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Following Finality: Why Capital Punishment Is Collapsing under Its Own Weight

Corinna Barrett Lain

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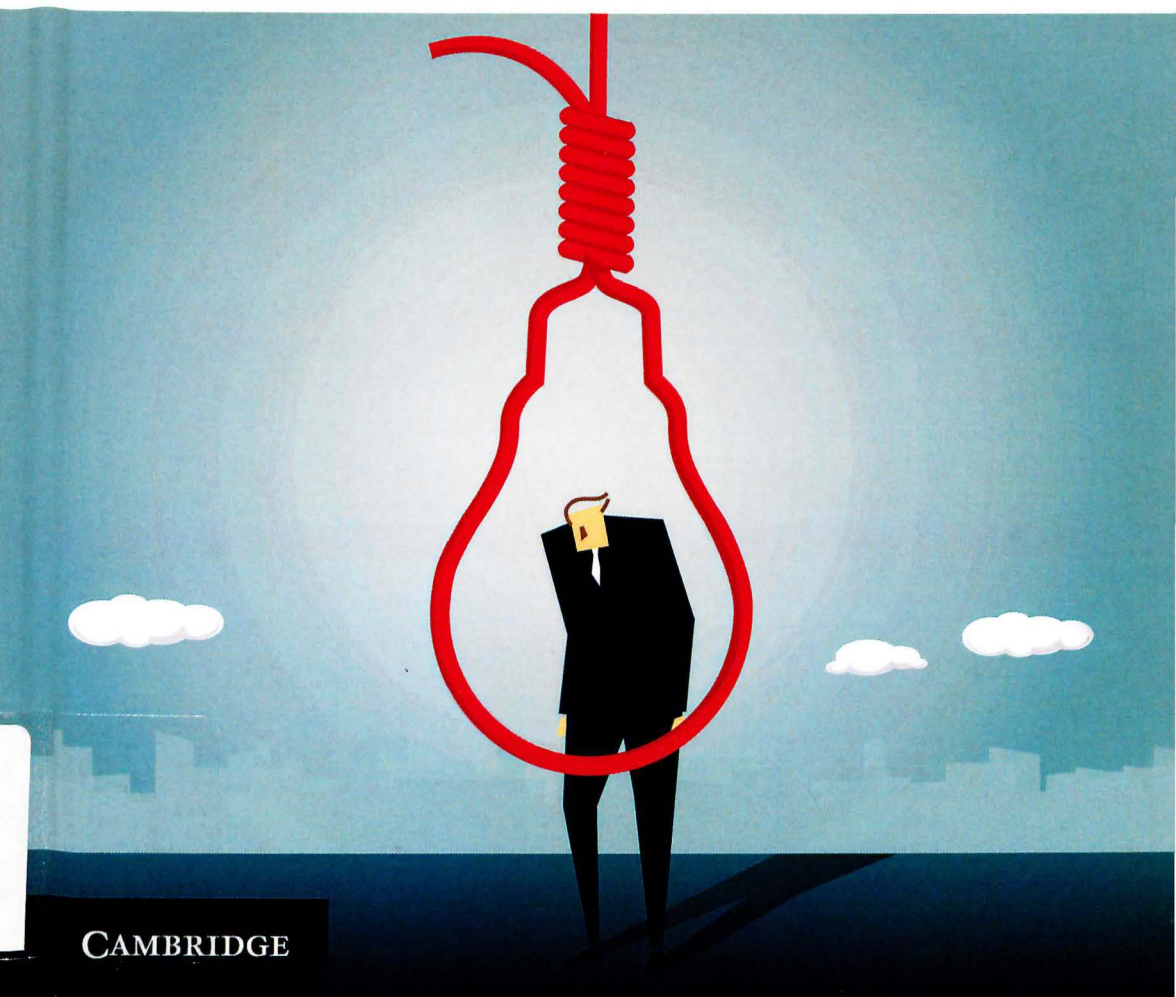
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Final Judgments

The Death Penalty in American Law
and Culture

Edited by Austin Sarat



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Final Judgments

THE DEATH PENALTY IN AMERICAN LAW AND CULTURE

Edited by

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Following Finality

Why Capital Punishment Is Collapsing under Its Own Weight

Corinna Barrett Lain*

Death is different, the adage goes – different in its severity and different in its finality.¹ Death, in its finality, is more than just a punishment. Death is the end of our existence as we know it. It is final in an existential way.

Because death is final in an existential way, the Supreme Court has held that special care is due when the penalty is imposed.² We need to get it right. My claim in this chapter is that the constitutional regulation designed to implement that care has led to a series of cascading effects that threaten the continued viability of the death penalty itself. Getting death right leads to things going wrong, and things going wrong lead to states letting go.

I am not the first to see how the Supreme Court's regulation of the death penalty has led to its destabilization over time. Others have written about it.³ And several judges have now brought the conversation full circle, recognizing

* Special thanks to Ron Bacigal, Jim Gibson, and Mary Kelly Tate for comments on an earlier draft, and to Holly Wilson and Zack MacDonald for their excellent research assistance.

¹ *Beck v. Alabama*, 447 U.S. 625, 637 (1980) ("As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments. 'Death is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality.'").

² *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). For the Supreme Court's declarations to this effect, see text accompanying notes 5–7.

³ Carol and Jordan Steiker's work is particularly noteworthy in this regard. Carol S. Steiker and Jordan M. Steiker, "Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment," *Law & Inequality* (2012): 211; Carol S. Steiker and Jordan M. Steiker, "Cost and Capital Punishment: A New Consideration Transforms an Old Debate," *University of Chicago Legal Forum* (2010): 144; Jordan Steiker, "The American Death Penalty from a Consequentialist Perspective," *Texas Tech Law Review* 47 (1995): 214; Jordan Steiker, "Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism," *University of Chicago Legal Forum* (1998): 320.

the constitutional implications of this phenomenon.⁴ But thus far, the role of finality has received little attention in the discourse. This chapter aims to give it its due.

To make my point, I first discuss the role of finality in the earliest developments of the modern death penalty era – constitutional regulation, habeas litigation, and the rise of a specialized capital defense bar to navigate those complicated structures. *Because death is final, we need to get it right.* Next I turn to the effects of those developments – a massive time lag between death sentence and execution, and with it, the discovery of innocents among the condemned, skyrocketing costs, and concerns about the conditions of long-term solitary confinement on death row. *Getting death right leads to things going wrong.* Finally, I examine the cascading effects of those developments – falling death sentences and executions, penological justifications that no longer make sense, and a growing number of states concluding that capital punishment is more trouble than it is worth. *Things going wrong lead to states letting go.* In the end, the finality of capital punishment is what makes it so rarely final, and so costly, cumbersome, and slow that it threatens to collapse under its own weight.

Before getting started, a few caveats merit mention. First, we do not know how the story ends. We can see the trajectory we are on now, but predicting the future is risky business – anything can happen. Second, even if our current trajectory continues, some states will cling to the death penalty no matter how little sense it makes or what the rest of the country does. In short, Texas will go down swinging. Third, the accumulated weight of finality is not the only factor threatening the death penalty's long-term feasibility. Other factors, like declining homicide rates and problems procuring lethal injection drugs, are also having an impact, but they are not what got the ball rolling and are not my focus here. Fourth and finally, history is a bit messier than the linear story I tell. Some developments I mention later were beginning to percolate earlier, some I mention earlier became stronger later, and many were interdependent with other developments also in play. I deal with this complexity by discussing each development where I believe it to have had the biggest impact, recognizing the nuances as best I can along the way.

Caveats aside, my point is simply this: Following finality allows us to see the cumulative nature of its heavy burden, and the weight of that burden on the death penalty today. Death is indeed different in the nature of its finality. But what makes it different may be what leads to its demise.

⁴ *Glossip v. Gross*, 576 U.S. ___, ___, 135 S. Ct. 2726, 2755–80 (2015) (Breyer, J., dissenting); *Baze v. Rees*, 553 U.S. 35, 78–87 (2008) (Stevens, J., concurring); *Jones v. Chappell*, 31 F. Supp. 3d 1050 (2014). *Jones* is discussed at text accompanying notes 181–82.

BECAUSE DEATH IS FINAL, WE NEED TO GET IT RIGHT

In the beginning, there was regulation. When the Supreme Court revived the death penalty in 1976, it did so on the premise that the death penalty would not be imposed unless “every safeguard is ensured.”⁵ “This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long,” the Court explained.⁶ “Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”⁷ *Death is final, so we need to get it right.*

In *Gregg v. Georgia* and its companion cases in 1976, getting death right meant requiring guided discretion statutes that told sentencers to consider certain aggravating and mitigating circumstances in the imposition of death.⁸ “No longer can a jury wantonly and freakishly impose the death sentence,” the Supreme Court declared. “It is always circumscribed by the legislative guidelines.”⁹

But the turn to legislative guidelines raised more questions than it answered. What aggravating factors were permissible? And what happened when the sentencer relied on both permissible and impermissible aggravators? What mitigating factors warranted consideration? And what could states do to cabin the consideration of mitigating evidence? What if the sentencer found that aggravating and mitigating factors were in equipoise? And what guidance did states owe to the juries that were making life-or-death decisions under this system? These questions and more made their way to the Supreme Court for resolution.¹⁰

And that was just ground zero. Because the whole point of the guided discretion statutes was to identify the “worst of the worst” for whom death was appropriate, the Supreme Court’s regulatory project also invited a number of categorical challenges to the death penalty’s application. Sometimes the Court’s resolution of these challenges had staying power. Those who raped without killing could not be executed.¹¹ Nor could those who were mentally incompetent at the time of execution.¹² Other times the Court changed its mind. Executing juvenile offenders and the

⁵ *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Gregg revived the death penalty after the Supreme Court had ruled it was unconstitutional as then administered in *Furman v. Georgia*, 408 U.S. 238 (1972).

⁶ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

⁷ *Ibid.*

⁸ *Gregg v. Georgia*, 195–207.

⁹ *Ibid.*, 206–07.

¹⁰ See, for example, *Arave v. Creech*, 507 U.S. 463 (1993); *Zant v. Stephens*, 462 U.S. 862 (1983); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Lockett v. Ohio* 438 U.S. 586 (1978); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Kansas v. Marsh*, 548 U.S. 163 (2006); *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

¹¹ *Coker v. Georgia*, 433 U.S. 584, 597–98 (1977); *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

¹² *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

intellectually disabled was constitutional, until it was not.¹³ And executing offenders who committed felony murder but did not themselves kill or intend to kill was not constitutional, until it was.¹⁴

Other issues added to the heap. Questions regarding the permissible bounds of jury selection in capital cases,¹⁵ the necessity of proportionality review,¹⁶ the admissibility of victim impact statements,¹⁷ the minimal responsibilities of counsel in capital cases,¹⁸ and the constitutional significance of racial bias in the imposition of death¹⁹ are called for clarification, crowding the Supreme Court's docket. By one unofficial count, the Court had issued over 80 opinions in capital cases between 1976 and 1995 – roughly four per year in the first two decades of the modern death penalty era.²⁰

In terms of the sheer number of capital cases decided, the Supreme Court's claim to "an especially vigilant concern for procedural fairness"²¹ in the death penalty context made sense. But as others have shown, the Court's regulatory project was largely a façade – over 90 percent of those sentenced to death before the Court's 1976 rulings were just as death-eligible afterwards.²² What slowed executions was not so much the Court's rulings, but the fact of litigation itself.

And litigation required lawyers – lawyers to litigate the law of capital punishment, and lawyers to litigate claims of lawyers litigating it wrong. In the first two decades of the modern death penalty era, there was plenty of work for both. While some of the legal wrangling centered around clarifying the death penalty's contours, much focused on the basic representation that capital defendants received at trial, which was bad – breathtakingly bad.

¹³ *Roper v. Simmons*, 543 U.S. 551 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

¹⁴ *Tison v. Arizona*, 481 U.S. 137 (1987) (overruling *Finnand v. Florida*, 458 U.S. 782 (1982)).

¹⁵ *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Morgan v. Illinois*, 504 U.S. 719 (1992); *Uttecht v. Brown* 551 U.S. 1 (2007).

¹⁶ *Pulley v. Harris*, 465 U.S. 37 (1984).

¹⁷ *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987)).

¹⁸ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

²⁰ Alex Kozinski and Sean Gallagher, "Death: The Ultimate Run-On Sentence," *Case Western Reserve Law Review* 46, no. 1 (1995): 3, n.10. Jordan and Carol Steiker describe the Supreme Court's constitutional regulation of the death penalty as "the defining feature of the 'modern era' of the American death penalty." Carol S. Steiker and Jordan M. Steiker, "Capital Punishment: A Century of Discontinuous Debate," *Journal of Criminal Law & Criminology* 101, no. 3 (2010): 668.

²¹ *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring).

²² David C. Baldus, George Woodworth and Charles Pulaski, *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (Boston: Northeastern University, 1990): 102. For excellent comparisons of the death penalty before and after the Supreme Court began regulating its administration, see Charles L. Black, Jr., *Capital Punishment: The Inevitability of Caprice and Mistake* (W. W. Norton & Co., 1982); Carol S. Steiker and Jordan M. Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment," *Harvard Law Review* 109, no. 2 (1995): 357.

In the early years especially, capital representation was provided by inexperienced, underpaid, and unsympathetic generalists.²³ Compensation averaging \$5–15 per hour was not uncommon,²⁴ and states got what they paid for. Stories of shockingly poor capital defense representation were legion, and the litigation to set it right played out largely on the field of habeas corpus.²⁵ From 1976 to 1995, death sentences suffered a whopping 68 percent reversal rate – and the number one reason was grossly ineffective assistance of counsel.²⁶

Something had to give; the question was what. One possible response to the high reversal rates in capital cases was to fix the problems that caused them (ineffective assistance of counsel was the number one reason for reversal, prosecutorial misconduct was number two).²⁷ Another possible response was to make reversals harder, and in 1996 that is exactly what Congress did. The Supreme Court had been tightening the availability of federal habeas corpus review for years,²⁸ and in the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), Congress codified those restrictions and added new ones of its own.

Responding to concerns about “delay and the lack of finality in capital cases,”²⁹ the AEDPA instituted an unprecedented array of procedural hurdles to federal habeas corpus review. To obtain relief, petitioners had to get past newly imposed statutes of limitations, restrictions on successive petitions, limits on evidentiary hearings, state exhaustion requirements, nonretroactivity doctrine, and a standard of review that required federal courts to find that the state court’s ruling was not just wrong, but patently unreasonable.³⁰ A number of these hurdles came with exceptions – some with exceptions to the exceptions – and every single one raised questions of its own. Further complicating matters was the AEDPA’s poor drafting,

²³ Roscoe C. Howard, Jr., “The Defunding of the Post-Conviction Defense Organizations as a Denial of the Right to Counsel,” *West Virginia Law Review* 98 (1996): 879, 881–82, 889; Steiker and Steiker, “Sober Second Thoughts,” 399.

²⁴ Howard, “The Defunding of the Post-Conviction Defense Organizations,” 892.

²⁵ Stephen B. Bright, “Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer,” *Yale Law Journal* 103 (1994): 1835; Carol S. Steiker and Jordan M. Steiker, “No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code,” *Texas Law Review* 89 (2010): 387.

²⁶ James S. Liebman, Jeffrey Fagan, Valerie West, and Jonathan Loyd, “Capital Attrition: Error Rates in Capital Cases, 1973–1995,” *Texas Law Review* 78 (2000): 1846–56.

²⁷ *Ibid.*

²⁸ *Wainwright v. Sykes*, 433 U.S. 72, (1977): 87–91 (adopting the “cause” and “prejudice” standard rescinding deliberate bypass); *Teague v. Lane*, 489 U.S. 288, 300–07 (1989) (adopting nonretroactivity doctrine).

²⁹ Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report (Powell Committee Report), printed in 135 Cong. Rec. 24694 (1989). The Powell Committee was charged with investigating “the necessity and desirability of legislation directed toward avoiding delay and the lack of finality in capital cases in which the prisoner had or had been offered counsel.”

³⁰ Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104–32, 110 Stat. 1214 (1996); Steiker, “Confronting the New Face of Excessive Proceduralism,” 320.

which made navigating the statute's provisions all the more difficult.³¹ The only thing clear about the AEDPA was its purpose: to frustrate federal review of state convictions and move the locus of litigation to state habeas corpus, an edifice that was itself designed to frustrate federal review of state convictions.³²

The AEDPA was a success, at least by way of lower reversal rates,³³ but in the process of curbing federal habeas review, it fed the monster it tried to tame. However arcane and elaborate federal habeas corpus was before the AEDPA, it was many times more afterwards. Federal habeas litigation continued unabated; indeed, it grew more prodigious over time.³⁴ What changed was its focus. Rather than ruling on the merits of claims, federal courts were mired in ruling on procedural rules.³⁵ Looking back on the dense procedural thicket that federal habeas corpus had become, Jordan Steiker had it right: what Congress meant was to prune the forest, but what it did was add more trees.³⁶

Once again, the complexities of capital litigation called for lawyers. At first that was a problem. In a separate (but related) move in 1996, Congress defunded the death penalty resource centers that had been providing counsel in federal habeas cases.³⁷ "We should not be spending federal money to subsidize think tanks run by people whose sole purpose is to concoct theories to frustrate the implementation of the death penalty," read an open letter to Congress.³⁸ In the AEDPA, Congress did its best to shut down federal habeas claims. In defunding the death penalty resource centers, it shut down the lawyers who filed them too.

But those lawyers did not just pack up and go home. They found private funding, took positions in the system elsewhere, submitted reimbursements, and sometimes worked for free.³⁹ Then came 2000, with its high-profile death row exonerations and revelations of lawyers falling asleep during capital trials.⁴⁰ Over the next several

³¹ *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("[I]n a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse in the art of statutory drafting.").

³² Steiker, "Confronting the New Face of Excessive Proceduralism," 342-44.

³³ Steiker and Steiker, "No More Tinkering," 387, n.70 (citing studies showing a 40 percent federal habeas reversal rate in capital cases before the AEDPA and 12.5 percent reversal rate afterwards).

³⁴ See *infra* discussion at notes 49-51.

³⁵ Steiker, "Confronting the New Face of Excessive Proceduralism," 317 (exploring causes of "emerging procedural fetishism" of federal habeas corpus in the wake of the AEDPA).

³⁶ *Ibid.* 320.

³⁷ Compare Judiciary Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1750-51 (allocating up to \$19.8 million for Death Penalty Resource Centers) with Judiciary Appropriations Act, 1996, Pub. L. No. 104-34, 110 Stat. 1321 (providing that "none of the funds provided in this Act shall be available for Death Penalty Resource Center or Post-Conviction Defender Organizations after April 1, 1996").

³⁸ Howard, "The Defunding of the Post-Conviction Defense Organizations," 915 (quoting Representative Inglis, R., South Carolina).

³⁹ Mark Hansen, "From Death's Door: With Federally Funded Appeals from Capital Punishment on the Way Out, Lawyers Are Wrestling with Questions About Who Will Pursue the Arguments to Keep Condemned Inmates," *ABA Journal* 82, no. 6 (1996): 58-59.

⁴⁰ Corinna Barrett Lain, "Deciding Death," *Duke Law Journal* 57, no. 1 (2007): 43-45.

years, quality capital defense became vogue. The Supreme Court started enforcing its competency standards.⁴¹ The American Bar Association issued new guidelines for defense attorneys in capital cases.⁴² And the 2004 Innocence Protection Act gave states grants to improve the quality of representation in state capital cases.⁴³ A new era of capital defense was born.

Inadvertently, the Supreme Court played a part in creating it. Decades of constitutional regulation added complexity to capital litigation, and that gave rise to a specialized capital defense bar skilled in harnessing that complexity and making it work for them.⁴⁴ From investigation, to mitigation, to voir dire, to pre- and post-trial motions and collateral review, these lawyers left no stone unturned and no legal argument overlooked.⁴⁵ They mounted a vigorous defense, negotiated the case when they could, fought tooth and nail at sentencing, and sought reversal of death sentences every step of the way. They held conferences, conducted training, and shared notes, all with a single objective: keeping their clients alive.

This is not to say that the world of capital defense had become a bed of roses. States with the most executions still did the least to provide capital defendants with the level of representation one would expect when the stakes were life and death.⁴⁶ And states without fully staffed, specialized units dedicated to litigating capital cases on collateral review still faced a massive shortage of lawyers willing and able to do the work.⁴⁷ But both had the unintended effect of further slowing executions. Poor capital defense at trial left more to litigate on collateral review, and the dearth of lawyers to do it created waitlists – long ones. California today presents a prime example: its wait from death sentence to the appointment of counsel for state habeas review is an incredible 8–10 years, and that’s just the beginning of the long and drawn-out process of collateral review.⁴⁸

In sum, the death penalty’s finality gave rise to voluminous constitutional regulation and habeas litigation, which gave rise to complaints about the lack of finality in litigating capital cases, which then gave rise to habeas reform legislation and yet more litigation. Over time, what emerged was a specialized capital defense bar well versed in both structures, which slowed the “machinery of death”⁴⁹ even more. And that gave rise to cascading effects of its own.

⁴¹ *Wiggins v. Smith*, 537 U.S. 1231 (2003).

⁴² ABA, “Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003),” *Hofstra Law Review* 31 (2003): 913.

⁴³ The Innocence Protection Act of 2004, Public Law No. 108–405.

⁴⁴ Steiker and Steiker, “Entrenchment and/or Destabilization,” 232.

⁴⁵ *Ibid.*

⁴⁶ Sean D. O’Brien, “Capital Defense Lawyers: The Good, the Bad, and the Ugly,” *Michigan Law Review* 105 (2007): 1069–70.

⁴⁷ Kozinski and Gallagher, “Death: The Ultimate Run-On Sentence” 19.

⁴⁸ *Jones v. Chappell*, 1058.

⁴⁹ *Callins v. Collins*, 510 U.S. 1141, 1130 (1994) (Blackmun, J., dissenting).

GETTING DEATH RIGHT LEADS TO THINGS GOING WRONG

Having discussed how the death penalty's finality added complexity to capital litigation, I focus here on how that complexity fundamentally changed the death penalty's contours along another dimension – time. In the mid-1980s, the first years for which data are available, the average time lag between death sentence and execution was six years.⁵⁰ In 1995, when Congress was considering the AEDPA, the average time lag was eleven years.⁵¹ In 2016, it was eighteen and a half years.⁵²

One consequence of the massive time lag between death sentence and execution is a pile-up on death row. Today, just under 3,000 condemned await their fate, a backlog that would take one execution per day for the next eight years to clear, assuming no new death sentences in the meantime.⁵³ The time it takes to get death right, and the pile-up it has produced, have in turn led to yet more disruptive developments: the discovery of innocents among the condemned, concerns about the inhumane conditions of long-term solitary confinement on death row, and skyrocketing costs. *Getting death right leads to things going wrong.*

Concerns about actual innocence came first. The problem wasn't new; DNA had been quietly exonerating the condemned since 1993.⁵⁴ But by the late 1990s, advances in DNA had made the technology more available,⁵⁵ and two other developments occurred that were needed to put it to use: lawyers and time.

The lawyers that made a difference were not just any lawyers. They were the new-fangled variety, the professional capital defenders who had emerged from decades of constitutional regulation and habeas litigation. These lawyers were committed to canvassing the record for errors and conducting the factual investigations necessary to make their claims stick, and in the process, they provided an unprecedented level of scrutiny to capital convictions.⁵⁶ And because habeas claims come with a statutory right to counsel in capital cases,⁵⁷ these lawyers were in the right place, at the right time, to put advances in forensic technology to use.

⁵⁰ Tracy L. Snell, "Capital Punishment, 2012 – Statistical Tables," *U.S. Department of Justice*, (NCJ) 245789, May 2014), 14, www.bjs.gov/content/pub/pdf/cp12st.pdf.

⁵¹ *Ibid.*

⁵² Death Penalty Information Center, "Execution List 2016," Death Penalty Information Center, www.deathpenaltyinfo.org/execution-list-2016.

⁵³ Death Penalty Information Center, "Death Row Inmates by State and Size of Death Row by Year," Death Penalty Information Center, www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#year.

⁵⁴ Lain, "Deciding Death," 47.

⁵⁵ Death Penalty Information Center, "Innocence and the Crisis in the American Death Penalty: Executive Summary," Death Penalty Information Center, 2004, www.deathpenaltyinfo.org/innocence-and-crisis-american-death-penalty (discussing emergence of more sophisticated technologies for evaluating DNA evidence).

⁵⁶ Steiker and Steiker, "Entrenchment and/or Destabilization," 238–39.

⁵⁷ Steiker, "The American Death Penalty from a Consequentialist Perspective," 213–15.

But a cadre of committed lawyers would have made no difference if the innocents languishing on death row had not been around to be exonerated. Time, as it turns out, is a necessary (but not sufficient) condition for vindicating claims of innocence. On average, exonerations take just over eleven years, and many take substantially longer.⁵⁸ In 2015, for example, five death row inmates were exonerated on a finding of actual innocence.⁵⁹ One had been on death row just ten years; the others had been there between nineteen and thirty.⁶⁰ Exonerations take time, and the death penalty's finality has played a critical role in providing it.

By the year 2000, the convergence of these three developments – time, advances in DNA, and the rise of a specialized capital defense bar – led to a number of high profile exonerations, catapulting the issue of innocents on death row into the national spotlight.⁶¹ Illinois Governor George Ryan declared a moratorium on executions in his state.⁶² The book *Actual Innocence* hit the shelves, chronicling the sagas of the wrongfully convicted and the reasons the system had failed them.⁶³ And media investigations confirmed the public's worst fears; the problem was even worse than it looked.⁶⁴ Wrongful convictions became the topic du jour of the national news, and a slew of exonerations over the next several years would keep it that way.⁶⁵

These events brought a dramatic shift in the script of the death penalty debate. In 1995, when Congress was considering the AEDPA, Ninth Circuit Judge Alex Kozinski epitomized prevailing sentiment in writing:

[E]rrors that go to guilt or innocence are exceedingly rare in criminal cases, and even more rare in death cases. Even if an error occurs, it is most likely to turn up sooner rather than later. Cases where the defendant is exonerated years after his conviction because the one-armed man is found and made to confess are seen only on television.⁶⁶

By 2000, it was clear that none of that was true. No one was even claiming it was anymore. What marked the death penalty discourse were not claims of competence, but confessions of doubt about the reliability of capital convictions.⁶⁷ It was the

⁵⁸ Death Penalty Information Center, "Innocence: List of Those Freed from Death Row," Death Penalty Information Center, January 10, 2016, www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

⁵⁹ Ibid.

⁶⁰ Ibid. For those wondering if 2015 was an anomaly, the year 2014 saw six death row inmates exonerated on a finding of actual innocence. Each one of them had been on death row for more than thirty years – one, almost forty. Ibid.

⁶¹ Lain, "Deciding Death," 43–44.

⁶² Ibid. 44.

⁶³ Ibid. 44–45.

⁶⁴ Ibid. 44.

⁶⁵ Ibid. 44–45; Death Penalty Information Center, "Innocence and the Crisis in the American Death Penalty: Executive Summary."

⁶⁶ Kozinski and Gallagher, "Death: The Ultimate Run-On Sentence," 21–22.

⁶⁷ Illinois Governor George Ryan stated when announcing a moratorium on executions in his state, "Our capital system is haunted by the demon of error, error in determining guilt and error

nation's first crisis of confidence in the death penalty (at least in the modern era) and it was a doozy. A moratorium movement took hold,⁶⁸ conservatives weighed in against the death penalty for the first time,⁶⁹ and calls for more executions, faster, quietly faded away.

Sixteen years later, the death penalty still has not recovered. The number of death row exonerations now stands at a whopping 156, and a recent study has shown that an estimated 4 percent of those sentenced to death are innocent.⁷⁰ This unusually high wrongful conviction rate reflects a number of dangers unique to capital cases: community outrage, tremendous pressure on police to solve the crime and on prosecutors to get a conviction, death qualification of jurors, and strategic decisions by defense counsel to make concessions at trial in hopes of gaining credibility at sentencing.⁷¹ The sheer number of exonerations has in turn led courts to scrutinize capital cases more closely, and the public to view the death penalty more warily.⁷² *USA Today's* 2015 exposé on the death penalty captured the prevailing view: "Of all the arguments against capital punishment, none is as powerful as the risk of executing the innocent."⁷³

If executing the innocent is a problem at one end of the death penalty spectrum, the problem at the other end is not executing the guilty. Here again, time has played a key role. Most of the condemned will spend more than a decade awaiting their execution.⁷⁴ In the half-dozen states with an official or de facto moratorium, that day will likely never come.⁷⁵ In the meantime, however, the condemned are subject to the exceptionally harsh conditions of solitary confinement on death row, and that has emerged as a problem in and of itself.

It all started with *Lackey v. Texas*, a case the Supreme Court decided not to decide in 1995.⁷⁶ Justice Stevens had no problem passing it by, but he wrote separately to

in determining who among the guilty deserves to die." Kevin Davis, "Faith and Fiscal Responsibility Cause Many Conservatives to Change Their View of the Death Penalty," *American Bar Journal*, June 1, 2015, www.abajournal.com/magazine/article/faith_and_fiscal_responsibility_cause_many_conservatives_to_change_their_vi.

⁶⁸ Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73 (2002): 1.

⁶⁹ Davis, "Faith and Fiscal Responsibility Cause Many Conservatives."

⁷⁰ Death Penalty Information Center, "Innocence: List of Those Freed from Death Row"; Samuel R. Gross, et al., "Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death," *Proceedings Nat'l Acad. Sci. U. S. A.* 111, no. 20 (2014): 7230–35.

⁷¹ Steiker and Steiker, "No More Tinkering," 408; *Glossip v. Gross*, 2757.

⁷² Jordan Steiker, "The American Death Penalty from a Consequentialist Perspective," 213; Death Penalty Information Center, "Innocence and the Crisis in the American Death Penalty."

⁷³ Richard Wolf and Kevin Johnson, "Courts, States put Death Penalty on Life Support," *USA Today*, September 14, 2015, www.usatoday.com/story/news/nation/2015/09/14/death-penalty-execution-supreme-court-lethal-injection/32425015/.

⁷⁴ See discussion at *supra* note 52.

⁷⁵ Death Penalty Information Center, "Jurisdictions With No Recent Executions," Death Penalty Information Center, www.deathpenaltyinfo.org/jurisdictions-no-recent-executions.

⁷⁶ *Lackey v. Texas*, 514 U.S. 1045 (1995).

credit the strength of the petitioner's claim – that seventeen years on death row was itself cruel and unusual punishment.⁷⁷ Two decades later, the Court has yet to consider a so-called *Lackey* claim on the merits, although Justices Breyer and Kennedy have now joined in the calls to do so.⁷⁸

Internationally, however, a number of tribunals have considered similar claims, consistently holding that prolonged incarceration under a sentence of death constitutes cruel, inhuman, and degrading treatment in violation of basic human rights.⁷⁹ These rulings have brought increased scholarly and media attention to the conditions of death row in the United States, and that, in turn, has led to a growing public awareness of how we house our condemned. The facts are sobering.

In virtually every state, the condemned are physically separated from the rest of the prison population and housed on death row, an isolated unit removed from the day-to-day activities of the mainstream institution.⁸⁰ On death row, each condemned prisoner spends at least 22 hours a day, typically 23, within the confines of a windowless cell the size of a standard parking lot space.⁸¹ They are fed through slots in doors, monitored by cameras, and spoken to through intercoms.⁸² Most are not allowed contact visits from family or friends.⁸³ Death row inmates are typically allowed an hour or less of exercise each day, and typically that takes place in caged exercise pens akin to dog runs.⁸⁴ These are the conditions of long-term solitary confinement on death row, and the condemned are subject to its hallmarks – extreme isolation and forced idleness – for agonizingly long periods of time.

The result is what has now been named “death row syndrome,” a condition more generally known as “isolation sickness.”⁸⁵ As it turns out, the absence of significant human interaction for extended periods of time is bad for humans. Even a few days of solitary confinement will cause a shift in EEG patterns indicative of cerebral dysfunction,⁸⁶ and over time, the effects are debilitating. Studies show that

⁷⁷ *Ibid.*

⁷⁸ *Davis v. Ayala*, 576 U.S. ___, ___, 135 S. Ct. 2187, 2208–09 (2015) (Kennedy, J., concurring); *Smith v. Arizona*, 552 U.S. 985 (2007) (Breyer, J., dissenting from the denial of certiorari); *Foster v. Florida*, 537 U.S. 990 (1999) (Breyer, J., dissenting from the denial of certiorari).

⁷⁹ *Glossip v. Gross*, 2765.

⁸⁰ Craig Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement,” *Crime & Delinquency* 49 (2003): 125; Marah Stith McLeod, “Does the Death Penalty Require Death Row? The Harm of Legislative Silence,” *Ohio State Law Journal* 77 (2016), 523.

⁸¹ Haney, “Mental Health,” 127, 146; *Davis v. Ayala*, 2208–09.

⁸² American Civil Liberties Union, “A Death before Dying: Solitary Confinement on Death Row,” ACLU, 4, July 2013, www.aclu.org/sites/default/files/field_document/deathbeforedying-report.pdf (accessed January 10, 2016); Haney, “Mental Health,” 126.

⁸³ American Civil Liberties Union, “A Death before Dying,” 5.

⁸⁴ *Ibid.*; Haney, “Mental Health,” 126.

⁸⁵ American Civil Liberties Union, “A Death before Dying,” 5; Haney, “Mental Health,” 134–37.

⁸⁶ Stuart Grassian, “Psychiatric Effects of Solitary Confinement,” *Washington University Journal of Law & Policy* 22 (2006): 331.

prolonged solitary confinement causes severe anxiety, hypersensitivity to stimuli, perceptual distortions and hallucinations, paranoia, insomnia, difficulty with concentration and memory, confused thought processes, and suicidal ideations and behavior.⁸⁷ The impact is similar to that suffered by victims of severe sensory deprivation torture techniques⁸⁸ and is exacerbated by the stress of not knowing when execution will come, if it ever does. Execution dates that come and go, and death warrants that are signed and then stayed, and then signed and then stayed again, are an innate part of living on death row.⁸⁹

For many condemned inmates, the conditions are too much to bear. Some go insane.⁹⁰ Some commit suicide.⁹¹ And some drop their appeals and volunteer to be executed.⁹² Just over 10 percent of the executed are “volunteers.”⁹³

Granted, concerns about the conditions of death row are controversial. Some say the condemned deserve what they get.⁹⁴ Others say the condemned forfeit their right to complain when their own appeals are the reason their executions are delayed.⁹⁵ But whatever one’s view as a normative matter, the torturous conditions of long-term confinement on death row as a descriptive matter are difficult to deny.

For those not concerned about long-term solitary confinement on death row for humane reasons, another reason may have more sway – cost. Early in the modern death penalty era, cost was a reason to support the death penalty; surely it cost less to execute murderers than to feed and house them for the rest of their lives.⁹⁶ Today the opposite is true. Cost has become one of the most potent arguments against the death penalty, and the reason is this: capital punishment costs substantially more than life imprisonment at every turn.⁹⁷

Start with trial. Constitutional regulation has fundamentally changed the nature of capital trials, and with it, capital defense. Today, competent capital representation at trial is marked by extensive investigation, a focus on mitigation, the pervasive use of experts, and motions – lots of them.⁹⁸ Jury selection imposes additional costs too.

⁸⁷ Haney, “Mental Health,” 125, 130–31, 137.

⁸⁸ *Ibid.* 132.

⁸⁹ *Glossip v. Gross*, 2765; American Civil Liberties Union, “A Death before Dying,” 9.

⁹⁰ Haney, “Mental Health,” 144; American Civil Liberties Union, “A Death before Dying,” 6–7.

⁹¹ Steiker, “The American Death Penalty from a Consequentialist Perspective,” 215; *Glossip v. Gross*, 2766.

⁹² *Glossip v. Gross*, 2766.

⁹³ *Ibid.*; American Civil Liberties Union, “A Death before Dying,” 8.

⁹⁴ *Davis v. Ayala*, 2210 (Thomas, J., concurring).

⁹⁵ *Thompson v. McNeil*, 129 S. Ct. 1299, 1301 (Thomas, J., concurring).

⁹⁶ Steiker and Steiker, “Entrenchment and/or Destabilization,” 231; “Capital Punishment in America: Revenge Begins to Seem Less Sweet,” *The Economist*, August 30, 2007, www.economist.com/node/9719806.

⁹⁷ Steiker and Steiker, “Cost and Capital Punishment,” 118, 139; Steiker and Steiker, “Entrenchment and/or Destabilization,” 231; “Capital Punishment in America: Revenge Begins to Seem Less Sweet.”

⁹⁸ Steiker and Steiker, “Entrenchment and/or Destabilization,” 231; Steiker and Steiker, “Cost and Capital Punishment,” 139–40.

Voir dire in capital cases takes around five times longer than in non-capital cases, in part so the prosecution can “death qualify” the jury, and in part so the defense can ensure it is open to the consideration of mitigating evidence.⁹⁹ Then there is the trial itself. Capital cases take over three times longer to try than non-capital cases because they are more complex and consist of essentially two trials – one to decide guilt or innocence, and one to decide life or death.¹⁰⁰ Every step of the trial process takes additional time and money, and with lawyers doing the work, the additional time is money too.

Although the bulk of extra expense in capital cases is trial-related,¹⁰¹ appellate and collateral review of death sentences costs substantially more as well. Capital cases enjoy a statutory right to counsel on state and federal habeas review that other cases typically do not, and with trial records in capital cases running into the tens of thousands of pages, just reviewing the record for error imposes sizable costs.¹⁰² Add that to the hours of investigation that go into building a case for non-record claims, the hundreds of pages of briefs that get filed, and the sheer number of issues that capital cases present – on average, three times that of non-capital cases – and one can begin to see how post-trial expenses can easily rack up to hundreds of thousands of dollars.¹⁰³

And then there is the cost of long-term confinement on death row. Solitary confinement is incredibly expensive. In California, for example, a recent study estimated that it cost an additional \$90,000 per inmate per year to house the condemned on death row, adding a hefty \$63 million per year to the state’s total incarceration spending.¹⁰⁴

Put it all together and the cost of capital punishment is staggering. The California study, for example, estimated that the total cost of the death penalty in that state was \$137 million annually, compared to the \$11.5 million annually that it would cost to maintain a criminal justice system with a maximum punishment of life without parole (LWOP).¹⁰⁵ An additional \$125 million per year – that is the cost of capital punishment in California, and other states estimate the additional cost per year in multi-million dollar figures as well.¹⁰⁶

But nowadays, the cost of capital punishment is not just what it takes to maintain the system. Part of the cost calculus is what the states get in return, and with the

⁹⁹ Steiker and Steiker, “Cost and Capital Punishment,” 141.

¹⁰⁰ Kozinski and Gallagher, “Death: The Ultimate Run-On Sentence,” 12–13.

¹⁰¹ Steiker and Steiker, “No More Tinkering,” 404–05; Steiker and Steiker, “Cost and Capital Punishment,” 143–44.

¹⁰² Steiker and Steiker, “Cost and Capital Punishment,” 143–44.

¹⁰³ Kozinski and Gallagher, “Death: The Ultimate Run-On Sentence,” 12–13.

¹⁰⁴ Gerald Uelman, ed., “California Commission on the Fair Administration of Justice Final Report” (2008), 141, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs>.

¹⁰⁵ *Ibid.*

¹⁰⁶ Bill Mears, “Study: States Can’t Afford Death Penalty,” CNN, October 20, 2009, www.cnn.com/2009/CRIME/10/20/death.penalty/index.html?eref=rss_us.

massive time lag between death sentences and executions, the answer is not much. Again, California is a prime example. It has spent over \$4 billion on capital punishment in the modern death penalty era, with just thirteen executions to show for it.¹⁰⁷ On average, that is over \$300 million per execution – take-your-breath-away expensive. That figure is lower in states with more executions and fewer inmates on death row. Florida, for example, spends an average of \$24 million per execution.¹⁰⁸ But that is still outrageously high, especially for a state where more death row inmates die of natural causes and suicide than executions.¹⁰⁹ In practice, the death penalty today is mostly just an incredibly expensive form of life imprisonment.

That realization has broadened the base of those opposed to the death penalty. In the past, opposition to the death penalty rested primarily on humanitarian and due process-type grounds. Today, those opposed to the death penalty include fiscal conservatives and legislators in cash-strapped states.¹¹⁰ Gone is the claim that opponents of the death penalty are “soft on crime.”¹¹¹ The new narrative is that they are “smart on crime” – it makes no sense to have a death penalty that costs millions to maintain but almost never gets used.¹¹²

In sum, the finality of the death penalty led to a massive time lag between death sentences and executions, and that time lag, and the unprecedented scrutiny of capital convictions that it allowed, led to the discovery of innocents on death row – a good thing for the wrongfully convicted, but a bad thing for the death penalty’s legitimacy. That time lag also led to a pile-up on death row, which in turn led to concerns about the inhumane conditions of long-term solitary confinement. Meanwhile, efforts to get the death penalty right led to skyrocketing costs at every turn, widening the ideological base of those willing to let the ultimate punishment go. As discussed next, these developments have led to yet more cascading effects, all with serious implications for the death penalty’s long-term viability.

THINGS GOING WRONG LEAD TO STATES LETTING GO

The most recent developments of the modern death penalty era start with a massive drop in executions and death sentences, each a product of the accumulated developments discussed thus far. Those declines, along with the developments that caused them, have in turn undermined every penological justification for capital

¹⁰⁷ Corinna Barrett Lain, “The Virtues of Thinking Small,” *University of Miami Law Review* 67 (2013): 397, 409.

¹⁰⁸ Mears, “Study: States Can’t Afford Death Penalty”; *Glossip v. Gross*, 2776; David Von Drehle, “The Last Execution: Why the Era of Capital Punishment Is Ending,” *Time*, April 2015, 29.

¹⁰⁹ Corinna Barrett Lain, “Passive-Aggressive Executive Power,” *University of Maryland Law Review* 73 (2013): 229; Steiker and Steiker, “Cost and Capital Punishment,” 120.

¹¹⁰ Steiker and Steiker, “Cost and Capital Punishment,” 120; Steiker and Steiker, “No More Tinkering,” 419–20; Steiker and Steiker, “Capital Punishment: A Century,” 662–68, 674.

¹¹¹ Lain, “The Virtues,” 410.

¹¹² *Ibid.*; Steiker and Steiker, “Cost and Capital Punishment,” 119.

punishment – incapacitation, deterrence, and retribution – while exacerbating some of the death penalty’s old problems and creating at least one new one. The result has been calls to abandon the death penalty, which have prevailed in a number of state legislatures across the country. *Things going wrong lead to states letting go*. And states letting go, along with the reasons that take them there, are raising constitutional concerns of their own.

Turning first to executions, 2016 saw just 20 of them.¹¹³ That is less than half of the 53 executions that the nation saw ten years earlier in 2006, and a 70 percent decline from the 66 executions the nation saw fifteen years earlier in 2001.¹¹⁴ It is also a 39 percent decline from the 28 executions of 2015.¹¹⁵

Granted, part of the decline in executions over the last several years reflects the difficulty states have had in procuring lethal injection drugs.¹¹⁶ But the strong downward trend in executions predates that development and is in large part a reflection of decades of constitutional regulation of the death penalty. Today, the single most likely outcome of a death sentence is reversal.¹¹⁷ The next most likely outcome varies state-to-state; nationally, death by execution and death by other causes (natural and suicide) run neck and neck for second place.¹¹⁸ Executions require a strong institutional commitment, and pervasive doubts about the accuracy of capital convictions have left few states with the will necessary nowadays to carry them out.¹¹⁹ The year 2016’s executions illustrate the point. Eighty percent of those executions – 16 of 20 – were conducted in just two states: Texas and Georgia.¹²⁰

Even greater than the decline in executions has been the decline in death sentencing. The year 2016 brought just 30 new death sentences – a record low for the modern death penalty era.¹²¹ That’s a 76 percent decline from the 125 death sentences we saw ten years ago in 2006, and an 81 percent decline from the 155 death sentences we saw fifteen years ago in 2001.¹²² It is also a 39 percent decline from the 49 death sentences issued in 2015, which was itself a record low at the time.¹²³ The fact that death sentencing has fallen just over 80 percent over the past fifteen years

¹¹³ Death Penalty Information Center, “Executions by Year,” Death Penalty Information Center, www.deathpenaltyinfo.org/executions-year.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ James Gibson and Corinna Barrett Lain, “Death Penalty Drugs and the International Moral Marketplace,” *Georgetown Law Journal* 103 (2015): 1217, 1251.

¹¹⁷ *Glossip v. Gross*, 2768–69.

¹¹⁸ *Ibid.*; Lain, “The Virtues,” 410.

¹¹⁹ Lain, “Passive-Aggressive,” 229–30; Steiker, “The American Death Penalty from a Consequentialist Perspective,” 216 n. 37.

¹²⁰ Death Penalty Information Center, “Executions by Year.”

¹²¹ Death Penalty Information Center, “Death Sentences in 2016,” Death Penalty Information Center, www.deathpenaltyinfo.org/2016-sentencing.

¹²² Death Penalty Information Center, “Death Sentences in the United States from 1977 by State and by Year,” Death Penalty Information Center, <http://www.deathpenaltyinfo.org/death-sentences-year-1977-present>.

¹²³ *Ibid.*

speaks volumes about the state of the death penalty today, and the long-term viability of executions going forward.

Even more telling are the negligible death sentences coming out of states traditionally known as death penalty strongholds. Virginia is the third most executing state in the country, but has had no new death sentences in the last five years.¹²⁴ Oklahoma is the second most executing state in the country, but has had just eight new death sentences in the last five years.¹²⁵ Texas is by far the most executing state in the country, and had eleven new death sentences in 2014 alone. But in 2015 it generated only two, and in 2016 it generated only four.¹²⁶ And even 2014's 11 death sentences were less than half of the 23 death sentences the state produced ten years earlier in 2004, and 77 percent lower than the 48 death sentences it produced fifteen years earlier in 1999.¹²⁷

Driving the extraordinary decline in death sentencing is a host of factors that make juries less likely to choose death, and prosecutors less likely to ask for it in the first place.¹²⁸ At the top of the list are reduced public confidence in the death penalty,¹²⁹ exorbitant costs,¹³⁰ reliably strong mitigating evidence in most every case,¹³¹ the availability of LWOP as a sentencing option,¹³² and the likelihood that hard-won death sentences will never be carried out.¹³³ All but one of these – the availability of LWOP¹³⁴ – are cascading effects set in motion by the Supreme Court's attempt to regulate the death penalty to get it right, which was itself driven by the Court's recognition of the uniquely consequential finality of death.

This precipitous decline in death sentences and executions has, in turn, undermined every penological justification of capital punishment. Incapacitation is no longer considered to be a primary purpose of capital punishment. The death penalty once assured that murderers would never have the opportunity to terrorize society again, but today we have LWOP for that – and it costs millions less to maintain.¹³⁵ Moreover, both public opinion polls and the sentences that juries choose in capital

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Steiker and Steiker, "Entrenchment and/or Destabilization," 240; Steiker and Steiker, "Capital Punishment: A Century," 671–72; Steiker and Steiker, "Cost and Capital Punishment," 142.

¹²⁹ Steiker, "The American Death Penalty from a Consequentialist Perspective" 216–18, 216 n. 37; Steiker and Steiker, "Entrenchment and/or Destabilization," 240; Steiker and Steiker, "No More Tinkering," 374–75.

¹³⁰ Steiker and Steiker, "Cost and Capital Punishment."

¹³¹ Steiker and Steiker, "Entrenchment and/or Destabilization," 232.

¹³² *Ibid.* 234.

¹³³ See discussion at *supra* note 117.

¹³⁴ Steiker and Steiker, "Entrenchment and/or Destabilization," 234.

¹³⁵ *Glossip v. Gross*, 2767 (Breyer, J., dissenting).

cases both suggest that when given the choice, between LWOP and the unposition of death, the public prefers LWOP.¹³⁶

The deterrence rationale for the death penalty has also largely faded away. The death penalty's deterrent value has always been a point of sharp contention,¹³⁷ but never has it been more attenuated than today, when death sentences are disappearing and executions take decades to carry out, if carried out at all.¹³⁸ What Judge Kozinski said in 1995 is even more true now: "To get executed in America these days you have to be not only a truly nasty person but also very, very unlucky."¹³⁹ Only 1 percent of murderers end up on death row, and among those who do, the chance of being executed any given year is around 2 percent.¹⁴⁰ Nowadays, the death penalty's cost is also part of the mix; the question is not just whether the death penalty deters, but whether it deters more than the myriad of other crime control measures that those millions might buy instead.¹⁴¹

That leaves retribution, the chief justification for the death penalty today.¹⁴² The idea that those who take a life should forfeit theirs, if only because they deserve it, has a certain intuitive appeal; but here again, the prolonged wait between death sentence and execution (if it ever comes) undermines the moral force of that claim.¹⁴³ Killing a killer might satisfy the retributive impulse, but killing a "poster child for redemption,"¹⁴⁴ a killer whose life decades later is marked by deep remorse, service to others, and religious devotion,¹⁴⁵ often lacks the same sense of satisfaction. Those executed are rarely the same people they were when they committed the crime, draining the retributive value of the execution while depriving victims' families of the cold-hearted killer whose execution they could feel good about (although some feel good about it anyway).¹⁴⁶ Moreover, to the extent "closure"

¹³⁶ *Baze v. Rees*, 78 (Stevens, J., concurring).

¹³⁷ John Donohue, "Does the Death Penalty Deter Killers?," *Newsweek*, August 19, 2015, www.newsweek.com/does-death-penalty-deter-killers-364164. For a recent report by the National Research Council of the National Academy of Sciences, Engineering, and Medicine concluding that research to date has not shown a deterrent effect and therefore should not be used to inform judgments about the death penalty, see National Research Council, "Deterrence and the Death Penalty," April 18, 2012, www.deathpenaltyinfo.org/documents/NatResCouncil-Deterr.pdf.

¹³⁸ *Glossip v. Gross*, 2768–69, 2770.

¹³⁹ Kozinski and Gallagher, "Death: The Ultimate Run-On Sentence," 25.

¹⁴⁰ "Capital Punishment in America," *The Economist*.

¹⁴¹ Steiker and Steiker, "Capital Punishment: A Century," 676–77.

¹⁴² *Ibid.* 676; *Baze v. Rees*, 79 (Stevens, J., concurring).

¹⁴³ *Glossip v. Gross*, 2769; Kozinski and Gallagher, "Death: The Ultimate Run-On Sentence," 4.

¹⁴⁴ "Former Inmates Plead for Clemency for Kelly Gissendancer, Who Gave Them Hope in Prison," Death Penalty Information Center, <http://deathpenaltyinfo.org/node/6254>; Jane Lampman, "A Saint on Death Row," *Christian Science Monitor*, April 7, 2009, www.csmonitor.com/Books/Book-Reviews/2009/0407/a-saint-on-death-row.

¹⁴⁵ Carol S. Steiker and Jordan M. Steiker, "Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing," *Yale Law Journal* 102 (1992): 836–37.

¹⁴⁶ Steiker and Steiker, "Entrenchment and/or Destabilization," 230; Frank Green, "Powell Executed for 1999 Murder," *Richmond Times-Dispatch*, March 19, 2010.

for victims' families figures into the retributive calculus, today's death penalty falters for another reason as well: it revictimizes victims, prolonging their suffering and tormenting them with the ups and downs of multiple execution dates and last-minute stays.¹⁴⁷

If the only consequence of the current administration of capital punishment was to cast its penological justifications into doubt that would be problematic enough. But as the death penalty has become more rare, it has also become more capricious, exacerbating old problems and creating at least one new one. The old problems include arbitrariness in death sentencing and executions,¹⁴⁸ racial disparities in the imposition of death,¹⁴⁹ and death sentences that say more about the lawyering than the crime.¹⁵⁰ The new problem is the influence of location. Today, the single biggest predictor of a death sentence is where the defendant is tried, a reflection of the death-seeking propensities of the local prosecutor.¹⁵¹ In 2015, 21 counties – less than 1 percent of the nation's total – were responsible for all of the nation's executions; indeed, five were responsible for 40 percent of those executions alone.¹⁵² Like race, the influence of location in death sentencing feeds into a larger problem with the death penalty's application: the factors that should explain the imposition of death don't, and the factors that shouldn't, do.¹⁵³

In short, today's death penalty is marked by high costs and low returns – and that has led to calls to let it go. In 2009, the prestigious American Law Institute rescinded its model penal code on the death penalty, an important development in part because the provision served as the model for every death penalty statute in the modern era, and in part because of the ALI's reason for doing so: “the intractable and structural obstacles to ensuring a minimally adequate system of capital punishment.”¹⁵⁴ Conservative opposition to the death penalty has also grown over time. Indeed, it has now given rise to Conservatives Concerned About the Death Penalty, a national organization whose rationale for repeal is perhaps best captured by the words of conservative commentator George Will: “There is no bigger government

¹⁴⁷ *Glossip v. Gross*, 2769; Kozinski and Gallagher, “Death: The Ultimate Run-On Sentence” 4; Ronald J. Trabak and J. Mark Lane, “The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty,” *Loyola Louisiana Law Review* 23 (1989): 129–32.

¹⁴⁸ See the discussion at *infra* notes 167–69.

¹⁴⁹ *Glossip v. Gross*, 2761; Ian Millhiser, “Killing a White Person Is Almost the Only Reason Murderers Ever Receive the Death Penalty,” *Think Progress*, September 23, 2015, <http://thinkprogress.org/justice/2015/09/23/3704622/murderers-are-almost-never-executed-unless-they-kill-a-white-person/>.

¹⁵⁰ *Glossip v. Gross*, 2761.

¹⁵¹ *Ibid.* For an excellent report on the issue, see Fair Punishment Project, “America’s Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty,” June 2016, http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf.

¹⁵² *Ibid.*; Nina Totenberg, “Why Has the Death Penalty Grown Increasingly Rare?,” NPR, December 7, 2015, www.npr.org/2015/12/07/457403638/why-has-the-death-penalty-grown-increasingly-rare.

¹⁵³ *Glossip v. Gross*, 2759–62.

¹⁵⁴ Steiker and Steiker, “No More Tinkering,” 354.

program than the one that can kill you.”¹⁵⁵ The media has chimed in as well, although in the last several years, its focus has shifted from reporting on the death penalty’s problems to predicting its impending demise.¹⁵⁶

But talk is cheap. The strongest indication of the death penalty’s end is the number of states that have ended it. In the last decade, seven states have abandoned the death penalty as the ultimate sanction: New York, New Jersey, Illinois, New Mexico, Connecticut, Maryland, and Delaware.¹⁵⁷ Others have come close. Attempts to repeal the death penalty in Montana and New Hampshire failed by a single vote, and Nebraska’s Republican-controlled legislature actually passed a repeal measure, only to have the governor lead a charge to bring it back.¹⁵⁸

In all but one of the states that abolished the death penalty (Delaware), the cost of capital punishment – and what the state was getting for it – played a substantial part in the decision to let it go. Illinois reported that it had spent some \$100 million on the death penalty in the ten years prior to abolition, but had no executions during that time.¹⁵⁹ New York had spent \$170 million, and New Jersey \$253 million, in the modern death penalty era, and like Illinois, neither had a single execution to show for it.¹⁶⁰ Connecticut and New Mexico had each executed one person in the modern era, but were paying \$3–5 million a year to maintain their capital punishment systems.¹⁶¹ And Maryland had executed five people during that time, but had

¹⁵⁵ Davis, “Faith and Fiscal Responsibility”; Clarence Page, “The Most Unlikely Death-Penalty Critics,” *Chicago Tribune*, April 12, 2000, http://articles.chicagotribune.com/2000-04-12/news/0004120027_1_death-penalty-critics-executions-death-penalty-information-center.

¹⁵⁶ Von Drehle, “The Last Execution,”; Wolf and Johnson, “Courts, States Put Death Penalty on Life Support”; Lincoln Caplan, “Richard Glossip and the End of the Death Penalty,” *New Yorker*, September 30, 2015, www.newyorker.com/news/news-desk/richard-glossip-and-the-end-of-the-death-penalty.

¹⁵⁷ Wolf and Johnson, “Courts, States Put Death Penalty on Life Support”; Steiker and Steiker, “No More Tinkering,” 362–64. Delaware is the most recent state to make the move. In August 2016, the Delaware Supreme Court ruled that the state’s death penalty statute was unconstitutional, and the state attorney general chose not to appeal the ruling. Randall Chase, “Delaware AG Won’t Appeal Court Rejection of Death Penalty,” *AP The Big Story*, August 15, 2016, <http://bigstory.ap.org/article/8afa1b6bebb447f92a8e3cd7bc9ac28/delaware-ag-wont-appeal-court-rejection-death-penalty>.

¹⁵⁸ Katharine Q. Seelye, “Measure to Repeal the Death Penalty Fails by a Single Vote in the New Hampshire Senate,” *New York Times*, April 17, 2014, www.nytimes.com/2014/04/18/us/n-new-hampshire-measure-to-repeal-death-penalty-fails-by-a-single-vote.html?_r=1; Amanda Terkel, “Bill to Abolish the Death Penalty Fails by Just One Vote in Montana House,” *Huffington Post*, February 24, 2015, www.huffingtonpost.com/2015/02/24/montana-death-penalty_n_6744316.html. Nebraska reinstated its death penalty by referendum, with the governor contributing \$300,000 from his own funds to help. Paul Hammel, “Nebraskans Vote Overwhelmingly to Restore Death Penalty, Nullify Historic 2015 Vote by State Legislature,” *Omaha World-Herald*, November 9, 2016, www.omaha.com/news/politics/nebraskans-vote-overwhelmingly-to-restore-death-penalty-nullify-historic-vote/article_38823d54-a5df-11e6-9a5e-d7a71d75611a.html.

¹⁵⁹ Lain, “The Virtues,” 408.

¹⁶⁰ Ibid.; Steiker and Steiker, “Cost and Capital Punishment,” 121–23.

¹⁶¹ Laura Bassett, “Connecticut Repeals Death Penalty,” *Huffington Post*, April 25, 2012, www.huffingtonpost.com/2012/04/25/connecticut-repeals-death-penalty_n_1453331.html; the New

estimated its cost of doing so at just over \$32 million per execution.¹⁶² Other considerations factored into the decision-making calculus as well – concerns about wrongful convictions, racial bias, and the intolerable conditions of death row among them.¹⁶³ But the fact that states were getting little bang for the buck appears to have been a tipping-point for repeal – an ominous sign for the death penalty's future, particularly in low-executing states.¹⁶⁴

In addition, the cascading effects of decades of constitutional regulation of the death penalty have led to another development portending its demise: the prospect of judicial abolition. In 1972, the Supreme Court invalidated the death penalty because it was arbitrary and capricious as then administered.¹⁶⁵ A sentence of death was like being struck by lightning, Justice Stewart famously lamented¹⁶⁶ – and today that is literally true. In 2016, 20 people were executed; 36 were struck by lightning.¹⁶⁷

But the problem then, as now, was not just arbitrariness; it was also the mere fact of the death penalty's infrequent use. As Justice White explained in 1972, it was a "near truism" that a punishment "could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."¹⁶⁸ He went on to say that "[a] penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment."¹⁶⁹ In Justice White's mind, this was exactly what had become of the death penalty by the early 1970s; it had come to be "so infrequently imposed that the threat of execution [was] too attenuated to be of substantial service to criminal justice."¹⁷⁰ And that was 1972.

Fast-forward to 2016. The dramatic decline in death sentences and executions has made the death penalty even more arbitrary than it was 40 years ago, plus it has substantially negated the penological justifications that supported the death penalty in the first place. Over the years, various Supreme Court justices have bemoaned the death penalty's arbitrariness, as well as its failure to produce executions in a manner that would serve its deterrent and retributive purposes (the former complaint coming

Mexico Coalition to Repeal the Death Penalty, "Cost," www.nmrepeal.org/issues/cost; Steiker and Steiker, "Cost and Capital Punishment," 121–22.

¹⁶² Ian Simpson, "Maryland Becomes Latest U.S. State to Abolish Death Penalty," *Reuters*, May 2, 2013, www.reuters.com/article/us-usa-maryland-deathpenalty-idUSBRE9410TQ20130502; Steiker and Steiker, "Cost and Capital Punishment," 120;

¹⁶³ Simpson, "Maryland Becomes Latest U.S. State"; Deborah Baker, "New Mexico Bans Death Penalty," *Huffington Post*, April 18, 2009, www.huffingtonpost.com/2009/03/18/new-mexico-bans-death-pen_n_176666.html.

¹⁶⁴ Steiker and Steiker, "Cost and Capital Punishment," 162.

¹⁶⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁶⁶ *Ibid.* 309–10.

¹⁶⁷ Death Penalty Information Center, "Executions by Year," National Weather Service, "U.S. Lightning Deaths in 2016: 38," www.lightningsafety.noaa.gov/fatalities.shtml.

¹⁶⁸ *Furman v. Georgia*, 311.

¹⁶⁹ *Ibid.*, 312.

¹⁷⁰ *Ibid.*, 313.

from the left, the latter from the right).¹⁷¹ But most recently, those complaints have converged into a constitutional catch-22. As Justice Breyer put the point:

A death penalty system that seeks procedural fairness and reliability brings with it delays that severely aggravate the cruelty of capital punishment and significantly undermine the rationale for imposing a sentence of death in the first place. . . . 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.¹⁷²

Fold in the fact that the Justices now consider societal trends – “evolving standards of decency” – in determining whether a punishment violates the “cruel and unusual punishments” clause and one can begin to see the constitutional case for abolition.¹⁷³

Indeed, lower courts have already started making it. In 2015, the Connecticut Supreme Court struck down what was left of the state's death penalty after its legislative repeal.¹⁷⁴ And in 2014, a federal district court in California ruled that the state's death penalty was unconstitutional, in part because “the execution of a death sentence is so infrequent, and the delays proceeding it so extraordinary, that the death penalty is deprived of any deterrent or retributive effect it might once have had,” and in part because in California, a sentence of death amounted to one “no rational jury or legislature could ever impose: life in prison, with the remote possibility of death.”¹⁷⁵ Ironically, the Ninth Circuit Court of Appeals reversed the decision on procedural grounds.¹⁷⁶ The case had come to the district court on habeas, and procedural hurdles should have prevented it from ruling on the merits of the claim.¹⁷⁷

So there we stand. The finality of the death penalty makes the stakes too high to impose the punishment without substantial protections, but those protections come with burdens and those burdens come with costs. Those costs have led to problems (or at least revealed them), and those problems have beget problems of their own. Put it all together and you get plummeting death sentences and executions, along with more costs, more burdens, and more dissatisfaction with the death penalty's negligible returns. States walk away, courts start taking notice, and even politicians are not campaigning on support for the death penalty like they once were.

¹⁷¹ Steiker and Steiker, “Capital Punishment: A Century,” 683; John Paul Stevens, “On the Death Sentence,” *New York Review of Books*, December 23, 2010, www.nybooks.com/articles/2010/12/23/death-sentence/ (last accessed January 10, 2016); Glossip v. Gross, 2760, 2762, 2770; Callins v. Collins, 1130; Steiker and Steiker, “No More Tinkering,” 388–89.

¹⁷² Glossip v. Gross, 2772.

¹⁷³ Glossip v. Gross, 2773, 2749.

¹⁷⁴ State v. Santiago, 318 Conn. 1, 55–73 (2015).

¹⁷⁵ Jones v. Chappell, 1053, 1063.

¹⁷⁶ Jones v. Davis, 806 F.3d 538 (2015).

¹⁷⁷ Ibid., 538–53.

The train, it would seem, has left the station – but one can still imagine it getting derailed. A domestic terrorism attack (or other mass murder) might do it; retribution is a value one can tout at any cost. A Supreme Court ruling that invalidates the death penalty before the country is ready might also be a way to kick-start renewed enthusiasm for capital punishment. After all, the death penalty was dying once before; it was backlash in the wake of the Court's 1972 decision abolishing the death penalty that led to its revival in 1976.¹⁷⁸

Only this much is clear – the trajectory we are on now. If we continue on this trajectory, the American institution of capital punishment will, over time, collapse under its own weight. It may take years, it may take decades, and it may be cut short by court intervention. But if current trends continue, it is only a matter of time – and time is so much of what today's death penalty is all about. Upon reflection, there is something strangely karmic in the way the death penalty is winding down, an irony in the fact that capital punishment itself is dying a painstakingly slow death on pragmatic grounds.

¹⁷⁸ Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82 (2007): 46–55.