, "What does it mean to be a human being?" starts with the matter of consciousness. Human beings are endowed with the capacity for a conscious awareness of self that marks the individual as distinct and separate from others; that conscious awareness is found in a world that exists independently of individuals and can be understood objectively through the use of reason. 2 Individual distinctiveness is understood through the use of the unique human capacity to reason about the world and one's place in the world, which in turn entails the capacity, and ultimately the obligation, to bear responsibility for one's life as a continuing moral enterprise. 3 Reasoning thus makes it possible to understand oneself as having a life that can be [\*585] reflected upon and understood to be one's own, for which one is responsible; and, further, to understand that this awareness and its consequences--that is, individual consciousness, identity, and moral obligation--are necessarily true for other human beings as well. 4

Awareness that one has a life that can be understood to be one's own conveys the capacity to make choices that shape the course of one's life, which is to say, choices that permit self-determination. 5 Self-determination is necessarily achieved in the world of other human beings through a process of self-defining social interactions. 6 No human being is born in isolation from others or lives in isolation without the implicit permission of others. We are born into a society composed of others who, like ourselves, possess the capacity for autonomous thought and action, and who must be seen and treated as intrinsically equal in kind and value to us because they are fellow human beings. 7

Human beings shape their distinctive characters through selfdetermining choices and actions. We are self-directed, in that choice and action come from within. We are also connected to others outside ourselves, those who comprise the social context against which individuality is situated and in which choices and actions are grounded. 8 No human being, to paraphrase the great metaphysical poet John Donne, is [\*586] an island secure unto him- or herself. 9 We are separate yet part of the whole, always working out our lives in relation to the possibilities embodied in the social world, the world formed by the decisions and actions of ourselves and others. 10

The answer to the second question, "What does it mean to respect a person's human dignity?" comes down to acknowledging their humanity, a humanity shared by all human beings by virtue of being human beings. Awareness of self, reason, choice, connection to others--these are part and parcel of what it means to be a member of the human species. 11 These attributes, in turn, convey the moral right to live as a human being, which is to say, to act on one's awareness of self, to use reason, to make choices, and to take into account the existence and corresponding rights of other human beings. The essential respect due another human being is to treat him or her as a human being with the right to live as a human being. To be sure, the capabilities that undergird our humanity vary over the life course and among individual persons--in awareness of self, in reasoning power, in insight, in the capacity to see others as like oneself and, indeed, in the ability to see oneself in others, often captured in the notion of empathy. These capabilities vary as a function of genetic, congenital, developmental, or environmental factors. Yet even with such variations, all human [\*587] creatures share an essential humanity and, by virtue of that endowment, possess human dignity and hence the right to be treated like human beings.

CRIME AND CHOICE: CHOOSING CRIMINAL PUNISHMENTS

In the area of crime and punishment, we stipulate that the vast majority of human beings are responsible for their criminal choices, even if there are factors in their lives--such as abuse, neglect, or discrimination--which limit action or cause damage that in turn mitigates or reduces that responsibility. 12 Criminal choices result in actions that typically, perhaps necessarily, violate the human dignity of the victims, who are treated like objects or animals, not fellow human beings. But when we punish criminals, we explicitly seek not to replicate the essential criminal quality of the crimes in question; we seek not to dehumanize, but rather to hold accountable the human beings who committed the crimes and who, moreover, deserves to be held accountable for criminal actions they chose to commit. 13

Punishment that dehumanizes is itself a crime; punishment that respects the human dignity of the criminal is justice. In the matter of crime and just punishment, criminals dehumanize their victims but, ideally, the punishments meted out in society's name do not dehumanize the criminals. Punishment is meant to entail sanctions that reflect a moral point of view. 14 The person punished should deserve that punishment and, according to Plato's Laws, should emerge from that punishment "a better man, or failing this, less of a wretch." 15 In a similar vein, in his Nicomachean Ethics, Aristotle famously claimed that "punishment is intended as moral [\*588] medicine." 16 Ideally, any given punishment should offer a moral lesson because it is deserved and, hence, right and just. The point of a moral exchange is to offer the possibility for change and even redemption to the wayward offender now in our custody and also our care. Punishment hurts, but punishment should not demean, damage, or extinguish hope by precluding change. 17

Regrettably, criminal sanctions in the real world too often are criminal themselves, trafficking in widespread and pervasive dehumanization and producing a host of harms, some permanent and beyond amelioration. 18 To impose sanctions that damage and dehumanize is antithetical to basic human rights; such sanctions deny and suppress a person's humanity and hence violate one's inherent human dignity. It is critical to note that, as a general matter, and in sharp contrast to practices in Western Europe, "American criminal justice displays a resistance to considering the very personhood of offenders" 19 and a blindness to routine acts of cruelty. 20 Nowhere is the routine violation of the offenders' personhood or humanity more evident than in America's prisons--and especially America's high-security and supermax prisons 21--grim settings to which long-term inmates are routinely relegated. 22

[\*589] Among America's high security prisons, the setting that is the most profoundly dehumanizing is death row. Condemned prisoners are warehoused for execution on death row in what amounts to solitary confinement. 23 American states with high rates of executions, such as Texas, have the most repressive regimes of solitary confinement on their death rows. 24 Research on the experience of death row confinement reveals widespread demoralization in the face of objectively dehumanizing conditions. That demoralization, in turn, is the end result of conditions of death row confinement that render prisoners powerless, vulnerable, and alone, deprived of opportunities to make decisions that affect the course of their lives in any meaningful way. In the words of the prisoners, the condemned are "the living dead"; death row, in turn, is a "living death." 25

To put the matter another way, prisoners on death row are relegated to a kind of existential limbo, existing as entities in cold storage rather than living as human beings with even a modicum of self-determination. 26 Thus, [\*590] for years, and more often decades, condemned prisoners are contained and constrained in solitary cells on death row, knowing that one day they will likely be moved to another cell, this one in the death house, and then finally to the death chamber, the last cell in the modern execution sequence. The death penalty as a penal sanction, though waning in popularity and declining in practice, 27 is nevertheless here to stay, at least in the important sense that this penalty has repeatedly passed constitutional muster in relation to most offenders convicted of aggravated capital murder. 28 The prisoners thus convicted, waning and declining in their circumscribed lives on death row, are in jeopardy. The threat of execution for them is quite real. At the end of this grim legal procession--from court to prison to death chamber--the condemned are, we know from ethnographic research on male prisoners, "defeated men, men worn down by time and pressure and isolation on death row." 29

The condemned, male and female alike, are well-versed in a dark etiquette of submission. They are, to quote execution team officers from ethnographic research on the modern execution process, "humbled" by force of impending death, making up a class of the "walking dead." 30 [\*591] These humbled creatures, with very rare exceptions, are more dead than alive; they offer no resistance, instead following the execution script in every morbid detail. Passive acquiescence from persons once considered "the worst of the worst" by the juries that sentenced them to death 31 is the essential contribution of death row confinement to the killing process, destroying the human spirit of the prisoners and, in effect, grooming them for the execution chamber. As adumbrated in the profound reflections on the guillotine rendered years ago by the noted French philosopher Albert Camus, "As a general rule, a man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second[.]" 32

### AT: No Spillover

#### Empirics show Supreme Court using dignity in their decision sets a precedent

Glensy 11. Rex D. Glensy is affiliated with Drexel University Thomas R. Kline School of Law, [“The Right to Dignity”, 3-2-11, Columbia Human Rights Law Review, Forthcoming; Drexel University Earle Mack School of Law Research Paper No. 2011-W-01, Available at SSRN: [https://ssrn.com/abstract=1775144](about:blank), Date Accessed: 6-21-20] RN

Dignity is not mentioned in the U.S. Constitution, nevertheless it is a concept found in some U.S. Supreme Court opinions. Gerald Neuman has noted that, at least as it pertains to the U.S. Constitution, the U.S. Supreme Court has developed (albeit scantily) certain narratives based on human dignity as it pertains to both Eighth Amendment and Fifth Amendment jurisprudence.99 Other national constitutions, such as that of Germany, however do have explicit clauses dealing with the right to dignity. Major international legal instruments also give importance to the right to dignity enumerating it as one of those foundational blocks of a global regime based on human rights. Nevertheless, this is only the tip of the iceberg seeing that, at least in the last 60 years, the right to dignity has entered the legal discourse in a wide variety of other ways in many different jurisdictions.

i. U.S. Law

The U.S. Supreme Court has referenced human dignity when tasked with interpreting certain provisions of the Constitution.100 These references have been steady, although not consistent, so that there is a partially developed body of constitutional law in the U.S. that deals with some semblance of the right to dignity. One commentator has identified eight broad categories of constitutional claims where the U.S. Supreme Court has invoked dignity in more than just a random fashion.101 As demonstrated below, it is the Kantian vision of dignity that seemingly animates those justices that find in the concept of human dignity a value that relates to certain constitutional clauses. That is, it is a person’s inherent autonomy, integrity, and right to be respected by the government that motivates references to dignity by the U.S. Supreme Court.

What is eye opening regarding the concept of human dignity as having some sort of constitutional value is the fact that one of the first times that the term appears in a U.S. Supreme Court opinion is in Justice Frank Murphy’s dissent in Korematsu v. U.S.102 Korematsu of course is an infamous case where the Court rejected a challenge by a Japanese-American who claimed that his forcible relocation and detention during WWII on the sole grounds of his ancestry was unconstitutional.103 Justice Murphy rejected the contention that the Court had to defer to what the military thought was necessary because “[t]o give constitutional sanction [to the action of the military] is to adopt one of the cruelest of rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups.”104 Justice Murphy returned to this theme in Yamashita v. Styer,105 a case where the Court denied certiorari to a Japanese general who was challenging his detention by American authorities. In dissenting from the denial of certiorari Justice Murphy again opined that the Court was sanctioning activity that only people who do not share an American belief in the values of “due process and the dignity of the individual” would engage in and that if the U.S. was “ever to develop an orderly international community based upon a recognition of human dignity,” it would be best to hear the case at hand.106

From these two examples it can be seen that Justice Murphy equates the destruction of dignity as the basest of human activities by making reference to the fact that this would be an action deign of the U.S.’s enemies during WWII, a fact with which Justice Murphy must have been well acquainted by the time Korematsu and Yamashita were decided. Interestingly, Justice Murphy makes a secondary point: that the actions of the U.S. would have international repercussions that could cause the U.S.’s global status to be questioned if not diminished. Thus Justice Murphy, although applying the concept of dignity in its purest Kantian meaning, also resorts to using it instrumentally as something that is reputation enhancing for the U.S. In doing so, Justice Murphy seemingly makes the claim that the U.S. Constitution does protect against actions that offend human dignity.

Ever since Justice Murphy’s exposition on the right to dignity under the U.S. Constitution, other cases have provided an opportunity to expand on this reading of certain constitutional provisions. Probably the most important of these is Trop v. Dulles where the Supreme Court declared that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”107 Trop, of course, is more famous as the case that announced the modern Eighth Amendment standard as mandating that a particular punishment must conform with “the evolving standard of decency that mark the progress of a maturing society.”108 Fascinatingly, while courts interpreting the Eighth Amendment have readily quoted the “evolving standard of decency” refrain, they are much more reticent to reiterate what Chief Justice Warren declared as “the basic concept underlying” the amendment. Nevertheless, this concept does appear explicitly every now and then; the most noteworthy example occurred in Hope v. Pelzer where the Court ruled that tying a prisoner to a hitching post in the sun for more than seven hours, feeding him little water, and preventing him from going to the toilet during that time was a violation of the Eighth Amendment.109 The Court noted that the punishment was “antithetical to human dignity” because it was “degrading and dangerous.”110 It focused on the demeaning aspect of the punishment, which included taunting and wanton humiliation inflicted on the prisoner. Thus, the use of “dignity” in Hope reflects the same notion as that offered in the Korematsu dissent: a background principle that mandates a minimum standard of conduct from government officials regardless of the constitutional principle being invoked—that, in the most neo-Kantian sense, people not be treated as objects. 111 Unfortunately, even though this reading seems to enunciate a stable principle, the fact that its reference is comparatively rare partially negates its intrinsic value and calls into question whether there actually is a methodological underpinning to the reliance on the right to dignity. After all, if the Eighth Amendment really is the ultimate embodiment of an inherent right to dignity, then why does the Court refer to this underlying value so rarely and, apparently, so randomly?

A similar question can be asked pertaining to the Fourth Amendment’s prohibition against unreasonable search and seizure seeing that the Court characterized its “overriding function” as being “to protect privacy and dignity against unwarranted intrusion by the State.”112 In the Fourth Amendment context, however, the Court’s explicit resort to the dignity rights of the individual are slightly more frequent. Thus, the Court has readily characterized police behavior as “offensive to human dignity” when it rose to the level of shocking even those of “hardened sensibilities.”113 Similarly, the Court found that “the extent of intrusion upon the individual’s dignitary interests” accounted for an unconstitutional search and seizure when officials forced that individual to undergo surgery to remove a bullet that might have implicated him in a crime.114 What links all of these cases is the fact that dignitary interests were adduced to by the majority opinion when the actions complained of actually invaded the physical body of the individual—indeed, in all cases the actions encompassed forcibly going inside the body of the person. Thus, dignity in this context is paired with physical integrity, which is a step beyond the Fourth Amendment’s privacy interest in that the latter concept generally involves the expectation of seclusion within the confines of a home. In this sense, the dignity interest is used similarly to the Eighth Amendment examples: an alarm bell to signal a standard of conduct so reprehensible as to violate the core precept of what it means to be human.115

Quite a different import to the reference to the right to dignity is found in the Court’s invocation of this concept within the framework of its substantive due process jurisprudence under the Fourteenth Amendment. In this context, the Court equates dignity with the respect owed for the core characteristics of an individual’s personality, and the right to be free from government interference as it pertains to the expression of those characteristics. The most prominent example of this came in Lawrence v. Texas where the court invalidated an antisodomy statute of the basis that it violated individuals’ due process rights.116 The majority opinion, rather than focusing on a possibly narrower ruling by linking the violation to an intrusion on one’s privacy, opted for a broader statement by declaring that the accused statute infringed upon a liberty interest that involved “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” which were key to the protections afforded by the Fourteenth Amendment.117 The Court noted that the criminal penalties to which people running afoul of this law would be subject would result in a sort of “scarlet letter” “with all that imports for the dignity of the person charged.”118 Thus, to the Lawrence Court, dignity was used differently than in the Eighth and Fourth Amendment contexts. Under the liberty rubric identified in Lawrence dignity was called upon as a marker of value granted to individuals on the ground of their status as a human being. In other words, humans command respect for their dignity rights for no reason other than their existence. It seems as if the Court in this instance located the right to dignity outside of the constitutional sphere while at the same time finding clauses, such as the liberty interest of the Fourteenth Amendment, that embody this extra-positive source of law.

This connection was expressed more clearly in Planned Parenthood v. Casey where Justice Stevens noted that “[p]art of the constitutional liberty to choose is the equal dignity to which each of us is entitled.”119 Indeed, abortion-rights cases raise a similar use of dignity to that encountered in Lawrence. In Casey both the plurality opinion and Justice Stevens’ concurrence connected the right to dignity to the right of women to control their own reproductive health. Thus, the Court stated that the choices confronting women faced with the decision to terminate a pregnancy are “central to personal dignity and autonomy,” and the authority to make that decision “is an element of basic human dignity.”120. In Sternberg v. Carhart, the Court struck down a statute criminalizing certain forms of late-term abortions noting “a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty.”121 Interestingly, not only do these opinions hearken to the idea of dignity as respect in the form of governmental non-interference, but they also introduce an element of equal treatment into the mix by coining the phrase “equal liberty.” Thus dignity also encompasses, at least in words, an anti-discrimination component.

#### Setting a legal precedent for dignity would ensure healthcare and increase legal support of other social services

Glensy 11. Rex D. Glensy is affiliated with Drexel University Thomas R. Kline School of Law, [“The Right to Dignity”, 3-2-11, Columbia Human Rights Law Review, Forthcoming; Drexel University Earle Mack School of Law Research Paper No. 2011-W-01, Available at SSRN: [https://ssrn.com/abstract=1775144](about:blank), Date Accessed: 6-21-20] RN

The placement on the state of the duty to provide for the basic necessities of life so that each individual can live a life of dignity plays out in may places around the world including presently in the U.S. So whereas other countries, such as Germany or South Africa, have textual direction to respect, promote, and protect the right to dignity, and have developed legal rules to do so, the U.S., in certain contexts, has also developed these rules without a specific textual directive specifically mentioning dignity. Thus, in the context of the duties owed to prisoners under the Eighth Amendment, the Supreme Court has stated that the government has affirmative obligations to provide medical care, to ensure safety, to supply adequate nutrition, to maintain standards of sanitation, and to furnish appropriate climactic conditions for inmates.207 Certainly this milieu in the U.S. is more limited than the general applicability of the mandate to secure dignity for all people that has led the Inter-American Court of Human Rights to hold that the state of Guatemala had to ensure that all people “not be prevented from having access to the conditions that guarantee a dignified existence,”208 the German Constitutional Court to note that the right to dignity “imposes an obligation on the state to provide at least minimal subsistence to every individual,”209 the South African Constitutional Court to decide that dignity rights compelled the state to provide social security benefits to its permanent residents,210 the Hungarian Constitutional Court to deem that the right to social security “entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realization of the right to human dignity,”211 the Italian Constitutional Court to opine that “human dignity requires that decent housing be secured for all citizens as a constitutional ‘social right,’”212 and the Indian Supreme Court to state that “the right to live with human dignity [goes] with … the bare necessities of life such as adequate nutrition, clothing and shelter … and facilities for reading, writing, and expressing oneself … , freely moving about and mixing … with fellow human beings.”213 The consequence of a positive right to dignity thus encompasses a broad swath of socio-economic rights that includes the basic entitlements of the welfare state that are already present in the U.S. whether mandated or not (such as the ability to collect social security or the right to a publicly-funded education)214 and probably some that are not yet considered as “rights” in the U.S. such as the right to basic health care. 215

Advocates of incorporating the right to dignity in U.S. law as a positive right have used the notion that “[h]uman dignity … also implies a duty of care for individuals,”216 to push for nationalized universal health care in some form or another. However, the affirmative view of dignity rights would not stop at this government obligation. Maxine Eichner, for example, compellingly emphasizes “it is a fundamental responsibility of the state … to support families’ care-taking efforts” because this “responsibility stems directly from the commitment to human dignity that underlies the liberal democratic form of government.”217 She traces the role of human dignity from its traditional roots in the autonomy of the individual (and thus tinged with a slightly libertarian bent) to a more modern reading that envisions the right to dignity as a support for those who are unable to exercise their autonomy due to external circumstances (such as young age, old age, or illness) that causes them to lapse into a state of dependency. She notes:

“Once we adjust the image of citizens to account for dependency in the human life cycle, respect for human dignity entails more than just protecting citizens’ individual rights: It entails a commitment to meeting dependency needs through supporting caretaking and human development so that citizens can live dignified lives. [Thus, the state] has a basic responsibility to support caretaking and human development.”218

This reading of the right to dignity is certainly more expansive that most theorists would advocate for the U.S., but in a changing society, where the years of dependency at the end of one’s life are increasing, it is certainly something that ought to be considered. After all, it certainly is in the state’s interest not to have a huge underclass of destitute or quasi-destitute children, mothers, aged, or sick people.219

## Racism Adv

### 1ac Adv – Racism

#### **The death penalty is an inherently racist weapon of the state – only wholesale abolition solves**

MacDougall 7/6/20 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

I first noticed it in a South Carolina courthouse 20 years ago. Our client was on trial for capital murder, and the State was seeking the death penalty. The defendant as well as the victim were black. The prosecutors, the judge and most of the jury were white. But so were the two South Carolina defense lawyers and so am I—a partner in a Washington law firm.

Walking back to the defense table after a bench conference, I glanced at the burly African American deputy sheriff seated beside the door to the holding cell. We locked eyes, and he nodded. In capital murder trials the courtroom is heavily guarded. The deputies and police officers—black and white—were on the county prosecutor’s home team. They would mostly glare at the defendant and at us. We were the ones slowing down the process. I didn’t think about that nod for long—maybe just a small touch of Southern courtesy.

The next day it happened again. I finished a long cross-examination of one of the state’s experts and turned from the witness stand. Walking past that same deputy, I was sure that I heard a muffled “Amen.”

A few days later, as I finished my closing argument in the first part of the trial—to determine guilt or innocence—12 unimpressed citizens stared back at me. When I turned, momentarily blocking the holding cell from the view of the prosecutors, I glanced at the same black deputy. A thumb sprang up out of a massive fist and then disappeared as quickly.

I never had a real conversation with that deputy, and the trial ended with a death sentence in a chaotic courtroom.

There were several more trials in South Carolina, each involving a black defendant accused of a vicious homicide. There was a pattern—the nod, the smile, the occasional pat on the arm from African American law clerks, court reporters and police officers. I finally started to get the message. “Thanks for doing this,” they seemed to tell me. “But don’t be fooled—your client is black, and that’s why he is here.”

**If there is a place in the American legal system that says loudly that** black lives do not matter**, that place is how we** administer capital punishment. Only 12.7% of the U.S. population is African American, but in the 28 states that still sentence defendants to death, 41.6% of inmates facing capital punishment are black. The situation in the federal system—which has had the death penalty available since 1988—is substantially the same, with black inmates comprising slightly less than 42% of the population of federal death row in Terre Haute, Indiana.

Today, right now, in the only place in our constitutional system that empowers the government to lawfully take a human life—black lives matter a whole lot less than white lives.

The slow-motion killing of George Floyd was horrific in every way. The history of race in the United States is at the heart of that horror and of this moment of near-national consensus. But the same racial dynamic that was at work on that street in Minneapolis is played out daily in courtrooms throughout the United States—**where a black defendant is nearly** four times more likely to face the death penalty **than a white person charged with the same crime**, according to Race and the Death Penalty, published by the Capital Punishment Project of the American Civil Liberties Union. On June 28, the U.S. Supreme Court cleared the way to renewed executions by denying the petition of four federal inmates who are scheduled to die later this year (Bourgeois, Alfred v. Barr).

If black lives really do matter, we can begin to bring an end to a system in which the most fundamental human decision—life or death—is based largely on the color of a person’s skin. That may not be as difficult as it first seems. Capital punishment has been on the road to natural extinction in the United States for a while. In 1999, a total of 279 defendants received death sentences in this country. By 2010, that number had fallen to 114. Last year only 34 death sentences were imposed in the United States, according to a Death Penalty Information Center fact sheet. Before Attorney General William Barr announced in July 2019 that the Trump administration had selected five federal inmates for execution, the death penalty had not been carried out in the federal system in more than 17 years.

#### There is a straight line from slavery to the death penalty --- it is just the latest iteration of state-sponsored racial control. The plan is necessary for the Court to confront the death penalty's roots in slavery and remove this critical tool in the government’s oppression of black people

Barry & Malkani, 17 --- \*Professor at Quinnipiac University School of Law, AND \*\*Lecturer at Birmingham Law School (Kevin & Bharat, “THE DEATH PENALTY'S DARKSIDE: A RESPONSE TO PHYLLIS GOLDFARB'S MATTERS OF STRATA: RACE, GENDER, AND CLASS STRUCTURES IN CAPITAL CASES,” 74 Wash. & Lee L. Rev. Online 184, Nexis Uni via Umich Libraries, JMP)

On February 27, 2017, Arkansas Governor Asa Hutchinson announced that he would execute one-fifth of those on the state's death row because the drugs needed to kill them were set to expire at the end of April. 1 Much was made of how many people the governor intended to execute--a record eight inmates in eleven days. 2 Much was also made of how they would be executed--a lethal cocktail of three drugs, one of which has been known to fail and apparently did fail in at least one of the executions. 3 But little attention has been paid to who was executed. Although four white men and four black men were slated for death, three of the four white men were spared. 4 Nothing says black lives don't matter quite like the death penalty. 5

The invisibility of race in death penalty jurisprudence is well documented. 6 Some commentators have rightly referred to racism as the death penalty's "dark side": ever-present but often difficult to discern. 7 In her characteristically thoughtful essay, Matters of Strata: Race, Gender, and Class Structures in Capital Cases, Professor Phyllis Goldfarb shines the light on the death penalty's dark side. 8 Using the case of a former Virginia death row inmate, Joseph Giarratano, as her lens, she examines the multitude of ways in which race, class, and gender affect the American criminal justice system generally, and its death penalty system in particular. 9

In this Response, we focus on one of Goldfarb's observations: The relationship between slavery--the pinnacle of American racism--and the death penalty. 10 In Part II, we briefly explore the history of the two institutions. 11 The death penalty's connection to slavery is not a distant parallel; it is a straight line. Over the past four decades, the thirteen states of the former Confederacy have been responsible for nearly all of this nation's executions. 12 This relationship is not a coincidence.

We next turn to judicial responses to slavery and the death penalty. In Part III, we discuss how a majority of the United States Supreme Court has been unwilling to draw a link between slavery and the death penalty. 13 From Furman and McCleskey to Buck and Foster, the Court has responded with silence when confronted with the death penalty's roots in slavery.

In Part IV, we discuss several state court justices that have risen to the occasion, finding an unacceptable taint of racial bias in the administration of the death penalty dating back to slavery. 14 We discuss their findings and suggest two doctrinal pathways for future courts to follow. Specifically, we argue that the death penalty's roots in slavery should inform courts' determination of the national consensus that the death penalty purportedly enjoys and the legitimate purposes that it purportedly achieves.

In Part V, we discuss the future of abolition, given a Supreme Court in flux. 15 We conclude with some general remarks.

I. A Straight Line

The death penalty's connection to slavery is not the stuff of hyperbole or analogy. The histories of both institutions are tightly bound. As Goldfarb explains, "the ghosts of the colonial and antebellum slave system" continue to haunt our death penalty. 16 Indeed, "[o]ne cannot understand America's penologies of capital punishment--its legitimation of state-imposed death--without understanding its ideologies of race" that began with slavery. 17

From the earliest colonial days, slavery and the death penalty were symbiotic. 18 In the southern states, one of the principal purposes behind the death penalty was to protect the white minority from violence and rebellion by an enslaved black majority. 19 Capital punishment was therefore a vital component in the machinery of slavery: the perpetual threat of death served to keep slave populations under control. 20 Fear of captivity in prison, the reasoning went, would mean little to those already enslaved; indeed, "imprisonment would have been a reward, giving the slave time to rest." 21 Without the threat of death, slavery may have been lost to rebellion. 22 And without slavery, the death penalty may have lost its appeal as a deterrent. 23 Slavery demanded the death penalty, and the death penalty, in turn, demanded slavery. The connection between the institutions is not a distant parallel but rather a straight line.

Slavery and the death penalty not only reinforced each other but also closely resembled each other--both were explicitly race conscious in their application. 24 Although the death penalty, unlike slavery, applied to both blacks and whites, state "slave codes" ensured that blacks were subject to capital punishment for a wider range of crimes than whites. 25 Such laws even compensated white slaveholders for the "taking" of executed slaves. 26 In colonial Georgia, for example, the criminal code provided for an automatic death sentence for blacks who committed murder, while non-black murderers could receive a life sentence. 27

During the 1830s and 1840s, many states limited their lists of capital crimes and moved executions out of the public arena into more private settings. 28 Importantly, these death penalty reforms did not extend to slaves and free blacks. 29 A study by George Stroud in 1856 found that in Virginia, for example, there were sixty-six potentially capital crimes that attracted the death penalty when committed by slaves, yet just one crime for which white defendants could be executed. 30 In Mississippi, there were thirty-eight crimes that were capital for slaves but not for whites. 31 And in Georgia, as in many southern states, black men were executed for raping white women, while white men were imprisoned or fined. 32

Slaves and free blacks also faced gruesome public executions, including crucifixion, starvation, and having one's hands cut off prior to being hanged or burned alive. 33 White defendants, by contrast, were hanged in private. 34 The emergence of such racially disparate death penalties reinforced the view--held to this day--that black bodies are worth less than those of whites. 35 Not surprisingly, the opponents of slavery, like Frederick Douglass, decried the death penalty as "a mockery of justice." 36

Although many slavery abolitionists contributed to the cause of death penalty abolition by "excoriating 'hangman clergymen' who supported the death penalty and the inhumane notion of retributive justice," 37 the progress of the anti-slavery movement brought efforts to eliminate capital punishment to a halt in the 1850s and 1860s. 38 For example, in Connecticut, a grassroots campaign to abolish the death penalty in the 1840s and early 1850s foundered in 1854, as "[p]ublic attention turned away to the more pressing issues of Irish immigration and the expansion of slavery in the western territories." 39 And Marvin Bovee delayed the publication of his anti-death penalty book on the eve of the Civil War, noting that it would be inappropriate to defend the lives of murderers and rapists when so many soldiers were heroically sacrificing their lives on the battlefield. 40 As David Brion Davis has argued, after the Civil War, Americans were hardened to the loss of life, thus dissipating any anti-death penalty sentiments. 41

As Goldfarb explains, following the end of slavery, the death penalty was vital to reasserting white control over the newly-freed black population. 42 In the years following the Civil War, slave codes gave way to "Black Codes," which reinstated a dual system of criminal justice based explicitly on race, with the death penalty at its center. 43 As was the case under slavery, blacks "were given harsher punishments than whites for committing similar offenses." 44 In Alabama, Mississippi, and South Carolina, for example, "only blacks could be executed for raping a white woman." 45

Although Reconstruction ended de jure discrimination under the Black Codes, it did not--and, indeed, could not--end de facto discrimination. 46 As Goldfarb notes, "[t]he past was not the past; it flourished in new forms." 47 Reconstruction's failure to secure equal rights for black people has been well-documented, with numerous scholars detailing how proponents of racial segregation turned to the criminal justice system, generally--and the death penalty, specifically--as a tool of racial control. 48 Racial discrimination, no longer explicit in the law, persisted in the administration of the death penalty under Jim Crow. 49

In the late nineteenth century, southern states openly defended a racially discriminatory death penalty as necessary to deter white vigilantism, i.e., lynching. 50 Black people suspected of crimes were going to be killed no matter what, the argument went. Better, then, to execute black people after trial than for white mobs to cut them down and parade their mutilated remains through the street. The Equal Justice Initiative has noted that when proponents of racial justice campaigned against lynchings during the 1920s and 1930s, communities turned to the death penalty instead. 51 Campaigns against lynchings in the early twentieth century, therefore, ultimately helped to consolidate the use of capital punishment in America.

In the mid-twentieth century, the progress of racial justice once again worked to the disadvantage of death penalty abolition. Between 1957 and 1965, five states abolished the death penalty--Alaska, Hawaii, Vermont, West Virginia, and Iowa. 52 But, as Goldfarb notes, the successes of the Civil Rights movement in the 1960s and 1970s provide at least a partial explanation for the failure of the anti-death penalty movement to secure lasting, nationwide abolition before the U.S. Supreme Court. 53 When the Court temporarily outlawed capital punishment in 1972 in Furman v. Georgia, it was perceived as yet another interference with "states' rights"--the same argument advanced by the Confederate states in defense of slavery. 54 This backlash culminated in the restoration of the death penalty four years later in Gregg v. Georgia, 55 which purported to rid the death penalty of arbitrariness once and for all. 56

Not surprisingly, given the death penalty's roots in slavery and its reinforcement of racial subordination after the Civil War, the task the Supreme Court set for itself in Gregg has proven impossible. The post-1972 death penalty systems, like their forbearers, remain rife with discrimination. 57 As Carol and Jordan Steiker note, "the current map of active death penalty states is predominantly a map of the former Confederacy." 58 And as Goldfarb points out, nearly all executions occur in states "with the most extensive lynching histories." 59 The sickening spectacle in Arkansas in April 2017 is a case in point. 60 Arkansas, a former slaveholding state, seceded from the Union at the start of the Civil War in 1861. 61 Between 1877 and 1950, 491 African Americans were lynched in Arkansas, just behind Mississippi (614), Georgia (595), and Louisiana (559). 62 Further, Arkansas is home to Phillips County, the site of a staggering 244 lynchings--the most of any county in the U.S. and nearly five times the number of lynchings as second place Caddo, Louisiana, with 51. 63

The northern experience also sheds light on the death penalty's connection to slavery. In the late 1700's and early 1800's, for example, the northern states of Pennsylvania, New Hampshire, Massachusetts, Connecticut, Rhode Island, Vermont, New York, and New Jersey took steps to restrict the use of capital punishment. 64 In the years that followed, the death penalty faded in these states as the number of death-eligible crimes and executions declined, and as calls for abolition of the death penalty increased. 65 Connecticut is a case in point. Over the course of its nearly 400-year-old experiment with the death penalty, a single theme characterized Connecticut's relationship to the death penalty: the reluctance to impose it. 66 Indeed, between 1960 and 2012, when it repealed the death penalty, Connecticut executed only 2 people--both of whom volunteered for it. 67

In many non-slave-holding states admitted to the Union in the first half of the nineteenth century, the connection between slavery and the death penalty was even more direct. Michigan and Wisconsin, which were admitted as free states in 1837 and 1848, respectively, abolished their death penalties less than a decade after admission. 68 Maine, admitted in 1820, and Minnesota, admitted in 1858, took a bit longer; they abolished their death-penalties within seventy and sixty years of admission, respectively. 69 While the northern states were no strangers to racism, their racism knew bounds. 70

From this brisk historical survey, a central theme emerges: where slavery was not firmly entrenched, the death penalty withered; where slavery flourished, the death penalty remained an integral part of the criminal justice system. As Carol and Jordan Steiker have noted, in the North, the death penalty abolition movement and the slavery abolition movement were "mutually reinforcing." 71 In the South, the linkage of the two movements "led them to fail together." 72

Some have taken offense to the death penalty's comparison to slavery. During a public hearing on the bill that repealed Connecticut's death penalty in 2012, State Senator John Kissel, a Republican with six prisons and 8,000 inmates in his district, objected to testimony comparing the death penalty to slavery:

[T]o analogize folks that support [the death penalty] to people that supported slavery, that's so offensive. To analogize this to individuals that just act out of rage or vindictiveness, that's just not right. . . . I take umbrage at the whole slavery thing because, once upon a time, one of my relatives was a surgeon in the union side of the Civil War. Come on, man, . . . to make that analogy, I think, is a stretch. 73

But the link between slavery and the death penalty is not a stretch, and the death penalty's support among northerners does not make it so. While it is true that people in Connecticut have supported the death penalty throughout history, they--unlike their brethren to the south--have been reluctant to use it. 74 And one of the primary reasons that Connecticut has lacked an appetite for execution is because it does not share the South's long history of slavery and its tolerance for state-sponsored violence to sustain racial control. 75

II. The Silent Branch

In Dred Scott v. Sanford, the U.S. Supreme Court explicitly sanctioned slavery, articulating a powerful defense of racial subordination that set the stage for the Civil War. 76 Although the Supreme Court has not explicitly defended racial subordination in the death penalty context, it certainly has not challenged it. In Justice Accused, Robert Cover examines how the judiciary responded to the moral and legal dilemmas posed by slavery, and notes how even anti-slavery judges were ultimately complicit in the survival of slavery. 77 His analysis can be applied to today's judiciary, particularly the ways in which the U.S. Supreme Court has failed to acknowledge the pervasive influence of slavery on the administration of capital punishment.

A majority of the Supreme Court has never addressed the death penalty's historical roots in slavery. Take Furman, for example, in which a majority of the Court imposed a moratorium on the death penalty out of concern for arbitrariness. 78 Despite the centrality of race to the issue of arbitrariness, only Justices Douglas and Marshall squarely addressed racial discrimination in their concurring opinions. 79 Neither of them mentioned slavery. 80 Some commentators argue that the majority's decision to ignore race enabled, or even encouraged, states to recalibrate their death penalty statutes. 81

McCleskey v Kemp, decided in 1987, is often considered to be the Court's seminal decision on the relevance of race to questions of the death penalty's constitutionality. 82 In that case, the Court infamously held that statistical evidence of racial disparities in the application of capital punishment are to be tolerated, and that a person's death sentence will only be quashed on such grounds if it can be shown that a decision-maker in his or her particular case acted with specific discriminatory intent. 83 Not surprisingly, the majority made no mention of the death penalty's roots in slavery. Only Justice Brennan, writing for the four dissenters, drew parallels between the modern death penalty and the raceconscious criminal justice systems that reinforced slavery. 84 "[W]e cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries," he wrote. 85 "[W]e remain imprisoned by the past as long as we deny its influence on the present." 86

The decision in McCleskey has been described by Anthony Amsterdam, who led the death penalty abolitionist efforts of the 1960s and 1970s, as "the Dred Scott of our time." 87 Michelle Alexander has likewise written that "McCleskey v. Kemp and its progeny serve much the same function as Dred Scott and Plessy"--preserving racial caste systems. 88 In Dred Scott, Chief Justice Taney infamously declared that slaves were sub-human for the purposes of the American legal system: "It is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted [the Declaration of Independence]." 89 In Taney's view, black people were "so far inferior, that they had no rights which the white man was bound to respect… [Africans] were brought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made of it." 90 As McCleskey's many critics rightly argue, capital punishment, like slavery, is premised on the belief that some people are not worthy of membership in the human family. 91

Besides Justice Brennan, no other Supreme Court Justice has attempted to place the death penalty in its historical, slavery-rooted context. Instead, the focus has been on the notoriously difficult-to-prove animus and stereotypes of individual actors in the death penalty system--not on the system itself. In recent years, for example, the Court has struck down several death sentences in which inmates have demonstrated that prosecutors or jurors based their decision to seek or impose a death sentence on the grounds of race. However, in none of these cases have the Justices expressly acknowledged the legacy of slavery.

In Buck v. Davis, 92 decided earlier this year, the Court accepted that Duane Buck had been unconstitutionally sentenced to death because a psychologist had testified that, as a black man, Buck was particularly prone to violence. 93 But Chief Justice Roberts, writing for a 6-2 majority, failed to note that this stereotype--that a black man is biologically prone to "dangerousness"--derives from the so-called scientific studies that were used to justify slavery. 94 Similarly, in Foster v. Chatman, 95 decided in 2016, the Court ruled in favor of petitioner, and chastised the prosecutor who had deliberately struck black people off the jury with the intent to empanel an all-white jury. 96 As Goldfarb notes in her article, the phenomenon of all-white juries being empaneled against black defendants so as to ensure a conviction finds it roots in slavery and in post-emancipation attempts to subjugate black people. 97 Yet the Court in Foster v. Chatman again refrained from mentioning slavery. 98

Taking their lead from the Supreme Court, the lower federal courts and nearly all state courts have remained silent on the death penalty's connection to slavery. For example, the Fourth Circuit Court of Appeals recently overturned Johnny Bennett's death sentence on the grounds that the prosecutor in his case had used racially inflammatory language during the trial. 99 Prosecutor Donald Myers had referred to Bennett--an African American--variously as "King Kong," a "caveman," a "mountain man," a "monster," a "big old tiger," and "[t]he beast of burden." 100 Although the Court found in Bennett's favor, it made only oblique reference to "historical prejudice against African Americans, who have been appallingly disparaged as primates or members of a subhuman species in some lesser state of evolution." 101

The reluctance of courts to explicitly use the word "slavery," or to squarely confront the ways in which the legacy of slavery is woven into the fabric of capital punishment, can mean only one of three things. First, there simply is no connection between slavery and the modern death penalty: the past is in the past, thanks to procedural safeguards imposed by the Supreme Court. Second, there is a connection, but courts are not troubled by it. Or third, there is a troubling connection, but there is nothing courts can do about it.

The first conclusion is untenable. The Court in Gregg did not sever the death penalty's ties to slavery and racial subordination, 102 and the regional differences in the application of the death penalty are not coincidental. As Goldfarb ably demonstrates, racial animus and stereotypes are not issues that affect some cases but not others. 103 The entire death penalty system is steeped in the values and beliefs that underpinned slavery; the notion that some people do not belong to the moral and political human community and can be treated and discarded as mere objects instead. 104

The second conclusion is unthinkable. The Court, as a chronicler of history, has an obligation to expose the death penalty's roots in slavery. 105 By remaining silent, the Court legitimizes a racial legacy that continues to drive the death penalty today.

The third conclusion is unacceptable. There is much the Court can do and little to prevent it from doing so. We turn now to the ways in which several state supreme court justices have addressed the death penalty's connections to slavery, and how and why the Supreme Court and state and federal lower courts should do the same.

III. Looking Back, a Way Forward

The Supreme Court's failure to address the death penalty's connection to slavery serves only to deepen the connection. As Chief Justice Roberts noted in another context, "[T]o blind yourself to history is both prideful and unwise. 'The past is never dead. It's not even past.'" 106

Despite the Supreme Court's silence, several state courts have risen to the occasion, expressing concern over the death penalty's ties to racism generally, and to slavery in particular. In 1980, in District Attorney v. Watson, the Massachusetts Supreme Judicial Court held that the death penalty violated the state constitution based in part on evidence of racial discrimination in the administration of the death penalty throughout the southern states. 107 According to the court, "[t]he conclusion is inescapable that the death penalty is reserved for those who kill whites, because the criminal justice system in these states simply does not put the same value on the life of a black person as it does on the life of a white." 108 The race of the defendant also mattered, with "a disproportionate number of nonwhite offenders being sentenced to death." 109 To the Massachusetts high court, this discounting of black lives, a practice rooted in slavery, was fatal to the death penalty.

In 1999, in State v. Loftin, Justice Handler of the New Jersey Supreme Court similarly argued in dissent that New Jersey's death penalty statute was unconstitutional because of "a long and relentless history of racism that has not only the capacity to cause a disproportionate impact on blacks in the administration of the death penalty, but has indeed done so from the era of slavery in this country, and, many argue, to the present." 110

And in 2015, in State v. Santiago, the Connecticut Supreme Court declared the death penalty unconstitutional based, in part, on its finding that the death penalty "appears to be inescapably tainted by caprice and bias," particularly, "racial and ethnic discrimination." 111 Significantly, statistical evidence of such discrimination was not before the court, nor were alleged instances of racial bias by individual prosecutors, jurors, and judges. 112 Instead, the court assumed that there existed a risk of racial and ethnic discrimination in capital sentencing, and concluded that such risk deprived the death penalty of any legitimate penological purpose. 113 The court also pointed to the "striking" disparity in death penalty usage between the northern states and "the thirteen states that comprised the Confederacy," noting that the latter "were last to abandon slavery and segregation, and . . . were most resistant to the federal enforcement of civil rights norms." 114

Calling the majority's commentary on race "extraordinary and inflammatory," the Santiago dissenters shot back:

[T]he majority suggests that Southerners are racists, and so are those who support the death penalty. Painting Southerners and supporters of the death penalty with the broad brush of racism could appear to some to be racist itself and reinforces stereotypes that have no foundation in fact or law. 115

In a concurring opinion, Justices Fleming Norcott and Andrew McDonald traced the "unmistakable racial dimension" of Connecticut's death penalty, including the fact that "in almost 400 years, no white person has ever been executed in Connecticut for the murder of a black person." 116 Like the majority, the concurring justices emphasized the impermissible risk that "the death penalty in Connecticut, as elsewhere, has been and continues to be imposed disproportionately on racial and ethnic minorities, and particularly on those whose victims are members of the white majority." 117 Responding to the dissenters' McCleskey-based argument that there was no evidence of individual racial animus, the concurring justices discussed the death penalty's deeper roots in subordination by the cultural majority that, regrettably but inevitably, carries through to the present day:

We strongly emphasize that the fact that a charging or sentencing decision may be based in part on impermissible racial factors does not imply that the prosecutor, judge, or juror making that decision is "racist," as that term is typically used. Statistical studies from other jurisdictions have demonstrated that the most likely explanation for such disparities is the tendency of members of the majority race to be more empathetic to majority victims, who resemble themselves, and less sympathetic to minority perpetrators, with whom they are less able to identify. This conclusion is bolstered by recent scientific studies that now document what has long been recognized: most, if not all, of us exhibit unconscious or implicit bias.

It likely is the case that many, if not most, of the documented disparities in capital charging and sentencing arise not from purposeful, hateful racism or racial animus, but rather from these sorts of subtle, imperceptible biases on the part of generally well-meaning decision makers. Historically, though, it is difficult to refute . . . that, at varying times throughout our history, the lives of Native Americans, African Americans, Asians, Irish, Italians, Jews, Roman Catholics, and Hispanics simply have not been considered to be as innately valuable as those of the cultural majority. 118

Together, these decisions suggest two doctrinal pathways for the courts' consideration of the death penalty's roots in slavery, which neatly align with the Supreme Court's two-part proportionality test under the Eighth Amendment. 119

First, in determining whether there exists objective evidence of a "national consensus" in support of the death penalty, courts should consider not only the dwindling number of southern states that retain and impose the death penalty, but also those states' historical commitment to slavery. 120 A penalty rooted in slavery, which retains robust support among only a small number of states with a deeply troubling legacy of slavery, is a penalty that has lost the support of the Nation. 121

Second, in determining whether the death penalty furthers the deterrent and retributive goals of punishment, courts should acknowledge a state's legacy of slavery and the death penalty's historical roots in slavery, and should consider whether this linkage creates a substantial risk that race continues to play a role in the selection of people for death. 122 A penalty that risks deterring primarily black offenders and those who murder whites, and that risks targeting black people for "just desserts" and expressing outrage for white but not black victims, does not further the legitimate purposes of deterrence and retribution. It furthers racial subordination--an impermissible purpose if ever there was one. 123

Clearly, courts troubled by the death penalty's connection to slavery can address this connection in their jurisprudence. But there are many reasons why courts may not want to do so, including: concern with alienating southern states by depicting them as "racist"; the McCleskey majority's concern with opening the floodgates to arguments over the role of racism and the legacy of slavery in non-capital cases; 124 and an abiding faith that race can be removed from the equation of death in the future without wading into an ugly past. None of these reasons is persuasive.

The alienation of southern states is a legitimate concern but should not guide the courts in deciding to address slavery. Not all southerners lost the Civil War; for many of the descendants of enslaved people and whites whose homes dotted the Underground Railroad, their South won. Similarly, not all southerners support the death penalty. A decision acknowledging the death penalty's ties to slavery does not disparage a monolithic South; rather, it pays tribute to southern voices that have not been heard. 125 Acknowledging these ties, moreover, does not require calling anyone a "racist." As Connecticut Supreme Court Justices Norcott and McDonald stated, "[t]he types of subtle biases that influence members of the majority to make decisions favoring their own race may well be inevitable, albeit regrettable. When unconsciously made, they do not inherently impugn the diligent and good faith work of our prosecutors, police, judges, and jurors." 126

Fear of opening the floodgates to non-capital challenges based on the legacy of slavery is also overblown. As the Massachusetts Supreme Judicial Court stated, "[o]ur society's failure to bring evenhandedness to the entire spectrum of criminal punishment calls for great and persistent effort toward improvement. However, we are not required to abandon all such punishments on constitutional grounds." 127 Stated another way, "[t]he death penalty is fundamentally different from other punishments for which we may, reluctantly, have to tolerate some degree of unintentional systemic disparity or imperfection." 128

Lastly, faith in a color-blind death penalty is deeply misguided. For over forty years, courts have tried and failed to eliminate race from the death penalty calculus. 129 The taint of bias and caprice, rooted in slavery, simply cannot be removed.

IV. The Future of Abolition

It has been over 40 years since Gregg revivified a dying death penalty. 130 For over a decade, Justice Kennedy has applied his characteristic logic of the heart to the Court's death penalty jurisprudence, setting the table for a per se challenge that would put the death penalty to rest forever. 131 At the time of this writing, it now appears that he is prepared to step away from that table. 132 The settings will be cleared, and the death penalty will likely remain with us for some time--a crude tool to be used by politicians to rally their base, to reinvigorate their campaigns, to make America "great." 133 Power, not principle, will continue to define the death penalty.

We remind Justice Kennedy that he can stop this carnival of cruelty, this macabre charade. History has given him an ability that few can claim: He can prevent death. 134 Should he retire without declaring the death penalty unconstitutional, we shall forever number the losses spurred by his inaction. What a waste of lives and legacy. Rather than the Justice who brought long-awaited coherence to the Eighth Amendment's dignity doctrine, 135 Justice Kennedy will become just another retired Justice who wished he had. 136

Eventually, though, the Supreme Court will abolish the death penalty, bringing the U.S. in line with 141 other abolitionist countries throughout the world. 137 When the Court abolishes, it will almost certainly base its decision on the death penalty's inherently flawed administration--the unreliability, arbitrary imposition, and protracted delay that deprives the death penalty of any legitimate purpose. 138 The Court might also find that the death penalty is at odds with human dignity; it is the ultimate humiliation. 139 Such reasoning will be much welcomed among abolitionists, but an opportunity will have been missed. As a chronicler of history, the Court should take the opportunity to shine the light on the role that slavery has played in perpetuating the legitimacy of the death penalty since colonial times. 140 This will ensure an accurate picture of one of our country's most racist institutions. More importantly, it will ensure that the death penalty, like slavery, never returns.

In the meantime, the abolition movement will continue, with government, businesses, and private citizens all playing a role. 141 Judges, legislators, and governors will continue to halt the death penalty through judicial abolition, statutory repeal, moratoria, and clemency. Prosecutors will refuse to seek the death penalty and defenders will slow its progress through legal challenges to the death penalty per se and as applied. Police chiefs and prison wardens will highlight the death penalty's exorbitant costs and secondary trauma, while international leaders mobilize the shame of the world community. Media, researchers, and academics will focus national and international attention on the intractable issues of innocence, botched executions, arbitrariness and racial discrimination, undue delay, disability, poverty, and inadequate representation. Medical professionals and drug manufacturers will decry lethal injection's perversion of medical ethics. Civil rights organizations, faith groups, and family members of murder victims will hold vigils, disrupt the flow of lethal injection drugs, and organize grassroots campaigns to reform and eventually end the death penalty.

Like the movement to abolish slavery, death penalty abolition will eventually achieve its end and, in time, will be widely regarded as right. Indeed, Harriett Tubman, who once had a price on her head for disrupting the flow of free black labor in the antebellum south, will soon grace the front of the $ 20 bill (although Donald Trump has suggested that slaveholder Andrew Jackson ought to remain there); the D.C. home of former slave turned abolitionist statesman, author, and activist Frederick Douglass is a national historic site; and John Brown, who was hanged for attempting to overthrow the slave system through armed conflict, assumed the status of icon "in the eyes of African Americans, abolitionists, and revolutionaries all over the world." 142

In anticipation of the death penalty's inevitable abolition, we close with the following words of gratitude.

To the growing number of young people in the U.S. who see the death penalty as an anachronism that divides rather than unites our increasingly diverse society, we look forward to the contribution you will make. Indeed, we have already seen it. The #BlackLivesMatter movement--founded in 2012 in response to widely publicized incidents of black people being shot by police officers--has included death penalty abolition among its core aims, calling out the death penalty for "devalu[ing] Black lives" and "target[ing] Blacks and other people of color and poor people throughout . . . history." 143 Although more men of color are incarcerated and shot by police than are executed each year, the death penalty is of critical importance for one simple reason: If the State can execute people of color, it can do anything to people of color. The death penalty is, quite literally, low-hanging fruit--and strange fruit, indeed. Be indignant in your advocacy; you deserve better from your country.

To those like Phyllis Goldfarb who have stood against the death penalty for so long, we thank you for shining the light that we follow. We are students of your advocacy--one of us, quite literally. As you say, the reality that race permeates the American death penalty "represents not only a profound concern about inequality and unfairness in the selection of defendants for death," but also "an indictment of American systems of capital punishment." 144 We look forward to the day when the Supreme Court agrees. In solidarity, and one day in victory, we salute you.

VI. Conclusion

When the history of the death penalty is written, the death penalty's connection to slavery will not be a distant parallel but a straight line. Phyllis Goldfarb's article, Matters of Strata: Race, Gender, and Class Structures in Capital Cases traces that line. 145 The institution of slavery helps to explains why, over the past four decades, the thirteen states that comprised the former Confederacy have been responsible for nearly all of this nation's executions. 146 Although the U.S. Supreme Court has failed to address this connection, several state court judges have risen to the occasion, calling out the impermissible taint of bias that colors the death penalty. More courts, including the Supreme Court, should follow their lead. In the meantime, we, like our abolitionist forebears, will fight. Emancipation was once considered "a wild delusive idea," but it became a reality. 147 So, too, will abolition of the death penalty.

#### Challenging institutional racism is a prior ethical question— it makes violence structurally inevitable and foundationally negates morality making defenses of utilitarianism incoherent

Memmi, 2k --- Professor Emeritus of Sociology @ U of Paris, Naiteire (Albert, Racism, Translated by Steve Martinot, p. 163-165)

The struggle against racism will be long, difficult, without intermission, without remission, probably never achieved. Yet, for this very reason, it is a struggle to be undertaken without surcease and without concessions. One cannot be indulgent toward racism; one must not even let the monster in the house, especially not in a mask. To give it merely a foothold means to augment the bestial part in us and in other people, which is to diminish what is human. To accept the racist universe to the slightest degree is to endorse fear, injustice, and violence. It is to accept the persistence of the dark history in which we still largely live. it is to agree that the outsider will always be a possible victim (and which man is not himself an outsider relative to someone else?. Racism illustrates, in sum, the inevitable negativity of the condition of the dominated that is, it illuminates in a certain sense the entire human condition. The anti-racist struggle, difficult though it is, and always in question, is nevertheless one of the prologues to the ultimate passage from animosity to humanity. In that sense, we cannot fail to rise to the racist challenge. However, it remains true that one’s moral conduit only emerges from a choice: one has to want it. It is a choice among other choices, and always debatable in its foundations and its consequences. Let us say, broadly speaking, that the choice to conduct oneself morally is the condition for the establishment of a human order, for which racism is the very negation. This is almost a redundancy. One cannot found a moral order, let alone a legislative order, on racism, because racism signifies the exclusion of the other, and his or her subjection to violence and domination. From an ethical point of view, if one can deploy a little religious language, racism is ‘the truly capital sin. It is not an accident that almost all of humanity’s spiritual traditions counsels respect for the weak, for orphans, widows, or strangers. It is not just a question of theoretical morality and disinterested commandments. Such unanimity in the safeguarding of the other suggests the real utility of such sentiments. All things considered, we have an interest in banishing injustice, because injustice engenders violence and death. Of course, this is debatable. There are those who think that if one is strong enough, the assault on and oppression of others is permissible. Bur no one is ever sure of remaining the strongest. One day, perhaps, the roles will be reversed. All unjust society contains within itself the seeds of its own death. It is probably smarter to treat others with respect so that they treat you with respect. “Recall.” says the Bible, “that you were once a stranger in Egypt,” which means both that you ought to respect the stranger because you were a stranger yourself and that you risk becoming one again someday. It is an ethical and a practical appeal—indeed, it is a contract, however implicit it might be. In short, the refusal of racism is the condition for all theoretical and practical morality because, in the end, the ethical choice commands the political choice, a just society must be a society accepted by all. If this contractual principle is not accepted, then only conflict, violence, and destruction will be our lot. If it is accepted, we can hope someday to live in peace. True, it is a wager, but the stakes are irresistible.

### Death Penalty Continues Legacy of Slavery

#### \*\*\*note when prepping file – this is a shorter version of the Barry & Malkani card above

#### The death penalty’s connection to slavery is not a distant parallel but a straight line – capital punishment imperativeness in de-facto racial control traces its root to slavery

Barry and Malkani, 17 (Kevin Barry & Bharat Malkani, Barry is a professor at Quinnipiac University School of Law. Malkani is a lecturer at the Birmingham Law School, University of Birmingham. “The Death Penalty's Darkside: A Response to Phyllis Goldfarb' s Matters of Strata: Race, Gender, and Class Structures in Capital Cases ", 74 Wash. & Lee L. Rev. Online 184 , https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1087&context=wlulr-online, 2017, Accessed 6-20-2020) //ILake-JQ \*\*Titles bracketed for clarity

[II. A Straight Line]

The death penalty’s connection to slavery is not the stuff of hyperbole or analogy. The histories of both institutions are tightly bound. As Goldfarb explains, “the ghosts of the colonial and antebellum slave system” continue to haunt our death penalty.16 Indeed, “[o]ne cannot understand America’s penologies of capital punishment—its legitimation of state-imposed death—without understanding its ideologies of race” that began with slavery.17

From the earliest colonial days, slavery and the death penalty were symbiotic.18 In the southern states, one of the principal purposes behind the death penalty was to protect the white minority from violence and rebellion by an enslaved black majority.19 Capital punishment was therefore a vital component in the machinery of slavery: the perpetual threat of death served to keep slave populations under control.20 Fear of captivity in prison, the reasoning went, would mean little to those already enslaved; indeed, “imprisonment would have been a reward, giving the slave time to rest.”21 Without the threat of death, slavery may have been lost to rebellion.22 And without slavery, the death penalty may have lost its appeal as a deterrent.23 Slavery demanded the death penalty, and the death penalty, in turn, demanded slavery. The connection between the institutions is not a distant parallel but rather a straight line.

Slavery and the death penalty not only reinforced each other but also closely resembled each other—both were explicitly race conscious in their application.24 Although the death penalty, unlike slavery, applied to both blacks and whites, state “slave codes” ensured that blacks were subject to capital punishment for a wider range of crimes than whites.25 Such laws even compensated white slaveholders for the “taking” of executed slaves.26 In colonial Georgia, for example, the criminal code provided for an automatic death sentence for blacks who committed murder, while non-black murderers could receive a life sentence.27

During the 1830s and 1840s, many states limited their lists of capital crimes and moved executions out of the public arena into more private settings.28 Importantly, these death penalty reforms did not extend to slaves and free blacks.29 A study by George Stroud in 1856 found that in Virginia, for example, there were sixty-six potentially capital crimes that attracted the death penalty when committed by slaves, yet just one crime for which white defendants could be executed.30 In Mississippi, there were thirty-eight crimes that were capital for slaves but not for whites.31 And in Georgia, as in many southern states, black men were executed for raping white women, while white men were imprisoned or fined.32

Slaves and free blacks also faced gruesome public executions, including crucifixion, starvation, and having one’s hands cut off prior to being hanged or burned alive.33 White defendants, by contrast, were hanged in private.34 The emergence of such racially disparate death penalties reinforced the view—held to this day—that black bodies are worth less than those of whites.35 Not surprisingly, the opponents of slavery, like Frederick Douglass, decried the death penalty as “a mockery of justice.”36

Although many slavery abolitionists contributed to the cause of death penalty abolition by “excoriating ‘hangman clergymen’ who supported the death penalty and the inhumane notion of retributive justice,”37 the progress of the anti-slavery movement brought efforts to eliminate capital punishment to a halt in the 1850s and 1860s.38 For example, in Connecticut, a grassroots campaign to abolish the death penalty in the 1840s and early 1850s foundered in 1854, as “[p]ublic attention turned away to the more pressing issues of Irish immigration and the expansion of slavery in the western territories.”39 And Marvin Bovee delayed the publication of his anti-death penalty book on the eve of the Civil War, noting that it would be inappropriate to defend the lives of murderers and rapists when so many soldiers were heroically sacrificing their lives on the battlefield.40 As David Brion Davis has argued, after the Civil War, Americans were hardened to the loss of life, thus dissipating any anti-death penalty sentiments.41

As Goldfarb explains, following the end of slavery, the death penalty was vital to reasserting white control over the newlyfreed black population.42 In the years following the Civil War, slave codes gave way to “Black Codes,” which reinstated a dual system of criminal justice based explicitly on race, with the death penalty at its center.43 As was the case under slavery, blacks “were given harsher punishments than whites for committing similar offenses.”44 In Alabama, Mississippi, and South Carolina, for example, “only blacks could be executed for raping a white woman.”45

Although Reconstruction ended de jure discrimination under the Black Codes, it did not—and, indeed, could not—end de facto discrimination.46 As Goldfarb notes, “[t]he past was not the past; it flourished in new forms.”47 Reconstruction’s failure to secure equal rights for black people has been well-documented, with numerous scholars detailing how proponents of racial segregation turned to the criminal justice system, generally—and the death penalty, specifically—as a tool of racial control.48 Racial discrimination, no longer explicit in the law, persisted in the administration of the death penalty under Jim Crow.49

In the late nineteenth century, southern states openly defended a racially discriminatory death penalty as necessary to deter white vigilantism, i.e., lynching.50 Black people suspected of crimes were going to be killed no matter what, the argument went. Better, then, to execute black people after trial than for white mobs to cut them down and parade their mutilated remains through the street. The Equal Justice Initiative has noted that when proponents of racial justice campaigned against lynchings during the 1920s and 1930s, communities turned to the death penalty instead.51 Campaigns against lynchings in the early twentieth century, therefore, ultimately helped to consolidate the use of capital punishment in America.

In the mid-twentieth century, the progress of racial justice once again worked to the disadvantage of death penalty abolition. Between 1957 and 1965, five states abolished the death penalty— Alaska, Hawaii, Vermont, West Virginia, and Iowa.52 But, as Goldfarb notes, the successes of the Civil Rights movement in the 1960s and 1970s provide at least a partial explanation for the failure of the anti-death penalty movement to secure lasting, nationwide abolition before the U.S. Supreme Court.53 When the Court temporarily outlawed capital punishment in 1972 in Furman v. Georgia, it was perceived as yet another interference with “states’ rights”—the same argument advanced by the Confederate states in defense of slavery.54 This backlash culminated in the restoration of the death penalty four years later in Gregg v. Georgia, 55 which purported to rid the death penalty of arbitrariness once and for all.56

Not surprisingly, given the death penalty’s roots in slavery and its reinforcement of racial subordination after the Civil War, the task the Supreme Court set for itself in Gregg has proven impossible. The post-1972 death penalty systems, like their forbearers, remain rife with discrimination.57 As Carol and Jordan Steiker note, “the current map of active death penalty states is predominantly a map of the former Confederacy.”58 And as Goldfarb points out, nearly all executions occur in states “with the most extensive lynching histories.”59The sickening spectacle in Arkansas in April 2017 is a case in point.60 Arkansas, a former slaveholding state, seceded from the Union at the start of the Civil War in 1861.61 Between 1877 and 1950, 491 African Americans were lynched in Arkansas, just behind Mississippi (614), Georgia (595), and Louisiana (559).62 Further, Arkansas is home to Phillips County, the site of a staggering 244 lynchings—the most of any county in the U.S. and nearly five times the number of lynchings as second place Caddo, Louisiana, with 51.63

The northern experience also sheds light on the death penalty’s connection to slavery. In the late 1700’s and early 1800’s, for example, the northern states of Pennsylvania, New Hampshire, Massachusetts, Connecticut, Rhode Island, Vermont, New York, and New Jersey took steps to restrict the use of capital punishment.64 In the years that followed, the death penalty faded in these states as the number of death-eligible crimes and executions declined, and as calls for abolition of the death penalty increased.65 Connecticut is a case in point. Over the course of its nearly 400-year-old experiment with the death penalty, a single theme characterized Connecticut’s relationship to the death penalty: the reluctance to impose it.66 Indeed, between 1960 and 2012, when it repealed the death penalty, Connecticut executed only 2 people—both of whom volunteered for it.67

In many non-slave-holding states admitted to the Union in the first half of the nineteenth century, the connection between slavery and the death penalty was even more direct. Michigan and Wisconsin, which were admitted as free states in 1837 and 1848, respectively, abolished their death penalties less than a decade after admission.68 Maine, admitted in 1820, and Minnesota, admitted in 1858, took a bit longer; they abolished their death-penalties within seventy and sixty years of admission, respectively.69 While the northern states were no strangers to racism, their racism knew bounds.70

From this brisk historical survey, a central theme emerges: where slavery was not firmly entrenched, the death penalty withered; where slavery flourished, the death penalty remained an integral part of the criminal justice system. As Carol and Jordan Steiker have noted, in the North, the death penalty abolition movement and the slavery abolition movement were “mutually reinforcing.”71 In the South, the linkage of the two movements “led them to fail together.”72

Some have taken offense to the death penalty’s comparison to slavery. During a public hearing on the bill that repealed Connecticut’s death penalty in 2012, State Senator John Kissel, a Republican with six prisons and 8,000 inmates in his district, objected to testimony comparing the death penalty to slavery: [T]o analogize folks that support [the death penalty] to people that supported slavery, that’s so offensive. To analogize this to individuals that just act out of rage or vindictiveness, that’s just not right. . . . I take umbrage at the whole slavery thing because, once upon a time, one of my relatives was a surgeon in the union side of the Civil War. Come on, man, . . . to make that analogy, I think, is a stretch.73

But the link between slavery and the death penalty is not a stretch, and the death penalty’s support among northerners does not make it so. While it is true that people in Connecticut have supported the death penalty throughout history, they—unlike their brethren to the south—have been reluctant to use it.74 And one of the primary reasons that Connecticut has lacked an appetite for execution is because it does not share the South’s long history of slavery and its tolerance for state-sponsored violence to sustain racial control.75

#### The retention of slavery in the South directly evolved from the brutalization of slaves

Banner, 02 (Stuart Banner, Stuart Alan Banner is an American legal historian and the Norman Abrams Professor of Law at the UCLA School of Law. Banner also directs UCLA's Supreme Court Clinic, which offers students the opportunity to work on real cases before the U.S. Supreme Court. "The death penalty: an American history" (Chapter 5, P. 137-143), Harvard University Press, https://www.fulcrum.org/epubs/7w62f857z?locale=en#/6/292[xhtml00000146]!/4/2[text1]/32/1:0, 2002, Accessed 6-19-2020 via Umich Libraries) //ILake-JQ \*\*Titles bracketed for clarity

If the list of capital crimes for whites in the antebellum South was much longer than in the North, it was far shorter than the corresponding list for southern blacks. In Texas slaves but not whites were subject to capital punishment for insurrection, arson, and-if the victim was white-attempted murder, rape, attempted rape, robbery, attempted robbery, and assault with a deadly weapon. Free blacks were subject to capital punishment for all these offenses plus that of kidnapping a white woman. In Virginia slaves were liable to be executed for any offense for which free people would get a prison term of three years or more. Free blacks, but not whites, could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault if the victim was white. Attempted rape of a white woman was a capital crime for blacks in these two states as well as Florida, Louisiana, Mississippi, South Carolina, and Tennessee. In his 1856 treatise summarizing the slave laws of the southern states, George Stroud counted sixty-six capital crimes for slaves in Virginia against only one (murder) for whites. In Mississippi he found thirty-eight crimes capital for slaves but not for whites. The ratios in the other southern states were less skewed but all had a similar imbalance.58

The black-white divergence in southern criminal codes was reflected in actual practice. Blacks were hanged in numbers far out of proportion to their percentage of the population. When the Reverend Preston Turley was executed in Charleston, Virginia, in 1858, observers noted that while it was unusual to hang a minister, the real interest in the event arose "from the strange spectacle of the execution of a white man in this region. It was the first occurrence of the kind ever known to have taken place within the county."5" Blacks were executed for many more crimes than whites were. All of the whites known to have been hanged in Virginia between 1800 and 1860 were hanged for murder. But of the hundreds of blacks hanged in Virginia in the same period, only about half were murderers. The other crimes for which blacks were commonly hanged included rape, slave revolt, attempted murder, burglary, and arson. In Louisiana nearly all the whites executed were murderers, but the blacks hanged for murder appear to have been outnumbered by those executed for planning slave revolts, and several others were hanged for arson and attempted murder. Kentucky hanged whites only for murder but hanged blacks for attempted murder, rape, attempted rape, arson, and slave revolt. The Carolinas were the states most likely to hang whites for crimes other than murder, but even they executed many more black nonmurderers than white.

Even if it were possible to count the official antebellum executions, the figure would underestimate the intensity with which capital punishment was used for black criminals in the South, for two reasons. First, it would not include the growing number of lynchings-that is, unofficial executions. These often had the approval, and sometimes the actual participation, of government authorities. Blacks were the primary victims. They were often lynched because they were believed to have committed crimes, so we can assume that many would have been executed officially had they lived a bit longer. Second, to the official count one would also have to add the many slaves who were spared execution only to be sold abroad. In Virginia (and perhaps in other southern states as well) condemned slaves were often sold to contractors who agreed to convey them out of the United States. Between 18o01, when Virginia established the program, and 1858, when it was abandoned, nearly nine hundred condemned slaves were transported out of the country.60 Because the state had to compensate the slaves' owners-a rule that prevailed in almost all the southern states, to ensure that owners would not attempt to protect their property from the criminal justice system -selling slaves rather than hanging them represented a substantial saving for the public treasury. If these slaves had been executed, the proportion of blacks hanged in the antebellum South would have been significantly higher.

The South's retention of capital punishment for blacks was surely a direct result of slavery. In the middle of the nineteenth century whites formed a minority of the population in South Carolina, Mississippi, and Louisiana. Blacks made up more than a third of the residents of Virginia, North Carolina, Georgia, Florida, and Alabama. From the perspective of slaveowners, harsh punishments were necessary to manage such large captive populations. The institution of slavery prevented southern states from developing alternatives to the death penalty for blacks. Incarceration or forced labor would not have been much worse than slavery itself, so these would not have been effective deterrents. Most white southerners had little interest in the reformation of black criminals-many would have dismissed the goal as impossible -so the ideal of prison as a penitentiary would not have held any appeal. With two million captives on their hands, southern state governments saw no solution other than capital punishment.

Slavery was also responsible, although less directly, for the South's retention of capital punishment for whites. In the North the most outspoken supporters of abolishing capital punishment were also in favor of abolishing slavery and a host of other reforms. Northern reformers such as Robert Rantoul or John O'Sullivan operated within networks of likeminded people who had similar positions on a wide range of issues. The social and economic importance of slavery in the South prevented this culture of reform from emerging there.61 The South had always been a more violent place than the North, and one may suppose that the continued employment of violent punishments for slaves acclimated white southerners to violent punishments generally, further reducing the opportunity for any significant anti-capital punishment movement to take hold. Hangings remained public in most southern states long after they had moved into the jail yard in most of the North, which also suggests that antebellum white southerners were simply more comfortable with public violence than white northerners. Finally, the idea that crime was caused by environmental or biological influences appears not to have been as widespread in the South as in the North, perhaps because such a belief would have entailed difficult moral questions about the propriety of punishing slaves. The loss of confidence in the criminal's blameworthiness had contributed to the North's movement away from capital punishment. The absence of comparable change in the South helped keep the death penalty relatively intact.

By the time of the Civil War the North had been through decades of debate over capital punishment. The South had not. Three northern states had abolished the death penalty completely, and the rest had confined it to murder and treason. In the South capital punishment still existed on paper for a wide range of crimes committed by whites and still existed in practice for an even wider range committed by blacks. Slavery had produced a wide cultural gap between the northern and southern states in attitudes toward capital punishment.

### Death Penalty => Racialized System of Degradation

#### Capital punishment, like slavery, is a racialized system of degradation where apparent recognitions of humanity only vindicate structural inhumanity

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

In the context of the death penalty, Hugo Adam Bedau has explained that the legality of the death penalty depends on the assumption that the person being executed is a morally rational agent who deserves condemnation for their choice to commit a heinous crime, yet simultaneously involves the denial that that person belongs to the human community, with the intrinsic worth, or dignity, that attaches to all human beings. Bedau explains why this is problematic: “It is conceptually impossible… for a person in a given act to deserve condemnation by the law for the criminality of that act and for the person to have proved by this act that he is no longer a person at all – but only a creature who now lacks any moral standing in the community of persons.”77 This contradiction lay at the heart of slavery too. The legal construction of slaves as more akin to animals or property ran counter to the fact that slaves were, in other legal and non-legal respects, treated as human beings. We know that slaveowners regularly sexually assaulted slaves, but there is no record that these same slaveowners sexually assaulted animals or inanimate property. That is, at some level even slaveholders recognized the human qualities of slaves. From the colonial era, through the Revolutionary and antebellum eras, legislators and courts routinely placed limits on the ways in which, and the extent to which, slaveowners and third parties could treat or punish slaves. The wording of these statutes, and the reasoning of the courts, appeared to be based on the fact that slaves were human beings.78 Slaves were to be counted as persons for the purposes of the Electoral College, and were indeed referred to as “persons” throughout the text of the US Constitution. Animals and property were not.

The dual, fluid status of slaves and death row inmates can lead to several conclusions. First, it might be concluded that this status illustrates the inherent hypocrisy of both institutions. Kenneth Stampp, for example, argued that “the slave’s status as property was incompatible with his status as a person.”79 In legally-orientated abolitionism, highlighting this hypocrisy can serve to strip the practice in question of its underlying rationale. This is what Bedau did when he argued that the characterization of certain people as no longer worthy of life was incompatible with the retributive and deterrent rationales for capital punishment.80

A second possible conclusion is that the systems in question actually depend on the appearance of the dual status of its subjects. In short, whenever we see instances of the law of slavery, or the law of capital punishment, appearing to treat a person with respect for their dignity, the law is actually masking the underlying inhumanity of the practice in question. Put another way, isolated incidents of apparent respect for dignity draw attention away from the structural denial of dignity. Andrew Fede makes this point with regards to slavery. Fede suggests that the legal recognition of the “humanity” of slaves served to mask the very inhumanity of the system of slavery in two ways: “First, it protected the public interest and the owner’s interest, and second, it burdened slaves with special legal duties and obligations that marked the complete oppression of the system.”81 This was because all limitations on the master’s power over their slaves were concerned primarily with protecting the institution of slavery, rather than with protecting the person condemned to bondage. The power to maim, kill, starve, or even free a slave, Fede writes, threatened the practice of slavery, since the slave would not be economically profitable. Thus, even though the statutes and the courts referred to the humanity of slaves in such cases, such references only served to legitimize and vindicate the very inhumanity of slavery in the abstract. Similarly, the law’s apparent recognition of the “humanity” of those facing capital punishment – whether through the individualized sentencing procedure, or approaches to methods of execution – serves to legitimize and vindicate the structural and underlying inhumanity of the death penalty as a conceptual matter. When the law regulates the groups of people who can be executed, or the way in which they are executed, it gives a veneer of acceptability to capital punishment. This is particularly the case in the context of “humane” executions. It has long been noted that the shift away from visibly brutal executions towards executions that appear to be relatively pain-free, such as lethal injections, “may have had little to do with humanitarian concerns, but much to do with identifying a method that would temper opposition to the death penalty and reduce if not eliminate court challenges by the condemned.”82 Similarly, excluding certain groups from capital punishment serves to further legitimize the executions of those not excluded, just as the law’s ostensible recognition of the humanity of slaves legitimized human bondage.

Alexander Reinert makes the connection between the “humane” treatment of slaves, and the “humane” treatment of prisoners, clear by illustrating how the Eighth Amendment prohibition on “cruel and unusual punishments” derives from the standards deployed in the treatment of slaves.83 Reinart documents the local and state laws that used words such as “cruelly”,84 and notes how the pro-slavery lobby pointed to these laws to show that slaves were protected from inhumane treatment. Although Reinart uses this analysis to discuss the contemporary treatment of prisoners, his overarching point remains: the Eighth Amendment was used to regulate a system of subordination. In practice, slaves were rarely spared harsh treatment. As Reinart writes, “the laws themselves may have been a product of a Southern elite’s cynical attempt to respond to antislavery critics by demonstrating that slavery could be ‘humanize[d]’ without altering the underlying brutality of the institution.”85

It is with this in mind that today’s capital punishment, like slavery in the antebellum era, can best be described as a racialized system of degradation, as defined in Chapter Two. It is racialized in the sense that racial prejudices guide its application, but it hides this by the occasional sentencing to death of a white person, or the sentencing to death of a person accused of killing a black person. It is a system of degradation in that it gives legal sanction to the moral view that some people can and should be treated as if they are something other than fully human – because of their skin color, their conduct, or both. It hides this, though, by appearing to treat such people as human beings.

The above analysis indicates how respect for the dignity of the person is necessarily intertwined with both the dignity of the community, and of the legal system, since it is the community and the legal system that strive to deny the human being’s dignity. Since neither the community nor the legal system are “human beings”, though, we need an alternative account of dignity for these contexts.

### Death Penalty is Racially Disparate

#### Death penalty is still administered in racially disparate ways

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)

B. Race

Another reason for the declining support is the concern over the continued racial disparities in the administration of the death penalty. Racism in the implementation of the death penalty does not appear to be a relic of the past. 27 African-Americans continue to be sentenced to death and executed disproportionately. African-Americans constitute roughly 13% of the U.S. population, 28 yet they account for about 42% of the death row population 29 and approximately 35% of all executions in the U.S. since 1976. 30 It is also troubling that the vast majority [\*276] of those who have been executed killed white victims, 31 despite the fact that approximately 44% of murder victims in the United States are African-American. 32 Since 1976, 76% of people who have been executed killed white victims. 33 Thus, because African-Americans are almost one half of all homicide victims, this means that their killers are, for the most part, not being sentenced to death and executed. Numerous studies have concluded that these disparities are the result of racial discrimination in the administration of the death penalty. 34 The most prominent study to reach such a conclusion was the Baldus study, which purports to show a disparity in the imposition of the death penalty in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. 35 The Baldus study took into account 230 variables "that could have explained the [racial] disparities" in capital sentencing "on non-racial grounds." 36 Even after taking account of these variables, the Baldus study found that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing blacks and others. 37 The study also found that black defendants were 1.1 times as likely to receive a death sentence as other defendants. 38 The study concluded that black defendants who kill white victims have a greater likelihood of receiving the death penalty than any other defendant-victim combination. 39

[\*277] The Supreme Court had largely ignored the issue of racial disparities in capital sentencing, but the strength of the Baldus findings forced it to finally confront the issue in 1987. In McCleskey v. Kemp, although the Court accepted the legitimacy of the Baldus study, 40 it did not allow the inmate to use the statistics as proof of racial discrimination. 41 Rather, the Court held that in order to prevail on a claim of racial discrimination in capital sentencing, a death row inmate would have to prove that the decisionmakers in his specific case acted with discriminatory purpose or that a capital sentencing statute was enacted by the legislature with a discriminatory purpose. 42 Not surprisingly, given this onerous standard, no death row inmate has been able to prove racial discrimination in capital sentencing. 43

A major reason racial disparities in capital sentencing persist is because those who decide whether the defendant lives or dies are overwhelmingly white:

The criminal justice system is the part of American society that has been least affected by the Civil Rights Movement. Many courthouses throughout the country look about the same today as they did in the 1940s and 1950s. The judges are white, the prosecutors are white, and the court-appointed lawyers are white. Even in communities with fairly substantial African American populations, all of the jurors at a trial may be white. 44

According to a recent study, 95% of elected state and local prosecutors are white. 45 These overwhelmingly white prosecutors make the decision whether to seek death in a particular case. They also have a big influence over who sits on the jury in a capital case. Prosecutors are obviously aware of the fact that many African-Americans perceive the criminal justice system to be biased. As a result, a jury composed of African-Americans is significantly less likely to return a death verdict. 46 Therefore, prosecutors have an incentive to remove as many African- [\*278] Americans from a capital jury as they possibly can, and they often do so through the use of peremptory challenges. 47 Several studies have documented the continuing use of peremptory challenges to strike African-Americans from the jury in capital cases. 48

In Batson v. Kentucky, 49 the Supreme Court outlawed the use of race in the exercise of peremptory challenges. Despite Batson, courts have tended to uphold the prosecutors' use of peremptory challenges against African-American members of the jury pool because "race-based peremptory strikes are almost always invisible, or at least, as Batson has shown, hard to prove." 50 As long as the prosecutor can articulate a race neutral reason for the strike, the courts will usually reject the defense's Batson challenge. 51 This is so even when the prosecutor offers an absurd reason for striking black jurors, such as the fact that a juror agrees with the verdict in the O.J. Simpson case, 52 or that the potential juror has facial hair. 53 Despite the continued use of peremptory challenges to remove black jurors from capital cases, the Supreme Court has refused to strengthen Batson.

#### Racial bias is more prevalent now in capital cases

Funt, 20 (1/9/20, Peter - writer and host of "Candid Camera", “'Just Mercy' shows why death penalty, racial disparity in American justice should make you angry; While the use of capital punishment has decreased, racial bias in death sentences is on the rise. Activist lawyer still fighting to reverse injustices,” <https://www.usatoday.com/story/opinion/policing/spotlight/2020/01/09/just-mercy-shows-why-death-penalty-racial-disparity-should-make-you-angry/4418179002/>, accessed on 3/24/20, JMP)

My view that capital punishment is immoral is shared by many Americans. But beyond questions of morality are problems of cost and racial bias. While the number of executions in America has dropped in recent years — to a near low of 22 in 2019 — racial bias in capital cases has actually increased.

A recently released study by The Intercept news organization, going back to the reinstatement of the death penalty in 1976, concludes that “the death penalty appears to be more racially biased than ever.”

In the first decade after capital punishment was reinstated, 46% of those sentenced to die in states that now use the death penalty were people of color. In the 10 years ending in December 2018, the percentage grew to 60, according to The Intercept.

At the outset of his legal career, Stevenson was shaken by a 1987 Supreme Court decision upholding the death penalty in a Georgia case marked by racial prejudice, he told The Wall Street Journal. Writing for the majority, Justice Lewis Powell deemed the inequities found in Georgia’s death penalty sentencing to be “an inevitable part of our criminal justice system.”

### Death Penalty => Race / Gender Stereotypes / Poverty

#### The death penalty is powerfully intertwined with race, gender stereotypes and poverty

Bessler, 16 --- Associate Professor, University of Baltimore School of Law (John D., “ARTICLE: The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments,” 73 Wash. & Lee L. Rev. Online 487, Nexis Uni via Umich Libraries, JMP)

[\*498] Phyllis Goldfarb's "Matters of Strata" is a welcome addition to the sizeable, growing body of literature on capital punishment and inequality. 39 In examining what she calls "the interactive role of race, gender, and class in capital cases in general and the Giarratano case in particular," 40 she sheds light and insight on the reality that race, gender stereotypes, and poverty have long shaped--and continue to shape--America's death penalty system. For example, she notes that "abundant evidence reveals" that race and the death penalty are "powerfully intertwined." 41 That [\*499] the histories of capital punishment and lynching are inextricably linked with racial prejudice and oppression, in fact, is amply shown through Professor Goldfarb's observations about the Scottsboro cases 42 and the Southern lynch mobs that took so many African-American lives. 43 The death penalty has frequently targeted the illiterate, the poor, the intellectually disabled, and racial minorities, and often in not-so-subtle ways. 44 And the [\*500] punishment of death--initially rooted in the Old Testament 45 and fertilized in prior centuries by then-prevailing religious orthodoxy 46 and superstition 47 --has long been used mainly (almost exclusively) against men. 48

This response to Professor Goldfarb's essay explores the implications of her analysis for the U.S. Supreme Court's Eighth and Fourteenth Amendment jurisprudence and the constitutionality of capital punishment. In the twenty-first century, Americans have a growing awareness and understanding that their criminal justice system--frequently [\*501] described as one of "mass incarceration" and as "overly punitive"--is badly in need of reform. 49 There are lots of non-violent offenders living in American prisons, 50 with the rise of private prisons perversely incentivizing incarceration and profit-taking at the expense of people's lives. 51 The American people now know that the capital punishment "system" (if it can even be called that) is riddled with arbitrariness, error, geographic and racial disparities, and wrongful convictions. 52 After examining the [\*502] evidence, Goldfarb is right to conclude that "the entanglement of race, gender, and class structures" in the capital decision-making process can no longer be overlooked--and, in fact, "hang like a shadow over America's death penalty." 53 Indeed, in the face of miscarriages of justice, a series of high-profile botched executions, and the long delays between death sentences and executions that inflict severe psychological torment on death row inmates, U.N. officials, academics and jurists, as well as members of the general public, are starting to talk about executions not just as cruel and unusual but through the lens of torture. 54 Though the U.S. Constitution's Fourteenth Amendment, as recounted below, was intended in part to equalize the punishment of blacks and whites, America's death penalty has never separated itself from its terrifying, discriminatory past.

### Must Reject Racism

#### Racism should be rejected – causes suffering for black people

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/] RN

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.

#### Racism exacerbates diseases and health conditions in black people

Thames 19. April Thames is a Associate Professor, Psychology and Psychiatry, from University of Southern California – Dornsife College of Letters, Arts and Sciences, ["Study: Racism shortens lives and hurts health of blacks by promoting genes that lead to inflammation and illness," 10-17-2019, The Conversation, URL: https://theconversation.com/study-racism-shortens-lives-and-hurts-health-of-blacks-by-promoting-genes-that-lead-to-inflammation-and-illness-122027] RN

Negative social attitudes, such as racism and discrimination, damage the health of those who are targeted by triggering a cascade of aberrant biological responses, including abnormal gene activity. It is not surprising that reports documenting lifespan and causes of mortality have demonstrated a clear pattern: African Americans die sooner and bear a heavier burden of many diseases, including hypertension, heart disease, dementia and late-stage breast cancer.

Scientists have searched for genetic causes to health disparities between blacks and whites but have had limited success. The strongest evidence to date points to social-environmental factors such as poverty, health care inequities and racism.

Our society is plagued by racism and racial inequality which is not fully recognized by all, according to a recent study showing that many Americans overestimate our progress in fixing racial inequality. On the other hand, more Americans (65%) are aware that it has become more common for people to express racist or racially insensitive views, according to a U.S. survey.

Racism is not merely negative attitudes or treatment from one person to another. Racism has deep historical roots in American society, sustained through institutional policies and practices, whereby people of color are routinely and systematically treated differently than whites.

As an African American/white individual, I often experienced comments growing up like “You don’t sound black,” and “What are you?” that made me cringe. In college, I became intrigued by the field of psychology as it was a field that explained how prejudices, stereotyping and racism arise. My research as a clinical psychologist at USC is focused on understanding how societal factors interact with biology to create disparities in health outcomes. A recent study I co-authored showed that racism promotes genes that turn on inflammation, one of the major drivers of disease.

Less overt, but entrenched

Although racism may be less overt today than during the early 20th century, government policies and norms, unfair treatment by social institutions, stereotypes and discriminatory behaviors are sobering reminders that racism is still alive – and contribute to earlier deaths in addition to poorer quality of life.

For example, blacks are more likely than whites to receive drug testing when prescribed long-term opiates even though whites show higher rates of overdose. African Americans have shouldered the burden of racism for decades, creating a level of mistrust for societal systems, be it health care or law enforcement.

Terms such as “driving while black” illustrate how racism and discrimination have been deeply embedded in African American cultural experience. Just imagine trying to buy a home and being turned down because of your race. This is too common of an experience for African Americans. Nearly half (45%) reported experiencing discrimination when trying to find a home and in receiving health care, according to a Robert Wood Johnson survey that was developed by the Harvard T.H. Chan School of Public Health, Robert Wood Johnson Foundation and National Public Radio.

From macro to micro, the effect is widespread

Blacks’ exposure to chronic stress has often been cited as a reason for worse health outcomes.

Until recently, we scientists did not know the mechanism linking racism to health. The new study from my lab here at USC and colleagues at UCLA shows that the function of genes may explain this relationship. As it turns out, our study showed that genes that promote inflammation are expressed more often in blacks than in whites. We believe that exposure to racism is why.

We previously showed how activating racism, such as asking people to write down their race before taking an exam, in the form of stereotyping impairs brain functions such as learning and memory and problem-solving in African Americans. This may partly explain the higher rates of dementia in African Americans compared to whites.

Researchers have well documented that chronic stress alters the function of brain regions, such as the hippocampus, that are targeted in brain diseases such as Alzheimer’s disease. This work has been expanded through the field of social genomics, largely pioneered by my colleague Steve Cole at UCLA. A relatively new field called social genomics demonstrates how the function of genes – termed gene expression – is influenced by social conditions.

Genes are programmed to turn off and on in a certain manner. But those patterns of activity can shift depending on environmental exposures.

Certain marginalized groups demonstrate abnormal patterns of gene activity in genes responsible for innate immunity. Innate immunity is how the body fights off and responds to foreign pathogens. Dr. Cole named this pattern/sequence of gene activity the Conserved Transcriptional Response to Adversity. It refers to the how genes controlling innate immunity behave under positive or negative environmental conditions.

When environmental stresses like socioeconomic disadvantage or racism trigger the sympathetic nervous system, which controls our fight-or-flight responses, the behavior of our genes is altered. This leads to complex biochemical events that turn on genes, which may result in poor health outcomes.

The Conserved Transcriptional Response to Adversity profile is characterized by increased activity of genes that play a role in inflammation, and decreased activity of genes involved in protecting the body from viruses.

We found that blacks and whites differed in the pattern of which pro-inflammatory and stress signaling genes were turned on. Our findings are particularly important because chronic inflammation ages the body and causes organ damage.

As my colleagues and I pulled this study together, we took into consideration the health disparities such as socioeconomic status, social stress, and health care access. For example, we recruited African Americans and whites with similar socioeconomic status. We also examined racial differences in reports of other types of stress events. Both groups reported similar levels of social stress.

For this particular study, none of these traditional factors explained why African Americans had greater expression in pro-inflammatory genes than whites. However, we found that experiences with racism and discrimination accounted for more than 50% of the black/white difference in the activity of genes that increase inflammation.

So what do these results mean for future health? I believe racism and discrimination should be treated as a health risk factor – just like smoking. It is toxic to health by damaging the natural defenses our bodies use to fight off infection and disease. Interventions tailored toward reducing racism-associated stress may mitigate some of its adverse effects on health. As a society we cannot afford to perpetuate health inequities by undermining or disguising the biological impact of racism.

### Racism => Existential Threat

#### Overcoming racism can solve existential risks – ideology implicates both policies and cooperation necessary to respond

Oliver 20. A Professor in Applied Ecology at the University of Reading and author of The Self Delusion, a popular science book about our human interconnectedness, ["Why overcoming racism is essential for humanity’s survival," 4-5-20, BBC, URL: https://www.bbc.com/future/article/20200403-how-to-overcome-racism-and-tribalism] RN

Movements such as Nazism have openly promoted xenophobia and bigotry. They encourage a strong tribal loyalty to the “in-group” (one’s own group), while stigmatising (and in the case of Nazism, executing) others. A healthy pride in one’s country can easily tip into unhealthy nationalism, where we identify with our own nation at the exclusion of others.

Things seem to be moving in this direction today. Leaders with nationalist leanings are more frequently taking centre stage around the world, from the US, to Brazil, to India. In the UK, figures such as Nigel Farage, posted this tweet about the 2020 coronavirus outbreak: “It really is about time we all said it. China caused this nightmare. Period.”

When people and organisations we trust talk in such a way, it has a profound effect on our receiving minds. It can even shape our beliefs about what we might think are purely rational issues. For example, the belief in whether humans are causing climate change is strongly associated with US political party membership.

This is because we tend to adopt a common position on a topic to signal that we are part of a group, just like football fans wear certain colours or have tattoos to show their tribal loyalty. Even strong individuals who stand up to oppressive regimes typically have shared ideals and norms with other members of a resistance movement.

This tribalism can all feel very visceral and natural because, well, in a way, it is. It fires up the primal parts of our brain that evolved for such responses. Yet, there are other natural attitudes, such as compassion and consideration for others – and they can be suppressed in such circumstances.

This combination of nature and nurture shaping our attitudes and behaviour is apparent in many human characteristics, and unpicking some of these examples can help us see opportunities to steer the process.

Consider the tendency to become overweight in modern society. In premodern times, sugary and fatty foods were rare and valuable for humans. Now, they are everywhere. A biological trait – the craving for sugary or fatty foods – which was adaptive in premodern times, has become detrimental and maladaptive.

Surely our modern cultures can protect us from these innate drives when they are unhealthy for ourselves and society? After all, we effectively suppress violent behaviour in society through the way we bring up children, policing and the prison system.

Instead of acknowledging and protecting us from the innate drive to binge on unhealthy food, however, our modern cultures (in many countries at least) actually exacerbate that particular problem. The result is two billion people – over a quarter of the world’s population – who are overweight or obese, while another two billion suffer some kind of micronutrient deficiency.

When we understand how our “hardwired” urges interact with an unhelpful cultural context, we can begin to design positive interventions. In the case of obesity, this might mean less marketing of junk food and altering the composition of manufactured food. We can also change our own behaviour, for example laying down new routines and healthier eating habits.

Both nature and nurture play a role in how we relate to others - cultures that encourage acceptance help to undermine xenophobia (Credit: Getty Images)

But what about bigotry and xenophobia? Can’t we simply design the right fixes for them? That may depend on how big the problems we face in future are. For example, growing ecological crises – climate change, pollution and biodiversity loss – may actually lead to more bigoted and xenophobic attitudes.

The cultural psychologist Michele Gelfand has shown how environmental shocks can cause societies to become “tighter” – meaning the tendency to be loyal to the “in-group” gets stronger. Such societies are more likely to elect authoritarian leaders and to show prejudice towards outsiders.

This has been observed under past ecological threats such as resource scarcity and disease outbreaks. Under most climate change scenarios we expect these threats, in particular extreme weather events and food insecurity, to only get worse. The same goes for the coronavirus pandemic. While many hope such outbreaks can lead to a better world, they could do exactly the opposite.

This enhanced loyalty to our local tribe is a defence mechanism that helped past human groups pull together and overcome hardship. But it is not beneficial in a globalised world, where ecological issues and our economies transcend national boundaries. In response to global issues, becoming bigoted, xenophobic and reducing cooperation with other countries will only make the impacts on our own nations worse.

Back in 2001, a United Nations initiative called the Millennium Ecosystem Assessment sought to take stock of global environmental trends and, crucially, to explore how these trends might unfold in the future. One of the scenarios was called “order from strength” and represented “a regionalised and fragmented world that is concerned with security and protection… Nations see looking after their own interests as the best defence against economic insecurity, and the movement of goods, people, and information is strongly regulated and policed”.

Later iterations of the scenario have been dubbed “fortress world” describing a dystopian vision where order is imposed through an authoritarian system of global apartheid with elites in protected enclaves and an impoverished majority outside.

On a larger scale, the rich “developed” countries primarily responsible for causing climate change are doing very little to address the plight of poorer countries.

There seems to be a lack of empathy, a disregard and intolerance for others who were not lucky enough to be born in “our” tribe. In response to an ecological catastrophe of their making, rich countries simply argue about how best to prevent the potential influx of migrants.

Thankfully, we can use rational thinking to develop strategies to overcome these attitudes. We can reinforce positive values, build trust and compassion, and reduce the distinction between our in-group and the “other”.

An important first step is appreciating our connectedness to other people. We all evolved from the same bacteria-like ancestor, and right now we share more than 99% of our DNA with everyone else on the planet. Our minds are closely linked through social networks, and the things we create are often the inevitable next step in a series of interdependent innovations.

Innovation is part of a great, linked creative human endeavour with no respect for race or national boundaries. In the face of overwhelming evidence from multiple scientific disciplines (biology, psychology, neuroscience) you can even question whether we exist as discrete individuals, or whether this sense of individuality is an illusion (as I argue in my book The Self Delusion).

We evolved to believe we are discrete individuals because it brought survival benefits (such as memory formation and an ability to track complex social interactions). But taken too far, self-centred individualism can prevent us from solving collective problems.

Beyond theory, practice is also necessary to literally rewire our brains – reinforcing the neural networks through which compassionate behaviour arises. Outdoor community activities have been shown to increase our psychological connectedness to others, albeit right at this moment they are off-limits for those in lockdown. Similarly, meditation approaches alter neural networks in the brain and reduce our sense of isolated self-identity, instead promoting compassion towards others. Even computer games and books can be designed to increase empathy.

Finally, at the societal level, we need frank and open debate about environmental change and its current and future human impacts – crucially, how our attitudes and values can affect other lives and livelihoods. We need public dialogue around climate-driven human migration and how we respond to that as a society, allowing us to mitigate the knee-jerk reaction of devaluing others.

Let’s defuse this ticking ethical timebomb and shame those who stoke the flames of bigotry beneath it. Instead, we can open ourselves up to a more expansive attitude of connectedness, empowering us to work together in cooperation with our fellow human kin.

It is possible to steer our cultures and rewire our brains so that xenophobia and bigotry all but disappear. Indeed, working collaboratively across borders to overcome the global challenges of the 21st Century relies upon us doing just that.

#### Racism is the root cause of climate change – the colonial mindset led to exploitation of resources

Yeampierre 20. Co-chair of the Climate Justice Alliance, ["Unequal Impact: The Deep Links Between Racism and Climate Change," 6-9-20, Yale E360, Interview of Yeampierre conducted by Beth Gardiner, URL: https://e360.yale.edu/features/unequal-impact-the-deep-links-between-inequality-and-climate-change] RN

The killing of George Floyd by Minneapolis police and the disproportionate impact of Covid-19 on African Americans, Latinos, and Native Americans have cast stark new light on the racism that remains deeply embedded in U.S. society. It is as present in matters of the environment as in other aspects of life: Both historical and present-day injustices have left people of color exposed to far greater environmental health hazards than whites.

Elizabeth Yeampierre has been an important voice on these issues for more than two decades. As co-chair of the Climate Justice Alliance, she leads a coalition of more than 70 organizations focused on addressing racial and economic inequities together with climate change. In an interview with Yale Environment 360, Yeampierre draws a direct line from slavery and the rapacious exploitation of natural resources to current issues of environmental justice. “I think about people who got the worst food, the worst health care, the worst treatment, and then when freed, were given lands that were eventually surrounded by things like petrochemical industries,” says Yeampierre.

Yeampierre sees the fights against climate change and racial injustice as deeply intertwined, noting that the transition to a low-carbon future is connected to “workers’ rights, land use, [and] how people are treated,” and she criticizes the mainstream environmental movement, which she says was “built by people who cared about conservation, who cared about wildlife, who cared about trees and open space… but didn’t care about black people.”

Yale Environment 360: You’ve spoken about the big-picture idea that climate change and racial injustice share the same roots and have to be addressed together, and that there is no climate action that is not also about racial justice. Can you describe the links you see connecting these two issues?

Elizabeth Yeampierre: Climate change is the result of a legacy of extraction, of colonialism, of slavery. A lot of times when people talk about environmental justice they go back to the 1970s or ‘60s. But I think about the slave quarters. I think about people who got the worst food, the worst health care, the worst treatment, and then when freed, were given lands that were eventually surrounded by things like petrochemical industries. The idea of killing black people or indigenous people, all of that has a long, long history that is centered on capitalism and the extraction of our land and our labor in this country.

For us, as part of the climate justice movement, to separate those things is impossible. The truth is that the climate justice movement, people of color, indigenous people, have always worked multi-dimensionally because we have to be able to fight on so many different planes

When I first came into this work, I was fighting police brutality at the Puerto Rican Legal Defense Fund. We were fighting for racial justice. We were in our 20s and this is how we started. It was only a few years after that I realized that if we couldn’t breathe, we couldn’t fight for justice and that’s how I got into the environmental justice movement. For us, there is no distinction between one and the other.

In our communities, people are suffering from asthma and upper respiratory disease, and we’ve been fighting for the right to breathe for generations. It’s ironic that those are the signs you’re seeing in these protests — “I can’t breathe.” When the police are using chokeholds, literally people who suffer from a history of asthma and respiratory disease, their breath is taken away. When Eric Garner died [in 2014 from a New York City police officer’s chokehold], and we heard he had asthma, the first thing we said in my house was, “This is an environmental justice issue.”

The communities that are most impacted by Covid, or by pollution, it’s not surprising that they’re the ones that are going to be most impacted by extreme weather events. And it’s not surprising that they’re the ones that are targeted for racial violence. It’s all the same communities, all over the United States. And you can’t treat one part of the problem without the other, because it’s so systemic.

With Hurricanes Maria and Katrina, the loss of lives came “out of a legacy of neglect and racism.”

e360: Can you more explicitly draw the connection between climate change and the history of slavery and colonialism?

Yeampierre: With the arrival of slavery comes a repurposing of the land, chopping down of trees, disrupting water systems and other ecological systems that comes with supporting the effort to build a capitalist society and to provide resources for the privileged, using the bodies of black people to facilitate that.

The same thing in terms of the disruption and the stealing of indigenous land. There was a taking of land, not just for expansion, but to search for gold, to take down mountains and extract fossil fuels out of mountains. All of that is connected, and I don’t know how people don’t see the connection between the extraction and how black and indigenous people suffered as a result of that and continue to suffer, because all of those decisions were made along that historical continuum, all those decisions also came with Jim Crow. They came with literally doing everything necessary to control and squash black people from having any kind of power.

You need to understand the economics. If you understand that, then you know that climate change is the child of all that destruction, of all of that extraction, of all of those decisions that were made and how those ended up, not just in terms of our freedom and taking away freedom from black people, but hurting us along the way.

It’s all related. You can’t say that with Hurricane Maria in Puerto Rico and Hurricane Katrina in New Orleans the loss of lives was simply because there was an extreme weather event. The loss of life comes out of a legacy of neglect and racism. And that’s evident even in the rebuilding. It’s really interesting to see what happens to the land after people have been displaced, how land speculation and land grabs and investments are made in communities that, when there were black people living there, had endured not having the things people need to have livable good lives.

These things, to me, are connected. It’s comfortable for people to separate them, because remember that the environmental movement, the conservation movement, a lot of those institutions were built by people who cared about conservation, who cared about wildlife, who cared about trees and open space and wanted those privileges while also living in the city, but didn’t care about black people. There is a long history of racism in those movements.

e360: So how do you have a fight for climate action that is intertwined with a fight for racial justice? What are the steps, the policies, that we should be thinking about looking forward?

Yeampierre: With the Green New Deal, for example, we said that it wasn’t a Green New Deal unless it was centered on frontline solutions and on ensuring that frontline leadership would be able to move resources to their communities to deal with things like infrastructure and food security. When that happens, we’ll be able to move the dial much more efficiently. In New York, for example, we passed the Climate Leadership and Community Protection Act, which is aggressive legislation that looks at how you move resources to frontline communities and how you invest in those communities.

Nationally, we need to be looking at stopping pipelines — reducing carbon but also reducing other pollutants. We need to start focusing on regenerative economies, creating community cooperatives and different kinds of economic systems that make it possible for people to thrive economically while at the same time taking us off the grid.

In every community there are different things people are doing, everything from putting solar in public housing to community-owned solar cooperatives. This is not the ‘60s or the ‘70s or the ‘80s where we follow one iconic leader. This is a time where we need to have numerous people really taking on the charge of directing something that’s big and complex.

e360: Can you talk a little bit about the idea of a just transition to a low-carbon future and how that dovetails with anti-racism efforts?

Yeampierre: A just transition is a process that moves us away from a fossil fuel economy to local livable economies, to regenerative economies. Those are different economies of scale that include not just renewable energy but healthy food and all of the things that people need in order to thrive. The word justice here is important because for a long time people would talk about sustainability, that you could have sustainability without justice, and the climate movement focused on reducing carbon but didn’t really care about other pollutants.

“Climate activists talk about moving at a big, grand scale, and we talk about moving at a local scale.”

A just transition looks at the process of how we get there, and so it looks at not just the outcomes, which is something that the environmentalists look at, but it looks at the process — workers’ rights, land use, how people are treated, whether the process of creating materials that take us to a carbon-neutral environment is toxic and whether it affects the host community where it’s being built. It looks at all those different kinds of things.

I can give you one example in New York City. We have been advocates of bringing in offshore wind. One of the things that we learned is that in order for that to happen, the pieces have to come from Europe and be assembled in New York and they would be coming in these huge container ships. Now these ships operate by diesel, and so what happens is they park themselves on the waterfront of an environmental justice community and the climate solution becomes an environmental justice problem. The climate solution is we reduce carbon, but the environmental justice problem is we dump tons of nitrogen oxides and sulfur oxides and PM2.5 [particles] into the lungs of the host community.

We need the climate solution, but then we need to talk about how we electrify the industrial waterfront and how these ships can plug in so they’re not burning diesel. While we’re doing that, we also need to look at how we create the market instead of following the market — wind turbines that are built in the United States so we don’t have to bring the parts in from Europe.

These are the kinds of things that we think about when we’re thinking about a just transition. A climate activist will be like, “Okay, we need offshore wind” — right, that’s it. But a climate justice activist will be like, “Okay, let’s look at it a little closer and let’s figure out what the process looks like and how we can engage in remediation to make sure we are not only reducing carbon but we’re also reducing co-pollutants, and let’s make sure that the people that are hired are hired locally.” So there are all of these other pieces that are involved in a just transition. Climate activists talk about moving at a big, grand scale, and we talk about moving at a local scale, and then replicating those efforts.

e360: Racial justice would presumably have to be at the heart of that.

Yeampierre: It has to be at the center. For example, in Sunset Park [Brooklyn, where Yeampierre runs the Latino community group UPROSE], we just launched the first community-owned solar cooperative in the state. Okay, we want renewable energy. We need to be able to prioritize the people that are going to be most impacted. Low-income communities. People of color. It has to matter to white folks because when our communities succeed and get what they need, everyone benefits from that.

## Global Abolition Adv

### 1ac Adv – Global Abolition

#### Thousands are sentenced to death globally each year and the numbers are increasing

AI 20 Amnesty International is a non-governmental organization with its headquarters in the United Kingdom focused on human rights. [“Death penalty in 2019: Facts and figures,” 04-21-2020, *Amnesty International,* URL: <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/>] kly

Global death penalty figures

Amnesty International recorded 657 executions in 20 countries in 2019, a decrease of 5% compared to 2018 (at least 690). This is the lowest number of executions that Amnesty International has recorded in at least a decade.

Most executions took place in China, Iran, Saudi Arabia, Iraq and Egypt – in that order.

China remained the world’s leading executioner – but the true extent of the use of the death penalty in China is unknown as this data is classified as a state secret; the global figure of at least 657 excludes the thousands of executions believed to have been carried out in China.

Excluding China, 86% of all reported executions took place in just four countries – Iran, Saudi Arabia, Iraq and Egypt.

Bangladesh and Bahrain resumed executions last year, after a hiatus in 2018. Amnesty International did not report any executions in Afghanistan, Taiwan and Thailand, despite having done so in 2018.

Executions in Iran fell slightly from at least 253 in 2018 to at least 251 in 2019. Executions in Iraq almost doubled from at least 52 in 2018 to at least 100 in 2019, while Saudi Arabia executed a record number of people from 149 in 2018 to 184 in 2019.

Central African Republic, Equatorial Guinea, Gambia, Kazakhstan, Kenya and Zimbabwe either took positive steps or made pronouncements in 2019 which may lead to the abolition of the death penalty.

Barbados also removed the mandatory death penalty from its Constitution. In the United States, the Governor of California established an official moratorium on executions in the US state with biggest death row population, and New Hampshire became the 21st US state to abolish the death penalty for all crimes.

Gambia, Kazakhstan, Malaysia, the Russian Federation and Tajikistan continued to observe official moratoriums on executions.

At the end of 2019, 106 countries (a majority of the world’s states) had abolished the death penalty in law for all crimes, and 142 countries (more than two-thirds) had abolished the death penalty in law or practice.

Amnesty International recorded commutations or pardons of death sentences in 24 countries: Bangladesh, China, Egypt, Gambia, Ghana, Guyana, India, Indonesia, Iraq, Kuwait, Malaysia, Mauritania, Morocco/Western Sahara, Niger, Nigeria, Oman, Pakistan, Singapore, Sudan, Thailand, UAE, USA, Zambia, Zimbabwe.

At least 11 exonerations of prisoners under sentence of death were recorded in two countries: USA and Zambia.

Amnesty International recorded at least 2,307 death sentences in 56 countries compared to the total of 2,531 reported in 54 countries in 2018. However, Amnesty did not receive information on official figures for death sentences imposed in Malaysia, Nigeria and Sri Lanka, countries that reported high official numbers of death sentences in previous years.

At least 26,604 people were known to be under sentence of death globally at the end of 2019.

The following methods of execution were used across the world in 2019: beheading, electrocution, hanging, lethal injection and shooting.

At least 13 public executions were recorded in Iran. At least six people – four in Iran, one in Saudi Arabia and one in South Sudan – were executed for crimes that occurred when they were below 18 years of age. People with mental or intellectual disabilities were under sentence of death in several countries, including Japan, Maldives, Pakistan and USA.

Death sentences were known to have been imposed after proceedings that did not meet international fair trial standards in countries including Bahrain, Bangladesh, China, Egypt, Iran, Iraq, Malaysia, Pakistan, Saudi Arabia, Singapore, Viet Nam and Yemen.

Regional death penalty analysis

Americas

For the 11th consecutive year, the USA remained the only country to carry out executions in the region. Trinidad and Tobago was the only country to retain the mandatory death penalty for murder.

The number of executions (from 25 to 22) and death sentences (from 45 to 35) recorded in the US decreased compared to 2018.

More than 40% of all recorded executions were carried out in Texas, which remained the leading executing state in the country (from 13 to nine). Missouri carried out one execution in 2019 after none in the previous year. Conversely, Nebraska and Ohio did not put anyone to death in 2019 after carrying out executions in 2018 (one in each state).

Outside the USA, the progress towards ending the use of the death penalty continued. Barbados removed the mandatory death penalty from its constitution while Antigua and Barbuda, Bahamas, Belize, Cuba, Dominica, Guatemala, Jamaica, Saint Kitts and Nevis and Saint Lucia did not have anyone on death row and no reports of new death sentences.

Asia-Pacific

For the first time in almost a decade, the Asia-Pacific region saw a decrease in the number of executing countries, with seven countries carrying out executions during the year.

Without a figure for Viet Nam, the number of recorded executions (29) showed a slight decrease due to drops in Japan (from 15 to three) and Singapore (from 13 to four). This regional total, as in previous years, does not include the thousands of executions that were believed to have been carried out in China and is affected by ongoing secrecy in this country as well as in North Korea and Viet Nam.

Although Bangladesh resumed executions (two), hiatuses were reported in Afghanistan, Taiwan and Thailand, which all executed people in 2018. Malaysia continued to observe its official moratorium on executions established in July 2018.

Recorded executions in Pakistan in 2019 represented the same total as in the previous year with at least 14 men hanged in the country. Death sentences in the country increased significantly to at least 632, after additional courts became operational to deal with a backlog of cases.

The number of executions in Japan was down from 15 in 2018, when the country reported its highest yearly figure since 2008, to three in 2019. Two Japanese men were executed on 2 August and a Chinese national was executed on 26 December. All men had been convicted of murder.

Singapore reported 4 executions in 2019, from a record-high of 13 in 2018.

The Philippines attempted to reintroduce the death penalty for “heinous crimes related to illegal drugs and plunder”.

At least 1,227 new death sentences across 17 countries were known to have been imposed, a 12% increase compared to 2018.

Europe and Central Asia

At least two executions were recorded in Belarus in 2019, compared to at least four in 2018. The last time another country in the region carried out executions was in 2005.

Kazakhstan, the Russian Federation and Tajikistan continued to observe official moratoriums on executions. Kazakhstan also announced measures to start the process of joining the Second Optional Protocol to the International Covenant on Civil and Political Rights, which commits states to abolishing the death penalty.

Middle East and North Africa

The Middle East and North Africa region reported a 16% increase in the number of executions, from 501 in 2018 to 579 in 2019, bucking the trend that has seen a decline in the region’s recorded use of the death penalty since 2015.

This was mainly due to a sharp increase in the use of the death penalty in Iraq and Saudi Arabia. Iraq almost doubled the number of executions from at least 52 in 2018 to at least 100 in 2019, while Saudi Arabia executed a record number of people – 184 -- in 2019 compared to 149 people in 2018. Together with Iran, they accounted for 92% of the total number of recorded executions in the region.

Seven countries – Bahrain, Egypt, Iran, Iraq, Saudi Arabia, Syria and Yemen – were known to have carried out executions last year.

There were 707 recorded death sentences in 2019, a 40% drop compared to 2018, when 1,170 death sentences were recorded in the region.

Egypt again imposed the most confirmed death sentences in the region, but the 2019 number (at least 435) was dramatically lower from at least 717 people sentenced to death in 2018. The number of death sentences the Iraqi authorities imposed during the course of the year was also significantly lower -- at least 87 in 2019 compared to at least 271 in 2018.

Sub-Saharan Africa

Four countries – Botswana, Somalia, South Sudan and Sudan – carried out 25 executions in 2019. Overall recorded executions in the region increased by one compared to 2018.

For a second year in a row, South Sudan saw an alarming increase in executions, putting to death at least 11 people in 2019; the highest recorded number in any year since the country’s independence in 2011. Of the people executed, three were from the same family, one was a child at the time of the crime and was about 17 when he was sentenced to death.

Recorded death sentences rose by 53% from at least 212 in 2018 to 325 in 2019.

The number of countries that imposed death sentences increased to 18 from 17 recorded in 2018.

#### The U.S. death penalty helps sustain the practice in Africa, the Middle East, and South and Southeast Asia AND it undermines international human rights law --- reversal by the Court is necessary to reinvigorate global abolition

Caplan, senior research scholar at Yale Law School, 16 (12/31/16, Lincoln, “The Growing Gap Between the U.S. and the International Anti-Death-Penalty Consensus,” <https://www.newyorker.com/news/news-desk/the-growing-gap-between-the-u-s-and-the-international-anti-death-penalty-consensus>, accessed on 4/25/2020, JMP)

Last week, the General Assembly of the United Nations adopted a resolution calling for a worldwide “moratorium on the use of the death penalty”—the sixth that the U.N. has approved in the past decade. Each one has gained the support of more of the organization’s members. The latest vote was a hundred and seventeen countries in favor to forty against. (Thirty-one abstained, and five did not vote.) In addition to a call for a halt to executions worldwide, the resolution urges countries that maintain the death penalty to increasingly restrict its imposition and to apply international laws that protect the rights of those facing the penalty. The rights include that a death sentence may be imposed only for the “most serious crimes,” defined as intentional crimes that have “lethal or other extremely grave consequences,” and that execution be carried out only after “a final judgment rendered by a competent court,” following a legal process that insures a fair trial and that provides access to appeal to a higher court and the opportunity to seek a pardon or a commutation of the sentence.

At the General Assembly, the United States cast one of the nay votes. Stefanie Amadeo, the deputy representative to the U.N. Economic and Social Council, explained the country’s position, which is basically unchanged since the U.S. opposed the first resolution against the death penalty, in 2007: “The ultimate decision regarding these issues must be addressed through the domestic democratic processes of individual Member States and be consistent with their obligations under international law,” which does not prohibit capital punishment. The position reflects the American reality of supporting the death penalty in principle, but increasingly outlawing it in practice. As Jeffrey Toobin reported recently, the U.S. maintains the death penalty under federal and military law and under the laws of thirty-one states—even though only five states conducted executions in 2016 and executed only twenty people in total, the lowest number in twenty-five years.

The U.S. stresses the importance of observing global norms. “Just as the United States is committed to complying with its international obligations,” Amadeo said, “we strongly urge other countries that employ the death penalty to do so only in full compliance with their international obligations.” Meanwhile, in the past forty years, the U.S. Supreme Court has increasingly sought to restrict the application of the death penalty to the worst of the worst offenders—first, to people who commit the most heinous murders and, then, only to adults who commit them, excluding youth under the age of eighteen. In addition, it generally takes a decade or more for a state to carry out an execution because of challenges to a death sentence allowed under due process of law.

Among the states with the death penalty, twelve have not carried out an execution for a decade or more, and another five have not executed anyone for at least five years. In California, where the last execution was in 2006, there were seven hundred and fifty people on death row as of December 2nd. Rather than being executed (the state has executed only thirteen people since 1978) it is much more likely that a death-row inmate will die as a result of natural causes or suicide.

Roger Hood, an emeritus professor at Oxford, and Carolyn Hoyle, who directs Oxford’s Centre for Criminology, last year published the fifth edition of “The Death Penalty: A Worldwide Perspective.” Their book documents the many ways that people are sentenced to death in violation of international law—for drug-trafficking, for example, rather than for “the most serious crimes,” in unfair proceedings and with no opportunity to ask for clemency, and while imprisoned in terrible conditions. These and other realities, they write, are moving “the debate about capital punishment beyond the view that each nation has, if it wishes, the sovereign right to retain the death penalty” to persuading “countries that retain the death penalty that it inevitably, and however administered, violates universally accepted human rights.” Countries that employ the death penalty and insist that they are abiding by international law, including the U.S., decline to join in making the most important international commitment about the penalty, which is to reject it as a violation of human rights.

There has long been a gap between the idealism that the U.S. expresses when boasting of its dedication to the rule of law, especially the protection of individual rights, and the reality of its persistent refusal to abide by major international human-rights commitments. The U.S. was a leader in the development of the Universal Declaration of Human Rights, which the U.N. adopted in 1948, but stopped supporting the international system to carry it out because, among other reasons, Jim Crow laws directly violated the declaration. There is a sizable list of human-rights treaties—on the Rights of the Child, for example, and on the International Criminal Court—that the U.S. has signed but not ratified. Even when the U.S. ratifies treaties, the government often adds a caveat that excludes protection of some basic rights.

As a result, the U.S. has ended up in some rough company, particularly when it comes to the death penalty. In the past generation, the number of countries that have stopping using the death penalty has doubled, from about fifty to about a hundred. Of the fifty-seven member states of the Organization for Security and Co-operation in Europe, and of the thirty-five member states of the Organization of American States, only the U.S. carried out executions last year. The countries that executed the most offenders were, in order, China, Iran, Pakistan, Saudi Arabia, and the United States. China executed thousands of people, though its secrecy about its use of capital punishment makes it impossible to know exactly how many. Excluding China, Iran (with close to a thousand or more), Pakistan (three hundred and twenty-six), and Saudi Arabia (a hundred and fifty-eight) executed almost nine out of ten people put to death worldwide—“often after grossly unfair trials,” according to Amnesty International, and “for crimes—including drug trafficking, corruption, ‘adultery,’ and ‘blasphemy’—that do not meet the international legal standards for the use of the death penalty.” In 2015, according to Amnesty International, at least a thousand six hundred and thirty-four people were executed, an increase of more than fifty per cent from the year before and the highest number in a quarter of a century. (The organization expects to release figures for 2016 in the spring.)

The United States, in other words, ranks with countries that conspicuously are not in full compliance with their international obligations. And its responsibility is sometimes worse than guilt by association. As Maya Foa, the director of the death-penalty team at Reprieve, an international human-rights organization, told me, “The U.S. clearly leads and influences global death-penalty practice. Our partners, who are lawyers and human-rights defenders in jurisdictions that retain the penalty, tell us that the use of the death penalty by the U.S., a ‘developed’ nation, is used to justify the death-penalty practice in the jurisdictions they work in.” Reprieve is providing legal and investigative assistance to people facing execution in eleven countries, in Africa, the Middle East, and South and Southeast Asia, and in the U.S.

In August at a rally in Istanbul, after the failed coup attempt in Turkey, the BBC reported, the country’s President, Recep Tayyip Erdoğan, said, “They say there is no death penalty in the E.U. ... Well, the U.S. has it; Japan has it; China has it; most of the world has it. So they are allowed to have it. We used to have it until 1984. Sovereignty belongs to the people, so if the people make this decision I am sure the political parties will comply." He said that the Turkish people might want to restore the death penalty to punish those responsible for killing hundreds of citizens during the attempted coup. That has not happened yet, but, if it does, its purpose, Erdogan suggested, will be a display of cold-blooded power.

The influence of the U.S. on the death penalty worldwide has sometimes been constructive. In 1976, for example, when the Supreme Court ruled that it was unconstitutional for a state to make the death penalty mandatory for any crime, it marked the beginning of the decline of mandatory death sentences around the world. “The fundamental respect for humanity underlying the Eighth Amendment,” the Court said, “requires consideration of the character and record of the individual offender and the circumstances of the particular offense.”

The Indian Supreme Court employed this logic when it struck down the mandatory death sentence in the country’s penal code, in 1983. The legislature, it held, could not compel judges “to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death.” More recently, the Cornell Center on the Death Penalty Worldwide reports, eighteen other countries have followed suit and struck down the mandatory death penalty, including almost every Caribbean nation and Uganda, Malawi, and Kenya.

In their latest edition of “The Death Penalty,” Hood and Hoyle write optimistically about the U.S. example: “Those who campaign for abolition worldwide can hope that it will not be many years before the U.S. Supreme Court will be able to find that the majority of states, in line with a majority of countries worldwide, does not support the death penalty for anyone.” Donald Trump has said that he will replace the late Justice Antonin Scalia—the Court’s most vehement defender of the death penalty for almost thirty years—with someone in his mold. But, even when that happens, there will be a possibility that Justice Anthony Kennedy will join the Court’s moderate liberals in striking down the death penalty, for reasons Justice Stephen Breyer articulated in 2015: “The Court in effect delegated significant responsibility to the States to develop procedures that would” insure the fairness of the capital-punishment system, he wrote. “Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed.” If the Court continues to uphold the death penalty, on the other hand, the gap between the U.S. and a large and growing majority of the rest of the world will continue to increase.

#### Judicial action is critical --- will align the U.S. with the democratic world and establish a foundation for permanent 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)

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

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

If the Court were to abolish the death penalty, would abolition stick or would such a decision trigger a backlash comparable to what followed Furman? Several considerations lessen the likelihood of backlash. At the time of Furman, there was minimal doctrinal support for permanent invalidation of the death penalty, and the abruptness of Furman likely contributed to its harsh reception; in contrast, the past forty years have produced numerous death penalty doctrines and decisions that could be invoked in support of constitutional abolition. Relatedly, the post-Furman choice to regulate rather than abolish the death penalty was premised in large part on the potential of regulation to cure some of the manifest pathologies of the practice (including arbitrariness, discrimination, and error). Virtually no one regards the experiment to cure those pathologies a success, and a decision declaring the death penalty unconstitutional would not face the same pressure to simply improve rather than reject the practice. Lastly, the effort to abolish the American death penalty in the 1960s and early 1970s put the United States on a slightly earlier path toward abolition than the rest of the world, and thus the United States was not a wild outlier in its retention when the death penalty was revived in 1976. Today, though, the United States faces increasing criticism and pressure from peer countries for its retention of the death penalty. Hence, a decision abolishing the American death penalty would align the United States with the rest of the developed democratic world and thus provide a firmer foundation for permanent abolition.

#### Pressure for abolition will also extend to authoritarian regimes

Bessler, 18 --- Associate Professor, University of Baltimore School of Law (John D., SAINT LOUIS UNIVERSITY LAW JOURNAL, “WHAT I THINK ABOUT WHEN I THINK ABOUT THE DEATH PENALTY,” <https://www.slu.edu/law/law-journal/pdfs/issues-archive/v62-no4/john_bessler_article.pdf>, accessed on 5/14/2020, JMP)

X. THE FUTURE

I think about a world without capital punishment—a world in which human rights are honored and protected, not denigrated and violated. I think about a world in which jurists around the globe would not, as part of their jobs, have to decide whether to put people to death. I think about a world in which the United States no longer resorts to state-sanctioned killing, and in which the United States and other retentionist countries finally decide to reject the use of executions. If the United States and Japan (the other highly industrialized country that still uses executions) would get rid of capital punishment, that would put more concerted pressure on authoritarian and rogue regimes, whether in China, North Korea, Yemen, or Sudan, to abandon executions, too. In time, what was once a universally accepted, lawful sanction would thus become an unlawful practice —and the world would be rid of it once and for all.143

#### Dignity is at the center of global death penalty jurisprudence --- U.S. abolition paves the way for a transnational approach to valuing human dignity and facilities other human rights movements

Andrew Novak, 11-4-19, an Adjunct Professor of Criminology, Law, and Society at George Mason University and Adjunct Professor of African Law at American University Washington College of Law. He is an attorney based in Washington, DC, and he has written widely on comparative and international criminal justice issues. "After abolition: the empirical, jurisprudential and strategic legacy of transnational death penalty litigation," <https://www-elgaronline-com.proxy.lib.umich.edu/view/edcoll/9781786433244/9781786433244.00030.xml> //Kiefer

Abolition, where it has come, has been a combined effort of political will, grassroots activism and strategic courtroom litigation, though the paths that different jurisdictions have taken have diverged considerably on the path to the same goal. These different paths are shaped by many factors: political transition, economic development, external pressure and a prior misuse of the death penalty, to name a few.7 As with slavery today, academics and historians may well look back on the death penalty abolitionist movement long after the death penalty has ended as a model for the diffusion and triumph of Enlightenment values. The abolition of the death penalty would be a success of an increasingly global postwar international human rights agenda.8

Future historians could well view the abolition of the death penalty as a victory for comparative law. Death penalty litigation and jurisprudence will leave three legacies for comparative lawyers long after abolition: the empirical, the jurisprudential and the strategic. Empirically, capital punishment research may well represent the most complete and most deeply researched body of data in the entire field of criminology, nowhere more than in the United States. Haney and Logan write that ‘few topics in law and social science…have attracted as much scholarly attention as capital punishment’.9 Legislators and judges use empirical research to inform their decision-making.10 Radelet and Borg add, ‘changes in the nature of death penalty debates are a direct consequence of social scientists’ close and careful examination of the various dimensions of these arguments’.11 This empirical evidence encompasses volumes of quantitative and qualitative evidence on everything from racial disparities to sentencing consistency to execution rates.12 Through this research, we may well know more about death row prisoners worldwide than we do about any other group of people in the criminal justice system, but spillover is already occurring. New empirical analyses of juveniles, incarcerated populations, persons in pretrial detention or persons held in solitary confinement are attracting new attention and may well spur law reform in coming years.13

The second legacy of the abolition of capital punishment is the jurisprudential. While the United States Supreme Court has frequently insisted that ‘death is different’, courts around the world have used death penalty jurisprudence in addressing issues such as life imprisonment.14 Because so much death penalty jurisprudence is premised on human dignity, and not the right to life, this jurisprudence will continue to have relevance even after the death penalty is abolished.15 Even in the United States, some spillover from the death penalty realm has been apparent: the United States Supreme Court’s ruling in Miller v Alabama, finding mandatory life imprisonment without the possibility of parole for juveniles unconstitutional, closely followed the reasoning of Roper v Simmons, which abolished the death penalty for juveniles.16 The Court even premised these decisions and others on a dignitarian principle. In Roper, for instance, the Court wrote: ‘When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.’17 The global human dignity strain in death penalty jurisprudence has even reached the United States.

The final legacy of death penalty abolition is the strategic. Abolition would be a victory for the incremental litigation strategy once pioneered by the NAACP Legal Defense Fund (LDF) in the United States in the 1960s.18 Around the world, human rights advocates have pursued a strategy of challenging procedural aspects of capital punishment, which has had the result of driving up the structural costs of executions.19 No aspect of the death penalty process has gone unchallenged. An impressive body of global case law has developed on jury selection, clemency, conditions on death row, methods of execution, extradition, mental illness and wrongful convictions, among many others. This incrementalist strategy of targeting the weakest aspects of the capital punishment process and thereby putting the death penalty out of business entirely has been broadly successful. For instance, constitutional challenges to the death row phenomenon and the mandatory death penalty have all but succeeded in ending the death penalty in the Commonwealth Caribbean.20

Death penalty abolition would not just be a victory for litigation strategy, however, but for comparative constitutional law. Advocates engaged in a shared transnational mission created a global ‘common law’ of death penalty jurisprudence, which has been cited, distinguished and applied by judges around the world.21 Judges in domestic, regional and international courts are engaged in a global dialogue that is helping to diffuse human rights norms from the Comparative capital punishment international realm to the domestic realm and back again.22 Human rights advocates have used comparative constitutional law to advance a normative agenda by petitioning international tribunals, citing foreign law, and appealing to global trends. Is this experience transferable to other human rights issues? Pending challenges to laws that criminalize consensual same-sex intimacy may be one example, as gay rights advocates conceive of a transnational strategy to challenge the anti-sodomy provisions of British-style penal codes in the Caribbean, Indian subcontinent and Sub-Saharan Africa.23 The use of comparative constitutional law to advance a specific human rights agenda in the courtroom is another legacy of death penalty abolition.

THE EMPIRICAL

One legacy of the death penalty abolition movement will be the strong body of empirical social science research that has been compiled over the last 50 years, especially in the United States. Empirical research has come to show, inter alia, that the death penalty produces little if any marginal deterrent effect;24 that the death penalty is most frequently sought when the victim is white;25 that the race and appearance of the defendant matters;26 that the race, gender and age After abolition: the legacy of transnational death penalty litigation 375 of jurors affect their verdicts;27 that the death penalty is more costly than life imprisonment;28 that the manner in which judges are selected plays a role in their verdicts;29 and that capital sentencing rates vary based on geography.30 Empirical evidence can bolster the case for abolition or negate the case for retention, as where retention is premised on empirical evidence that is weak or absent. Mai Sato makes this point with Japan, where the government claims that empirical evidence demonstrates public support for the death penalty. However, existing literature is inconclusive, and the government surveys have significant weaknesses.31

In strictly numerical terms, such as the number of citations to social science research, the US Supreme Court’s death penalty jurisprudence has made extensive use of empirical evidence, especially in dissenting opinions.32 ‘Research studies almost invariably have produced evidence that is inconsistent with the premises that the death penalty is administered evenhandedly and that capital punishment is effective or necessary to serve deterrent and incapacitation objectives.’33 This has not necessarily translated into jurisprudence that restricts capital punishment. Acker writes that the US Supreme Court has not consistently credited social science research even where the consensus of that research was very strong. Rather, judges frequently expressed uncertainty about the research, used methods of interpretation that reduced the importance of social science research and proclaimed incompetence to scrutinize that research.34 Although the US Supreme Court has not consistently followed empirical evidence in its death penalty jurisprudence—and indeed, sometimes it has proven quite hostile— there is evidence that social science research has affected the Court’s decision-making in more nuanced ways. The decision of Justice Harry Blackmun to vote against capital punishment in 27 Comparative capital punishment his dissent in Callins v Collins (1994), despite previously voting to uphold death sentences, was premised in part on ‘highly reliable’ statistical analysis showing racial discrimination.35

One of the most important empirical death penalty studies ever performed, led by University of Iowa Professor David Baldus, reviewed over 2000 capital cases in Georgia in the 1970s.36 Baldus later reflected on the importance of social science research to death penalty law: ‘social science research…influences opinions and beliefs about the death penalty, which impacts death penalty decision-making at many levels.’37 He writes that empirical research on the death penalty does change some minds and some votes, ‘exposing more clearly the values that are driving the decisions of legislators and judges’.38 In a system of law that purports to be guided by data, the law can change as the data change. He cited the social science research on deterrence, which provided strong support for the assertion that if any marginal deterrent effect by the death penalty existed at all, it was so slight that it could not be measured. This research ‘is of very high quality, and there is much of it’, he wrote, adding that it was widely replicated and produced a nearly complete consensus.39 Empirical research also contributed to changing public opinion on the costs of capital punishment and on the probabilities that innocent people are sentenced to death.40 Baldus’s study was widely cited by federal courts and by the US Supreme Court in McCleskey v Kemp, which infamously found that statistical evidence of racial discrimination was insufficient to prove a constitutional violation absent intent to discriminate, though it generally accepted the Baldus study’s results.41 Baldus’s study (and the Supreme Court’s decision in McCleskey) motivated the Racial Justice Act, which passed the US House of Representatives in 1990 and 1994 and was later signed into law at the state level in Kentucky and North Carolina.42

Although the influence of empirical research on the death penalty is most pronounced in the United States, death penalty abolition has been motivated by social science inquiry in other jurisdictions as well. In South Africa during the apartheid era, strong empirical research helped to identify racial disparities and sentencing inconsistencies that helped render the death penalty regime unsustainable. Influenced by civil rights leaders in the United States, legal scholar Barend van Niekerk conducted an exhaustive study of the racial application of the death After abolition: the legacy of transnational death penalty litigation 377 penalty in South Africa and Rhodesia, and he published his conclusions in the South African Law Journal in 1969 and 1970.43 His views were unpopular with the apartheid establishment. Though he was acquitted of a contempt charge, his harassment by state officials chilled independent academic inquiry into the death penalty until the 1980s.44 By then, however, empirical research into the death penalty was reignited. An analysis of death sentences in the Orange Free State between 1984 and 1987 revealed the rareness of executive clemency.45 Statistical inquiry in Bophuthatswana revealed that the length of time prisoners were on death row increased, as did execution volunteerism and prison suicide to escape abysmal prison conditions.46 By the 1980s, statistics on death sentences showed wildly sharp disparities among judges; the most prolific among them were known as ‘hanging judges’. A detailed statistical analysis of about 50 judges in Transvaal and Witwatersrand between 1987 and 1989 revealed that ‘judicial attitudes towards the death penalty play a material role’ in the inconsistencies.47 A similar study in the Cape Provincial Division between 1986 and 1988 identified significant patterns of arbitrariness in sentencing.48

Comparative empirical research outside the United States is still skeletal. Pascoe writes that ‘only rarely (and relatively recently)’ have scholars ‘included some of the most secretive but currently prolific death penalty jurisdictions’ in East Asia, Sub-Saharan Africa and the Middle East.49 To date, most transnational comparative studies of the death penalty have analyzed global trends through qualitative or quantitative methods, though gaps remain in empirical literature especially in closed or partially-closed retentionist jurisdictions.50 Empirical research helps create pressure for opaque and secretive regimes to release closely-guarded information and open internal procedure to scrutiny. Mai Sato’s survey work in Japan revealed, for instance, that the majority of respondents did not have strong opinions on the death penalty, and certainly not strong enough to erode public legitimacy in state institutions—direct refutation of the Japanese government’s claim that the death penalty was central to public trust in the criminal justice system.51

Roger Hood explains that the ‘response to and impact of empirical research has been very different’ in the countries where recent public opinion surveys have been performed, such as in China, Trinidad, Ghana and Malaysia.52 The Death Penalty Project’s detailed survey on 378 Comparative capital punishment public opinion toward the mandatory death penalty in Malaysia, published in 2013, has been influential on that country’s political leadership as it considers reform of its death penalty laws, particularly for drug trafficking.53 Hood adds that ‘the strong support for the research in Malaysia from the Bar Council and human rights bodies has brought the findings to the fore in political debate on the abolition of the mandatory death penalty’.54 In Ghana, a 2014 public opinion survey on attitudes toward the death penalty involved a large sample size of 2460 people and revealed that the majority of Ghanaians opposed the death penalty for murder. The study was performed by the Centre for Criminology and Criminal Justice at the University of Ghana at Legon and the Institute for Criminology at Cambridge University.55 ‘Indeed, taken as a whole, this body of research on public opinion in retentionist countries suggested that the argument that the death penalty cannot be abolished because of public demand…is very likely to be a myth.’56 In 2016, the National Law University Delhi published the first comprehensive report of India’s entire death row population, using both quantitative and qualitative analysis. Through in-depth interviews with death row prisoners and their families, researchers at NLU Delhi’s Centre on the Death Penalty were able to provide a sophisticated socio-economic profile of death row prisoners and detail their interactions with the criminal justice system.57 The Law Commission of India recommended abolition of the death penalty in August 2015 after a national consultation with judges, lawyers and parliamentarians, and the government of Vietnam restricted the number of capital crimes in 2015 following academic inquiry.58

THE JURISPRUDENTIAL

Globally, constitutional challenges to the death penalty in many different jurisdictions have contributed to the emergence of a transnational body of jurisprudence, which is frequently cited, followed, and distinguished by courts around the world. Carozza writes that the ‘real center of gravity’ in global death penalty jurisprudence ‘is in the affirmation of the dignity of the human person and the principle that human rights law exists to protect that dignity’.59 He explains that the cases in which the human dignity principle is articulated most clearly tend to be the cases that are most frequently and most fully relied upon by other courts. Carozza identifies human dignity as the most universal value on which death penalty abolition is premised. One major legacy of global death penalty litigation is the jurisprudential development of human dignity as a guiding principle in the emerging global ius commune of human rights.60

Dignity ‘has a rich and varied history, and our understanding of it is shaped as much by the history of multiple, horrific violations of the inherent dignity of the human person, as by the complex intellectual history of the idea’.61 Dignity implicates both the global and the local, the universal and the particular, and therefore it captures the competing tensions inherent in comparative constitutional law.62 The concept of human dignity is found in most postwar constitutions, including in the German Basic Law of 1949, which declared it to be ‘inviolable’.63 Human dignity is also explicitly mentioned in the Preamble of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at abolition of the death penalty.64 Barroso writes that the concept of human dignity has found expression in transnational legal discourse: ‘constitutional and supreme courts all over the world have begun engaging in a growing constitutional dialogue involving mutual citation and academic interchange’, including references to dignity.65

The US Supreme Court has drawn on human dignity as a guiding principle in its Eighth Amendment jurisprudence. In Trop v Dulles, the Court explained that the prohibition on cruel and unusual punishments implicated ‘nothing less than the dignity of man’ and stated that the Eighth Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society’.66 Another example is Justice William Brennan’s concurring opinion in Furman v Georgia in which he stated that ‘calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity’.67 In the same decision, Justice Potter Stewart wrote that the death penalty was unique ‘in its absolute renunciation of all that is embodied in our concept of humanity’.68 In Lockett v Ohio, Chief Justice Warren Burger explained that the sentencing process must provide a ‘degree of respect due the uniqueness of the individual’ and noted that ‘the fundamental respect for humanity underlying the Eighth Amendment…requires consideration of the character and record of the individual offender’.69 Justice Thurgood Marshall also emphasized the humanity of a death row prisoner with mental illness in his majority opinion in Ford v Wainwright, which prohibited execution of insane persons.70 As Carozza notes, the passages in which US Supreme 380 Comparative capital punishment Court justices have cited to human dignity are the most frequently cited by other jurisdictions, because the human dignity language is globally recognizable.71

As McCrudden explains, ‘[i]n applying dignity, judges in several jurisdictions draw on the judicial interpretation of dignity in other jurisdictions as well as their own’.72 McCrudden cites jurisprudence from Germany, Hungary, Canada and the United States, among other jurisdictions, that relied on human dignity as a guiding principle.73 However, it was the South African Constitutional Court’s decision in Makwanyane that articulated the clearest conception of how the death penalty infringed human dignity. Court President Arthur Chaskalson, writing for a unanimous court, explained that the death penalty ‘annihilates human dignity’ and reiterated that the foundational rights to life and human dignity were ‘the most important of all human rights’.74 Justice Yvonne Mokgoro, in a concurrence, cited the concept of ubuntu in the Nguni family of languages: ‘life and dignity are like two sides of the same coin. The concept of ubuntu embodies them both.’75 This concept of ‘humanness’ has cognate terms in many other languages in Sub-Saharan Africa: botho in the Tswana/Sotho languages; hunhu in Shona; utu in Swahili.76 According to the Court’s discussion, the death penalty may be degrading because it is unequally applied, it rejects rehabilitation, and it causes psychological torment, among other reasons.77 McCrudden explains that the global judicial dialogue on human dignity is not simply found, but constructed, reflecting the view that comparative law is dynamic and strives for universalism.78

Because the abolition of the death penalty in constitutional jurisprudence is frequently premised on notions of human dignity rather than the right to life per se, this jurisprudence will have relevance after death penalty abolition. The US Supreme Court has recognized certain constitutional protections in death penalty cases that are not applicable to other categories of prisoners on the theory that persons on death row have a life interest at stake while life imprisonment inmates do not. For instance, the US Supreme Court has held that non-death row prisoners do not have a due process right to minimal state clemency procedures, but it has suggested that death row prisoners may have such a right.79 Jordan and Carol Steiker have written that the US Supreme Court’s divergence between capital and non-capital cases is stark, and due process victories in the capital realm have not necessarily led to spillover benefits for non-capital defendants.80 Miller v Alabama provided some hope that this may be changing. 71 After abolition: the legacy of transnational death penalty litigation 381 In Miller, the Court explicitly cited two lines of jurisprudence—Roper, which invalidated the juvenile mandatory death penalty, and Graham v Alabama, which abolished juvenile life without parole for nonhomicide offenses. Miller abolished mandatory juvenile life without parole in homicide cases, finding that ‘the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment’, in part because juveniles are ‘constitutionally different than adults for purposes of sentencing’.81

One fertile area for extension of the human dignity principle that appeared in death penalty jurisprudence is the problem of life imprisonment. Life imprisonment can have profound social and psychological impact on prisoners, including social isolation, loss of responsibility, increased dependency, stress and anxiety, and emotional or situational withdrawal, especially when accompanied by solitary confinement or deprivation of privileges.82 The European Court of Human Rights has adopted, in part, a dignitarian approach in assessing the sentence of life imprisonment without the possibility of parole (also known as whole life without remission) when it found such sentences to be a violation of Article 3 of the European Convention, prohibiting cruel and degrading treatment.83 The concurring opinion of Judge Ann Power-Forde in Vinter v United Kingdom explained that even ‘[t]hose who commit the most abhorrent and egregious acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change’.84 As Hood and Hoyle wrote, Vinter stood for the proposition that the Convention prohibited categorically excluding a group of prisoners as beyond salvation.85

In the Commonwealth, successful litigation against the mandatory death penalty has been applied in constitutional challenges to mandatory life imprisonment. In Boucherville v Mauritius, the Privy Council accepted the petitioner’s submission that a mandatory life sentence was ‘subject to almost all the vices held to be inherent in the mandatory death sentence itself’, including the failure to tailor an offense to the seriousness of the crime and the person of the offender.86 Boucherville grasped the human dignity principle in the Privy Council’s mandatory death penalty jurisprudence and applied it to mandatory life imprisonment.

In State v Tjijo, the Namibian High Court found life imprisonment unconstitutional on the basis that a life sentence constituted a ‘death sentence’ and thereby violated the right to life under the Namibian constitution.87 No other court has held that life imprisonment is a right to life violation; however, the argument that it could infringe on human dignity is a stronger one. The Supreme Court of Namibia reversed Tjijo’s right to life holding and instead found that life imprisonment without the possibility of parole was a violation of human dignity in State v Tcoeib: ‘the sentence of life imprisonment in Namibia can therefore not be constitutionally 382 Comparative capital punishment sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner’s natural life as if he was a “thing” instead of a person without any continuing duty to respect his dignity.’88 In July 2016, citing Tcoeib, the Zimbabwe Constitutional Court found life imprisonment without the possibility of parole unconstitutional and a violation of the rights to equal protection and human dignity in the Zimbabwean constitution.89 Of all the jurisprudential principles that appear in the global body of death penalty jurisprudence, the human dignity strain appears to be the most universal among them. Carozza explains that ‘the universalism of the concept of human dignity is employed by judges to legitimate and license transnational jurisprudential openness’.90 The transnational judicial dialogue on human dignity will continue even after the death penalty has faded away.

THE STRATEGIC

Death penalty abolition, when it comes, will be a victory for the strategy of incremental litigation. By challenging every aspect of the death penalty process over thousands of cases, from jury selection to methods of execution, advocates succeeded in driving up the structural costs of executions to unsustainable levels and contributed to capital punishment’s ‘death spiral’. This litigation, in the aggregate, delayed and reduced the number of executions; as executions became rarer, they became more arbitrary; and finally the arbitrariness itself became a rationale for abolition. As Jordan and Carol Steiker reflected, decades of death penalty litigation was successful ‘not by directly demanding meaningful change, but by creating institutional structures that, would in turn exert pressures toward a higher level of practice and impose extraordinary costs on state capital systems’.91 Zimbabwe, another retentionist jurisdiction, experienced a ‘golden age’ of human rights litigation in the early 1990s. Constitutional challenges succeeded against prison conditions, corporal punishment, capital sentencing, and the death row ‘syndrome’, and nearly succeeded against hanging as a method of execution.92 While litigation did not directly end the death penalty in either the United States or Zimbabwe, in the long-term sustained litigation has helped to reduce the number of executions by increasing the structural costs of the death penalty process and winning small victories.

In addition to increased structural costs, the consequence of decades of incremental litigation against the death penalty in the United States, India, the Commonwealth Caribbean and elsewhere, is that an impressive body of transnational death penalty jurisprudence has developed.93 As Carozza writes, the death penalty provides ‘an especially strong example of the growing globalization of human rights norms’.94 Courts across the world ‘share’ death penalty jurisprudence, ‘borrowing from, responding to, or otherwise interacting substantially with external sources of law, including foreign sources that do not fit directly into the home system’s formal hierarchy of positive legal norms’.95 The global trend toward the abolition of capital punishment becomes self-reinforcing. As Hood writes, the growing global consensus on abolition generates its own momentum, as the ‘influence exerted by the weight of numbers…has itself strengthened the normative legitimacy of the case against capital punishment’.96

It is axiomatic that judges increasingly look to international or foreign law in resolving domestic constitutional questions, helping to reinforce global human rights norms.97 Domestic courts are ‘mediators between international and domestic legal norms’ and thereby play an active part in creating, enforcing and shaping those norms.98 Judges have a variety of motivations for citing international and foreign law in their domestic judicial opinions, including to improve decision-making, reinforce an ideology or strategically communicate with other institutional actors.99 In addition, contract judges in the Commonwealth, academic exchanges, and civil society networks of advocates and judges (such as the Commonwealth Lawyers Association) have also contributed to the migration of constitutional norms.100 The evolution of these human rights norms, however, is not strictly an organic process in which judges cite foreign and international law on their own initiative. Rather, human rights advocates themselves drive this process by citing transnational legal norms in their pleadings.101 Critics allege selection bias: the process by which domestic courts engage with international law, even when attempting to discern or apply an objective rule, ‘gives great discretion to those engaged in comparative analysis to upgrade foreign decisions that they like…and downgrade ones they dislike…’.102 While one may object to an advocate purporting to show a global consensus where arguably none exists, legal advocates naturally cite the decisions that favor their positions in an adversarial system.

The global restriction and abolition of the death penalty is a particularly successful reminder that the use of international and foreign law may be a powerful tool of law reform for transnational human rights advocates. Death penalty advocates have cultivated this jurisprudence, selectively relying on favorable judgments that purported to show an emerging global trend in favor of international norms. Strategic litigation helped to build a corpus of persuasive Comparative capital punishment reasoning and the cumulative effort of such litigation was to crystallize an emerging international norm through repeated affirmation by domestic courts. The emerging norm against the death row ‘syndrome’ or ‘phenomenon’—the theory that delay or conditions of death row could render an otherwise constitutional sentence cruel and degrading—developed in this way. Decisions of the Supreme Court of India and the European Court of Human Rights were reinforced by subsequent decisions in jurisdictions as diverse as Canada, Jamaica, Zimbabwe, Uganda, and two dissenting justices of the United States Supreme Court.103 Schabas writes that ‘the death row phenomenon has generated a tremendous synergy among international and domestic courts’.104 The abolition of the mandatory death penalty, first in the United States and India, has been followed by judges in the Commonwealth Caribbean, Bangladesh, Kenya, Malawi and Uganda.105 In both instances, the instrumental drivers of this judicial sharing process or dialogue were anti-death penalty advocates themselves, such as the Death Penalty Project and their partner organizations, who brought strategic litigation in international tribunals and domestic courts.106

#### Protecting human rights violations is a critical step to removing war and other structural atrocities

UNHR 07 The United Nations Human Rights Council is a United Nations body whose mission is to promote and protect human rights around the world. [“Preventing violations and strengthening protection of human rights, including in situations of conflict and insecurity,” 12-08-2007 Date created by Carbon Dating the Web <http://carbondate.cs.odu.edu/>, *United Nations Human Rights Office of the High Commissioner,* URL: <https://www.ohchr.org/EN/AboutUs/ManagementPlan/Pages/preventing-violations.aspx>] kly

The maintenance of international peace and security is one of the purposes of the United Nations Charter. Violence and conflict undermine sustainable development. Human rights violations are at the root causes of conflict and insecurity which, in turn, invariably result in further violations of human rights. As such, **action to protect and promote human rights has** inherent preventive power **while rights-based approaches to peace and security bring this power to efforts for sustainable peace**. The human rights normative framework also provides a sound basis for addressing issues of serious concern within or between countries that, if left unaddressed, may lead to conflict. Human rights information and analysis is a tool for early warning and early targeted action that has not yet been used to its full potential.

**Failure to adhere to international human rights standards and protect human rights weakens peace- making**, peacekeeping and peacebuilding efforts. Global efforts to counter terrorism and prevent the spread of violent extremism suffer from this failure. The UN’s renewed focus on prevention and sustaining peace is key to both this and the previous pillar on advancing sustainable development. We can help to sustain both peace and development by showing how applying human rights norms can address grievances, reduce inequality and build resilience. This pillar also addresses potential threats posed by new technologies in a security context.

From 2018-2021, together with our partners, we will work so that:

Parties to conflict and actors involved in peace operations increasingly comply with international human rights and humanitarian law and provide greater protection to civilians.

We will monitor human rights violations committed during armed conflicts, including civilian casualties and incidents of sexual and gender-based violence; bring facts and evidence to the parties’ and public attention, and advocate for changes in policy, practice and conduct; provide training and technical advice to integrate international human rights and humanitarian law in military and peace operations; strategically engage with parties to conflicts to reduce human rights violations and integrate human rights in political decision making and peace agreements; facilitate the participation of diverse groups, including women, in peace negotiations; and cooperate closely with regional and UN peace missions to ensure integration of human rights.

Efforts to counter terrorism and prevent violent extremism comply with international law.

We will gather evidence and undertake further research, monitoring and reporting to support our strategic advocacy on the role of human rights violations in driving violent extremism and terrorism, and the role of human rights protection in prevention. We will build the capacity and commitment of State authorities and other actors to respect international law in their efforts to combat terrorism and prevent violent extremism, and ensure accountability and respect for victims’ rights.

Strategies to prevent and respond to conflict consistently integrate human rights protection.

We will actively engage with UN entities, regional bodies, and individual Member States to show that protection and promotion of human rights contribute to more effective conflict prevention, conflict management, and post-conflict peace. To this end, we will monitor the implementation of relevant strategies, provide advice on what is needed to ensure effective human rights protection; and provide training, operational guidance and technical advice on how to integrate human rights operationally in prevention and peacebuilding activities.

### U.S. Abolition => Global Abolition

#### Abolishing the death penalty would allow us to join and help lead a worldwide conversation to promote fair criminal justice

Garrett, 17 --- professor of law at the Duke University School of Law (Brandon L., End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice, ebook from University of Michigan, pg. 254-255, JMP)

Human Rights

“The death penalty has no place in the 21st century,” said Ban Ki-moon, then the Secretary General of the United Nations. The triumph of mercy is a global phenomenon. A majority of the countries in the world have now abolished the death penalty, and even more do not use it in practice.42 More than four out of five countries have abolished or stopped using the death penalty. China, Iran, Iraq, Saudi Arabia, and the United States are at the top of the list of states that execute the most people each year. Indeed, the only countries that have seen executions increase in recent years are Iran, Pakistan, and Saudi Arabia. Saudi Arabia typically beheads individuals and displays bodies in public as a warning. China, Saudi Arabia, and Pakistan sentence people to death for drug crimes, financial crimes, and lesser “crimes” including adultery and blasphemy.

For decades, challenges to the death penalty have forced Americans to think carefully about the connections between our own criminal justice practices and those around the world. Ever since Trop v. Dulles, in 1958, when the Supreme Court announced that cruel and unusual punishment should be governed by “evolving standards of decency that mark the progress of a maturing society,” the justices have occasionally looked to punishment practices in other countries. We should not be behind the “civilized nations of the world” but rather should be a model for all nations. In 1977, the justices ruled out the death penalty for rape, noting international consensus among major nations.43 In 2002, in Atkins v. Virginia, the justices noted that “within the world community,” the execution of intellectually disabled offenders is “overwhelming disapproved.”44 In 2004, in Roper v. Simpson, the justices described as “instructive” the “overwhelming weight of international opinion against the juvenile death penalty.” The United States “now stands alone in a world that has turned its face against the juvenile death penalty.”45 Even Supreme Court Justice Sandra Day O’Connor, who disagreed with the result in that case, agreed that it was appropriate to rely on international practices, since our “evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries.”46 Others strongly disagree. Justice Antonin Scalia maintained that international human rights and practices are not relevant, and we need not try to “conform” American law to the “views of foreigners.”47

A new moral awakening has made killing the death penalty feasible for the first time in decades, and the same forces are working their way around the world. Just as the death penalty is in decline and concentrated within the United States, fewer countries across the world have the death penalty or use it in practice. The trend, sometimes despite popular opinion, is unmistakable. The countries that are doubling down on executions are largely authoritarian regimes. We should not remain in their company. What would it mean to rethink punishment as part of an international community, with common values and concern for fundamental human rights? Since the death penalty is seen as so out of touch with fundamental human rights, rejecting the death penalty definitively in America would mean we would no longer “stand alone,” or stand with the likes of Iraq and Saudi Arabia in our punishment practices. Joining the broad set of nations that have abolished the death penalty could help us be part of that worldwide conversation rather than standing to the side as an outlier. After the fall of the death penalty, the United States can reclaim its role as the standard-bearer for fair criminal justice.

#### U.S. abolition will spur global follow on AND strengthen human rights agenda to effectively challenge authoritarian regimes

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.408-9, 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.

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.

#### The plan will reinvigorate U.S. leadership on criminal justice and provide momentum to address mass incarceration

Garrett, 17 --- professor of law at the Duke University School of Law (Brandon L., End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice, ebook from University of Michigan, pg.15-16, JMP)

More than the reform of our own criminal justice system hangs in the balance. Most countries around the world have already abolished the death penalty, and because of our adherence to the practice, they no longer look to America for moral leadership in criminal justice. After the fall of the death penalty, we can begin to reclaim our role as a standard-bearer for fairness. At a time when some politicians seek to stoke punitive emotions, it is important to remember how we have all but escaped the self-defeating cycle of punishment in death penalty cases. We did it once and we can do it again. Our supersized mass-incarceration system needs a crash diet—and the end of the rope for the death penalty can give criminal justice renewed life.

#### The plan will be modeled by democracies and in the Americas

Anckar, 14 --- Professor of Comparative Politics at Âbo Akad University (Fall/Winter 2014, Carsten, Brown Journal of World Affairs, “Why Countries Choose the Death Penalty,” <https://www.jstor.org/stable/24591027>, JMP)

Conclusion

The present articles point of departure was the claim that international pressure for abolition of the death penalty has increased markedly during the last decades. We then set out to assess to what extent the countries that retain the death penalty have become a more homogeneous group during the past 30 years. Overall, the results gave little support for such an assumption of increasing homogeneity. However, a bird's eye view showed that the death penalty has remained popular in two regions, the Americas and the Middle East and North Africa, whereas Europe and Oceania it is a rare phenomenon. It is evident that the geographical and cultural contexts in which countries are situated play a major role in explaining why countries uphold the death penalty. What is perhaps the most important factor of all is the example set by the major powers in each geographical region. In other words, although there is no direct relation between the power of nations and death penalty usage, there appears to be an indirect relation; small and weak countries can resist pressures for abolition, particularly if there are strong examples of countries that uphold it. The fact that the death penalty has remained popular in the Americas and among many democracies is most likely explained to a large extent by the United States' example. In Asia, death sentences are carried out in communist China and democratic India. In Africa, again, only one of the 10 most populous countries has abolished the death penalty completely or for ordinary crimes, namely South Africa.

The mirror image is Europe, where the issue of the death penalty appears to be buried. In Western Europe, no execution has been carried out for almost 40 years and, accordingly, supporters of the death penalty have no powerful example to which they can refer back. Even in Russia, where the formal status of the death penalty remains unclear but where public support for the death penalty is strong, the government has thus far ignored popular demands to make active use of it.

It is consequently easy to predict that the future of the death penalty depends heavily on the few dominant powers where it is upheld. With regard to democracies in general, and particularly the countries in the Americas, the example of the United States is extremely important. If the United States were to abolish the death penalty, it is quite possible that other countries would follow suit very quickly. In other words, although regional variances in death penalty usage have become more manifest during the last decades, these differences can disappear quite rapidly if key countries in the regions revise their stand on capital punishment.

### Death Penalty Key

#### U.S. retention plays a critical role --- has symbolic and practical impact that weakens pressure for global abolition

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.399-400, JMP)

American Exceptionalism

A significant roadblock to worldwide abolition is the continued retention of the United States. United States retention is an obstacle in its own right, given the scale of the American capital system, with thousands of inmates on death row and dozens of executions each year; but U.S. retention poses further difficulties both symbolically and practically in terms of weakening international pressure on other retentionist jurisdictions. As the only Western developed democracy with the death penalty, the U.S undermines the claim that abolition is necessary for a given jurisdiction to stand among free, enlightened societies.71 United States retention relatedly hinders efforts to achieve abolition through international commitments, including customary international law and treaties.

#### Death penalty key – China and others reference it specifically as justification for disregarding international norms

Wesley Kendall and Joseph M. Siracusa, 9-12-13, Wesley – an experienced American trial lawyer (Juris Doctor) and currently assistant professor and law studies program director at the University of West Virginia. He was formerly a law lecturer at the Royal Melbourne Institute of Technology University's Vietnam campus in Hanoi. Joseph – professor of human security and international diplomacy and associate dean of international studies at the Royal Melbourne Institute of Technology University, Australia. "The Death Penalty and U.S. Diplomacy," No Publication, [https://ebookcentral-proquest-com.proxy.lib.umich.edu/lib/umichigan/detail.action?docID=1407824#](https://ebookcentral-proquest-com.proxy.lib.umich.edu/lib/umichigan/detail.action?docID=1407824) //Kiefer

The perceived intractability of the United States to concede its position on the death penalty while persistently resisting the chorus of civilized consensus among its nation peers has been widely viewed as a blatant flouting of international norms and an arrogant display of unilateralist disregard of international law. Foreign challenge to U.S. attempts to selectively discern which international treaties it will deign to be bound by are further compounded when the United States also attempts to seek to enforce those very same treaties against other signatories. 27

U.S. credibility has been undermined by its position in denouncing human rights violations of other nations, such as China, Iran, and North Korea, who often invoke U.S. capital punishment statutes and practices as a rejoinder to accusations of human rights violations. On April 10, 2011, China’s State Council Information Office released a report titled “Human Rights Record of the United States in 2010,” in which the U.S. use of the death penalty was criticized as a human rights violation and which stated, “The United States applies double standards.” 28

#### Capital punishment tarnishes perceptions on US commitment to human rights treaty obligations – only abolition can align us with international views and improve foreign policy

Drilling, 14 --- J. D. at Ohio Northern University—Claude W. Pettit College of Law (2014, Andrew, “Capital Punishment: The Global Trend toward Abolition and Its Implications for the United States,” 40 Ohio N.U. L. Rev. 847 pg.870, Accessed via UMich Libraries)//MP

The United States' attitude toward capital punishment is significant on an international level because it unquestionably tarnished the United States' international reputation for its commitment to treaty obligations, as well as its commitment to basic human rights.245 It does not help that all of Europe (with the exception of Belarus), Canada, and Mexico, some of the United States' more significant allies, have abolished capital punishment.246 Indeed, American diplomats have voiced concerns that the United States' reputation for civilized values has suffered from its retention of capital punishment.247 Recently, several former U.S. diplomats filed an amicus curiae brief with the Supreme Court in McCarver v. North Carolina,248 in order to inform the Court how the continued use of capital punishment could result in "diplomatic isolation and inevitably harm other United States foreign policy interests."2 49 Of added concern is the fact that Germany, a significant ally of the United States, was willing to jeopardize its relations and sue the United States in the ICJ over the breach of a treaty that resulted in two of its citizens being executed, indicating just how damaging the continued use of capital punishment could be to future diplomatic relations.250

Increasingly, countries attempt to influence abolition through refusing to extradite capital defendants, sending diplomats to plead for reprieves for capital defendants, and providing amicus curiae briefs to the Supreme Court in capital cases. 251 These influential policies have been met with success in other countries. For example, Rwanda abolished the death penalty after European countries refused to extradite those responsible for genocide in order to protect them from the death penalty.252 Further, since the United States has increasingly offered assurances to Mexico that it will not pursue the death penalty in regard to extradited "drug lords," the United States has seen increased cooperation in the number of offenders extradited.253 Additionally, countries outside the United States may enjoy more influence on this trend toward abolition in the United States, as some members of the Supreme Court are increasingly willing to look to foreign countries to determine what standards should apply domestically. 254

#### The death penalty harms US credibility in wielding power to create human rights norms in international institutions

Bae, Sangmin., 2004,Professor of Political Science at Northeastern Illinois University "When the state no longer kills: International human rights norms and abolition of capital punishment," No Publication, proquest //Kiefer

After finishing his service as Assistant Secretary of State for Democracy, Human Rights and Labor, under the Clinton administration, Harold Koh stated that the issue of the death penalty has placed the United States and its closest allies - particularly the European Union and Latin American countries - on a collision course both in important bilateral meetings and in almost every multilateral human rights forum. Probably as one of few outspoken critics of the death penalty among the high profile administrators, Koh remarked: “Capital punishment concretely diminishes America’s reputation as a human rights leader and hence its ability to lead a coalition of nations founded on moral principle. For a country that aspires to be a world leader in human rights, the death penalty has become our Achilles’ Heel” (Koh 2002,1108).12

#### The death penalty is the primary reason states don’t think the US is committed to human rights

Bae, Sangmin., 2004, Professor of Political Science at Northeastern Illinois University "When the state no longer kills: International human rights norms and abolition of capital punishment," No Publication, proquest //Kiefer

The United States stands alone among Western industrial democracies in practicing the death penalty, showing that this country has moved in the opposite direction from the general international trend of death penalty prohibition. American allies of long standing, including the members of the European Union, Canada and Australia, have increasingly criticized the U.S. execution practice, with particular emphasis on executing juvenile offenders and the mentally retarded. Despite the declaration of a “war on terrorism” by the United States, a number of European countries have announced that they will not extradite alleged terrorists if the suspects are threatened by a death sentence. In addition, they will not provide specific intelligence information on defendants charged with the death penalty (Blocker 2002; Shenon and Lewis 2002).

Why is the United States, or at least the thirty-eight states and federal government which maintain the death penalty, out of step with international opinion amongst those countries with whom they share similar social and political values? Why do “Americans not pay decent respect to the world opinion with regard to capital punishment?” (Koh 2002) I argue that the retention of the death penalty in the United States closely relates to its domestic institutional system. Major features of American federalism and its electoral politics can fairly be described as populist, especially in comparison to most European parliamentary systems. Politicians or political leaders are less resistant to raw public opinion, especially given that most public officials, like district attorney, prosecutors, and judges, are all directly elected in the United States. Accordingly, U.S. officers, all subjected to the popular vote, apparently fear to voice their opposition to the death penalty, as opposed to European political elites who enjoy state autonomy to pursue liberal human rights norms in the face of political controversies and public opposition. As Bill Bradley put it, “we need leaders who believe that, if politics is the art of the possible, it is the role of a leader to expand the possibilities” (Evans 2000). Indeed, political initiative seems to be the only answer, but the political institutional setting in the United States makes this very unlikely.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission. 153 The death penalty provides an illuminating case study of the importance of maintaining American sovereignty in the face of organized campaigns by the international human rights movement. It symbolizes the American determination to interpret human rights so as to accord with the U.S. Constitution and public opinion, rather than internationally recognized and promoted principles and rules.

### Court Key

#### A supreme court ruling is key to developing international norms that regard the death penalty as a violation of human rights

Hood & Hoyle, 09 --- Professor and Director at Centre for Criminology, University of Oxford (2009, Roger and Carolyn, “Abolishing the Death Penalty Worldwide: The Impact of a “New Dynamic”,” The University of Chicago Press, Vol. 38, No. 1 (2009), pp. 49-50, Accessed via UMich Libraries)//MP

The United States has not embraced the aspiration, embodied in article 6 of the ICCPR and in UN resolutions, to abolish the death penalty in due course. The persistence of capital punishment in the United States, a country that proudly champions democratic values, human rights, and political freedom, has become, in our opinion, one of the greatest obstacles to the acceptance by other retentionist countries that capital punishment inherently and inevitably violates human rights. So what prospects are there that the United States will abandon capital punishment? The government of the United States made its position clear in 2005 in its response to the UN Seventh Quinquennial Survey on capital punishment and the implementation of the safeguards for those facing the death penalty: “When administered in accordance with all the aforementioned safeguards, the death penalty does not violate international law. Capital punishment is not prohibited by customary international law or by any treaty provisions under which the United States is currently obligated. . . . We believe that in democratic societies the criminal justice system—including the punishment prescribed for the most serious and aggravated crimes—should reflect the will of the people freely expressed and appropriately implemented through their elected representatives” (United Nations 2005, para. 17). Similarly, an article by two senior lawyers from the U.S. Department of Justice (Margaret Griffey and Laurence Rothenberg), written for the Organization for Security and Co-operation in Europe (OSCE) publication The Death Penalty in the OSCE Area, 2006, brushed aside criticisms relating to “alleged racial disparities,” conviction of the innocent, inadequate representation, and the “death row phenomenon.” It concluded: “Despite criticism of its justness and accuracy, public support for the death penalty in the United States remains high. Proponents and supporters cite its retributive and deterrent values as both morally required and practically necessary to ensure a safe society. Its application is subject to constitutional constraints and has been tested many times in court, leading to a complex jurisprudence that serves to protect defendants’ rights while also enforcing the desire of the American public for just criminal punishment” (OSCE 2006, p. 44). The negative attitude of the U.S. government toward international human rights treaties that have sought to limit the use of capital punishment and the hesitant approach of the Supreme Court toward claims based on international human rights norms have been major barriers to change. For example, in its report to the UN Committee Against Torture, the U.S. government claimed that it was not obliged to report on the use of the death penalty because the United States had made a condition of its ratification the proposition that the United States was bound only to article 16 of the UN Convention Against Torture, to the extent that the definition of “cruel, inhuman or degrading treatment or punishment” matches the “cruel and unusual punishment” prohibited by the U.S. Constitution as interpreted by the U.S. Supreme Court. The United States also registered an “understanding” that the convention did not “restrict or prohibit the United States from applying the death penalty consistent [with the Constitution], including any constitutional period of confinement prior to the imposition of the death penalty” (“United States’ Response to the Questions Asked by the Committee Against Torture,” Geneva, May 8, 2006). Given the extraordinarily long periods of time that inmates in the United States spend on death row before execution—an average of 12 years and sometimes more than 20 years—when compared with the limit of 5 years set by the Judicial Committee of the Privy Council (see above in this section), the failure of the U.S. Supreme Court to deal decisively with this issue is another example of its distance from developing international norms.70 The importance of this issue was underlined when, in September 2008, Jack Alderman, a model inmate who had been convicted of the murder of his wife—of which he had maintained his innocence—was executed by the State of Georgia, having been denied clemency, after 33 years on death row.7

### Abolition => U.S. Human Rights Leadership

#### U.S. abolition will reinvigorate its leadership on human rights

Bessler, 18 --- Associate Professor, University of Baltimore School of Law (John D., SAINT LOUIS UNIVERSITY LAW JOURNAL, “WHAT I THINK ABOUT WHEN I THINK ABOUT THE DEATH PENALTY,” <https://www.slu.edu/law/law-journal/pdfs/issues-archive/v62-no4/john_bessler_article.pdf>, accessed on 5/14/2020, JMP)

VI. ALL THE TYRANNY, AUTHORITARIANISM, AND TOTALITARIANISM

Death sentences were once justified on the basis of the “divine right of kings,” and iron-fisted monarchs made frequent use of executions to quash uprisings or rebellions.80 Dictators such as Stalin, Hitler, and Pol Pot all made use of arbitrary killings, death sentences, and executions,81 and the death penalty is still employed by a number of totalitarian, autocratic, or one-party regimes. The People’s Republic of China—the country that ruthlessly squelched prodemocracy demonstrators in Tiananmen Square—is the world’s top user of executions,82 but other countries that make regular use of executions constitute a rogues’ gallery of human rights violators. Among the countries that top Amnesty International’s list of most frequent users of executions are Iran, Saudi Arabia, Iraq, and Pakistan.83 “Often,” scholar Franklin Zimring writes in The Contradictions of American Capital Punishment, tracing the movement of Western representative democracies away from executions, “state killings in totalitarian regimes did not involve even the pretense of judicial process.”84

The death penalty is an outlier, especially for modern-day Western democracies. When I was a kid, I used to go to a dental office in Mankato, Minnesota, that had copies of Highlights magazines in the waiting room. One popular activity, as I remember it, was to circle the object that did not belong in a grouping.85 If one examines the countries of the world that still use death sentences and executions, it quickly becomes clear that a Western representative democracy like the United States should have abandoned capital prosecutions, death sentences, and executions long ago. Iran is still hanging people from construction cranes,86 and North Korea’s despotic ruler has ordered numerous executions by hanging, firing squad, and even anti-aircraft guns.87 But America’s next-door neighbors, Canada and Mexico, have abolished and long ago abandoned the death penalty,88 and the whole of Europe no longer uses capital punishment and now advocates its abolition worldwide.89

When it comes to human rights, the United States of America should be a leader, not a follower or a violator. The Declaration of Independence, containing the historic proclamation that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,” was a milestone in the annals of human rights.90 It is time for the United States to outlaw the death penalty throughout the country—and to reclaim its leadership position in the world. Steven Pinker, writing of the U.S. Supreme Court and capital punishment in Enlightenment Now: The Case for Reason, Science, Humanism, and Progress, suggests how that might actually happen: “Court watchers believe it is only a matter of time before the Justices are forced to confront the caprice of the whole macabre practice head on, invoke ‘evolving standards of decency,’ and strike it down as a violation of the Eighth Amendment’s prohibition of cruel and unusual punishment once and for all.”91

### Human Rights Leadership – China Specific

#### Abolition will bolster U.S. human rights leadership and allow it to challenge China without being labeled as hypocritical

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.319-320, JMP)

Constitutional abolition of the death penalty will also reduce tension between the United States and its international peers. Joint criminal justice initiatives with our abolitionist allies will no longer be shadowed by the concern that extradition to the United States may be refused because of the possibility of a capital prosecution.78 On a broader level, the United States will no longer have reason to reject the consensus that capital punishment is a human rights issue rather than one of domestic criminal justice policy. Adopting a shared human rights lens with our allies will reduce the friction that our fundamentally different conception of the issue currently generates. No longer will earnest young human rights activists from Paris, Geneva, and Stockholm seek internships in capital defense organizations in Texas and Alabama. No longer will the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions file reports to the Commission on Human Rights about defects in death penalty processes in the United States.79 Such changes are not merely symbolic; more pragmatically, they will permit the United States to avoid claims of hypocrisy when it dons the mantle of a global human rights leader and seeks to take other countries, like China, to task for their human rights failings.

A categorical constitutional abolition of the death penalty obviously will render the criminal justice system less harsh. But it will also likely produce a less divisive criminal justice politics, both domestically and internationally.

#### China is an existential threat to global human rights --- renewed leadership is critical to challenge it

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)

China’s government sees human rights as an existential threat. Its reaction could pose an existential threat to the rights of people worldwide.

At home, the Chinese Communist Party, worried that permitting political freedom would jeopardize its grasp on power, has constructed an Orwellian high-tech surveillance state and a sophisticated internet censorship system to monitor and suppress public criticism. Abroad, it uses its growing economic clout to silence critics and to carry out the most intense attack on the global system for enforcing human rights since that system began to emerge in the mid-20th century.

Beijing was long focused on building a “Great Firewall” to prevent the people of China from being exposed to any criticism of the government from abroad. Now the government is increasingly attacking the critics themselves, whether they represent a foreign government, are part of an overseas company or university, or join real or virtual avenues of public protest.

No other government is simultaneously detaining a million members of an ethnic minority for forced indoctrination and attacking anyone who dares to challenge its repression. And while other governments commit serious human rights violations, no other government flexes its political muscles with such vigor and determination to undermine the international human rights standards and institutions that could hold it to account.

If not challenged, Beijing’s actions portend a dystopian future in which no one is beyond the reach of Chinese censors, and an international human rights system so weakened that it no longer serves as a check on government repression.

To be sure, the Chinese government and Communist Party are not today’s only threats to human rights, as the Human Rights Watch World Report shows. In many armed conflicts, such as in Syria and Yemen, warring parties blatantly disregard the international rules designed to spare civilians the hazards of war, from the ban on chemical weapons to the prohibition against bombing hospitals.

Elsewhere, autocratic populists gain office by demonizing minorities, and then retain power by attacking the checks and balances on their rule, such as independent journalists, judges, and activists. Some leaders, such as US President Donald Trump, Indian Prime Minister Narendra Modi, and Brazilian President Jair Bolsonaro, bridle at the same body of international human rights law that China undermines, galvanizing their publics by shadow boxing with the “globalists” who dare suggest that governments everywhere should be bound by the same standards.

Several governments that in their foreign policies once could be depended upon to defend human rights at least some of the time have largely abandoned the cause. Others, faced with their own domestic challenges, mount a haphazard defense.

Yet even against this disturbing backdrop, the Chinese government stands out for the reach and influence of its anti-rights efforts. The result for the human rights cause is a “perfect storm”—a powerful centralized state, a coterie of like-minded rulers, a void of leadership among countries that might have stood for human rights, and a disappointing collection of democracies willing to sell the rope that is strangling the system of rights that they purport to uphold.

Beijing’s Rationale

The motivation for Beijing’s attack on rights stems from the fragility of rule by repression rather than popular consent. Despite decades of impressive economic growth in China, driven by hundreds of millions of people finally emancipated to lift themselves out of poverty, the Chinese Communist Party is running scared of its own people.

Outwardly confident about its success in representing people across the country, the Chinese Communist Party is worried about the consequences of unfettered popular debate and political organization, and thus afraid to subject itself to popular scrutiny.

As a result, Beijing faces the uneasy task of managing a huge and complex economy without the public input and debate that political freedom allows. Knowing that in the absence of elections, the party’s legitimacy depends largely on a growing economy, Chinese leaders worry that slowing economic growth will increase demands from the public for more say in how it is governed. The government’s nationalist campaigns to promote the “China dream,” and its trumpeting of debatable anti-corruption efforts, do not change this underlying reality.

The consequence under President Xi Jinping is China’s most pervasive and brutal oppression in decades. What modest opening had existed briefly in recent years for people to express themselves on matters of public concern has been decisively closed. Civic groups have been shut down. Independent journalism is no more. Online conversation has been curtailed and replaced with orchestrated sycophancy. Ethnic and religious minorities face severe persecution. Small steps toward the rule of law have been replaced by the Communist Party’s traditional rule by law. Hong Kong’s limited freedoms, under “one country, two systems,” are being severely challenged.

Xi has emerged as the most powerful leader of China since Mao Zedong, building a shameless cult of personality, removing presidential term limits, promoting “Xi Jinping thought,” and advancing grandiose visions for a powerful, yet autocratic, nation. To ensure that it can continue to prioritize its own power over the needs and desires of the people of China, the Communist Party has mounted a determined assault on the political freedoms that might show the public to be anything but acquiescent to its rule.

The Unconstrained Surveillance State

More than any other government, Beijing has made technology central to its repression. A nightmarish system has already been built in Xinjiang, the northwestern region that is home both to some 13 million Muslims—Uyghurs, Kazakhs, and other Turkic minorities—and to the most intrusive public monitoring system the world has ever known. The Chinese Communist Party has long sought to monitor people for any sign of dissent, but the combination of growing economic means and technical capacity has led to an unprecedented regime of mass surveillance.

The ostensible purpose is to avoid recurrence of a handful of violent incidents several years ago by alleged separatists, but the venture far surpasses any perceptible security threat. One million officials and party cadre have been mobilized as uninvited “guests” to regularly “visit” and stay in the homes of some of these Muslim families to monitor them. Their job is to scrutinize and report “problems” such as people who pray or show other signs of active adherence to the Islamic faith, who contact family members abroad, or who display anything less than absolute fealty to the Communist Party.

This in-person surveillance is just the tip of the iceberg, the analog prelude to the digital show. Without regard to the internationally recognized right to privacy, the Chinese government has deployed video cameras throughout the region, combined them with facial-recognition technology, deployed mobile-phone apps to input data from officials’ observations as well as electronic checkpoints, and processed the resulting information through big-data analysis.

Data it collects are used to determine who is detained for “re-education.” In the largest case of arbitrary detention in decades, one million or more Turkic Muslims have been deprived of their freedom, placed in an indefinite detention of forced indoctrination. The detentions have created countless “orphans”—children whose parents are in custody—who are now held in schools and state-run orphanages where they, too, are subjected to indoctrination. Children in regular Xinjiang schools may face similar ideological training.

The apparent aim is to strip Muslims of any adherence to their faith, ethnicity, or independent political views. Detainees’ ability to recapture their freedom depends on persuading their jailers that they are Mandarin-speaking, Islam-free worshipers of Xi and the Communist Party. This brazen endeavor reflects a totalitarian impulse to reengineer people’s thinking until they accept the supremacy of party rule.

The Chinese government is building similar systems of surveillance and behavior engineering throughout the country. Most notable is the “social credit system,” which the government vows will punish bad behavior, such as jaywalking and failure to pay court fees, and reward good conduct. People’s “trustworthiness”—as assessed by the government—determines their access to desirable social goods, such as the right to live in an attractive city, send one’s children to a private school, or travel by plane or high-speed train. For the time being, political criteria are not included in this system, but it would take little to add them.

Ominously, the surveillance state is exportable. Few governments have the capacity to deploy the human resources that China has devoted to Xinjiang, but the technology is becoming off-the-shelf, attractive to governments with weak privacy protections such as Kyrgyzstan, the Philippines, and Zimbabwe. Chinese companies are not the only ones selling these abusive systems—others include companies from Germany, Israel, and the United Kingdom—but China’s affordable packages make them attractive to governments that want to emulate its surveillance model.

China’s Template for Prosperous Dictatorship

Many autocrats look with envy at China’s seductive mix of successful economic development, rapid modernization, and a seemingly firm grip on political power. Far from being spurned as a global pariah, the Chinese government is courted the world over, its unelected president receiving red-carpet treatment wherever he goes, and the country hosting prestigious events, such as the 2022 Winter Olympics. The aim is to portray China as open, welcoming, and powerful, even as it descends into ever more ruthless autocratic rule.

The conventional wisdom once held that as China grew economically, it would build a middle class that would demand its rights. That led to the convenient fiction that there was no need to press Beijing about its repression; it was sufficient to trade with it.

Few today believe that self-serving rationale, but most governments have found new ways to justify the status quo. They continue to prioritize economic opportunities in China but without the pretense of a strategy for improving respect for the rights of the people there.

In fact, the Chinese Communist Party has shown that economic growth can reinforce a dictatorship by giving it the means to enforce its rule—to spend what it takes to maintain power, from the legions of security officials it employs to the censorship regime it maintains and the pervasive surveillance state it constructs. Those vast resources buttressing autocratic rule negate the ability of people across China to have any say in how they are governed.

These developments are music to the ears of the world’s dictators. Their rule, they would have us believe with China in mind, can also lead to prosperity without the nettlesome intervention of free debate or contested elections. Never mind that the history of unaccountable governments is littered with economic devastation.

For every Lee Kwan Yew, the late Singaporean leader who is often mentioned by proponents of autocratic rule, there are many more—Robert Mugabe of Zimbabwe, Nicolas Maduro of Venezuela, Abdel Fattah al-Sisi of Egypt, Omar al-Bashir of Sudan, or Teodoro Obiang Nguema Mbasogo of Equatorial Guinea—who led their country to ruin. Unaccountable governments tend to put their own interests above their people’s. They prioritize their power, their families, and their cronies. The frequent result is neglect, stagnation, and persistent poverty, if not hyperinflation, public health crises, and economic debacle.

Even in China, an unaccountable system of government allows no voice to those left out of China’s growing economy. Officials boast of the country’s economic progress, but they censor information about its widening income inequality, discriminatory access to public benefits, selective corruption prosecutions, and the one in five children left behind in rural areas as their parents seek work in other parts of the country. They hide the forced demolitions and displacements, the injuries and deaths that accompany some of the country’s massive infrastructure projects, and the permanent disabilities resulting from unsafe and unregulated food and drugs. They even deliberately underestimate the number of people with disabilities.

Moreover, one need not go back far in China’s history to encounter the enormous human toll of unaccountable government. The same Chinese Communist Party that today proclaims a Chinese miracle only recently imposed the devastation of the Cultural Revolution and the Great Leap Forward, with deaths numbering in the tens of millions.

### Human Rights Leadership Good

#### Revitalizing human rights leadership is critical to address terrorism, ISIS, cyber attacks, econ collapse, disease, and refugee crises

Schnetzer, 16 --- Fellow, Global Initiatives at the George W. Bush Institute (7/21/16, Amanda, “Why promoting freedom and human rights is in our national interest,” <https://www.bushcenter.org/publications/articles/2016/07/why-promoting-freedom-is-in-national-interest.html>, accessed on 6/4/19)

Substantially more people experience liberty today than at the end of World War II, but more than half the world’s population still lives in countries where basic political rights and civil liberties are only partly respected, if at all. The last decade in particular has not been good for freedom.

For ten consecutive years, Freedom House has documented a worrisome “decline in global freedom.” The National Endowment for Democracy has warned of authoritarian regimes cracking down at home while also “seeking to reshape the international order and democratic norms.”

From China to Russia to the Middle East, the challengers to liberalism are gaining ground. It is in the direct and immediate interest of the United States to help shift the balance by supporting the advance of human rights and freedom abroad.

The current mood in the United States does not appear conducive to this strategy. New Pew Research polling shows that 69 percent of Americans believe the United States should “concentrate more on our own national problems.” Seventy percent want the next U.S. president to focus on domestic policy over foreign policy.

Yet in order to address the “major threats” that keep Americans awake at night — ISIS, foreign cyberattacks, global economic instability, the spread of infectious diseases, the refugee crisis — strong U.S. leadership is required, as are strategies that help advance rule of law, good governance, open markets, and other features of free societies.

So where do we go from here?

One step would be for policymakers, presidential candidates, and other public office hopefuls to make the promotion of democracy and human rights an important part of their foreign policy agendas. This March, 139 policy experts, civil society leaders, and former elected officials—Republicans and Democrats alike—signed a letter encouraging the presidential candidates to do just that.

While recognizing that “democracy and human rights cannot be the only items on the foreign policy agenda,” the letter calls it a “false choice” to pit the pursuit of democratic ideals against national security. I was proud to sign that letter.

A second step would be to engage the American people in a conversation about the impact of advancing freedom on our own peace, prosperity, and security.

At the end of World War II, for example, many questioned whether democracy was compatible with Germany and Japan. The United States actively supported the development of democratic institutions and practices. Today, Germany and Japan are among our strongest partners and allies in the world, and Americans reap tangible benefits.

In North Texas, where the Bush Institute is located, the relocation of Toyota’s North American headquarters is expected to create jobs and have an economic impact of $7 billion in the first ten years, according to estimates when the move was announced.

During the Cold War, the United States supported democratic reform in places like Taiwan, South Korea, the Philippines, and Chile. The end of the Cold War was a major victory for freedom in Central and Eastern Europe. After decades of Soviet nuclear threat, it also was a great victory for American peace and security.

Today, the moral and strategic imperatives of advancing human rights are just as compelling. In Afghanistan, investing in women promotes stability and helps reduce the possibility of future terrorist attacks on the United States emanating from that country. In the Middle East, the spread of Islamic extremism and ISIS has had devastating consequences, and the United States is not immune. In North Korea, a regime that systematically and horrifically abuses the rights of its own people seeks nuclear weapons that can reach our shores.

In these and other places, it is in the interests of the United States to see the forces of freedom eventually prevail.

A third step would be to find opportunities for immediate bipartisan action. Both Republican and Democrat presidents have affirmed the U.S. commitment to standing for freedom at home and leading the advance of freedom abroad. Congress, too, has played an important role.

Ensuring continued support for democracy and development assistance overseas, promoting progress on human rights in trade and economic agreements, and continuing support for initiatives like the President's Emergency Plan for AIDS Relief (PEPFAR) that relieve human suffering are just some of the options available to policymakers today.

In the current political environment, this may be a tall order, but the stakes at home and abroad are high and American leadership is essential.

### Dignity Key to International Human Rights

#### Human dignity is key to uphold the international declarations of human rights.

McCrudden 08 Christopher McCrudden FBA is Professor of Equality and Human Rights Law, Queen's University Belfast; William W Cook Global Professor of Law at University of Michigan Law School; and a member of Blackstone Chambers. [“Human Dignity and Judicial Interpretation of Human Rights,” 09-01-2008, *Oxford Academic,* URL: <https://doi.org/10.1093/ejil/chn043>] kly

D Justifying the Creation of New, and the Extension of Existing, Rights

**Dignity has functioned**, thirdly, **as a source from which new rights may be derived, and existing rights extended**. In the Israeli context, for example, human dignity has been seen as providing a basis on which to import rights that had not, intentionally, been included in the text of the Basic Law: Human Dignity and Liberty. As Kretzmer observes, ‘the Basic Law does not mention many of the fundamental rights that are protected under most constitutions and international human rights instruments …. The most blatant exclusions are equality, freedom of religion and conscience and freedom of speech.’414 These were excluded because of the inability to generate a consensus among the parties in the Knesset that they should be included at that time. Notably, several of the religious parties objected to their inclusion. Given that the self-perceived role of the Israeli Supreme Court is to assist in the building of an Israel that is committed to the broad range of human rights, that was unsatisfying. Conceptualizing human dignity as a general value ‘has enabled the Court to resort to the concept to create rights in various situations’, including in those contexts where the excluded rights would otherwise have been expected to operate.415 In some cases, the Court has used this method to recognize precisely those rights which were deliberately omitted from the Basic Law because of the lack of political consensus.416 For example, in the Hupert case, the Court asserted that the right to equality could be derived from human dignity and as a consequence merited constitutional protection.417 Other rights that have been derived from dignity in a similar manner include freedom of religion, the right to strike, the right of minors not to be subject to corporal punishment, and the right to know the identity of one's parents.418

A somewhat similar approach can be identified in the UK House of Lords’ Limbuela decision,419 in which the claims of three asylum seekers who applied for judicial review of the Nationality, Immigration, and Asylum Act were considered under the Human Rights Act 1998, which effectively incorporated the ECHR into domestic UK law. The challenged legislation had revoked the authority of the Secretary of State to provide support for asylum seekers who did not make a recorded claim for asylum as soon as reasonably practicable after arriving in the UK. Nor were such asylum seekers permitted to work, even where they were destitute. The asylum seekers contended that the regime diminished their human dignity and violated Article 3 of the ECHR, which provided an absolute prohibition on torture, and inhuman or degrading treatment. Dignity was the standard for determining whether treatment rose to the level of inhuman or degrading treatment for the purposes of Article 3. Discussing the types of treatment falling within Article 3, Lord Craighead wrote, ‘Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish, … it may be characterized as degrading and also fall within the prohibition of article 3’.420 The House agreed that the statutory regime violated Article 3 because, by denying the asylum seekers state support at the same time as effectively cutting off self-support measures (applicants could not work without permission, which took a minimum of 12 months to obtain), the state actions resulted in treatment that was severe enough to be considered inhuman or degrading.

E Reacting to the Institutional Uses of Dignity

How should we react to these institutional uses of dignity? Some may see the three uses of dignity as merely rhetorical. The courts use the concept of dignity merely to disguise, for example, the absence of a theory on how to resolve conflict between incommensurable values. Instead of making a choice between conflicting rights, they present the conflict as an issue internal to dignity. Some may well consider that this approach obscures the moral issues which give rise to conflicts of rights, pretending that the problem is the absence of a common metric, where the real disagreement is deeper. There may be a similar reaction to the other uses of dignity discussed in this part of the article. If these arguments are accepted, then from a substantive point of view, dignity is a placeholder, but it has taken on a rhetorical function in these three distinct contexts to give judges something to say when they confront the really hard issues. This counts as ‘finding the use of dignity’, but not in a way that some readers will see as normatively attractive, since it seems merely to provide a smokescreen behind which substantive judgments are being made, but unarticulated as such, and therefore uncontestable. Some, indeed, may consider this as a breach of the Rule of Law which, as conceptualized by Raz, requires decisions to be open, prospective, and clear, such that individuals are able to plan their lives around them.421 Critics of pluralistic visions of human rights may well argue that the techniques of ‘domesticating’ human rights discussed above undermine the predictability necessary to create a functioning approach to human rights and in extreme forms allows for total derogation from human rights norms by tolerating all deviations. Others may see the uses of dignity described in this part of the article as anti-democratic. This article is not the place to consider whether these arguments are convincing. My only purpose, I repeat, is to identify what seems to me to explain the increasing popularity of the concept of dignity among judges and advocates, not to justify these uses of dignity.

7 Conclusion

**Dignity has undoubtedly played a pivotal political role in enabling different cultures with vastly different conceptions of the state**, differing views on the basis of human rights, and differing ethical and moral viewpoints to put aside these deep ideological differences and agree instead to focus on the specific practices of human rights abuses that should be prohibited, as Maritain suggested. Dignity has helped to achieve this by enabling all to agree that human rights are founded on dignity. A basic minimum content of the meaning of human dignity can be discerned: that each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for the individual not vice versa. The fault lines lie in disagreement on what that intrinsic worth consists in, what forms of treatment are inconsistent with that worth, and what the implications are for the role of the state.422

Although a more specific common theory going beyond the minimum core content was not necessary for the political acceptance of the Charter and the Universal Declaration, or for the acceptance of the subsequent human rights texts at the international, regional, and domestic levels, and attempts to generate one might well have been counter-productive, this did not help much when it came to the judicial interpretation of those specific rights that were enacted. When judges read their texts and found that these rights were founded on human dignity, or found that there was a right to dignity as such, it was not surprising that some considered that dignity should be given a more substantive content. **It is significant that dignity is so often drawn on where there is some personal security issue at stake (torture, death), where equality is at stake (including as a basis for limiting other rights like freedom of expression), and where some forms of autonomy are at stake (abortion, sexual practices). This** might have led (and **may** still **lead) to** the development, through discussion among judges nationally and transnationally,423 of an agreed transnational, transcultural, non-ideological, humanistic, non-positivistic, individualistic-yet-communitarian conception of human dignity which was absent when the Charter and the Declaration were being drafted. I understand Carozza to be arguing that this is what is currently underway. But, although we see judges often speaking in terms of ‘common principles for a common humanity’, in practice this is often rhetoric, however well intentioned and sincere. We appear to have significant consensus on the common core, but not much else.

### Human Rights Solve Conflict

#### International human rights violations make conflicts inevitable and intractable

Ortega, Herman, and Sriram 9 --- first two are research fellows at the Centre on Human Rights in Conflict at the University of East London, and latter is a Professor of Law at the University of London (2009, Olga, Johanna, and Chandra, “War, Conflict, and Human Rights,” Routledge pg. 4-6)//MP

The relationship between war and other violent conflict is complex and dynamic. As discussed later, violations of human rights can be both causes and consequences of violent conflict. Further, violations of human rights and violations of international humanitarian law can alter the course of conflicts, adding grievances and changing the interests of various actors, in turn making conflicts more intractable. Where this is the case, conflict resolution can become much more difficult, not least because many issues beyond the original "root causes" of conflict will be at stake, and because trust between the warring parties will be extremely low. Finally, demands for accountability will be made, whether by victims and relatives of victims, by local and international nongovernmental organizations, or by various international actors such as donor countries, The pursuit of legal accountability is often controversial, and is often resisted by one or more of the fighting parties; insisting upon legal accountability may impede negotiations or peace implementation. Nonetheless, there have been numerous attempts to pursue legal accountability while also making peace, and this book will examine many such cases. These complex problems are both legal and political. Developing useful policy responses requires an understanding not only of international human rights and humanitarian law, but also of conflict dynamics and conflict resolution. We turn next, briefly, to the specific fields and disciplines of conflict analysis and resolution, human rights, and international humanitarian law, which will be developed in greater detail in subsequent chapters. We address in greater detail the specific ways in which war and human rights violations may be intertwined, and the particular and competing demands and goals of conflict resolvers and right

Conflict analysis and causes of conflict Conflict analysis, in theory and in practice, seeks to identify the “underlying" causes of conflict as well as to understand the dynamics of conflict once it is under way. In any given conflict there is always more than one cause, although some will be more salient in particular conflicts, as discussed in Chapter 2. Causes of conflict can include mistrust or grievances based upon ethnic discrimination or preferential treatment; competition over resources, whether political or economic; demands for political autonomy or independence; allegations of corruption; and myriad claims regarding current or past human rights abuses. Attempts to resolve conflicts will need to address many or all of these underlying causes, which means that in conflict resolution processes, human rights abuses are but one concern among many. Those seeking to resolve conflict will be concerned with bringing all relevant parties to the negotiating table, including the possibility of defection by some, particularly "spoilers". building confidence among parties ; and addressing the many grievances that parties may have against one another. They may also be concerned with allocating future economic and political resources, guaranteeing security for all parties. particularly those that fear for their survival: rebuilding institutions of law and order and addressing specific demands for justice to rectify past abuses. They may also be concerned with setting the stage for peacebuilding processes, often with a significant international presence. or with longer- term reconciliation and conflict transformation, Clearly, in many instances, human rights are not the first topic of concern for conflict resolution experts or practitioners. However, as we will see, human rights violations and human rights protections are intimately linked to the patterns of contemporary conflict in a number of ways, meaning that contemporary efforts to end wars have been compelled to deal with human rights and humanitarian law obligations. Encounters between human rights advocates and conflict resolution experts have thus been necessarily uneasy, with each "side" viewing the priorities of the other as suspect.

Human rights violations as causes of conflict Human rights violations can be both causes and consequences of conflict. We begin with the ways in which human rights violations can generate conflict, with some examples for illustration in Box 1.1. In the most general sense, grievances over the real or perceived denial of rights can generate social conflict. This may be the case where there is systematic discrimination, differential access to education or health care, limited freedom of expression or religion, or denial of political participation, whether based upon race, ethnicity, caste, religion, language, gender, or some other characteristic. These violations may seem relatively minor, particularly in comparison to some of the grave crimes examined later in this book, including war crimes and genocide, but they can still generate real grievances and social unrest. In functional polities, such grievances may be handled through relatively peaceful, constitutional means, whether through litigation in the courts or through legislative reform or administrative policy change. However, in weak, corrupt, abusive, or collapsed and collapsing states, such conflict is more likely to become violent. That violence nay be merely sporadic, if serious, or it may give rise to more systematic opposition. Violent conflict may also emerge where there are more violent human rights abuses**-** illegal detention, extrajudicial execution, disappearances, torture, widespread killing, or even attempts at genocide. Where civilians have already been targeted by such violence. committed by the state or by nonstate actors, it is unlikely that peaceful resistance will have much effect, so it is yet more likely that affected individuals and groups will take up arms to defend themselves. In such situations, then, human rights violations are an important, underlying cause of conflict, although seldom the only one. Once war has erupted, any serious attempt at conflict resolution will also have to address the underlying sources of the original conflict, including abuses of human rights. Otherwise, violence, particularly retaliation for past abuses, is likely to re-emerge once third-party mediators, observers, or peacekeepers have departed.

#### **Human rights violations are clearly associated with conflict – dignity based approaches solve by reducing discrimination and state repression**

Thoms and Ron 7 --- Research Associate in McGill University’s Research Group in Conﬂict and Human Rights and Associate Professor at Carleton University’s Norman Paterson School of Inter-national Affairs (August 2007, Oskar N. T. and James, “Do Human Rights Violations Cause Internal Conflict,” The Johns Hopkins University Press, <https://jamesron.com/documents/scholarly-2007-rights-violations.pdf>, accessed on 7/7/20)//MP

Inequality is only a human rights violation when caused or reinforced by state discrimination, and it seems to be somehow associated with conflict emergence. The precise causal relationship and relevant inequality types remain unclear, however, in part because the available inequality and discrimination data are insufficient for reliable cross-national analysis.

Abuses of personal integrity rights are closely associated with conflict escalation. The causal link between repression and conflict seems strong, although other political factors are crucial. Denial of political participation rights is a conflict risk factor insofar that established democracies experience less conflict, but it is unclear whether the causal link between intermediate regimes and conflict is repression, or instability, or something else. The association between democracy and domestic peace does not mean, however, that democratization necessarily reduces conflict, since regime transition is also a major risk factor. Indeed, stable autocracies experience less political violence on average than democratizing countries.

Possible remedies for these risk factors are complicated, since some remedial discrimination and group rights can, under certain circumstances, avert conflict. Democratization, moreover, may do more harm than good. Even efforts to restrain the state’s appetite for repression can backfire and contribute to conflict, by creating intermediately repressive regimes that are too harsh to accommodate dissent, but insufficiently brutal to stamp out all opposition.

Nonetheless, rights-based approaches to conflict reduction and prevention would be well advised to consider nuanced, context-specific efforts to reduce discrimination, and to be careful not to contribute to existing inequalities; improve access to political participation; and weaken the state’s appetite for repression through well-designed security sector reform, effective national human rights commissions, and other violence-monitoring efforts. More broadly, external actors should pursue democracy-building efforts cautiously and in conjunction with efforts to reduce the political uncertainties associated with regime transition.

#### Human rights violations are indicators of power abuses and consequences of violence – adhering to HR norms helps conflict resolution

Babbitt, 11 --- director of the Henry J. Leir Institute and co-director of the Program on Human Rights and Conflict Resolution at The Fletcher School of Law and Diplomacy (July 2011, Eileen, “Conflict Resolution and Human Rights in Peacebuilding: Exploring the Tensions”, UN Chronicle)//MP

The international community, therefore, has a responsibility to incorporate human rights norms in conflict resolution efforts for peacebuilding in cases of extreme power asymmetry. Human rights norms help address these asymmetries in two important ways. First, they help empower the weaker party -- a norm that the conflict resolution community already endorses. By strengthening the salience of human rights norms, third-party conflict resolution processes can achieve greater efficacy by giving a weaker party the support it might need to negotiate from a more equitable vantage point. Second, human rights norms are important in reinforcing the notion that a state's sovereignty carries with it a responsibility to protect the civilians within its borders.  
Most importantly, those designing and implementing conflict resolution processes for peacebuilding in intra-state conflicts cannot assume that human rights are "not our issue." They are key components of parties' interests and concerns, significant **indicators of** power asymmetry and sometimes **power abuses, and often** both a cause and **a consequence of the conflicts** we are trying to settle or transform. **It is crucial that peacebuilders know** and understand the strengths and weaknesses of human rights norms, and **how to use these norms** in a constructive and appropriate way. \* For further reading see: Babbitt, Eileen F. and Lutz, Ellen L. (eds.) (2009) Human Rights and Conflict Resolution in Context: Colombia, Sierra Leone, and Northern Ireland. Syracuse, New York: Syracuse University Press; Babbitt, Eileen F. (2008) "Conflict Resolution and Human Rights: Pushing the Boundaries." In Zartman, I.W., et al., (eds.) The Handbook of &not;Conflict Resolution. San Francisco: Sage Publications

### Abolition Key to Democracy

#### Abolishing the death penalty is key to international democracy

Franck 3 Hans Göran Franck was a Swedish human rights activist and political figure. [The Barbaric Punishment: Abolishing the Death Penalty, pp 151-154, 01-01-2003, *Martinus Nijhoff Publishers,* URL: <https://doi.org/10.1080/1323238X.2004.11910789>] kly

13 The Death Penalty and Democracy

A closer look at the background and use of the death penalty in the world shows that it is now mainly used in states that lack democratic traditions. It is important therefore to try to understand what it is that has made most democratic and law- abiding nations abolish capital punishment.

7.3.1 The Death Penalty as an Instrument of Oppression

The death penalty has always been intimately associated with political power and has often been used as an instrument to **oppress government critics**. History is full of examples of how capital punishment has been used to purge political dissidents or where it has been turned into miscarriages of justice. One such example is Pakistan's former head of state, Zulfikar Ali Bhutto, who was executed on 4 April 1979, after having been convicted on very shaky grounds for murdering a political opponent.

The South Korean politician and present President Kim Dae Jung was close to being executed in 1981, after having been accused of trying to overthrow the government. The case against him was based on a document that he was forced to sign under threat of torture. The death sentence was commuted after international protests. On a later visit to Stockholm, Kim Dae Jung emphasized the importance of the tireless struggle waged by the Swedish section of Amnesty International during many years to secure his release.

An overwhelming majority of the victims of Stalin’s purges, the death sentences after the Hungarian rebellion and the shootings at the Berlin wall illustrate the brutality of dogmatic communism and its intolerance of political dissidents.

There is a plethora of crimes that are punishable by death. In Taiwan a person who has tried actively to overthrow the government risks death, in Somalia it is enough to distribute anti-government propaganda, and Syrians risk execution if they in action, writing or speech refuse to comply with ‘the socialist order’.

In South Africa there used to be several politically motivated crimes that carried the death penalty. Several African National Congress members were executed for treason in the 1980s. Indeed, Nelson Mandela barely escaped a death sentence in his celebrated trial in the 1960s. Under South Africa’s Internal Security Act, people were sentenced to death for ‘terrorism’, which included acts of violence intended to ‘achieve or promote any form of constitutional, political, industrial, social or economic change in the republic.’ The international community introduced sanctions because apartheid constituted a threat to international peace and security. Several experts on international law held that apartheid was a form of ‘institutionalised violence’, which legitimised the oppressed majority’s right to use violence in self-defence.

It is clear that these death penalty statutes can easily be used against the regime’s political opponents. One basic characteristic of a democratic state ruled by law is the safeguarding of freedom of expression and an open political debate. This implies a respect for the opinions of the minority. By using political death penalty statutes, a regime may efficiently suppress all opponents and ensure its own undemocratic reign. In this way the death penalty clearly functions as an instrument of political oppression.

7.3.2 The Third Reich and the Right of a State to Kill

During the twentieth century approximately 100 million people died at the hands of others. The human capacity to kill has now caught up with epidemics and natural catastrophes in the competition to be humanity's worst scourge. The Third Reich developed a psychological and social environment that set the stage for the most devastating genocide in history. The key to exterminating a minority lay in the ability to define it in such a way that its members were stripped of all rights and came to be perceived as inferior beings. At that point, the minority could no longer defend itself through political and judicial institutions and it became possible to practise all sorts of abuses on them. This also enabled the regime to pass laws that led to the extermination of the minority in a systematic and formally lawful way. First, the mentally retarded and political opponents were put to death, then the Jews, gypsies and other undesirables.

In 1933, a law was passed in Germany under which it was possible to revoke the citizenship of certain groups that had obtained citizenship after 1918. This paved the way for the first concentration camps. In 1941, German Jews were stripped of their rights outside of Germany’s borders, so that German Jews sent off by the SS towards the camps in Poland automatically lost their rights when they passed the German border.

In this way the Holocaust was carried out in a formally and constitutionally lawful way. Those who were murdered had been stripped of their citizenship and any rights associated with it. It was not the hatred that the Nazis felt for the Jews that made the Holocaust possible. Such emotions were held in check through a bureaucratic control that insisted on rationale and objectivity. It was by defining Jews and other groups as inferior beings that the laws could be passed and the Holocaust carried out. The ‘rational’ basis of the regime was evidenced in a ‘factual” jargon, where terms such as ‘administration’ and ‘economy’ were used to describe the operation of the death camps.

When the Third Reich fell, Europe rid itself of one of the most barbaric regimes in history. There are, however, certain attitudes that characterised this system that persist in countries that use capital punishment. Ever since Europe witnessed the Holocaust and organized killing perpetuated by the Third Reich, there has been a rising awareness that the state should not be in a position to dispose of human life. This is one important reason why Western European countries have abolished capital punishment. The United States does not share this experience of having organized violence within its national borders. The country played the role of Europe’s saviour during the Second World War. Events during the twentieth century show beyond all doubt that the state should not have the power to deprive individuals of their lives. The state is an imperfect creation that mainly strives to ensure its own survival. It is not an appropriate judge over matters of life and death.

7.3.3 The Death Penalty is Undemocratic

The danger that the death penalty can be misused for political ends has prompted many countries to abolish capital punishment for politically motivated crimes, but many other states still retain it. The death penalty, by its very nature, is incompatible with democratic values, which is why it can only live on in countries that are more or less undemocratic. The account in this book of the worldwide use of the death penalty shows that it is mainly imposed in totalitarian states or in cultures that lack a democratic tradition. The picture is somewhat complicated by the fact that some countries perceived of as democratic still use the death penalty. **The U**nited **S**tates **poses the biggest problem in this respect**.

Nevertheless, more and more countries are becoming abolitionist and that is a step in a democratic direction. There is an inherent inertia in all political systems, which is why some newly democratic countries have not yet abolished the death penalty. This inertia is consolidated when important segments of the general public still favour capital punishment.

The former Soviet republics are illustrative of how the process of abolition evolves where there is a long tradition of using it regularly. A country’s political culture is decisive for its view of the death penalty. The Baltic States, for instance, are located close to Sweden, but are still haunted by the legacy of the old Soviet system when it comes to fighting crime and capital punishment. For that reason it is important that countries like Sweden facilitate the Baltic countries’ progress towards increased democracy and a more humane correctional system. For Sweden, however, it would be unthinkable to reinstate the death penalty, much less to imagine Swedish judges imposing, from a Swedish legal tradition, this utterly obsolete form of punishment.

To illustrate how people’s attitudes toward the death penalty have changed it can be helpful to think about how methods of execution have evolved. Up until the 1800s, executions in the western world were spectacular events performed in public places. During the nineteenth century, executions started to be carried out inside the prison walls, with just a few witnesses present. In the twentieth century, they moved into the innermost regions of the prisons, surrounded by as much secrecy as possible. This change was partly due to an increasing lack of faith in the deterrent effect, but it is mainly indicative of the shamefaced realization that the deliberate taking of human life is basically uncivilized.

Death penalty opponents in the United States have been demanding lately that executions be broadcast on television. This may be an effective way of alerting the public and convincing people of how barbaric it is to execute a human being in cold blood. There is, however, a clear risk that public executions will further brutalize the atmosphere. When the state extinguishes a human life it sets an extremely bad example, to put it mildly.

Capital punishment is basically incompatible with the most important tenet of democracy: the respect for the individual person. By executing a human being, the state undermines the public’s respect for the value of human life. The undemocratic nature of the death penalty is also evidenced by the fact that minorities and vulnerable groups are affected to a disproportionately high degree. **In a democracy, political power is in the collective hands of individual citizens. In earlier epochs, citizens were subjects without any rights**. In feudal times and under the divine monarchies, the king was sovereign and the prince owned the lives of individual persons. With the advent of political democracy, all human beings have equal worth and no one has the right to deprive anyone else of their life. It is absurd that the majority should be able to assume this right via the government institutions.

Apart from deterrence, death penalty advocates are still mostly interested in pure retribution. Thus capital punishment is converted into a societal purging ritual, where the criminal has forfeited his right to life. In committing a crime that has excluded him or her from the human community, the criminal can no longer claim the protection of any human rights. But such a view can never be defended. The struggle for global abolition of the death penalty is therefore closely linked to the struggle for human rights and democracy in the world.

### AT: Global Death Penalty Declining

#### Declining use doesn’t signal inevitable abolition – it could remain on the books

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, JMP)

Even some of the most frequently noted and most agreed-upon landmarks on the road to abolition may be less clear than they initially appear. The tremendous decline in the footprint of the global death penalty—whether one counts by countries, death-eligible crimes, death sentences or executions—is a consistent theme of those most optimistic about the prospects for worldwide abolition.118 But the stunning withering of the death penalty around the world in recent decades may not be an inevitable harbinger of total abolition. Withering may simply lead to a smaller footprint (for now). Moreover, a less vigorous use of the death penalty may be a more stable one; capital punishment that remains on the books but is rarely enforced may prove to be an attractive and therefore enduring compromise, especially in countries that continue to be plagued by instability and high crime rates. In the Caribbean, for example, where levels of violent crime remain very high, governments ‘are content to pander to the electorates’ albeit reasonable fear of crime and social disintegration by retaining the death penalty, even if only as a symbolic scarecrow.’119

#### Thousands of people are awaiting execution – inaccurate data confounds the ability to assess the number of people on death row

DPIC, 20 (4-22-2020, "Amnesty International Report: Confirmed Executions and Death Sentences Continue Global Decline, But Secrecy Hinders Accurate Assessment of Trends", Death Penalty Information Center, <https://deathpenaltyinfo.org/news/amnesty-international-report-confirmed-executions-and-death-sentences-continue-global-decline-but-secrecy-hinders-accurate-assessment-of-trends>)//MP

Executions across the globe fell 5% worldwide in 2019 to the fewest in more than a decade, despite a record number of executions in Saudi Arabia, Amnesty International reported in the human rights organization’s [Global Report: Death Sentences and Executions in 2019](https://www.amnestyusa.org/wp-content/uploads/2020/03/Amnesty-Death-Sentences-and-Executions-2019.pdf).

The Amnesty report, released April 21, 2020, detailed rising political abuse of the death penalty in the Middle East, but said the region’s increased executions were offset by declines in executions in the Asia-Pacific region and elsewhere in the world. Amnesty said that in the countries for which it was able to obtain reliable data, nations carried out at least 657 executions in 2019, down from the already decade-low number of at least 690 recorded in 2018. The number of confirmed executions in 2019, the report said, was “one of the lowest figures that Amnesty International has recorded in any given year since it began its monitoring of the use of the death penalty in 1979.” However, the human rights organization said that efforts by countries to hide the extent of their death penalty usage confounded its ability to assess the significance of the decline.

As in previous years, the execution total does not include the estimated thousands of executions carried out in China, which treats data on the death penalty as a state secret. China is thought to have carried out more executions in 2019 than the rest of the world combined. Excluding China, 86% of all reported executions were concentrated in just four Middle Eastern countries — Iran (251+), Saudi Arabia (184), Iraq (100+), and Egypt (32+). The 22 executions in the U.S. were the sixth most of any nation, although Vietnam’s and North Korea’s execution totals are not known.

Amnesty recorded at least 2,307 death sentences in 56 countries in 2019, a 9% decline from the 2,531 reported in 2018. However, Amnesty believes that number is artificially low as a result of the unavailability of reliable information from Malaysia, Nigeria and Sri Lanka, three nations that had reported significant numbers of death sentences in previous years. Five countries are confirmed to have imposed more than 100 death sentences in 2019: Pakistan (632+), Egypt (435+), Bangladesh (220+), India (102), Zambia (101). The U.S. ranked 12th, with 35 new death sentences imposed. Because of state secrecy, Amnesty was also unable to obtain information on new death sentences imposed in China, Iran, North Korea, and Syria.

In a [web posting](https://www.amnestyusa.org/reports/death-penalty-2019/) accompanying the release of the report, Clare Algar, Amnesty International’s Senior Director for Research, Advocacy and Policy, credited the continuing worldwide decline in executions to the recognition by “[a] large majority of countries” that “[t]he death penalty is an abhorrent and inhuman punishment; and there is no credible evidence that it deters crime more than prisons terms.” Against this trend, Algar said, “a small number of countries … increasingly resort[ed] to executions.”

Saudi Arabia beheaded 184 people in 2019, up from 149 in 2018 and the most since Amnesty began tracking executions in the country. Executions in Iraq increased from at least 52 in 2018 to at least 100 in 2019.

Algar characterized Saudi Arabia’s “growing use of the death penalty, including as a weapon against political dissidents,” as “an alarming development.” The report noted that more than half of those executed were foreign nationals. Amnesty documented numerous human rights abuses in Saudi Arabia’s use of the death penalty, including its use to punish non-violent drug offenses, its increased use as a political weapon against Shi’a Muslim dissidents, the use of confessions obtained through torture, and the execution of prisoners for alleged offenses when they were juveniles.

Algar described “the massive jump in executions in Iraq” as “shocking.”

By comparison, the report said executions in Iran “remained at an historical low” as a result of amendments in 2017 that reduced the number of drug-related offenses to which the death penalty applied. Amnesty reported that Iran had at least 251 executions in 2019, roughly on par with the at least 253 carried out in 2018, but less than half the number recorded in 2017.

Amnesty also assailed the lack of transparency in many nations’ execution practices. “Even countries that are the strongest proponents of the death penalty struggle to justify its use, and opt for secrecy,” Algar said. “Many of them take pains to hide how they use the death penalty, knowing it will not stand up to international scrutiny.”

The report said state secrecy “hindered Amnesty International’s full assessment of the global use of the death penalty. Major executing countries … continued to hide the full extent of their use of the death penalty by restricting access to death penalty-related information.” Some countries, including Belarus, Botswana, Iran, and Japan, “carried out executions without announcing them in advance or giving advance notices to families or legal representatives of people executed,” Amnesty reported, and sometimes provided no advance notice to the prisoners themselves.

Amnesty reported that at least 26,604 people were known to be on death rows around the world at the end of 2019, 38% more than the 19,336 people known to have been on global death rows at the end of 2018. With known death sentences down, the increase more likely reflects better information gathering, rather than a surge in the death-row population.

#### 20,000 people around the world are currently sentenced to death – around 1000 died by execution in 2017

Webb, Christodoulou, and Rogers 19 --- the first two are correspondents for the sun and the latter has been a journalist for more than 20 years, having written for a number of national newspapers including the Daily Express (January 2019, Sam, Holly, and John "Here are the countries that still have the death penalty today", Sun, https://www.thesun.co.uk/news/2525739/countries-death-penalty-how-many-people-executed-world/ )//MP

Which countries have the death sentence?

As of late 2018, a total of 52 countries still have the death sentence, employing a variety of methods including hanging, shooting, lethal injection, electrocution and beheading.

Because of the ongoing conflicts, Amnesty was unable to confirm whether executions were carried out in [Syria](https://www.thesun.co.uk/news/6181726/isis-syrian-soldier-human-missile/), Libya and Yemen.

The Middle East and North Africa region accounted for the vast majority of all recorded executions, thanks largely to Iran and Saudi Arabia.

Capital punishment is a legal penalty in Pakistan and, as an Islamic state, it must follow Islamic laws.

The Pakistan Penal code lists 27 different offences punishable by death.

There include blasphemy, rape, sexual intercourse outside of marriage, assault on the modesty of women and drug-smuggling.

After several amendments from different governments in Pakistan, the Code is now a mixture of Islamic and English law.

Hanging is the only legal method of execution.

In 2018 the United States executed 25 people across eight states.

The method was mainly lethal injection with two by electrocution.

In October 2018, Malaysia announced it was scrapping the death penalty, meaning that more than 1,200 people currently on death row could be saved.

Belarus is the only European country not to have abolished it, executing two people in 2017 and more than 200 since 1990.

How many people were executed?

Amnesty International found that at least 993 executions in 23 countries were carried out in 2017, a drop of 4 per cent from 2016, when [1,032 executions were carried out](https://www.thesun.co.uk/news/2392155/syrian-troops-carry-out-on-the-spot-executions-of-civilians-including-women-and-children-according-to-human-rights-officials/) and a decline of 39 percent from 2015 when there were 1,634 executions.

At least 2,591 death sentences in 53 countries were recorded in 2017, a significant decrease from the record-high of 3,117 recorded in 2016.

There are at least 21,919 people known to be currently under sentence of death around the world.

Nearly 90 per cent of these happened in just four countries: Iran, Iraq, Pakistan and Saudi Arabia - but these figures exclude China and North Korea, where numbers remain a state secret.

Amnesty names China as the world’s top executioner but the true extent of the use of the death penalty there is unknown.

Iraq more than [tripled its executions](https://www.thesun.co.uk/news/1414818/isis-thugs-execute-four-men-in-front-of-children-after-accusing-them-of-spying/) as it continued to battle Isis, while Egypt and Bangladesh more than doubled the numbers of people they killed.

## Disad Answers

### AT: DA Japan – No LDP Collapse

#### LDP stays in power – Japanese citizens care less about politics and more about stability

Steger 17. Isabella is an editor and reporter based in Quartz's Hong Kong bureau, where she covers the Asia region with a focus on Hong Kong, China, Taiwan, Japan, and Korea. She focuses on geopolitics, gender issues, demographics, and the future of work, [“With other democracies in flames, Japan is saying “no thanks” to change”, 4-23-17, Quartz, URL: <https://qz.com/965303/with-other-democracies-in-flames-the-japan-of-shinzo-abe-is-saying-no-thanks-to-change/>] RN

Japanese prime minister Shinzo Abe made an appearance at last year’s Rio Olympics dressed up as Super Mario climbing out of a pipe. He is rarely that delightful or exciting.

What he’s appreciated for in Japan is his steadiness, which is why his government consistently gets approval ratings of above 50%, a dream for any elected leader of a major world democracy.

No, his ambitious plan to reboot the Japanese economy, Abenomics, hasn’t yielded spectacular results. Yes, many are concerned with creeping nationalism and authoritarianism in his government policies. And indeed, Abe’s wife and his defense minister both are embroiled in a big scandal involving a far-right school operator, Moritomo Gakuen (paywall), that has taught children to be racist against Koreans and Chinese.

Still, Japanese people know that things could be a lot worse.

“His government has been so stable and pretty much every other advanced democracy looks so unstable… Voters aren’t even looking for him to shake things up,” said Tobias Harris, a fellow at the Sasakawa Peace Foundation in Washington DC. “After years of a revolving-door premiership, people are just happy there’s a stable pair of hands.”

Steady does it

Abe is now in his third term as prime minister of Japan. His first term lasted from 2006 to 2007 and his second from 2012 to 2014. Between the first and second, Japan cycled through five different prime ministers. The last leader in recent memory with such a lengthy tenure and high levels of support—and genuine popularity—was Junichiro Koizumi, the hirsute maverick who for a while seemed to be able to shake things up in Japan during his prime ministership from 2001 to 2006.

Abe is no populist, and he certainly lacks Koizumi’s dramatic flair. But he may be just what Japan needs at the moment. Across the sea, South Korea recently ousted its president and is without real leadership at a time when tensions are running high on the Korean peninsula. Nobody really knows what US president Donald Trump’s Asia strategy is, and so far Washington’s actions haven’t exactly inspired confidence (paywall) among its Asian allies. And in Europe, Japanese people see a continent that is racked by problems like terrorism, migration (of which Japan has little), and Brexit.

But polling shows that Japanese people are dissatisfied with the prime minister on a whole range of domestic issues. They are deeply unhappy with the way the government has explained the Moritomo Gakuen scandal, for example. The school operator was able to purchase public land in Osaka prefecture at a large discount to build a future school of which the first lady, Akie Abe, was supposed to be honorary principal. According to a poll (link in Japanese) conducted by the Yomiuri newspaper released on April 17, 82% of people did not find the government’s explanation of the land deal in the scandal convincing—the corruption allegations in question have gone far beyond the traditional type of structural cronyism that has been so prevalent in Japanese politics.

People also continue to feel pessimistic about the economy, despite attempts by the government to push through reforms relating to labor practices and women in the workplace. Other policies, such as restarting Japan’s nuclear reactors and Abe’s long-held dream to revise the pacifist clause in the constitution that restricts the military activities of the Self-Defense Forces, are also not popular.

Slim pickings

But there is simply no one else that voters can turn to. The ruling Liberal Democratic Party (LDP) has dominated Japanese politics almost continuously since it was formed in 1955, with opposition parties making only brief dents into the LDP’s monopoly on power. The Democratic Party of Japan’s (DPJ) last tenure in power from 2009 to 2012 was seen as a failure, and it is not something that many Japanese voters want to revisit.

“I would hesitate to call [support for Abe] ‘popularity’ because it’s too strong a term. Opinion polls indicate invariably that people support his cabinet because there’s no alternative,” said Koichi Nakano, a professor of politics at Sophia University in Tokyo. “That’s the number one reason.”

Many liberals are concerned about how powerful Abe has become. The media has been effectively muzzled from being critical (paywall) of his government. In a recent column, the Financial Times (paywall) argued that the Moritomo Gakuen scandal was the result of the practice of sontaku—a Japanese term referring to people who perform pre-emptive acts to ingratiate themselves to their superiors—which is the “a direct consequence of the way in which (Abe) has successfully consolidated huge individual power.”

Within the LDP, which functions as a collection of factions, there are whispers of a possible challenge from foreign minister Fumio Kishida at some point down the line, but Abe’s grip on power means that “he has no rivals in the political system,” said Nakano. Tokyo’s female mayor, Yuriko Koike, is immensely popular—not least because she has staked her career on standing up against the conservative cabal of men in Japanese politics—but it would be difficult for her to translate her local political power to a national level.

Better the devil you know

Meanwhile, the recent geopolitical chaos on the Korean peninsula has given Abe a further leg up.

“This plays right into Abe’s wheelhouse. Over 90% of Japanese feel threatened [by North Korea] to one extent or another. Abe made his name as a North Korea hawk,” said Harris. “If there’s one thing that he’s going to be good on, it’s standing firm against North Korea.”

Abe has made the resolution of North Korea’s abduction of Japanese citizens in the 1970s and 1980s a priority for his administration. Earlier this month Japan extended sanctions against North Korea that have been in place since 2006.

The LDP recently revised its rules for term limits on party leaders, such that Abe could in theory run for another term and remain in power until 2021—meaning he could become the longest-serving prime minister in Japanese history. Some analysts cast doubt on whether even Abe could last that much longer in power, but at least in the near future, Abe is the devil that Japan knows.

“Japanese people do look at places like South Korea and Europe and shake their heads and say, ‘Compared to that we’re in pretty good shape,’” said Michael Cucek, an adjunct professor at Tokyo’s Waseda University. “‘We may not like individual programs that have been proposed, we may even think that Abe and his cronies do some self-dealing… But still, is it worth throwing everything off the side of the boat for trying out somebody new?’”

#### LDP stays in power – structural factors

Norris 10. Michael J. Norris graduated in 2014 with a Bachelors degree in Asian Studies from The University of Adelaide in Adelaide, Australia, [“The Liberal Democratic Party in Japan: Explaining the Party's Ability to Dominate Japanese Politics”, 2010, Inquiries Journal, Vol. 2 No. 10, URL: <http://www.inquiriesjournal.com/articles/296/the-liberal-democratic-party-in-japan-explaining-the-partys-ability-to-dominate-japanese-politics>] RN

The Liberal Democratic Party’s largely uninterrupted dominance of Japanese politics must be ascribed to processes which transverse electoral systems and periods of economic vigour. This essay proposes that clientelistic behaviour within the Japanese political system best explains the LDP’s dominance of Japanese politics. Clientelism, an exchange of benefit for voter support (Scheiner 2006: 64) evolved from structural factors in the Japanese political system and was harnessed by the LDP to maximise its tenure.

Structural factors conducive to clientelism included fiscal centralisation, the pre-1994 electoral system and electoral malapportionment. Fiscal centralisation provided a context for the commoditisation of votes for material gains. The pre-1994 electoral system, Single Non-Transferable Vote in Multimember Districts (SNTV/MMD), encouraged the proliferation of koenkai networks and money politics, entrenching clientelistic behaviours in elections. Electoral malapportionment was a result of the pre-1994 electoral system and encouraged politicians to appeal to segments of the population through pork-barrel politics and protectionist policies. This structural defect also allowed the LDP to garner a majority of seats, without a majority of votes.

Whilst clientelism evolved from structural factors, its continuing presence in the post-1994 electoral system can be ascribed to the creation of a clientelistic ‘norm’, whereby the Japanese citizenry expect to receive dividends from their votes and candidates’ continue to see clientelism as tantamount to electoral success. Clientelism, therefore, has permeated the fabric of Japanese politics, especially in rural areas. Its presence has conditioned the electorate to prolong the LDP’s tenure in return for material benefit; allowing the LDP to retain power long after it failed to gain a majority of the popular vote.

### --- 1ar No LDP Collapse

#### A. Fiscal Centralization

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The presence of clientelistic behaviours in Japanese politics originated from structural factors in the political system. The primary cause for the emergence of clientelistic behaviour was tight fiscal centralisation in Japan. It is rare for Japanese rural prefectures to have access to substantial fiscal resources, instead relying upon the national government (Fukui & Fukai 1996: 272; Scheiner 2006: 61). Indeed, Ethan Scheiner estimates that local prefectures source 70 per cent of their revenue from the national government (Scheiner 2005: 805). As such, the 47 prefectural governments are engaged in a constant struggle to obtain funds from national coffers. Hence, Diet members are not simply representatives of their constituents; they act as conduits, or “pipelines” between the national treasury and their respective prefectures (Hirano 2006: 57).

The LDP has capitalised significantly on fiscal centralisation. Electoral candidates are not judged qualitatively on policy considerations, rather, judgement is based on quantitative grounds; the ability to facilitate the transfer of financial benefit to constituents. J.A.A. Stockwin describes the perception of politicians as ‘monetary or material distributionists’ (Stockwin 2008: 178). Nowhere is this more salient than the case of Tanaka Etsuzankai, who provided significant (and infamous) public works services to his electorate, including high speed train lines and expressways. Bradley Richardson observes that the prolific talent Tanaka had in securing pork led to his repeated electoral success (Richardson 1997: 29). The reduction in qualitative differentiation of candidates was favourable to the LDP: it led to an erosion of serious political debate as it denies the opportunity for opposition to scrutinize the ruling party and distinguish themselves from the incumbents. In fact, clientelism can account, to a moderate degree, of the inability of the opposition in Japan to usurp the LDP. Although there were key structural deficiencies in the composition of Japanese oppositions, such as their fragmentation (Cox & Niou 1994: 230; Kohno 1997: 120), the opposition had ample opportunity to unseat the LDP. For instance, major corruption scandals affected the elections of 1967, 1983, 1990 and 1993 (Nyblade & Reed 2008: 930) and policy failures following the stagnation of the economy should have seen the removal of the LDP from power longer than a brief 10 months in 1993-94. However, the opposition was disadvantaged because large blocs of votes had been secured on the basis of clientelist appeals (Scheiner 2006: 4). The LDP, therefore, achieved electoral security through clientelism even in the wake of political failures. As the essay describes later, this electoral security was also guaranteed by the opposition’s failure to gain seats in rural prefectures, which were key to forming a national government. Nevertheless, the LDP’s ability to remain in government more than a decade after the Japanese economy began to stagnate is illustrative of the extent to which qualitative differentiation has declined in Japanese politics (McElwain 2008: 39).

Moreover, fiscal centralisation bequeathed further electoral benefits to the LDP’s national governments: constituents had incentives to elect and re-elect those candidates who were influential in the national government to secure resources for their prefecture (Scheiner 2005: 809). The mantle of influence largely fell upon LDP candidates, who generally boasted governmental experience. In fact, a quarter of all new LDP candidates had been a mayor or prefectural assembly member (Scheiner 2006: 137). The structural incentives to vote for an LDP candidate are augmented if the LDP-led national government exhibited clientelistic behaviour. The distinction between pork-barrel politics and clientelistic behaviour is that the latter features the elements of punishment and reward. Under a truly clientelist system, non-LDP prefectures should receive less government funding. Threats to cuts funding for projects in non-LDP prefectures were commonplace (Asashi Shinbun 19 October 1999; Asashi Shinbun [Online] 6 March 2002), however, statistical evidence on the LDP’s “carrot and stick” allocation of fiscal resources is inconclusive (Reed 2001). Nonetheless, there is an academic consensus that regions which were better connected to the LDP receive a greater distribution of resources (Fukui & Fukai 1996: 285; Scheiner 2005: 808). It is arguable that this was also a popular preconception among the electorate. Hence, clientelistic behaviour, (or the threat of) coordinated votes irrespective of voter-party ties in favour of the LDP (Cox & Thies 2000: 39). Prolonged LDP success, therefore, was underpinned by Japan’s fiscal centralisation, which conferred advantages to those politicians who could bring resources to their constituents. These politicians largely hailed from the LDP, generating impetus for their consistent re-election.

#### B. Money-power politics

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Where fiscal centralisation acted as the genesis of vote commoditisation, the SNTV/MMD system’s emphasis on the personal vote and the cultivation of support networks (koenkai) entrenched the process into electoral behaviour. The LDP thrived in the consequent environment of kinken-seiji (money-power politics). The SNTV/MMD system pitted intraparty and interparty candidates against one another. Thus, candidates were invariably pressed to pursue a personal campaign strategy, in order to differentiate themselves from their competition (Reed 1994: 22). Candidates were the cornerstone of Japanese voting behaviour, rather than party-ties or issue-based concerns (Hrebenar 1986: 21). Elections were typified by the ability to attract votes, rather than substantial policy matters (Carlson 2006: 234; Reed 1994: 22; Swindle 2002: 286). This reinforced the decline in qualitative differentiation described earlier. Additionally, the focus on candidates and vote-attraction manifested itself through the creation of personal support networks, called koenkai. Essentially, koenkai are platforms of support manifested in exchange for monetary or lobbying favours (Scheiner 2006: 71). Koenkai were of great use to political candidates because they were more personalised than a party branch, and could focus on the provision of specific goods and services for direct candidate support (Stockwin 2008: 140; Swindle 2002: 282). Particularly startling is the pervasiveness of these networks: in 1989, a national newspaper reported that over half the electorate, around 40 million eligible voters, were involved in koenkai (Richardson 1997: 27). Due to their widespread utilisation, koenkai broadcasted that the exchange of gifts for personal electoral support was acceptable electoral practice and this created a precedent for large-scale clientelism (Cox & Thies 2000: 40).

The chief precedent created by koenkai was the LDP’s recognition that money, or the promise of a similar material benefit, was tantamount to electoral success. By courting constituents with larger material benefits than their interparty or intraparty opponents, LDP candidates’ election or re-election opportunities were buffeted (Carlson 2006: 241). The use of money to coordinate votes is acutely felt amongst Japanese constituents; where party affiliations are seldom strong (Richardson 1997: 23) and roughly half the electorate is undecided (Scheiner 2006: 68). The LDP candidates’ extensive contacts with Japanese business facilitated their ability to provide larger material benefits. Millions of yen donated by business groups in support for LDP candidates are commonly reported (Nadell 1990: 40; Richarson 1997: 180). This provided the LDP with a tremendous advantage, but also increased the temptation for corruption (Stockwin 2008: 176). Matthew Carlson’s analysis of personal support in Japan found that, for the 1966, 1990 and 1993 elections, LDP lower house candidates reported a yearly income of ¥209.4 million (Carlson 2006: 245). Mustering this amount of monetary support was clearly beyond the means of most opposition parties, who were without the extensive business contacts of the LDP. However, recent political parties, such as the Democratic Party of Japan (DPJ) have been established by former LDP politicians. The increased presence former LDP members have in opposition could see opposition parties boasting greater business contacts, and improved fiscal competitiveness with the LDP. Nevertheless, the excessive cost of maintaining koenkai networks and challenging LDP incumbents had a prohibitive effect on most opposition parties; many could not afford to run candidates in all districts, thereby sacrificing Diet seats for financial austerity. Particularly under a SNTV/MMD system, where one electoral district can translate into the acquisition of multiple lower house seats, the opposition’s inability to run some candidates only increased obstacles to attaining national government. The SNTV/MMD system and its resultant emphasis on personalised voting cemented the normality of clientelistic appeals into the consciousness of politicians and constituents alike. The LDP capitalised on this context; the SNTV/MMD system was suited to the LDP’s tactics, and as a result, was far more successful in attracting personal votes than other parties.

#### C. Electoral malapportionment

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In addition to fiscal centralisation and the SNTV/MMD system, disproportionate allocation of seats under the SNTV/MMD system was directly exploited by the LDP’s clientelistic behaviour to gain electoral advantage. By specifically targeting electorally powerful sub-constituencies with clientelistic appeals, the LDP retained power long after it failed to gain the majority vote in 1963. Urbanisation in Japan led to accompanying population shifts from rural to urban areas; around 10 per cent of the Japanese population live on farms (Richardson 1997: 155). The 1947 Electoral Law did not provide for an independent body to review electoral boundaries and reallocate seats (Kishimoto 1988: 16; Stockwin 2008: 177). Instead, electoral districts largely remained unmolested by review and, consequently, rural prefectures contained more Diet seats per capita than urban districts (Scheiner 2006: 57). This increased the value of rural votes to almost three times that of an urban vote (Mulgan 1997: 882).

The LDP realised that this malapportionment could be used to effect a situation where it obtains more seats than votes (Cox & Niou 1994: 221). There was thus little incentive for the LDP to correct the discrepancy. This was, according to J.A.A. Stockwin, a ‘negative gerrymander’ (Stockwin 2008: 177). While some commentators feel that the failure to redraw electoral boundaries was malign (Mulgan 1997; Pempel 1992), Steven Reed advances that the appeal to powerful sub-constituencies within malapportioned constituencies had some legitimacy: ‘[e]lectoral systems structure political competition […] Politicians learn which strategies work best under their electoral system and politicians who use more effective strategies will tend to dominate the politics of the country’ (Reed 1994: 21). With the votes of rural areas overrepresented, the LDP forged a particularly clientelistic relationship with these sectors. The LDP-led national government used restrictions on agricultural imports to shelter farmers from foreign competition in conjunction with direct subsidies to shore up rural support (Gordon 1990: 946). Economic protectionism of rural constituents was blatant: restrictions on agricultural goods, in a time of increased economic and trade liberalisation, were in place far longer than those on industrial goods (Richardson 1997: 157). This created significant incentive for rural constituents to vote for LDP candidates to ensure the retention of the LDP national government (Inoguchi 2005: 103). Thus, the LDP’s fervent clientelistic appeal to the rural prefectures frequently defied economic sense (Richardson 1997: 233) but ensured the continued support of the intended audience.

The LDP was very successful in pursuing this strategy. Indeed, the number of rural seats held by non-LDP parties remained consistently low (Scheiner 2005: 803), the stable support resting on the clientelistic relationship between patron (the LDP-led national government) and client (the rural constituents). This explains the weakness of opposition parties in rural areas. The sustained failure of opposition parties to challenge LDP incumbents has also been ascribed to the LDP’s changes to campaign periods. By reducing the length of the official campaign period from 20 days in 1958 to 12 days in 1994, Kenneth McElwain posits that the LDP reduced the ability of opposition parties to challenge incumbents (McElwain 2008: 33, 41). While McElwain advances a well-contended point, it is imperative to stress that by virtue of koenkai-created networks of personal support, campaigning in Japan is a year-round process (Pempel 1992: 16). As such, the ability for nonincumbents to vie for election in their constituency is not restricted to the official number of days. McElwain’s argument aside, election to rural prefectures, due to their low seat-vote threshold, was central to forming a national government. Moreover, without success in rural elections, opposition parties had little governmental credibility (Scheiner 2005: 803). With consistent support in rural areas, based on clientelist networks, the LDP consistently achieved parliamentary majorities without accruing a majority of the popular vote.

### AT: DA Japan – Abe Facing Crisis Now

#### Abe is already getting crushed politically now --- eroding public confidence, corona virus, policy flip flops

Suzuki 20. Noriyuki Suzuki is a writer for Kyodo News, [“FOCUS: Japan PM Abe faces turning point amid COVID-19, scandals”, 5-19-20, Kyodo News, URL: <https://english.kyodonews.net/news/2020/06/901ff7deaa24-focus-japan-pm-abe-faces-turning-point-amid-covid-19-scandals.html>] RN

As Prime Minister Shinzo Abe finds himself bogged down in another political scandal, some observers believe it could prove to be a decisive turning point in his premiership.

Japan's longest-serving leader has been powerless to prevent a chain of events, including the coronavirus crisis, from eroding public confidence in his leadership and administration.

Now Thursday's arrests of his close aide and former justice minister Katsuyuki Kawai and his wife Anri on suspicion of vote buying in the 2019 upper house election come as another blow to Abe as prime minister and head of the Liberal Democratic Party to which the couple had belonged.

As Abe has faltered, his longtime rival Shigeru Ishiba has emerged in recent media polls as the most likely party figure to succeed him. The former defense minister is apparently seeking to cozy up to LDP heavyweights who are close aides to the prime minister.

With more than a year left in his current term as LDP head and thus prime minister, Abe will be hoping to put the bad times behind him while parliament is in recess, but political analysts say regaining public trust may be harder than before.

"There are emerging signs of an administration entering its final stage," said Tomoaki Iwai, a political science professor at Nihon University.

The risk of losing his grip on power and the LDP will increase if public support remains low, leaving him with no choice but to focus on maintaining the status quo, according to Iwai.

"The coronavirus outbreak obviously pulled the trigger. He can neither quit nor call an election while support ratings are low. Foreign diplomacy is not an option due to the virus. So he cannot do anything unless the pandemic ends," Iwai said.

Since returning to power in 2012, Abe has enjoyed relatively strong public support, fending off a fractured opposition bloc.

Abe has ridden out scandals involving his Cabinet ministers and himself, including a state-funded cherry blossom viewing party that he was alleged by opposition lawmakers to have used to entertain supporters.

But the coronavirus outbreak changed the landscape as voters became more interested in what the administration was doing to protect their livelihoods and lives.

"People who were asked to stay at home and work remotely due to the coronavirus had more time than usual to follow the news. That changed their evaluations of the Abe administration too," said Hiroshi Hirano, a political psychology professor at Gakushuin University.

It was only recently that the distribution of reusable cloth face masks to all households was almost completed after criticism about their quality and slow delivery.

Abe's posting online of a video clip showing him relaxing with a dog also rubbed some people up the wrong way despite its intended message that staying at home is important.

Abe's policy flip-flops in recent months have also not helped his image and have angered some LDP lawmakers.

#### Abe’s is being criticized domestically and internationally for his poor handling of COVID

Japan Times, 20 (The Japan Times, "Abe administration bombs in global survey on coronavirus response", Japan Times, https://www.japantimes.co.jp/news/2020/05/09/national/abe-coronavirus-survey/#.Xr4C40QzaM8, 5-9-2020, Accessed 7-7-2020) //ILake-JQ

LONDON – Japan’s leaders have received the worst public rating for their response to the coronavirus pandemic, according to a survey of 23 nations and regions.

Japan’s official infection rate and death toll aren’t necessarily high in global terms. But the way its leaders dealt with the crisis were rated poorest by citizens in all four fields — politics, business, community and media. The overall score, 16, was worst as well.

The online survey, the results of which were released Wednesday, was jointly conducted by Singapore’s Blackbox Research and France’s Toluna between April 3 and 19 on 12,592 people between the ages of 18 and 80. The margin of error was listed as 3 to 6 percent.

The findings included an extremely low support rating of 5 percent for Japan’s political leaders versus 86 percent for China, where the pandemic started, and 32 percent for the United States, now the hardest-hit region in the world. Even Hong Kong, which has the second-worst, received a support rating of 11 percent. The average for all 23 areas was 40 percent.

Japan’s low ratings are “in line with ongoing criticism” of the Abe government’s handling of the pandemic, “such as a perceived delay in declaring a state of emergency,” Blackbox Research CEO David Black said, adding that Prime Minister Shinzo Abe arguably failed to pass “the COVID-19 leadership stress test.”

The survey also found that China enjoyed the highest overall leadership score, at 85, while advanced countries other than New Zealand fared poorly overall, with France ranking second to last at 26.

Abe and his team are also under criticism domestically, with many in the public showing discontent with the government’s virus measures in another poll released last month.

The poll by the Gallup International Association said more than 60 percent of people surveyed in Japan last month said the government was not handling the coronavirus outbreak well.

### AT: DA Japan – Link Turn

#### Abolition spills over to Japan – decline of crime ensures conservative elites follow America’s lead and embrace human rights

Johnson, 19 --- Professor of Sociology at the University of Hawaii (November 2019, David T., “Why Does Japan Retain Capital Punishment?”,” Palgrave Advances in Criminology and Criminal Justice in Asia, pp. 115-116)//MP

A second scenario is that abolition in the United States could stimulate abolition in Japan. The retention of capital punishment in the world’s most infuential democracy has long helped to legitimate capital punishment in democracies such as Japan, Taiwan, and India. And some analysts believe a nation-wide American abolition could occur in the near future. Professors Carol and Jordan Steiker suggest that “the death penalty will not last much longer in the United States,” mainly because many Justices on the U.S. Supreme Court have renounced capital punishment after repeatedly seeing their efforts fail to regulate it in a manner that is consistent with the principles and promises of the U.S. Constitution.34 Similarly, Professor Brandon Garrett has concluded that American capital punishment “is at the end of its rope.” He believes it could be abolished “not in a matter of generations, but in a matter of years.”35 And in the U.S. Supreme Court’s Glossip v. Gross decision (2015), Justice Stephen Breyer (joined by Justice Ruth Bader Ginsburg) stated that he believes it is “highly likely that the death penalty violates the Eighth Amendment” of the U.S. Constitution (prohibiting “cruel and unusual punishment”), because of three constitutional defects in its administration: unreliability in fact-fnding, arbitrariness in application, and long delays between death sentences and executions that undermine the death penalty’s main penological purposes (deterrence and retribution). Because of these chronic problems, Breyer called for a full briefng before the U.S. Supreme Court on the question of whether American capital punishment violates the Constitution. If such a briefng occurs before a Court with one more member who has serious concerns about the constitutionality of capital punishment than is the case at the time of this writing (July 2019), then American capital punishment could be abolished judicially, with repercussions for Japan and other retentionist nations who will have lost their American cover for a practice that has become increasingly diffcult to defend in an era of human rights.

Regardless of the precipitating circumstance, abolition in Japan will occur only if elites push for it. Since conservatives have ruled the country for all but 3 of the last 64 years, we may wonder whether it is realistic to expect a conversion of this kind. Why would conservative policymakers embrace facts (about deterrence and wrongful convictions) they once shunned and adopt a position (abolition) they once abhorred, especially when changing minds on this subject is so diffcult? Yet evidence from the United States, where many conservative leaders have turned against mass incarceration and capital punishment, suggests that the right circumstances could produce real reform in Japan too.36 One key to the conservative turn in America has been a major decline in crime over the past quarter-century, which made it easier for politicians to support “right on crime” policies instead of posturing as “tough on crime.” In Japan, crime has been declining for more than a decade, and a once troubling turn toward penal populism has decelerated as incarceration rates have fallen.37 Time will tell more, but the decline of crime in what is already one of the world’s safest societies could eventually prompt some of the country’s conservative leaders to embrace “human rights” as a better frame for thinking about capital punishment in the twenty-frst century than were the “crime control” and “atonement” frames that they routinely employed in previous decades.38

#### Public support for retention isn’t predictive – Japanese attitudes shift with top-down reform

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. 192-193), Springer VS, https://www.springer.com/gp/book/9783658006778, 2014, Accessed 7-5-2020 via Umich Libraries) //ILake-JQ

One way of striking a balance between acknowledging the nature of public opinion, while still being responsive enough to public demands to ensure legitimacy, is to focus on the extent to which the public is willing to tolerate abolition. The criterion in assessing this should be whether the death penalty is important in maintaining the legitimacy of the justice system. This approach to surveys provides state institutions with the room to exercise leadership, as well as to be responsive to public opinion. Of course, it is important for the Japanese government to disclose more information about the death penalty and promote debate. However, it is probably unrealistic to think that governments can do on a national scale what experiments have done on a small scale. The important thing is not for the government to wait until a change occurs in public opinion, or attempt to demonstrate a majority abolitionist nation through various forms of public education, but for it to push for increased humane treatment of offenders while remaining in tune with public limits of toleration.

It should be remembered that surveys carried out in abolitionist countries prior to removal of the death penalty have generally shown that this action did not command public support (Hood & Hoyle, 2008, pp. 361-366). However, those carried out after abolition have attracted less support for retention, with the death penalty “defined as a barbarity of the past” (Hood, 2009, p. 7). It could be argued, then, that despite strong support from surveys for the death penalty on the surface, the public may still consider abolition as bearable or acceptable. This further stresses the importance of how public opinion surveys are interpreted.

The way in which the Government Survey has been interpreted by the government, the courts, and politicians, considering only the proportion of support, is not a good way of using empirical evidence as social barometers. The Japanese government should open its mind to possibilities beyond the rhetoric of “majority support”; it should stop simply asking the public if it would like to retain the death penalty. Instead, it should start examining whether the public will tolerate abolition – and aim not to overstep the limits of public tolerance. Based on the findings from the studies, it has been argued that the Japanese public is likely to accept the abolition of the death penalty, and that, if this were done, it would continue to regard the Japanese criminal justice system, and other state institutions, as legitimate authorities.

### AT: DA Japan – No Internal Link

#### LDP stable enough to pass a controversial policy and get away with it

Nagai and Mizorogi 19. Oki Nagai and Takuya Mizorogi are staff writters for Nikkei Asian Review, [“Japan's ruling coalition outshines other developed democracies”, 10-6-19, Nikkei Asian Review, URL: <https://asia.nikkei.com/Politics/Japan-s-ruling-coalition-outshines-other-developed-democracies>] RN

So why is Japan so politically stable? Nikkei compared the percentage of Lower House seats the LDP and Komeito won in the seven general elections before and after 1999. The average since 2000 is 65%, 12 points higher than the 53% in the pre-coalition elections.

One reason is that the single-seat districts introduced in 1996 work in favor of well-organized parties. But it is also true that the combination of the LDP, whose main voters are conservative, and "centrist" Komeito has helped to expand the parties' mutual base.

Komeito supported 59% of the LDP candidates in single-seat districts in the 2000 general election. The ratio rose to 96% in the 2017 poll. Komeito's support organization is said to be able to secure around 20,000 votes in one district. The deeper the two parties' cooperation, the more seats the coalition wins and the more stable the government becomes.

Prime ministers stayed in office for an average of 660 days in the 20 years before the LDP-Komeito coalition. The average now sits at 792 days.

A stable government can implement policies that divide public opinion. The coalition dispatched Self-Defense Force units to Iraq -- a highly controversial move at the time. It has gradually advanced legislation allowing the Self-Defense Forces to take on more active roles, something the U.S. has been pushing Japan to do for decades.

And it has twice survived consumption tax hikes, previously a death knell for Japanese governments.

A strong government leads to a concentration of power in the prime minister. The LDP used to have active in-house policy debate among factions. Komeito, in the initial years of the coalition, claimed to be a kind of supervisor, but now there is little debate in the coalition.

As the opposition's presence in the Diet wanes and the likelihood of a handover of power narrows, public interest in Diet debate has evaporated.

"What would happen when serious discussions on amending the constitution arises?" former prime minister Kakuei Tanaka wondered more than 30 years ago. "I bet Komeito will team up with the LDP."

Amending Japan's pacifist constitution is Abe's passion project. Komeito remains cautious on this issue but never mentions the possibility of leaving the coalition. Stability and stagnation are the two sides of the coin. It remains to be seen whether the subject of amending the constitution spurs vigorous debate.

### AT: DA Japan – Relations Low

#### Relations low now – Chinese incursions on the Senkaku’s incited the LDP to cancel Xi’s planned visit

Hadano, 7-6-20 (Tsukasa Hadano, Hadano is a Nikkei staff writer. "China holds simultaneous drills in 3 Asia seas", Nikkei Asian Review, https://asia.nikkei.com/Politics/International-relations/South-China-Sea/China-holds-simultaneous-drills-in-3-Asia-seas, 7-6-2020, Accessed 7-6-2020) //ILake-JQ

BEIJING -- China conducted military exercises in the South and East China seas as well as in the Yellow Sea last week, flexing its muscles amid growing tensions with the U.S.

State-run media touted the unusual simultaneous exercises in what it called the "three major battle zones." Speculation suggests that the large-scale drills were intended not only to send a strong message to the outside world, but also to distract from concerns at home.

A missile destroyer and two helicopters practiced capturing unrecognized vessels in the East China Sea, state broadcaster China Central Television reported. The drill is thought to have been tailored for the waters near Taiwan and the Japan-administered Senkaku Islands, which China claims and calls the Diaoyu.

The People's Liberation Army also conducted live-fire exercises in the Yellow Sea and the South China Sea. Civilian ships were banned from sailing near the Paracel Islands in the latter waters from Wednesday to Sunday.

Meanwhile, the U.S. Navy is conducting large-scale exercises in the South China Sea involving the two aircraft carrier strike groups of the USS Nimitz and the USS Ronald Reagan. A B-52 bomber was sent from the American mainland to take part in the exercise as well. It is rare for both China and the U.S. to conduct military exercises in the same area, highlighting growing tensions in the waters.

"There is growing concern within China over heightened tensions with countries like the U.S. and India," a Chinese military source said.

Top Chinese diplomat Yang Jiechi visited an American military base in Hawaii last month to meet with U.S. Secretary of State Mike Pompeo. But the officials appeared to make little progress on improving bilateral relations.

Tensions have only grown since, with China enacting a controversial national security law covering Hong Kong. The U.S. Senate has unanimously passed a bill that would allow Washington to sanction Chinese Communist Party members and financial institutions that undermine Hong Kong's autonomy.

Japan's ruling Liberal Democratic Party also drafted a resolution on Friday asking Prime Minister Shinzo Abe's government to cancel a planned state visit by Chinese President Xi Jinping. The visit has been postponed due to the coronavirus.

Beijing has intensified maritime activities since March, when the coronavirus outbreak passed its peak in China. Two Chinese Coast Guard vessels spent about 37 hours in Japanese territorial waters around the Senkakus this weekend, the Japan Coast Guard said -- the longest incursion since Japan nationalized the islands in 2012. Chinese Foreign Ministry officials also have escalated their rhetoric against Australia and Canada.

"It's a negative cycle where China's moves trigger pushback from other countries, which in turn drives China to double down," a diplomatic source in Beijing said.

#### Abe’s mediation only produced a temporary Sino-Japanese détente BUT Chinese animosity is breaking fragile trust

The Economist, 6-27-20 (The Economist. "A supposed detente between Japan and China is already fading", Economist, https://www.economist.com/asia/2020/06/27/a-supposed-detente-between-japan-and-china-is-already-fading, 6-27-2020, Accessed 7-6-2020) //ILake-JQ

Mr Xi defined it as a “new era” in relations. He was to have come on a state visit in April (the first by a Chinese leader since 2008), to be greeted by the new emperor, Naruhito. Partly to ensure it went well, the Japanese government was still welcoming Chinese tourists in late January, even as the virus raged in Wuhan. That seeded an outbreak on Hokkaido, hastening the spread of covid-19 throughout Japan. When the pandemic forced Mr Xi’s visit to be postponed, Mr Abe’s advisers breathed a sigh of relief. The prime minister was getting flak from his right wing for hosting a dictator.

The new era has since been losing its shine. Since April Chinese coastguard vessels have sharply increased operations around the Senkakus, with near-daily visits. And now Hong Kong has become a thorn in the relationship. In its strongest language against Japan in years, China lashed out at criticism of its plan to impose a draconian security law in the territory (see article), even though Mr Abe had walked a delicate line by declining to join Australia, Britain, Canada and the United States in an admonitory joint statement.

Some 1,400 Japanese companies and 26,000 Japanese make Hong Kong their home. But Japan’s greater concern is what China might do to Taiwan, its democratic neighbour and friend. It all means, for Mr Abe, that domestic political constraints will grow, too. Already, ordinary folk increasingly fault China for Japan’s epidemic. And, crucially, they remain suspicious of China’s intentions. The same Genron npo poll found that the proportion of Japanese with an unfavourable opinion of China had remained at 85%. Bet on Mr Xi’s state visit never happening. Don’t count on the new era lasting either.

### AT: DA Japan – No War

#### Economic interdependence, threat of U.S. intervention, and possibility of defeat caps Sino-Japanese conflict escalation

Moss, 13 (Trefor Moss, Trefor Moss is an independent journalist based in Hong Kong. He covers Asian politics, defence and security, and was Asia-Pacific Editor at Jane’s Defence Weekly until 2009. "7 Reasons China and Japan Won’t Go To War", The Diplomat, https://thediplomat.com/2013/02/7-reasons-china-and-japan-wont-go-to-war/, 2-10-2013, Accessed 7-6-2020) //ILake-JQ

But if Shinzo Abe is gambling with the region’s security, he is at least playing the odds. He is calculating that Japan can pursue a more muscular foreign policy without triggering a catastrophic backlash from China, based on the numerous constraints that shape Chinese actions, as well as the interlocking structure of the globalized environment which the two countries co-inhabit. Specifically, there are seven reasons to think that war is a very unlikely prospect, even with a more hawkish prime minister running Japan:

1. Beijing’s nightmare scenario. China might well win a war against Japan, but defeat would also be a very real possibility. As China closes the book on its “century of humiliation” and looks ahead to prouder times, the prospect of a new, avoidable humiliation at the hands of its most bitter enemy is enough to persuade Beijing to do everything it can to prevent that outcome (the surest way being not to have a war at all). Certainly, China’s new leader, Xi Jinping, does not want to go down in history as the man who led China into a disastrous conflict with the Japanese. In that scenario, Xi would be doomed politically, and, as China’s angry nationalism turned inward, the Communist Party probably wouldn’t survive either.

2. Economic interdependence. Win or lose, a Sino-Japanese war would be disastrous for both participants. The flagging economy that Abe is trying to breathe life into with a $117 billion stimulus package would take a battering as the lucrative China market was closed off to Japanese business. China would suffer, too, as Japanese companies pulled out of a now-hostile market, depriving up to 5 million Chinese workers of their jobs, even as Xi Jinping looks to double per capita income by 2020. Panic in the globalized economy would further depress both economies, and potentially destroy the programs of both countries’ new leaders.

3. Question marks over the PLA’s operational effectiveness. The People’s Liberation Army is rapidly modernizing, but there are concerns about how effective it would prove if pressed into combat today – not least within China’s own military hierarchy. New Central Military Commission Vice-Chairman Xu Qiliang recently told the PLA Daily that too many PLA exercises are merely for show, and that new elite units had to be formed if China wanted to protect its interests. CMC Chairman Xi Jinping has also called on the PLA to improve its readiness for “real combat.” Other weaknesses within the PLA, such as endemic corruption, would similarly undermine the leadership’s confidence in committing it to a risky war with a peer adversary.

4. Unsettled politics. China’s civil and military leaderships remain in a state of flux, with the handover initiated in November not yet complete. As the new leaders find their feet and jockey for position amongst themselves, they will want to avoid big foreign-policy distractions – war with Japan and possibly the U.S. being the biggest of them all.

5. The unknown quantity of U.S. intervention. China has its hawks, such as Dai Xu, who think that the U.S. would never intervene in an Asian conflict on behalf of Japan or any other regional ally. But this view is far too casual. U.S. involvement is a real enough possibility to give China pause, should the chances of conflict increase.

6. China’s policy of avoiding military confrontation. China has always said that it favors peaceful solutions to disputes, and its actions have tended to bear this out. In particular, it continues to usually dispatch unarmed or only lightly armed law enforcement ships to maritime flashpoints, rather than naval ships. There have been calls for a more aggressive policy in the nationalist media, and from some military figures; but Beijing has not shown much sign of heeding them. The PLA Navy made a more active intervention in the dispute this week when one of its frigates trained its radar on a Japanese naval vessel. This was a dangerous and provocative act of escalation, but once again the Chinese action was kept within bounds that made violence unlikely (albeit, needlessly, more likely than before).

7. China’s socialization. China has spent too long telling the world that it poses no threat to peace to turn around and fulfill all the China-bashers’ prophecies. Already, China’s reputation in Southeast Asia has taken a hit over its handling of territorial disputes there. If it were cast as the guilty party in a conflict with Japan –which already has the sympathy of many East Asian countries where tensions China are concerned – China would see regional opinion harden against it further still. This is not what Beijing wants: It seeks to influence regional affairs diplomatically from within, and to realize “win-win” opportunities with its international partners.

### AT: DA Movements – Link Turn

#### Court decisions can provide resources and motivate movements

Strother 17 – assistant professor of political science at Purdue, has a Ph.D. from Syracuse (Logan, Dissertations – ALL, “Impact: The Supreme Court in American Politics”, June 2017, p. 33-34, https://surface.syr.edu/cgi/viewcontent.cgi?article=1741&context=etd)//mj

Scholars critiquing the compliance genre have documented a number of effects of Court decisions that can be understood as operations of second face power. For example, Scheingold (1974) argues that court victories serve as catalysts for political mobilization. An observed victory may embolden potential activists by endowing them with purpose and confidence. Similarly, McCann argues that federal courts generally lacked the will and the capacity to correct discriminatory wage practices, but that legal norms “significantly shaped the terrain of the struggle... [and] that litigation and other legal tactics provided movement activists an important resource for advancing their cause” (1994: 4). For McCann, legal mobilization occurs when members of a social movement, sharing a general legal consciousness, understand their rights to have been violated and thus utilize courts as at least part of their strategy to fight policy battles and advance their goals (see also Zemans 1983). With respect to the pay equity movement in particular, McCann argues that “legal rights discourse provided reform activists with a compelling normative language for identifying, interpreting, and challenging the unjust logic of wage discrimination”; and that movement litigation served as an important tactical resource to raise expectations among working women that wage reform was possible (McCann 1994: 48). Legal challenges in state courts served most importantly to raise consciousness and offer a course for action, and were cited as highly important by movement activists in both these regards despite the failure of any of these cases to win past the trial-court level (McCann 1994: 74-77). Scholars have made similar claims in studies of a wide range of issue domains, consistently finding that both victories and defeats in court can spur subsequent activism (McCann 1992; O’Brien 1996; Kelly and Dobbin 1999; Keck 2004b; Andersen 2006; Keck 2009).

#### **Supreme Court decisions can spur both direct policy solutions and activism – Brown proves**

Strother 17 – assistant professor of political science at Purdue, has a Ph.D. from Syracuse (Logan, Dissertations – ALL, “Impact: The Supreme Court in American Politics”, June 2017, p. 56-57, https://surface.syr.edu/cgi/viewcontent.cgi?article=1741&context=etd)//mj

This rich and detailed account of Southern politics after Brown led Klarman to conclude that the “1964 Civil Rights Act, not Brown, was plainly the proximate cause of most school desegregation in the South” (2004: 363). In a roundabout sort of way, Klarman attributes the 1964 Civil Rights Act to Brown, however, arguing that “it was the brutality of southern whites resisting desegregation that ultimately rallied national opinion behind the enforcement of Brown and the enactment of civil rights legislation” (Klarman 2004: 385).

However, available evidence suggest that Klarman overstates the strength of this argument. Perhaps most telling is the fact that the six border states and the District of Columbia moved to desegregate their schools almost immediately after Brown (I) was handed down (Klarman 2004; Rosenberg 2008; Hall 2011). As a result, more than half of black school children in these states were attending public schools with white children by 1963 (Rosenberg 2008: 50). Hall’s (2011) analysis suggests that Brown had a meaningful direct impact on desegregation in the border states, as the percentage of black children in school with whites jumped from just over ten percent in 1955 to about forty percent in 1956. Even Klarman acknowledges that “Brown easily desegregated schools in border-state cities” (2004: 346). In Maryland, Missouri, Delaware, Kentucky, Oklahoma, and West Virginia, compliance was fairly quick (if not total), and most prominent politicians publicly acknowledged their intent to comply with the Court’s ruling. Additionally, Rosenberg’s data suggests that Brown did spur some increased egalitarian-minded activism, including increased membership rolls and donations to groups such as the NAACP, and increasing public support among whites (outside of the deep South) for more racially egalitarian policies (see for example McCann 1992). In sum, Klarman’s account seems to gloss over important parts of the Brown story, especially the pattern of subsequent political development in border states, and a significant amount of genuine desegregation that occurred in direct response to the Court’s decision.

#### The Supreme Court can influence the public agenda – generates media attention

Strother 17 – assistant professor of political science at Purdue, has a Ph.D. from Syracuse (Logan, Dissertations – ALL, “Impact: The Supreme Court in American Politics”, June 2017, p. 150-152, https://surface.syr.edu/cgi/viewcontent.cgi?article=1741&context=etd)//mj

In this chapter I have shown that the Supreme Court does in fact regularly influence media attention to the issues that it is speaking when it decides cases. These findings have several important implications for our understanding of American politics. The paper also raises important questions for future research. First, I provide new evidence that decisions made by the Supreme Court regularly influence media attention to issues in significant ways. In this sample of 52 cases decided between 1970 and 2005 in 20 distinct issue areas, 20 cases (38%) caused statistically significant changes in subsequent media attention to the issue each case was concerned with. Importantly, 17 of these cases (32.6%) resulted in long-term changes in the salience of the issue to which they spoke. And the size of these effects was clearly significant as well, with the average change in the volume of coverage being about 220 percent.

This finding clearly indicates that the Supreme Court can powerfully influence the public agenda. Indeed, Peake and Eshbaugh-Soha (2008) argue that presidents’ best opportunity to increase media attention to their preferred policies is in their televised addresses. Even so, they find that the ability of presidents to significantly alter media coverage of issues through such televised addresses is significantly constrained, with presidents doing so successfully only in 14 of the 40 instances they studied (35%). They conclude that the “president’s public leadership may be limited because the presidency must rely upon an independent, economic-driven media to communicate with the public” (Peake and Eshbaugh-Soha 2008:130). My analyses indicate that the Court is able to influence media coverage of issues about as often as the president is.

The second key takeaway is that the theorized predictors of significant changes in media coverage do not perform well in a large, heterogeneous sample of issue areas and cases. That is, neither the controversialness of a decision nor the disruption of the political or legal status quo reliably predicts significant impact on public issue attention. As such, while these analyses have offered significant insight into the nature of Court influence on issue attention, I have also uncovered ambiguity in the causal dynamics of the relationship. I noted at the outset that the leading view of Court impact on issue attention was developed inductively (Flemming et al. 1997) and only tested once, on a small sample concerning only one issue (Ura 2009). In my analyses, I find no empirical support for this perspective: decisions that disrupt the status quo appear to be no more likely to affect media attention than decisions which leave the status quo intact. However, I also failed to find support for the alternative offered here: I hypothesized, drawing on a large body of research in media studies, that controversial decisions would be more likely to influence issue attention than noncontroversial ones.

The fact that the Supreme Court regularly influences public issue attention is profoundly important to American politics research. To the extent that American citizens monitor politics and political elites, they do so by consuming information provided by media; thus the modern mass media is a crucial link between political elites and the general public (Pritchard 1992; McCombs 2004; Jones and Wolfe 2010). Media coverage of issues and events powerfully influences what issues people think are important (e.g. Iyengar and Kinder 2010), how people think about those issues (e.g. Chong and Druckman 2007), and subsequent levels of interest in and attention to those issues (e.g. McCombs 2005; Albertson and Gadarian 2015). Put differently, the media plays a powerful role in shaping the national political agenda (Sill et al. 2013). As such, any theory of how and when political institutions shape politics and policy must take media coverage into account. Given that recent work has found that the Court often shapes public policy indirectly (Grossmann and Swedlow 2015), this research can be plausibly read as suggesting a pathway for such indirect influence. Put different, it seems likely that one pathway by which the Court indirectly shapes public policy is by influencing the political agenda.

### AT: DA Movements – Non-reformist Reforms Help Movements

#### Non-reformist reforms can help facilitate movement success

**Simonson 17** ( Jocelyn Simonson is an Assistant Professor, Brooklyn Law School., 2017, "DEMOCRATIZING CRIMINAL JUSTICE THROUGH CONTESTATION AND RESISTANCE," [Northwestern University Law Review](https://search-proquest-com.proxy.lib.umich.edu/pubidlinkhandler/sng/pubtitle/Northwestern+University+Law+Review/$N/37235/DocView/1946273161/fulltext/C308619297FE4F2BPQ/1?accountid=14667), via umich libraries, accessed 7-5-2020//mrul)

III. The Role of the State in Democratic Criminal Justice

The methods of communal intervention I have been describing are born outside of the state and controlled by non-state actors. However, each branch and level of government has an important role to play in supporting and facilitating productive agonistic practices. As a preliminary matter, the state should eliminate formal barriers to democratic participation from marginalized populations. Any model of democratic criminal justice is incomplete without a push to restore voting rights to incarcerated individuals and those with criminal records.52 States interested in bolstering the political power of those most affected by local criminal justice policies can also allow non-citizens and youth to serve on juries and vote in local elections; eliminate death-qualifying juries;53 reinvest in neighborhoods weakened by mass incarceration;54 and push for inclusionary forms of citizenship for immigrants who are not United States citizens.55 Although I have described these reforms as preliminary, the paradox is that without first possessing sufficient political power to call for reforms, disenfranchised populations struggle to attain formal political recognition. The change must therefore begin elsewhere, through processes that simultaneously build power and push against dominant conceptions of what it means to count as a citizen or democratic subject.56

The state should facilitate-rather than silence-the efforts of disenfranchised groups to participate in criminal justice through contestatory modes of popular resistance. All too often, police and courts meet bottom-up participatory tactics with resistance, calling them disruptive and harmful to the decorum of everyday justice. Police arrest organized copwatchers for filming; administrators close courtrooms to the public; judges shut down community bail funds; prison officials retaliate against people striking in prison; and federal investigators increase surveillance of social movements that aim to transform the criminal justice system.57 However, we can imagine how state actors might instead enact policies that allow for disruptive but nonviolent forms of protest and intervention. Localities can promote policing policies that respect the right of the people to assemble, protest and dissent; courts can enforce the First and Sixth Amendment rights of community members to dissent and intervene; court administrators can ensure open courtrooms and allow audience members to participate in proceedings upon request; and prison officials can permit prisoners to fast, strike, and publicize these mass actions beyond prison walls.

Finally, we can imagine state-driven processes that themselves allow for community control of local criminal justice policies and priorities. The key here is to design methods of governance that facilitate power shifts, not just deliberation.58 Local juries that include individuals with criminal records might make decisions about individual cases and larger criminal justice policies alike.59 A local police review board, drawn from residents of a particular neighborhood, might be given the power to make both disciplinary and policy decisions.60 And judges designing and enforcing consent decrees might give power to community groups and other marginalized stakeholders to design or veto portions of consent decrees that affect their neighborhoods.61 Any push to move decisionmaking and resource allocation in criminal justice down to the local level is a potentially useful one.62 But we should not rest at local, consensus-building strategies alone. Given the profound inequalities in political power that pervade our current system, we should also seek out methods of governance that hand over levers of power to the powerless.

To pursue any of these avenues, government actors must be open to the possibility of what Ruth Wilson Gilmore calls "nonreformist reform"- "changes that, at the end of the day, unravel rather than widen the net of social control through criminalization."63 There is reason to think that if those most likely to be arrested and incarcerated were given truly equal influence over policy, and if policymaking happened more locally, then the criminal justice system would be less rather than more punitive.64 Not only that, law that is responsive to the demands of local democracy will end up depending less on a punitive criminal justice system, and more on other modes of state and community support.65

### AT: DA Movements – Courts => Social Change

#### Courts are key to effective social change – neg scholars are wrong

NeJaime 12 (Douglas NeJaime is Anne Urowsky Professor of Law at Yale Law School, where he teaches in the areas of family law, legal ethics, law and sexuality, and constitutional law, “Winning Through Losing." The Dukeminier Awards, 11, 94”, 2012, Nexis Uni via Umich Libraries, accessed 6/20/20//mrul)

B. THE POSITIVE INDIRECT EFFECTS OF LITIGATION

Many sociolegal scholars, particularly in the legal mobilization and cause lawyering fields, offer a compelling counternarrative to the pessimistic account of court-centered change. Although they identify tangible benefits that courts often bestow on subordinated groups, (52) to a certain extent these scholars agree with the claim that courts themselves often fail to directly produce significant social reform. (53) That is, scholars who redeem the power of litigation recognize the limitations of courts and acknowledge the constraints courts face in attempting to directly bring about social change but focus on the positive indirect benefits that movements gain from court-centered strategies.

These sociolegal scholars begin from the premise that courts are constrained in their ability to directly bring about reform. Brown and the civil-rights movement again represent an important starting point. In his seminal work on law and social movements, Joel Handler cites implementation and enforcement issues in acknowledging school desegregation as the "classic example" of litigation's failed promise. (54) Similarly, in his foundational text on the political potential of rights claims, Stuart Scheingold examines school desegregation as an illustration of the substantial limitations of court-centered change. (55) Generalizing these insights to other social-reform settings, both Handler and Scheingold demonstrate that courts generally lack the capacity to oversee policy implementation and to remedy enforcement problems. (56)

Nonetheless, many sociolegal scholars, including Handler and Scheingold, depart from this pessimistic account and redeem court-centered strategies by documenting the productive indirect effects of litigation victories on social-reform projects. For instance, while Brown may not have produced, the desired remedial action, scholars who stress the indirect benefits of litigation credit Brown with fueling a powerful social movement by raising consciousness, driving fundraising, legitimizing a cause, and influencing other state actors. (57) This competing account of Brown turns away from the "myth of rights," in which lawyers naively rely on courts to bring about social reform, and instead turns toward what Scheingold terms the "politics of rights," in which lawyers seize on the political nature of rights. (58) This approach decouples success from the implementation and enforcement of judicial orders and focuses on the discursive and political power of courts' pronouncements. (59)

Following the cues of Handler and Scheingold, more recent scholarly accounts have identified a variety of important benefits that litigation--from the mere act of litigating to a favorable judicial decision--produces. I characterize these benefits as internal (those relating to the movement itself) and external (those relating to the movement's interactions with outside actors). First, litigation internally affects movement formation by raising consciousness, mobilizing constituents, and documenting an alternative understanding of rights. (60) Leading legal mobilization scholar Michael McCann explains how when movement goals are framed around legal norms, the movement is able to articulate demands, provide a compelling narrative, and thereby forge a group-based identity. (61) Ultimately, when courts legitimate a group's claims, they speak to movement members in an affirming way. (62)

Next, litigation shapes the way the movement interacts externally with state actors, private elites, and ordinary citizens. Litigation may result in increased bargaining power for the subordinated group. (63) Such bargaining power may spring from legal rights announced by courts--litigation victory (64)--or from the more ancillary costs, pressures, and publicity associated with litigation--litigation process. (65) Furthermore, litigation, again through both positive rights pronouncements and increased publicity, may shape the opinions of elites and the public. (66)

Overall, this competing account of social-change litigation offers a more optimistic picture that directly takes issue with Rosenberg's empirical claim that court-centered strategies generally fail to produce positive indirect effects. The two camps observe the same social-change campaigns and yet come away with very different assessments of what has been gained and lost through litigation. I next turn to an exploration of the basis for these starkly contrasting accounts.

III. BUILDING A THEORETICAL FRAMEWORK FOR AN ANALYSIS OF LITIGATION LOSS

The dispute over the effects of social-change litigation is more than just an empirical one. Instead, the competing accounts reflect significant theoretical and methodological divisions. As I explain in this Part, Rosenberg isolates courts in order to observe and measure their empirically verifiable impact, and he situates courts as independent actors in competition, not conversation, with other law-making institutions. All the while, he alternately ignores and condemns social movement lawyers. Legal mobilization and cause lawyering scholars, on the other hand, take a more contextual and dynamic view of court-centered strategies. Their qualitative analyses account for the multiple radiating effects of litigation, and they pay attention to the way in which lawyers themselves cultivate such effects. (67)

There is, however, a way to develop the valuable insights of the constrained-courts view within the more optimistic account of litigation offered by legal mobilization and cause lawyering scholars. More specifically, we can identify ways in which the failure of courts and litigation may, within a dynamic system of law and social change, actually produce positive effects for a social movement. Instead of focusing on the potential and possibilities of litigation, as legal mobilization and cause lawyering scholars generally do, I focus here on the limits of litigation, many of which Rosenberg identifies. In doing so, I fill a significant gap in sociolegal literature on the impact of court-centered strategies--attention to litigation loss and its aftermath. In particular, I contend that the legal mobilization and cause lawyering literature, which furnishes insights consistent with a rigorous analysis of litigation loss, prematurely falls in line with the conventional account of judicial defeat as demobilizing and unproductive.

My aim in this Part, then, is to show how even though legal mobilization and cause lawyering scholarship fails to theorize litigation loss, it supplies the foundations for such a theory. In what follows, I rely on a dynamic, multidimensional framework of law and social change--one in which litigation, from filing to resolution, shapes and is shaped by activity in other institutional domains. I claim that appreciating courts' potential and recognizing courts' limitations are both critical to understanding the ways in which litigation influences movement activity and policy formation across the full range of law-making avenues.

A. TURNING COURTS' CONSTRAINTS ON THEIR HEAD

Rosenberg's pessimistic account of courts would seem to have much to say to an attempt to theorize litigation loss: Judicial defeats--instances in which courts reject a social movement's claim--may highlight some of courts' key constraints. Moreover, analysis of social movement activity in the wake of litigation loss might offer a comparative account to supplement Rosenberg's empirical analysis and bolster his (somewhat veiled) normative commitments. Although framed most often as an empirical and descriptive account, the constrained-courts view derives from a normative position that prefers social change that emanates from nonjudicial institutions. (68) When courts fail to grant the asked-for reform, advocates may turn to other lawmaking channels, such as legislative and administrative arenas, and Rosenberg's approach would value this tactical and institutional shift. (69)

Yet, because Rosenberg contests the optimistic account of court-centered change offered by other sociolegal scholars, he focuses on the empty promise and negative effects of court victories and pays little attention to court defeats. (70) Setting out to show how wins in court (and specifically in the U.S. Supreme Court (71)) generally fail to deliver social change on the ground, Rosenberg takes as his starting point the favorable judicial decree. As he puts it, "Winning court cases is, of course, the first step toward courts producing significant social reform." (72) Ultimately, Rosenberg aims to show that "legal victories do not automatically or even necessarily produce the desired change." (73) When he observes little or no change emanating directly from a particular court order, he concludes that courts (and litigation) are generally ineffective. (74) On the rare occasions when he does observe change emanating from courts--when courts overcome the constraints he identifies--such change results from the litigation success he has analyzed. (75)

In assessing whether court decisions produce social change, Rosenberg seeks to establish a direct causal link between court decrees and changes on the ground. In this framework, court decisions are independent forces that produce unmediated impacts that can be observed and measured. (76) As Robert Post explains, Rosenberg's approach "asks whether one quantifiable variable (e.g., court decisions) 'causes' changes in a distinct quantifiable variable (e.g., public opinion)." (77) This approach forsakes the subtle constitutive effects of law and neglects the way in which courts and litigation interact with other lawmaking avenues and social movement tactics. (78) In other words, in hewing to a view of law as independent, Rosenberg forsakes any consideration of law as interdependent. (79)

Furthermore, while Rosenberg's account seems to place blame for social movement setbacks squarely on professional cause lawyers who naively turn to courts, he barely mentions social movement advocates' strategic considerations and constraints. (80) This underdeveloped approach toward cause lawyering fails to capture the multiple ways in which social movement advocates understand and seize on the radiating effects of litigation, and neglects the diversity of strategies that characterizes contemporary public-interest law practice. (81)

Shifting the scholarly focus to more accurately reflect social movement advocates' on-the-ground reality demands that we assess the positive and negative effects of litigation by understanding how court-based tactics function across the range of strategies deployed by advocates. Litigation loss shapes advocates' strategies. Advocates do not simply turn away from courts and erase what happened there; instead, they cultivate the loss to advance the complex process of reform. Understanding litigation in this way is not to suggest, as Rosenberg does, that litigation is an inherently harmful or useless social-change tactic and that legislative advocacy and direct action are inherently productive and normatively desirable. (82) In fact, a shift from litigation to nonlitigation is both overly simplistic and empirically false. (83) Even in the wake of litigation loss, court-centered strategies remain an important component of advocates' tactical repertoire. Rather than abandon litigation altogether, social movement lawyers reconfigure their strategies--including their litigation strategies--in response to litigation loss.

The key point here is that Rosenberg's account can be turned on its head: His rejection of court-centered reform and his commitment to what he terms more "political" avenues may, counterintuitively, help us to understand how advocates use the limits of court-based strategies to advance their social movement agenda. Both the inherent constraints of courts and the limitations of court-based strategies may actually become part of an optimistic account of litigation for social change. Uncovering this, though, requires recognizing the important pieces of Rosenberg's descriptive account, but abandoning his theoretical perspective and methodological approach.

#### Courts control public opinion---any opposition won’t create lasting change.

Ura 14 (Joseph Daniel Ura is an Associate Professor of Political Science at Texas A&M, January 2014, "Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions," JSTOR via umich libraries, accessed 6-25-2020//mrul)

This article offers a first attempt to develop and assess the competing predictions of the thermostatic model of public opinion and legitimation theory for the likely responses of public mood to Supreme Court decision making. While thermostatic theory predicts a negative relationship between the ideological direction of Supreme Court decisions and changes in public mood, legitimation theory predicts that changes in public mood should be positively associated with the ideological content of the Court's actions. To assess these rival expectations, I estimate a model of the dynamic relationship between changes in public mood and Supreme Court decisions, controlling for policy choices made by Congress and the president as well as the state of the macro economy. The results show that both thermostatic and legitimizing forces bear on the response of public mood to the Supreme Court. The model predicts that the public's initial response to changes in aggregate Supreme Court liberalism is negative. When the Supreme Court hands down salient decisions in one ideological direction, public mood shifts in the opposite direction in the short run, which is consistent with thermostatic accounts of public mood. However, the model predicts that this negative response ultimately decays and is replaced by a positive response to Supreme Court decisions. Aggregate Supreme Court liberalism is significantly and positively associated with liberalism in public mood over the long run. Though the model shows mood to be a reasonably 13The null relationship between unemployment and public mood is inconsistent with other evidence that growing joblessness in creases liberalism in public mood (e.g., Erikson, MacKuen, and Stimson 2002). Yet, recent research suggests that the link between unemployment and policy sentiment may be more complex than classic macro political analyses indicate. Enns and Kellstedt (2007) and Ellis and Ura (2011) show that the strength of the positive association between unemployment and mood is conditional on political sophistication. In the aggregate, therefore, the relatively high responsiveness of more sophisticated cohorts "averages out" with the relatively low responsiveness of less sophisticated cohorts. Using somewhat different data and modeling approaches, some scholars have continued to find a stronger association between unemployment on public opinion liberalism (Enns and Kellstedt 2007; Erikson, Stimson, and MacKuen 2002), whereas others show a weaker, more limited relationship between the two (Ellis and Ura 2011; Ura and Ellis 2012; Ura and Socker 2011). This mixed set of results suggests a need for care in modeling opinion dynamics that vary systematically across various social and political cleavages in general and about the dynamic consequences of unemployment for policy mood in particular. slowly adjusting time series, there is significant evidence that public mood shifts toward the ideological position of the Supreme Court. These patterns of responsiveness are indicative of both thermostatic dynamics and legitimation, though the persistent, long-run relationship between Supreme Court decision making and public mood is characterized by legitimation. Additionally, the difference between the predicted response of public mood to Supreme Court de cision making and its reaction to policy choices enacted by Congress and the president provides further support for the intuition of Dahl (1957) and subsequent scholars (e.g., Gibson and Caldeira 2009) who have argued that the unique legitimacy of courts in the public mind support public responses to information about courts and their actions that are distinct from responses to similar information about the elected branches of national government. Courts are different, and this difference indicates substantial obstacles for developing a unified theoretical framework that addresses both public responsiveness to the choices made by courts and those made by other institutions of national government. These findings also have important implications for interpreting the role of the Supreme Court in American politics. In part because of the limited empirical support for legitimation found in prior empirical studies, claims about the Supreme Court's role as a "republican school master" have been relatively rare. However, the results presented here argue for a reconsideration of the idea of judicial leadership of public sentiment. Most obviously, the present analysis supports Lerner's classic claim that judges can somehow "transfer to the minds of the citizens the modes of thought lying behind legal language and the notions of right fundamental to the regime" (1967, 180). Additionally, the results suggest that this judicial teaching function may influence political attitudes about issues in the domain of normal politics and which may be important for policy choices made in the elected branches of national government (e.g., Erikson, Stimson, and MacKuen 2002). This judicial leadership of American public opinion may also have important strategic implications for the behavior of the Supreme Court. Studies of macro politics generally support thermostatic models of reciprocal relationships between policymaking in the elected branches of national government and public mood. Policy making follows public opinion through elections and dynamic representation, which tends to shift away from the ideological direction of policymaking, creating the well-known cycles and swings of public opinion and policy making in America (Stimson 1999). The process is animated, in part, by the strategic incentives of elected officials to keep "in step" with the preferences of voters and potential voters (Canes-Wrone, Brady, and Co gan 2002). Supreme Court justices who are appointed in the first place and enjoy lifetime tenure do not face similar electoral imperatives. This study shows that the Court may have incentives to push or challenge public opinion with its decisions. Though the Court will generally face some backlash against its actions, public opinion will gradually move toward the Court, creating a political climate more consistent with the preferences of a controlling majority on the Court and, perhaps, ultimately influencing the composition and behavior of other branches of government in ways supportive of the Court and its decisions. The potential for the Supreme Court to help create a political environment that reinforces and extends the policy implications of its own decisions may provide new ways to interpret and investigate a variety of important social movements and public opinion trends that have ultimately played out in the Court, Congress, and public opinion, including the development of the civil rights movement (e.g., Klarman 2004) and the emergence of the modern conservative movement (McMahon 2011; Perlstein 2001). Additionally, this study points to important issues of research design in the study of public reactions to judicial decisions. The results reported here highlight the potential for conclusions about the general dynamics of public responsiveness to Supreme Court decisions based on small numbers of decisions and public opinion surveys may be highly sensitive to the peculiarities of particular cases and the timing of the surveys analyzed. In particular, research designs that involve comparisons of the distribution of attitudes revealed in surveys taken shortly before and after salient Supreme Court decisions are not likely to identify important, long-run consequences of those decisions in mass political behavior. Public reactions to Supreme Court decisions, and other changes in the macro political environment, are dynamic. Assessing the scope and scale of those reactions is best undertaken by longitudinal analysis, which suggests a recourse to either panel data, where they are available, or to time-series analysis of macro-level data

#### Litigation is a prerequisite to reforms

Chiang 15 - Legal Director, American Civil Liberties Union of Washington State, former Associate Professor of Law at the University of Utah S.J. Quinney College of Law (Emily, Penn State Law Review, “Institutional Reform Shaming”, Summer 2015, p.67-68, accessed via Heinonline)//mj

This Article argues that there is life left in old-school litigated reform, which can be revived and rejuvenated even in the shadow of new governance. The question is not whether new governance is ill advised, but what role traditional institutional reform litigation can and should play in a world besotted with new governance. The question is whether institutional reform litigation can acclimate to new governance priorities, such as flexibility, adaptability, and tolerance for uncertainty as part of an educative process of self-improvement.

Others have criticized new governance from a cause lawyering perspective, focusing in particular on the professional identity of cause lawyers. They suggest, for example, that new governance ignores the skill set strengths of these lawyers and that a commitment to new governance principles may compromise the ability of these lawyers to turn later to litigation. This perspective is extremely persuasive, but omits a more crucial aspect of the dynamic between old-school systemic reform litigation and new governance: the latter simply cannot be successful without the continued vitality of the former.

To the extent that new governance succeeds, it does so because of the continued threat of the very old-school litigation it seeks to replace. Structural reform litigation in the form of messy and prolonged class actions is not only necessary, but also a critical aspect of new governance, even as that litigation has adopted some of the multilateral attributes of new governance itself. New governance is not as much a paradigm shift as it is a paradigm hedge: its continued existence rests upon the age old foundation of the class action lawsuit-the lawsuit need not ever be filed, but must remain a credible threat. Without the looming possibility of the lawsuit, institutions have little external incentive to change, outsider stakeholders will never be brought to the table, and the only experimental solutions likely to be implemented are those that favor entrenched interests.

Second generation, non-litigative means of reforming institutions hold promise where the institution is willing and capable. Susan Sturm, for example, describes the use of change agents to work within an institution for "self-reform" in the context of what would otherwise have been an equal protection and/or a Title VII claim. The problem, of course, is that the vast majority of institutions are unwilling to engage in this sort of process, opting instead for what Scheingold calls "legal evasion., New governance typically emphasizes the importance of stakeholder participation in reform, both for the substantive input that these parties can contribute to the policymaking process and for the resultant benefits to civic and political life. As institutional reformers have long recognized however, litigation is sometimes the only way in which certain types of stakeholders-namely, the disenfranchised, the poor, the oppressed, and the despised--can get a seat at the table. Finally, litigation is a potent catalyst for change, often serving as a critical crisis for an institution, without which it would be unable or unwilling to confront the need for evolution.

This Article acknowledges the challenges posed by the conditions necessitating new governance answers to age-old problems and contends that institutional reform litigation can and must adapt to these conditions. Doing so is critical not just for the stakeholders who would likely otherwise be left out of new governance altogether, but also for the eventual success of new governance itself.

#### Only the plans fiat solves, public opinion can’t shift Court rulings --- they will alter the content, but the product doesn’t change.

Black et al 16 (Ryan C. Black is an Associate Professor in the Department of Political Science at Michigan State University., 11-3-2016, "The Influence of Public Sentiment on Supreme Court Opinion Clarity," http://www.uky.edu/~jpwede2/BOWW2016LSR.pdf, accessed 6-30-2020//mrul)

Scholars have paid considerable attention to the relationship between the Court and public opinion but the results have been mixed. Surprisingly, there has been little attention devoted to how public opinion influences the Court’s opinion content. We test a novel theory of how public opinion should affect opinion content. Our findings offer something new. They show public opinion does in fact influence the Supreme Court in systematic ways. In this capacity, the results have the potential to re-frame a recurring debate. Indeed, the strategic model of judicial decision making argues justices are likely to respond to public opinion. Our results support that theoretical claim—in part. While scholars have long examined various Court behaviors (e.g., voting) for evidence of the public’s influence, perhaps we need to pay more attention to the content of the majority coalition’s opinion language (see, e.g., Black et al. 2016). The consequences of these findings are important. They suggest justices are aware of their interdependence and employ strategies to evade obstruction. By writing clearer opinions in the face of public opposition, justices aggressively seek out their goals. Writing clearer opinions become all the more important if the public perceives the Court in political terms (Bartels and Johnston 2012). Thus, while public opinion influences judicial behavior, justices appear to respond in an effort to accomplish their broader goals. And while opinion clarity will not give the justices freedom to do whatever they wish, it is something they seem to use to mitigate possible negative responses to their counter-majoritarian opinions. For those who support enhanced judicial accountability (and, we suppose, for those who oppose it), these findings are bittersweet. Yes, public opinion can influence the Court’s behavior. Our results suggest justices do indeed alter how they write opinions as a consequence of changing public mood. But therein lies Black, Owens, Wedeking, & Wohlfarth 727 the rub: public mood seems to have an effect on justices’ opinion content, but scholars disagree whether it has an effect on their votes. To be sure, the jury is still out on whether and to what extent public opinion influences justices’ votes, but the influence of public opinion might just be an example where the packaging seems to change, but the product does not. While these results do not speak directly to judicial legitimacy, we suspect they might indirectly relate to it. If justices can alter the content of their opinions to avoid or mitigate public rebuke, it stands to reason they could alter it so as to enhance the Court’s reputation. Do justices, for exampl000e, garner more support for the Court when they speak in positive tones? When they write more legalistically? When they are collegial to one another in separate opinions? These factors might lead to enhanced legitimacy. So too could negative language harm the Court’s reputation. So, though we do not examine legitimacy here, we hope future scholars analyze the link between opinion content and legitimacy. Finally, we believe the approach we used may extend beyond the Court. The public may influence bureaucratic outputs, such as agency regulations, in terms of their clarity and its relationship to interpretation and compliance. Even though bureaucrats (like Supreme Court justices) are not elected, those who oversee and fund their decisions are directly subject to popular will. So the indirect electoral connection exists there as well. Whether bureaucrats adjust by altering the clarity of their policies is an empirical question to be tested. It is also worth emphasizing, in this vein, that our approach to measuring clarity could be adopted elsewhere. 0We have every reason to believe other scholars who analyze policymakers and complex texts could adopt our strategy as well.

### AT: DA Movements – Rosenberg/Hollow Hope Wrong

#### **“Hollow Hope” theories fail – they assume everything is zero-sum and cherry-pick their examples**

Schuck 93 – Simeon E. Baldwin Professor of Law Emeritus at Yale University. His major fields of teaching and research are law and public policy; tort law; immigration, citizenship, and refugee law; groups, diversity, and law; and administrative law (Peter H., The Yale Law Journal, “Public Law Litigation and Social Reform”, May 1993, Vol. 102, No. 7, p. 1782-1784, https://www.jstor.org/stable/pdf/796831.pdf?refreqid=excelsior%3A1dd9b781f1ab41005456ab05845474b3)//mj

Rosenberg's strategic point-which converges with Gerald Lopez's argument-is that environmentalists (and other reformers) should not look to the courts for much help but should instead invest their resources in political mobilization and legislative lobbying. Courts, he concludes, simply "preserve victories achieved in the political realm from attack. But preservation, while important, is only useful when there are victories to preserve. And environmental litigation, as a strategy for producing a clean and healthy environment, achieved precious few victories." For several reasons, however, this seems a dubious balance sheet on environmental litigation since the early 1970's. First, environmental groups have in fact won many victories in the courts during this period, as industry and government litigators will ruefully attest. The harder, more significant question (as noted above) is whether those victories were actually good for the environment, a question about which Rosenberg shows little sustained interest. Second, there can be little question that environmental litigation was effective in helping to slow, and occasionally to defeat, the Reagan-Bush deregulatory juggernaut, and in helping to build up membership in environmental action organizations." More generally, his argument moves from the undeniable fact that reformers' resources are limited, so that public law litigation must compete for those resources with other forms of political activity conducted in nonjudicial forums, to what appears to be an implicit but far more doubtful assumption about the process of social reform. He writes that "the courts also limit change by deflecting claims from substantive political battles, where success is possible, to harmless legal ones where it is not."' The process of social change, however, is not a zero-sum game in which efforts initiated by courts and in other quarters are competitive rather than complementary. It is true, of course, that court-initiated change may generate a political backlash that can defeat or at least impede the reform enterprise, as with the abortion controversy. But this particular dynamic hardly exhausts the range of interactions between courts and politics, many of which are synergistic with respect to both substantive reform and political resources. Here as elsewhere in the book, Rosenberg's agnosticism concerning how social change actually occurs weakens the persuasiveness of his analysis. In a very brief discussion of reapportionment litigation, Rosenberg likens his findings to those in the environmental area: "A procedural victory was won but one that didn't automatically lead to substantive ends. Legislatures were reapportioned, but the reformers' liberal agenda did not then automatically come to pass."' To imply that any reform is ineffective unless it can produce an "automatic" success is patently unreasonable, of course; I know of no reform that would satisfy it. Nevertheless, Rosenberg does make some telling points about how politicians have managed to mute the effects of reapportionment.' He goes on, however, to ignore a characteristic aspect of reapportionment litigation that is inconvenient for his theory and conclusion. Compared to the other areas that Rosenberg analyzes, court implementation of reapportionment decrees is easy; the court can either enjoin the election until a satisfactory districting plan is adopted or draw the plan itself.'O'

#### **Rosenberg is too misleading to ever be a useful way of theorizing about the court**

Schuck 93 - the Simeon E. Baldwin Professor of Law Emeritus at Yale University. His major fields of teaching and research are law and public policy; tort law; immigration, citizenship, and refugee law; groups, diversity, and law; and administrative law (Peter H., The Yale Law Journal, “Public Law Litigation and Social Reform”, May 1993, Vol. 102, No. 7, p. 1785, https://www.jstor.org/stable/pdf/796831.pdf?refreqid=excelsior%3A1dd9b781f1ab41005456ab05845474b3)//mj

When Rosenberg turns to analyzing the relationships between courts and these other political forces, however, his work is of considerably less value and may even be misleading. His court fatalism seems largely oblivious to the dialogic, sequential, iterative quality of court-society interactions in important public law cases, a quality so elegantly elaborated by Alexander Bickel and applied by those scholars who have followed in the Bickelian tradition. Rosenberg's theory of constraints and conditions, while identifying factors that are undeniably significant in determining judicial effectiveness, adds little that scholars literate in the political science of judicial behavior and policy implementation do not already know, and it is in any event too ill-specified to be either fruitful or refutable.

### AT: DA Movements – Litigation Key to Democracy

#### Litigated reform remains vital to democracy

Chiang 15 - Legal Director, American Civil Liberties Union of Washington State, former Associate Professor of Law at the University of Utah S.J. Quinney College of Law (Emily, Penn State Law Review, “Institutional Reform Shaming”, Summer 2015, p.63-64, accessed via Heinonline)//mj

But there remains a place for litigated reform. Rosenberg could not have predicted in 2008 the tidal wave of court rulings in favor of marriage equality, rulings that have resulted in truly substantive victories at both the federal and state levels, and victories that stem from litigated reform. Brown and its aftermath teach us that, if nothing else, court victories must either be rooted in widely shared social norms or nurture the development of such norms in order to produce meaningful change. Rosenberg failed to predict the rapidity with which social norms on marriage equality would develop-and once they did develop, litigation was vital to the protection of the right. And litigation built on strong norms foundations will continue to be essential in the cases that define institutional reform today, those that involve fundamentally forgotten populations and that are not characterized by great moral debate, i.e., the big cases, as opposed to the hard ones on which Rosenberg focuses, where litigated reform is needed precisely because there will never be any political will to fix the problem.

C. Litigators and the Politics of Rights

Although some have argued otherwise, structural reform litigation is far from dead. Litigation will always have a role to play in systemic reform, and much of the above criticism failed to recognize what public interest lawyers have always known: that the role of litigation in public interest reform is multifaceted, flexible, and dynamic-and that it extends far beyond the courthouse. Litigators can only do so much. Someone needs to litigate the cases and they do so with the understanding that others must do their part as well, because litigation is a full-time job and because they are trained as lawyers, not lobbyists or community organizers. Sometimes these actors are all in the same office (more on that later), but sometimes they are not. More recent scholarship recognizes these essential facts of cause lawyering, the reputation of which appears largely to have been rehabilitated. The remainder of this Section will discuss the most salient aspects of the new (old) role of litigation in structural reform, beginning with the premise that it remains necessary to achieving structural reform. It will further contend that these defining features stem largely from the fact that reformers recognize they cannot rely exclusively upon the courts to restructure institutions.

### AT: DA Positive Rights Bad

#### **14th Amendment already being applied to protect human dignity**

Samar 19, Vincent Samar is a Lecturer in Philosophy and an Associate Faculty Member at Loyola University Chicago Graduate School, and an Adjunct Professor of Law at Loyola University Chicago School of Law ["Rethinking Constitutional Interpretation to Affirm Human Rights and Dignity," 12-3-2019, *UC Hastings Scholarship Repository*, URL: https://repository.uchastings.edu/hastings\_constitutional\_law\_quaterly/vol47/iss1/6/] kly

So far, this discussion has focused on the role that human rights ought to play in constitutional interpretation. But what does this mean for **human dignity**, which, as explained below, **has already been recognized as an important constitutional value**? One might begin explaining human dignity by distinguishing “self-respect,” as a realistic assessment of having satisfied one’s moral obligations, from “self-esteem,” which is an affirmation of one’s specific abilities to fulfill one’s own desires or goals. The latter might include following a personalist morality beyond what human rights requires.292 Dignity then, as a moral virtue, represents the self respect one has for oneself, and the respect one deserves from others for satisfying reasonable moral obligations as would be required by a system of universal morality, such as is offered by the PGC.293 Exactly how dignity and universal morality are implicated in constitutional interpretation, however, now needs explanation.

First, it should be noted “that dignity is a humanistic characteristic.”294 As Gewirth points out, “it is in reason and voluntariness or free will as generic features of action that the basis of human dignity is to be found.”295

For **the worth assigned to human dignity arises because humans are capable of** being the authors of their own actions**, as well as being moral agents capable of controlling their own behavior.** Humans would not have much dignity if the state did not afford them the ability to make their own choices**.** Their dignity resides in their autonomy. Hence, humans properly take ownership of their own actions, when their actions are not coerced, and, consequently, subject themselves to praise or blame for the choices they make. Gewirth describes this relation between dignity and authorship of one’s own actions this way:

An ineluctable element of agent-estimated worth, then, is involved in the very concept and context of human purposive action. Now there is a direct route from this ascribed worth of the agent’s purposes to the worth or dignity of the agent himself. For he is both the general locus of all the particular purposes he wants to attain and also the source of his attribution of worth to them. Because he is the locus and source, he must hold that the worth he attributes to his purposes pertains a fortiori to himself. They are his purposes, and they are worth attaining because he is worth sustaining and fulfilling, so that he has what for him is a justified sense of his own worth.2

Gewirth goes on to point out that the “**worth or dignity the agent logically attributes to himself by virtue of the purposiveness of his actions,** he must also attribute to all other actual or purposive agents. For their actions have the same general kind of purposiveness that provides the ground for his attribution of dignity to himself.”297 Consequently, every agent, in acknowledging she has rights to freedom and well-being, acknowledges all other humans have these same rights. This imposes “a universalist moral restriction on the purposes she is justified in regarding as worth pursuing, and, hence, too, on her ascription of worth or dignity to herself.”298 It also means that law must be sensitive to this justification and not punish the legitimate assertion of human rights. Yet, nowhere in Gewirth’s analysis does he suggest that the actions satisfying human rights or the presence of human dignity are the same, or even that the latter is a derivative of the former. Rather, what he suggests is that one’s moral dignity supervenes on one’s possession of human rights, along with their willingness to maintain rights that are consistent with the rights of others.299 It is this attribution of worth that is dialectically necessary, rather than phenomenology required.300 And it is this attribution of worth that ultimately applies to all human beings, such that attempts by anyone, including the state, to undermine or be indifferent to it cannot be morally justified.

Perhaps this is why human dignity has now taken hold in constitutional interpretations. Consider Lawrence v. Texas, a case challenging a Texas statute that imposed criminal penalties for private same-sex sexual relations of consenting adults with no coercion or overt harm to either party.301 Justice Anthony Kennedy, writing for the Majority in striking down the Texas statute as unconstitutional, interpreted the Due Process Clause of the Fourteenth Amendment to provide this connection of human dignity to constitutional rights**:**

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.302

Kennedy would note later in the opinion that “[t]he petitioners are entitled to respect for their private lives.”303 Kennedy’s Opinion in this case, as well as the Court’s subsequent same-sex marriage decision in Obergefell v. Hodges, suggests that efforts to preserve human rights as part of constitutional interpretation equate with preserving human dignity at the same level; for the constitutional protection of human rights is indeed the constitutional protection of each person’s human dignity.

#### The plan embraces a narrower conception of dignity [based on negative rights] BUT the Court is already embracing an expansive vision which thumps the link

Rao, 11 --- Assistant Professor of Law, George Mason University School of Law (Neomi, Notre Dame Law Review, “THREE CONCEPTS OF DIGNITY IN CONSTITUTIONAL LAW,” <http://ndlawreview.org/wp-content/uploads/2013/06/Rao.pdf>, accessed on 7/4/2020, JMP)

CONCLUSION: CHOOSING DIGNITY

This Article has sought to demonstrate three different concepts of dignity: the dignity of the individual associated with autonomy and negative freedom; the positive dignity of maintaining a particular type of life; and the dignity of recognition of individual and group differences. Each of these forms of dignity expresses different values about the individual and his relationship to society, values that have important consequences when dignity is used as a justification for social policy and constitutional rights.354

Constitutional courts, however, often elide the different conceptions of dignity and fail to identify the conflicts between them. This conflation of concepts no longer works for values we know to be distinct, even if sometimes overlapping, like liberty and equality.355 But dignity as a political and constitutional ideal is a relative newcomer, and so it may still seem possible that dignity can include a little bit of liberty, equality and fraternity, as the circumstances require. Nonetheless, despite the seeming openness of dignity, neither scholars nor constitutional judges have found a unifying understanding of this value—and it is unlikely that they will find one.356

Instead, as the examples demonstrate, courts use different conceptions of dignity to support particular conceptions of what is worthy of regard in the individual. These conceptions of value mirror familiar debates about negative and positive freedom, liberty and equality, and the relationship between the individual and the community—the conflicts do not disappear simply by appealing to “dignity.” While some forms of dignity may coexist or overlap, the demands of different forms of dignity cannot be simultaneously maximized.

But dignity in constitutional law and political life cannot simply be brushed aside. In modern constitutional systems, dignity is already a preeminent value. Even in the United States, it is increasingly a part of our discourse in thinking about individual rights and government action. So it makes sense to think about what conceptions of dignity we want to promote in our political and social community. The type of dignity that a society protects is part of how a community defines itself—how individuals belong to the community and how the state must act to respect human dignity. An appeal to dignity cannot solve conflicts between competing visions of the good life, but it gives us an opportunity to discuss what we value and why.

If different conceptions of dignity are irreconcilable, then perhaps, for the sake of conceptual clarity in constitutional discourse, we should choose a particular conception of dignity. A grand philosophical definition of dignity being unavailable, we can evaluate what dignity means and what it should mean in American constitutional law. I hope that by identifying three different conceptions of dignity, this Article will be a precursor to further work in this direction.

Although more research is necessary, I will offer a few thoughts on this subject. The American constitutional law tradition has primarily emphasized intrinsic human dignity that promotes liberty and autonomy—it is the dignity of the individual demanding a certain freedom and space from government interference. This form of dignity accords with our constitution of negative rights and with an awareness of judicial limitations in articulating and protecting social norms and values of dignity. Moreover, it fits with our liberal, pluralistic society and allows individuals to pursue various conceptions of the good life.

Nonetheless, the Supreme Court has, at times, appealed to other conceptions of dignity—finding that concerns for recognition and relief from subordination and humiliation may also be appropriate and necessary. In some cases, such as Lawrence or Loving, autonomy and recognition point in the same direction. But as the examples of hate speech or affirmative action have demonstrated, the various conceptions of dignity will often diverge. When that happens, the Court cannot simply appeal to dignity, but will have to choose which dignity to protect and advance. While dignity as recognition compels a certain sympathy, it is problematic to protect such dignity at a constitutional level when it conflicts with fundamental individual rights. The subjectivity of recognition dignity pits the personal dignity of persons against each other. American courts are on firmer ground when they protect the rights of individuals against the state.

With the choices placed in greater contrast, it may become apparent that the structure of our Constitution and our long history of protecting individual liberty points in the direction of intrinsic human dignity and the autonomy and liberty that it requires.

### --- XT: Court Already Issued Dignity Based Rulings

#### Not new activism – courts have made similar decisions in the past

Glensy 11. Rex D. Glensy is affiliated with Drexel University Thomas R. Kline School of Law, [“The Right to Dignity”, 3-2-11, Columbia Human Rights Law Review, Forthcoming; Drexel University Earle Mack School of Law Research Paper No. 2011-W-01, Available at SSRN: [https://ssrn.com/abstract=1775144](about:blank), Date Accessed: 6-21-20] RN

U.S. Law

The U.S. Supreme Court has referenced human dignity when tasked with interpreting certain provisions of the Constitution.100 These references have been steady, although not consistent, so that there is a partially developed body of constitutional law in the U.S. that deals with some semblance of the right to dignity. One commentator has identified eight broad categories of constitutional claims where the U.S. Supreme Court has invoked dignity in more than just a random fashion.101 As demonstrated below, it is the Kantian vision of dignity that seemingly animates those justices that find in the concept of human dignity a value that relates to certain constitutional clauses. That is, it is a person’s inherent autonomy, integrity, and right to be respected by the government that motivates references to dignity by the U.S. Supreme Court.

What is eye opening regarding the concept of human dignity as having some sort of constitutional value is the fact that one of the first times that the term appears in a U.S. Supreme Court opinion is in Justice Frank Murphy’s dissent in Korematsu v. U.S.102 Korematsu of course is an infamous case where the Court rejected a challenge by a Japanese-American who claimed that his forcible relocation and detention during WWII on the sole grounds of his ancestry was unconstitutional.103 Justice Murphy rejected the contention that the Court had to defer to what the military thought was necessary because “[t]o give constitutional sanction [to the action of the military] is to adopt one of the cruelest of rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups.”104 Justice Murphy returned to this theme in Yamashita v. Styer,105 a case where the Court denied certiorari to a Japanese general who was challenging his detention by American authorities. In dissenting from the denial of certiorari Justice Murphy again opined that the Court was sanctioning activity that only people who do not share an American belief in the values of “due process and the dignity of the individual” would engage in and that if the U.S. was “ever to develop an orderly international community based upon a recognition of human dignity,” it would be best to hear the case at hand.106

From these two examples it can be seen that Justice Murphy equates the destruction of dignity as the basest of human activities by making reference to the fact that this would be an action deign of the U.S.’s enemies during WWII, a fact with which Justice Murphy must have been well acquainted by the time Korematsu and Yamashita were decided. Interestingly, Justice Murphy makes a secondary point: that the actions of the U.S. would have international repercussions that could cause the U.S.’s global status to be questioned if not diminished. Thus Justice Murphy, although applying the concept of dignity in its purest Kantian meaning, also resorts to using it instrumentally as something that is reputation enhancing for the U.S. In doing so, Justice Murphy seemingly makes the claim that the U.S. Constitution does protect against actions that offend human dignity.

Ever since Justice Murphy’s exposition on the right to dignity under the U.S. Constitution, other cases have provided an opportunity to expand on this reading of certain constitutional provisions. Probably the most important of these is Trop v. Dulles where the Supreme Court declared that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”107 Trop, of course, is more famous as the case that announced the modern Eighth Amendment standard as mandating that a particular punishment must conform with “the evolving standard of decency that mark the progress of a maturing society.”108 Fascinatingly, while courts interpreting the Eighth Amendment have readily quoted the “evolving standard of decency” refrain, they are much more reticent to reiterate what Chief Justice Warren declared as “the basic concept underlying” the amendment. Nevertheless, this concept does appear explicitly every now and then; the most noteworthy example occurred in Hope v. Pelzer where the Court ruled that tying a prisoner to a hitching post in the sun for more than seven hours, feeding him little water, and preventing him from going to the toilet during that time was a violation of the Eighth Amendment.109 The Court noted that the punishment was “antithetical to human dignity” because it was “degrading and dangerous.”110 It focused on the demeaning aspect of the punishment, which included taunting and wanton humiliation inflicted on the prisoner. Thus, the use of “dignity” in Hope reflects the same notion as that offered in the Korematsu dissent: a background principle that mandates a minimum standard of conduct from government officials regardless of the constitutional principle being invoked—that, in the most neo-Kantian sense, people not be treated as objects. 111 Unfortunately, even though this reading seems to enunciate a stable principle, the fact that its reference is comparatively rare partially negates its intrinsic value and calls into question whether there actually is a methodological underpinning to the reliance on the right to dignity. After all, if the Eighth Amendment really is the ultimate embodiment of an inherent right to dignity, then why does the Court refer to this underlying value so rarely and, apparently, so randomly?

A similar question can be asked pertaining to the Fourth Amendment’s prohibition against unreasonable search and seizure seeing that the Court characterized its “overriding function” as being “to protect privacy and dignity against unwarranted intrusion by the State.”112 In the Fourth Amendment context, however, the Court’s explicit resort to the dignity rights of the individual are slightly more frequent. Thus, the Court has readily characterized police behavior as “offensive to human dignity” when it rose to the level of shocking even those of “hardened sensibilities.”113 Similarly, the Court found that “the extent of intrusion upon the individual’s dignitary interests” accounted for an unconstitutional search and seizure when officials forced that individual to undergo surgery to remove a bullet that might have implicated him in a crime.114 What links all of these cases is the fact that dignitary interests were adduced to by the majority opinion when the actions complained of actually invaded the physical body of the individual—indeed, in all cases the actions encompassed forcibly going inside the body of the person. Thus, dignity in this context is paired with physical integrity, which is a step beyond the Fourth Amendment’s privacy interest in that the latter concept generally involves the expectation of seclusion within the confines of a home. In this sense, the dignity interest is used similarly to the Eighth Amendment examples: an alarm bell to signal a standard of conduct so reprehensible as to violate the core precept of what it means to be human.115

Quite a different import to the reference to the right to dignity is found in the Court’s invocation of this concept within the framework of its substantive due process jurisprudence under the Fourteenth Amendment. In this context, the Court equates dignity with the respect owed for the core characteristics of an individual’s personality, and the right to be free from government interference as it pertains to the expression of those characteristics. The most prominent example of this came in Lawrence v. Texas where the court invalidated an antisodomy statute of the basis that it violated individuals’ due process rights.116 The majority opinion, rather than focusing on a possibly narrower ruling by linking the violation to an intrusion on one’s privacy, opted for a broader statement by declaring that the accused statute infringed upon a liberty interest that involved “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” which were key to the protections afforded by the Fourteenth Amendment.117 The Court noted that the criminal penalties to which people running afoul of this law would be subject would result in a sort of “scarlet letter” “with all that imports for the dignity of the person charged.”118 Thus, to the Lawrence Court, dignity was used differently than in the Eighth and Fourth Amendment contexts. Under the liberty rubric identified in Lawrence dignity was called upon as a marker of value granted to individuals on the ground of their status as a human being. In other words, humans command respect for their dignity rights for no reason other than their existence. It seems as if the Court in this instance located the right to dignity outside of the constitutional sphere while at the same time finding clauses, such as the liberty interest of the Fourteenth Amendment, that embody this extra-positive source of law.

This connection was expressed more clearly in Planned Parenthood v. Casey where Justice Stevens noted that “[p]art of the constitutional liberty to choose is the equal dignity to which each of us is entitled.”119 Indeed, abortion-rights cases raise a similar use of dignity to that encountered in Lawrence. In Casey both the plurality opinion and Justice Stevens’ concurrence connected the right to dignity to the right of women to control their own reproductive health. Thus, the Court stated that the choices confronting women faced with the decision to terminate a pregnancy are “central to personal dignity and autonomy,” and the authority to make that decision “is an element of basic human dignity.”120. In Sternberg v. Carhart, the Court struck down a statute criminalizing certain forms of late-term abortions noting “a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty.”121 Interestingly, not only do these opinions hearken to the idea of dignity as respect in the form of governmental non-interference, but they also introduce an element of equal treatment into the mix by coining the phrase “equal liberty.” Thus dignity also encompasses, at least in words, an anti-discrimination component.

### AT: DA Positive Rights Bad – Health care Specific

#### No link – the plan strengthens a different conception of dignity of individual choice based on negative rights

Rao 12 Neomi Rao is a federal judge on the United States Court of Appeals for the District of Columbia Circuit. She was the administrator of the Office of Information and Regulatory Affairs (OIRA), an agency within the White House Office of Management and Budget (OMB), from July 2017 to March 2019. Rao previously worked as an associate professor of law at George Mason University's Antonin Scalia Law School, where she founded the Center for the Study of the Administrative State. ["AMERICAN DIGNITY AND HEALTHCARE REFORM, Harvard Journal of Law and Public Policy, 35(1), 171-184." January 2012, *Harvard Society for Law and Public Policy*, URL: https://search-proquest-com.proxy.lib.umich.edu/docview/922364221?accountid=14667&pq-origsite=summon] kly

II. CONFLICTING DIGNITIES AND HEALTHCARE

The dignity of welfare and the dignity of individual choice often conflict and the legal and political debate over healthcare reform reflects these fundamental differences. As explained above, in the context of welfare rights dignity generally appears on the side of more government programs and responsibilities. In many socialist or quasi-socialist democracies, healthcare is treated as a right and a basic component of the State's protection and promotion of human dignity.43 From this baseline, the polity does not debate whether the State must provide healthcare, but what should be included and to what extent. For example, in England there are debates about whether certain groups, such as the elderly, are being treated with due respect and dignity,44 and in Canada about whether abortion must be included as part of the national health program.45

In America, however, dignity refers primarily to individual rights and agency. Relief from poverty or provision of healthcare may be considered an aspect of dignity, but the scope remains contested and there is no widespread agreement that the government should provide healthcare. Attempts to provide universal coverage have failed,46 and the debate over how to control costs and increase coverage has continued. Most recently, the Patient Protection and Affordable Care Act (also known as "Obamacare") seeks to address these problems by, among other things, mandating that individuals purchase their own health insurance and fining those who fail to do so.47 Lawsuits alleging that the individual mandate exceeds Congress's enumerated powers continue to work their way through the federal courts, with the Supreme Court agreeing to decide the issue.48

That our Constitution creates a federal government of limited and enumerated powers is another part of American exceptionalism. The political branches have limited authority, and, when they overstep, courts can enforce constitutional limits. The basic structure of our government- federalism and separation of powers- is designed to protect individual liberty and promote political accountability.49

Thus, it is possible to bring serious legal challenges to the constitutional authority for enacting a program such as the individual mandate.50 Even if Congress could, under existing Supreme Court precedent, tax and spend to provide universal healthcare or health insurance, Congress might lack the constitutional authority to require everyone to purchase health insurance.51 Not every choice of means will be found necessary and proper to an exercise of Congress's authority to regulate interstate commerce.52 By design, the constitutions of most other western democracies do not have the same type of limits on centralized regulation, and many affirmatively recognize an obligation to provide healthcare.53

Alongside the ongoing constitutional challenges, the political branches continue to debate this issue. The Obama Administration championed broader healthcare coverage through government regulation, but Republicans took control of the House of Representatives in 2010 in part by campaigning against the overreaching of Obamacare and the individual mandate. Republican presidential hopefuls for 2012 have all committed to repealing all or parts of Obamacare. Claims from dignity arise on both sides of the issue. The Obama Adininistration expresses the imperative for government to address the indignity and needs felt by those who lack healthcare. Critics contend that requiring the purchase of healthcare insurance intrudes on the individual dignity that comes from making one's own choices with minimal interference by the State.54

The different understandings of dignity reflect constitutional principies about what government can do, as well as political and cultural disagreements about what the government should do, with respect to healthcare regulation. What type of human dignity do the American people envision? Is it a dignity promoted and supported by the government? Or rather is it an individualistic dignity that leaves people largely free to pursue their ends without government interference? How will the President, Congress, and Supreme Court exercise their authority in enacting and reviewing legislation under constitutional constraints?

Dignity provides one angle on the different values implicated by the debate about government-regulated or government-sponsored healthcare. Invoking dignity does not determine the type of regulation that we should have; rather, it serves as a starting point for a political debate about our fundamental values and the basic relationship between the individual and the state. In America, one important, perhaps even historically predominant, conception of dignity relates to liberal individualism and a society with a minimum of government interference.55 This is not the only conception we have of dignity. Yet the strength of our legal and political commitment to this form of dignity and our willingness to protect this dignity from intrusions by the State is part of what makes us exceptional. Although in America we have a social welfare system, its expansion and growth remain subject to political and constitutional challenges in part because oí our robust understanding of individual liberty and freedom.

Some would have us jettison this aspect of American exceptionalism, or perhaps they would say supplement it, with more government protections. Yet it is a fallacy that government welfare merely supplements individual dignity. Policies such as the individual mandate make a trade-off between dignitiespromoting communitarian and protective dignity while diminishing the dignity of individual choice. The Supreme Court will decide whether this particular trade-off is constitutional, but in the course of debating welfare policy the American people must ultimately determine the balance between these

### AT: DA Positive Rights Bad – Environment Specific

#### Conception of dignity based on individual rights can’t resolve ecological crises

Vorster 10. Nico Vorster is a professor at the School of Ecclesiastical Sciences at Northwestern University, [“THE RELATIONSHIP BETWEEN HUMAN AND NON-HUMAN DIGNITY”, *Scriptura*, 2010, URL: https://scriptura.journals.ac.za/pub/article/download/180/776] RN

The ecological crises which we are currently experiencing are not just ‘ecological’ in nature, nor can they be solved by purely technical means.1 They not only demand an energy revolution, but also a moral and legal one.

Contemporary liberal human rights discourse seems to be inefficient in the face of the ecological threats that we are facing, because it is so formal in structure, so tilted towards individual entitlements, so engrained in modernity that the definitions of human dignity it issues are not adequate to address the global ecological crisis. Rights can, according to the general legal definition only be attributed to subjects of law who are rational beings that can grasp moral law and act as advocates for their interests. Little opportunity is provided for obligations to anything that is not free and rational.

Modern society requires an ethical and legal discourse that directs itself to the whole of creation, rather than only to human society’s dependence on its natural environment or its survival – a discourse that correlates human dignity and ecological justice, human rights and the integrity of nature, and the rights of both present generations and future generations. In order to do this, a conception of dignity is needed that will be able to relate human and non-human dignity. Biblical literature and Christian ethics may be helpful in this endeavour because it poses no either/or choice between caring for people and caring for the earth,2 yet it gives dignity a multi-relational content and is focused on the well-being of the entirety. The aim of this article is to offer a definition of dignity that might help to relate human and non-human dignity to each other.

#### A change in human rights discourse would be required

Vorster 10. Nico Vorster is a professor at the School of Ecclesiastical Sciences at Northwestern University, [“THE RELATIONSHIP BETWEEN HUMAN AND NON-HUMAN DIGNITY”, *Scriptura*, 2010, URL: https://scriptura.journals.ac.za/pub/article/download/180/776] RN

Since the concepts of human and non-human dignity have to correlate with the dignity of the entirety, a change in the hierarchy of human rights discourse is needed. Human autonomy cannot be protected if basic conditions for a dignified life are not provided. These can in turn not be provided if the relational structure within which human beings function is not protected.

Although first generation rights have traditionally enjoyed preference above second and third generation rights, it is logical that certain key second and third generation rights should enjoy precedence above some first generation rights, because urgent needs are more immediate necessities than higher goods. Typical first generation rights – such as the right to free trade, freedom of movement, the freedom to practise a profession of your choice, the freedom to possess private property – might in future be limited in order to protect the environment and natural resources. Such limitations of first generation rights are not only necessary for the environment, but also for economic development as such, because unsustainable economies that damage the environment cannot flourish for long.

A recognition of the rights of future generations is also essential, because a consciousness of our inter-generational responsibilities will awaken a desire to save the world for the countless generations of living beings that may come after us. Theologically speaking, the rights of future generations follow from God’s covenant with us and our descendants. In the eyes of God the Creator we and our descendants are partners in the same covenant. Juridically speaking, future generations are members of our moral community because our social ideal is relevant to them.23

Future generations need to enjoy rights of status and not only rights of recognition, because their existence can be reasonably anticipated. The historical continuous nature of communities and the high probability of the existence of future generations are sufficient grounds for affirming rights and responsibilities. Future generations can be said to have anticipatory and presumptive rights, and every present generation therefore has anticipatory obligations. Responsibilities extend not only in space but in time, in a chain of obligation that is passed from one generation to the other. Obligations to future generations are essentially an obligation to produce a desirable state of affairs and promote good living conditions for future generations. Future generation rights would include the right to life, the right not to suffer excessive debts of past generations and the right not to be subjected to the ecological legacy of pollution and environmental degradation. To protect the rights of future generations’ development needs to be sustainable. Justice demands that economies should be arranged in a way that ensures efficiency and the anticipated participation of future generations. Growth without limits can no longer be defined as healthy economics.

Care for the environment is probably the most profound obligation that present generations have with regard to future generations, because we thereby promote conditions of good living for the community of the future. Such environmental obligations might include the following:

ƒ Preventing pollution and ecological degradation.

ƒ Promoting conservation.

ƒ Ensuring ecologically sustainable development and a sustainable use of natural

resources, while promoting justifiable economic and social development.

ƒ Prohibiting practices such as nuclear proliferation that could jeopardise the

opportunities for future generations to come into being.

ƒ Avoiding ecologically irreversible actions that might endanger future generations or

deprive them irreversibly for the sake of present generations.

The legal recognition of the abovementioned rights is tenable, because they are definable, measurable and enforceable. Obviously these rights will have to be balanced with other rights, and might also be limited at times, as is the case in all human rights jurisprudence.

### AT: DA Federalism

#### Federal death penalty undermines federalism

Czajka, 19 --- graduate of Northwestern University's Medill School of Journalism (Kelley, 7/25/19, “HOW DOES THE FEDERAL DEATH PENALTY WORK? The federal government has announced plans to resume capital punishment. But the order will likely face challenges,” <https://psmag.com/news/how-does-the-federal-death-penalty-work>, accessed on 3/13/2020, JMP)

STATE OPPOSITION TO THE DEATH PENALTY IS STILL ON THE RISE

The order comes at a time when more and more states, with mounting conservative support, are making moves to abolish the death penalty: Most recently, New Hampshire repealed the death penalty in May of 2019, and bipartisan legislators in Wyoming, Montana, and Kentucky all introduced bills to end capital punishment in their states this year.

However, state opposition does not impede the federal government from applying the death penalty to a prisoner from that state.

As it stands, 21 states and Washington, D.C., have outlawed the death penalty, four have a governor-imposed moratorium, and 25 allow the death penalty, according to the Death Penalty Information Center. Although it's only legal by state law in half of the U.S., the federal death penalty applies to all 50 states, D.C., and other U.S. jurisdictions.

IS THE FEDERAL DEATH PENALTY AN OVERSTEP OF STATE POWERS?

States traditionally have the power to define and enforce criminal law, leading to questions about the constitutionality of the federal government's right to exercise capital punishment, especially when so many states oppose it. The federal death penalty was outlawed in the 1972 case Furman v. Georgia, which found that it constituted cruel and unusual punishment and was applied in an inconsistent, discriminatory manner. It was reinstated in the Anti-Drug Abuse Act of 1988 for a short list of crimes, and then lengthened to include 60 offenses in the Federal Death Penalty Act of 1994. This drew criticism from a range of scholars, anti-death penalty advocates, attorneys, and more for overriding state powers.

"Problems unique to the federal death penalty include over-federalization of traditionally state crimes and restricted judicial review," Ruth Friedman, director of the Federal Capital Habeas Project, told CNBC. "These and other concerns, including troubling questions about the new execution protocol, are why there must be additional court review before the federal government can proceed with any execution."

#### Federal government death penalty creates friction with states --- greater threat than trying to inhibit state death penalties

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.257-258, JMP)

Even if congressional abolition were constitutionally permissible, its political prospects appear remote. Congress has the power to reform or abolish its own capital provisions, but there have been no significant initiatives to withdraw the federal death penalty. The federal government— with its small number of death sentences, death row prisoners, and executions— may seem to have more in common with states considering repeal than those actively engaged in executions. Despite these similarities, friction between the federal government and the states regarding the death penalty in recent times has come not from the federal government trying to inhibit states’ use of the death penalty, but rather from the federal government seeking to impose the death penalty for a federal crime committed in an abolitionist jurisdiction, such as the recent capital prosecution of Dzhokhar Tsarnaev in Massachusetts for the 2013 Boston Marathon attack. The Tsarnaev case illustrates the unique federal considerations that support retention: the view that the death penalty might be essential to punish extraordinary crimes such as treason, espionage, military offenses, or terrorism. Experience in Europe and elsewhere demonstrates that these uses of the death penalty tend to be the last to be repealed, representing the final step toward full abolition. Accordingly, Congress is an unlikely candidate to initiate (much less complete) the process of American death penalty abolition.

### AT: DA Backlash

#### Plan is a categorical ruling that doesn’t invite rollback

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. 75) //ILake-JQ

Had the Court issued such an opinion in the mid-1960s, it might have encountered a backlash, just as the Court’s subsequent decision in Furman did. But that backlash would not have been as strong or as effective given the timing. Southern states protesting judicial abolition of the death penalty would have had less traction in the mid- to-late 1960s, coming on the heels of ugly and violent resistance to the Civil Rights Movement. By 1972, the controversy over busing and President Nixon’s successful politicization of criminal justice issues intensified the backlash in ways that likely would have been avoided a half de cade earlier. More importantly, a constitutional abolition that firmly rejected the death penalty as inconsistent with contemporary values would have rendered later attempts to reinstate capital punishment extremely difficult to mount. The more ambiguous Furman decision focusing on procedural and administrative defects contained an obvious invitation to future legislation and therefore litigation; a more decisive, categorical ruling would have contained no such invitation and likely would have stuck.

#### Backlash will be unlikely if the Court rules the death penalty is unconstitutional

* Prior to Furman the Court had not issued any decisions regulating the DP
* Several members of the Court, both past and present, have been publicly critical of the DP
* Politics of DP have shifted
* International support for plan will positively shape public reaction

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)

The final objection to the Court striking down the death penalty is to avoid a similar reaction when it found the death penalty as then applied to be unconstitutional in Furman. The Furman decision - striking down the death penalty - generated an enormous public backlash that unintentionally reinvigorated the death penalty, which had previously been on the decline. 291 The decision mobilized the pro-death penalty movement into a political force for the first time. 292 Within a few months of the decision, pro-death penalty activists campaigned in every state for reinstatement of the death penalty and were joined by police chiefs, state attorney generals, local district attorneys, and assorted politicians. 293 Within two years of the decision, thirty-five states had enacted new capital statutes. 294 The Supreme Court responded to the backlash by reinstating the death penalty four years later. 295

[\*309] Several factors suggest that the current Court would not face a similar backlash should it find the death penalty unconstitutional. First, prior to Furman, the Court had not issued any decisions regulating the death penalty. States had largely unfettered latitude in carrying out the death penalty. Since 1976, the Court has placed important limitations on capital punishment. 296 Therefore, the doctrinal framework is in place for the Court to strike down the death penalty. Furthermore, several members of the Court, both past and present, have been publicly critical of the death penalty 297 and alerted the public to the problems in the administration of the death penalty. Thus, a decision invalidating capital punishment would not be totally unexpected as it had been when the Court issued its holding in Furman.

Second, the politics of the death penalty have substantially changed. During the 1988 presidential campaign, Michael Dukakis' opposition to the death penalty was a major campaign issue. 298 By 2004, the politics of the issue had changed enough that the democratic nominee, John Kerry, was opposed to the death penalty, but his opposition did not make the death penalty a major issue in that campaign. 299 A good example of the reaction the Court may anticipate if it invalidated the death penalty occurred during the 2008 presidential campaign. In the summer of 2008, during the heart of the presidential campaign, the Court issued its decision invalidating the death penalty [\*310] for rape of a child. 300 Although both major presidential candidates disagreed with the decision, neither candidate made the decision an issue in the campaign. 301 The reaction of opponents to the decision was brief and the discussion quickly moved on to other issues. In recent years, even candidates running for office in states that have abolished the death penalty have not made capital punishment a major campaign issue.

Third, the international community is significantly more interconnected than it was at the time of the Furman decision in 1972. The international reaction to a Supreme Court decision striking down the death penalty would likely be well received. Given the fact that most countries in the world have outlawed the death penalty, 302 this decision would enhance the United States' international standing, and the favorable international reaction would likely have a similar downstream effect on American public opinion. Therefore, there is considerably less risk of public outcry today than there was in 1972 should the death penalty be struck down on constitutional grounds.

#### Backlash unlikely this time --- experiment with regulation has failed and international backing will make abolition sustainable

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 the Court were to abolish the death penalty, would abolition stick or would such a decision trigger a backlash comparable to what followed Furman? Several considerations lessen the likelihood of backlash. At the time of Furman, there was minimal doctrinal support for permanent invalidation of the death penalty, and the abruptness of Furman likely contributed to its harsh reception; in contrast, the past forty years have produced numerous death penalty doctrines and decisions that could be invoked in support of constitutional abolition. Relatedly, the post-Furman choice to regulate rather than abolish the death penalty was premised in large part on the potential of regulation to cure some of the manifest pathologies of the practice (including arbitrariness, discrimination, and error). Virtually no one regards the experiment to cure those pathologies a success, and a decision declaring the death penalty unconstitutional would not face the same pressure to simply improve rather than reject the practice. Lastly, the effort to abolish the American death penalty in the 1960s and early 1970s put the United States on a slightly earlier path toward abolition than the rest of the world, and thus the United States was not a wild outlier in its retention when the death penalty was revived in 1976. Today, though, the United States faces increasing criticism and pressure from peer countries for its retention of the death penalty. Hence, a decision abolishing the American death penalty would align the United States with the rest of the developed democratic world and thus provide a firmer foundation for permanent abolition.

#### Little backlash risk – judicial invalidation outweighs slow decline

Steiker, 14 --- Professor, 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)

Overall, then, despite some important similarities, the present moment differs substantially from the time of Furman, and there is considerably less risk that backlash would follow a Court decision invalidating the death [\*221] penalty. 64 Accordingly, given the unattractiveness of the death penalty from a consequentialist perspective, judicial abolition should be welcomed in favor of the slow, seemingly inexorable decline of this unnecessary and costly anachronistic punishment.

### AT: DA Court Capital – Kavanaugh = Swing Vote

#### Kavanaugh’s conservative vote is not locked in—empirics prove he sides with Roberts most of the time

Berenson 19 (Tessa, 6-28-2019, "Inside Brett Kavanaugh's Surprising First Term on the Supreme Court", Time, https://time.com/longform/brett-kavanaugh-supreme-court-first-term/, accessed on 6-6-2020) //DYang

But now that Kavanaugh is on the Court, who he is matters more than ever. The 54-year-old lifetime appointee replaced Justice Anthony Kennedy, who for decades occupied the swing seat on the bench, casting the decisive vote on legalizing same-sex marriage, protecting corporations’ political spending and affirming an individual right to own guns. Those issues and more may hang on what kind of justice Kavanaugh becomes and how he votes.

The process is less predictable than anyone who watched the confirmation battle might suspect. Kavanaugh could veer hard to the right, as Justice Clarence Thomas did after Anita Hill accused him of sexual harassment during his confirmation hearings in 1991. He could settle toward the center, as Kennedy did after the contentious nomination battles over Robert Bork in 1987. Or he could become something more complicated than the most fervent agonistes on either side expect.

As his first term ends, everyone—from Kavanaugh’s oldest friends to his fiercest detractors, from clerks to court-watchers to his eight new colleagues—is scrutinizing the new justice for signs of where he will take the court. A close look at Kavanaugh’s voting this term reveals that he is more reliably conservative than Kennedy, helping push the court right since his confirmation. He has formed an influential alliance with Chief Justice John Roberts, and, to a lesser extent, Justice Samuel Alito, both Bush-era nominees.

But **Kavanaugh has** also **voted with some of the liberal justices as often as he did with the far-right flank during his first term.** He sided with justices Stephen Breyer and Elena Kagan, for example, the same percentage of the time that he did with President Donald Trump’s other appointee, Justice Neil Gorsuch, according to data collected by Adam Feldman, a lawyer who writes the Empirical SCOTUS blog.

**Kavanaugh has already provided the decisive vote in eight 5-4 rulings with a traditional ideological split, including cases related to immigrant detention, the death penalty and sovereign immunity.** In one of the most hotly anticipated cases of the term, he and the other conservatives decided that partisan gerrymandering of legislative districts isn’t reviewable by federal courts. And over the coming years, Kavanaugh will wield enormous power as the new, more conservative court takes up pivotal subjects like environmental regulations, guns and religious liberty.

The wild card in Kavanaugh’s effect on the court, and America, is his own effort to move past the confirmation hearings. Unlike others who have been accused of past sexual abuse in the #metoo era, he has a lifetime appointment to a position of power from which to try, and already he is using his spot on the court to do so. Rather than always sign on anonymously to his colleagues’ rulings, for example, he has issued multiple concurring opinions, laying out his thinking in ways first term justices don’t often do.

For many, nothing he does on or off the court will change the judgment they have already rendered. The confirmation hearings were a torment for Blasey Ford. She says she never wanted to testify, and that her life has been upended by the public airing of the suffering she had carried for years. “Having Brett Kavanaugh on the Supreme Court, with allegations of sexual misconduct still very fresh in the public’s mind, strikes millions of Americans as a dagger through the heart,” says Nan Aron, founder of liberal judicial advocacy group Alliance for Justice.

Outside the court, Kavanaugh’s friends and colleagues are speaking, on-the-record and on background, in hopes of shaping perception on his behalf. “I don’t know if he’ll ever fully get over the confirmation process,” says one friend. Not even those closest to him know how his work as a justice will be affected. Kavanaugh, who has vociferously denied Blasey Ford’s allegations, hasn’t given an on-the-record interview since the hearings, and declined to do so for this story.

Sometime soon, the most charged moral, legal and political issue will land on Kavanaugh’s desk: abortion. And at that point, another reckoning with history will come for him, even if he doesn’t yet know how he will rule.

Kavanaugh’s chambers at the Supreme Court are a work in progress. His bookshelves are a jumble of freshly unpacked volumes and trinkets. Seven months after he was sworn in, Kavanaugh still had unframed reproductions of the paintings he planned to borrow from the Smithsonian taped up on his walls: portraits of Abraham Lincoln, Ulysses S. Grant and former Chief Justice John Marshall. The most prominent decoration, behind Kavanaugh’s desk, is a framed reproduction of a Tom Lea landscape over a quote from the artist about living on “the sunrise side” of the mountain. The original hung in Bush’s Oval Office, when Kavanaugh served as staff secretary.

The office reflects Kavanaugh’s unsettled place on the court. During his 12 years as a judge on the D.C. Circuit, **Kavanaugh developed a reputation for being a conservative judge, but not an entirely dogmatic one.** His writings and opinions displayed a broad reading of the Second Amendment, skepticism about the power of federal regulatory agencies, and a robust view of executive power. This last attribute may have piqued Trump’s interest when he decided to nominate Kavanaugh in the summer of 2018, in the heat of special counsel Robert Mueller’s investigation.

Kavanaugh’s first term on the court presents a more complicated picture of the kind of justice Kavanaugh may become. From one perspective, **he is developing a new center on the court with the Chief Justice. Kavanaugh voted with Roberts more often than any other justice, sticking with the chief 94% of the time**, according to Feldman. These two justices voted with the majority the highest percentage of the time this term, cementing the court’s new conservative middle.

Those who know both Kavanaugh and Roberts aren’t surprised by this emerging judicial partnership. Kavanaugh regularly sent law clerks to Roberts, and the two judges are temperamentally, philosophically and stylistically similar, friends and former clerks say. Kavanaugh may be more academic in his jurisprudential approach, while Roberts tends to be more practical— Kavanaugh has said he’s an originalist, while Roberts doesn’t identify as one. But neither is doctrinaire like the late Justice Antonin Scalia was, philosophically adrift like Kennedy or incrementalist like former Justice Sandra Day O’Connor.

Some on the right see a second possibility, that Kavanaugh’s alignment with Roberts could be a passing phase. Citing Kavanaugh’s testimony following Blasey Ford’s, they hope the confirmation hearings will help drive him further to the right. “Brett Kavanaugh has seen how unforgiving the Left can be,” says Leonard Leo, executive Vice President of the Federalist society and a friend of Kavanaugh’s who advises Trump on judicial nominations. “[He] has experienced, in a way the Chief Justice never really has, that no matter what you try to do to placate or reason with the potential opposition, they will never be satisfied. So Justice Kavanaugh has every incentive to basically do what he wants to do and ignore the Left.”

Leo and his allies predict that Kavanaugh will evolve to be more like Alito, who is ideologically to the right of Roberts, less willing to compromise or inclined toward consensus. There is some data to support this conclusion. According to Feldman, Kavanaugh sided with Alito 91% of the time in his first-term. In a fractured decision on the court’s most political case of the term, about whether the Trump Administration can add a citizenship question to the Census, Kavanaugh, Alito and the other conservatives split from Roberts and the liberal wing.

Kavanaugh also joined conservatives in some key 5-4 cases in his first term. He found that federal courts can’t strike down electoral districts designed to favor certain political parties. He adopted an expansive interpretation of a mandatory immigration detention statute that will allow the Trump administration to arrest and detain immigrants without bond hearings years after they have completed criminal sentences. He also voted with the conservative bloc in ruling that Alabama could execute a Muslim prisoner without the man’s imam present as requested, and to clear the way for the execution of a Missouri man who claimed lethal injection would cause him terrible pain due to a medical condition. Previously, five justices had delayed this same man’s execution, with Kennedy joining the four liberals. Kavanaugh’s vote suggests his presence may strengthen the court’s conservative bent on capital punishment.

But in his first term, Kavanaugh was not simply a strident conservative crusader. He voted with a majority over Thomas and Gorsuch’s dissents to stay the execution of a Buddhist man in Texas who requested his spiritual advisor be present. Squabbling over the decision among the conservative justices burst into public view. Kavanaugh, joined by Roberts, took the rather unusual step of issuing an explanation of his decision. The other three conservatives responded with another statement, written by Alito, accusing Kavanaugh, Roberts and the liberal justices of being “seriously wrong.”

Kavanaugh also granted other wins to liberals, including in a 5-4 case where he ruled that consumers could pursue an antitrust lawsuit against Apple for monopolizing the iPhone app market. He even wrote the majority opinion in that case, an assignment handed down by the senior liberal justice, Ruth Bader Ginsburg. “People made all sorts of wild predictions about him,” says Travis Lenkner, who clerked for Kavanaugh on the D.C. Circuit. “So far, those have not come to pass.”

Few suspect that Kavanaugh will take a third route, to the left of Roberts. But **his occasional alliance with Breyer and Kagan suggest that he may be more moderate than many expect.** What is clear is that the court is still adjusting to its new configuration, with some surprising results. There have been eight traditional 5-4 splits this term, with the five conservatives voting as a bloc. But **there were as many 5-4 decisions with all the liberals plus one conservative in the majority this term as there were cases with all the conservatives voting over the liberal wing.** “They’re trying to discover a new identity,” says Feldman.

#### Kavanaugh could swing as well

**Rubin 19** – Reporter (Jordan S., 7-9-2019, "Kavanaugh, Roberts Hold Death Penalty Power After Bitter Term", Bloomberg Law, https://news.bloomberglaw.com/us-law-week/kavanaugh-roberts-hold-death-penalty-power-after-bitter-term, accessed on 6-6-2020) //DYang

The gloves are off at the U.S. Supreme Court after a bitter death penalty term that could be a sign of things to come, with Chief Justice John Roberts and Justice Brett Kavanaugh now in control of how hard a line the post-Anthony Kennedy court will take in capital cases. With swing vote Kennedy out and Kavanaugh in, a more solidly conservative bloc is taking an austere stance toward death row prisoners’ efforts to halt their executions, while states seek to carry out what they see as long delayed justice. Though capital punishment has been a hot-button issue at the court for years, it was particularly fraught this term, with liberal frustration showing in late-night dissents over what they see as rushes to the execution chamber, and conservatives equally frustrated with what they see as unwarranted delays and misplaced prioritizing of convicts’ pain at the expense of victims. It’s a long-simmering tension on the court that “reached a full-boil” this term, said Dale Baich, a capital litigator at the Arizona federal public defender. Bernard Harcourt, another capital litigator and a Columbia law professor, said that he’s “concerned that these new frictions at the Court may break bad, at the expense of the condemned and their constitutional right to be heard without the taint or shadow of this emerging bitterness.” But **against this bitter backdrop Roberts and Kavanaugh have emerged as the new middle, by occasionally voting for the condemned, or by issuing relatively moderate concurrences.** “For nearly three decades, Justice Kennedy served as a swing vote on the death penalty issues. Now, there seem to be five solid votes to uphold death sentences in almost every case,” said South Texas College of Law Houston professor Josh Blackman. Still, during heated exchanges, **Kavanaugh and Roberts have at times staked out relative moderate positions** in contrast to the harder-line trio of Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch. One of the court’s most controversial rulings of the term was a solid 5-4 split along ideological lines, but Kavanaugh would write a concurrence in a factually similar case later. In February, Alabama death row prisoner Domineque Ray wanted his imam with him in the death chamber, but the state only offered a Christian minister who was on the prison staff. A court divided along ideological lines gave the green light for Ray’s execution without an imam, citing what it said was the last minute nature of the request. Justice Elena Kagan wrote the dissent for the liberal bloc, calling the state’s practice discriminatory and the majority’s move “profoundly wrong.” Ray’s execution sparked condemnation “from the entire political spectrum,” said Robert Dunham, executive director of the Death Penalty Information Center. In a similar case the following month, the high court granted a stay to Buddhist prisoner Patrick Murphy. Thomas and Gorsuch noted at the time that they would have ruled against him. Kavanaugh wrote a concurrence siding with Murphy, but observing that the state of Texas could just deny ministers to people of all faiths. The state later took him up on that offer, changing its practice and barring all faith ministers from the execution chamber. The dispute sparked an unusual set of after-the-fact opinions weeks later, revealing that Roberts, alone among the conservatives, agreed with Kavanaugh’s approach. **Even in the strongest statement by the court that it was taking a hard-line on capital claims, Kavanaugh threw “quite a big bone” in the direction of death row inmates**, said Deborah Denno, a death penalty expert at Fordham Law. In April 1’s 5-4 decision in Bucklew v. Precythe, Gorsuch wrote the opinion against Missouri death row prisoner Russell Bucklew, joined by the conservative wing in full. Bucklew argued the state’s preferred lethal injection execution method will cause a gruesome execution, due to a rare disease that will cause tumors growing in his head, neck and throat to rupture. He wants lethal gas instead. But he can’t show the state’s method “superadds” pain to the death sentence, Gorsuch wrote. Delay tactics were on the majority’s mind there, too, with the conservatives reasoning that condoning the longtime death row inmate’s argument would invite others to play games with litigation to avoid execution. “The people of Missouri, the surviving victims of Mr. Bucklew’s crimes, and others like them deserve better,” Gorsuch wrote. The Bucklew case is “the defining moment for the Supreme Court in terms of cases that arise during death warrants,” Dunham said. He said the “emotional callousness” of the decision was shocking to many. It wasn’t that the court “recognized that executions may unintentionally be painful, it’s that it appeared to accept that executions could be unnecessarily cruel,” he said. But Kavanaugh’s concurrence seemed designed to “soften the blow” of the ruling, Denno said. Kavanaugh wrote to emphasize what he called the court’s “additional holding” that alternative execution methods don’t need to be authorized under current state law. It’s an issue that had been uncertain before Bucklew, he said. It’s a point that “sort of got lost in the shuffle” and is “a pretty big bonus” to capital litigators, Denno said. Still, Kavanaugh and Roberts fell in line with their conservative colleagues not just in cases like Bucklew but in another case later that month that laid bare the liberals’ frustration. Death row prisoner Christopher Price raised a similar claim to Bucklew’s and the five conservatives overturned lower court stays in his favor, saying Price also waited too long to bring his claim. An impassioned dissent from Justice Stephen Breyer for the four liberals called the majority out, leveling charges of arbitrariness and unfairness. Breyer wrote that the majority acted in a way that “calls into question the basic principles of fairness that should underlie our criminal justice system. To proceed in this matter in the middle of the night without giving all Members of the Court the opportunity for discussion tomorrow morning is, I believe, unfortunate.” Breyer’s discussion of the court’s internal procedures in his opinion was an “unorthodox step,” Blackman said. It’s “a signal that the progressive Justices are frustrated, and feel like they have no other choice.” Meanwhile, capital defenders will continue the “recent trend of narrow, focused challenges” to the death penalty, “with an eye to appeal to the Chief Justice or Justice Kavanaugh,” Baich said. Roberts peeled away in other death penalty cases this term as well, including casting a tie-breaking vote for an elderly Alabama prisoner with dementia, and for an intellectually disabled prisoner in Texas. Thomas, Alito, and Gorsuch dissented in both cases.

#### He will vote in favor of the aff and can be the swing vote

Katzen 20 – University of Miami School of Law (Alli, 4-28-2020, University of Miami Law Review, Vol. 74 No. 3, “Why Justice Kavanaugh Should Continue Justice Kennedy’s Death Penalty Legacy—Next Step: Expanding Juvenile Death Penalty Ban”, <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=4607&=&context=umlr&=&sei-redir=1&referer=https%253A%252F%252Fwww.google.com%252Furl%253Fq%253Dhttps%253A%252F%252Frepository.law.miami.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%25253D4607%252526context%25253Dumlr%2526sa%253DD%2526source%253Dhangouts%2526ust%253D1591557309674000%2526usg%253DAFQjCNGzuJ1BqyIJycUNeFvP3_F_jXgZLg#search=%22https%3A%2F%2Frepository.law.miami.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D4607%26context%3Dumlr%22>, accessed 6-6-2020) //DYang

It is difficult to predict whether Justice Kennedy’s successor will continue his legacy of supporting defendants’ rights. Justice Kavanaugh did not encounter any death penalty related cases during his twelve years on the D.C. Circuit Court of Appeals, nor was he confronted with any questions regarding his views on the death penalty during the confirmation process.183 Regardless, many scholars predict that the replacement of Justice Kennedy with “a more doctrinaire law-and-order conservative”184 is not just a setback for death penalty jurisprudence, but rather “a death knell.”185 While Justice Kennedy has been described as a “heterodox jurist,” Justice Kavanaugh is considered “a reliably conservative judge.”186

Yet contrary to what many scholars are predicting,187 the Court’s steady trend away from the constitutionality of the death penalty188 may not be halted by Justice Kavanaugh. Prior to his confirmation to the Supreme Court, Justice Kavanaugh was only involved in one case involving a death row inmate, and it did not involve any Eighth Amendment analysis.189 Therefore, it is necessary to analyze Justice Kavanaugh’s writings and public speeches to produce an informed projection. This Section will provide two reasons why Justice Kavanaugh should find death sentences unconstitutional for offenders under the age of twenty-five, should the issue come before the Court.

First, Justice Kavanaugh’s views on sentencing inform how he may decide death penalty cases. He has expressed the opinion that courts should return to a mandatory sentencing system, particularly because judges naturally “bring their own personal philosophies [and] their personal views on particular issues into the courtroom.”190 Because he has expressed concern about disparities that often result from advisory guidelines, he has consistently pushed for a mandatory sentencing system.191 Although Justice Kavanaugh did not refer specifically to death sentences, the death penalty is applied more disparately than any other sentence, with only eight states using the practice in 2018.192 Because the Supreme Court has already held that mandatory death sentences are unconstitutional, the only solution to this sentencing disparity through implementation of a mandatory system is to make it unconstitutional. If Justice Kavanaugh intends to remain consistent with his jurisprudence on mandatory uniform sentencing guidelines, he would need to either err on the side of eliminating the death penalty, or support making the death penalty mandatory for certain offenses.

Second, Justice Kavanaugh “emphatically” dissented when the majority held that despite the “mandatory thirty-year sentence for any person who carries a machine gun while committing a crime of violence,” the government is not required “to prove that the defendant knew the weapon he was carrying was capable of firing automatically.”193 In other words, the majority ruled that even if the defendant was not aware that the weapon he was carrying was a machine gun, he must receive this mandatory sentence.194 Justice Kavanaugh expressed disturbance with the court’s imposition of “an extra 20 years of mandatory imprisonment based on a fact the defendant did not know.”195 He called this practice “unjust and incompatible with deeply rooted principles of American law.”196

In the same way that it is unjust to imprison a defendant for twenty additional years by “dispensing with mens rea,” it is likewise unjust to sentence offenders under the age of twenty-five to death.197 Discounting mens rea, or the intent to commit an act, is analogous to ignoring the fact that eighteen to twenty-five-year-olds lack the physical ability to properly assess options and make decisions, exacerbated in the presence of peer pressure or negative emotions, which are often factors in adolescent crime.198

Because Justice Kavanaugh stated that “[t]he debate over mens rea is not some philosophical or academic exercise,” as “[i]t has major real-world consequences for criminal defendants,” he should recognize that there should be no debate over sentencing offenders under the age of twenty-five to death—the most severe real-world consequence.199 This is not a simple policy debate—scientists have proven that individuals under the age of twenty-five lack developed brain functions, making them less capable of having the required mens rea, and therefore less culpable. These individuals are not the most culpable offenders, and, therefore, should not be sentenced with the harshest punishment. Justice Kavanaugh similarly concluded that when a defendant lacks mens rea, they have a lessened “moral depravity.”200

#### Kavanaugh is the swing vote in upcoming death penalty cases

**Wheeler 18** – Writer, (Lydia, 11-6-2018, "Supreme Court death penalty case may rest on Kavanaugh vote", TheHill, https://thehill.com/regulation/court-battles/415202-kavanaugh-could-be-key-vote-in-supreme-court-death-penalty-case, accessed on 6-6-2020) //DYang

A majority of the Supreme Court on Tuesday seemed to be sympathetic to the pleas of a Missouri man on death row, who argues the state’s method of lethal injection will cause him needless suffering due to a medical condition. But the court grappled with whether Russell Bucklew should have to suggest a less painful way to die and if the lower court was right in assuming the medical professionals carrying out his execution are qualified. State Solicitor John Sauer argued anyone claiming the state’s method of execution would cause gruesome and brutal pain must offer an alternative under the court’s own ruling in Glossip v. Gross. In the 2015 case, the justices ruled that inmates have to propose a reasonable alternative that would significantly lower their risk of pain to claim successfully that the state’s method of execution would violate the Constitution's ban on cruel and unusual punishment. “Is there any limit to that?” Kavanaugh asked. Sauer said if there is an attempt to deliberately inflict pain for the sake of pain, an alternative method would not be required. He noted that the court has recognized it’s impossible to completely eliminate all risks of pain when it comes to execution. Bucklew suffers from a rare medical disease known as cavernous hemangioma, which causes blood-filled tumors to grow in his head, neck and throat. If the state follows its lethal injection protocol, he says the tumors are likely to rupture, causing him to suffocate on his own blood, according to court documents. The state argues Bucklew has failed to show he is “sure or very likely” to suffer severe pain from Pentobarbital, the state’s lethal injection drug. Justice Sonia Sotomayor, an Obama appointee, wanted to know Bucklew’s current condition, particularly if the tracheostomy tube that was inserted for a tracheotomy surgery is still in place. She asked if the trach moots much of Bucklew’s claim, asking if it will minimize the risk of him choking on his own blood. Bucklew’s attorney, Robert Hochman, said his client still has the trach but there’s no indication of how long it will be in. “I don't think it can moot out the case because if the trach is removed, all of the problems return,” Hochman said, but he could not ascertain whether it would be in place for the execution. "Isn't it your job to find out if it can be removed now?" Sotomayor asked, seemingly perturbed by the lack of information. She stated that the court is hearing a totally different case if Bucklew has a trach. While Bucklew argues he’s not required to provide an alternative method of execution, he has proposed death by nitrogen hypoxia, or lethal gas. State officials, however, say lethal nitrogen is not a reasonable alternative. “Nitrogen hypoxia has never been tried by any state, Sauer said. “At this time, no protocol exists for execution by nitrogen hypoxia. No state has ever tried it.” It was this argument that appeared to resonate with Chief Justice John Roberts, a George W. Bush appointee. He asked Bucklew’s attorney how it can be a reasonable alternative if it's never been used before. “Well, one of the things we see often in the Eighth Amendment cases is the point or allegation that things can go wrong regardless of the method of execution. And it seems to me that if you have a method that no state has ever used, that danger is magnified,” he said. Bucklew, who was convicted of forcibly raping and kidnapping his ex-girlfriend, murdering her boyfriend, and shooting at police in 1996, was scheduled to be put to death on March 20 until the Supreme Court stayed his execution by a 5-4 vote. The chief justice, along with Justices Clarence Thomas, Samuel Alito and Neil Gorsuch, of the court’s conservative wing, said they would have denied his request for a stay. **Since Kavanaugh was not yet on the bench, he could prove to be the deciding vote in the case.**

### AT: DA Progressive Opposition – Court on Balance Good

#### The Supreme Court is on-balance good --- maintains democratic norms

Sherry 15 - the Herman O. Loewenstein professor of law at Vanderbilt University Law School (Suzanna, The New York Times, “The Good the Supreme Court Has Done Far Outweighs the Harm”, 7-6-15, https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-good-the-supreme-court-has-done-far-outweighs-the-harm)//mj

Before you conclude that we would be better off without the Supreme Court, consider what we would lose. Liberals might prefer a world without Citizens United invalidating campaign finance laws, Shelby County invalidating part of the Voting Rights Act or Heller invalidating gun laws – but that would also be a world without Brown, Roe, Obergefell or Loving, which protected interracial marriage. Conservatives, of course, take the opposite positions, but should be similarly concerned about throwing out their preferred outcomes.

The court is the last-chance, back-up opportunity to protect individual rights when legislatures fails to do so.

And (despite what people living in blue states might believe) in the absence of galvanizing Supreme Court decisions, legislatures in red states would not have integrated schools, allowed racial intermarriage, liberalized abortion restrictions or allowed same sex marriage very quickly -- or perhaps ever.

In short, we have to take the bitter with the sweet. And the good the Supreme Court has done far outweighs the harm.

That the court does more good than harm is not mere happenstance, but is built into the structure of our constitutional democracy. Essentially, the court serves as the last-chance, back-up opportunity to protect individual rights when the legislature fails to do so. Because the court is not subject to electoral pressure, it is able to take the long view and rise above what James Madison called the “transient impressions” into which the people might be led by demagogues.

The worst the court is likely to do is to fail in that task, and allow legislative incursions on liberty (as it did in Plessy v. Ferguson, for example). It rarely actually stands in the way of legislative attempts to protect individual rights or enduring values – at least not for very long.

Consider the progress we’ve made in the 60 years or so, and usually you will find that the court took the lead and the country followed. The court led the way in outlawing discrimination and putting a stop to government censorship of ideas. Cases and ideas that were controversial when they were decided are now foundational. It would be unthinkable if the court hadn’t corrected what we now recognize, with hindsight, as serious injustices.

Here’s a thought experiment: Pick the “best” and “worst” cases from the past several terms. Erase them both from the law books. Now look forward some years: Are you more ashamed of our history with or without the two cases? Personally, I’d be more ashamed of the history without the Supreme Court: it would be a country that regulated campaign contributions and guns but discriminated against gays and lesbians. Wouldn’t you?

#### **Roe v. Wade empirically proves that the Supreme Court can be instrumental in bringing about social change**

Schuck 93 - the Simeon E. Baldwin Professor of Law Emeritus at Yale University. His major fields of teaching and research are law and public policy; tort law; immigration, citizenship, and refugee law; groups, diversity, and law; and administrative law (Peter H., The Yale Law Journal, “Public Law Litigation and Social Reform”, May 1993, Vol. 102, No. 7, p. 1777-1778, https://www.jstor.org/stable/pdf/796831.pdf?refreqid=excelsior%3A1dd9b781f1ab41005456ab05845474b3)//mj

Rosenberg's analysis of the Court's first major abortion decision, Roe v. Wade, is far less persuasive. It purports to exemplify a different aspect of his theory of court fatalism-the proposition (consistent with Rosenberg's "Dynamic Court" view) that courts can effectively propel social change if certain conditions are met, especially the existence of widespread public support and of market incentives for the reform. Even here, of course, the public support condition serves to underscore Rosenberg's claim that the Court's reformist role is essentially derivative, reinforcing, and epiphenomenal, not initiatory and causal. His crucial factual claims center on the observation that the number of legal abortions, although flat in the late 1960's, began a steep, steady rise in 1970 (three years before Roe), flattening out again in 1980.70 From this he argues that widespread availability of abortion, as well as liberal reform activity in state legislatures and relative passivity by conservative politicians on the issue, had already made abortion a mainstream social practice by 1973, when Roe was decided. At that time, he says, "there was little political opposition to abortion on the federal level, widespread support for it among relevant professional elites and social activists, large-scale use of it . . ., and growing public support."7' When the Court rendered its decision in Roe, his argument implies, it was sailing comfortably with the wind at its back. Further, since the number of legal abortions increased steadily before and after Roe, Rosenberg argues that the decision had little effect. But Roe did, after all, invalidate forty-six state laws restricting abortion. Rosenberg's explanation is that the laws that Roe struck down had been so massively evaded that their demise had little practical effect. There are several serious difficulties with this argument as a factual matter. As Neal Devins points out, the pre-Roe liberalizations of state abortion laws typically had been quite modest, leaving significant restrictions in place. Thus, Roe immediately produced far-reaching changes in the law. Nor was the pre-Roe liberalization trend as powerful and irreversible as Rosenberg suggests. Indeed, immediately before Roe, reform initiatives in Michigan and North Dakota had failed. In qualitative terms as well, Roe did not simply continue the pre-Roe state of affairs; it appears to have sharply reduced both the maternal death rate from, and the cost of, abortions. To frame Roe's effect another way, it improved the outcomes for even those women who, before the decision, would have successfully evaded the legal restrictions on abortions.

### AT: DA Court Clog

#### Turn – capital cases consume more court resources and overburden the criminal docket

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 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.

### AT: DA Courts – Activism / Legitimacy

#### Ruling that capital punishment violates the 8th Amendment would be consistent with the Amendment's essential purposes and text --- the Constitution is a living document and Framers didn’t contemplate the current errors in administering the death penalty

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)

III. Objections to Abolition

Three major objections are likely to be made to the Supreme Court invalidating the death penalty. The first, and probably strongest, objection will be that the text of the Constitution allows the death penalty to be imposed. 264 As Justice Scalia argues, "it is impossible to hold unconstitutional that which the Constitution explicitly contemplates." 265 In support of his position, Justice Scalia specifically refers to the Fifth Amendment which provides that "no person shall be held to answer for a capital … crime, unless on a presentment or indictment of a Grand Jury," and which also provides that no person shall be "deprived of life … without due process of law." 266 These two provisions in the Constitution, it will be argued, make it clear that the Framers did not intend to prohibit capital punishment when it enacted the Eighth Amendment. In Scalia's view of the Eighth Amendment, it was enacted only to prohibit those punishments that added "terror, pain, or disgrace" to an otherwise permissible capital sentence. 267

There are a couple of major flaws in the argument that the death penalty is constitutional because of the Fifth Amendment. First, the Fifth Amendment does not confer power onto the state. Rather it limits the power of the state by requiring certain procedural safeguards. As Justice Brennan explained, the "amendment does not, after all, declare the right of the Congress to punish capitally shall be inviolable; it merely requires that when and if death is a possible punishment, the defendant shall enjoy certain procedural safeguards, such as indictment [\*305] by grand jury and, of course, due process." 268 Second, those who use the Fifth Amendment to argue that the death penalty is constitutional fail to explain why it should trump the Eighth Amendment. For instance, the double jeopardy provision of the Fifth Amendment seems to contemplate the taking of limbs as punishment: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." 269 Wouldn't the Eighth Amendment prohibit the taking of limbs even though it is contemplated in the Fifth Amendment?

How the Court resolves the issue of whether the text of the Constitution constrains it from abolishing the death penalty will also depend on whether a majority of the Court views the Constitution as a "living document" or whether a majority believes that strict adherence to the text of the Constitution is required. 270 Proponents of a "living constitution" believe that it "evolves, changes over time, and adapts to new circumstances, without being formally amended." 271 They believe that the world has changed in ways that the Framers could not have foreseen and therefore the Constitution cannot be restricted to the world that the Framers faced. 272 On the other hand, those who believe in strict adherence to the text of the Constitution, "originalists," believe that the text of the Constitution should be given the meaning that it bore when it was adopted. 273 According to originalists, the Constitution is supposed to be an embodiment of our most fundamental principles. 274 Public opinion, they say, will change but our basic constitutional principles must remain constant. 275 Otherwise, an originalist would ask, why have a Constitution at all? 276 An originalist believes that if the Constitution changes at all, it should be through the people by way of a constitutional amendment as the Constitution provides. 277

The Supreme Court has confronted the issue of whether the Constitution is an evolving document and a majority of the Supreme [\*306] Court has come down squarely on the "living constitution" side. The Court in N.L.R.B. v. Noel Canning, 278 in deciding the limits to the President's recess appointments power under the Constitution, declared that:

The Founders knew they were writing a document designed to apply to ever-changing circumstances over centuries. After all, a Constitution is 'intended to endure for ages to come' and must adapt itself to a future that can only be 'seen dimly,' if at all. [citation omitted] We therefore think the Framers likely did intend the Clause to apply to a new circumstance that so clearly falls within its essential purposes, where doing so is consistent with the Clause's language. 279

In other decisions, the Court has made clear that it believes that the interpretation of the Constitution should evolve over time. 280 For instance, the text of the Constitution does not address discrimination based on sexual orientation - an uncontemplated issue when the Fourteenth Amendment was enacted - yet the Court has decided that the Constitution protects the right of gays and lesbians to marry. 281

There are other reasons for rejecting the Framers' view of the constitutionality of the death penalty. How the death penalty is administered today is very different from the death penalty that the Framers administered. There is no evidence to suggest that the Framers were aware that mistakes were being made in sentencing defendants to death. Today, we have been made well aware of the flaws in the administration of the death penalty. The Framers were also likely not aware of the arbitrary application of the death penalty. At common law, for instance, all felonies were punishable by death. 282 Today we are well aware that receiving the death penalty is about as arbitrary as being struck by lightning. 283 Furthermore, the Framers did not have to deal with the long delays in carrying out executions that typically [\*307] occur today and the suffering that accompanies these long delays. 284 Finally, the death penalty was a widely acceptable practice around the world when the Constitution was enacted. 285 Presently, a majority of the international community no longer views the death penalty as an acceptable punishment. 286 Therefore, these changing circumstances warrant a different interpretation of the Eighth Amendment from that of the Framers. An interpretation by the Court that the Eighth Amendment now prohibits capital punishment would be consistent with the Amendment's essential purposes and text.

### AT: DA Abortion

#### **Human dignity guarantees right to abortion – international and historic precedent prove**

Dixon and Nussbaum 12 Rosalind Dixon, University of New South Wales (UNSW) - Faculty of Law Professor. Martha C. Nussbaum, University of Chicago - Law School. ["Abortion, Dignity and a Capabilities Approach," Feminist Constitutionalism: Global Perspectives p 64 - 82, 04-16-2012, *Cambridge University Press*, URL: https://ebookcentral-proquest-com.proxy.lib.umich.edu/lib/umichigan/detail.action?docID=862368] kly

In the United States, as Reva Siegel has recently noted, **the** right to abortion **has increasingly been linked** by pivotal justices **to the idea of** individual human dignity.1 This connection between ideas about human dignity and rights of access to abortion also finds support in a broader comparative context.2

For example, in Canada, in her concurring judgment in R v. Morgentaler, 3 Justice Wilson suggested that “**respect for human dignity” was central** to the issue of access to abortion because “**the right to make fundamental personal decisions without interference from the state**” was a key aspect of human dignity, as one of the central values on which the Canadian Charter of Rights and Freedoms 1982 was founded.4 In Germany, in the Abortion I Case,5 the German Federal Constitutional Court (GFCC) held that “**pregnancy belongs to the sphere of intimacy of the woman**, the protection of which is **guaranteed by the Basic Law**”; and further that this sphere of intimacy, and the **right of** self-determination it implied, were “values to be viewed in their relationship to human dignity.”6 In the Abortion II Case,7 the GFCC was even more explicit in recognizing that access to abortion was supported, or indeed probably even required, by “the human dignity of the pregnant woman, her . . . right to life and physical integrity, and her right of personality.”8 In Brazil, in 1999, in the case of a pregnancy involving an anencephalic fetus, the Supreme Court of Brazil placed similar reliance on the idea of human dignity – and the capacity of “gestating pain, anguish, and frustration” in the context of such a pregnancy to cause “violence to human dignity” – as the prime basis for invalidating a prohibition on access to abortion in such circumstances.9 More recently, in Colombia in 2006, in holding that the Colombian Constitution protects certain minimal rights of access to abortion, the Colombian Constitutional Court cited a concern for human dignity as a basis for striking down the criminalization of abortion in three sets of circumstances: where a pregnancy is the result of rape; involves a nonviable fetus; or threatens a woman’s life or health.10 In other countries, such as Australia, the idea of human dignity has also been relied on to support recognition of related reproductive rights claims, such as the **freedom from involuntary sterilization**.11

Likewise at an international level, in recent years, the United Nations Human Rights Committee has held that a concern for human dignity **implies limits on states’ freedom to restrict access to legal abortion** services. Article 7 of the International Covenant on Civil and Political Rights prohibits state conduct that is “cruel and inhuman,” and this, according to the Committee, prohibits states party from any action that infringes “the dignity and the physical and mental integrity of the individual.”12 The Committee has further held that where **carrying a fetus** to term would involve significant **physical or psychological harm to a woman**, restricting access to legal abortion services would directly violate the guarantee of individual dignity and integrity in Article 7. 13 At the same time, the idea of dignity as a constitutional value that supports a right of access to abortion also remains undertheorized in comparative constitutional scholarship. This is particularly so when it comes to the relationship between human dignity and women’s physical and psychological health or integrity. There is a deep body of theoretical writing dating back (in the Western tradition14) at least to the ancient Greek and Roman Stoics, and prominently exemplified in the writings of Immanuel Kant, which supports the idea that respect for human dignity involves seeing a human being as an end and not merely a means. This respect involves a reciprocal willingness, on the part of individuals, to treat others as subjects and not merely as objects, and thus entails the protection of areas of freedom around people so that they can **determine their own destiny in areas of central concern.**15 There have also been numerous attempts, both judicial and scholarly, to connect this idea of dignity to the specific abortion context.

#### **Affirms abortion and spills over – accesses a better internal link to gender equality efforts broadly**

Dixon and Nussbaum 12 Rosalind Dixon, University of New South Wales (UNSW) - Faculty of Law Professor. Martha C. Nussbaum, University of Chicago - Law School. ["Abortion, Dignity and a Capabilities Approach," Feminist Constitutionalism: Global Perspectives p 64 - 82, 04-16-2012, *Cambridge University Press*, URL: https://ebookcentral-proquest-com.proxy.lib.umich.edu/lib/umichigan/detail.action?docID=862368] kly

The CA, as Part I notes, helps show why, as a normative matter, **rights of access to abortion should be** understood in terms that refer to both barriers against **state interference** and **affirmative duties** on the part of the state to provide support. A life with human dignity requires protection of all the Central Capabilities up to a minimum threshold level; but all are conceived as opportunities for choice, and thus none has been secured unless the person has the opportunity to exercise choice in matters of actual functioning. The CA also helps show the close connection between autonomy and health-based reasons for allowing access to abortion**,** in a way that can help highlight the deep normative inconsistency in allowing a woman access abortion on health grounds, while at the same time denying her capacity for rational decision making about her health. Under the CA, practical reason is not merely one capability on the list: it also suffuses and shapes all the others, making their pursuit truly worthy of human dignity. By providing a theoretical vocabulary in which these interrelationships are articulated, the CA thus gives advocates and policy makers a way of articulating these claims that is richer and more precise than that promised by Kantian or narrowly economic approaches.

In the United States in particular, given the nature of ongoing controversies surrounding access to abortion, both of these theoretical insights are likely to be especially valuable. Access to abortion for poor women remains a major issue in many U.S. states in the wake of the 1977 Hyde Amendment, restricting access to abortion under federal Medicaid programs in all but the most extreme circumstances,47 which the Supreme Court in Harris v. McRae upheld as constitutional.48 There have also been increasing challenges in the United States in recent years to legal rights of access to therapeutic abortions, or certain abortion procedures designed to protect women’s health, based on women-protective antiabortion arguments.49 Following Carhart II in which the Supreme Court dismissed a facial challenge to the Partial-Birth Abortion Ban Act of 2003, 50 it is illegal in almost all cases in the United States for medical practitioners to use D&X procedures to perform a late-term abortion. In eight states, there is also legislation that (at least prima facie) prohibits the use of all abortion procedures (including nonintact D&E) postviability, unless they are necessary to save the life of a woman, or justified on very limited health grounds.51 In the earlier stages of pregnancy, at least until recently, there have also been concerted attempts to limit access to RU486 or medical abortion as another medically beneficial abortion option for many women.52

In other countries, however, there are also similar ongoing controversies surrounding access to abortion services. While most countries other than the United States allow legal access to abortion, they also provide at least some form of public funding for abortion. In many countries there continues to be important gaps in the adequacy and universality of such funding.53 As to women-protective, anti-abortion arguments, there has also been a rise in the prevalence of such arguments outside the United States in recent years. Such arguments have been voiced in the context of the Parliamentary Assembly of the Council of Europe deliberations54 and also the United Nations Committee on the Elimination of Discrimination Against Women hearings.55 More recently, such arguments have also been made in domestic courts such as the High Court of New Zealand, in the context of a challenge to the administration and supervision of various exceptions to the general prohibition on abortion under section 183 of the Crimes Act.56

In almost all these contexts, and particularly in the United States, there is also some existing at least quasi-constitutional commitment to recognizing the importance of human dignity, either in a Kantian or baseline sense, in the context of rights of access to abortion, that provides a natural starting point for reproductive rights advocates in seeking to make arguments based on a CA.57 Across a wide variety of contexts, therefore, the CA has the potential to make a difference to existing rights of access to abortion on the ground. This is particularly so if it is used by reproductive rights advocates so as to complement or supplement, rather than wholly replace, existing constitutional discourses – such as those based on gender equality.

The CA draws **a close connection between human dignity and** human equality. The dignity of all human beings (who possess a minimum of agency and sentience) is held to be fundamentally equal.58 The deep equality of human beings does not necessarily mean that they are only treated justly if they are treated alike: it remains to be seen, in each area, what sort of treatment sufficiently acknowledges the fact of human equality. In some areas – voting, religious liberty – it will readily be agreed that the recognition of human equality requires equal treatment: giving some people more votes than others would be offensive to their equal human dignity. In areas like education, it remains controversial whether respect for human equality requires giving equal educational provisions.59 Yet in areas such as housing, it may seem that respect for human equality requires only a threshold of adequacy: adequate, but not similar housing for all. But one thing that is clearly unacceptable is to give a disadvantage or burden to a group within the population that is already marginalized or disadvantaged on other grounds; this insight, which lies behind modern Equal Protection Clause review, is also articulated by the CA.60 This insight will show us why the CA supports a common form of argument for abortion rights based on women’s equality.

In many countries, as a matter of existing constitutional practice, there is also an extremely close link between, on the one hand, constitutional commitments to human dignity, and on the other, constitutional guarantees of equality. Indeed, in countries such as Canada, Germany, and South Africa, perhaps the most important determinant of whether a constitutional guarantee of equality is violated is in fact whether a measure adversely affects individual dignity – in the sense of an individual’s sense of self-worth or enjoyment of respect from others.61 In the United States, there are also arguable emerging traces of such an understanding in the jurisprudence of Justice Kennedy.62 In the specific context of abortion, as Canadian Justice Wilson noted in Morgentaler, there is also a particularly close connection between the struggle for human dignity and gender equality, given that for many women the struggle for reproductive rights advocates is **parallel** to previous struggles by men to “**assert their common humanity and dignity against an overbearing state apparatus**,” such that “the right to reproduce or not to reproduce . . . is properly perceived as an integral part of modern woman’s struggle to assert her dignity and worth as a human being.”

#### Human dignity entails a women’s right to have autonomy over her body

Halliday 16. Samantha Halliday is an Associate Professor of Biolaw at Durham University and used to be a professor of law at the University of Huddersfield and the University of Leeds, [“Protecting Human Dignity: Reframing the Abortion Debate to Respect the Dignity of Choice and Life”, 2016, Contemporary Issues in Law. 13, URL: https://www.researchgate.net/publication/304957348\_Protecting\_Human\_Dignity\_Reframing\_the\_Abortion\_Debate\_to\_Respect\_the\_Dignity\_of\_Choice\_and\_Life Date Accessed: 6/20/20] RN

The tension between the multiple and often competing conceptions of dignity is particularly apparent in the reproductive context where human dignity may require the protection of both the woman’s rights to bodily integrity and self-determination, as well as the protection of foetal life. Although the English courts have not recognised that the foetus has a right to life, or that the pregnant woman has a right to autonomy in respect of choosing an abortion at any stage of the pregnancy,39 a number of superior courts have addressed these rights by reference to human dignity. For example, the Hungarian Constitutional Court found that dignity was engaged in the regulation of abortion, holding: ‘Among the rights to be weighed against the state’s duty to give increased protection to foetal life, the mother’s right to self-determination – as part of the right to human dignity – is the most important one.’40 By contrast, the Bundesverfassungsgericht found that the regulation of abortion impacts upon both the dignity of the pregnant woman and foetal life and was significantly less inclined to prioritise the woman’s right to self-determination as will be considered below.

Emphasising the conceptualisation of dignity as liberty, Joseph Raz wrote ‘Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus respecting people’s dignity includes respecting their autonomy, their right to control their future.’41 This formulation echoes that adopted by Wilson J in R v Morgentaler where she stressed that human dignity underpins the Canadian Charter of Rights and Freedoms42 and that ‘the right to reproduce or not to reproduce … is properly perceived as an integral part of modern woman’s struggle to assert her dignity and worth as a human being.’43 She emphasised that the limitations upon access to abortion imposed by section 251 Criminal Code undermined not only a woman’s autonomy, but also her bodily integrity, that the pregnant woman ‘is truly being treated as a means – a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect?’44 Thus conceived dignity is more broadly defined than autonomy, it encompasses the right to bodily integrity and reflects Immanuel Kant’s second categorical imperative, the principle that persons should not be instrumentalised, that they should be an end in themselves, and not a means to an end.45

#### Defense of dignity doesn’t preclude abortion – frames action on public health

Halliday 16. Samantha Halliday is an Associate Professor of Biolaw at Durham University and used to be a professor of law at the University of Huddersfield and the University of Leeds, [“Protecting Human Dignity: Reframing the Abortion Debate to Respect the Dignity of Choice and Life”, 2016, Contemporary Issues in Law. 13, URL: https://www.researchgate.net/publication/304957348\_Protecting\_Human\_Dignity\_Reframing\_the\_Abortion\_Debate\_to\_Respect\_the\_Dignity\_of\_Choice\_and\_Life Date Accessed: 6/20/20 ] RN

Abortion is a public health issue, it should not be a criminal matter and it is time that we move away from treating it as such. The German solution is not perfect; it is regrettable that the majority of the Bundesverfassungsgericht decided that an abortion based upon the counselling provision must continue to be stigmatised as ‘unlawful’, however the manner in which counselling has been used in order to protect human dignity represents a useful benchmark to which we can look for inspiration. Respect for human dignity requires that the woman’s choice is informed, that she takes account of the foetus in making that choice, and that the state facilitates not only the making of the choice through information, but also ensures that there is a real choice to be made. The choice is not merely to continue the pregnancy or not, her decision will continue to have an impact after birth, for the rest of the woman’s life. Therefore, the context in which that choice will operate must be acknowledged and further support must be provided to women and families, for example by providing subsidised childcare, paid parental leave and more general support for families in the case of those who wish to continue the pregnancy and funded abortion for those who do not. In balancing the woman’s interests with those of the foetus, it would appear fair to require that information be made available about alternatives to abortion, and even that she be asked to wait a few days to consider that information, provided that thereafter she is entitled to have an abortion without the need for two medical professionals to say that her choice can be justified by reference to an indication, and funded by the National Health Service. In sum her dignity requires that her choice, and her ability to make that choice, be both facilitated and respected by the state.

### AT: DA Nuclear Deterrence – Punishment Focus Bad

#### Logic of link is flawed --- nuclear deterrence based on vengeance and punishment backfire and undermine national security

Beres, 20 --- PhD from Princeton (1/28/2020, Louis René Beres, “United States Nuclear Strategy: Deterrence, Escalation and War,” <https://smallwarsjournal.com/jrnl/art/united-states-nuclear-strategy-deterrence-escalation-and-war>, accessed on 5/30/2020, JMP)

Washington should also continue to bear in mind any US nuclear posture's imperative focus on prevention rather than punishment. In absolutely any and all circumstances, using its own available nuclear forces for vengeance rather than deterrence would miss the principal point - which, invariably, must be to optimize US national security. Accordingly, any American nuclear weapons use based on narrowly corrosive notions of revenge, even if only as a residual default option, would be not only purposeless, but also irrational.

### AT: Terrorism Impacts

#### Death penalty undermines cooperation in war on terrorism

Steiker, 14 --- Professor, 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)

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

#### Death penalty undermines counter terrorism cooperation with allies

Bae, Sangmin., 2004, Professor of Political Science at Northeastern Illinois University "When the state no longer kills: International human rights norms and abolition of capital punishment," No Publication, proquest //Kiefer

The United States stands alone among Western industrial democracies in practicing the death penalty, showing that this country has moved in the opposite direction from the general international trend of death penalty prohibition. American allies of long standing, including the members of the European Union, Canada and Australia, have increasingly criticized the U.S. execution practice, with particular emphasis on executing juvenile offenders and the mentally retarded. Despite the declaration of a “war on terrorism” by the United States, a number of European countries have announced that they will not extradite alleged terrorists if the suspects are threatened by a death sentence. In addition, they will not provide specific intelligence information on defendants charged with the death penalty (Blocker 2002; Shenon and Lewis 2002).

### AT: Covid Impacts

#### States are hoarding drugs that can treat Covid patients in order to carry out future executions

Sarat, 4/20/20 --- Professor of Jurisprudence and Political Science, associate dean of the faculty at Amherst College (Austin, “Death Penalty States Won’t Turn Over Scarce COVID-19 Drugs,” <https://slate.com/news-and-politics/2020/04/death-penalty-states-florida-scarce-covid-19-drugs.html>, accessed on 4/22/2020, JMP)

As the COVID-19 pandemic has spread around the world, hospitals across this country and in many other nations have reported serious shortages of sedatives, painkillers, and paralytics needed to treat coronavirus patients. Many states have supplies of these drugs that could be used to alleviate those shortages and treat seriously ill and dying patients. These states, though, have decided shortsightedly and dangerously to maintain these stockpiles for their intended purpose: executions.

Lethal injection drugs—like fentanyl, midazolam, vecuronium bromide, and rocuronium bromide—are urgently needed to help save people seriously ill with COVID-19. And death penalty states with stockpiles of those drugs now have a choice to make: Is it more important to guard those supplies so that in the future they can be used to execute convicted murderers, or should they release them to help save innocent lives? So far, they are choosing to let innocent people fighting the illness today suffer.

Why are execution drugs useful as medication in this pandemic? The most seriously ill need to go on ventilators that require those patients to be kept on sedatives and painkillers. Hospitals use midazolam and fentanyl to sedate those patients and use vercuronium bromide and rocuronium bromide in ventilation and intubation.

So severe is the current emergency drug shortage that earlier this month the Drug Enforcement Administration, which regulates the production and supply of controlled substances, loosened production restrictions and approved more imports of the narcotic medications necessary for patients on ventilators.

Earlier this month, seven leading anesthesiologists, pharmacists, and medical academics took the unusual step of writing an open letter to the corrections departments of all 28 death penalty states asking them to give health care facilities needed medications. They said that drugs currently stockpiled for lethal injection “could be used to save the lives of potentially hundreds of patients suffering from COVID-19 and potentially thousands of patients in other ICU settings.”

Recently enacted laws allowing states to keep secret their death penalty procedures prevent us from knowing how many and which states actually have such stockpiles. However, we do know that 19 death penalty states have execution protocols calling for the use of sedatives and paralytics.

Only three states—Florida, Nevada, and Tennessee—have disclosed that they possess large stockpiles of sedatives and paralytics for executions. And, according to one report, Florida alone has a quantity of rocuronium bromide large enough to intubate “about 100 COVID-19 patients.”

The health care professionals’ appeal has come at a moment of growing doubts about the death penalty’s fairness and reliability, yet citizens of many states still support it and officials in those places are willing, if not eager, to use it.

The coronavirus is also complicating the administration of capital punishment. Death row inmates are contracting the disease and being moved to hospitals outside prisons. In addition, even the Texas Court of Criminal Appeals, long noted for being unsympathetic to death penalty appeals, has stayed three executions citing “the current health crisis and the enormous resources needed to address that emergency.”

Since the middle of March, executions planned in Texas, Tennessee, and Ohio have been put on hold. Those scheduled for May and June, and perhaps longer, are likely to be halted as well.

Yet so far no death penalty state has said it will repurpose lethal injection drugs. They seem reluctant to do so because for many years those drugs have been hard to obtain. Drug shortages often have stopped executions from going forward. As a result, some states turned to nefarious suppliers to obtain lethal drugs, while others brought back previously abandoned methods of execution like the electric chair and the firing squad.

Death penalty supporters now confront a grim irony. The very case that they make as to why the United States still needs capital punishment should make it hard for them to resist calls to relinquish lethal injection drugs.

Many proponents of capital punishment say they favor it precisely because of their commitment to the sanctity of life. As the philosopher and death penalty supporter Ernest van den Haag put it, the sanctity of life is “best safeguarded by executing murderers who had not respected it.”\* And despite evidence to the contrary, supporters still claim that because the death penalty deters murders, “capital punishment does, in fact, save lives.”

Some even have chided the Roman Catholic Church for opposing the death penalty in the name of a “culture of life.” Justice Antonin Scalia, himself a devoted Catholic, strongly disagreed with the church’s view “ ‘that the death penalty can only be imposed to protect rather than avenge’ and therefore is almost always wrong.” Scalia observed that “for the believing Christian, death is no big deal.”

Others argue that capital punishment, in fact, makes valuable contributions to a culture that respects life. As Ann Widdecombe, a former member of the British Parliament, put it, “To ignore the deterrent effect is to condemn innocent people to death and a state that does that is morally responsible for those deaths. Is that really what the pope is advocating?”

If those who embrace capital punishment indeed value life, they should join medical professionals now urging states to quickly provide drugs that hospitals need to treat COVID-19 patients even if it impedes the states’ ability to carry out executions in the future. By Widdecombe’s logic, if they fail to do so, they will bear some responsibility for deaths that otherwise could have been prevented.

The authors of the open letter got it right when they wrote, “At this crucial moment for our country, we must prioritize the needs and lives of patients above ending the lives of prisoners.”

## Politics

### 2ac Kritik of Politics

#### The DA is ethically bankrupt – the negative is no better than Trump because it plays politics with death

Wong, 19 --- senior political adviser to the Bernie Sanders 2020 presidential campaign (7/26/19, Winnie, “The Trump Administration’s Death Penalty Cult; William Barr’s decision amounts to playing politics with death,” <https://www.thenation.com/article/archive/william-barr-death-penalty-trump/>, accessed on 4/12/2020, JMP)

Attorney General William Barr’s decision to reinstate the federal death penalty is a cynical political ploy aimed at energizing President Trump’s base in parts of the country that still believe in the widely discredited policy of state executions.

The United States has the grim distinction of being one of the few countries in the world that still permits the government to kill its own people in the name of justice. America is joined in this regard by China, North Korea, Iran, and Saudi Arabia.

“The government should not be in the business of killing people,” said Sister Helen Prejean, the pioneering Catholic nun who has spent decades fighting against the death penalty. “Capital punishment is a failed, morally bankrupt policy.”

The death penalty is also not effective as a deterrent against crime, according to leading criminal justice experts. A landmark 2009 University of Colorado study found that “the consensus among criminologists is that the death penalty does not add any significant deterrent effect above that of long-term imprisonment.”

Aside from its ineffectiveness as a law enforcement tool, the death penalty is both immoral and inhumane according to many religious leaders, including Pope Francis. In 2015, Pope Francis called for the global abolition of the death penalty, stating that a “just and necessary punishment must never exclude the dimension of hope and the goal of rehabilitation.”

President Trump is a longtime and vocal supporter of capital punishment. The most infamous example is when he called for the execution of five young men charged with rape in the 1989 Central Park jogger case—before they had even been tried. The five were later exonerated, after spending many years in prison. Trump has never apologized.

The modern-day death penalty in the United States is a dark reminder of America’s shameful history of state violence against black and poor and marginalized communities. As a historical matter, the death penalty in the United States should be understood less as a form of judicial punishment and more as a form of state-sanctioned political terrorism. As Jamelle Bouie pointed out earlier this month in The New York Times, the 1893 lynching of Henry Smith, a mentally disabled black teenager, was a community affair. Smith was burned alive in front of 10,000 cheering white people in Paris, Texas.

On the day of the lynching, an estimated 10,000 people crowded along Paris’s main street to witness the killing. Smith was bound to a float and paraded across town in a theatrical performance meant to emphasize his guilt. The audience jeered and chanted, cursed and gave the rebel yell. “Fathers, men of social and business standing, took their children to teach them how to dispose of Negro criminals,” a witness to the event said. “Mothers were there, too, even women whose culture entitles them to be among the social and intellectual leaders of the town.” Around noon, Smith was tortured, doused with kerosene, and lit ablaze, immolated for the crowd’s enjoyment.

Senator Bernie Sanders, the Vermont independent and presidential candidate, reaffirmed his promise to abolish the death penalty: “There’s enough violence in the world,” Sanders said. “The government shouldn’t add to it. When I am president, we will abolish the death penalty.”

The United States once aspired to be the world’s leading human rights champion, a refuge for victims of state violence. Attorney General Barr’s decision to resume federal executions may prove politically popular with Trump’s base in states that continue to kill people in the name of justice. But no amount of political calculus can remove the moral shame of a nation that kills its own people.

### 2ac Elections vs. Soft on Crime Link

#### Trump is already weaponizing the death penalty for political purposes

Sarat, 6/23/2020 --- Professor of Jurisprudence and Political Science at Amherst College (Austin, “William Barr Has Made the Federal Death Penalty a Weapon in Trump’s Campaign Arsenal,” <https://verdict.justia.com/2020/06/23/william-barr-has-made-the-federal-death-penalty-a-weapon-in-trumps-campaign-arsenal>, accessed on 6/23/2020, JMP)

For a President who is a longstanding proponent of capital punishment and is gearing up to run a law-and-order re-election campaign, Attorney General William Barr’s June 15 order to resume federal executions was a gift. As Barr in a statement accompanying the order, “The American people, acting through Congress and Presidents of both political parties, have long instructed that defendants convicted of the most heinous crimes should be subject to a sentence of death.”

Ignoring the federal death penalty’s well-documented problems of inequity, arbitrariness, and racial discrimination, he continued, as if previewing a Trump campaign commercial, “We owe it to the victims of these horrific crimes, and to the families left behind, to carry forward the sentence imposed by our justice system.”

Barr’s decision builds on the federal death penalty’s long history in the United States.

That history began on June 25, 1790, when Thomas Bird became the first person executed by the federal government for committing a “murder on the high seas.” From 1790 to the middle of the 20th century, there were just 340 federal executions, with the most famous being the execution of Julius and Ethel Rosenberg in 1953.

They were put on hold in 1972 when the U.S. Supreme Court found capital punishment to be unconstitutional and reinstated in 1988, as part of the Anti-Drug Abuse Act. At the time, very few federal crimes carried death sentences.

That changed six years later when the Federal Death Penalty Act added many more offenses to that list. There are now more than 60 of them, including crimes like carjacking or aircraft hijacking which cause death, and crimes that may not result in death, like terrorism and large-scale drug trafficking.

Yet the use of the federal death penalty pales by comparison with the situation in some American states.

Today, there are 2,558 people on death row in states that retain capital punishment, but there are just 62 inmates awaiting execution in the federal system. And while Texas alone has executed 567 people since 1988, only three people have been put to death by the federal government, the last one in 2003.

Throughout most of American history, racial disparities were much less apparent at the federal than at the state level. But that situation has changed dramatically, driven in part by the tough-on-crime politics of the last several decades.

A Department of Justice study published in 2000 found significant racial disparities in the department’s own handling of capital charging decisions. It reported that from 1995 to 2000, minority defendants were involved in 80% of the cases federal prosecutors referred to the department for consideration as capital prosecutions. In 72% of the cases approved for prosecution, the defendants were persons of color.

In addition, white defendants were twice as likely as members of racial minorities to be offered a plea deal with life in prison as the punishment.

Another study found a similar pattern in drug kingpin cases. The vast majority of defendants convicted under the 1988 law have been white. However, when the death penalty has been used in those kinds of cases, only 11% of the people convicted were white, while 89% were black or Hispanic.

And racial minorities now comprise 52% of the inmates awaiting execution at the federal penitentiary in Terre Haute, Indiana, a figure only slightly lower than the 55% found on state death rows.

But race is not the only source disparity in the federal system. Geography plays a key role as well in both charging and sentencing decisions.

From 1995 to 2000, 42% of the 183 federal death cases submitted to the Attorney General for review came from just 5 of the 94 federal districts.

Federal death verdicts, like those in the states, are concentrated in the states of the former confederacy. Three of them—Texas, Missouri, and Virginia—account for 40% of the total.

One additional problem is noteworthy: the federal death penalty raises serious issues for proponents of states’ rights and federalism. In cases, like the Boston Marathon Bomber, prosecutions have been carried out in jurisdictions where the death penalty is not authorized under state law.

Recognizing these difficulties, in 2014 President Obama asked the Department of Justice to conduct a comprehensive review of capital punishment in the U.S. As he said at the time, “In the application of the death penalty in this country, we have seen significant problems — racial bias, uneven application of the death penalty, you know, situations in which there were individuals on death row who later on were discovered to have been innocent.”

Ignoring those issues and resuming federal executions is just another way President Trump can distinguish himself from his predecessor. Unquestionably, that decision, and its sequencing of next steps, is deeply political.

It is no coincidence that Barr chose four inmates who had committed particularly grisly crimes for the resumption of the federal death penalty starting on July 13.

One murdered a family of three, including an 8-year-old. Another raped and murdered a 16-year-old girl and killed an 80-year-old woman. The third was sentenced for killing five people in Iowa, including two children, while the fourth was sentenced to death for kidnapping, raping, and strangling a 10-year-old girl who was rollerblading in front of her Kansas home.

Barr’s decision, and these choices, tee up the death penalty as a campaign issue for 2020. In the run up to the executions, the President will surely accuse former Vice President Biden, who now opposes the death penalty, of siding with child killers.

Whatever the outcome of his effort, all Americans have a stake in stopping the federal death penalty. Whether we live in states that have abolished or that retain capital punishment, we should take note: when the federal government puts someone to death, it does so in all of our names.

### 2ac Elections vs Liberal Court Links

#### Trump is already attacking the Court – He’s actively trying to replace justices

Shaw 6/18 - a reporter covering U.S. and European politics (Adam, Fox News, “Trump calls for ‘new justices’ on Supreme Court, as conservatives rage at Roberts”, 6/18/2020, https://www.foxnews.com/politics/trump-justices-supreme-court-conservatives-roberts)//mj

President Trump, in the wake of Thursday's defeat at the Supreme Court in his efforts to repeal the Obama-era Deferred Action for Childhood Arrivals (DACA) program, called for new justices as conservatives took aim at Chief Justice John Roberts for what they called a “pattern” of siding with the liberal wing in key decisions.

“The recent Supreme Court decisions, not only on DACA, Sanctuary Cities, Census, and others, tell you only one thing, we need NEW JUSTICES of the Supreme Court. If the Radical Left Democrats assume power, your Second Amendment, Right to Life, Secure Borders, and ... Religious Liberty, among many other things, are OVER and GONE!” he tweeted.

He went on to promise that he will release a “new list of Conservative Supreme Court Justice nominees, which may include some, or many of those already on the list, by September 1, 2020.”

Trump’s call comes after the court ruled Thursday, in a 5-4 decision penned by Roberts, that his reversal of former President Barack Obama’s executive order –­ that shielded immigrants who came to the country illegally as children from deportation –­ was in violation of the Administrative Procedure Act (APA), which sets out rulemaking procedures for federal agencies.

While Democrats and immigration activists cheered the decision, conservatives fumed at the ruling, accusing the justices of preventing Trump from overturning what they have long seen as an illegal executive order. As the day went on, their ire turned to Roberts -- the Bush appointee who has a history of deciding outcomes favorable to liberals by siding with the liberal bloc.

It was Roberts who, by siding with the liberal wing and reinterpreting an individual mandate as a tax, allowed ObamaCare to be found constitutional in 2012. Last year, he joined with the wing again in shutting down Trump’s efforts to add a citizenship question to the census.

#### Trump is already firing up his voters over DACA and Title VII – both are larger than the plan

Hagen 6/18 - a politics reporter covering Congress, the 2020 campaign and the Supreme Court. Has covered campaigns for the past five years in Washington, and has worked for The Hill, National Journal’s Hotline and Hearst Newspapers D.C. bureau. She was an Arthur F. Burns fellow in 2017(Lisa, U.S. News, “Recent Rulings Suggest Trump Can’t Count on His Court”, 6/18/20, https://www.usnews.com/news/national-news/articles/2020-06-18/recent-rulings-suggest-trump-cant-count-on-his-court)//mj

THE SUPREME COURT handed President Donald Trump two major defeats this week, ruling against him on the Deferred Action for Childhood Arrivals program and LGBTQ workplace rights just five months out from the 2020 presidential election.

Trump was dealt his biggest blow on Thursday over immigration, an issue that has been the centerpiece of his campaign and presidency. The Supreme Court blocked his administration from rescinding a program that shields nearly 700,000 immigrants who were brought to the U.S. illegally as minors from deportation, ruling that the termination violated federal administrative law. And on Monday, the court ruled 6-3 that a federal civil rights law protects people from workplace discrimnation based on their sexual orientation or gender identity, another landmark ruling and one in which the majority opinion was penned by Trump appointee Justice Neil Gorsuch.

The president faces the potential for other judicial setbacks on his priorities as the court's term winds down and issues the remainder of its high-profile rulings. Next week, the Supreme Court could issue its decision on a case revolving around school choice, which Trump has declared the civil rights issues "of the decade and probably beyond." The court will decide whether states can allow public funds to flow to private religious schools.

President Donald Trump tosses a hat into the crowd as he arrives for a 'Make America Great Again' campaign rally at Williamsport Regional Airport, May 20, 2019 in Montoursville, Pennsylvania. Trump is making a trip to the swing state to drum up Republican support on the eve of a special election in Pennsylvania's 12th congressional district, with Republican Fred Keller facing off against Democrat Marc Friedenberg.

In the lead-up to the 2020 election, the Supreme Court was poised to tackle a number of thorny political issues that animate both liberals and conservatives. Republicans have previously been able to mobilize their voters over the high court, especially during the 2016 election when a vacancy created by the death of Justice Antonin Scalia hung in the balance. And Trump appears ready to use the court again to fire up his frustrated base ahead of November.

But after two major victories, Democrats believe they can generate excitement among their own voters – and particularly Latino voters – to help oust Trump. Polls show broad support among voters for DACA protections and providing a path to citizenship for DACA recipients. A growing number of Republican voters, particularly young ones, embrace LGBTQ rights. And as Trump signals that he will try again to end DACA, Democrats warn that they must win the White House in November to permanently save immigrant protections.

"If Donald Trump wins in November, he will end DACA. For every voter who cares about Dreamers, please understand this: the future of Dreamers depends 100% on the outcome of the November election," Democratic National Committee Chairman Tom Perez said on a press call, according to The Los Angeles Times, using a term for DACA recipients that's based on never-passed congressional legislation that would have provided similar protections. "We can't lift our foot off the gas, and we won't."

Trump is ratcheting up the attacks on a court that he's dramatically reshaped since taking office in 2017, filling two vacancies that have cemented a conservative majority on the bench. The president and Senate Republicans have also prided themselves on appointing a large number of judges – many with lifetime appointments – to the federal judiciary. But Chief Justice John Roberts, who was appointed by former President George W. Bush, sided with the court's liberals in both decisions this week, generating backlash from social conservatives frustrated with him and Trump-appointed Gorsuch.

The president blasted the recent decisions as "horrible and politically charged" rulings, citing several cases from the last term, including the Supreme Court's decision to temporarily block adding a citizenship question to the 2020 census.

"The recent Supreme Court decisions, not only on DACA, Sanctuary Cities, Census, and others, tell you only one thing, we need NEW JUSTICES of the Supreme Court. If the Radical Left Democrats assume power, your Second Amendment, Right to Life, Secure Borders, and Religious Liberty, among many other things, are OVER and GONE!" Trump tweeted.

### 2ac Elections vs Take Credit for CJR Link

#### Zero change Trump will pivot to take credit for the plan --- he is all-in on a tough-on-crime election strategy

Swan, 7/1/2020 (Jonathan, author of Sneak Peek, “Scoop: Trump regrets Kushner advice on prison reform,” <https://www.axios.com/trump-kushner-second-thoughts-408d5a33-725d-442a-88e4-d6ab6742c139.html>, accessed on 7/5/2020, JMP)

President Trump has told people in recent days that he regrets following some of son-in-law and senior adviser Jared Kushner's political advice — including supporting criminal justice reform — and will stick closer to his own instincts, three people with direct knowledge of the president's thinking tell Axios.

Behind the scenes: One person who spoke with the president interpreted his thinking this way: "No more of Jared's woke s\*\*\*." Another said Trump has indicated that following Kushner's advice has harmed him politically.

Why it matters: This could be the final straw for federal police reform legislation this year, and it could usher in even more incendiary campaign tactics between now and November.

Details: The sources said the president has resolved to stick to his instincts and jettison any policies that go against them, including ambitious police reform.

Trump dipped his toe into police reform under pressure after a Minneapolis police officer killed George Floyd — with an executive order that activists considered toothless — but he will likely go no further to restrain law enforcement officers, according to senior administration officials.

Trump has made clear he wants to support law enforcement unequivocally, and he won't do anything that could be seen as undercutting police.

Several conservative allies of the president have reached out to him and advised him to reduce Kushner's influence over his re-election campaign.

Yes, but: No adviser to the president has more power over the White House and the campaign than Kushner. And nobody we've spoken to suggested that fundamental dynamic will change. It's always possible that the views Trump expressed recently could just be a passing phase.

In response to this reporting, White House press secretary Kayleigh McEnany said in a statement, "President Trump is very proud of the historic work that he's done to benefit all communities. The First Step Act made historic strides toward rectifying racial disparities in sentencing while his executive order to secure America's streets works with our nation's heroic police officers to ensure we have safe policing and safe communities."

Another senior White House official pushed back against Axios' reporting, saying: "Numerous anonymous sources have attempted to provide separation between Jared and the president. They have failed for the last three and a half years. They are not going to be successful today either."

Between the lines: Trump never really wanted criminal justice reform, according to people who have discussed the subject with him privately. He's told them he only supported it because Kushner asked him to. Though he has repeatedly trumpeted it as a politically useful policy at times.

Trump now says privately it was misguided to pursue this policy, undercutting his instincts, and that he probably won't win any more African American support because of it.

"He truly believes there is a silent majority out there that's going to come out in droves in November," said a source who's talked to the president in recent days.

The president also pays close attention to Fox News' Tucker Carlson. A few weeks ago, in a brutal monologue, Carlson blamed Kushner for giving Trump bad advice.

"In 2016, Donald Trump ran as a law-and-order candidate because he meant it," Carlson said. "And his views remain fundamentally unchanged today. But the president's famously sharp instincts, the ones that won him the presidency almost four years ago, have been since subverted at every level by Jared Kushner."

It hasn't escaped Trump's attention that Carlson has recently been the highest-rated host on cable news. Trump, generally skeptical about polls, views television ratings as a kind of substitute poll, according to a person who's discussed the subject with him.

What's next: In the past 24 hours, Trump has issued a series of tweets that leave no ambiguity about where he is heading in this campaign.

He's tweeted enthusiastically about arresting people who are looting or damaging statues, and he's promised to veto must-pass defense spending legislation if it removes Confederate generals' names from military bases.

In tweets this morning, Trump described "Black Lives Matter" as a "symbol of hate":

"NYC is cutting Police $'s by ONE BILLION DOLLARS, and yet the @NYCMayor is going to paint a big, expensive, yellow Black Lives Matter sign on Fifth Avenue, denigrating this luxury Avenue. This will further antagonize New York's Finest, who LOVE New York & vividly remember the....

"....horrible BLM chant, 'Pigs In A Blanket, Fry 'Em Like Bacon'. Maybe our GREAT Police, who have been neutralized and scorned by a mayor who hates & disrespects them, won't let this symbol of hate be affixed to New York's greatest street. Spend this money fighting crime instead!"

#### Voters won’t believe Trump’s shift to embrace reformism and he’ll just switch right back post plan

Intelligencer 7/2 (Eric Levitz, Intelligencer, “Trump Believes That He Is Losing Because He Hasn’t Been Racist Enough”, 7/2/20, https://nymag.com/intelligencer/2020/07/trump-is-losing-2020-polls-racism-black-lives-matter.html)//mj

Over the past month, Joe Biden has opened up a double-digit lead over Donald Trump in national polls.

That same period witnessed the following milestones in American political life:

• For the first time since the movement’s inception, Black Lives Matter won the support of a large majority of voters — and a slim majority of white ones.

• The percentage of Americans who say that “racial discrimination is a serious problem,” that “police are more likely to use deadly force against Black people,” and that “white people are more likely to get ahead” all hit record highs in various tracking polls.

• For the first time in 55 years of polling the question, Gallup found more support for increasing immigration among the U.S. public than for reducing it.

• A Pew Research survey found that Biden boasts his largest advantage over Trump on two questions: Which candidate voters trust to “effectively handle race relations,” and which one can “bring the country closer together.”

• The Republican government of Mississippi voted to retire the last remaining state flag featuring a Confederate emblem. Five years ago, a white supremacist slaughtering African-American churchgoers at a Bible study wasn’t enough to get the Magnolia State to heed calls for removing a tribute to the slavocracy from its official symbol. In 2020, the murder of George Floyd proved sufficient.

• And Donald Trump concluded that the reason he is losing support to Joe Biden is that he hasn’t been nearly racist enough.

That last bit isn’t mere conjecture. On Wednesday, three Trump confidants told Axios that the president regrets heeding Jared Kushner’s advice to broaden his appeal by embracing milquetoast police and criminal-justice reforms; as one source summarized Trump’s thinking, he wants “no more of Jared’s woke shit.”

This account of Trump’s private reasoning comports with his public actions in recent days. Just this week, the president has:

• Described New York’s plan to paint “Black Lives Matter” down Fifth Avenue as a plot to affix a “symbol of hate” onto the city’s “greatest street.”

• Threatened to end an Obama-era policy that bars local governments from accessing federal housing funds unless they make affirmative efforts to track and reduce racial segregation in their communities. Trump said that he was reviewing this regulation on behalf of the “great Americans who live in the Suburbs,” and lamented that the policy is “not fair to homeowners.”

• Vowed to veto the Defense Authorization Act unless an amendment requiring the renaming of U.S. military bases that presently honor Confederate generals is stripped from the bill. (In announcing this position, Trump made sure to note that the amendment was sponsored by “Elizabeth ‘Pocahontas’ Warren.”)

If one imagines Trump to be a rational political actor, it is difficult to make sense of these actions. According to Axios, Trump soured on Kushner’s calls for triangulation on criminal justice out of concern that indulging such reforms might be “seen as undercutting police” — as though anti-reform cops and Blue Lives Matter bumper-sticker owners were swing constituencies. George Floyd’s death has created plenty of political challenges for Trump. But one thing it absolutely hasn’t done is jeopardize the Republican Party’s grip on single-issue, “unshackle the police” voters.

### Abolition Growing More Popular With Conservatives

#### Support for death penalty abolition is growing among conservatives

The Economist 7/2 (The Economist, “American conservatives are pushing for the repeal of the death penalty”, 7/2/20, https://www.economist.com/united-states/2020/07/04/american-conservatives-are-pushing-for-the-repeal-of-the-death-penalty)//mj

Look more widely, though, and attitudes are turning against the idea of the state killing its prisoners. Younger respondents and independents are less keen on it. Few believe it is an effective deterrent. A poll by Gallup, in late June, found that only 54% of all Americans see its use as moral, the lowest level in two decades since Gallup started asking, and down from 60% last year. Pollsters say a majority of Americans oppose its use once they are reminded of other punishments, such as life in prison without any chance of parole.

Could conservatives, who remain its staunchest supporters, even turn against the death penalty? Hannah Cox, of a national movement founded in 2013 to achieve that, calls Mr Trump’s administration “really remiss” and “out of step with grassroots” on the topic. Her outfit seeks repeal by states and has set up 15 chapters nationally. No longer is it taboo for conservatives to suggest the death penalty should be scrapped: “There’s been a significant shift in culture, attitude,” she says. Whereas a decade ago it was nearly impossible to get state Republicans to back repeal, in the past two years Ms Cox counts ten such bills sponsored by them.

Partly as a result, states increasingly shun its use. Last year only seven of them, mostly in the South, killed a total of 22 prisoners. Just 33 new death sentences were handed down, one of the lowest tallies ever. Last year Republican and Democratic legislators combined in New Hampshire to override their governor’s veto, abolishing the death penalty there. In March Colorado’s governor signed legislation making it the 22nd state to end it. Utah, Nebraska, Wyoming and others have come close. California last year called a moratorium. Many others keep the option, but have not applied it for a decade or more.

Jack Tate, a state senator in Colorado, says his fellow Republicans came to see “a common-sense case, this policy ain’t working”. One strand in the party, he says, are pro-lifers, especially Catholics (their church now opposes its use), who find it inconsistent to favour the death penalty but oppose abortion. Others, especially younger colleagues, warm to a libertarian view, doubting “whether the state should have the power of life and death”, especially when executions don’t provide any “healing” for victims’ families and when, too often, legal mistakes are made.

In overwhelmingly Republican Wyoming a representative, Jared Olsen, last year got a repeal bill passed by the House; it failed only narrowly in the Senate. He argued that capital punishment has become too costly and unequal. Hordes of Republicans lined up to sponsor a new version of his bill, suggesting it will fare well when reintroduced next year. Only wealthy counties pursue capital cases, he points out, because they typically require $1m or more to prosecute. (Just 2% of American counties have been responsible for more than half of all executions since 1976.)

Even in the past couple of months, believes Mr Olsen, opposition to the death penalty has grown. Awareness has spread of its unacceptable “racial application”, because African-Americans nationally are the likeliest to be sentenced and put to death. Recent Black Lives Matter protests have prompted understanding of “huge flaws in the justice system”, he says. As a result, he doubts the summer resumption of federal executions will be popular.

Views on the death penalty may thus be shifting, just as public attitudes swung towards gay marriage and legalisation of marijuana. In Ohio, for example, Republicans look likely to get round to supporting repeal—significant in a state with 141 prisoners on death row. The state’s governor, Mike De Wine, who is Catholic, has already made clear he will not approve any executions. He has hinted that he wants the state house to bring a repeal bill. Mike Hartley, a Republican strategist, calls the moment ripe for change.

Mr Hartley predicts that a test repeal bill will get to Ohio’s state legislature late this year, with the goal of building momentum for a big push next year. A recent convert to the cause himself, he points to growing conservative “distrust in institutions” to explain the shift, along with a better general grasp of racial inequities and, especially, of the gruesome details of how prisoners are killed: “People just realise it’s inhumane as shit.”

### Public Support for Death Penalty Declining

#### Public support for death penalty declining – despite fears over terrorism

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)

I. Declining Public Support

Public support for the death penalty has drastically declined during the last twenty years. According to a Gallup survey, in 1994, 80% of Americans supported the death penalty. 2 In 2014, support for the death penalty was at 60%. 3 There are other strong indicia of the public's declining support for the ultimate punishment. First, the number of individuals sentenced to death by juries and judges has also declined significantly during the past twenty years. In 1994, 311 death sentences were meted out by juries and judges. 4 In 2014, only seventy-three death sentences were imposed. 5 In 2015, forty-nine individuals received death sentences, a 33% decline from the previous year and the fewest since 1973. 6 Even in Texas, the leader among the states in carrying out the death penalty since 1976, far fewer death sentences are being imposed. 7 Juries sentenced forty-eight individuals to death in 1999, but only eleven individuals in 2014 and an astoundingly low total of two individuals in 2015. 8

Second, there has been a steady, nationwide decline in executions in the last twenty years. Executions have fallen from a high of ninety-eight executions in 1999, to thirty-five in 2014, and twenty-eight [\*273] in 2015, the lowest number of executions since 1991. 9 Third, during the last twenty years, Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York have abolished the death penalty and the Governors of four other states have imposed moratoriums. 10 Finally, fewer Americans believe the death penalty to be morally acceptable. Gallup began to measure public sentiment regarding the morality of the death penalty in 2001. The number of Americans who believe the death penalty to be morally acceptable during this time period has gone from a high of 71% in 2006 down to 60% in 2014. 11 Most surprisingly, this decline in public support for the death penalty has occurred despite the public's rising anxiety over terrorism. 12

### Religious Opposition to Death Penalty

#### Most religious groups now oppose capital punishment

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)

iii. Religion

There was a time when practically every organized religious denomination supported capital punishment. 101 That is no longer the case. In fact, most major Christian denominations have announced their opposition to capital punishment. 102 Many non-Christian denominations, such as reform Jews and Unitarian Universalists, have also announced their opposition to capital punishment. 103 The religious denomination that opposes the death penalty most aggressively has been the Catholic Church. The Catholic Church's opposition is based on its belief in the sanctity of human life. 104 Pope John Paul II has stated that all human life deserves respect, "even [the lives] of [\*285] criminals and unjust aggressors." 105 According to the Pope, since human life "from the beginning … involved the 'creative action of God' and remains forever in a special relationship with the Creator, only God is the master of life." 106 Therefore, the government

ought not go to the extreme of executing the offender except in cases of absolute necessity; in other words, when it would not be possible otherwise to defend society. Today, however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent. 107

These religious objections, especially the Catholic Church's work against the death penalty, have likely had an impact on the declining support for the death penalty in the United States. 108

### AT: Courts Don’t Link

#### The plan secures GOP base turnout and put dems on defense

Tucker 95 – associate professor of political science at the University of Melbourne (D.F.B. The Rehnquist Court and Civil Rights, p. 40-41)

The point I have been illustrating is that the backlash generated by an activist Supreme Court is likely to influence the political process of other political actors; indeed, that it is likely to provide an enormous advantage to those politicians who are unscrupulous enough to oppose the Court. We see this in recent presidential contests in the United States for the strategies adopted by the major political parties when conducting election campaigns have been shaped by an on-going debate about liberal values, partly provoked by the activities of the Supreme Court. This phenomenon has been very significant in the South because the Supreme Court was involved as a key institution when the federal government brought segregation to an end. But the Warren-Burger Court’s role as an unwitting agent provocateur for the Republicans, encouraging conservative communities to shift political allegiance away from the Democrats by presenting as a symbol of unpopular liberal principles, has not been confined to the issue of racial justice. The Supreme Court expanded the liberal agenda enormously by bringing down unpopular and controversial rulings relating to police powers, separation of Church and State, speech, and privacy. In a series of decisions, that stretch the legal imagination and ingenuity even of their defenders, it recognized a number of new rights that protected stigmatized groups that had little or no community support (for example, criminals, prisoners, atheists, pornographers, drug users); even more controversially, it acted aggressively to withdraw protection from traditionally protected communities (such as poorly educated rural whites and the religious communities) by refusing to uphold claims to state autonomy (made in the name of the federal agreement originally embodied in the Constitution). The Supreme Court justices acted in the name of liberal values and conditions of the federal division of powers that were widely recognized and accepted. These interventions had the effect of placing progressive leaders in the Democratic Party in a very vulnerable position. Although they knew that they were unable to secure public support for the rights and liberties that the Court had decided to recognize, they felt obligated to defend the agenda the Court had foisted upon them. This was partly because of their own personal values. (How can someone who strongly believes that liberal ideals are worthy easily enter into a campaign to discredit the Court’s imposition of those very values?)

#### Even if partisan attacks against the Court are inevitable, liberal decisions unify the conservative base – we have comparative evidence

Devins 6– Goodrich Professor of Law and Professor of Government, College of William and Mary (Neal, “THE MARYLAND/GEORGETOWN CONSTITUTIONAL LAW SCHMOOZE: SMOKE, NOT FIRE” 65 Md. L. Rev. 197, lexis)

**That** Democrats and **Republicans in Congress see the Court as a rhetorical whipping boy is hardly surprising**. Voters typically see the judiciary as a low salience issue. Consequently, **increasingly ideological lawmakers can** play to their increasingly partisan base **by condemning "activist" judges** (even state judges!). It simply does not matter that lawmakers are not all that upset with the Court. What matters is that lawmakers can speak to issues that resonate with their baseand, in so doing, **call attention to differences between the two parties**. Ironically, lawmakers might pay a price if they were truly upset with the Court. Popular support for judicial independence may be sufficiently strong that the enactment of court-stripping proposals might prompt a political backlash. The true test of this proposition is yet to come. As congressional districts become increasingly polarized and as presidential races turn more and more on the ability of each side to bring out their base, it may be that the conventional wisdom about judicial independence will give way to a new era of winner-takes-all politics. [\*205] In the meantime, the Rehnquist Court will fade from view without testing the willingness of Democrats or Republicans to push through draconian anti-Court measures. By issuing decisions that largely reflect majoritarian norms, the Rehnquist Court did not prompt the true ire of either Democrats or Republicans. For that reason, newspapers, voters, and presidential candidates did not pay much attention to the Chief Justice's cancer diagnosis and, with it, the Court. Put another way: In this era of ideological polarization, **it is inevitable** that lawmakers will launch rhetorical attacks against the courts. That Court decisions reflected majoritarian norms is simply beside the point. But so long as the Court steers a centrist course**,** ongoing attacks against the judiciary, as the title of this piece suggests, should be understood as little more than smoke. For those who fear smoke inhalation, the current wave of incendiary anti-Court rhetoric is cause for concern. Nevertheless, the fires associated with a paradigm shift of Court-Congress relations are not yet upon us.

#### Prefer our link – it’s empirically confirmed –decisions have swung 3 prior elections

Stephenson 99 - professor of government @ Franklin and Marshall College, (Donald Grier, “Campaigns and the Court: The U.S. Supreme Court in Presidential Elections, pg. 233)

In contrast to 1936, it is difficult to comprehend the shape of campaigns or even the candidates of 1968, 1980, and 1984 without the Supreme Court.  Along with national security and economic concerns in each race, social and cultural issues achieved salience.  They were salient not because voters had only recently developed opinions on race discrimination, criminal justice, school prayer, and abortion, but because the Court had thrust these and other issues into the cauldron of national politicsby draping each in constitutional garb.  The Court became a target of opportunity for Republicans, who identified Democrats with liberal rulings of the Warren and Burger Courts.  Simultaenously, Republicans became decidedly the party of social conservatives, with a noticeable Southern tint.  It seemed light-years since 964, when a Democratic Congress was able to pass the Civil Rights Act only with significant Republican support.

#### Republicans will attack the Court’s liberal ruling in order to grandstand for their constituents—that guarantees it’s perceived even if the public doesn’t care about the substance of the decision itself

Devins 6– Goodrich Professor of Law and Professor of Government, College of William and Mary (Neal, “THE MARYLAND/GEORGETOWN CONSTITUTIONAL LAW SCHMOOZE: SMOKE, NOT FIRE” 65 Md. L. Rev. 197, lexis)

[\*200] Against this backdrop, lawmakers understand that there are real costs in pursuing court-curbing proposals. n27 That does not mean, however, that lawmakers do not have reason to bad mouth the judiciary. Indeed, **the growing ideological divide in Congress creates incentives for** both liberals and **conservatives to strengthen their base by engaging in political grandstanding.** Let me explain: Ever since 1980, an ever-growing ideological gap has separated Democrats and Republicans. In the House of Representatives, for example, the most liberal Republican is more conservative than the most conservative Democrat. n28 One outgrowth of this phenomenon is that lawmakers, especially in the House, are not interested in appealing to centrist voters. In particular, with computer-driven redistricting guaranteeing that Democrats will win certain seats and Republicans other seats, the party primary often controls who will win the election. n29 Not surprisingly, lawmakers pay increasing attention to the partisans who vote in the primaries. In an effort to secure their base, Democrats and Republicans are increasingly concerned with "message politics," that is, using the legislative process to make a symbolic statement to voters and other constituents. n30 Lawmakers, moreover, turn more and more to so-called "position taking" legislation. "The electoral requirement [of such measures] is not that [a lawmaker] make pleasing things happen but that he make pleasing judgmental statements." n31 Correspondingly, even if a judicial ruling barely registers with voters **and interest groups, lawmakers may nevertheless firm up their base by taking a position on purported judicial overreaching.**

#### GOP will run against the plan, which provides an intensity and enthusiasm advantage in the election

Tucker 95 – associate professor of political science at the University of Melbourne (D.F.B. The Rehnquist Court and Civil Rights, p. 40)

Even in cases where the Court’s rulings are supported by a majority of the public, politicians threatening to reverse its policies may gain an advantage. If we take the case of abortion as an example, we see that the justices who decided *Roe v. Wade* in 1973 correctly assessed the direction in which public opinion would change. More people in the United States today support the pro-choice position on abortion and only a very small proportion of the electorate (about 20 percent) are keen to see Roe v. Wade reversed. This is one reason why Congress has never confronted the Court over abortion. **Yet conservatives have managed to use the issue to their advantage**. Consider how long abortion has served to agitate religious communities in the United States and speculate how many votes may have been lost by liberal candidates bravely trying to support *Roe* v. *Wade*. The problem they faced is the difference in intensity with which the various contending affects are held by members of the electorate. Pro-life candidates may have annoyed many women but so long as the right to an abortion was assured, not many votes were at risk because the competing candidates were not assessed on this one issue by most of those who were pro-choice. In contrast, the 20 percent of voters who were motivated by religious beliefs cared enough about abortion to change their voting behaviour – they were single issue voters and politicians who tried to accommodate them could gain an advantage.

## Agent Counterplan Answers

### Supreme Court Key – Congress & States Can’t Solve

#### Only the Court can abolish the death penalty --- Congress lacks the constitutional power to accomplish it

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.255-258, JMP)

Consideration of the various possible mechanisms for nationwide abolition reveals that the path to abolition in the United States will be as distinctive, and as distinctively constitutional, as the American choice to regulate capital punishment rather than merely retain or abolish it. Contrary to the abolition of the death penalty achieved by most of our peer countries, American abolition almost certainly will arrive, if it does, by constitutional ruling rather than legislative repeal. In most of the countries in Western Europe, abolition of the death penalty has occurred through legislation. Portugal and the Netherlands initiated abolition of the death penalty for ordinary crimes in the mid- nineteenth century, and the Scandinavian countries followed in the first few de cades of the twentieth. Germany and Italy abolished capital punishment for ordinary crimes in their postwar constitutions after surrendering to the Allied powers in 1945. But the phenomenon called “European abolition” was largely accomplished during the last quarter of the twentieth century, when virtually all of Europe completely abolished the death penalty not only for ordinary crimes like murder, but for all crimes (including military crimes, treason, and terrorism). This abolition was almost always the consequence of legislative action, either through the passage of ordinary legislation or the legislature’s approval of constitutional provisions.

Although the United States has seen a powerful surge of state legislative repeal of the death penalty in recent years, nationwide abolition cannot reasonably be expected through legislative means, either on the state or federal level. At the state level, it is likely that the surge of legislative repeal is not over, as a number of states recently have come extremely close to repealing the death penalty.2 But American federalism cedes primary authority over criminal justice matters to individual states and permits— indeed, celebrates— wide variation among the states, which serve, as Justice Louis Brandeis evocatively suggested, as “laboratories of democracy.”3 And among those laboratories are jurisdictions— such as Texas and Alabama, among others—in which legislative repeal is simply a political nonstarter for the foreseeable future. These states may become increasingly marginalized as legislative repeal gains ground elsewhere; moreover, capital punishment may become increasingly marginalized within these states as fewer counties seek or impose death sentences. But while capital punishment may substantially decrease in scope through a combination of legislative repeal and local restraint, it will not disappear as an American institution anytime soon through unanimous state legislative action.4

Nor is federal legislative action a likely route to nationwide abolition. Although the matter is not settled, the Constitution may well prevent Congress from abolishing capital punishment in the states, even if Congress wanted to do so. In the early 1970s, congressional hearings addressed the constitutionality of potential top- down abolition (as well as a more limited proposal to stay executions), and some scholars opined that such a path might be open to Congress.5 But a series of Supreme Court decisions since then has imposed limits on federal power that make such a course more doubtful today.6 It is unlikely that Congress could use its otherwise broad power to regulate interstate commerce to override states’ choice to retain the death penalty, given the remote connection between the death penalty and commerce and the prerogative of states (protected by the Tenth Amendment) to choose their own criminal justice policies.7 Congress might also be precluded from using its enforcement powers under the Fourteenth Amendment to achieve abolition. Unless the Supreme Court itself were to embrace the view that state capital punishment practices are constitutionally problematic, congressional abolition might not satisfy the Court’s increasingly restrictive test for appropriate Fourteenth Amendment legislation. Perhaps Congress could use its spending power to condition receipt of targeted federal funds on states’ willingness to abandon the death penalty (such as funds for indigent defense), but that type of legislation could only encourage, and not command, state abolition across the board.

Even if congressional abolition were constitutionally permissible, its political prospects appear remote. Congress has the power to reform or abolish its own capital provisions, but there have been no significant initiatives to withdraw the federal death penalty. The federal government— with its small number of death sentences, death row prisoners, and executions— may seem to have more in common with states considering repeal than those actively engaged in executions. Despite these similarities, friction between the federal government and the states regarding the death penalty in recent times has come not from the federal government trying to inhibit states’ use of the death penalty, but rather from the federal government seeking to impose the death penalty for a federal crime committed in an abolitionist jurisdiction, such as the recent capital prosecution of Dzhokhar Tsarnaev in Massachusetts for the 2013 Boston Marathon attack. The Tsarnaev case illustrates the unique federal considerations that support retention: the view that the death penalty might be essential to punish extraordinary crimes such as treason, espionage, military offenses, or terrorism. Experience in Europe and elsewhere demonstrates that these uses of the death penalty tend to be the last to be repealed, representing the final step toward full abolition. Accordingly, Congress is an unlikely candidate to initiate (much less complete) the process of American death penalty abolition.

Consequently, if truly nationwide abolition is to occur in the foreseeable future, it must come by means of a federal constitutional ruling— a “Furman II.” Given the close divide on the Court on this and other contested social issues, much depends on the Court’s changing composition. The death of Justice Antonin Scalia in February of 2016 underscored how crucial the next Supreme Court appointment will be in either maintaining or shifting the current balance on the death penalty. But the consistent movement of justices toward abolition and the creation of a doctrinal “blueprint” for abolition under the Eighth Amendment suggest that the moment may be coming, and coming sooner rather than later. The possibility of an imminent “Furman II” has engendered speculation and debate even among those who would be expected to welcome it, as abolitionist lawyers ponder the tactics of constitutional litigation under conditions of uncertainty.

#### Only judicial action can overcome obstacles presented by federalism

Steiker & Steiker, 19 --- Professors of Law at Harvard and University of Texas respectively (Carol S. & Jordan M., “Chapter 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.403-4, JMP)

More importantly, the U.S. Supreme Court has developed a jurisprudence congenial to the possibility of constitutional abolition. American abolition, if it is to happen, will be accomplished through judicial decision, the only path capable of surmounting the obstacles posed by American federalism.100 Prior decisions construing the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’ focused almost exclusively on the number of states authorizing a challenged practice and the frequency with which a punishment is actually imposed Over the past 15 years, though, the Court has broadened the considerations bearing on ‘evolving standards of decency,’ taking account of professional opinion, polling data, religious views, and world opinion and practice.101 Several members of the Court have questioned the continued constitutional viability of the death penalty, and recent decisions (as well as opinions calling for further constitutional review) provide a workable blueprint for constitutional abolition.102 The prospects for such abolition turn largely on the composition of the Court, which has moved to the right with the retirement of Justice Kennedy, a key architect of the Court’s more capacious jurisprudence.

### Supreme Court Key – Best Protects Minorities

#### The Courts have an obligation to act --- key to prevent mob rule and protect unpopular minorities

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)

Justice Scalia articulated the second objection to the Supreme Court abolishing capital punishment. The death penalty is an issue that should be left to the American people to decide:

The American people have determined that the good to be derived from capital punishment - in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes - outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution. 287

Thus, according to Justice Scalia, individual states should be free to decide whether to retain or abolish capital punishment and they should even have autonomy in carrying it out with almost no interference from the Court.

[\*308] Justice Scalia's argument is flawed in that it is difficult to imagine any issue that needs to be regulated by the Supreme Court more than the death penalty. First, there is the long history of racial discrimination in capital sentencing that continues to this day. 288 Second, capital cases are often extremely emotional and may motivate vengeance-seeking behavior. It is often only the Court that is able to prevent mob rule and ensure a fair process in these emotionally-charged and often racially-tinged cases. Third, the defendants are an extremely unpopular minority who are not able to vindicate their rights through the political process, as the November 2016 vote in California rejecting abolition and supporting the "speeding up" of executions demonstrates. 289 Finally, according to Chief Justice Marshall, the Court has a "virtually unflagging obligation" to exercise the jurisdiction bestowed upon them by Congress and the Constitution. 290 The Eighth Amendment clearly mandates that the Court limit the types of punishment that the state can inflict upon individuals.

### Supreme Court Key – Key to Challenge Public Opinion

#### Supreme Court action is critical to successful abolition --- it must defy public opinion and live up to history's demands to avoid repeating the same mistake it made with slavery

Barry, 17 --- Professor, Quinnipiac University School of Law (Fall 2017, Kevin M., “2016 SYMPOSIUM: THE DEATH PENALTY'S NUMBERED DAYS?: THE LAW OF ABOLITION,” 107 J. Crim. L. & Criminology 521, Nexis Uni via Umich Libraries, JMP)

C. LEADERSHIP FROM THE FRONT

Where abolition has come about in other countries, "it has not been as a result of the majority of the general public demanding it." 41 Indeed, Zimring and Hawkins could not find any "examples of abolition occurring at a time when public opinion supported the measure." 42 When countries abolish the death penalty, it is instead the result of what Zimring and Hawkins call "leadership from the front" - "responsible agents manifesting a willingness to act against public opinion." 43

One obvious reason for the gap between public opinion and the government is perspective: the public views the death penalty from afar, like an amateur astronomer gazing at the moon. 44 From a distance, the death penalty appears as "an important legal threat, abstractly desirable as part of society's permanent bulwark against crime." 45 But government actors - particularly judges - do not share this luxury of distance. Those "closer to the nexus between policy and practice, between "the death penalty' as statute, and killing people as punishment" see the death penalty as it truly is, with all of its imperfections laid bare. 46

The U.S. experience is emblematic of the divide between popular support for the death penalty and political leadership against it. According to an October 2016 Gallup poll, 37% of respondents answered "no" when asked whether they were "in favor of the death penalty for a person convicted of murder." 47 Although this is the highest rate of death penalty opposition in [\*530] forty-five years, 60% answered yes (down 20% from an all-time high of 80% in 1994). 48 On November 8, 2016, voters in California rejected a referendum to abolish the death penalty (53% to 46%), 51.1% of voters voted to hasten the execution process in California, 61% of voters in Nebraska reinstated the death penalty that the state legislature repealed in 2015, and two-thirds of Oklahoma voters passed a referendum that amended their constitution to permit the death penalty. 49

Despite popular (albeit declining) support for the death penalty, various government leaders have taken action to end it. At the state level, legislative leadership has led to repeal of the death penalty in five states over the past decade: New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), and Maryland (2013). 50 In 2015, the Nebraska legislature repealed the death penalty over a gubernatorial veto; voters reinstated the death penalty by referendum in 2016. 51 Executive leadership at the gubernatorial level has completely halted executions in Colorado, Washington, Oregon, and Pennsylvania, and has resulted in the commutation of death sentences in New Jersey, Maryland, Illinois, and several other states. 52 Leadership among district attorneys has likewise resulted in fewer death sentences. 53 And three [\*531] state supreme courts - California (1972), Massachusetts (1980), and Connecticut (2015) - have struck down the death penalty as unconstitutional per se, although voters in California and Massachusetts later abrogated the decisions of their high courts by amending their state constitutions to permit the death penalty. 54

In our federal system, the actions of state legislatures, governors, and state supreme courts can only do so much; to abolish the death penalty, it will take federal action. 55 Congress could pass a law prohibiting the death penalty, but it is unlikely to do so on such a divisive issue. 56 The President could halt federal executions and pardon federal prisoners, but this is similarly unlikely, as is the U.S. Attorney General's refusal to authorize federal prosecutors to seek the death penalty. 57 In any event, these executive [\*532] actions would apply only to people convicted of federal crimes. 58

This leaves the U.S. Supreme Court, the branch whose membership is insulated from public opinion 59 and "whose exercise of moral leadership is supported by a long historical tradition," as the best bet to abolish the death penalty for good. 60 In 2015, the Supreme Court seemed poised to do so. 61 That year, in Glossip v. Gross, four Supreme Court Justices - Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor - dissented from a decision upholding Oklahoma's lethal injection protocol, and the former two Justices stated that it was "highly likely that the death penalty [\*533] violates the Eighth Amendment." 62 Approximately three months later, and shortly before his death, Justice Antonin Scalia told an audience of college students that four of his colleagues on the Court believe that the death penalty is unconstitutional, and that he "wouldn't be surprised" if the Court abolished it. 63 The fate of the death penalty, it appeared, lay in the thoughtful hands of Justice Anthony Kennedy, whose soaring opinions supporting LGBT rights and limiting the class of people eligible to receive the death penalty have "pushed "dignity' closer to the center of American constitutional law and discourse." 64

**\*\*\*start of footnote 59\*\*\***

The experience of state judges illustrates the importance of Supreme Court leadership. When state courts have abolished the death penalty outright or reversed death sentences on a case-by-case basis, "the offending judges have sometimes been removed in retention elections, though veiled hints alone have usually sufficed to secure compliance with popular will. Lacking the institutional wherewithal of the federal courts, state judges must either relent or face ouster." Stephen P. Garvey, Politicizing Who Dies, 101 Yale L.J. 187, 207 (1991); see, e.g., Phyllis Goldfarb, Matters of Strata: Race, Gender, and Class Structures in Capital Cases, 73 Wash. & Lee L. Rev. 1395, 1419-20 (2016) (discussing efforts to defeat elected justices); Ronald J. Tabak, The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s, 14 N.Y.U. Rev. L. & Soc. Change 797, 846 (1986) (discussing "efforts to defeat sitting justices because of their death sentence votes."); Christopher Keating, House, Senate Approve Justice Palmer For Another Term On Supreme Court Bench, Hartford Courant (Mar. 8, 2017), http://www.courant.com/politics/hc-justice-palmer-votes-20170308-story.html (discussing unusually close vote in state senate to confirm the reappointment of Justice Richard N. Palmer, who authored the 2015 decision abolishing Connecticut's death penalty).

**\*\*\*end of footnote 59\*\*\***

But predictions about Justice Kennedy's willingness to join his four colleagues in abolishing the death penalty were premature. It is rumored that Justice Kennedy will soon retire from the bench. 65 Should he do so within the next three years, the populist and pro-death penalty president, Donald Trump, will almost certainly replace Kennedy with a conservative Justice unlikely to support judicial abolition. 66

Notwithstanding this setback for abolition, statistics detailing our moribund death penalty and its numerous flaws, coupled with an Eighth Amendment doctrine rooted in human dignity that largely turns on such statistics, are cause for optimism. 67 While not imminent, judicial abolition is inevitable. In the words of Zimring and Hawkins,

Although both the public mood and the ideology of governments fluctuate dramatically in relatively short periods of time, in the history of the Western world those fluctuations [\*534] occur within a larger continuous movement of developing social and political trends … . The movement for abolition of capital punishment … . arises from "beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century. In this longer-term perspective the transience and marginal significance of current fashion is clear … . We see the Court changed not by personnel or a single event but by a sense of the necessity of living up to history's demands. 68

In short, the Supreme Court's decision to abolish the death penalty will ultimately derive from its understanding that there is a right side of history and from the Court's commitment to being on that side.

II. The Law of Abolition

Having discussed why abolition ultimately depends upon the U.S. Supreme Court's willingness to act against public opinion, this essay now looks back at the history of judicial abolition of the death penalty. The goals of this part are modest and few: to gather, for the first time and all in one place, the opinions of judges who have advocated abolition of the death penalty for over the past half-century, and to suggest, through these opinions, what a Supreme Court decision invalidating the death penalty might look like. 69

A. THE REASONS FOR JUDICIAL ABOLITION

When a majority of the Supreme Court abolishes the death penalty, it will not be going it alone. Members of the judiciary, including several current [\*535] and former Supreme Court Justices, have not been silent on this issue. In all, at least thirty-five federal and state judges have concluded that the death penalty is unconstitutional per se. 70 This is "the law of abolition." Although their opinions span well over a half-century, their reasons for abandoning the death penalty are remarkably similar, and can be summed up as follows:

1. Objective criteria detailing the death penalty's unacceptability to contemporary society, as gleaned from statutory repeals, the rarity of executions and death sentences, and the worldwide trend toward abolition.

2. A determination that the death penalty no longer serves any legitimate penological purpose, as gleaned from several sub-factors:

a. The inherently arbitrary administration of the death penalty;

b. The inherently discriminatory administration of the death penalty;

c. The inherent unreliability of the death penalty;

d. The inherently long delays in imposing the death penalty;

e. The illegitimacy of retribution as a goal of punishment; and

f. The excessive pain involved in the administration of the death penalty - both physically, in terms of execution, and also mentally, in terms of waiting for execution.

3. And, lastly, the recognition that the death penalty violates human dignity. 71

When the Supreme Court again turns to the constitutionality of the death penalty, one can expect many of these factors to weigh heavily in the Court's Eighth Amendment analysis. 72

B. THE HISTORY OF JUDICIAL ABOLITION

The history of judicial abolition begins in 1963, when newly appointed Supreme Court Justice Arthur Goldberg circulated a memo to his fellow Justices, arguing that the death penalty was per se cruel and unusual under the Eighth Amendment. 73 In support of his argument, Justice Goldberg [\*536] pointed to the death penalty's unacceptability to contemporary society, as measured by its abolition among a number of states and "many, if not most, of the civilized nations of the western world"; public opinion polls showing only 42% to 51% support for the death penalty; and the risk of executing innocent people. 74 "Whatever may be said of times past," Goldberg wrote, "the evolving standards of decency that mark the progress of [our] maturing society now condemn as barbaric and inhuman the deliberate institutionalized taking of human life by the state." 75 According to Justice Goldberg, the death penalty also failed to "achieve the permissible ends of punishment." 76 He found "no persuasive evidence that capital punishment uniquely deters capital crime," and he rejected "vengeance" (i.e., retribution) as an unacceptable goal of punishment. 77

A majority of the Court did not share Justice Goldberg's opinion, and that is putting it lightly. As legal historian Stuart Banner has written, Chief Justice Earl Warren "was furious," fearing that publication of the memorandum would encourage defiance of desegregation efforts. 78 Justices Marshall Harlan and Hugo Black were similarly aghast. 79

In an opinion dissenting from a denial of writ of certiorari in the case of Rudolph v. Alabama, Justice Goldberg reframed his original per se attack on the death penalty as a call for consideration of whether the death penalty was unconstitutional as applied to non-homicide crimes. 80 According to Professor Banner, Justice Goldberg's dissent "rang like an alarm clock in the [\*537] offices of civil rights lawyers." 81 Although individual defense lawyers had been raising constitutional challenges to the death penalty in individual cases as early as 1950, by the late 1960's, a network of highly skilled lawyers at the ACLU and the NAACP Legal Defense Fund were consistently raising these challenges in a large number of cases. 82

These arguments were initially met with resistance by courts. For example, in Sims v. Balkcom, the Supreme Court of Georgia had this to say about Goldberg's dissent in Rudolph:

With all due respect to the dissenting Justices [in Rudolph], we would question the judicial right of any American judge to construe the American Constitution contrary to its apparent meaning, the American history of the clause, and its construction by American courts, simply because the numerous nations and States have abandoned capital punishment for rape. 83

But several state supreme court judges answered Justice Goldberg's call. 84

1. Abolition and Revival: 1971-1976

In 1971, in Adams v. State, two Indiana Supreme Court Justices argued in dissenting opinions that the death penalty was cruel and unusual under the state and federal constitutions. 85 Justice Roger DeBruler provided multiple reasons why the death penalty was unacceptable to contemporary society. Like the Goldberg memorandum, he pointed to the abolition of the death penalty in a number of states (including in Indiana, where a repeal bill was vetoed) and throughout the world, as well as polling data suggesting a lack of support for the death penalty. 86 He also offered a litany of other reasons for the death penalty's unacceptability, including the rarity of executions and [\*538] high rate of executive commutations nationwide, the reluctance of juries to sentence people to death, and the reluctance of courts to affirm death sentences. 87 "When the penalty is death, we [state supreme court justices], like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance." 88 Finally, Justice Debruler relied on his own subjective judgment, noting the "extreme" psychological and physical pain endured by those executed as well as the death penalty's unreliability and arbitrariness (disproportionately affecting the poor) as grounds for abolishing it. 89

In a separate dissenting opinion, Justice Dixon Prentice concluded that Indiana had already "abandoned capital punishment"; all that remained was for the court to abolish it. 90

It is ludicrous and inhumane to any longer suspend those under sentence of death in a state of limbo, pending formal abolition … . We are the guardians of the rights of the most lowly among us, and for us to require them to await the miracle of legislative action in their behalf is an unwarranted passing of our responsibility to the Governor's office or to higher judicial authority and is a denial of constitutional rights. 91

Less than one year later, in 1972, in People v. Anderson, California became the first state ever to judicially abolish its death penalty. 92 In a 6-1 decision holding the death penalty unconstitutional under the California Constitution, the Supreme Court of California noted the rarity of executions, the death penalty's brutalizing psychological effects, and its repudiation by a number of states and many nations. 93 The court also noted the death penalty's [\*539] failure to deter crime, given lengthy delays between sentencing and execution and the arbitrariness inherent in the selection of those for death. 94 And like Justice Goldberg, the Anderson court rejected "vengeance or retribution" as "incompatible with the dignity of an enlightened society." 95 According to the Anderson Court, the death penalty "degrades and dehumanizes all who participate in its processes" and is "incompatible with the dignity of man and the judicial process." 96

Several months after the Anderson decision, in Furman v. Georgia, the Supreme Court famously struck down the death penalty as applied, holding that standardless jury sentencing violated the Eighth Amendment. 97 Significantly, Justices Thurgood Marshall and William Brennan went further. In their concurring opinions, they argued that the death penalty was unconstitutional per se, relying on many of the same arguments raised by the Goldberg memorandum, the Indiana Justices, and the majority in Anderson. 98 Specifically, Justices Marshall and Brennan noted the death penalty's rejection by contemporary society; the arbitrariness, unreliability, and mental pain inherent in the administration of the death penalty; and the death penalty's failure to deter or deliver retribution, given the inefficiency and arbitrariness with which it is imposed. 99 According to Justice Marshall, the death penalty was not only arbitrary but also discriminatory, with "the burden of capital punishment falling upon the poor, the ignorant, and the under privileged members of society." 100 And for Justice Brennan, dignity was central: "In comparison to all other punishments today, … the deliberate extinguishment of human life by the State is uniquely degrading to human dignity." 101

The abolitionists' victory was short-lived. Just four years later, in 1976, in Gregg v. Georgia, the Supreme Court explicitly rejected Justice Marshall's and Brennan's position: the death penalty was not per se unconstitutional [\*540] under the Eighth Amendment. 102 Although the Supreme Court has repeated this refrain since 1976, 103 a significant number of federal and state court judges have challenged this assumption. 104

2. Abolition Post-Gregg: 1977-1990

In 1977, in Pierre v. Utah, Justice Richard Maughan of the Utah Supreme Court argued that the death penalty violates substantive due process under the federal and state constitutions because it deprives the "inherent and fundamental right" to life. 105 According to Justice Maughan, the death penalty did not deter, as confirmed by abolition in a number of states with no associated rise in murders. 106 The only compelling purpose that could possibly justify the death penalty, he concluded, would be restoring life. 107 "Were there some way to restore the bereaved and wounded survivors, and the victims, to what was once theirs[,]" he wrote, "there could then be justification for the capital sanction. Sadly, such is not available to us." 108

In 1980, in District Attorney v. Watson, the Supreme Judicial Court of Massachusetts followed California's lead in abolishing the death penalty. 109 In a 6-1 decision holding the death penalty unconstitutional under the Massachusetts Constitution, the court relied on the rarity of executions and the risk of error as evidence of the death penalty's unacceptability, and also [\*541] brought its own judgment to bear on the death penalty. 110 Chief among the court's reasons for abolishing the death penalty were arbitrariness, and racial bias specifically, in the administration of the death penalty. 111 According to the court, "experience has shown that the death penalty will fall discriminatorily upon minorities, particularly blacks." 112 Human dignity, and the physical and mental pain inflicted on the condemned, also played a role in the court's decision:

There is little doubt that life is a fundamental right explicitly or implicitly guaranteed by the Constitution … . The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. 113

In a concurring opinion, Justice Paul Liacos underscored the death penalty's "physical and mental tortures" and its deprivation of human dignity. 114 "The purpose of the cruel or unusual punishment prohibition is to guarantee a measure of human dignity even to the wrongdoers of our society," he wrote. 115 The death penalty was cruel and unusual because it

deemed the prisoner a nullity, less than human and unworthy to live … . My views would not change if stays on death row were made more pleasant, killing techniques less painful, or removal from death row more swift. This is a punishment antithetical to the spiritual freedom that underlies the democratic mind. What dignity can remain for the government that countenances its use? 116

Over the next decade, four more state high court justices - in Tennessee, Wyoming, Washington, and Montana - similarly argued that the death penalty was per se unconstitutional. 117 In 1981, in his concurring opinion in State v. Dicks, Chief Justice Ray Brock of the Tennessee Supreme Court argued in dissent that the death penalty violated the Tennessee Constitution. 118 Relying heavily on the reasoning of the Supreme Judicial Court of Massachusetts in Watson and the Supreme Court of California in Anderson, the Chief Justice argued that the death penalty was unacceptable to contemporary society; served no legitimate purpose; and was "barbarous," [\*542] arbitrary, and unreliable in its administration. 119 Significantly, in reaching this conclusion, the Chief Justice acknowledged that he erred in supporting constitutionality of the death penalty in a concurring opinion just two years earlier: "But, I think it better to confess and correct that error than to perpetuate it." 120

That same year, in Hopkinson v. State, Chief Justice Robert Rose of the Wyoming Supreme Court made nearly identical arguments in an opinion concurring and dissenting in part. 121 The death penalty's unacceptability to contemporary society, lack of penological purpose (including the illegitimacy of retribution as a goal of punishment), and infliction of physical and mental pain featured prominently in the Chief Justice's conclusion that the death penalty violated the Wyoming Constitution. 122 So, too, did the dignity of the condemned:

It frightens me to hear it argued that, since the vilest and most depraved criminal has killed four people, the most civilized and humane response that the state of Wyoming can think of, in discharging its punishment obligations to society, is to kill the killer while pretending that the act of state murder is not offensive to her people's sense of decency.

I wonder how many capital victims would, if they could, tell us that the murders perpetrated upon them were not cruel - were not unusual - and therefore (within the ambit of these constitutional proscriptions) society could, so far as they were concerned, proceed to murder murderers. 123

In 1984, in his concurring opinion in State v. Rupe, Justice James Dolliver of the Washington Supreme Court cited Anderson in support of his conclusion that the death penalty violated the Washington Constitution. 124 [\*543] Responding to the majority's charge of judicial activism, 125 Justice Dolliver stated that he was not substituting his moral judgments for those of the people of Washington; rather, he was deferring to those moral judgments as contained in the state constitution:

If the meaning and application of our Bill of Rights, and the judgments contained therein, were fully revealed, there would be no need for this court to sit on cases involving our Bill of Rights as the popular will would always be manifest. Unfortunately, the constitutional language defies this easy escape for the judiciary. Thus, rather than decline to articulate the meaning of the constitution and its application, it is the duty of this court to express its understanding of the moral judgments rendered by the people in their constitution. 126

And in 1990, one year before his retirement, Justice John Sheehy of the Montana Supreme Court dissented in State v. Kills on Top, arguing that the death penalty was unconstitutional per se under the Montana Constitution. 127 Relying on Justice Brennan's concurrence in Furman, Justice Sheehy supported his argument by pointing to the death penalty's unacceptability to contemporary society - particularly given Montana's lack of executions for over forty years with "no more than slight public reaction" - and the arbitrariness inherent in its administration. 128 Like Chief Justice Brock of the Tennessee Supreme Court, Justice Sheehy came to the conclusion that the death penalty was unconstitutional after supporting its constitutionality for some time. 129 Furthermore, like Justice Dolliver of the Washington Supreme Court, Justice Sheehy understood his decision to be motivated not by his personal moral views but rather by his interpretation of the state constitution:

For a long time I have had the moral conviction that exacting the penalty of death in criminal cases was improper. I have come to the legal conviction that the death penalty is indeed cruel and unusual punishment and so prohibited by the Eighth Amendment to the United States Constitution. 130

3. North, South, and the Federal Courts: 1994-2015

The state with the most prolific, and also the most recent, history of [\*544] judicial opinions declaring the death penalty unconstitutional per se is Connecticut. From 1994 to 2015, a total of seven Connecticut Supreme Court justices concluded that the death penalty violated the Connecticut Constitution. 131

In 1994, in State v. Ross, Justice Robert Berdon concluded that the death penalty was unconstitutional under the Connecticut Constitution based on arguments raised in Anderson and Watson, namely its unacceptability to contemporary society, lack of a legitimate penological purpose, unreliability, arbitrary and racially discriminatory application, and barbarity - particularly given long delays between sentencing and execution. 132 Citing Justice Brennan's concurring opinion in Furman, Justice Berdon concluded that the death penalty was "a denial of a person's basic humanity … . To burn human flesh to death by electrocution, or snuff out life through lethal injection, is not less inhumane because it is done in the name of justice." 133 Justice Berdon reiterated a number of these arguments - particularly his argument that the death penalty was racially discriminatory - in a series of subsequent dissenting opinions. 134 "When a capital defendant marshals a compelling argument that the death penalty as it is administered in our state is incurably racist," he wrote in State v. Cobb, "we should stop dead in our tracks until we have given the argument our most serious attention." 135

In 2000, in her dissenting opinion in State v. Webb, Justice Joette Katz similarly concluded that the death penalty violated the Connecticut Constitution. 136 Like those justices before her, Justice Katz regarded judicial abolition of the death penalty not as an affront to the separation of powers, but rather of a piece with it:

[Judges] have a duty, as the final arbiters of the state constitution, to determine whether the punishment of death meets contemporary and moral standards of decency. If a penalty exceeds those bounds, as I believe the death penalty does, we have a [\*545] constitutional obligation to declare it unconstitutional, just as we would if the legislature provided for punishment by the rack, the screw or the wheel.

… Whether carried out by impalement or electrocution, crucifixion or the gas chamber, firing squad or hanging, lethal injection or some other method yet to be designed, the very quintessence of capital punishment is cruelty. 137

In a subsequent dissent in a different death penalty case, Justice Katz pointed to arbitrariness and racial discrimination as additional reasons for opposing the death penalty per se. 138 "Even under the most sophisticated death penalty statutes, race continues to play a major role. We have not eliminated the biases and prejudices that infect society generally … ." 139

In contrast to the slow but steady drumbeat of state supreme court opinions opposing the death penalty post-Gregg, the federal judiciary was largely silent, save for the repeated dissents of Justices Brennan and Marshall. 140 This changed in 1994, when Justice Harry Blackmun, who had voted to uphold the death penalty in Gregg, uttered his now famous words in an opinion dissenting from a denial of certiorari in Callins v. Collins: "From this day forward, I no longer shall tinker with the machinery of death." 141 Arbitrariness, discrimination, and unreliability, he reasoned, were inescapable parts of that machinery; indeed, twenty years' worth of effort to remedy them had proven futile. 142 The death penalty - the "killing [of] human beings" - Justice Blackmun concluded, "cannot be administered in accord with our Constitution." 143

In 2002, federal district court Judge Jed Rakoff held that, given "the unacceptably high rate at which innocent persons are convicted of capital crimes" and the "prolonged delays before such errors are detected," the [\*546] federal death penalty statute violated due process by depriving innocent people of the right to prove their innocence. 144 Although Judge Rakoff's decision stopped short of holding the death penalty unconstitutional per se, this was the effect of his decision, for no criminal justice scheme is infallible. 145 Not surprisingly, the Second Circuit reversed the decision, holding that "there is no fundamental right to a continued opportunity for exoneration throughout the course of one's natural life." 146

In 2008, Justice John Paul Stevens who, like Justice Blackmun, had voted to uphold the death penalty in Gregg, registered his opposition to the death penalty. 147 Relying on over thirty years of "almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty," Justice Stevens concluded that the death penalty was "patently excessive and cruel and unusual punishment violative of the Eighth Amendment." 148 The death penalty served no penological purpose, he argued, and was plagued by arbitrariness and an "unacceptable" risk of racial discrimination and error. 149

On the heels of Justice Stevens's opinion in Baze v. Rees, Mississippi Supreme Court Justice Oliver E. Diaz, Jr., joined by Justice James E. Graves, Jr., argued that the death penalty violated the federal and state constitutions. 150 "I am convinced that the progress of our maturing society," Justice Diaz stated, "is pointed toward a day when our nation and state recognize that, even as murderers commit the most cruel and unusual crime, so too do executioners render cruel and unusual punishment … . I would [\*547] make today that day." 151

In reaching this conclusion, Justice Diaz traced the death penalty's familiar litany of failings, namely: "inherent" arbitrariness; "wholly inadequate" indigent defense; "the specter of racially motivated executions," particularly given that African Americans comprise more than half of Mississippi's death row but constitute only one-third of Mississippi's population; unreliability, with exonerations "leaving little room for doubt that innocent men, at unknown and terrible moments in our history, have gone unexonerated and been sent baselessly to their deaths"; objective indicia of unacceptability, both statewide and nationally; and a lack of penological purpose, with deterrence unproven and retribution illegitimate. 152

In 2012, in State v. Santiago (Santiago I), Connecticut Supreme Court Justice Lubbie Harper, Jr. added his opposition to the death penalty under the Connecticut Constitution, focusing on the themes of unacceptability; a lack of legitimate penological purpose, particularly given "the anguish attendant to capital punishment's performance of its irrevocable function"; and arbitrariness, racial discrimination, and unreliability inherent in the death penalty's administration. 153 Justice Harper's critique of the death penalty's "racially skewed imposition" was pointed:

The constitution and the standards of our society cannot possibly countenance ending a human life for racist reasons … . I take it as a matter too obvious to discuss that our state's constitution could not, in the twenty-first century, permit a hateful and vengeful system that takes the lives of predominantly black men generally accused of crimes against whites. The parallels to a prior, equally untenable system of "justice" that once prevailed in much of this country are all too clear. While significant social progress has been made since those days, the continued exercise of a racially charged system of extermination, coupled with the disparate treatment even of victims based on their race, is yet another reminder that our society's long path toward equality is far from complete. There is no better next step than the rejection of a system that is, in reality, little more than the heir to lynch mobs. 154

Human dignity was also central to his critique. "The categorical exclusion of any person from humanity cannot be reconciled with a legitimate vision of human dignity," he wrote. 155 "It is a reality, albeit a difficult one, that even a person who commits the most heinous and [\*548] unforgivable acts is still one of us - a member of the human community and of our society." 156

In 2014, after four decades on the bench, Judge Tom Price of the Texas Court of Criminal Appeals, Texas' highest court for criminal appeals, called for an end to the death penalty in his dissenting opinion in Ex parte Panetti. 157 Characterizing judges as "guardians of the process," he concluded that the death penalty process was inherently flawed and "should be abolished." 158 According to Judge Price, "societal values" supported abolition, as indicated by a reduction in death penalty prosecutions and death sentences. 159 In addition,

the execution of individuals does not appear to measurably advance the retribution and deterrence purposes served by the death penalty; the life without parole option adequately protects society at large in the same way as the death penalty punishment option; and the risk of executing an innocent person for a capital murder is unreasonably high, particularly in light of procedural-default laws and the prevalence of ineffective trial and initial habeas counsel. 160

In 2015, in Glossip v. Gross, Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, argued in dissent that it was "highly likely that the death penalty violates the Eighth Amendment" and invited full briefing on the issue. 161 According to Justice Breyer:

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. 162

Four considerations led Justice Breyer to question the death penalty's constitutionality. The first consideration was the death penalty's lack of reliability, especially given the high number of exonerations in capital cases. 163 Second was the death penalty's arbitrariness, with death sentences largely determined by race, gender, local geography, and resources, as opposed to the egregiousness of the crime. 164 Third was the extraordinary [\*549] delay between sentence and execution, which aggravates the death penalty's cruelty and diminishes its legitimate penological goals. 165 And the final consideration was the rarity with which the death penalty is carried out. 166

Responding to Justice Breyer's dissent, Justices Clarence Thomas and Antonin Scalia argued that judicial abolition would mark the culmination of the Court's "ceaseless quest to end the death penalty through undemocratic means," 167 "replacing the judgments of the People with [the Court's] own standards of decency." 168 Justice Breyer acknowledged this "strong counterargument." 169 Over forty years ago, in Furman, he explained that the Court did look to the People - to Congress and state legislatures - to fix many of the very problems he had identified. 170 And the legislatures responded. 171 But, he concluded:

In the last four decades, considerable evidence has accumulated that those responses have not worked. Thus we are left with a judicial responsibility. The Eighth Amendment sets forth the relevant law, and we must interpret that law. 172

Just weeks later, in State v. Santiago (Santiago II), the Connecticut Supreme Court became the third state supreme court in history to abolish the death penalty. 173 In a 4-3 decision, the court ruled that the death penalty was cruel and unusual in violation of the Connecticut Constitution. 174 One year later, in May 2016, a newly reconstituted court upheld that decision 5-2. 175

The majority's reasons in Santiago II for abolishing the death penalty were familiar ones, neatly packaged into two parts. 176 First, the court concluded that the death penalty was unacceptable to contemporary society, [\*550] based on objective criteria that included a rarity of executions and Connecticut's 2012 partial repeal of the death penalty (for future crimes only). 177 Second, the court concluded that the death penalty lacked a legitimate penological purpose, given its inherent inefficiency, unreliability, arbitrariness, and "inescapable taint[]" of "caprice and bias." 178 In response to a stinging dissent by Chief Justice Chase Rogers that accused the majority of "relying solely on its own views" and invalidating the death penalty because "it offends the majority's subjective sense of morality," 179 the Justices in the majority shot back:

We do not question the sincerity or good faith of Chief Justice Rogers' views, and we find it unfortunate that she deems it necessary to question ours. Although it should go without saying, we feel compelled to emphasize that we, no less than the dissenting justices, have decided this case on the basis of our understanding of and dedication to the governing legal principles, and our decision should in no way be taken as an indication of our personal views with respect to the morality of capital punishment. 180

Justice Flemming Norcott, a staunch critic of Connecticut's death penalty for over two decades, 181 together with the newly appointed Justice Andrew McDonald, authored a joint concurrence addressing persistent allegations of racial and ethnic discrimination in the administration of the death penalty. 182 "In light of the historical and statistical record," they wrote, "we would be hard-pressed to dismiss or explain away the abundant evidence that suggests the death penalty in Connecticut, as elsewhere, has been and continues to be imposed disproportionately on racial and ethnic minorities." 183

[\*551]

4. Honorable Mention

Several other judges deserve mention. While stopping short of either abolishing the death penalty per se or calling for its abolition, each has expressed grave doubts about whether the death penalty can ever be imposed as a sanction for murder. 184

In 1975, holding that Massachusetts' mandatory death penalty for rape-murder deprived "the fundamental constitutional right to life" in violation of the Massachusetts Constitution, Chief Justice G. Joseph Tauro of the Supreme Judicial Court of Massachusetts implied that a discretionary death penalty would also violate the right to life. 185

Dissenting from a denial of post-conviction relief in a 1981 death penalty case, Justice Daniel Shea of the Montana Supreme Court chided the majority for "closing its eyes to the issues raised on appeal." 186 According to Justice Shea, the federal and state constitutions required an evidentiary hearing to determine whether Montana's death penalty served any valid state purpose in light of its arbitrary and discriminatory imposition, the rarity of executions, and the undue delay between sentencing and execution. 187 "Never in the annals of criminal law history in this State," he wrote, "has a defendant ever been the victim of such a consistent and wholesale denial of fundamental rights." 188

In a 1987 dissenting opinion concluding that New Jersey's death penalty statute was cruel and unusual as well as a violation of due process and "fundamental fairness" under the state constitution, New Jersey Supreme Court Justice Alan Handler stated that:

Time will settle the question [of whether the death penalty is unconstitutional per se]. All of us will, I am certain, endure the frustrating and frenetic attempts to enforce capital punishment in a fair and sensible way that now plague our sister states. That experience will, I fear, yield grim confirmation of the fact that capital punishment in a civilized constitutional society is virtually impossible to administer in a principled manner. The [\*552] per se invalidity of official capital punishment, in other words, may well be self-revealing. 189

Justice Handler chronicled this revelation in a long series of sharply-worded, voluminous dissents that took aim at the death penalty's arbitrariness and "impermissible risk of racial discrimination" that "singled out black persons for death." 190

In 1988, Justice Hans Linde of the Oregon Supreme Court suggested that every death penalty scheme raises concerns of arbitrariness - namely, the "prosecution[] of similar offenders committing similar crimes, of whom some are selected for the death penalty and others are not" - in violation of the state constitution. 191

In 1989, Justice Robert Glass of the Connecticut Supreme Court expressed "serious doubts as to the viability of [the U.S. Supreme Court's] death penalty standard that only provides that the sentencer's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" 192 According to Justice Glass, the Connecticut Constitution, by contrast, did not appear to tolerate any "capriciousness in the application of the death penalty." 193

In 1998, in People v. Bull, Justice Moses Harrison II wrote a sharply-worded dissent that called for an end to Illinois' death penalty based largely on the exoneration of nine Illinois death row inmates in as many years. 194 Justice Harrison did not mince words: "Innocent persons are going to be [\*553] sentenced to death" and would "inevitably … be executed in Illinois" in violation of the federal and state constitutions. 195

Characterizing this line of argument as an "inexplicable attack" on fundamental principles and a "strident protest … against the concept of the Anglo-American criminal trial itself," the majority's response was, in effect, to let the defendant eat cake. 196 "Have mistakes been made? Will mistakes be made? Certainly," said the court. 197 But since the "defendant does not suggest a substitute for this system," the "inevitable execution of innocent persons" was not the court's problem. 198 The majority opinion, and a separate concurrence authored by three Justices in the majority, rebuked Justice Harrison for "elevating personal beliefs above thoughtful constitutional analysis," abandoning "judicial restraint and deference to legislative judgments," and "impugning the integrity of other members of the court." 199 Undeterred, Justice Harrison reflected:

Just as the execution of an innocent person is inevitable, it is inevitable that one day the majority will no longer be able to deny that the Illinois death penalty scheme, as presently administered, is profoundly unjust. When that day comes, as it must, my colleagues will see what they have allowed to happen, and they will feel ashamed. 200

In 2005, in Moore v. Parker, Judge Boyce F. Martin, Jr. of the Sixth Circuit enumerated various criticisms of the death penalty, including unreliability, "blatant racial prejudice," "incomprehensible arbitrariness," "bad lawyering," pro-death penalty bias among juries and elected judges, and U.S. exceptionalism among western democracies. 201 Acknowledging his "oath … to apply the law as interpreted by the Supreme Court of the United States," 202 Judge Martin declined to declare the death penalty unconstitutional, but forcefully argued that it was:

arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair… . Death has more to do with extra-judicial factors like race and socio-economic status than with whether death is deserved. A system, whose basic justification is the interest in retribution and general deterrence, is not served when guided by such [\*554] irrelevant factors. Nor should a system of life and death hinge on the proficiency of counsel. 203

Reflecting on his over twenty-five years on the bench, Judge Martin concluded that "the idea that the death penalty is fairly and rationally imposed in this country is a farce." 204

Less than six months later, Washington Supreme Court Justice Charles W. Johnson, joined by Justices Richard B. Sanders, Susan Owens, and Barbara Madsen, similarly argued in dissent that Washington's death penalty was "arbitrarily or capriciously" imposed in violation of Furman. 205 Pointing to life sentences received by three of "the worst mass murderers in Washington's history," who were collectively responsible for killing seventy-four people, Justice Johnson concluded that the "death penalty is like lightening … . No rational explanation exists to explain why some individuals escape the penalty of death and others do not." 206 While stopping short of finding the death penalty unconstitutional per se, Justice Johnson's opinion strongly implied that "the arbitrariness with which the penalty of death is exacted" was incapable of remedy. 207

More recently, in 2014, federal district court Judge Cormac Carney held that the extraordinary, decades-long delay that precedes execution in California rendered its death penalty arbitrary and devoid of penological purpose in violation of the Eighth Amendment. 208 Although Judge Carney did not reach whether California's death penalty was per se unconstitutional, 209 his opinion suggested that California's death penalty could not be rationally carried out, given the inherent tension between efficiency and accuracy. 210

In March 2016, in holding that Alabama's death penalty procedures violated the defendants' Sixth Amendment right to a jury trial in light of [\*555] Hurst v. Florida, 211 state trial court Judge Tracie Todd offered a harsh critique of Alabama's administration of the death penalty more generally. 212 Pointing to bias in the elected judiciary, unqualified defense counsel, and inadequate funding of the judicial branch, Judge Todd concluded:

There is a time and place for diplomacy and subtlety. That time and place has been expunged by the dire state of the justice system in Alabama. It is clear, from here on the front line, that Alabama's judiciary has unequivocally been hijacked by partisan interests and unlawful legislative neglect … . As a result, the death penalty in Alabama is being imposed in a "wholly arbitrary and capricious" manner. 213

And in December 2016, after conducting a two-week evidentiary hearing on the constitutionality of the Federal Death Penalty Act, federal district court judge Geoffrey Crawford concluded that the Act

falls short of the standard required in Furman v. Georgia and in Gregg for identifying defendants who meet objective criteria for imposition of the death penalty. Like the state statutes enacted after Furman, the [Act] operates in an arbitrary manner in which chance and bias play leading roles. 214

Conceding that "Gregg is still the law of the land," Judge Crawford denied the defendant's motion to dismiss the death penalty, but stated that "the time has surely arrived to recognize that the reforms introduced by Gregg and subsequent decisions have largely failed to remedy the problems [\*556] identified in Furman." 215

III. The Right Side of History

Is the death penalty acceptable to contemporary society? Is it defensible as a matter of deterrence or retribution? Is the death penalty consistent with human dignity? Eventually, the U.S. Supreme Court will follow the path laid down by federal and state judges for the past half-century and answer each of these questions in the negative. 216

This, in turn, gives rise to perhaps the most salient question of all: even if the death penalty is unacceptable, devoid of penological purpose, and a violation of dignity, should the U.S. Supreme Court be the one to get rid of it? Will doing so be the culmination of the U.S. Supreme Court's dignity jurisprudence - a rejection of American exceptionalism on the world stage and a ringing endorsement of the most universal dignity, the right to life itself? 217 Or will it instead represent a stunning blow to our democracy - a rejection of judicial self-restraint akin to Lochner v. New York. 218 Will judicial abolition make us "the Nation we aspire to be," 219 or a nation that has lost its way?

The right side of history, or the wrong side?

For an answer to that question, one might look to the example of slavery. The U.S. Supreme Court did not abolish slavery or even seriously question its constitutionality. 220 It certainly could have. In 1771, in his charge to a grand jury at a session of the North Carolina Superior Court, colonial judge Martin Howard remarked on the inconsistency between the institution of slavery and the idea that "all men are by nature equal and by nature free." 221 [\*557] Slavery, he argued,

is an adventitious, not a natural state. The souls and bodies of negroes are of the same quality with ours - they are our fellow creatures, tho' in humbler circumstances, and are capable of the same happiness and misery with us… . I am content it should be said, that these observations proceed more from the heart than the understanding, at the same time I shall ever suspect the soundness of that understanding which has no mixture of humanity. 222

Similarly, in 1783, in his instructions to a jury in a case involving the beating of an enslaved man, Chief Justice William Cushing of the Massachusetts Supreme Judicial Court concluded that slavery was at odds with the Massachusetts Constitution's declaration "that all men are born free and equal." 223 According to Cushing:

Whatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses - features) has inspired all the human race. 224

Instead of following the lead of these judges, the Supreme Court in Dred Scott v. Sandford did precisely the opposite, invalidating a federal law that would have restricted the expansion of slavery and thus fortifying slavery's hold on the Nation. 225

History has not been kind to slavery. Between 1865 and 1867, historian, congressman, newspaper editor, and antislavery advocate Horace Greeley published The American Conflict, a 1400-page, two-volume treatise on the abolition of slavery. 226 It is a harsh indictment of the institution. 227

[\*558] The death penalty - which Greeley and other anti-slavery advocates also opposed 228 - is not yet history. But it will be. Although none of us can know for sure how history will judge the death penalty, odds are good that the death penalty will come to be seen as one of the worst indignities our Nation has ever known, and that a Supreme Court decision abolishing it will, in time, be widely accepted as right. Odds are also good that many of us alive today will be there when history is made.

IV. Conclusion

Abolition of the death penalty is inevitable. Power, not principle, sustains it, 229 and principle, not power, will eventually end it. 230 Applying three themes that have characterized death penalty abolition in the Western world, this Essay: has argued that the end of the death penalty hinges on the Supreme Court's willingness to defy public opinion and live up to history's demands.

When the Supreme Court abolishes the death penalty, the Court will not be going it alone. This Essay: has gathered the opinions of federal and state judges who have advocated abolition of the death penalty for over the past half-century. These decisions form a coherent body of law - the "law of abolition" - on which the Supreme Court should rely.

[\*559] The Court's decision to abolish the death penalty will not be easy; one vote will most likely separate abolition from retention. Nor will the decision be popular; indeed, abolition has never been the result of popular demand. 231 But, as this Essay: has argued, it will, in time, almost certainly be regarded as right.

### AT: CP Executive Pardon

#### Executive actions would only apply to people convicted of federal crimes

Barry, 17 --- Professor, Quinnipiac University School of Law (Fall 2017, Kevin M., “2016 SYMPOSIUM: THE DEATH PENALTY'S NUMBERED DAYS?: THE LAW OF ABOLITION,” 107 J. Crim. L. & Criminology 521, Nexis Uni via Umich Libraries, JMP)

In our federal system, the actions of state legislatures, governors, and state supreme courts can only do so much; to abolish the death penalty, it will take federal action. 55 Congress could pass a law prohibiting the death penalty, but it is unlikely to do so on such a divisive issue. 56 The President could halt federal executions and pardon federal prisoners, but this is similarly unlikely, as is the U.S. Attorney General's refusal to authorize federal prosecutors to seek the death penalty. 57 In any event, these executive [\*532] actions would apply only to people convicted of federal crimes. 58

## States Counterplan Answers

### AT: Federal Modeling

#### National consensus alone won’t determine whether Court rules on death penalty --- Justices can still disagree with citizenry

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)

The Court has also indicated that although evidence of a national consensus is important, it does not wholly determine whether a particular practice violates the Eighth Amendment. Rather, the Court has stated that

the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment … . Thus, in cases involving a consensus, our own judgment is 'brought to bear,' [citation omitted] by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators. 263

## Reform Counterplan Answers

### AT: CP Reform – Abolition Better

#### Only abolition can solve – reforms can’t overcome pervasive structural problems

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)

iv. Arbitrariness

The Supreme Court has labored unsuccessfully to rid the death penalty of arbitrariness through various reforms. In 1972, the Supreme Court invalidated the death penalty because of concerns that it was too arbitrarily imposed. 155 After reinstating the death penalty in [\*292] 1976, 156 the Court has regulated it in an attempt to minimize arbitrariness and limit the penalty to the "worst of the worst." 157 In attempting to limit the arbitrary application of the death penalty, death sentences are automatically appealed. In addition, trials are bifurcated into two separate phases: (1) guilt-innocence and (2) punishment. 158 In the second phase, the Court has mandated a broad right to individualized sentencing to permit capital defendants to invoke any relevant grounds supporting a non-death sentence. 159 The Court has also limited the offenses punishable by death by exempting non-homicidal crimes. 160 Further, the Court has categorically excluded certain vulnerable groups, such as juveniles 161 and intellectually disabled offenders, n162from the penalty's reach. Notwithstandig these changes, the death penalty continues to be fraught with arbitrariness. Factors such as geography, race, resources, and quality of defense counsel continue to matter more than the heinousness of the crime in determining whether an inmate is sentenced to death. 163

The Court can continue its current attempt to regulate the death penalty instead of abolishing it outright. As discussed earlier, 164 the Supreme Court has attempted to reform the death penalty on multiple occasions. But, these reforms have not produced a fairer death penalty. There are still serious racial disparities despite Batson; 165 the death penalty is still not confined to the worst offenders despite the Supreme Court's attempts to do so; 166 and capital defendants are still frequently represented by incompetent defense counsel despite the Court's decision in Strickland. 167

[\*293] Any future effort to reform the death penalty is similarly unlikely to succeed. The failure of the aforementioned reforms will likely lead to a continued marginalization of the death penalty. Although death penalty statutes may remain on the books in several states, death sentences will rarely be imposed in the vast majority of states. 168 In these states, despite the dwindling number of executions, the death penalty will continue to be "fraught with arbitrariness, discrimination, caprice, and mistake." 169 Individuals who do not deserve to die will continue to be sentenced to death and executed. There is also the possibility that an individual who is completely innocent will be executed.

Taking these pervasive structural problems of the criminal justice system into consideration, the Supreme Court should finally admit that Justice Blackmun was right in 1994 when he said that "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies" 170 and abolish the death penalty.

#### The Court should unequivocally repudiate the death penalty --- case-by-case judgements and deference to the states inevitably fail --- only abolishing it can overcome inherent problems in the process

Berry, 11 --- Assistant Professor of Law, University of Mississippi (Spring 2011, WILLIAM W. BERRY III, “CRIMINAL LAW: REPUDIATING DEATH,” 101 J. Crim. L. & Criminology 441, Nexis Uni via Umich Libraries, JMP)

IV. Pandora's Box and the Inevitability of Repudiation

After arriving among mortals, Pandora opened the lid of a great jar that she had with her, causing a host of evils and disease to be released among the mortals for the first time; for until that moment, men had lived on the earth free from toil and sickness and other ills. 264

Having established that the three parallel shifts in perspective as to the use of capital punishment are questions of institutional and not normative choice, this Article concludes by claiming that these outcomes are inevitable consequences of the initial decision to constitutionalize capital punishment.

In reviewing the capital jurisprudence of the United States Supreme Court since Furman through the lens of institutional choice, the result of abandoning judicial restraint appears to be one of opening a sort of constitutional Pandora's box. 265 In other words, by constitutionalizing capital punishment through its application of the Eighth Amendment, the Court exposed itself to a complex, multilayered morass of problems that it is ill-equipped to remedy.

These problems began with Furman, where a fractured majority (each Justice wrote their own opinion) held capital punishment as instituted by the states was cruel and unusual punishment in violation of the Eighth Amendment. 266 In Furman, the Court highlighted many problems with the death penalty, most notably the manner in which the death penalty was arbitrarily and disproportionately applied to certain minority groups. 267 And in recent years, the problems have only magnified, with studies [\*487] demonstrating vast amounts of error 268 and increasing discoveries of innocent individuals on death row as well as the likelihood that innocent individuals have, in fact, been executed. 269

The "discovery" of such a complex and intractable set of problems is certainly not unique to the Eighth Amendment. For instance, the Fourth Amendment's prohibition against search and seizure has become a complicated mess with no clear rule to determine what constitutes a reasonable search or seizure. 270 The same is true for the voting apportionment cases - once the Court applied the Constitution, the Court opened the door to a number of interpretive problems. 271 The First Amendment Establishment Clause jurisprudence followed the same pattern. 272 The application of the Constitution in a single case to an area formerly controlled by state government legislation opens the door to a series of interpretive problems that are difficult to solve on a case-by-case basis. Thus, despite the Court's best efforts to limit its involvement in such areas, based on an abundance of caution and restraint in applying such open-ended constitutional language, the outcome is a long series of cases through which it becomes increasingly difficult to establish intelligible principles and bright-line rules.

In all of these examples, experience cautions against the Court's intervention into matters that have been historically addressed by the state legislatures. This concept of judicial restraint and deference toward state legislatures makes sense at first blush as a matter of institutional choice. State legislatures have a political process that can create nuanced and complex sets of rules, conduct thorough research and inquiry, and modify such rules as experience demonstrates their flaws and shortcomings. Further, state legislatures, as institutions comprised of elected officials, are [\*488] subject to majoritarian opinions and values. Finally, state legislatures enjoy the ability to compare themselves with each other as competing experimental laboratories. Indeed, one of the important values of our federalist system of government, as Justice Brandeis famously stated, is that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." 273

On the other hand, the Court does have a responsibility to protect the individual rights of citizens against the potential tyrannical overreaching of those same state legislatures. The Constitution, and in particular, the Bill of Rights, relies on the Court to intervene to protect those rights. As Justice White has explained,

Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not. 274

Given the opaque language of the provision applicable here - "cruel and unusual" punishment - attempting to protect citizens' rights under a modern understanding 275 of such words 276 invites the opening of a judicial Pandora's box. 277

Thus, this Pandora's box understanding of judicial restraint begins with the premise that certain applications of the Constitution to conduct formerly regulated by the state legislatures open a Pandora's box of judicial intervention such that the Court must continually intervene to address the myriad of issues that subsequently arise as a by-product of its initial intervention.

In this scenario, the Court is left with three choices: (1) try to close the box, (2) grapple indefinitely with the vast permutations of its original intervention and continue to regulate state legislatures and their legislative schemes on a case-by-case basis as issues happen to reach the Court, or (3) remove the box altogether (and completely prohibit the states from engaging in that area).

[\*489] Closing the box, although advocated by Justice Scalia in the death penalty context, 278 is often a near-impossibility. Once the Court has engaged in regulating a particular area under the Constitution, it is difficult to go back, particularly given its traditional application of the principle of stare decisis. 279 This becomes even more true the longer the Court continues to apply the constitutional provision, as its general application becomes more settled and often more accepted.

Continuing to apply the constitutional provision in a case-by-case basis, no matter how tortured the jurisprudence, has been the traditional practice of the Court. It has always seemed willing to give the states another try and allow state legislatures to remedy the latest constitutional flaw. 280

Death, however, is different. 281 While speech, freedom from search and seizure, and voting are important constitutional rights, the deprivation of one's life is a far more serious proposition. As the Supreme Court has repeatedly noted, "there is no question that death as a punishment is unique in its severity and irrevocability." 282 Thus, the consequence of relying on a case-by-case approach to address constitutional problems is that innocent individuals may be executed by the states.

Death is also different in the sense that capital trials tend to be full of error. According to one recent study, almost seventy percent of capital cases involve at least one serious, reversible error. 283 Ironically, despite all of the Court's constitutional regulation of the death penalty, the problems [\*490] have only increased over time. 284 Continued doubts about the capital system's ability to avoid imprisoning innocent individuals 285 and perhaps in some cases, execute them, is perhaps the best evidence that the Furman experiment has simply failed.

Thus, the second part of the Pandora's box understanding of judicial restraint, as applied to capital punishment, is that, given the ways in which "death is different," pulling the box off of the table is the inevitable conclusion one reaches if one opens the box in the first place.

Justice Powell ultimately concluded that getting rid of the death penalty was the only option after being unable to solve the problem raised by McCleskey - that race will always unfairly influence who receives the death penalty. 286 Throughout his jurisprudence, Justice Powell adhered to the principle of judicial restraint, but in the end, concluded that the Pandora's box of capital punishment should be removed from the reach of the states. 287

Justice Blackmun personally believed that the death penalty should be abolished. 288 Several times during his tenure on the Supreme Court he wrote that if he were a legislator he would cast his vote to strike down capital punishment. 289 Yet, during the early years of his career, Justice Blackmun exercised judicial restraint and refrained from constitutionalizing the issue of capital punishment. 290 Once Pandora's box was open, however, Justice Blackmun slowly began restricting the application of the death penalty in certain circumstances. 291 Ultimately, at the end of his career, the only remaining option was to remove the proverbial box of death penalty jurisprudence and eliminate its existence entirely through abolition of the death penalty. 292 In the end, for Justice Blackmun, all of the tinkering in the [\*491] world by the Supreme Court could not correct the fundamental problems of the administration of the death penalty. 293

Justice Stevens likewise sought for many years to solve the problems raised by the administration of the death penalty by the various states. 294 He ultimately concluded, though, that despite all of the Court's intervention, the same fundamental errors and flaws still persisted. 295 In the end, for Justice Stevens, Justice White's view in Furman - that the costs of allowing capital punishment heavily outweighed any benefit it might offer. 296

To constitutionalize the death penalty, then, sets one on a path toward its abolition. As the Court's jurisprudence has shown, the Eighth Amendment is not, and never will be, an effective tool that can eliminate the deep and fundamental problems with the capital systems adopted by the states: the propensity for widespread error and the risk (and even likelihood) of innocent individuals being executed.

Is the answer then to not constitutionalize it in the first place and allow the state legislatures complete autonomy to implement their capital systems? As Justice Scalia has argued, "there is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court." 297

Certainly not. As the Court explained in Furman, the historical implementation of capital punishment has always been full of problems. And as remains true today, "these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." 298 As the jurisprudence of Justices Powell, Blackmun, and Stevens can attest, the error of the Court came not when it "opened the box" in Furman, but when it allowed the box back on the table in Gregg.

V. Conclusion

This Article has sought to fill the void of a collective analysis of the repudiation of capital punishment by Justices Powell, Blackmun, and Stevens from their initial pro-death penalty positions. It has conceptualized these parallel shifts not as normative changes, but from the perspective of institutional choice.

[\*492] Thus, this repudiation is a story of abandoning judicial restraint at two levels. First, this Article explored the change at the level of constitutionalizing the death penalty in the first place, and then at the level of abolishing the death penalty altogether.

From this jurisprudence, the Article has argued that the conclusions of each of the three Justices are the inevitable consequence of abandoning judicial restraint because of the Pandora's box nature of such constitutional interpretation. The Article claims that, in the capital context, there are two natural consequences of constitutionalizing capital punishment. First, the initial decision to make the issue a constitutional one rather than one exclusively regulated by state legislatures results in the creation of numerous doctrinal and jurisprudential problems in the use of the death penalty. As with other similar areas, the problem becomes magnified as the Court tries to address these systemic issues one case at a time.

In the capital context, there is a second consequence of constitutionalizing the death penalty. Based on the notion that "death is different" and the high volume of error in capital cases, the inevitable outcome of constitutionalizing capital punishment is the conclusion that capital punishment should be abolished.

In sum, then, the Article has attempted to explore and explain the dramatic shift in the capital jurisprudence of Justices Powell, Blackmun, and Stevens. Perhaps their sentiments can best be summarized by the Frenchman Marquis de Lafayette:

Till the infallibility of human judgments shall have been proved to me, I shall demand the abolition of the penalty of death. 299

### --- 1ar Abolition Best

#### Reforms empirically fail --- abolition is necessary

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)

Conclusion

In 1963, Justice Goldberg wrote a dissent urging the Court to grant certiorari in order to decide whether the death penalty violated the Eighth Amendment. 303 He started a conversation which, nine years later, led to the Court determining that it did in fact violate the Constitution. Hopefully Justice Breyer's dissent has similarly started the much-needed conversation about whether the death penalty remains a constitutional practice. As this article has discussed, many of the problems that the Court believed would be eliminated - or at least minimized - when it began to regulate the death penalty have remained and, in some instances, been exacerbated: disparate racial application, arbitrariness, the risk of executing innocent individuals, the problem of ineffective assistance of counsel. The Court should allow these serious deficiencies to continue no longer. Almost every attempt to reform the death penalty has failed. Rather than continue the failed attempt to reform the death penalty, the Court needs to seriously [\*311] consider abolition as the only logical alternative. This article provides the doctrinal basis for doing so.

### AT: CP Reform – Abolition Challenges State Based Murder

#### Only abolishing the death penalty can remedy the state’s racist murder of innocents

Bessler, 16 --- Associate Professor, University of Baltimore School of Law (John D., “ARTICLE: The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments,” 73 Wash. & Lee L. Rev. Online 487, Nexis Uni via Umich Libraries, JMP)

V. The Need for Equal Protection of the Laws: From Discrimination and Arbitrariness to Abolition and the Protection of Universal Rights

The basic rule of equal protection is that persons "similarly situated with respect to the legitimate purpose of the law must receive like treatment." 246 The purpose of the Fourteenth [\*555] Amendment's Equal Protection Clause--it has been written--is "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." 247 In that regard, the Equal Protection Clause is, logically, an ideal vehicle for enforcing universal rights, such as the rights to be free from torture, cruelty and discrimination. 248 No one, not even prisoners, are to be subjected to torture or gratuitous cruelty, and similarly situated offenders should be treated alike under the law. 249 The death penalty, it is [\*556] true, has been a fixture of American life since colonial days. But the legal landscape--both in the U.S. and abroad--is changing rapidly, if not at lightning speed. 250 While a U.N. effort seeking a global moratorium on executions is gaining momentum, 251 American anti-death penalty advocacy has been focused in the courts and on the state level--and with some successes, with courts declaring certain practices to be unconstitutional 252 and with six states abolishing the death penalty since 2000. 253

While the U.S. Supreme Court has held that race and gender discrimination are unconstitutional in a series of cases, 254 it has yet to effectuate the Fourteenth Amendment's dictates in the [\*557] context of America's death penalty system. Thus, in McCleskey, the Supreme Court held that the Baldus study, the statistical study showing discrimination in Georgia's death penalty system, was "clearly insufficient" to support an inference that any of the decisionmakers in that particular criminal case "acted with discriminatory purpose." 255 In minimizing the role of race in death penalty adjudications writ large and rejecting Warren McCleskey's Eighth Amendment and Fourteenth Amendment equal protection claims, a bare majority of the Supreme Court sidestepped the Baldus study's alarming findings by concluding: "Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials." Ultimately, the Court in McCleskey determined that the presence of that risk of racial prejudice was not "constitutionally unacceptable." 256

In reaching its decision, the Court in McCleskey touted the "substantial benefits" of discretion. 257 Although it determined that the Baldus study "indicates a discrepancy that appears to correlate with race," the Court nonetheless found that "[t]he discrepancy indicated by the Baldus study is 'a far cry from the major systemic defects identified in Furman.'" 258 The Court in McCleskey then made this slippery slope argument:

[I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. 259

As Justice Powell, in extending his slippery slope argument, continued:

[\*558] Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could--at least in theory--be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. 260

But McCleskey wasn't about a defendant's physical attractiveness; it was about a man's life. And in the modern era, the death penalty's legitimacy has been corroded by the punishment's arbitrary, errant, and highly discriminatory application. Indeed, many people now see capital punishment--and increasingly and properly so--as violating basic and fundamental human rights, including the right to life and the rights to be free from torture and cruelty. The International Covenant on Civil and Political Rights, a widely ratified international treaty, itself expressly provides that "[n]o one shall be arbitrarily deprived of his life." 261 The language of that treaty, put in place in 1966, thus makes clear that the arbitrary infliction of death sentences has been a violation of international law for fifty years now. 262 While the treaty's use of the masculine--"his"--reflects its 1960s vintage and that executions have long been used mainly to kill men, the death penalty's arbitrary and discriminatory character (which a number of U.S. Supreme Court Justices spoke of in 1972 in Furman v. Georgia 263) has yet to be remedied. 264

Not only does the arbitrary infliction of death sentences violate long-standing international law principles, but the death [\*559] penalty should be found to be a torturous punishment 265 and to violate existing American constitutional law as well. 266 In fact, just as the Convention Against Torture now prohibits acts of torture and cruelty, 267 the U.S. Constitution's Fourteenth Amendment has long forbidden arbitrary, discriminatory, and excessive punishments, 268 with the U.S. Supreme Court [\*560] articulating the Equal Protection Clause's scope in a series of cases. 269 "When those who appear similarly situated are nevertheless treated differently," the U.S. Supreme Court has ruled, "the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'" 270

For fundamental rights, such as the right to be free from racial discrimination, the U.S. Supreme Court naturally imposes heightened protection, subjecting such laws to "strict scrutiny." Though the Supreme Court, in McCleskey, gave short shrift to the statistics demonstrating racial bias (something Justice Harry Blackmun pointed out in his dissent), 271 it is clear that the rights to be free from torture, cruelty, and discrimination are fundamental ones and must be respected and protected. 272 The [\*561] right to equality, like the right to be free from cruelty and torture, is itself a universal right. 273 The right to equal treatment under the law used to be, as noted earlier, more rhetoric than reality, especially since Thomas Jefferson's Declaration of Independence, which speaks of the equality of men, was promulgated in an era of slavery and overt racial and gender discrimination. But Jefferson's lofty rhetoric is, increasingly, being actualized in the United States, with the U.S. Supreme Court's decision in Obergefell v. Hodges, 274 for example, guaranteeing same-sex couples the right to marry. 275

It is clear--as Professor Goldfarb aptly notes--that "capital punishment has been reserved primarily for those convicted of killing white people" and is "disproportionately" imposed on men, especially those who victimize whites such as the innocents Joe Giarratano was convicted (perhaps falsely) of murdering. The first recorded execution of a woman in what is now the United States--that of Jane Champion--took place in Virginia in 1632, and in America women represent only a small percentage, 2.5 percent, of all persons executed by state and local authorities since 1608. 276 Justice Thurgood Marshall himself once recognized [\*562] the "overwhelming evidence that the death penalty is employed against men and not women." After taking notice of that fact, Justice Marshall observed: "It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are applicable to both sexes." 277

But in her essay, Professor Goldfarb offers a compelling explanation for why women (at least those whose conduct conforms to traditional gender stereotypes) are less harshly punished, an explanation rooted in society's history of patriarchy and the "chivalrous norms" associated with the treatment of women. 278 Her essay also explains why men who kill women, especially black men who kill white women, have long received the law's harshest treatment and are sentenced to death. Men who kill women have not only failed to protect, they have murderously harmed, the members of society whom earlier generations of Anglo-Americans once called "the weaker sex." 279 As Goldfarb adds after studying American executions and Giarratano's death sentence and laying out preexisting race, gender and class stereotypes and ideologies: "Inflicting harsh punishment, including death sentences, in situations like these supports the status quo and its multiple intersecting hierarchies, allowing chivalrous impulses to be expressed primarily against poor men, men of color, and other men lacking in social and material power." 280

The gross inequalities associated with capital punishment have long been clear, though the U.S. Supreme Court has been [\*563] slow to recognize them. The death penalty's "original sin," law professors Carol Steiker and Jordan Steiker write, tracing executions from colonial days through today, is "the stain of racial discrimination." 281 As they explain of the death penalty's close and inerasable association with slavery:

[T]he large increase in executions, especially of blacks, in the South during the eighteenth century was the direct result of the large influx of African slaves to that region. As the South's slave labor economy grew, so did the demand by slave owners for state assistance in disciplining the growing enslaved population, to promote economic productivity and to protect the increasingly outnumbered white population from much-feared slave violence or revolt. 282

"The extent to which capital punishment for slaves was perceived as a public good," they write, "is demonstrated by the provision of state compensation to the owners of executed slaves, in the same way that property owners today are compensated when their land is taken by the state for a public use such as a highway." 283 In other words, human beings as property; to be disposed of--in the language of that era--as "chattels." 284

For far too long, the U.S. Supreme has ignored the realities of discrimination associated with death sentences and executions. When America's death penalty came under attack in the 1960s and 1970s, it was the NAACP's Legal Defense and Educational Fund that led the campaign. 285 In cases that came before the Supreme Court, leading civil rights organizations--from the NAACP and the National Urban League to the Southern Christian Leadership Conference, the Mexican-American Legal Defense and Educational Fund, and the National Council of Negro Women--submitted or joined amici briefs. "The total [\*564] history of the administration of capital punishment in America, both through formal authority, and informally," the NACCP argued in one submission, "is persuasive evidence, that racial discrimination was, and still is, an impermissible factor in the disproportionate imposition of the death penalty upon non-white American citizens." 286 Yet, as the Steikers so cogently explain:

Despite ample ammunition in the amicus briefs, none of the justices seemed willing to offer a detailed history of the role of race in shaping capital statutes and practices for over 200 years; Justices Douglas and Marshall, the only two justices who addressed race at all, both stopped short of placing the practice in its historical, slavery-rooted context. 287

This was, clearly, a missed opportunity, though the Supreme Court undoubtedly made a conscious decision at the time to play down the issue of racial discrimination in the death penalty's administration. In their thoughtful and compelling book, Courting Death: The Supreme Court and Capital Punishment, Carol Steiker and Jordan Steiker offer this analysis: "The Court's deafening silence on the subject of race in its foundational capital punishment cases is striking but, on reflection, perhaps not altogether surprising. Ample reasons of various kinds--strategic, institutional, ideological, and psychological--help explain what otherwise might appear to be a baffling obtuseness." 288 "In light of the Court's ongoing role in the school desegregation battle," they observe, "it is no wonder that Chief Justice Warren, the architect of the Court's unanimous opinion in Brown, hesitated to add capital punishment to the simmering pot of racial issues." 289 "The Warren Court's desegregation rulings and its criminal procedure revolution," they add, "already seemed to target Southern institutions, and these decisions engendered substantial backlash in that region." 290 "A race-based abolition," they conclude, "would have amounted to an acknowledgment that the effects of institutionalized racism could not be erased by constitutional intervention--the very last message that the [\*565] Supreme Court wanted to send in the era of constitutionally mandated school desegregation and criminal procedure reform." 291

But in this second decade of the twenty-first century, the U.S. Supreme Court now finds itself at a crossroads as regards the punishment of death. It can let it continue, or it can say no more--no more will the United States of America engage in state-sanctioned killing. "The most profound consequence of the Court's failure to address the issue of race in its capital jurisprudence," the Steikers aptly note, "is that the unjust influence of race in the capital punishment process continues unchecked." 292 As they explain in their book:

More broadly, the Court's failure to address forthrightly the death penalty's racialized history and current practice has disserved the Court in its role as chronicler of history and social and political practices. Had the Court framed its constitutional regulation of capital punishment against the backdrop of antebellum codes, lynchings, mob-dominated trials, and disparate enforcement patterns, the Court would have done a much better job of explaining why the American death penalty deserved the sustained attention of the American judiciary. This would have been true even if the Court ultimately had framed its doctrines in nonracial terms. 293

VI. Conclusion

The death penalty's racial and gender bias is clear. 294 Congressman John Conyers once took note of the "gender [\*566] discrimination" associated with capital sentencing, 295 and Professor Elizabeth Rapaport--a law professor at the University of New Mexico School of Law--has written of the "chivalrous disinclination to sentence women to die." While articulating her "chivalry" theory, she simultaneously posits an "evil woman" hypothesis to explain "the gender stereotyping that has historically dehumanized despised female murderers" and resulted in their execution when they violate "sex role expectations" (e.g., by killing their children or husbands). 296 The Washington, D.C.-based Death Penalty Information Center, documenting the racial prejudice in the death penalty's administration, also cites study after study showing that killers of whites are much more likely to be sentenced to death than killers of blacks. In the modern era, the statistics for those [\*567] executed for interracial homicides are particularly telling. While 20 people have been executed for interracial homicides involving a white defendant and a black victim, an exponentially higher number of people--282--have been executed where the defendant was black and the victim was white. 297

Such discrimination calls for a remedy, and in the case of the death penalty, the only remedy that will suffice is the death penalty's abolition. In "Matters of Strata," Professor Goldfarb emphasizes that "when race, gender, and class play an explanatory role in decisions about who receives a death sentence, under the Supreme Court's death penalty jurisprudence those decisions constitute cruel and unusual punishment in violation of the Eighth Amendment." 298 And her perceptive essay, in tracing Joseph Giarratano's case and the ideologies and long history of discrimination undergirding the death penalty that "undermine" its legitimacy, 299 makes clear that, as a society, we need "to find other approaches." 300 Just as the U.S. Supreme Court, in Shelley v. Kraemer, 301 held in the 1940s that judicial enforcement of restrictive covenants attempting to bar minorities from ownership or occupancy of real property violated due process and equal protection principles, a wholly arbitrary and discriminatory death penalty regime--one still in place in the twenty-first century--should not be tolerated. 302 A government [\*568] should not involve itself with such a cruel and torturous punishment--one that, throughout American history, has been imbibed with racial discrimination, gender inequities, malice and hatred, and lottery-like arbitrariness. 303

In their 2015 dissent in Glossip v. Gross, 304 Justice Stephen Breyer--joined by Justice Ruth Bader Ginsburg--called for a "full briefing" on whether capital punishment violates the Eighth Amendment and concluded that it is "highly likely" that it does. 305 In a subsequent speech in Chicago, Illinois, Justice Ginsburg--in talking about their dissenting opinion in Glossip--specifically highlighted the death penalty's arbitrariness, telling her audience: "Factors that should not affect imposition of the death penalty, studies documented, often do, prime among those factors, race and geography." 306 "Ultimately," she said, "the considerations Justice Breyer discussed at length may bring us back to the years 1972-76, when no executions took place in the United States." 307 Already, the American death penalty is actively [\*569] used in only a small fraction of U.S. counties. 308 As Emily Bazelon wrote for the New York Times Magazine in 2016: "A new geography of capital punishment is taking shape, with just 2 percent of the nation's counties now accounting for a majority of the people sitting on death row." 309

In State v. Santiago, 310 the Connecticut Supreme Court declared that state's death penalty unconstitutional. In doing so, it held that "the eighth amendment is offended not only by the random or arbitrary imposition of the death penalty, but also by the greater evils of racial discrimination and other forms of pernicious bias in the selection of who will be executed." 311 As that court emphasized: "Unfortunately, numerous studies have found that '[e]rrors can and have been made repeatedly in the trial of death penalty cases because of poor representation, racial prejudice, prosecutorial misconduct, or simply the presentation of erroneous evidence.'" 312 "A study of all death sentences in the United States in the two decades following Furman," it pointed out, "found 'extremely high error rates' . . . ; with at least two thirds of capital sentences eventually overturned on appeal." 313 "Statistical analyses studies," it added, "have demonstrated to a near certainty that innocent Americans have been and will continue to be executed in the post-Furman era." 314 As the court concluded after compiling all of the evidence: "To the extent that the ultimate punishment is imposed on an offender on the basis [\*570] of impermissible considerations such as his, or his victim's, race, ethnicity, or socio-economic status, rather than the severity of his crime, his execution does not restore but, rather, tarnishes the moral order." 315

Hopefully, the U.S. Supreme Court will soon follow suit, looking to the jurisprudence of the Supreme Court of Connecticut and other judicial systems around the world that have already outlawed the punishment of death. Way back in 1995, South Africa's Constitutional Court--in the wake of apartheid's demise--declared the death penalty to be unconstitutional as a "cruel, inhuman or degrading" punishment. 316 Ironically, the President of the Court, Arthur Chaskalson, in writing for South [\*571] Africa's highest court, looked to the reasoning of an American case--Furman v. Georgia--to support the propositions that "[a]t every stage of the process there is an element of chance" and that "poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die." 317 If the present-day U.S. Supreme Court would only return to its own roots--Furman's denunciation of the death penalty as a violation of the Eighth and Fourteenth Amendments 318 --the American legal system could finally uproot a barbaric, discriminatory practice rooted in the Dark Ages and the institution of slavery.

### AT: CP Reform – Can’t Solve Racism

#### Reforms can’t correct racial disparities in administering the death penalty --- empirically fails and won’t be enforced

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. Reform or Abolition?

A longtime federal judge, Alex Kozinski, recently wrote that there are "reasons to doubt that our criminal justice system is fundamentally just." 109 As some of the problems discussed in the previous section illustrate, nowhere is his conclusion more evident than in the administration of the death penalty. There is a consensus emerging across ideological and political lines that the death penalty is seriously flawed. 110 This section discusses the option of continued reform and why that option is likely to fail.

A. Reform

There have been numerous proposals to "fix" the death penalty. Reform proposals have been made by academics, 111 state commissions, 112 [\*286] and others to address many of the areas of concern outlined in the previous section. Below is a review and assessment of some of these proposals.

i. Race

An attempt to eliminate racial disparity in capital sentencing failed at the Supreme Court in McCleskey v. Kemp. 113 Since then, two major legislative proposals have been advanced in the attempt to eliminate racial disparities in capital sentencing.

First, in federal cases, a federal statute was enacted in 2013 that attempts to eliminate racism in the jury deliberation process. 114 This statute requires that the judge instruct the jury at the end of the sentencing phase of a capital case that they may not in any way consider race, national origin, sex, or the religious beliefs of the defendant or the victim in reaching its verdict. 115 The same statute also requires that after a verdict has been rendered, all jurors must certify that they did not, in fact, consider the race, national origin, sex, or religious beliefs of the defendant or the victim in reaching their determinations and that their determinations would have been the same regardless of these factors. 116 Despite this statute, there continue to be racial disparities in the administration of the federal death penalty. 117

[\*287] The second legislative proposal to eliminate racial disparities in the administration of the death penalty was the Racial Justice Act. 118 Had the Racial Justice Act passed, it would have allowed defendants who had been sentenced to death to use statistical evidence to demonstrate a prima facie case of racial bias, 119 something that the Supreme Court did not permit in McCleskey. 120 The burden then would have shifted to the prosecution to explain the reason for the statistical disparity. 121 The reviewing court would then decide whether race was a factor, and if it found that it was, the defendant's death sentence would be overturned. 122 The Racial Justice Act would have required an explanation from prosecutors when racial disparities existed.

Requiring an explanation from prosecutors is important:

It is not unreasonable to require publicly elected prosecutors to justify racial disparities in capital prosecutions. If there is an underrepresentation of black citizens in a jury pool, jury commissioners are required to explain the disparity. A prosecutor who strikes a disproportionate number of black citizens in selecting a jury is required to rebut the inference of discrimination by showing race neutral reasons for his or her strikes. If there are valid, race neutral explanations for the disparities in capital prosecutions, they should be presented to the courts and public. Prosecutors, like other public officials, should be held accountable for their actions. The bases for critical decisions about whether to seek the death penalty and whether to agree to a sentence less than death in exchange for a guilty plea should not be shrouded in secrecy, but should be openly set out, defended, and evaluated. 123

Ultimately, the Racial Justice Act passed the U.S. House of Representatives but failed to be acted upon by the U.S. Senate. 124 Two states, North Carolina and Kentucky, enacted versions of the Act. 125 However, after a state judge overturned an inmate's death sentence based [\*288] on the statute, the North Carolina legislature repealed its Racial Justice Act. 126

Given these practical and political difficulties faced by Congress, the prospects for any legislative reforms designed to address the problem of racial disparities in capital sentencing are bleak. Furthermore, the Supreme Court has always been unwilling to address the issue of race and capital punishment. 127 Even in the unlikely event that either the Supreme Court or the legislature addressed the issue, it is questionable how much can be achieved in ending these disparities. The United States has been grappling with the issue of race since its inception. Racism, however, is not a relic of the past. A federal appellate court recently acknowledged "the sad truth that racism continues to exist in our modern American society despite years of laws designed to eradicate it." 128 As long as there continues to be significant racial prejudice in society, it is difficult to imagine any reform capable of eliminating the racial disparities that have always infected the highly-charged decision whether to sentence an individual to death. Even the Racial Justice Act, although well intended, would not have done so. The Act was modeled after Batson and as discussed earlier, judges have largely ignored obvious racism in jury selection. 129 Therefore, there is no reason to believe that the courts would do a better job enforcing the Racial Justice Act, even if it were to be enacted.

### AT: CP Reform – Can’t Solve Wrongful Convictions

#### Reforms can’t ensure that innocents are convicted and put to death

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. Innocence

There are several causes of wrongful convictions. Wrongful convictions often occur because of erroneous eyewitness testimony, which has been described as "the single greatest cause of wrongful convictions [\*289] in the U.S. criminal justice system." 130 Several factors cause witnesses to misidentify suspects. First, the stress of witnessing a traumatic event like murder may affect a witness' perception. 131 Second, witnesses often make misidentifications when identifying persons of a different race. 132 Third, the procedure used by law enforcement officers may cause a witness to identify the wrong person. 133 For instance, a suggestive lineup could cause a misidentification. 134 A lineup administered by a police officer who is familiar with the suspect can also cause misidentifications. 135

Several proposals have been made to minimize the possibility of a misidentification. One such proposal is that lineups be administered by officers who are not involved in the investigation and who are not familiar with the suspect. 136 To address the problem of suggestive lineups, some have proposed that individuals in a lineup be presented sequentially so that witnesses would not be able to compare and contrast the individuals in the lineup and pick the individual who most resembles the suspect. 137 Another potential source of misidentification comes from the fact that witnesses often believe that the suspect is part of the lineup and therefore feel pressure to pick someone in the lineup as the perpetrator. 138 Some have proposed informing witnesses that the suspect may not be in the lineup to reduce this pressure. 139

Another cause of wrongful convictions is misconduct by prosecutors and police. In Brady v. Maryland, 140 the Supreme Court held that prosecutors were constitutionally required to disclose exculpatory evidence to the defense, but they often fail to fulfill this duty. According to federal appeals court Judge Alex Kozinski, there is an "epidemic of Brady violations abroad in the land." 141 To deal with the problem of prosecutorial misconduct, Judge Kozinski believes that open file discovery 142 [\*290] should be required. 143 Thus, if open file discovery is required, prosecutors would be obligated to disclose any evidence bearing on the crime with which a defendant is being charged, not just exculpatory evidence. 144 Others have proposed that prosecutors should be disciplined more frequently and harshly when they engage in misconduct. 145 Separately, but related, police sometimes extract false confessions from suspects. To address that problem, some have opined that police interrogations should be videotaped. 146

A major impediment to preventing prosecutorial and police misconduct is that there are no incentives for either prosecutors or police officers to play by the rules. Prosecutors and police are rarely prosecuted even when they have been found to have engaged in misconduct. 147 Although prosecutors can be disciplined by the state bar association, this rarely occurs. 148 Furthermore, the standard for overturning a conviction based on prosecutorial misconduct or police overreaching is extremely high. The defendant not only has to prove that the violation occurred but also must prove that the evidence resulting from prosecutorial or police misconduct was not harmless. 149 Most defendants are unable to prove that the misconduct affected the outcome of their case. 150 Barring a complete overhaul of the disciplinary system governing prosecutors, small reforms are unlikely to curtail these problems.

### AT: CP Reform – Legitimizes Other Uses of Death Penalty

#### Attempts to make death penalty “error-free” lull us to legitimize the imposition of death in certain cases

Capers, 12 (Bennett Capers, Professor Bennett Capers is the Stanley A. August Professor of Law at Brooklyn Law School, where he teaches Evidence, Criminal Procedure, and Criminal Law. His articles and essays have been published or are forthcoming in the California Law Review (twice), Columbia Law Review, Cornell Law Review, Fordham Law Review, Harvard Civil Rights-Civil Liberties Law Review (twice), New York University Law Review, North Carolina Law Review, Notre Dame Law Review, Michigan Law Review, and UCLA Law Review, among others, and he is co-editing the forthcoming book Critical Race Judgments: Rewritten U.S. Court Opinions on Race and Law (Cambridge University Press) (with Devon Carbado, Robin Lenhardt, and Angela Onwuachi-Willig). His commentary and op-eds have appeared in the New York Times and other journals. He has been a visiting professor at Fordham Law School, University of Texas Law School, and Boston University Law School. "Life Without Parole: America's New Death Penalty?", (Chapter 5: Defending Life), ed. by Austin Sarat and Charles Ogletree, NYU Press, https://muse-jhu-edu.proxy.lib.umich.edu/chapter/725354/pdf, 2012, Accessed 6-22-2020 via Umich Libraries) //ILake-JQ

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

### AT: CP Reform – No Crime Net Benefit

#### Counterplan can’t correct unfairness of the system AND effectively deter crime – can’t have both

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)

E. Other Factors

Several other factors have contributed to the loss of public confidence in the administration of the death penalty.

i. Delay in Implementation

The few who are sentenced to death are not likely to be executed. They are more likely to have their sentences overturned or die from [\*283] natural causes than to be executed. 88 "In a word, executions are rare." 89 For the unlucky few who are executed, it takes on average of approximately eighteen years to carry out. 90 This delay is attributable to a lengthy appellate process, 91 which seeks to ensure reliability and fairness before the ultimate punishment is meted out. 92 However, the lengthy delay in carrying out the death penalty undermines the penological justifications for the death penalty, specifically the deterrence rationale. 93 The question whether the death penalty actually deters is uncertain. 94 There are studies that both support and undermine the deterrence rationale of the death penalty. 95 Most would agree that, to be an effective deterrent, executions have to be carried out swiftly. 96 Public support has diminished as a result of the lengthy delays. There is also no solution to the problem of lengthy delays as long as we are committed to reliability and fairness. As Justice Breyer explained, "in this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes or we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both." 97

## Dignity PIC Answers

### 2ac Dignity PIC

#### \*\*\*note when prepping file --- there is evidence in the “Kritik Answers” section that also has a defense of dignity

#### Only abolition by prioritizing human dignity can address the root of injustice in the criminal justice system and affirms that no life is worth less than another. That’s Malkani.

#### Only a moral defense for abolition prevents co-option that expands the carceral state

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

To understand why these various strands of abolitionism can be characterized as “conservative” and “pragmatic,” it is helpful to consider Herbert Haines’s critique of anti-death penalty efforts between the years 1972 and 1994.34 Haines outlined the movement’s then-largely unsuccessful attempts to stem the tide of death sentences and executions, and concluded that the movement

need[s] to adopt a more pragmatic strategy, one that places less emphasis on moralistic appeals and more emphasis on tangible costs and on policy alternatives that resonate with widespread cultural sentiments… [O]nly some form of life-without-parole (LWOP) is likely to be seen by the largest segment of the American public as capable of making executions unnecessary.35

Haines also suggested that the movement needed to diversify, noting that the anti-death penalty movement consisted of “mostly… middle-class white people with professional backgrounds and liberal politics”.36 The movement, Haines surmised, therefore struggled to convert others to their cause.

A revised edition of Haines’s book was published in 1999, and since around that time, there has been a discernible trend within the anti-death penalty community towards pragmatic discourses. For example, in November 1998, Northwestern University in Chicago, Illinois, hosted the first National Conference on Wrongful Convictions and the Death Penalty. The conference drew attention to the extent to which innocent people were being sentenced to death, and the risk of executing an innocent person has since played a considerable role in anti-death penalty efforts.37 Since the financial crash of 2008, abolitionists have also increasingly drawn attention to the high costs of capital punishment compared to other criminal sanctions. Campaigners and activists have also been more willing to highlight the availability of life sentences in prison without the possibility of parole as an alternative punishment, in the hope of securing support from those who have concerns about state-sanctioned executions, but who still want to see convicted people suffer harsh punishments and be permanently excluded from society. Although these sorts of arguments had been raised prior to 2000, they have steadily become more central to abolitionist discourse since the turn of the century.38

These sorts of arguments are “pragmatic” in that they appeal to the existing moral views of those who support, or are apathetic about, capital punishment. Almost everybody agrees that it is wrong to execute a person who is not factually guilty of a crime. Those who support capital punishment in the abstract might be willing to forego such a penalty if doing so saves money, and if they are assured that people found guilty of heinous crimes will nonetheless suffer and be kept away from the rest of society. These sorts of arguments are “conservative” in that such discourses do not necessarily address broader concerns with the criminal justice system, such as the reliance on harsh retributivism, mass incarceration, police brutality, and so on.39 The concern with executing an innocent person, for example, is unique to capital punishment. Similarly, the practical interference with the supply of lethal injection drugs that has proven so effective in stopping executions is “conservative” in that it is narrowly focused on the phenomenon of executions and, at first glance, says nothing about the measures that a society should adopt to prevent criminality, or how communities should respond to those found guilty of committing the most horrific offenses.

This apparent shift in abolitionist discourse, which has been characterized as rationalistic, conservative, and pragmatic, as opposed to emotional, progressive, and moralistic,40 has been praised by some commentators for its apparent efficacy. Daniel LaChance expresses this view: “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.”41 However, it is not axiomatic that pragmatic and conservative approaches will secure nationwide abolition. While it is true that public support for state-sanctioned executions is declining, the 2017 Gallup poll referred to above shows that just 41% of Americans expressly oppose capital punishment.42 And even though state legislatures have been abolishing the death penalty at a remarkable rate, it is still a legally sanctioned punishment in the majority of states and by the military and federal government. Perhaps more strikingly, as noted above, abolitionist efforts in a number of states have not only been defeated recently, but actively pro-death penalty efforts – efforts to entrench capital punishment, and to curtail opportunities to appeal death sentences – have met with some success. And in response to the shortage of drugs needed for executions, states have utilized alternative chemicals, have procured drugs from unlicensed sources, have enacted measures to prevent such interference, and have introduced other methods of execution such as electrocution and gassing, in order to press ahead with executions.43

Even if these pro-death penalty successes are construed as blips on an otherwise straight line towards the end of executions, we should still be concerned about the potential collateral effect of a conservative and pragmatic-based abolition. Angela Davis, who advocates the abolition of prisons, complains that

even the anti-death penalty campaign tends to rely on the assumption that life imprisonment is the most rational alternative to capital punishment. As important as it may be to abolish the death penalty, we should be conscious of the way the contemporary campaign against capital punishment has a propensity to recapitulate the very historical patterns that led to the emergence of the prison as the dominant form of punishment.44

Marie Gottschalk agrees, noting how the “disputes over capital punishment [in the 1960s and 1970s] helped solidify a zero-sum view of victims and offenders in capital and noncapital cases that bolstered the consolidation of the conservative victims’ rights movement”.45 This, she writes, “facilitated the expansion of the carceral state,”46 referring to the phenomenon of mass incarceration in the United States today. Thus, although situating anti-death penalty narratives within conservative discourses has reaped some rewards in the sense that there are fewer death penalty prosecutions, sentences imposed, and sentences carried out, this approach runs the risk of perpetuating the very values that (at least some) abolitionists are seeking to eradicate.47 Michael McCann and David T. Johnson also state that “if abolition is separated from reform of the larger penal complex, the advance will be limited and perhaps even Pyrrhic”. In their words, “[a]nother troubling possibility is that successful abolition could make other punishments harsher. Abolition was one precursor of America’s massive prison expansion after the US Supreme Court effectively eliminated the death penalty in 1972.”48 In this book, I build upon these views by using historical lessons – namely, those from the abolition of slavery – to argue that contemporary anti-death penalty efforts are actually more radical than conservative or pragmatic, and should continue to be so.

#### Focus on costs fails – sustains the retributive carceral state – only focusing on inhumane nature of death penalty can transform the system

Kleinstuber et. al 16 Ross Kleinstuber is an assistant professor of Justice Administration and Criminology at the University of Pittsburgh at Johnstown. Sandra Joy is a professor of Sociology at Rowan University. Elizabeth A. Mansley is an associate professor of Criminology at Mount Aloysius College. [“INTO THE ABYSS: THE UNINTENDED CONSEQUENCES OF DEATH PENALTY ABOLITION,” 19 U. Pa. J.L. & Soc. Change 185, URL: https://scholarship.law.upenn.edu/jlasc/vol19/iss3/1/#.XvvbaWeQHt0.link] kly

III. THE WRONG RHETORIC

As bad as the move from death to slow death with no appeals is, **the worst part about** the current spate of **repeals based upon costs might** actually **be its support for the** harsh, draconian rhetoric that sustains the retributive and brutal nature of the current American carceral apparatus. Rather than focusing on the inhumane nature of the death penalty, death penalty opponents in America have focused their attention on the (contradictory) concerns of cost and innocence—a move that seems to suggest that the real problem with the death penalty is too much due process and not its inhumane, brutal, and degrading nature. In fact, many abolitionists have even adopted the “law-and-order” rhetoric that justifies punitive punishments in the first place, causing them to seek a Pyrrhic victory, advocating for the abolition of one inhumane penalty (death) at the expense of a more sustained attack against the excessively brutal and degrading nature of American penal policy. Without a focus on human dignity, there is nowhere left for abolitionists to turn once they have accomplished abolition of the death penalty. As a consequence, although the number of death sentences has fallen in recent years, there has been a dramatic uptick in the number of people sentenced to LWOP and other “death-in-prison” sentences.60

Consider the language used in an editorial published by the Dallas Morning News:

[LWOP is] harsh. It’s just. And it’s final without being irreversible. Call it a living death.. . . Death does not provide an added level of justice. A prison sentence that does not allow for the possibility of parole accomplishes the same objectives: protecting society from violent criminals and ensuring that every day of a murderer’s life is a miserable existence. Our standards of punishment have evolved over time, from the gallows to firing squads, from the electric chair to lethal injection. Life without parole, essentially death by prison, should be the new standard.61

This language hardly attempts to see offenders in a different light or to humanize them; **it does not discuss** the **potential for reform or** alter the punitive frame through which criminal offenders have been viewed for the last forty years. On the contrary, it touts the harshness and misery of a LWOP sentence, equating it with a death sentence.

Language like this is not exclusive to conservative, Southern states like Texas that continue to use the death penalty with a high level of frequency; it was evident in the states that recently abolished capital punishment and was utilized by proponents of California’s failed Proposition 34. In New Jersey, New Mexico, Connecticut, and Illinois, the primary focus of the abolitionist movement was on the risk of a wrongful execution and on the costs associated with the death penalty rather than the punishment’s inherent barbarity.62 In fact, the language used in those states often explicitly endorsed a tough-on-crime rhetoric that failed to acknowledge the humanity of convicted killers. Prior to signing Connecticut’s death penalty repeal measure in 2012, Governor Daniel Malloy stated: “[g]oing forward, we will have a system that allows us to put these people away for life, in living conditions none of us would want to experience. . . Let’s throw away the key and have them spend the rest of their natural lives in jail.”63 When New Mexico abolished the death penalty in 2009, Governor Bill Richardson stated, “[w]ith my signature, we now have the option of sentencing the worst criminals to life in prison without the possibility of parole. They will never get out of prison.”64

Even the supposedly liberal American Civil Liberties Union (ACLU) of Northern California used extremely draconian language in offering its support for replacing the death penalty with LWOP:

The facts prove that life in prison without the possibility of parole (LWOP) is swift, severe, and certain punishment. The reality is that people sentenced to LWOP have been condemned to die in prison and that’s what happens: they die in prison of natural causes, just like the majority of people sentenced to death… Spending even a small amount of time in California’s overcrowded, dangerous prisons is not pleasant. Spending thirty years there, growing sick and old, and dying there, is a horrible experience.65

According to the ACLU, this is a benefit of — not a drawback to — LWOP. California’s failed ballot initiative used similarly punitive language: “[m]urderers and rapists need to be stopped, brought to justice, and punished,” and “[c]onvicted murderers must be held accountable and pay for their crimes.”66 In order to accomplish this, the measure would have “require[d] that persons convicted of murder with special circumstances remain behind bars for the rest of their lives, with mandatory work in a high-security prison, and that money earned be used to help victims through the victim’s compensation fund.”67

With a few rare exceptions, there was little attempt to change the retributive philosophical frame that has been used to justify the death penalty and other extremely harsh punishments. There was almost no discussion of mitigating circumstances, the possibility for reform or rehabilitation, or the inherent humanity of killers. On the contrary, most abolitionists have adopted the same dehumanizing rhetoric championed for decades by proponents of “get tough” legislation that has justified the death penalty, fueled mass incarceration, and made the United States the imprisonment capital of the world while doing nothing to address the root causes of crime. As such, the abolitionist movement has actually been complicit in condemning more people to die in prison:

#### Prioritizing dignity prevents life-without-parole from replacing death penalty – Europe proves

Nellis, 13 --- Senior Research Analyst at The Sentencing Project (Winter 2013, Ashley, “SYMPOSIUM: THE FUTURE OF THE DEATH PENALTY IN AMERICA: ARTICLE: Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty,” 67 U. Miami L. Rev. 439, Nexis Uni via Umich Libraries, JMP)

V. Suggestions for Reform

A. Seek Nuanced Assessments of Death Penalty Alternatives

Despite sizable declines in support over the years, the majority of the public still favors the death penalty. In a 2010 Gallup Poll, 64% of respondents said that they supported the death penalty for persons convicted of murder and 29% opposed it; the percentage in favor of the death penalty wavered only slightly between 2002 and 2010. 106 Yet, when surveys provide alternatives to the death penalty, support for the death penalty drops considerably. 107

[\*456] It is misleading to measure public opinion based on a limited range of sentencing options when, in actuality, there are additional sanctions that both support prison reform and protect public safety. It is essential to explore public support for all sentencing alternatives to the death penalty, not only life without parole.

Promotion of LWOP in exchange for fewer death sentences legitimizes LWOP even though it, too, is rife with problems of its own.

B. Look to Other Countries for Guidance

Many countries exist without the death penalty or LWOP and are able to maintain public safety. 108 These countries do not experience major crime spikes. 109 According to a 2005 United Nations report, seven countries reported having a mandatory life sentence for murder; however, all of them reported mechanisms for releasing prisoners after a certain period of time. 110 In 2005, the United Kingdom had only twenty-two prisoners serving LWOP sentences. 111 Most European countries do not have parole-ineligible life sentences. 112 In these countries, it is recognized that no one should be declared beyond reform or redemption without first attempting to rehabilitate them. 113 A comprehensive review after some term of years is considered appropriate because of the emphasis on human rights and human dignity. 114 Perhaps we can learn from these countries how to develop a continuum of sanctions that encourages individual reform and protects the public at the same time.

### --- 1ar Can’t Solve

#### How the death penalty is ended is critical --- determines whether life-without-parole replaces it

Gullapalli, 20 --- senior legal counsel at The Justice Collaborative, spent several years as a human rights advocate, public defender, and journalist in the U.S. and India (1/31/2020, Vaidya, “THE DEATH PENALTY IS PART OF A LARGER SYSTEM OF PUNISHMENT,” <https://theappeal.org/the-death-penalty-is-part-of-a-larger-system-of-punishment/>, accessed on 3/24/2020, JMP)

Colorado’s Senate took a critical vote on Thursday that put the state on the pathway to abolishing the death penalty. The body voted 19-15 in favor of a bill to repeal capital punishment. Around 11:30 a.m. local time today, Denver Post reporter Alex Burness wrote on Twitter to report further progress: “The Colorado Senate has given final passage to the bill to repeal the death penalty. This was expected, but still a huge moment. Colorado may now be just weeks away from becoming the 22nd state to repeal the death penalty.”

The expected victory in Colorado is a victory for death penalty opponents everywhere and other Western states may soon follow, as Liliana Segura and Jordan Smith of The Intercept chronicled last year. What is also crucial, as the number of people on death row shrinks and the number of people serving life sentences has ballooned, is to think about how a victory over capital punishment can either serve or undermine future victories over the larger system of punishment.

Colorado’s death row is representative of capital punishment nationwide in two ways. First, the three men on death row, all Black, were from the same county, products even, of the same high school in the city of Aurora. In this way, Colorado is emblematic of the hyperlocal nature of the death penalty today—the product, overwhelmingly, of a small number of outlier jurisdictions and prosecutors rather than of geographically broad use of the penalty.

Second, capital punishment has been on the wane in the state for a long time. The last execution was in 1997. Nationwide, there were fewer than 50 death sentences and fewer than 30 executions last year, for the fifth year in a row, according to the Death Penalty Information Center.

But even as its reach contracts, the death penalty continues to command particular attention in U.S. jurisprudence, national media attention, and international coverage of the U.S. legal system. The Supreme Court has said death is different and developed a jurisprudence that set capital cases apart from all others, with heightened (although still insufficient) protections. Conversations about the death penalty also have a particular moral valence, focused on the ethics of the taking of a life.

But that focus and that moral language can and should encompass the broader system of punishment. As we celebrate every single life that is not ended in an executioner’s chair, we can draw attention to the thousands of people in prison who will die far from their homes and families, and decades after the acts for which they were condemned to death. The death penalty is gruesome in how it dismisses the humanity of the condemned person and diminishes the humanity of those imposing and carrying out those sentences. But many other aspects of our system do the same things.

In the past month alone, 13 people in Mississippi state prisons have died. Jamelle Bouie of the New York Times wrote today about the ways in which that violence is coded into the DNA of the state’s prisons and the multiple failed attempts at reforms. “But no amount of change has been able to break the cycle of brutality,” he writes. “And why would it? The history of Parchman is a prime example of how dehumanization and neglect are intrinsic to separating people from their freedom.”

Many of the reasons to oppose capital punishment are reasons to end other harsh punishments: a belief in the inherent dignity of every human being, a belief that the state should not take a life even in exchange for a life, an understanding that the system of punishment we have is premised on racism and delivers on it, or an acknowledgment that our system is riddled with errors.

But there are other arguments against the death penalty that may entrench the larger system of punishment. These are the arguments that say the death penalty is too expensive because of the greater protections afforded those charged with capital crimes, when those greater protections should be extended to more people. Or the arguments that the death penalty should be done away with in favor of life in prison without hope of release. Ben Miller and Daniel Harawa wrote in Slate this month, speaking of the Democratic candidates whose (historical) opposition to the death penalty relies on an embrace of life in prison sentences: “We will solve nothing if we think the answer is to substitute one cruel punishment with another.”

This pairing of opposition to capital punishment with an embrace of life without parole sentences bears some responsibility for where we are today, with over 53,000 people sentenced to die in prison. In 2015, Ashley Nellis of the Sentencing Project and an author of the “The Meaning of Life: The Case for Abolishing Life Sentences,” explored the tensions between death penalty abolition work and efforts to end extreme sentencing in a law review article. The “rapid rise in LWOP [life without parole] sentences” she wrote, “can partly be attributed to a desire for a reliable, terminal punishment to replace the death penalty after it was declared unconstitutional in 1972.” But, Nellis said, it does not have to be this way: “Strategies to abolish the death penalty can be improved upon by viewing the successful elimination of the death penalty as just the first step on the road to the reformation of extreme sentences altogether. In this view, the efforts to eliminate the death penalty are not in conflict with efforts to eliminate LWOP.”

What is important, she wrote, was not just whether the death penalty is abolished but why. “The reasons why American society will eventually decide to eliminate the death penalty as a punishment are as important as the outcome—maybe more so.”

Kenneth Hartman, sentenced to life without parole in California, wrote in 2016: “Why not abolish the death penalty and life without the chance of parole? The assumption would be that it is possible for human beings to become better than their worst act.” Hartman described his own sentence as just a different kind of death: “Though I will never be strapped down onto a gurney with life-stopping drugs pumped into my veins, be assured I have already begun the slow drip of my execution [which] won’t come to full effect for 50, maybe 60 years.”

## Counterplan Answers

### AT: CP LWOP PIC

#### Both LWOP and the death penalty eliminate any chance at reform and allow the state to carry out state sanctioned murder

Nellis, 13 --- Senior Research Analyst at The Sentencing Project (Winter 2013, Ashley, “SYMPOSIUM: THE FUTURE OF THE DEATH PENALTY IN AMERICA: ARTICLE: Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty,” 67 U. Miami L. Rev. 439, Nexis Uni via Umich Libraries, JMP)

VI. Conclusion

Life without parole is effectively a death sentence; to consider it as anything less severe is a mistake. Even though one's death may not occur for a few decades or more does not mean that the government has not decided how and where the individual will die. When looked at from this view, LWOP is not so different from the death penalty. Moreover, in both an execution and a life sentence without the possibility of parole, there is no hope for redemption or reform, despite the reality that many people turn away from their criminal pasts and go on to lead law-abiding lives where they could contribute in a positive way to society. Neither of these two sentences allow for this possibility, however. Both the death penalty and LWOP are terminal sentences and guarantee that the prisoner will die in prison.

Death penalty abolitionists are in a difficult position. Victories in eliminating the sentence have only been successful in recent years despite efforts that span the last several decades. Advocates to eliminate LWOP can sympathize with the challenges inherent in this effort and know that most abolitionists privately consider LWOP to be an excessive punishment as well. Yet everyone agrees that if forced to choose between a death sentence and LWOP, life without parole is the preferred sentence.

Ultimately, however, neither sentence is appropriate in a corrections system that has the ability to reform lives as ours does. Our society demands fair and just sentences that keep the public safe, apply a reasonable amount of punishment, and attempt to reform the offender so that he or she can be safely returned to the community. Neither the death penalty nor LWOP accomplish these goals.

#### Life without Parole is a death sentence – over 53,000 people have been doomed to die in prison

Irons 20 – a professor of political science emeritus at the University of California, San Diego, member of the Supreme Court bar, and author of "A People’s History of the Supreme Court.”(Peter, NBC News, “A prison sentence of life without parole isn't called the death penalty. But it should be.”, 6/24/20, https://www.nbcnews.com/think/opinion/prison-sentence-life-without-parole-isn-t-called-death-penalty-ncna1232018)//mj

Advocates of criminal justice reform (just about everybody these days) are understandably pleased that the ultimate penalty of death is dying out, so to speak, with Colorado this year joining the list of states that have abolished the death penalty. The number of executions has dropped from a modern high of 98 in 1999 to only 22 in 2019, with the number of death sentences imposed down by almost 90 percent during those years, from 272 to 34.

Before we cheer this welcome development, however, we need to revisit and replace what I call “the extended death penalty,” known officially as life without parole, or LWOP. Embraced by many abolitionists as a more humane alternative to the death penalty, it is now supported by a majority of the public over execution; a Gallup poll in October showed 60 percent chose LWOP as the punishment for murder.

In addition, as more and more prosecutors seek the death penalty more infrequently, if at all­­, they routinely press for LWOP sentences in first-degree murder cases, and sometimes for second-degree murder and armed robbery. There’s no uniform standard to decide which defendants deserve to eventually be eligible for parole and which don’t; these choices are inherently “arbitrary and capricious” and the antithesis of fairness.

As a result, even with death-sentenced inmates at a modern low of some 2,800, there are now more than 53,000 serving LWOP sentences, a four-fold increase in the past two decades. Another 44,000 are serving “virtual life” sentences of 50 or more years, past the life expectancies of almost all inmates. In other words, some 97,000 inmates have still been condemned to die behind bars.

Those who receive life sentences with parole eligibility return to prison for another violent crime at a rate of only 1.2 percent. Though LWOP inmates, by definition, cannot present any evidence of rehabilitation to a parole board, it’s reasonable to expect that ending life without parole sentences would not unleash a new murder wave.

Doing so would also save taxpayers up to $40,000 for each year of further incarceration, not to mention the costs for the growing number of elderly inmates with serious health problems. That’s the pocketbook argument against the practice.

A better argument, in my opinion, is that restoring parole eligibility to all convicted murderers (with no guarantee of release, of course) would encourage inmates to keep their disciplinary records clean and to participate in educational and vocational programs to improve their chances of successful re-entry into their communities and job markets.

Cynics say that LWOP inmates deserve a lifetime behind bars for taking another person’s life. And regardless of the issue of justice, some are obviously incorrigible and would be a danger on the streets. No one advocates the release of serial killers and other “worst of the worst” offenders. And parole boards and governors will certainly err on the side of continued imprisonment in the most serious cases, if for no other reason that no official wants to be pilloried for releasing a murderer who murders again.

Nonetheless, conscientious parole boards and governors would find a substantial number of life-without-parole inmates deserving of release with the imposition of lifetime parole conditions — serious violations of which would result in return to prison. Despite having no chance of eventual release, many of these “lifers” already take part in educational, vocational and self-improvement programs, and have clean disciplinary records, factors that help establish the grounds for parole boards.

My personal preference would be to revise state laws to give all convicted murderers a chance for parole after serving a minimum of 10 or 15 years (those who get life sentences with the possibility of parole serve an average of 13.4 years), and a presumption of parole after age 55 or 60, by which time most inmates have “aged out” of further crime. But I understand both are unlikely of adoption in all but the bluest states, so I suggest instead urging governors to exercise their pardon and commutation powers in cases of demonstrated rehabilitation and remorse.

#### Both the death penalty and life without parole are subject to racial disparities

Nellis, 13 --- Senior Research Analyst at The Sentencing Project (Winter 2013, Ashley, “SYMPOSIUM: THE FUTURE OF THE DEATH PENALTY IN AMERICA: ARTICLE: Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty,” 67 U. Miami L. Rev. 439, Nexis Uni via Umich Libraries, JMP)

C. Racial Disparity

Racial disparity is a widely documented problem in death sentences; multiple studies confirm that race plays a fundamental role in sanctions imposed within the criminal justice system. 94 The race of the victim appears to play a particularly important role in whether the death penalty is sought. 95

Any sentence that is more likely to be imposed because of one's racial or ethnic background, all other factors being equal, is inappropriate. Just as it is wrong to administer a death sentence when it is discovered that the trial phase was influenced by race, it is also wrong to [\*454] sentence someone to life in prison for this reason. Yet we see this playing out in states around the country.

Of the 41,095 people serving LWOP sentences (as of 2008), 48.3% are African-American. 96 While data on the race of the victims for all people serving life without parole sentences has not been gathered, an analysis of data on juvenile life without parole ("JLWOP") shows that the proportion of African-Americans serving JLWOP sentences for killing a white person (43.4%) is nearly twice the rate at which African-American juveniles overall have been arrested for taking a white person's life (23.2%). 97 Perhaps other factors, such as a prior record, account for this large-scale disparity, but until we can be absolutely certain that these other factors provide a full explanation, it is inappropriate to permit criminal sentencing that produces racial disparity. 98

#### Life without parole lacks a sufficient review process and protections

Nellis, 13 --- Senior Research Analyst at The Sentencing Project (Winter 2013, Ashley, “SYMPOSIUM: THE FUTURE OF THE DEATH PENALTY IN AMERICA: ARTICLE: Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty,” 67 U. Miami L. Rev. 439, Nexis Uni via Umich Libraries, JMP)

III. What's Wrong with LWOP?

There are at least three serious issues with parole-ineligible life sentences. These problems include an absence of heightened review of LWOP sentences, the mandatory application of LWOP, and the extreme racial disparity in the LWOP population.

A. Lack of Heightened Review

Death penalty cases are reviewed with a high degree of scrutiny because of the irrevocable nature of executions. 51 In fact, several layers of review separate the imposition of death sentences from that of all lesser sentences. 52 For instance, capital defendants generally have the right to state-appointed counsel for post-conviction litigation, but noncapital defendants do not. 53 And, while ineffective assistance of counsel still occurs in death penalty cases some of the time, particularly for low-income defendants, these claims are carefully reviewed. 54

For life without parole cases, the court procedures are far more limited; appeals by the highest state court are not guaranteed as they are with death penalty cases, and the mandatory nature of LWOP sentences allows important features of a case or defendant to be overlooked. 55 For juveniles, it is not uncommon for a defendant's attorney to be trying his or her first homicide case, as trial attorneys often cut their teeth in juvenile cases.

Those facing LWOP sentences do not benefit from the same level of procedural protections during the original trial or during the appeals process, despite the similarities they share with death sentences. 56 And though state and federal post-conviction habeas restrictions differ from [\*449] state to state, appeals are frequently time-barred. 57 Yet there is virtually no limit to the appeals process where the penalty is death, resulting in offenders remaining in prison an average of about fifteen years before facing execution. 58 Of the roughly 3,300 prisoners currently on death row, nearly all will die of natural causes or suicide, the same cause of death for the roughly 41,000 individuals who comprise the LWOP population. 59

The means by which a defendant can be sentenced to death are much more limited than those for an LWOP defendant. First, depending on the jurisdiction, both judges and juries can deliver LWOP sentences, but death sentences are usually the sole decision of juries. 60 In addition, most states and the federal government require the jury to unanimously agree that a defendant should be sentenced to death, but this is not the case with LWOP. Unanimous jury decisions are not required for LWOP, and judges often make the sentencing decision. "Scholars estimate the reversal rate for noncapital cases to be 10-20%, far below the capital reversal rate of roughly 68%." 61

Another concern is the limited amount of information that juries are entitled to receive about sentencing options in death penalty cases. Simmons v. South Carolina determined that when a prosecutor who wishes to raise the issue of future dangerousness as justification for sentencing the defendant to death, he or she must disclose LWOP as an alternative if it is an option in the state. 62 However, it is not a requirement to disclose any other sentencing options that might be available.

The lack of heightened review in cases leading to LWOP sentences brings an increased likelihood that innocent individuals will be punished. Just as placing an innocent person on death row is morally unacceptable, so too is the wrongful imprisonment of someone for the rest of his or her life. For both, it means a period of irreversible years spent in prison. Since 1973, there have been 141 exonerated death row prisoners; [\*450] the exact number of exonerated individuals serving LWOP is not known but is presumed to be lower. 63 One such case is that of the West Memphis Three, which received prominent national attention by investigative journalists and Hollywood celebrities, ultimately pressuring the state enough to revisit the case. Eventually, the two LWOP sentences and one death sentence were successfully challenged, and the three men were released after serving sixteen years in prison for crimes they did not commit. 64

### AT: CP Referendum

#### Ballot initiatives empirically fail with death penalty

Sarat, et. al, 19 --- Associate Dean of the Faculty and William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College (May 2019, Austin, Austin Sarat, John Malague, Lakeisha Arias de los Santos, Katherine Pedersen, Noor Qasim, Logan Seymour, and Sarah Wishloff, “ARTICLE: When the Death Penalty Goes Public: Referendum, Initiative, and the Fate of Capital Punishment,” 44 Law & Soc. Inquiry 391, Nexis Uni via Umich Libraries, JMP)

CONCLUSION

The history of ballot measures concerning the death penalty confirms several of the hopes of populist and progressive-era proponents of direct legislation, and it [\*413] illustrates the ways the public can resist, or overcome, decisions of their political leaders. Moreover, some of the defects that critics of direct legislation highlight do not play prominent roles in that history. For example, with the exception of California and Nebraska, big money has not regularly been a major factor in determining the outcome of these ballot measures.

Yet the story of what happens when the death penalty is on the ballot is not uniformly positive for advocates of initiative and referendum. For example, in addition to allowing voters to check political leaders and institutions, ballot measures, as we noted above, have been used by political leaders to mobilize and direct public sentiment. Furthermore, the death penalty's ballot history has been marked by instances of the kind of ballot confusion that worries direct legislation's critics.

Whatever the complexities and problems of any particular ballot question dealing with capital punishment, examining what happens when the death penalty goes public demonstrates that since 1968, referendum and initiative measures have played a prominent role in stopping efforts to end capital punishment. When courts ruled against the death penalty or when legislatures voted to abolish it, the initiative or referendum process was used against them. When an executive would not sign a restoration bill, the death penalty was put on the ballot to circumvent him or her.

These results confirm the arguments of scholars that the public seems to be more punitive than elites (Gross 1993; Whitman 2003; Garland 2010). As Garland (2010, 309) notes, America's death penalty has not been abolished because of the resilience of America's system of "popular local democracy," which has stood strong against what he calls "top-down counter-majoritarian reform." Death penalty supporters repeatedly emphasize these public preferences and call on other politicians to respect the "will of the people." In their view, efforts to end the death penalty are undemocratic.

While many scholars advance concepts of democracy that go beyond simple majority rule (Kateb 1994; Dryzek 2000; Gutmann and Thompson 2004; Post 2005) and argue that the death penalty is incompatible with democracy (Bedau 1992; Johnson 2004; Kateb 2011), Samuel Gross notes that "whenever the death penalty has been abolished in a Western country it would have been retained if that matter had been put to a public vote" (Gross 1993, 87; see also Steiker and Steiker 2016). No matter what one's conception of democracy, or what one thinks about its compatibility with capital punishment, the history of the death penalty on the ballot suggests that Gross's (1993) observation is as applicable to the United States as it has been in other jurisdictions. Abolition, if it occurs in America, will likely be the work of legislators, executives, and, most especially, judges (Caplan 2016; Richardson 2016; Steiker and Steiker 2016). It will, in Whitman's (2003, 13) terms, be an "elite" project.

#### Public support for death penalty is declining but referendums to ban it aren’t being approved

Garrett, 17 --- professor of law at the Duke University School of Law (Brandon L., End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice, ebook from University of Michigan, pg. 213, JMP)

Public support for the death penalty continues to decline: fewer than half of Americans now support it, and opposition to it has reached the highest levels seen in more than forty years.2 Public opinion among both liberals and conservatives has increasingly turned against the death penalty. To be sure, in 2016, California voters decided to retain the death penalty, as did voters in Nebraska. Perhaps voters are of two minds about the death penalty, or perhaps some people like the idea of the death penalty in the abstract, but when confronted with individual cases they reject death sentences.

### AT: CP Stop Access to Lethal Drugs

#### Empirically causes shift to more dangerous less certain drugs

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)

The fugitive slave saga and access to lethal injection drugs are additional unintended consequences that exemplify the parallels between slavery and death penalty abolitionist movements. In his analysis of unintended consequences, Malkani explains:

Just as antebellum abolitionists frustrated the intended outcome of Prigg v. Pennsylvania [8] by disassociating themselves from slavery and thus preventing slave owners and their agents from recapturing escaped slaves, so today’s abolitionists have frustrated the intended outcome of Baze v. Rees [9] by encouraging disassociation from capital punishment and thus preventing executions from proceeding.[10]

But the unintended consequences did not always work in the favor of the abolitionists as in the two previous examples. When fugitive slaves were harbored in free states, this had the unintended consequence of emboldening the pro-slavery lobby and, for a time, made matters worse.[11] Likewise, anti-death penalty actions aimed at reducing access to lethal injection drugs have caused some states to turn to alternative, untested drug protocols that increase the risk of a painful death.[12] Justice Alito even referred to the result of these abolitionist tactics as part of a “guerilla war”[13] where the abolitionists are to blame for these new, potentially painful executions. [14]

### AT: CP Death Penalty For White Police Officers

#### The CP is just a tool to legitimize the racist foundation of the death penalty

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 describes how both slavery and death penalty proponents have attempted to legitimize the practices by implementing protections to create a “veneer of acceptability.”[17] For example, “slaves were to be counted as persons for the purposes of the Electoral College, and were indeed referred to as ‘persons’ throughout the text of the US Constitution.”[18] Likewise, proponents of the death penalty hide the “racialized system of degradation . . . by the occasional sentencing to death of a white person, or the sentencing to death of a person accused of killing a black person.”[19] According to Malkani, these safeguards are not implemented because the proponents care about the humanity of slaves or those who are executed.[20] Rather, they are implemented in a cunning attempt to legitimize a dehumanizing practice.[21]

## Kritik Answers

### AT: K Abolitionism – Dignity Good

#### Mirroring the slavery abolitionists’ strategy of fore-fronting dignity to question broader systems allows us to challenge other unjust punishments

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

Since the over-arching strategy of the anti-death penalty movement is geared towards securing a ruling from the US Supreme Court that the death penalty is contrary to the Eighth and Fourteenth Amendments to the Constitution, it makes sense to explore the ways in which the constitutional case against capital punishment is framed. While the US Supreme Court’s death penalty jurisprudence has usually been interpreted as requiring a conservative approach to constitutional argument, focusing on the unworkability rather than the immorality of the punishment, the literature on anti-slavery constitutionalism suggests that the Court’s case-law can and should be read as encouraging a more radical anti-death penalty constitutionalism.

A radical abolitionist constitutionalism involves invoking the idea of dignity, and encouraging a jurisprudence that can be used to tackle broader social injustices. A feature of what historian William Wiecek describes as “radical anti-slavery constitutionalism” was its appeal to a “higher law” when countering the claim that the text of the Constitution expressly permitted slavery. In Wiecek’s words, the radical constitutionalists “were the antebellum era’s leading exponents of a theory of natural-law limitations on governmental power”.1 Although the radical constitutionalists never succeeded in convincing a majority of the Supreme Court to find slavery unconstitutional, they did succeed in laying the groundwork for addressing other injustices. Justin Buckley Dyer takes this view: “The legacy and heritage of the antislavery constitutional tradition is perhaps most evident in the civil rights legislation passed immediately after the Civil War and in the Constitution’s Fourteenth Amendment, which sought to enshrine the basic tenets of antislavery constitutionalism in the nation’s fundamental law.”2 Ever since it was adopted in 1868, the Fourteenth Amendment has been used to address a whole range of inequalities and injustices,3 illustrating the importance of promoting a language that aspires to more than just an end of the practice in question. I do not mean to suggest that death penalty abolitionists should be aiming to inspire a new amendment when framing the constitutional case against capital punishment, but we will see that the death penalty jurisprudence of Justices Kennedy and Sotomayor in particular provide the framework for a comparable radical anti-death penalty constitutionalism. This constitutionalism draws on the idea of dignity (which I argue is a modern iteration of the radical anti-slavery constitutionalists’ invocation of a “higher law”), and can be, and has been, used to challenge other unjust punishments, such as the imposition of sentences of life without the possibility of parole on young offenders, and the use of solitary confinement. Although constitutional lawyers have tended to refrain from using the idea of dignity when arguing that the death penalty is contrary to the Eighth and Fourteenth Amendments, the history of anti-slavery constitutionalism suggests that the idea of dignity should be placed front and center of anti-death penalty constitutionalism.

#### Abolition grounded in a human rights framework prevents the system from reinscribing its flaws

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

Scholars have tended to identify the period around 1830 as the time when “abolitionism” came to the fore, noting the moment in January 1831 when William Lloyd Garrison published the first issue of the abolitionist newspaper, The Liberator.14 Garrison understood the limitations of the law and took issue with William Goodell’s view that since slavery was a legal institution, its abolition depended on “nothing more nor less than the repeal of these slave laws”.15 Garrison argued that mere repeal of the law would be meaningless “without transformation of the spirit that the law reflected.”16 Lydia Maria Child expressed this sentiment well in 1842, when she remarked: “Great political changes may be forced by the pressure of external circumstances, without a corresponding change in the moral sentiment of a nation; but in all cases, the change is worse than useless; the evil reappears, and usually in a more exaggerated form.”17

The radical abolitionists recognized the importance of transforming the consciences of the general public, to shake them out of their support for, or apathy towards, slavery. This tactic – referred to as “moral suasion” – was exemplified by the actions of Theodore Dwight Weld, one of the movement’s most effective orators. As well as undertaking innumerable public lectures on the subject of slavery, Weld organized the first nationwide petition campaign, seeking to convert large swathes of people to the abolitionist cause.18 This was a far cry from the PAS’s emphasis on focusing on society’s so-called elite. In contrast to the PAS’s “distinctly conservative style of activism”,19 Garrison and his followers were radical in their outlook and actions, jettisoning the composed, conciliatory tone of the likes of the PAS. “I will be as harsh as truth, and uncompromising as justice”, Garrison wrote in the first issue of The Liberator, “… I am in earnest, I will not equivocate, I will not excuse, I will not retreat a single inch, and I will be heard.”20

When Garrison called for the immediate abolition of slavery, he did not literally mean that slavery could be abolished overnight as a practical matter. His concern was with the effects that the rhetoric of gradualism had on the mindsets of Americans. Condoning gradualism, he believed, would necessarily prolong slaves’ suffering, and would lead to complacency among abolitionists who would think their work was dones upon the enactment of a gradual emancipation law. He was also concerned that the premises of gradualism entrenched the belief that black people were somehow inferior to whites and unable to live as free whites did.

Garrison was explicitly inspired by the black abolitionist David Walker, who in 1829 had argued against gradualism and other conservative anti-slavery measures. Walker claimed that white anti-slavery activists who championed gradualism and colonization contributed to, rather than diminished, the subjugation of black people.21 In this sense, it is perhaps Walker and other black abolitionists who should be attributed with the birth of immediatism as a strategy, and the historian Manisha Sinha has recently emphasized that black abolitionists were central to the radicalism of the movement.22 Either way, “immediatism” should be understood as a slogan or a mindset which conveyed the urgency and importance of emancipation. In the words of Garrison: “We have never said that slavery would be overthrown by a single blow; that it ought to be, we shall always contend.”23

A further aspect of “abolitionism” that rendered it a radical movement was the recognition that slavery was the worst of a range of sins that plagued American society. Slavery, the abolitionists understood, could not be conceptually divorced from other issues such as the mistreatment of free blacks, the subjugation of women, and the degrading treatment of those convicted of criminal offenses, for example. They therefore challenged the institutions that supported slavery and these other sins, as well as the structure and ideology of contemporary conceptions of liberal democracy and the existing constitutional order.24 Some, such as Garrison, went so far as to call for an outright rejection of the US Constitution, which he considered to be inherently pro-slavery and thus an insurmountable barrier to the goals of radical abolition.

Recently, Manisha Sinha and Ira Berlin have provided accounts of abolition that emphasize continuity within anti-slavery and abolitionist efforts, eschewing the suggestion that the period around 1830 marked a fundamental change in the history of efforts to end involuntary bondage.25 Garrison’s views certainly did not develop overnight, and both authors are correct to point out that enslaved and free blacks had claimed since the Revolutionary era that slavery should end immediately and that black people should have equal standing to whites. The abolition of slavery was a long process, stretching from the earliest days of the American Revolution through to 1865, and at no point in this process did one approach to abolition exist to the exclusion of other approaches. Regardless of when radical abolitionism emerged, or who was responsible for developing radicalism as an ideology, what matters for our purposes is that radical abolitionism differed from other types of anti-slavery efforts.

III. Distinguishing between “death penalty abolitionism” and “anti-death penalty activism”

Using the outline above, it does not take much of an intellectual leap to identify similar, albeit not identical, differences in the ideologies and proposed tactics among the women and men who today oppose state-sanctioned executions. We saw in the previous chapter that following the decision in McCleskey v. Kemp, the anti-death penalty movement has tended to frame the case against capital punishment in terms that are unique to the phenomenon of state-sanctioned executions, just like the PAS framed the issue of slavery in narrow terms. We also saw that the narratives of innocence and costs eschew moral argumentation, rendering contemporary anti-death penalty discourses rather distinct to the discourses of the radical slavery abolitionists. The prominence of life without parole in current anti-death penalty discourses likewise mirrors the prominence of colonization in anti-slavery efforts: both involve either a tactical compromise, or a principled belief that “undesirables” should be permanently excluded from “our” society.

I think it is inaccurate, though, to characterize today’s anti-death penalty movement as conservative, or moderate and merely “anti-death penalty.” For a number of reasons, today’s movement is better understood as an iteration of the radical slavery abolitionists. To begin with, almost all opponents of capital punishment advocate for the immediate, rather than gradual abolition of the death penalty in the spirit of Walker and Garrison. Even though legislative repeal in the likes of New Mexico have been prospective only, in a manner comparable to the Pennsylvania gradual emancipation law, abolitionists today are still immediatists as a point of principle. Moreover, though, the allegedly conservative and moderate frames of innocence, costs, and LWOP all operate under the banner of a radical framework that situates the moral wrong of capital punishment within broader concerns with a criminal justice system that does not take the idea of dignity seriously. The rest of this chapter sets out the idea of dignity in moral and political philosophy, and in US constitutional law, so that we can better understand the centrality of dignity to radical abolitionism.26

IV. Abolitionism and dignity

The notion that human beings have dignity is a popular one in moral and political philosophy. Hugo Adam Bedau was of the view that “[h]uman dignity is perhaps the premier value underlying the last two centuries of moral and political thought.”27 The idea has taken root in legal orders across the world too. In 2013, Christopher McCrudden suggested that “[t]he concept of human dignity has probably never been so omnipresent in everyday speech, or so deeply embedded in political and legal discourse.”28 The idea of human dignity is at the heart of instruments of international human rights law, with the Universal Declaration of Human Rights stating that “the inherent dignity and… the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.29 Dignity also forms the basis of several domestic legal systems. Article 1 of the German Basic Law reads: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” Article 7 of the Constitution of the Republic of South Africa explains that human dignity is the basis of that country’s Bill of Rights: “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” Article 10 reads: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

In contrast, the word “dignity” does not appear at all in the text of the US Constitution. For some commentators, this means that dignity is not protected in US law, and that the US Supreme Court should not base judgments on the idea of dignity.30 James Whitman has suggested that the absence of dignity as a controlling value in the US constitutional order explains the propensity of Americans to support “harsh justice” – including the death penalty – relative to Germany and France.31 For this reason, it might seem pointless for anti-death penalty advocates to frame the case against capital punishment in dignitarian terms. Daniel LaChance makes this point when he says that “[a]rguing that the death penalty is an affront to human dignity just doesn’t work.”32 However, not only has the US Supreme Court repeatedly stated that the idea of dignity is central to the Eighth Amendment prohibition on “cruel and unusual punishments”,33 it is precisely the idea of dignity that renders abolitionism radical in the sense outlined above. Although the idea of dignity is jurisprudentially and philosophically fraught, we can use both slavery and death penalty abolitionist argumentation to understand not just how abolitionism centers on the idea of dignity, but also why efforts to end capital punishment must center on such an idea. As explained below, today’s death penalty abolitionists recognize, just as the slavery abolitionists recognized, that the practice in question engages the dignity of the people involved, the dignity of the wider community, and the dignity, or integrity of the broader constitutional and legal order that permits such practices.

#### Anti-death penalty discourse begins a “dignity cascade” which destabilizes the logic of equivalence underpinning penal “justice” and even broader social control tactics

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

The history of slavery abolitionism and post-emancipation America offers a potential resolution for this dilemma. The anti-slavery activists who championed colonization actively encouraged the idea of racial segregation, and it was the lack of any assertion of racial equality in these discourses that paved the way for post-emancipation racism to take root.84 It can therefore be surmised that if death penalty abolitionists actively champion a dignity-free abolition, this will pave the way for dignity-free punishments such as LWOP to take root. The issue, then, is not a stark choice between accepting or denouncing LWOP. It is, rather, how to construe life sentences within anti-death penalty discourses in a way that takes the idea of dignity seriously. At present, LWOP is portrayed as an affirmative answer to the ills of the death penalty, because the ills of the death penalty are construed on non-dignitarian grounds.85 However, if complaints against the death penalty were centered on discussions of dignity, then it would be plausible for abolitionists to reluctantly accept LWOP as an alternative, while laying the groundwork for a post-abolition assault on such sentences.

Jonathan Simon has argued that anti-death penalty discourses should begin a “dignity cascade” which can be used to challenge and eliminate other harsh punishments, such as LWOP.86 Drawing on the work of David Garland and Marie Gottschalk, Simon emphasizes the role of capital punishment in infusing the entire criminal justice system with discourses of violence and dehumanization. That is, the existence of capital punishment, and the vociferous debates that take place around the topics of murder and state-sanctioned executions, has “infused criminal justice policy generally, helping to transform even the most pedestrian criminal matters into a subject of drama and emotion, and, inevitably, harsh punishment”.87 As Simon points out, it is in discussions about capital punishment that we find the idea of literal equivalence between crimes and punishment – a life for a life. In no other penal context do we speak of literally equivalent punishment. We do not contemplate raping rapists, or stealing from thieves. The presence of the death penalty, though, bends discussions of punishments towards the idea of literal proportionality. Perhaps, as Simon contemplates, “removing the one anchor that holds the metaphoric structure of crimes to that of punishments [would] destabilize the entire logic of equivalence, which both legitimizes penal justice and bends it toward harshness”.88 Simon acknowledges that this is an “optimistic scenario”, but hopes that “abolition, even with the terms on offer [i.e., LWOP], will deepen an existing shift in that context away from reliance on extreme punishments as anchors of public safety and back toward the broader mix of social control (and one hopes social justice) tools that include policing and probation, but also health insurance, social services, mental health care, and housing support.”89

### AT: K Abolitionism – Non-Reformist Reforms

#### A “revolutionary rupture” is utopian – only non-reformist reform battles the state from within AND energizes popular momentum to sustain long-term movements

Chibber, 17 (Vivek Chibber, Vivek Chibber is a professor of sociology at New York University. He is the editor of Catalyst: A Journal of Theory and Strategy. "Our Road to Power", Jacobin Magazine, https://www.jacobinmag.com/2017/12/our-road-to-power, 12-5-2017, Accessed 6-21-2020) //ILake-JQ

[Strategy]

On the question of strategy, the October Revolution is perhaps less instructive. The Bolshevik seizure of power was not a coup, but it did embody a violent and sudden overthrow of a regime, in a context of state breakdown and military disintegration. One might describe this as a strategy of a ruptural break with capitalism.

Now there’s no doubt that the decades from the early twentieth century all the way to the Spanish Civil War could be described as a revolutionary period. It was an era in which the possibility of rupture could be seriously contemplated and a strategy built around it. There were lots of socialists who advocated for a more gradualist approach, but the revolutionaries who criticized them weren’t living in a dream world.

The Russian road, as it were, was for many parties a viable one. But starting in the 1950s, openings for this kind of strategy narrowed. And today, it seems entirely hallucinatory to think about socialism through this lens. This is indubitably true in the advanced capitalist world, but it also holds for much of the South. Today, the state has infinitely greater legitimacy with the population than European states did a century ago. Further, its coercive power, its power of surveillance, and the ruling class’s internal cohesiveness give the social order a stability that is orders of magnitude greater than it had in 1917. What that means is, while we can allow for and perhaps hope for the emergence of revolutionary conditions where state breakdown is really on the cards, we can’t build a political strategy around it as an expectation — we can’t take it as the Left’s fundamental strategic perspective. Today, the political stability of the state is a reality that the Left has to acknowledge. What is in crisis right now is the neoliberal model of capitalism, not capitalism itself.

If this is so, then the lessons that the Russian experience has to offer — as a model of socialist transition — are limited. Our strategic perspective has to downplay the centrality of a revolutionary rupture and navigate a more gradualist approach. For the foreseeable future, left strategy has to revolve around building a movement to pressure the state, gain power within it, change the institutional structure of capitalism, and erode the structural power of capital — rather than vaulting over it. This entails a combination of electoral and mobilizational politics.

You build a party based in labor, you strengthen the organizational capacity of the class, you take on employers in the workplace and create rings of power in civil society, and you use this social power to push through policy reforms by participating in electoral politics. The reforms should have the dual effect of making future organizing easier, and also constraining the power of capital to undermine them down the road. There are many names for a strategy of this kind — non-reformist reforms, revolutionary reforms. But whatever you call it, it entails a more gradual approach than the ones available to the Bolsheviks.

But that means that we have to carefully study the experience of parties and countries that fell short of socialism but achieved real organizational and political gains nonetheless. We need to study social democracy, particularly its more ambitious variants. First of all, to understand how they combined electoral and non-electoral dimensions in an overall strategic perspective. This also entails studying their legislation, the economic models they implemented, how they used the state, how they dealt with capital’s structural power and its hostility to labor’s advance. The gains made by the most advanced social democracies, like the Nordic countries, are quite extraordinary, and their ritual denigration by the Left as merely “reformist” are wrongheaded. Those achievements came through struggle and were fought against tooth and nail by ruling elites.

The most important reason to study the history of social democracy, however, is to understand its limitations. This is why it can’t be dismissed as “merely” reformist. If you don’t understand why they failed, you will simply repeat their failure. It’s important to appreciate that, whatever else happens, if people like Jeremy Corbyn or Bernie Sanders take power in the next few years, their political agenda will broadly hew to the template laid down by social democracy.

This is great in many ways, but social democracy was a spent force by the 1980s; its parties degenerated into a managerial ethos; their reformist agenda was halted and then reversed; and they have proven to be largely uninterested in revitalizing their own legacy. For this phenomenon to be so widespread and so pervasive means that it can’t have been because of individual failings and treachery. There was something structural behind it. And this means in turn that the Left needs to understand the structural roots of the failure to at least have a fighting chance at avoiding the same fate. Hence, while we need to understand how something as ambitious as the Meidner plan came about in Sweden in the late 1970s, we also need to see why it was defeated, and why the Social Democratic Party became increasingly conservative in the following years.

### AT: K Abolitionism – Pragmatic Reforms Good

#### Initial action is the only way to solve – the magnitude of improvement outweighs risk of entrenching the system

Steiker 19 (Carol S. Steiker, Henry J. Friendly Professor of Law and Faculty Co-Director of the Criminal Justice Policy Program, Harvard Law School., 2019, "KEEPING HOPE ALIVE: CRIMINAL JUSTICE REFORM DURING CYCLES OF POLITICAL RETRENCHMENT," http://www.floridalawreview.com/wp-content/uploads/339077-FLR\_71-6\_Steiker\_NC.pdf, accessed 7-5-2020//mrul)

Not all of the six tools I have canvased above are synergistic; sometimes they tug in different directions. For example, the “grassroots” Movement for Black Lives opposed the “bipartisan” federal First Step Act on the grounds that “despite the few positive reforms, [it] is a dangerous bill” because it promoted electronic monitoring, the use of risk assessment tools, and increased investment in improved law enforcement—all things that M4BL opposes as “increased carceral infrastructure.”156 This conflict is just one example of the ways in which these tools do not always or easily work in tandem. I will conclude by briefly addressing a generalized version of this specific critique of the First Step Act. More broadly and more deeply, some radical critics from M4BL and elsewhere oppose the basic theme of this lecture—the idea that the current criminal justice reform moment is a positive development whose momentum we should work to protect as the political wheel turns. These critics hold the view that many reforms that have gained some traction in recent years—such as body-worn cameras for police, bail reform, and improved prison conditions, among others—are too partial and incremental. Such reforms involve making investments in existing institutions—like police, prosecutor’s offices, and prisons—that are essentially rotten to the core. Some radical scholars and advocates have suggested that we stop lauding so-called progressive prosecutors or supporting any criminal justice reform that is “reformist” rather than “transformative.”157 Alec Karakatsanis, founder and Executive Director of the Civil Rights Corps and a leader in the bail reform movement, has argued that “current ‘criminal justice reform’ discourse is . . . dangerous”158 and that “[t]he emerging ‘criminal justice reform’ consensus is superficial and deceptive.”159 He contends that we need to focus on dismantling what he calls the “punishment bureaucracy” and to reject reforms that see criminal justice as a “silo” separate from a host of other social problems such as “white supremacy, lack of access to health care, economic deprivation, educational divestment, neighborhood segregation, gender inequality, banking, lack of access to the arts, unaffordable housing, and environmental destruction.”160 Karakatsanis maintains that we should reject the project of mere “reform” of the punishment bureaucracy and embrace only “transformational” interventions that shift resources and power to the marginalized communities who have suffered from past injustice.161 I have sympathy for the argument that sometimes incremental reform can entrench and legitimize a broken system—I co-authored an article arguing along those lines with regard to reforming as opposed to abolishing the death penalty. 162 But the lines I would draw between worthwhile and objectionable reforms are different from those advanced by Karakatsanis and others. For example, police training in de-escalation techniques invests new resources in police departments, but the gains in better practices make that money well-spent, in my view. The same holds for investing in improved prison conditions, such as developing alternatives to the use of solitary confinement. I agree that it is important to have serious discussions about, say, whether money for police training is actually going to support militarized vehicles or whether improving prison conditions is in reality a whitewash. Such discussions should include recognizing the possibility that genuine improvements can work to make people more comfortable—too comfortable—with essentially unjust institutions. But the ultimate question should be one of weighing the magnitude of improvement against the likelihood of entrenchment of injustice. In contrast, an insistence on transformation or nothing seems to me unrealistic and even cruel in its willingness to decline to support real reductions in human misery. After all, first steps (as in the federal First Step Act opposed by the Movement for Black Lives) are often the only way to get to a second step. As one thoughtful student queried in a class debate about this issue, “Can anyone think of any truly transformative change that has ever happened in American history that did not involve many incremental steps along the way to achieve it?” It may also be the case, however, that “unrealistic” is not necessarily the same thing as “counterproductive.” Ironically, the opposition of the Movement for Black Lives to the First Step Act may actually have enhanced its prospects in the Republican-led Congress that passed it by reassuring more conservative members that the bill did not go too far. In short, having a far-left flank arguing against criminal justice reform (that is, arguing for transformation or nothing) may in fact be a good thing— as long as we do not really choose nothing.

### AT: K Abolitionism – Permutation

#### The perm solves best – coupling a political embrace for dignity and social reorientation away from fear-based incapacitation as penal rationale has a symbiotic effect in abolishing degrading punishment

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

[Risk and Dignity]

What explains the US embrace of degrading punishments such as LWOP? Today, almost no other wealthy democracies embrace LWOP on the broad scale that we do; some have explicitly banned it.6 Sociologists of punishment have treated American penal exceptionalism since the late 20th century as best explained by an extreme construction of risk as “crime risk,” one largely shaped by political leaders seeking to govern around the fragmented politics of race in American society.7 In contrast, historian James Whitman contends that the primary factor that accounts for the harshness of American punishments is the absence of a constraining value of “dignity” within the US legal history or principles.8 In contrast, Europe, where the prolonged struggle to create a legally egalitarian society against well-established status hierarchies favoring people with noble birth created a robust norm of dignity peculiarly associated with the state’s power to punish, has developed a contemporary legal framework that rejects degradation and resists harsh punishments.

Whitman’s account is persuasive in suggesting that dignity is often invisible in American public law and discourse and that were it present, dignity as a value would pose a significant base for resistance to LWOP and other degrading punishments, but his account does not explain the positive demand for these punishments and the rise of an extreme, fear-based version of incapacitation as a penal rationale.9 This extreme version of the historical logic of prevention in the criminal law, which I call “total” incapacitation, has its origins in a historically specific way of imagining the problem of violent crime anchored in the alarming events and distinctive economic and geographic contexts of the 1970s (especially in the Sunbelt states such as California that led the turn toward harsher punishments) but has been generalized through the politics and policies of mass incarceration.

Treated as alternative explanations, risk versus dignity, anomalies emerge for both accounts. The risk explanation, with its emphasis on change since the 1960s, ignores the unmediated penal harshness that the US criminal justice system consistently meted out to African Americans, Asians, and Latinos, reflecting the status hierarchy long associated with the white/nonwhite divide. The dignity explanation, with its emphasis on American democracy in the 18th and early 19th centuries, ignores that during the much of the 20th century, the US led the world in the development and adoption of progressive penal techniques such as parole, probation, and juvenile justice. Understanding penal severity in the US, especially the growth of LWOP, requires taking both factors into account. Despite the absence of a strong dignity tradition in American law, no substantial political demand for LWOP sentences emerged before the 1980s and 1990s, when American penal policy came to be shaped by a strong version of general incapacitation as the primary purpose of punishment. The emergence of an extreme risk rationality around crime, “total incapacitation” as a penal rationale, and the Supreme Court’s deference to state choices regarding the rationale of punishment have combined to diminish the role that proportionality played earlier in the 20th century in checking harsh and degrading punishments.

Europe, Whitman’s comparative case, provides a similar combination of dignity and risk. The European Court of Human Rights, whose jurisprudence has been deeply influenced by the value of dignity expressed in the growing body of European Community principles and policies, has gone much further than the US Supreme Court in holding harsh punishments in violation of the Charter of Rights, including imprisonment to LWOP sentences at least for juveniles.10 A number of European states do currently have an LWOP sentence, for example, the “whole-life tariff ” in which an English judge may sentence a person for life and set no minimum sentence after which the parole authorities would normally be able to release the prisoner on “license” to be supervised by the probation service with the possibility of recall. However, even these sentences are subject to mechanisms of executive pardon that offer a real opportunity for eventual release and thus do not appear to be as harsh as US LWOP sentences, which are almost never modified by executive clemency.11 At the same time, the absence of an extreme risk rationality in European penality has also played a key role in preventing European legal systems from confronting the kind of demand for degrading punishments that has shaped American politics in recent decades. However there are clear signs of such demand developing with Europe, for the example, Britain’s three-strikes-like “imprisoned for public protection” sentence.12 Currently public pressure for protection from violent offenders is carefully controlled by penal systems with a strong centralized managerialism and is insulated by the relative absence of party competition on crime risk. Were those conditions to change and European states to legislate harsh punishments including LWOP, it is not clear that the European Court of Human Rights would stop them. Thus, while developing a body of law and policy around dignity in the US is a high priority for those of us who would like to see an end to degrading punishments, combating total incapacitation and the extreme risk rationality behind it are equally so. Indeed, I want to suggest that these are not two distinct battles but in important respects one. The courts in the US are not likely to order an end to degrading punishments directly, and their willingness to burden the states administering those punishments with costs that might compel moderation will depend a lot on the ability of criminal justice officials, criminologists, and lawyers to promote a commitment to dignity within penalty itself.

The way dignity and risk combine to shape the prospects for abolishing LWOP and other degrading punishments is suggested by the US Supreme Court’s recent decision in Graham v. Florida (2010),13 holding LWOP for juveniles involved in nonhomicide crimes to violate the proportionality principle of the Eighth Amendment. The ruling suggests that help may be on the way. For those who are looking for a turn toward dignity as a value in our law, the decision offered some promising hints. Without using the term “dignity,” Justice Kennedy’s majority opinion characterized the special harm of LWOP in ways quite consistent with the dignity tradition. Specifically, Justice Kennedy characterized LWOP as cruel because it deprives the prisoner of any hope: “It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.”14

Moreover, in holding that LWOP in such circumstances could not be rationally justified in terms of any of the established penal rationales, including deterrence and incapacitation, Justice Kennedy seemed to invite lower courts to begin considering whether particular LWOP sentences constitute “cruel and unusual” punishment even for juveniles convicted of homicide crimes or, indeed, for nonjuveniles regardless of what crime they may have been convicted of.15 But if degrading punishments such as LWOP are a product of the absence of dignity and the presence of an extreme version of “total” incapacitation as a penal rationale, as I have asserted here, the road from Graham to any eventual abolition of LWOP may be a long one indeed. The course of that road, however, may be altered by the strength of dignity as a value around which a broad array of controversies in US law and society are being reframed; and it may perhaps be shortened if advocates for longterm prisoners can take advantage of some of the doctrinal creativity shown in these others fields.

#### Permutation best --- linking death penalty abolition with mass incarceration effectively challenges system of racialized control

Hughes, 15 --- national director of the Campaign to End the Death Penalty (4/22/2015, Lily, “Killing Capital Punishment; With public support for the death penalty declining dramatically, the barbarous practice may be on its way out,” <https://www.jacobinmag.com/2015/04/death-penalty-public-support-firing-squad>, accessed on 5/23/2020, JMP)

Struggling for Abolition

The increasingly desperate attempts by various states to continue carrying out the death penalty may be the last gasps of a dying system.

Over the years, a wide variety of anti–death penalty activists — including family members of prisoners, former prisoners, lawyers, scholars, students, elected officials, and community activists — have built sustained campaigns to stop executions and to expose the many insoluble flaws in the system. The work that these dedicated activists have done has brought the United States the closest it’s been in decades to outright abolition.

There are of course many debates within the abolitionist movement — how much to focus on race, what kinds of alternatives to offer in lieu of the death penalty, which voices must be prominent in the movement. But for a growing number of young activists, there is a recognition that the death penalty is but the sharpest edge of a justice system that oppresses the poor and people of color. The movement to end the death penalty should be considered one facet of the struggle against the system of racialized control that Michelle Alexander calls the New Jim Crow.

Linking the abolition struggle to the growing movement against police violence and mass incarceration is vital. Campaigns to support individuals on death row, amplifying the voices of prisoners and their families, are central to this approach.

This kind of work will continue to chip away at the death penalty system. Even in Texas, or as abolitionists call it, “the belly of the beast,” these efforts are making a difference. Several former prisoners recently traveled there to take part in a campaign to stop the planned March 5 execution of innocent death row prisoner Rodney Reed, and participate in a “Day of Innocence” lobby day at the state capitol. Reed did win a rare stay of execution, and a few weeks later an abolition bill was introduced for the first time in both the Texas House and Senate.

Speaking at a rally for her son a few days before he won the stay, Sandra Reed offered these words: “I will not give up this fight. I will not, regardless of what the outcome will be. There are too many innocent men that have gone, that are waiting, and that will go if we don’t stop this murdering machine.”

The rush to revive macabre execution methods like the gas chamber and the firings squad illustrate the lengths that sections of the ruling elite will go to preserve a powerful tool of repression. As support for and use of the death penalty continues to decline, these attempts appear to be the desperate acts of those on the losing side of the struggle.

#### Abolition is a critical non-reformist reform --- plan is part of a broader transformative vision

* reduces the power of an oppressive system while illuminating the system’s inability to solve the crises it creates

Berger, et. al, 17 --- associate professor of comparative ethnic studies at the University of Washington at Bothell (8/24/17, Dan Berger, Mariame Kaba – founding director of Project NIA, a grassroots organization with a vision to end youth incarceration, David Stein – lecturer in African-American studies and history at UCLA, <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration>, accessed on 5/23/2020)

Abolition has always been a bold project.

Whether in response to private property and nineteenth-century chattel slavery, or the prison industrial complex of the last half century, abolitionist movements have unsettled not only conservative critics but liberals, progressives, and even some radicals. The stubborn immediacy of the demand disturbs those who hope for resolution of intractable social problems within the confines of the existing order. To them, abolition is unworkably utopian and therefore not pragmatic.

Critics often dismiss prison abolition without a clear understanding of what it even is. Some on the Left, most recently Roger Lancaster in Jacobin, describe the goal of abolishing prisons as a fever-dream demand to destroy all prisons tomorrow. But Lancaster’s disregard for abolition appears based on a reading of a highly idiosyncratic and unrepresentative group of abolitionist thinkers and evinces little knowledge of decades of abolitionist organizing and its powerful impacts.

To us, people with a combined several decades of experience in the prison abolition movement, abolition is both a lodestar and a practical necessity. Central to abolitionist work are the many fights for non-reformist reforms — those measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.

The late Rose Braz, a longtime staffer and member of Critical Resistance emphasized this point in a 2008 interview. “A prerequisite to seeking any social change is the naming of it,” she said. “In other words, even though the goal we seek may be far away, unless we name it and fight for it today, it will never come.” This is the starting point of abolition, connecting a radical critique of prisons and other forms of state violence with a broader transformative vision.

These strategies and tactics harmonize with, inspire, and are inspired by many other left traditions. Socialists do not fight for trade unions in order to institutionalize capitalist social relations or build an aristocracy of labor. They do so in order to create durable structures that undermine the power of employers to exploit workers. And they do so with a radical humanist tradition in mind as well — to make actual people’s lives better, to overcome sexual harassment, to reduce workplace injuries, to build solidarity among workers, and, ideally, “to create the new world in the shell of the old.”

Such an analysis is also reflected in abolitionist organizing. As Braz emphasized in another 2008 interview, “prisons and horrible conditions go hand in hand. Prisons . . . are about punishment, warehousing and control. The prison industrial complex (PIC) systematically undermines the very values and things we need to be healthy.”

Rather than juxtapose the fight for better conditions against the demand for eradicating institutions of state violence, abolitionists navigate this divide. For the better part of fifty years, abolitionists have led and participated in campaigns that have fought to reduce state violence and maximize people’s collective wellbeing.

Abolitionists have worked to end solitary confinement and the death penalty, stop the construction of new prisons, eradicate cash bail, organized to free people from prison, opposed the expansion of punishment through hate crime laws and surveillance, pushed for universal health care, and developed alternative modes of conflict resolution that do not rely on the criminal punishment system.

Abolitionists refuse to abide the paradigm where “prisons [serve] as catchall solutions to social problems,” as Ruth Wilson Gilmore has put it. As a result, abolitionists have been among the most consistent advocates for creating conditions that improve people’s health, safety, and security.

### AT: K Abolitionism – AT LWOP Link

#### LWOP is part and parcel with state-sanctioned mastery of individuals the aff critiques – it’s just another form of the death penalty we dismantle

Swiffen, 16 (Amy Swiffen, Amy Swiffen is an Assistant Professor of Law and Society in the Department of Sociology and Anthropology at Concordia University, Montreal, Canada. Her research is focused on new legal contexts and has been published in a wide variety of academic and professional journals. "Mastery Over the Time of the Other: The Death Penalty and Life in Prison Without Parole", No Publication, https://link-springer-com.proxy.lib.umich.edu/content/pdf/10.1007/s10978-016-9178-z.pdf, 4-5-2016, Accessed 6-20-2020 via Umich Libraries) //ILake-JQ

Critics of the use of LWOP have described it as ‘a terrible change in our ways of punishing’ and suggested that it is actually worse than the death penalty because of the conditions in which inmates are kept, which have been said to cause greater mental and physical harm than living on death row (Dayan 2011, p. 48; see also Dayan 2014; Gottschlak 2012). They also point out that the use of LWOP is in part an outcome of ‘an alliance of death penalty abolitionists and conservative, tough on crime politicians’ (Ogletree and Sarat 2012, p. 4). Derrida’s analysis pinpoints the question of cruelty as the key to this alliance, however, it implies something deeper as well, which is that LWOP is not a distinct form of punishment from the death penalty at all. **In fact, if the death penalty is conceived as a calculating decidability that interrupts a principle of indetermination that is constitutive of life through mastery over the time of life of the other, then LWOP could be seen as another form of this decidability.**

The continuity between the calculable decidability of the death penalty and indefinite incarceration is thrown into relief by considering the extreme case of solitary confinement. In California in 2013, inmates in solitary confinement in Pelican Bay Prison began a hunger strike to protest the conditions in which they were kept. As Dayan describes, the inmates are ‘confined in state-of-the-art settings that make mental pain or intolerable suffering illegible’ (Dayan 2014, p. 633). The hunger strike was the third in 2 years at the prison and the largest in history. It only ended after 9 weeks when a state judge determined that officials could force-feed inmates who were striking (Dayan 2014, p. 635). The court further ruled that prison doctors could ‘refeed’ prisoners as long as they were at risk of ‘near-term death or great bodily injury’ (Dayan 2014, p. 635). Dayan points out that the term ‘refeeding’ signifies a ‘practice of eternal feeding’ in which prison officials can keep prisoners ‘alive’ by any means necessary (Dayan 2014, pp. 235, 636).

In California, inmates were forcibly re-fed ostensibly to preserve their lives but it was equally a means of physically dominating them and stopping their attempt to make the conditions of their lives visible outside the prison. Dayan argues that the California Department of Corrections and Rehabilitation’s action ‘nullifie[d] the strikers’ decision to assert themselves as sentient beings’ (Dayan 2014, p. 636). This highlights the fact that in the last instance when incarcerated, the only means available of asserting one’s particular life is to refuse to keep living. Thus, the forced living to which inmates were subjected at Pelican Bay inverts the lethal violence of the death penalty but is fundamentally the same from the perspective of sovereignty. The technique of forced re-feeding functions as a calculable decidability that interrupts the principle of indetermination of the moment of death. In being kept alive against one’s will one is robbed of a relation to finitude. The difference is that this interruption of the principle of indetermination constitutive of life does not happen by way of a ‘trenchant decision’ that determines the moment of death, but through a technique of fostering life.

[Conclusion: Changing Sovereignty]

To not allow to die sounds like the opposite of the death penalty. However, it is not necessarily the case from the perspective of the arguments presented here, which conceive of the death penalty as mastery over the time of the life of the other. Traditionally, this mastery has involved appropriating the indeterminacy of the moment of death with a decision of when death will arrive. This is a decision that robs a particular life of a relation to its own finitude. The Pelican Bay hunger strike reveals a form of this violence that has a similar effect as the calculating decidability to bring death but in a very different way. The violence that underpins the possibility of LWOP is that of not being allowed to die, which in the extreme case involves forced re-feeding. This possibility profoundly challenges a central aspect of abolitionist discourse that has consistently associated a reduction in cruelty with progress toward the end of the death penalty. Forced living as a punitive technique may seem less cruel than the death penalty but it equally interrupts the undecidability of an individual’s relation to their own finitude. In this sense, LWOP is not really opposed to the death penalty but can be understood as another kind of ending imposed on the incalculable and undecidable relation of a being to its own finitude.

The relation to time constitutive of the death penalty leads to a second implication, which is that if LWOP is a form of the death penalty from the perspective of political sovereignty thought as ipseity, then the increasing use of this form of legal violence contradicts the notion that sovereignty is currently in decline. Traditionally, political sovereignty has been identified with the nation-state. Recently, however, it has been argued that the decreasing use of the death penalty is a sign of the decline of the nation-state and an emerging ‘post-sovereign’ era of politics (e.g. Yorke 2011). On the contrary, I would argue that if we accept a concept of the death penalty as a relation to time and that a relation to time is constitutive of the experience of life, then the increasing use of LWOP suggests that the death penalty is not in decline at all, but rather changing form. This means that political sovereignty per se is not disappearing either. Rather, a change in the institution of the death penalty might reflect a change in the appearance of sovereignty in the political. The shift from bringing death to forcing life described in this paper might be related to a new form of political sovereignty, perhaps an even more formidable sovereignty that may or may not be identified with the nation-state.

### AT: K Anti-Blackness – Permutation

#### The plan is a starting point to correct the carceral system’s construction of victims as non-human, undignified chattel reflected in structural anti-blackness

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

Since they were treated as something other than a fully-fledged member of the human community, slaves were compelled to claim that they should not be treated as such. It was this feature of slavery, Bernard Boxhill writes, that illustrates the incompatibility of bondage with the idea of dignity. The institution of “slavery mocked the human dignity of the slaves”, Boxhill writes,60 because it treated slaves’ claims to natural rights as “absurd, or beneath serious consideration.”61 In other words, it was not so much the treatment of slaves per se that violated their dignity, but rather it was the response of the pro-slavery lobby to the slaves’ claims of how they should be treated. Slavery was a violation of dignity because it compelled slaves to argue that they should be treated with equal respect and concern, even though white communities assumed such respect and concern for themselves. In Boxhill’s words: “the person who has human dignity will take it for granted that – without any question, hesitation, or need for the merest argument – he is entitled to every fundamental moral consideration any society assumes for its members.”62 By not being able to take this entitlement for granted, slaves were made to feel undignified, even if we accept Justice Thomas’s claim that their inherent dignity could not be taken away.

Boxhill’s comments resonate with one of the central tenets of critical race theory, which is that the formal legal recognition of racial equality under the Fourteenth Amendment is insufficient because in a cultural sense black people have to meet the pre-ordained standard of “whiteness” in order to enjoy equality. That is, “whiteness” is the default standard that black people have to abide by before being accepted as equals.63 Black people, then, have to make claims about their moral attributes, conduct, and quality that white people are assumed to possess. We see this acutely in the context of modern day shootings of black people by police officers. In almost every case, claims are made about the moral attributes of the deceased person in order to explain why that person should not have been killed.64 At this juncture, we can tentatively see how the assault on black people’s dignity reflects the lack of integrity in the legal and social institutions that demands black people today, like slaves in the antebellum era, to claim that they are entitled to moral consideration, before being granted such consideration. This is a theme returned to below.

Frederick Douglass – perhaps the most famous of all former slaves who played a leading role in the abolitionist movement – emphasized in his memoirs how he and other slaves were treated like animals:

We were all ranked together at the valuation. Men and women, old and young, married and single, were ranked with horses, sheep, and swine. There were horses and men, cattle and women, pigs and children, all holding the same rank in the scale of being, and were all subjected to the same narrow examination…. We had no more voice in that decision than the brutes among whom we were ranked.65

Other writers used similar imagery in their slave narratives, and this imagery illustrates the lack of respect for the dignity of slaves in two ways. First, it comports with the definition of dignity that depends on the fundamental biological differences between humans and non-human animals (“all holding the same rank in the scale of being”). Second, it comports with the definitions of dignity that are connected with the concept of autonomy (“We had no more voice in that decision…”).

In the context of the death penalty, we find similar sentiments in the writings of those who have been on death row. Nick Yarris, who spent 13 years on death row in Pennsylvania before being exonerated, writes about his wait for a potential transfer to a prison that was notorious for the violence inflicted on prisoners by the guards: “I was shivering as I stood there in my handcuffs and leg irons, dressed only in a prison-issue yellow jumpsuit, lined up in the cold night air like a farm animal ready to be transported to the slaughter house.”66 Yarris also describes the day-to-day conditions of life on death row: “we are only allowed out on weekdays for our 30 minutes of exercise in these dog kennel-like cages behind the Death Row building – although I wouldn’t put a full-sized animal in a cage like the ones they make us use.”67 Another exoneree – Anthony Graves – has also described “12 years of having my meals slid through a small slot in a steel door like an animal.”68

Some might retort that the testimonies of slaves and death row prisoners are subjective, and cannot be used to determine whether such people were actually treated as less-than-human. In response, we can turn to the opinion of Chief Justice Roger Taney in Dred Scott v Sandford in 1857, and to the words of a Californian judge in a death penalty case from 2013. Addressing the alleged tension between a Declaration of Independence that proclaimed that all men are created equal, with a practice that involved the subjugation of one race by another, Taney declared that the Founders did not intend black people to be part of the human family to which the Declaration of Independence was addressed: “it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration.”69 In Taney’s view, black people were “so far inferior, that they had no rights which the white man was bound to respect… [Africans were] bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made of it.”70 The legal construction of black people as more akin to property than to human beings illustrates how slaves were, in legal terms, treated without respect for their human dignity. Likewise, when sentencing Osman Canales to death in 2008, Honorable Steven R. Van Sicklen said to him: “To call you an animal would be an insult to the animal kingdom. The only word that comes to mind when I think of you is the word ‘monster’.”71 Here, Sicklen is stating that Canales is not only non-human, but is also not worthy of the respect given to non-human animals. Unlike Taney, Sicklen was not suggesting that the legal system does not recognize Canales’s status as a human being for the purposes of legal rights, but it is clear that Sicklen – in his capacity as a legal official – was construing Canales as a non-human entity in order justify the imposition of a death sentence.

#### The death penalty plays a critical role in maintaining cultural norms of racial hierarchy --- race can’t be understood without examining how its powerfully intertwined with capital punishment.

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)

II. The Role of Race

I begin with two uncontroversial observations: The death penalty has played a role of long standing in American culture 16 [\*1400] and race has played a role of long standing in American culture. 17 Although these two starting points will not necessarily lead to the conclusion that race and the death penalty are interconnected, the reality is - as abundant evidence reveals - that they are powerfully intertwined. 18 One cannot understand America's penologies of capital punishment - its legitimation of state-imposed death - without understanding its ideologies of race, and vice versa. 19 Moreover, powerful ideologies of race interlock with other powerful ideologies, such as those of gender and class, ideologies that, reinforcing one another, create a complex hierarchy that separates the classes of those who decide others' fate from those whose fates are decided. 20

A symposium based on the capital case of Joseph Giarratano, a white man, is not the most likely occasion for examining these questions about the entanglement of race and the death penalty. Nonetheless, it is a valuable occasion for examining these questions because, if the roles I ascribe to the ideologies and hierarchies of America's social strata in the capital punishment [\*1401] process are accurate, then evidence of their operation should appear throughout a large volume of cases, not just in obvious ones. Therefore, this essay explores how structural hierarchies such as those built on ideas of racial difference are implicated in cases like Giarratano's.

A. History of Race Ideologies

Accepting the challenge to examine the role of racial hierarchy in a case understood as non-racial requires attention to America's fraught and complex history of race. This history is grounded in awareness that from the colonial era through the Civil War, slavery constructed the meaning of race in America for more than two centuries. 21 Slavery was the practice, white supremacy was the ideology, and racial stereotypes were the consequence. 22 Slaveholders rationalized that Africans' natural inferiorities to white European colonists rendered them unsuited for liberty and in need of the control provided by the institution of slavery, 23 an institution with staggering economic benefits for the slaveholding [\*1402] classes. 24 Once the Civil War forced an end to slavery, a need arose for other forms of control of the several million newly-freed, racially-marked slaves 25 who, their former masters feared, might revolt against them. 26

When federal efforts to support and protect former slaves during the Reconstruction era were brought to a premature halt, strictly enforced racial segregation policies and selectively enforced law enforcement policies - the era known as Jim Crow - emerged, providing white majorities with the control they felt they needed. 27 Stereotypes of black people, especially black men, as predatory, dangerous, and naturally inclined toward violence served to justify these systematic policies of racial control. 28 Once racial control policies were established, social conditions of segregation and inequality maintained the ideologies of racial [\*1403] difference, at the same time that ideologies of racial difference maintained segregated and unequal social conditions. 29 In short, the past was not past - it flourished in new forms.

The rule of law, impartially administered, has long been vulnerable to these race ideologies. In the same regions where white-on-black racial violence, notably in the form of lynchings, was virtually ignored by criminal justice processes, 30 black-on-white violence was punished with special fervor, most notably with the death penalty. 31 This combination of circumstances provides evidence that criminal justice actors were using their authority strategically and selectively to reinforce cultural norms of racial hierarchy, and assigning the death penalty a key role in that racial narrative. 32

[\*1404] These are the post-slavery realities that underlie the empirical evidence presented to the Supreme Court in the 1980s in the case of McCleskey v. Kemp. 33 That evidence, never refuted by the Supreme Court, showed race, particularly the race of the victim, to be a statistically significant factor in determining who received death sentences. 34 When the Supreme Court upheld McCleskey's death sentence despite compelling evidence that race was playing a major role in selecting who lived and who died at the hands of the state, it effectively upheld the role of the death penalty in supporting racial hierarchy and gave racial hierarchy a continuing role in the state's infliction of death. 35

McCleskey was a 5-4 opinion that was disavowed by its author Justice Powell after his retirement. 36 So its conclusion, its implications, and the ideas it embodies are sharply contested. These are reminders - befitting a symposium in a Law Review bearing the names of Washington and Lee - that in many ways the ghosts of the colonial and antebellum slave system continue to [\*1405] inhabit our cultural contests. Since the late nineteenth century, America has been at war with itself, deeply divided on whether and how to challenge racial hierarchy and on the role law should play in supporting or mitigating the racial hierarchy that became embedded in American culture through its slave system. 37 As recent events illustrate, questions about whether and how black lives matter are still haunting us, as they have for centuries. 38 The legal and ideological battles that undergird drug laws, stop and frisk policies, police shootings, presidential campaigns, and most certainly the death penalty, remain volatile and unresolved. 39

As coercive institutions empowered to keep people in bondage, state criminal justice systems have long been key sites for these ideological and legal battles. 40 The Fourteenth Amendment, part [\*1406] of the package of Reconstruction Amendments that followed soon after the end of the Civil War, imposed the first explicit constitutional limits on the power of states, because one outgrowth of the Civil War was an awareness that tyranny could come not just from a centralized federal power but also from decentralized state authorities. 41 Questions of federalism - the appropriate balance between federal and state power - continue to live in this battleground, shaped by a cataclysmic conflict about the meaning of race in America. 42

The story of Criminal Procedure - the constitutional regulation of law enforcement processes and a course taught in every law school - is one of the federalism stories that emerged from the Civil War and carried forward its preoccupations with race. 43 The Scottsboro cases, capital cases involving nine black male teenage defendants falsely accused yet sentenced to death for the rape of two white women, exposed the role of state criminal justice and death penalty systems in perpetuating racial stereotypes and racial subordination by state violence. 44 The notoriety of criminal justice scandals like these provoked quests to find federal mechanisms that might limit states' racialized, and sometimes lethal, abuses of criminal justice processes. 45

[\*1407] Reconstruction's Fourteenth Amendment was one of the limiting mechanisms, a weapon in the fight to disentangle state criminal justice and racial ideology. 46 Through its limits on state power, the criminal justice protections contained in the federal Bill of Rights were incorporated through the Fourteenth Amendment as limits on the actions of state authorities. 47 The Supreme Court first applied the incorporation doctrine to reverse a state's criminal conviction in the Scottsboro cases, launching the broad constitutionalization of Criminal Procedure. 48 Succinctly stated, incorporation was a post-Reconstruction tool for reinforcing the rule of law and curbing the worst racial abuses of state criminal justice systems. 49 The expansion of federal habeas corpus remedies was another approach to the same problem, providing greater access to federal court review of state criminal justice actions. 50

The incorporation doctrine, the constitutionalization of Criminal Procedure, and habeas corpus remedies are ostensibly race-neutral legal mechanisms. Debates about their scope are often devoid of explicitly racial content. 51 But all of these legal mechanisms were born of America's deep-seated racial conflicts. When we recall their racial history, we can see more clearly the [\*1408] pervasive racial influences on the contours of our contemporary criminal justice systems. And when we view these systems now, we can begin to appreciate that they look the way they do because of a significant cultural dynamic: longstanding racialized uses of state criminal justice systems and fairly recent multifaceted efforts to limit their racialized uses, followed by the pushback against those limiting efforts that has gathered force in recent decades. 52

B. Understanding Race in the Giarratano Case

This brief description of the history of the many and varied efforts to recapture state criminal justice systems from racialized uses helps us to understand some of the ways that Joseph Giarratano's case was shaped by race. To one degree or another, every criminal case has been shaped by race. Our criminal justice system was forged in America's racial cauldron and would not look as it does but for our racial history. The constitutional arguments that Giarratano framed in his jail cell, his access to the federal courts to review Virginia court actions, the legal doctrines that offered promise of relief but ultimately constrained his remedies, are a product of the ongoing battle of ideologies that are, not exclusively but in significant part, an inheritance of our racial past and a continuing mold for our legal system's future.

Moreover, Giarratano's was a death penalty case, and as much or more than any other practice, America's capital punishment system was forged in its racial cauldron. 53 When the end of slavery removed the value of black lives as property, it enhanced the risk [\*1409] of having black lives taken, as one author noted, by "white mobs and white courts." 54 Most lynching victims were African-American, 55 such that lynching was understood as a practice of racial violence staged publicly to bolster white supremacist norms. 56 When Southern states turned away from lynching in the twentieth century, whether due to fear of federal anti-lynching legislation or otherwise, 57 we can find examples of officials calling off would-be lynch mobs by implicitly promising capital punishment as law's alternative route to a parallel outcome. 58 A recent empirical study by researcher Franklin Zimring reports that, without exception, the states with the most extensive lynching histories, including Virginia, now use the death penalty and "collectively dominate the nation's execution totals." 59 Although Giarratano is white, Virginia's attachment to the death penalty that was imposed on him is part of a racial pattern, a legacy rooted in its racial past.

[\*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

2. Executive Clemency

Despite the death sentence that he received and the proximity to execution that he experienced, the fact that Joe Giarratano no longer lives under the official threat of death may have a racial aspect as well. Based on a review of the facts of the case and questions about guilt, Giarratano was granted a conditional pardon and a commutation of sentence - from death to life with parole - by Governor Douglas Wilder, who indicated that the state's attorney general should consider granting Giarratano a retrial. 69 If a retrial were granted, its outcome would prevail over [\*1412] the sentence remaining from the conditional pardon. 70 Because the prosecutor's office with authority to provide a retrial never permitted it and the Parole Board has yet to grant parole, Giarratano remains incarcerated. 71

Although Governor Wilder expressed support for the death penalty as Virginia governor 72 and refused clemency in other cases, 73 it is not unthinkable that his perspective as the grandson of slaves, the namesake of Frederick Douglass, and a child of segregation, then the first African-American elected to statewide office in Virginia and the first African-American governor in the country, 74 influenced his willingness to entertain skepticism about [\*1413] the accuracy of Giarratano's conviction, 75 despite political pressure to allow his execution to proceed. 76 Growing up in a segregated black community, educated in segregated schools and a historically black college, attending Howard Law School where civil rights litigation was invented by professors like Charles Hamilton Houston and students like Thurgood Marshall - both of whom pursued a legal campaign to dismantle segregation as lawyers at the NAACP Legal Defense Fund - and having extensive experience as a criminal trial lawyer, Wilder undoubtedly encountered many stories of wrongful convictions and executions of innocents, given the racialized context that made these narratives especially prevalent among African-Americans. 77

[\*1414]

3. Juries

Where narratives like these have remained especially prevalent among African-Americans in our still largely segregated communities, the systematic exclusion of African-Americans from juries has disproportionately excluded many whose backgrounds have generated an openness to considering the possibility of official error. 78 Through the combined operation of jury eligibility laws 79 [\*1415] and jury selection practices - such as those that permit prosecutors to peremptorily strike African-Americans from juries as long as, if challenged later, they can articulate race-neutral reasons for the strikes 80 - in many communities juries rarely contain more than a token number of African-Americans, if any. 81 Because jurors are [\*1416] not representative of the regions from which they are drawn, their views may not be representative. 82 In capital cases, the process of "death-qualifying" a jury - by removing all the jurors with conscientious scruples about the death penalty 83 - will exacerbate the problem, as the accumulated lessons of the lives of people of color make them disproportionately disinclined toward death sentences and thereby ineligible to sit as capital jurors, even in the guilt-innocence phase of capital trials. 84

[\*1417] In other words, regardless of the race of the defendant, the systematic and rampant exclusion of African-Americans from juries skews fact-finding in the direction of more convictions and death sentences. 85 These realities can influence other aspects of the process. For example, even when there are legitimate defenses, the possibility of actual innocence, or questions about the degree of guilt, defendants understandably bent on escaping the possibility of a death sentence may choose to plead guilty to obtain a sentence less than death. 86 The pressure to do so will only increase where the defendant's sense of the jury is that selection processes have skewed it toward a conviction and death sentence.

While issues surrounding jury composition play a role in an overall analysis of the continuing pervasive effects of racial dynamics on criminal justice processes, they do not play a role in the Giarratano case. In what we now understand to be a decision- [\*1418] making process motivated by a suicidal aim, Joe Giarratano waived his right to a jury when he was tried for murder. 87 Aware of gaps in his memory, addled by years of severe substance abuse, and believing that he may have committed murder, Giarratano thought he deserved to die. 88 Refusing to plead to eliminate the prospect of the death penalty, Giarratano chose a bench trial to fulfill his suicide mission. 89 With the help of his appointed defense counsel, he waived a jury, presented an unsupported defense at trial, obtained a conviction, and asked the judge for a death sentence. 90 As events confirmed, Giarratano had correctly identified the most efficient route to assisted suicide.

4. Judges

Of course, the judge had to play his expected role in the suicide plan. Knowing that Giarratano had declined to accept a plea to avoid the death penalty then waived his right to a jury trial, 91 knowing that Giarratano had suffered abuse in an unstable home as a child and that he turned to drug and alcohol abuse starting at age eleven, 92 knowing that Giarratano had attempted to take his own life multiple times and was being administered psychotropic drugs during trial, 93 the judge might have decided that, despite Giarratano's request for death, an appropriate sentence in these circumstances was life in prison. 94 Although the judge was [\*1419] required under law to make an independent moral judgment as to whether the circumstances of Giarratano's life reduced his culpability and made the death penalty excessive in his case, Giarratano presumed that the judge would oblige his request to receive a death sentence. 95 Why was this a safe wager?

The selection process for state trial court judges reinforced the likelihood that the judge would deliver the death sentence that Giarratano sought. 96 In states that have relied on the death penalty to the greatest extent - states of the old Confederacy 97 - judges are elected. 98 State judges typically serve for a term of years, then stand for re-election against potential opponents, or survive a retention election, to continue to serve. 99 In states where [\*1420] the death penalty is popular, judges are under political pressure to impose and support death sentences where they can. 100 Those who fail to do so when opportunities arise are vulnerable to ugly re-election campaigns, and potential rejection, in the next election cycle. 101

Political pressure to impose death sentences in states with considerable support for the death penalty may remain acute in Virginia, where trial court judges are elected by the Virginia General Assembly rather than by the voting populace. 102 In this unusual selection procedure, voting legislators may be concerned about their own reelection to the Virginia state legislature and will be inclined to make safe judicial choices that pose limited risk to their reelection prospects. 103 Because judicial choices reflect [\*1421] directly on these legislators, the safest path is to choose judges who will reliably comport with the prevailing political will. 104

In states like Virginia, where in many of its regions the death penalty has the backing of majorities, legislators have political incentives to elect judges who will find favor with the general electorate by demonstrating their willingness - sometimes even their eagerness - to impose death sentences. 105 In a judicial selection system like this, the pro-death penalty views of the majority will control. 106 The anti-death penalty views that predominate among minorities, who are disproportionately subject to the harshest punishments, will have far more difficulty finding their way to the bench. 107 These political dynamics were especially pronounced in the late 1970s, an era of post-civil rights [\*1422] backlash. 108 Through political structures controlled by white majorities, judges inclined toward issuing death sentences were selected to preside over Virginia's courts. 109 Racial dynamics played a supporting role in sustaining the judicial selection system that enhanced the likelihood that Giarratano would be condemned to die.

5. Race of Victims

These are the less than obvious ways that race influenced Joe Giarratano's case. Yet the most obvious way that race played a role in the Giarratano case is that he was convicted of killing white victims. 110 In America, capital punishment has been reserved primarily for those convicted of killing white people. 111 Indeed, the Baldus study confirmed empirically what many had long understood from observation and experience. 112 Baldus' gargantuan study, conducted over years, demonstrated that defendants convicted of killing white victims increased their chances of receiving a death sentence by more than four times, compared with those convicted of killing non-whites, a statistic [\*1423] reinforcing a cultural message that the lives that matter most should be avenged and that white lives matter most. 113 The Baldus study provides empirical evidence that an ideology of white supremacy, or ideas about racial difference, are at work in deciding which capital defendants will be chosen for death. 114

### AT: K Settler Colonialism

#### Legal loopholes pave the way for disproportionate executions of native people AND affronts to native sovereignty over criminal law

Thompson, 19 (Christie Thompson, Christie Thompson is a staff writer. Her work has been published by outlets including The New York Times, The Washington Post, NPR, ProPublica, and The Atlantic. She was the recipient of the 2016 George Polk Award for Justice Reporting and a finalist for a 2016 IRE Award. "The Navajo Nation Opposed His Execution. The U.S. Plans to Do It Anyway.", The Marshall Project, https://www.themarshallproject.org/2019/09/17/the-navajo-nation-opposed-his-execution-the-u-s-plans-to-do-it-anyway, 9-17-2019, Accessed 6-22-2020) //ILake-JQ

In 2003, Lezmond Mitchell was found guilty of carjacking and murder for stabbing a woman and her 9-year-old granddaughter on Navajo land in Arizona. Despite the gruesome nature of the crimes, the Navajo Nation, a federal prosecutor and even members of the victims’ family said they did not want the U.S. government to pursue the death penalty. But the Justice Department had other plans.

A mostly-white jury sentenced Mitchell—a Navajo man—to death, while his co-defendant, who was 16 when the crimes were committed, received life in prison. Mitchell’s life was then in limbo as the federal government ceased executions for nearly two decades. In “Case in Point,” The Marshall Project examines a single case or character that sheds light on the criminal justice system.

That changed in July, when the Justice Department announced it would put Mitchell and four other men to death in December and January. “We owe it to the victims and their families to carry forward the sentence imposed by our justice system,” Attorney General William Barr said in a statement.

While the Justice Department’s press release included the gory details of Mitchell’s crime, it left out the tangled story of how he ended up as the only Native American on federal death row—and the ongoing legal fight to spare him. Although Justice officials claimed that all five men scheduled for execution have already exhausted their appeals, Mitchell has ongoing litigation. Last week, Mitchell’s attorneys asked a federal appellate court to stay his execution, saying that “allowing [it] to go forward with so many questions unresolved would be a grave injustice, as well as an affront to the values and sovereignty of the Navajo Nation.”

The Justice Department’s response is due Sept. 27.

Most criminal cases out of Indian Country involve thorny jurisdictional issues, but they are thrown into stark relief when the ultimate punishment is on the line.

In 2001, Mitchell and his co-defendant, Johnny Orsinger, hijacked the car of Alyce Slim, a Navajo woman, as she and her granddaughter were returning from a visit to a medicine woman in New Mexico. The men stabbed Slim dozens of times, put her body in the backseat next to her granddaughter, then drove to the mountains and killed the little girl. They dismembered and buried the bodies, and Mitchell used Slim’s truck to rob a reservation general store a few days later. A former attorney for Orsinger declined to comment.

After his fingerprints were found within the truck’s burned remains, Mitchell was arrested on a tribal warrant and detained at the Navajo jail. Court records show that Mitchell remained in tribal custody for 25 days before being appointed an attorney or appearing in front of a federal judge, even though federal law enforcement were involved and would ultimately take over the case. While at the tribal jail, Mitchell was questioned multiple times by FBI agents and ultimately confessed to the crime. According to records, Mitchell was read his rights and waived them when he agreed to speak.

Navajo Nation officials wrote a letter to the federal prosecutor assigned to the case in 2002 expressing their opposition to the death penalty for those involved in the murders, saying their culture and religion “instruct against the taking of human life for vengeance.” According to court filings, Slim’s daughter and the girl’s mother, Marlene Slim, also asked the prosecutor not to seek capital punishment. The prosecutor then told the Justice Department that he didn’t recommend the death penalty in this case.

Despite the tribe’s opposition, then-Attorney General John Ashcroft instead found a legal work-around. He pursued a death sentence for Mitchell on the grounds that he committed a carjacking resulting in death, a crime that falls under federal authority as it relates to interstate commerce.

After holding several public hearings, the tribe ultimately decided to opt out of the Federal Death Penalty Act entirely. That meant that any crime that was determined to be a federal offense only because it took place on their reservation could not be punishable by death. Marlene Slim testified to the tribal Public Safety Committee in favor of the decision. (Only one U.S. tribe, the Sac and Fox Nation of Oklahoma, has opted in.)

Ashcroft’s insistence on seeking the death penalty for Mitchell was unusual, as federal death sentences are often reserved for crimes of significant national interest. But Ashcroft had been a steadfast proponent of capital punishment. During his first year and a half in office, he went against federal prosecutors’ recommendations in a dozen cases to pursue a death sentence.

“It's clear that America is so concerned about the safety and security of its citizens that certain crimes against the people of this country have been designated as death-eligible by Congress,” Ashcroft said in a 2002 speech. He previously told lawmakers he was confident there was an “absence of any evidence of bias or racial discrimination in the federal death penalty.” Ashcroft did not respond to a request for comment.

Mitchell’s attorneys appealed his death sentence to the Ninth Circuit Court of Appeals, claiming that his initial lawyer had failed to show Mitchell may have been intoxicated at the time of the crime or to stress his history of mental illness, abuse and addiction to the jury. The court ruled against Mitchell in 2015, deciding that his defense had been adequate. But in a forceful dissent, Circuit Judge Stephen Reinhardt noted how “anomalous” Mitchell’s case was.

“The arbitrariness of the death penalty in this case is apparent … Mitchell, who was 20 years old at the time and had no prior criminal record, does not fit the usual profile of those deemed deserving of execution by the federal government—a penalty typically enforced only in the case of mass murderers and drug overlords who order numerous killings,” Reinhardt wrote.

Mitchell’s ongoing appeal, filed in March 2018 in federal district court, stems from the makeup of the jury that sentenced him to death. Only one of the 12 jurors was Native American. For security reasons, the government moved the trial to a court 100 miles away, making it more difficult for Navajo jurors to participate, his lawyers claim. According to court filings, many of the prospective Native jurors were struck because Navajo was their first language or because the death penalty was against their beliefs. Prosecutors tried to dismiss the remaining Native American from the jury but were blocked by the court.

Under-representation of Native Americans on federal juries is a common problem, due to factors such as geography, language and religious beliefs, said Jordan Gross, a law professor at the University of Montana who has studied the issue. “There are no federal district courts in Indian Country,” she said. “If I live hundreds of miles away from the federal court, and I don’t have a lot of money or resources, how am I going to get there for jury duty?”

Mitchell’s attorneys are now asking to interview former jurors to see if there were any signs of racial bias in their decision-making. Such interviews would be allowed if the case was being heard in Arizona state court, but they are often blocked in the federal jurisdiction where his case is being heard.“

All 116 inmates on death row in Arizona are free to conduct a reasonable investigation by informally interviewing their jurors,” the petition states. “But Mitchell, solely by virtue of the fact that he was prosecuted federally, is barred from conducting that same reasonable investigation.”

Slim’s grandson, Michael Slim, only found out that the execution had been scheduled when a reporter called for his reaction. He supported the death penalty when Mitchell was first sentenced, but has since changed his position. In August, he wrote to Mitchell to tell him he forgives him, and signed it: “Your friend. Your Navajo brother.”

“I don’t think he should die. It’s not my place or humanity’s place, it’s only God’s place,” Slim said in an interview. “There’s no reason another person needs to die because two people were hurt. That’s not justice, it’s revenge.”

Mitchell is scheduled to be put to death on Dec. 11, 2019.

#### Capital punishment had become the latest tool utilized by settler society to continue its genocide against natives

Baker 07 – Lecturer of criminology at the University of North Carolina Wilmington with a J.D, Ph.D. in sociology, and a B.A. in political science (David, American Indian Executions in Historical Context, p. 320-322)//mj

Internal colonialism accents colonizing powers controlling subordinate groups by means of legal institutions. Indeed, the white dominant group in the USA has used the imposition of capital punishment against American natives throughout the country’s history to realize its social, political, and economic interests. The first execution of an American Indian took place when military authorities beheaded Nepauduck in Connecticut in October 1639 for the murder of Abraham Finch, a white man (Hearn, 1999, p. 8). Nepauduck’s execution resulted from the genocidal brutality reaped upon the Pequot Indians in that year by the colonial army. One observer wrote about an incident with the Pequot Indians, ‘In a little more than one hour, five or six hundred of these barbarians were dismissed from a world that was burdened with them’ (Stannard, Downloaded By: [Baker, David] At: 16:36 8 December 2007 Criminal Justice Studies 321 1992, p. 114). Since then, historical inventories show that death penalty jurisdictions have executed 450 American natives (Death Penalty Information Center, 2006; Espy & Smykla, 2004; Hearn, 1997, 1999, 2005; O’Hare et al., 2006). Murderous encounters with racist white settlers underscore much of American Indian history, and as a result, death penalty researchers have no accurate count of Indian executions. The historical record abounds with instances of European settlers and white vigilante groups indiscriminately killing American natives ‘while local government looked the other way’ (Rummel, 1994). For instance, when white settlers found the body of John Oldham, an abusive English colonist banished from Plymouth in 1636, the settlers ‘proceeded to murder more than a dozen [Pequot] Indians found at the scene of the crime, whether or not they were individually responsible’ (Stannard, 1992, p. 112). Similarly, in 1642 Dutch colonizers butchered ‘a friendly village’ of some 120 American Indian men, women, and children with bayonets while they slept. A witness to the atrocity reportedly found alive a young man the next morning ‘who’d had his left hand and legs hacked off … supporting his protruding entrails with his other hand’ (Davis & Fortier, 2006; see also Strong, 1994).

Scholars have established a strong association between legal executions and lynchings (Beck, Massey, & Tolnay, 1989; Beck & Tolnay, 1990; Tolnay & Beck, 1992, 1995; Tolnay, Beck, & Massey, 1989, 1992; Vandiver, 2006; see also Forum, 1998), but the historical record is mostly silent on American Indian lynchings despite the fact that, as Waldrep (1998, p. 15) puts it, ‘the tension between constitutionalism and extralegal violence is a central paradox of American society.’ There is some evidence of mob violence toward Indian victims in California, Washington, Wisconsin, and Wyoming (Pfeifer, 2001, 2006), and Carrigan (2004) writes of mob violence against American Indians in the conquest of Central Texas beginning in the 1830s. In July 1849, a mob lynched an American native for murderous assault in Chippewa Falls, Wisconsin (Wylie, Land of the Free). White mob violence against Indians lasted well into the late 19th century in the Oklahoma Indian Territory when in 1898 a crowd of vicious townspeople burned alive two young Seminole men named Palmer Sampson and Lincoln McGeisey whom the mob tortured into confessing to Mary Leard’s murder, a white woman. One scholar’s account of the killings concludes that the young native men were not guilty of the murder and that a drifter named Keno was responsible (Littlefield, 1996). To one commentator, the lynching attracted considerable numbers of ‘white Southerners who considered the victimized Seminoles as yet another human variety of non-white scapegoats’ (Davis, 2005). One newspaper reporter vividly described the lynching:

Stoically, the Indians went to their death. One of them, it is true, when the pain was unbearable, leaned forward and sucked the flames into his lungs. But the other, like the braves among his ancestors who had silently borne the worst tortures enemies could devise, stood erect until the flames ended his life, a dreadful punishment at the best made still more dreadful by the thought that the victims might have been innocent of the crime laid on them. (Sampson, 2002)

Deloria and Lytle (1983) have provided death penalty researchers with a useful framework for investigating the criminal justice history of American Indians with each Downloaded By: [Baker, David] At: 16:36 8 December 2007 322 D. V. Baker historical period accenting the impact of government initiatives to resolving the continuing problem of dealing with American Indians. They divide the historical contact of American Indians with European whites into six distinct periods: an initial period of discovery, conquest, and treaty making from 1532 to 1828; a period of removal and relocation from 1828 to 1887; a period of allotment and assimilation from 1887 to 1928; a period of reorganization and self government from 1928 to 1945; a period of termination from 1945 to 1961; and a period of self determination from 1961 to the present.

#### American Indians are significantly more likely to face the death penalty for killing whites than whites are for killing American Indians

Baker 07 – Lecturer of criminology at the University of North Carolina Wilmington with a J.D, Ph.D. in sociology, and a B.A. in political science (David, American Indian Executions in Historical Context, p. 352-353)//mj

Thirty-nine American Indian prisoners reside on state and federal death rows in the USA; comprising 1.1% of the country’s entire death row population (Fins, 2006). Seven states and the federal government hold condemned Indian prisoners. Since 1961, state jurisdictions have executed 15 American Indian prisoners with authorities executing 13 Indian prisoners for killing whites and 2 Indian prisoners for killing other Indians. Yet, between 1976 and 1999, whites killed 32% of the 2,469 American Indians murdered and American Indians killed 1% of the 164,377 whites murdered. These figures reveal that whites murdered 790 American Indians while American Indians murdered 1,644 whites (Perry, 2004). This means that American Indians are slightly more than twice as likely to murder whites as are whites to murder American Indians. Since no jurisdiction has executed a white defendant for killing an American Indian, American Indians are 13 times more likely to suffer execution for killing whites than whites are for killing American Indians (Fins, 2006).

The relatively small number of American Indian executions during this period is partially the result of capital punishment undergoing constitutional challenges from the early 1970s to the late 1980s. In 1972, the US Supreme Court held in Furman v. Georgia that the imposition of capital punishment as then administered contravened constitutional protections against cruel and unusual punishment because the punishment was arbitrary and capricious in its application. The Court found defective the death penalty statutes of 40 states, the District of Columbia, and the federal government. The result of Furman was a 10-year moratorium on the death penalty throughout the USA. No state or federal jurisdiction conducted any executions between June 1967 and January 1977. The Court relied upon long-standing empirical findings that capital punishment jurisdictions had applied the death penalty in a discretionary and discriminatory manner. Many in the academic and judicial community believed that the Court had ‘sounded the constitutional death knell’ for capital punishment in the USA. But in 1976, in Gregg v. Georgia, the Court found capital punishment constitutionally permissible so long as death penalty statutes provided procedural safeguards to guide the discretion of the sentencer. Yet, the essence of the Court’s 1987 holding in McCleskey v. Kemp is that there are acceptable standards of risk of racial discrimination in imposing the death penalty. Accordingly, empirical studies simply showing that a discrepancy appears to correlate with race in imposing death sentences do not prove that race enters into any capital sentencing decisions or that race is a factor in the petitioner’s case. As Stevenson and Friedman (1994) point out about the McCleskey decision:

It is unimaginable that the U.S. Supreme Court, an institution vested with the responsibility to achieve equal justice under the law for all Americans, could issue an opinion that accepted the inevitability of racial bias in an area as serious and final as capital punishment. However, it is precisely this acceptance of bias and the tolerance of racial discrimination that has come to define America’s criminal justice system. (p. 510)

The trend in American Indian executions during the present historical period of selfdetermination shows a significant increase in Indian executions during the 1990s. The 15 American Indian executions since 1973, in many cases, accent the problems endemic to contemporary capital punishment schemes—increasing rates of voluntary executions, botched executions, racist prosecutorial discretion, and ineffective capital defense counsel. In these cases, all the victims were white and the American Indian defendants largely suffered from severe alcoholism, drug abuse, and mental illness. In most cases, defendants came from predictable backgrounds of abject poverty, alcoholic and abusive parents, and violent family histories.

#### Federal death penalty is a direct impediment to tribes’ ability to self-police

Murray and Sands 01 – Assistant federal public defenders for the district of Arizona (Ken Murray and Jon M. Sands, Federal Sentencing Reporter, “Race and Reservations: The Federal Death Penalty and Indian Jurisdiction”, July/August Vol 14, No. 1, www.jstor.org/stable/10.1525/fsr.2001.14.1.28)//mj

B. Indian-ness as an Element

The federal government has been reluctant to allow tribes to self-police all crimes committed by Indians in Indian Country. In fact, over the years, Congress and the courts have seen fit to expand federal jurisdiction for many offenses committed by Indians, against Indians and/or on Indian Country. When Indian Country offenses are involved, precisely where, when and under what circumstances federal jurisdiction exists and who can be prosecuted is often a difficult question to answer. Despite this country’s equal protection jurisprudence, the solution to such federal jurisdiction problems cannot be resolved without considering the race of both the accused and the victims. The use of race to determine federal jurisdiction, even if it is labeled as a political affiliation by the courts, raises very significant concerns. For example, if a defendant who is Indian is charged with the murder of a tribal officer, as discussed above, he may be subject to federal capital jurisdiction and a potential death penalty. If the crime occurred in Indian Country in a state that does not possess the death penalty – for example, Minnesota – then the sole basis of the defendants exposure to capital punishment is the fact that he (and the victim) are Indians. It cannot be said that such charges and potential sentence are pursued based on race-free considerations. Race has to be considered to invoke federal jurisdiction and to make the death penalty an available sentence. Federal statutes require that a jury making a sentencing decision about whether a defendant charged with a capital offense should be sentenced to death must not consider race. For example, 21 U.S.C. ¤ 848(o), in pertinent part, states: The jury shall return to the court a certificate signed by each juror that consideration of the race . . . of the defendant or the victim was not involved in reaching his or her decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race . . . of the defendant, or the victim, may be. As the hypotheticals above show, there is no way that race would not be considered in charging an Indian defendant with a federal offense punishable by death. Race is an essential component of pursuit of such a Change – it is essential in establishing federal jurisdiction. Thus the troubling jurisdictional issues discussed - Indian-ness and Indian Country - above are intertwined with the concept of race, and proof of who - defendant, victim, or both - is an “Indian.” Finally, considering the fact that race can be an essential factor in making an Indian defendant eligible for the death penalty, should it not be an element that must be established by the government beyond a reasonable doubt? Apprendi v. New Jersey,13 after all, held that any factor, (except possibly recidivism), that serves to increase the maximum punishment which a defendant can receive, must be treated as an element of the offense, with the constitutional safeguards as to proof and process that are attached. The finding that a defendant is an Indian, supposedly a “political” definition under Antelope, is in reality a marker for race. The prospect of a racial category like “Indian-ness” becoming not just a sentencing factor but an element of a capital crime obviously raises significant constitutional challenges, especially since it is the defendant’s or victim’s “Indian-ness” and the fact of Indian Country location that exposes him to the death penalty in the first place.

V. Conclusion

Federal jurisdiction over Indians and Indian Country is frequently overlooked in the debates over crime and punishment. Indian tribes are domestic dependent nations with their own sovereign rights. In the debate over capital punishment, it is critical for Congress and the courts to recognize the uniqueness of Indians, and to respect their political sovereignty, culture and status. This requires listening to the Indian tribes, and respecting their political decisions regarding the death penalty. Section 3598 provides this with the “opt-in” provision. However, there is still too much discretion left in the hands of federal prosecutors in seeking the death penalty against Indians for crimes committed against Indians in Indian Country under other jurisdictional bases. Moreover, Congress has failed to see that its attempt to eliminate race from the death sentencing process is fundamentally inconsistent with its criminal jurisdiction over Indians. Contrary to its intentions, race necessarily will play a fundamental role in virtually every case in which a federal prosecutor seeks to prosecute an Indian for a capital crime committed on Indian Country –indeed, “Indian-ness” may have to be proved to the jury as an element. Given these considerations, and especially given the all but uniform rejection of the federal death penalty by the Indian tribes under ¤ 3598, one can only have deep concerns about the use of the death penalty for federal Indian jurisdiction.

#### The death penalty is a colonialist law born from racism and colonizer ignorance

Hopkins 19 - Dakota/Lakota Sioux writer (Ruth, Zora, “Why Won’t the U.S. Acknowledge Tribal Rule in Its Death Penalty Decisions?”, 8-13-19, https://zora.medium.com/why-wont-the-u-s-acknowledge-tribal-rule-in-its-death-penalty-decisions-f3e0b11b3ceb)//mj

What’s alarming to me, as a Native woman, tribal attorney, and former tribal judge who advocates for the rights of Indigenous peoples and the tribes they comprise, is the way the federal government is disregarding tribal sovereignty — the inherent authority of Native nations to govern themselves — by giving Mitchell the death penalty.

“The Navajo Nation was not a party to the U.S. Constitution. They are pre-constitutional and extra-constitutional.”

Logic would dictate that the crimes Mitchell committed should fall under the jurisdiction of the Navajo Nation. The perpetrator and the victims are members of the Navajo Nation. The crimes Mitchell was convicted of all occurred within the boundaries of the Navajo Nation Reservation.

However, under federal law, tribes do not have jurisdiction over seven types of felonies — murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny — even when they’re committed by the tribe’s own members, regardless of whether the victims were Native or not, or if the crime happened on their land. This law is called the Major Crimes Act and was born of racism and colonizer ignorance of tribal law and custom.

Here is how the Major Crimes Act came about: On August 5, 1881, in Rosebud Indian Agency, on the Great Sioux Reservation in Dakota Territory, two well-respected Lakota men, Crowdog and Spotted Tail, had a dispute. Crowdog killed Spotted Tail. The Oceti Sakowin (Great Sioux Nation) had their own governmental system and means of procuring justice for their people. They followed their laws. Crowdog was ordered to give restitution to the family of Spotted Tail in the form of $600, eight horses, and one blanket. He did so immediately. This outraged local settlers, who were unwilling to accept the form of justice administered by the tribe over their own members. Even though he had followed the law according to his people, Crowdog was arrested by order of a local federal government agent. The court proceedings that followed were poisoned by overwhelming anti-Native sentiment.

The case, now known as Ex Parte Crow Dog, went all the way to the U.S. Supreme Court, which upheld the authority of tribes to be ruled by their own laws on their own lands as sovereign nations. The non-Native populace was not satisfied with the decision. Congress answered with the Major Crimes Act, which gave the federal government authority over Natives who committed the crimes listed, for no other reason than non-Natives thought their forms of justice were morally superior and said so.

Since then, the Major Crimes Act has led to Natives being disproportionately criminalized and serving more time in federal prisons compared to non-Natives who commit similar wrongs. Statistics show that Natives are incarcerated at a rate 38% higher than the national average, and Native men are incarcerated at four times the rate of white men. Natives are also more likely to be killed by police than any other racial group.

What’s ironic about Mitchell’s case is that the Major Crimes Act should prevent him from being executed, because under the act, tribes can opt to reject capital punishment. The Navajo Nation has outlawed the death penalty. It goes against tribal custom. The attorney general of the Navajo Nation even explicitly asked federal prosecutors not to pursue the death penalty for Mitchell. The victims’ family is also against his execution.

In short, the federal government is executing Mitchell against the express wishes of the Navajo Nation and the victims’ family and is using a loophole to do it. The murders Mitchell committed fell under the Major Crimes Act, but the carjacking he was convicted of did not. Legally speaking, Mitchell is being put to death for carjacking.

Sister Helen Prejean, a well-known anti-death penalty activist, called the plan to execute Mitchell “federal overreach.” “The federal government should not be allowed to unilaterally come in and pursue the death penalty for crimes that occur in Indian Country. If a tribal government says NO to the death penalty, then that should be the last word. This is a serious tribal sovereignty issue,” she tweeted. Prejean also noted that there was only one Native on the jury at Mitchell’s trial.