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Capital Punishment: A Century of Discontinuous Debate

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I. CRIMES AND PUNISHMENTS

CAPITAL PUNISHMENT: A CENTURY OF DISCONTINUOUS DEBATE

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I. INTRODUCTION

A little more than one hundred years ago, in 1909 (the same year as the founding conference for the *Journal of Criminal Law and Criminology*¹), the U.S. Supreme Court held its first and thus far only full-blown criminal trial under its original jurisdiction. The defendants were a group of city officials and townspeople from Chattanooga, Tennessee, and the charges were criminal contempt. The charges arose from the lynching of Ed Johnson—a black man accused of raping a white woman—an act of defiance in response to the Supreme Court’s assertion of jurisdiction to conduct federal habeas corpus review of his case. Johnson’s state court trial began two weeks after the crime and concluded four days later; his lawyers had been allotted only ten days to prepare his defense. Johnson was convicted and sentenced to death by an all-white jury on extremely flimsy evidence (the victim and sole witness to the crime testified, “I will not swear that he is the man”) in a hasty proceeding suffused with the threat of mob violence. The Tennessee Supreme Court denied Johnson’s appeal, but Justice John Marshall Harlan (famous dissenter in *Plessy v. Ferguson*² thirteen years earlier), after consulting with his brethren, accepted habeas review of the case as the Circuit Justice hearing emergency appeals from

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¹ The *Journal* was a product of the “National Conference on Criminal Law and Criminology,” held in 1909 to celebrate the fiftieth anniversary of Northwestern University School of Law. *Journal of Criminal Law & Criminology*, About the Journal: History of The Journal of Criminal Law & Criminology, <http://www.law.northwestern.edu/jclc/about/> (last visited Aug. 18, 2010).

² 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

the Sixth Circuit. The day following Justice Harlan's order, a mob removed Johnson from his cell with the tacit permission of jail officials and the county sheriff. The mob brought Johnson to the county bridge that spanned the Tennessee River, where they hanged him and also shot him more than fifty times. One of those involved was a deputy sheriff who fired five shots himself at point-blank range and left a note pinned to Johnson's body that read: "To Justice Harlan. Come get your n—r now." The Supreme Court, in an opinion by Justice Oliver Wendell Holmes, rejected vociferous defense arguments that the Court's assertion of jurisdiction over the case constituted an unlawful intervention in state processes and held instead that the violation of the Court's order, if willful, would constitute criminal contempt.³ Ultimately, the sheriff, a deputy sheriff, and four leaders of the lynch mob were convicted of contempt at trial and given sentences ranging from sixty to ninety days in prison, though the sheriff was greeted as a hero in Chattanooga upon his early release by a crowd of 10,000 supporters.⁴

No one doubts that death penalty litigation has changed a great deal in the past on hundred years, as this dramatic case illustrates. The authority of the United States Supreme Court and the federal courts more generally to review state capital and criminal convictions is now unquestioned, thanks in no small part to the Chattanooga contempt prosecutions. Moreover, starting in the decades following Johnson's lynching and accelerating during the constitutional criminal procedure revolution of the 1960s, the Supreme Court established a plethora of constitutional guarantees regarding state capital and criminal processes—including the rights to appointed counsel, representative juries, and insulation from the threat of mob violence, among many others. Ironically, Ed Johnson's lawyers raised all three of these claims in their representation of him, but to no avail. Indeed, it is clear that the recognition of these federal rights was driven in large part by trials like Johnson's—hasty, mob-driven capital trials of black defendants in state courts in the South that could be so perfunctory as to earn the sobriquet "legal lynchings."⁵ The procedural world of Ed Johnson's trial is unrecognizable today and elicits amazed headshakes when presented to

³ United States v. Shipp, 203 U.S. 563, 573-74 (1906).

⁴ All of the facts regarding Johnson's trial and lynching and the contempt proceedings that followed are taken from Mark Curriden, *A Supreme Case of Contempt*, A.B.A. J., June 2009, at 34, available at http://www.abajournal.com/magazine/article/a_supreme_case_of_contempt/.

⁵ See generally Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts "Legal Lynchings,"* in CRIMINAL PROCEDURE STORIES 1, 42-43 (Carol S. Steiker ed., 2006) (describing the phenomenon of the Supreme Court responding to "legal lynchings" with new constitutional protections in the context of the famous "Scottsboro Boys" case).

current law students studying the history of criminal procedure and federal habeas corpus.

In contrast to the transformation of the legal *process* for capital trials, many assume that the nature of public *discourse* about capital punishment has remained relatively static, with the same old, well-worn arguments about the morality or wisdom of the death penalty recycled through the generations. There is a non-fanciful basis for this assumption, as some of the most familiar arguments in debates about the death penalty make a fairly unchanged appearance across the centuries. The leading scholarly work on the history of the American death penalty describes a college student at Columbia who, having left an essay until the last minute, sighs that time pressure forced him “to take refuge in some old thread bare subject as Capital punishment”—in 1793!⁶ What was already “threadbare” at the time of our nation’s founding has seen more than 200 years of further wear and tear. Any student of death penalty debates over the generations recognizes the timeless quality of certain approaches. For example, Cesare Beccaria’s seminal 1764 essay *Of Crimes and Punishments*,⁷ the first sustained attack on the death penalty in the modern West, argued that long-term incarceration is a better deterrent than death and that executions set a bad example for the populace, decrying the absurdity of the state killing in an attempt to demonstrate that killing is wrong. These arguments could be lifted and dropped into a contemporary state legislative session or high school debater’s file without any change at all.

Our purpose in this essay is to challenge the easy (because partially true) assumption that there is nothing new under the sun in death penalty discourse. Rather, we contend that debates about capital punishment have been as much *discontinuous* as continuous over the past century. Some arguments that were made in the past have been entirely discredited or even forgotten today, while our current debates contain arguments that would be utterly foreign to denizens of earlier decades, despite the fact that they cared deeply about the issue of capital punishment in their own times. We address two “lost” arguments from the past in favor of the retention of capital punishment: the contention that capital punishment was a necessary antidote to extrajudicial lynchings and the defense of capital punishment as part of a larger program of eugenics endorsed by many progressive leaders of the late nineteenth and early twentieth centuries. We also explore two “new” abolitionist arguments from the present: the fiscal argument about

⁶ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 88 (2002).

⁷ See generally CESARE BECCARIA, *OF CRIMES AND PUNISHMENTS* (1764), available at http://www.constitution.org/cb/crim_pun.htm.

the greater cost of capital punishment even in comparison to life imprisonment and the concerns raised about the suffering of those awaiting execution for lengthy periods (so-called Death Row Phenomenon). We hope to show not only that death penalty discourse has not been as static as is often assumed, but also that the debates of each era provide a window onto both the nature of the actual practice of the death penalty in different times and the broader social contexts in which that practice has operated.

II. TWO FORGOTTEN ARGUMENTS FOR THE RETENTION OF CAPITAL PUNISHMENT

Consider the following thought experiment. Imagine asking the members of any current audience in the United States to give the two strongest arguments they can think of in favor of the retention of capital punishment. The audience members would doubtless disagree and produce a varied list of considerations, but it is highly unlikely that such a list would contain arguments about either the prevention of lynchings or the promotion of a program of eugenics. Yet these two considerations were powerfully present in the lively debates about capital punishment that took place a century ago. Not everyone who supported capital punishment in the early twentieth century found either or both of these arguments persuasive, and not everyone concerned about lynchings or enthusiastic about the eugenics movement supported capital punishment. Yet everyone familiar with public discourse about the death penalty at the time would have recognized the *relevance* of these considerations to the debate and, indeed, their sometimes decisive impact on policy. In what follows, we hope to recapture a flavor of the significance of these issues to early twentieth-century debates about the death penalty and explore what light this significance sheds on the changing role of capital punishment as a social practice over the past century.

A. THE DEATH PENALTY AS A NECESSARY ANTIDOTE TO LYNCHING

Our country's shameful history of lynchings—extrajudicial executions mostly of black men suspected of criminal acts against whites—has been well-documented. During the Reconstruction Era in the South, freed blacks were frequently the target of lethal violence even in the absence of any suspicion of criminal wrongdoing, merely as part of “the wave of counterrevolutionary terror that swept over large parts of the South” after

the Civil War.⁸ But the practice of lynching continued robustly well past Reconstruction and into the twentieth century, primarily in the South, claiming the lives of 4,708 people between the years of 1882 (when the Tuskegee Institute first began keeping such records) and 1944 (after which lynchings declined steeply).⁹ The vast majority of these victims were black men, and while statistically, the most commonly cited motivation for lynching was the suspected murder of a white person by a black man, the “most emotionally potent excuse” was the claim that a black man had raped a white woman.¹⁰ Historians of lynching in the South find it difficult to overstate the centrality of the fear of black rapists to the practice of lynching: “Black men were lynched for other crimes, but rape was always the key.”¹¹ Even high-level elected officials in the South publicly endorsed lynching as the only “suitable punishment” for black men who raped white women.¹² Lynching was so entrenched a practice that in the most intense period of lynchings in American history, 1889-1893,¹³ considerably more people were lynched than executed nationwide—921 to 556, by one count.¹⁴

⁸ ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, 425 (1988); see generally GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* (1984).

⁹ See PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* viii (2002).

¹⁰ RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 45 (1997).

¹¹ EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 240 (1984).

¹² KENNEDY, *supra* note 10, at 45-46 (quoting U.S. Senator Theodore Bilbo of Mississippi, among others).

¹³ AYERS, *supra* note 11, at 238.

¹⁴ James W. Garner, *Crime and Judicial Inefficiency*, 29 *ANNALS AM. ACAD.* 601 (1907), reprinted in *DEBATERS’ HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT* 10, 11 (C. E. Fanning, ed., 1909) (reproducing the table compiled by the *Chicago Tribune* and published in 1906). Ayers places the number of lynchings during this period at “nearly 700” but does not offer a specific source reference and does not indicate whether this figure includes both black and white victims. See AYERS, *supra* note 11, at 238. A source comprehensively comparing the number of lynchings and legal executions over time finds that lynchings outnumbered legal executions in the South and Border states (where the vast majority of lynchings occurred) between the years 1886 and 1895, with the balance shifting toward legal executions over the next three decades. During this entire period (1886-1925), lynchings never fell below half the number of executions, and the total numbers of lynchings and executions in the two regions over this thirty-year period came out almost exactly equal. See HOWARD W. ALLEN & JEROME M. CLUBB, *RACE, CLASS, AND THE DEATH PENALTY: CAPITAL PUNISHMENT IN AMERICAN HISTORY* 84 tbl. 4.3 (2008). Moreover, the ratio of lynchings to executions is higher and more sustained over time for blacks. See *id.* The exact number of lynchings (and, in this period, of executions as well) is probably impossible to determine, but precision is not crucial to the argument; any of the figures listed above

The practice of lynching had some obvious implications for the practice of capital punishment at the turn of the century. Many victims of lynching were first identified as criminal suspects by their arrest on capital charges. Lynchings frequently commenced with mobs dragging capital suspects from their jail cells, often with the tacit or active participation of local officials, before any trial could take place or lawful sentence be imposed.¹⁵ Even when the criminal process was allowed to run its course, the threat of mob violence pervaded many trials, particularly trials of black men charged with capital crimes against white victims. Jurors in such cases must have felt intense pressure to yield to the passion of the mob, if, indeed, they did not share that passion themselves. During Ed Johnson's trial in 1906, when the white victim identified Johnson as her rapist, one of the jurors had to be restrained by his fellows as he leapt from his chair yelling, "If I could get at him, I would tear his heart out right now!"¹⁶ The threat of lynching affected post-trial proceedings as well; Johnson was by no means the only capital defendant advised to relinquish his appellate rights in an attempt to stave off a lynch mob (an attempt that proved vain in Johnson's case).¹⁷ The ever-present threat of lynching led reformers to urge speeding up the criminal process to allow for immediate trials followed by instant executions,¹⁸ pressures that created the practice known derogatorily as "legal lynching," a process that was often only a hairsbreadth away from the illegal version.¹⁹ The prevalence of lynching in the Deep South at the turn of the century is probably best illustrated by the ingenious argument of a defense lawyer to the jury in a case of alleged interracial attempted rape in Louisiana in 1907 to the effect that his client *must* be innocent because otherwise he surely would already have been lynched!²⁰

supports the claim that lynchings clearly outnumbered executions for a period shortly before the turn of the twentieth century and remained numerically substantial in relation to executions for decades after the turn of the century, at least in the regions in which lynching was widely practiced.

¹⁵ See AYERS, *supra* note 11, at 245-46 (describing collusion of local officials); KENNEDY, *supra* note 10, at 42-44 (quoting from NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918, 11-18 (1919)).

¹⁶ See Curriden, *supra* note 4, at 34.

¹⁷ See *id.*; see also Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching?*, in FROM LYNCH MOBS TO THE KILLING STATES: RACE AND THE DEATH PENALTY IN AMERICA 21, 35 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (describing a 1929 execution in Texas in which the defendant's lawyers waived appeal to avoid a lynching as representative of summary capital processes or "legal lynchings").

¹⁸ AYERS, *supra* note 11, at 246.

¹⁹ See Klarman, *supra* note 5, at 2-3.

²⁰ See Jennifer Wriggins, Comment, *Race, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 109 (1983) (quoting *State v. Petit*, 119 La. 1013, 1016 (1907) ("Now, don't you know

The practice of lynching, however, affected not only the administration of capital punishment as described above, but also public discourse about capital punishment as appropriate public policy. Supporters of capital punishment urged that the maintenance of the death penalty was a necessary antidote to lynching; indeed, it may well be that some who might otherwise have opposed the death penalty came reluctantly to support it as a lesser evil, given that the anti-lynching voices tended to come from the more politically progressive members of communities in which lynching was most prevalent. The role of lynching in public discourse about capital punishment in the early twentieth century is most visible in the debates surrounding the wave of abolitionist legislation during the Progressive Era and the almost as powerful wave of reinstatement that shortly followed. The experiences of Colorado and Tennessee, which both abolished and quickly reinstated the death penalty during this period, are particularly instructive about the powerful role that lynching could play in the fate of the death penalty as law. But arguments about lynching and capital punishment extended beyond specific legislative initiatives and were clearly present more generally as stock positions in academic and popular treatments of “the death penalty debate” during the first few decades of the twentieth century.

First, consider the role of lynching in the waves of abolition and reinstatement during the Progressive Era. The early decades of the twentieth century were the most active period of death penalty repeal and reinstatement in American history. Ten states abolished capital punishment between 1897 and 1917, and eight of them reinstated the death penalty by the end of the 1930s, some within only a few years of the original abolition.²¹ To be sure, each of these ten states has its own death penalty story, and different considerations weighed more or less heavily in different places at different times. Moreover, with the exception of Tennessee, all of these states were in the West or Midwest rather than the heartland of lynchings in the American South. Nonetheless, lynchings were “*the* most important common triggering event in reinstatement of the death penalty” after abolition, occurring in each of the four states with the shortest periods of death penalty abolition.²² The experiences of Tennessee (the only Southern state to abolish the death penalty during this era) and Colorado

that, if this n—r had committed such a crime, he never would have been brought here and tried . . . he would have been lynched . . . ”)).

²¹ John F. Galliher, Gregory Ray & Brent Cook, *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 543-573 (1992) (providing state-by-state accounts).

²² *Id.* at 574 (emphasis added).

(which was the first to abolish the death penalty during this era, but reinstated before any other states joined it) are particularly helpful in understanding the power of lynching in the politics of capital punishment in the early twentieth century.

In Tennessee, abolition was accomplished in 1915 largely as a result of the determined efforts of Duke Bowers, a retired Memphis merchant who was so involved and influential that the legislation abolishing the death penalty was titled the “Duke Bowers’ Bill.”²³ Bowers submitted a lengthy brief to the legislature in support of the bill, in which he made a plethora of arguments against the death penalty, emphasizing in particular the risk of executing the innocent.²⁴ But he also responded directly to the argument that abolition would lead to more lynchings: “It is claimed by advocates of the death penalty that if it is abrogated, it would increase lynching. Here . . . statistics come to our aid [because other states did not experience a rise in lynchings after abolition].”²⁵ Bowers also maintained that lynch mobs are encouraged more by state executions than by abolition: “If the State does not consider life sacred, the mob, with ready rope, will strangle the suspected. . . . In other words, why may not the mob do quickly what the law does slowly?”²⁶ The Governor of Tennessee received many letters urging the Governor’s veto of the bill predicting (or even threatening) mob violence in its wake. A county attorney argued that the bill would “only encourage mob law,” while a Tennessee state committee member predicted that “if this bill should become law it would be almost impossible to suppress mobs in their efforts to punish colored criminals.”²⁷ Governor Thomas Rye sent a veto statement to the legislature explaining his refusal to sign the bill into law on the grounds that it would “increase crime and encourage mob law.”²⁸ But the Governor’s veto was not sent within the five-day time period set by state law, and thus abolition was passed in Tennessee.

²³ *Id.* at 556-57.

²⁴ See Duke C. Bowers et. al., *Life Imprisonment vs. The Death Penalty*, Brief to the Honorable Members of the Senate and Lower House of the Fifty-Eighth General Assembly and to the Chairman and Members of the Judiciary Committees Thereof (1915), available at <http://www.archive.org/details/lifeimprisonment00bowe.pdf>.

²⁵ *Id.* at 18.

²⁶ *Id.*

²⁷ Galliher et al., *supra* note 21, at 557 (quoting letters received by Tennessee Governor Thomas Rye).

²⁸ Margaret Vandiver & Michel Coconis, “*Sentenced to the Punishment of Death:*” *Pre-Furman Capital Crimes and Executions in Shelby County, Tennessee*, 31 U. MEM. L. REV. 861, 881 (2001) (quoting Governor’s veto message to the state assembly).

What is perhaps most striking about Tennessee's abolition of capital punishment (aside from its brevity, about which more below) is that, despite the common listing of Tennessee among the ten Progressive Era abolitionist states, Tennessee's bill did not, in fact, "abolish" the death penalty. Rather, Tennessee's hard-fought measure abolished the death penalty only for most forms of murder; it retained it for both for murder committed by a prisoner serving a life sentence (rare) and also for the crime of rape (not so rare), which was in practice punished by death only when the perpetrator was black.²⁹ Tennessee's retention for rape was unique among the rest of the Progressive Era abolition bills, and it reflected the distinctively Southern belief that lynch mob violence simply could not be suppressed in cases of black men accused of the rape of white women, especially if the law refused to treat such outrages as capital crimes.³⁰

Tennessee's abolition was short-lived; the death penalty was reinstated a mere four years later in 1919. The emphasis on lynching in the drive for reinstatement was, if anything, even stronger than it had been during the abolition battle. Three lynchings (all of black men) occurred during the four-year period of abolition, and all three lynchings were prolonged, public, and gruesome affairs involving torture and burning.³¹ These events provoked community outrage, reflected in a series of editorials in the *Nashville Tennessean*, and led to the formation of a citizen-sponsored "Law and Order League" to combat lynching.³² Because Tennessee's period of abolition overlapped with the United States' involvement in World War I, anti-lynching advocates also highlighted the effects of such violence on the war effort:

"[t]he lynching . . . yesterday, can but sow disunion among our people, undermine the morale of our negro troops, and lessen the effectiveness of our propaganda among the colored people for food production and conservation. It will, therefore, tend to prolong the war and increase the price of victory."³³

One week after Governor Albert H. Roberts took office in 1919, he sent an urgent message to the legislature, calling upon them to repeal

²⁹ BANNER, *supra* note 6, at 222.

³⁰ See George W. Hays (former Governor of Arkansas), *The Necessity for Capital Punishment*, in CAPITAL PUNISHMENT 156, 162 (Julia E. Johnsen ed., 1939) ("[I]t is plainly evident that if capital punishment were abolished and the bloodcurdling assaults [earlier described by the author as "fiendish crimes of low-grade types of Negroes"] were unpunishable by death, mob violence would be supreme."); see also Vandiver & Coconis, *supra* note 28, at 880.

³¹ See Galliher et al., *supra* note 21, at 564-65.

³² *Id.* at 565.

³³ *Id.* (quoting *Lynching Evil to be Fought*, NASHVILLE TENNESSEAN, Apr. 25, 1918, at 8).

abolition, charging that “the ‘Bowers Law’[] has been the contributing cause to the commission of the crime of murder and to the summary vengeance of the mob on the murderer,”³⁴ essentially echoing the concerns of Governor Rye’s toothless veto message four years previously. The legislature lost no time in acting; both houses voted by large majorities to repeal abolition within twenty-four hours.³⁵

Colorado’s abolition bill, in contrast to that of Tennessee, enjoyed the support of the Governor and was passed by the state senate without discussion and by a large majority in 1897.³⁶ But Colorado’s law lasted no longer than Tennessee’s (four years) and was reinstated under similar pressures—“in the face of what at the time seemed the threat of mob rule.”³⁷ In the year preceding reinstatement in Colorado, two gruesome lynchings (both of men, one “mulatto” and one black) were carried out before large crowds. The *Rocky Mountain Daily News* editorialized strenuously in favor of reinstatement in order “to prevent the recurrence of such horrors.”³⁸ In addition to their intrinsic horribleness, lynching represented the frightening threat of the deterioration of the rule of law and democratic governance: “The greatest danger in a republic is a mob,” the Bowers brief would later argue in Tennessee, quoting a “learned statesman.”³⁹ Governing elites, especially in the South, feared the volatility of the large class of poor whites, who could easily be moved to racially motivated violence in times of economic uncertainty and escalating crime. A white woman writing in 1914 on race relations in the South described this class as “the nitrogen of the South”—a combustible element “ready at a touch” to ignite “and in the ensuing explosion to rend the social fabric in every direction.”⁴⁰ On a less apocalyptic but perhaps more accessible level, lynchings also posed a threat to the state’s image: “In the case of such crimes [that led to lynching] . . . a jury may be relied upon to fix the penalty at death, and the certainty that it will do so will stop the blackening of

³⁴ Vandiver & Coconis, *supra* note 28, at 882 (quoting Governor Roberts’s message to the state assembly).

³⁵ *Id.* at 882-83.

³⁶ Galliher et al., *supra* note 21, at 553.

³⁷ HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY* 10 (rev. ed. 1967).

³⁸ Galliher et al., *supra* note 21, at 561 (quoting *Restore Capital Punishment*, ROCKY MOUNTAIN DAILY NEWS, May 24, 1900, at 4).

³⁹ See Bowers, *supra* note 24, at 18.

⁴⁰ AYERS, *supra* note 11, at 245 (quoting LILY H. HAMMOND, *IN BLACK AND WHITE: AN INTERPRETATION OF SOUTHERN LIFE* 60-61 (1914)).

Colorado's fair name with lynchings."⁴¹ The apparently widespread belief in Colorado that the lack of capital punishment made lynchings more likely, if not inevitable,⁴² undermined the earlier acceptance of abolition. The legislature's reinstatement was attributed by the press chiefly to the most recent murder followed by lynching that had occurred only six months previously.⁴³

Quite apart from the central role that lynching played in the abolition, and especially the reinstatement, of capital punishment during the Progressive era, the assertion that abolition would increase lynch mob violence was a frequently made "stock" argument in the death penalty debates of the early twentieth century, untethered to specific legislative proposals. The Bowers brief to the Tennessee legislature is some evidence of the general familiarity of the argument, with its reference to the lynching argument made by unnamed "advocates of the death penalty."⁴⁴ But the best proof of the salience of the lynching argument is probably the publication in several editions of the popular *Debaters' Handbook* on capital punishment of an essay entitled "Capital Punishment and Lynching," devoted entirely to the argument that "to abolish capital punishment in this country is likely to provoke lynchings. Whenever unusually brutal and atrocious crimes are committed, particularly if they cross racial lines, nothing less than the death penalty will satisfy the general sense of justice that is to be found in the average American community."⁴⁵ This piece appeared in the first four of five editions of the *Handbook*, published in 1909, 1913, 1917, and 1925, respectively.⁴⁶ It disappeared from the fifth edition, published in 1939, although the argument "Lynchings would increase" is included in that volume as part of an outline of arguments for and against the death penalty under the general heading "It is socially desirable that we retain the death penalty."⁴⁷

⁴¹ Galliher et al., *supra* note 21, at 561 (quoting *Restore Capital Punishment*, ROCKY MOUNTAIN DAILY NEWS, May 24, 1900, at 4).

⁴² *Id.* at 562.

⁴³ *Id.*

⁴⁴ See *supra* text accompanying notes 23-28.

⁴⁵ J. E. Cutler, *Capital Punishment and Lynching*, 29 ANNALS AM. ACAD. 622, (1907), reprinted in DEBATERS' HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT 17, 21-22 (C.E. Fanning, ed., 1909).

⁴⁶ See DEBATERS' HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT (C.E. Fanning, ed., 1909, 1913, and 1917); THE HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT (Lamar T. Beman, ed., 1925) [hereinafter Beman].

⁴⁷ *Summary of Arguments*, in CAPITAL PUNISHMENT 231, 243 (Julia E. Johnsen, ed., 1939).

Not surprisingly, the same *Handbook* series also contains attempted refutations of this pro-death penalty lynching argument. One edition of the *Handbook* contains an excerpt from the learned statesman quoted, but not identified, in the Bowers brief who argues, "The greatest danger in a republic is a mob, and as long as States inflict the penalty of death, mobs will follow the example."⁴⁸ Alternatively, some abolitionists in the *Handbook* cleverly countered the claim that lynchings will result from the perceived under-enforcement of the law resulting from abolition with the plausible assertion that retention of capital punishment itself leads to under-enforcement of the law, because juries sometimes wrongly acquit for fear of inflicting death⁴⁹ (and thus presumably will incite lynch mobs in this way, as well). A more direct response to the lynching argument, similar once again to one of the arguments in the Bowers brief, was made in a 1927 book grandly titled *Capital Punishment in the Twentieth Century*, to the effect that if lynchings were really substitutions for capital punishment, one would expect to see more of them in abolitionist states.⁵⁰ Nonetheless, as the book points out, lynchings were demonstrably more common in states that retained the death penalty than in those that abolished it. Of course, this argument leads to the question of whether the states (particularly those of the Deep South) that refused to abolish the death penalty would have experienced no rise in lynchings had *they* abolished it. But the existence of such a counter-argument in an abolitionist-tilted survey of capital punishment demonstrates the felt need to address what a review (in this illustrious *Journal*) of the 1927 book places first on a list of retentionist arguments: the "danger of lynching."⁵¹

The prevalence and pride of place of the lynching argument in the early years of the twentieth century, both in legislatures and in public discourse more broadly, reflects a world in which capital punishment played a very different role from its place in our current one. In this earlier world (or at least in regions of it), extrajudicial lethal violence, targeted especially at black men suspected of crimes against whites, was so common that it could seem foolhardy, sentimental, or simply counterproductive to attack the more vulnerable, but morally and socially more benign, legal

⁴⁸ Robert G. Ingersoll, 24 AM. L. REV. 203 (1890), reprinted in Beman, *supra* note 46, at 350.

⁴⁹ See *Does Capital Punishment Prevent Convictions?*, 40 REV. REV. 219, (1909), reprinted in DEBATORS' HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT 136 (C.E. Fanning, ed., 1909).

⁵⁰ E. ROY CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY 85-86 (1927).

⁵¹ Clifford Kirkpatrick, *Review of E. Roy Calvert, Capital Punishment in the Twentieth Century* (1927), 18 J. AM. INST. CRIM. L. & CRIMINOLOGY 609, 611 (1928).

form of execution. In this world, state imposed death was *not* the worst, or even the most likely, fate that could befall one suspected of a capital crime. The defiance of the U.S. Supreme Court by Ed Johnson's lynch mob is a powerful symbol of the fragility of the legal order a century ago (at least in certain places and with regard to interracial crimes) and the difficult tradeoffs that many perceived in the relationship between lynchings and legal executions.

B. CAPITAL PUNISHMENT AND EUGENICS

We, the authors, first encountered the proposal that eugenics might undergird an argument in support of capital punishment as law clerks for Justice Thurgood Marshall. Working on capital cases in Justice Marshall's chambers, we took pains to familiarize ourselves with the Court's history of constitutional regulation of capital punishment and especially with the opinions of our boss, who joined the Court just before it began to "constitutionalize" the death penalty in the late 1960s. We were both struck by Justice Marshall's opinion in the landmark case of *Furman v. Georgia*,⁵² which temporarily struck down capital punishment as it was then administered in the United States. In order to assess whether the death penalty was an excessive or unnecessary punishment under the Eighth Amendment, Justice Marshall identified "six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy."⁵³ The rest of list was familiar to us, even formulaic, but—eugenics?? It seemed to us at the time, in our youth and inexperience, that Justice Marshall was conjuring a straw man, positing an argument that no one actually made and that could not really be taken seriously.

A visit to the early twentieth century, however, puts flesh and blood on the supposed straw man of the argument from eugenics. The influence of the eugenics movement on those concerned with the problems of crime and punishment was enormous and, indeed, central to this *Journal's* own founding a century ago. John H. Wigmore, then the Dean of Northwestern University School of Law, was a key member of the organizing committee for the First National Conference on Criminal Law and Criminology in 1909, which led to the founding of the American Institute of Criminal Law and Criminology and its official organ, this *Journal*.⁵⁴ Writing more than a

⁵² 408 U.S. 238, 314 (1972) (Marshall, J., concurring).

⁵³ *Id.* at 342.

⁵⁴ See Jennifer Devroye, *The Rise and Fall of the American Institute of Criminal Law and Criminology*, 100 J. CRIM. L. & CRIMINOLOGY 7, 7 (2010).

decade later, Wigmore and other members of the Institute explained that “the inspiration of Italy’s criminalists was strongly influential in the founding of the ‘Journal of the Institute’ in 1909.”⁵⁵ By “Italy’s criminalists,” Wigmore meant Cesare Lombroso and his student Enrico Ferri, of the Italian Positivist School, who developed biological theories of innate criminality. Lombroso sought to define the criminal type, *Homo delinquens*, as a throwback to an earlier evolutionary era.⁵⁶ He believed that one could see “the nature of the criminal” in the physical attributes of criminals (large jaws, high cheek bones, handle-shaped ears, insensitivity to pain, etc.)—“an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals.”⁵⁷ Ferri shared Lombroso’s belief in the existence of congenital murderers with distinctive physical characteristics and defended the idea of the “born criminal” in his most important work, *Criminal Sociology*, published in 1917 in English translation by the American Institute of Criminal Law and Criminology.⁵⁸

Lombroso and Ferri’s belief in the heritability of criminality was of obvious relevance to those interested in the science of eugenics, defined by its founder, the British naturalist Francis Galton, as “the study of agencies under social control that may improve or impair the racial qualities of future generations, either physically or mentally.”⁵⁹ The eugenics movement of the late nineteenth and early twentieth centuries was an attempt to harness the science of eugenics “for the improvement of the human race by better breeding,” according to Charles B. Davenport, a leader of the movement in the United States in the early part of the twentieth century.⁶⁰ Many reformers believed that eugenics offered some obvious prescriptions for criminal justice policy, beyond studying the heredity and physical characteristics of criminals. In addition to “positive” eugenics (promoting the propagation of the fit), many criminal justice reformers urged policies of “negative” eugenics (preventing the propagation of the unfit),⁶¹ often citing

⁵⁵ Robert H. Gault, James W. Garner, Edwin R. Keedy & John H. Wigmore, *The Progress of Penal Law in the United States of America*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 173, 174 (1924).

⁵⁶ See ELOF AXEL CARLSON, *THE UNFIT: A HISTORY OF A BAD IDEA* 45 (2001).

⁵⁷ *Id.* at 44 (quoting Leonard D. Savitz, *Introduction* to GINA LOMBROSO-FERRERO, *CRIMINAL MAN, ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO* xxv (1911)).

⁵⁸ Devroye, *supra* note 54, at 13.

⁵⁹ RUTH CLIFFORD ENGS, *THE EUGENICS MOVEMENT: AN ENCYCLOPEDIA* xii (2005) (quoting Sir Francis Galton, *Herbert Spencer Lecture Delivered before the University at Oxford, June 5, 1907*, in *ESSAYS IN EUGENICS* 81 (1909)).

⁶⁰ *Id.* (quoting CHARLES DAVENPORT, *HEREDITY IN RELATION TO EUGENICS* 1 (1911)).

⁶¹ DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 47 (1985).

the work of Lombroso.⁶² In particular, sterilization and even castration were frequently at the center of eugenics-inspired proposals to prevent crime and punish criminals.⁶³ Many states passed legislation in the first few decades of the twentieth century compelling or permitting sterilization of those who were epileptic, insane, or mentally retarded, or of those who combined some mental defect with criminal behavior, or as punishment for those who committed crimes such as rape or indecent exposure, or who were recidivist offenders.⁶⁴

Despite the belief of many reformers in the early twentieth century that the insights of eugenics into the causes of crime yielded obvious beneficial prescriptions for crime policy, there was real division among eugenics enthusiasts about its implications for capital punishment. Some of those most enthusiastic about the sterilization or castration of prisoners were opposed to capital punishment, believing that these alternative responses to criminality would be either more effective deterrents or more humane, or both.⁶⁵ Moreover, not every eugenics enthusiast was drawn to “negative” policies like sterilization or immigration restriction. Rather, many social radicals and utopians embraced eugenics;⁶⁶ among these were passionate eugenics enthusiasts who supported more voluntary policies like the legalization of birth control and euthanasia, disdained the crude theories of racial or ethnic superiority that eventually tainted the eugenics movement, and strenuously opposed capital punishment.⁶⁷ For this wing of the eugenics movement, their opposition to capital punishment was not a position they took *despite* their eugenic convictions, but rather *because* of them. Eugenics helped to undermine the assumption of free will that underlay the retributive justice of capital (and indeed of all) punishment. If criminal behavior is to some degree determined by heritable biological traits (and their interaction with the environment), then the moral case for capital punishment based on just deserts is weakened by a corresponding degree (if not entirely eliminated). As an abolitionist writing in 1927 explained, “The trend of modern psychological thought . . . [is] that conduct is not

⁶² See CARLSON, *supra* note 56, at 399 (offering flowchart depicting Lombroso’s influence in the rise of negative eugenics).

⁶³ See *id.* at 199-229.

⁶⁴ See *id.* at 248.

⁶⁵ See *id.* at 202-03, 205 (describing views of Dr. Walter Lindley, Dr. W.A. Hammond, and Dr. Robert Boal regarding castration and sterilization).

⁶⁶ See KEVLES, *supra* note 61, at 85.

⁶⁷ See ALEXANDRA MINNA STERN, *EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA* 118 (describing the beliefs of eugenics enthusiast and innovative reformer August Vollmer).

determined by an unknowable something called free will, but by personality traits built up through the interaction of heredity and environment.”⁶⁸

So why did Justice Marshall identify eugenics as a *pro*-death penalty argument? As one historian of the eugenics movement explains, “To the followers of Lombroso, the criminal problem was solved through emigration, perpetual imprisonment, and *capital punishment* to protect the present and to prevent the genetic spread of crime.”⁶⁹ Even those who opposed the death penalty in the early twentieth century found it easy to see and articulate the eugenic argument for capital punishment. As a prominent abolitionist explained in 1919, the death penalty “might be defended as an agency of conscious artificial selection for the elimination of dangerous biologic stocks from the community, in accordance with the ideas of the Positivist school of criminologists.”⁷⁰ Another abolitionist elaborated, “There is a eugenic objection sometimes raised to the substitution of life imprisonment for Capital Punishment. A life imprisonment sentence in present practice is subject to periodic review and generally means ultimate release. . . . [Thus,] it may be extremely undesirable to allow certain persons of tainted heredity to go free.”⁷¹ These authors went on to rebut such arguments as proving far too much⁷² and leading to “unthinkable” excesses,⁷³ but they phrase their objections as counters to what appears to be a “stock” or familiar argument.

The salience of the eugenic argument in favor of capital punishment is most clear in its frequent repetition in the essays and articles collected in the *Debaters’ Handbook* series published five times over the course of the thirty years between 1909 and 1939. In the first edition of the *Handbook*, a supporter of capital punishment replied to a recent abolitionist essay with the following observations drawn from the work of Lombroso:

The fact is that there is mentally a true criminal type Heredity and atavism between them have produced the criminal recidivist, the throw-back in the evolution of mankind.

Granting . . . that reformation is out of the question, are we not to continue and say that the interests, and even the *being* of the criminal, are to be sacrificed for the

⁶⁸ CALVERT, *supra* note 50, at 150 (internal quotes omitted).

⁶⁹ CARLSON, *supra* note 56, at 68 (emphasis added).

⁷⁰ RAYMOND T. BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 97-98 (1919).

⁷¹ CALVERT, *supra* note 50, at 193.

⁷² *Id.* at 195 (“To assert that society has the right to kill those of its members who are of no use to it or who are judged unfit to live, is a very dangerous argument which might be applicable to many persons and groups other than murderers!”).

⁷³ BYE, *supra* note 70, at 98 (“[T]he logical application of this principle would involve such an increase in the number of executions that it is unthinkable.”).

welfare of the public? Surely if the first premise is correct, the second necessarily follows.⁷⁴

In the same edition of the *Handbook*, an abolitionist listed eight arguments in favor of capital punishment, the second of which was that “[i]t rids society of criminal pests and dangerous savages.”⁷⁵ Although the author ultimately advocated for reliance on “brick walls and strong cells”⁷⁶ instead of the death penalty, the prominence of such a social hygiene argument on this list is telling with regard to the salience of the eugenic argument the debates of the time. Both of these essays were reprinted in the second and third editions of the *Handbook*, and the Vicars essay was also reprinted in the fourth edition. Although neither essay made it into the fifth edition of the *Handbook*, that volume’s outline of arguments for and against the death penalty includes the argument that “[i]t is socially desirable that we retain the death penalty,” because “[t]he elimination of the worst classes of murderers . . . is *biologically* better.”⁷⁷

Despite the prominence of these eugenic arguments about capital punishment in the debates of the early twentieth century, at least one historian of the American death penalty, Stuart Banner, argues that “the death penalty was never widely perceived to have a eugenic basis.”⁷⁸ Banner recognizes that during the heyday of the eugenics movement in the early part of the twentieth century, “there were a few proponents of the death penalty on the ground that it would prevent the worst criminals from reproducing.”⁷⁹ However, Banner contends that this view was not particularly influential because it was undermined both by the fact that “capital punishment was a patently inefficient eugenic program” and by the way in which “[b]iological theories of crime tended to undermine, not support, capital punishment.”⁸⁰ Banner is surely right that the eugenic argument for capital punishment lacks some logical force, but its ubiquity and persistence over time (at least until World War II) suggest that its persuasiveness lay in something other than its logic.

⁷⁴ C.J. Ingram, *Shall We Abolish the Death Penalty?*, 170 WESTMINSTER REV. 91-98, (1908), reprinted in DEBATEERS’ HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT 156, 164 (C. E. Fanning ed., 1909) (emphasis added).

⁷⁵ G. Rayleigh Vicars, *Ought Capital Punishment to be Abolished?*, 143 WESTMINSTER REV. 561 (1895), reprinted in DEBATEERS’ HANDBOOK SERIES: SELECTED ARTICLES ON CAPITAL PUNISHMENT 137, 139 (C. E. Fanning ed., 1909).

⁷⁶ *Id.* at 143.

⁷⁷ *Summary of Arguments*, in CAPITAL PUNISHMENT 231, 243 (Julia E. Johnsen ed., 1939) (emphasis added).

⁷⁸ BANNER, *supra* note 6, at 213.

⁷⁹ *Id.*

⁸⁰ *Id.*

What that something else might be is illuminated in the fifth edition of the *Handbook* series published in 1939, when the eugenic argument in favor of capital punishment became more overtly and intensely racist, at the same time that eugenic ideas and policies were reaching full flower in Nazi Germany. In one excerpt, a supporter of capital punishment urged the maintenance of the death penalty as a form of societal self-defense against dangerous inferior groups, like immigrants and blacks. On the topic of immigration, the author (a member of the Michigan State Bar Association's Committee on Capital Punishment) explained, "With the good immigrant has come the bad. The scum of Europe, like the plague of the locusts, has descended upon us."⁸¹ On the topic of blacks, the author was even more explicit:

It has been established beyond any doubt that our modern killer is biologically inferior. Authorities agree upon this fact. To illustrate: Memphis, with its illiterate, defective Negro population, has the highest murder rate of any American city. On the other hand, St. Paul and Minneapolis, of almost pure Scandinavian stock, have the lowest.⁸²

The author urged that the death penalty "will terminate the breeding of diseased stock . . . and it will prevent the repetition by this offender, of further monstrous acts."⁸³ Along similar lines, the former Governor of Arkansas argued that the death penalty was necessary to deal with one of the South's most serious problems—"the Negro question."⁸⁴ The former Governor explained that "the latter race is still quite primitive, and in general culture and advancement in a childish stage of progress."⁸⁵ He warned, "If the death penalty were to be removed from our statute-books, the tendency to commit deeds of violence would be heightened owing to this Negro problem. The greater number of the race do not maintain the same ideals as the whites."⁸⁶ Governor Hays's arguments echo the earlier views of J.E. Cutler, published in the first several volumes of the *Handbook* series, that the "the colored race in the United States is a child race,"⁸⁷ one that does not share "the same standards as the whites, either intellectually, morally, or industrially."⁸⁸ Both Hays and Cutler argued that the

⁸¹ John M. Dunham, *Report of Committee on Capital Punishment*, 1928, 8 MICH. ST. BAR J. 279 (1929), reprinted in CAPITAL PUNISHMENT 192, 195 (Julia E. Johnsen ed., 1939).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Hays, *supra* note 30, at 161.

⁸⁵ *Id.*

⁸⁶ *Id.* at 162.

⁸⁷ Cutler, *supra* note 45, at 164.

⁸⁸ *Id.*

predisposition of the black race to heinous crimes meant that capital punishment was necessary both to deter such crimes and to prevent the outraged lynchings that would inevitably follow in the absence of swift and certain capital justice.

Thus, it is not surprising that Thurgood Marshall, alone among the Justices who each wrote individually on the question of the constitutionality of capital punishment in *Furman*, would remember the eugenic argument in favor of capital punishment, with its eventually explicit racial cast. Justice Marshall had worked on numerous criminal and capital cases early in his career in the 1930s and 1940s, and arguments of the type made by Cutler and Hays were not ancient history to him, but rather lived reality. The rise of eugenics as a powerful new idea, while often embraced by progressive reformers, also allowed old-fashioned racists—the ideological descendants of those who had defended slavery on the grounds that some inferior races were “natural slaves”⁸⁹—to add a new scientific gloss to an old prejudice. When considered together, the early twentieth century arguments about lynching and eugenics unearthed above reveal how much the debates about capital punishment at that time were debates about race and how much the death penalty itself, as it was practiced on the ground, was racially inflected. Justice Marshall clearly did not need such a reminder, but perhaps we, in our supposed “post-racial” society in which other issues predominate in our own death penalty debates, are more prone to forget. Thus, we would do well to heed the lessons that these two “lost” arguments teach us about the strong connections, which would have been obvious to contemporaneous observers a century ago, between the death penalty question and what Governor Hays called “the Negro question.”

III. TWO NEW ARGUMENTS AGAINST CAPITAL PUNISHMENT

The most powerful “new” argument in the death penalty debate—one that simply did not exist in any sustained form prior to the modern era of capital punishment in the United States (post-1976)—emphasizes the greater cost of capital punishment compared to the alternative of long-term

⁸⁹ T.R.R. Cobb, author of an influential nineteenth-century study of the Southern law of slavery, explained that his “‘inquiry into the physical, mental, and moral development of the negro race, seems to point them clearly, as peculiarly fitted for a laborious class.’” See Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1022 (2002) (quoting Thomas R.R. Cobb, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY 46-47 (1858)). The idea of “natural slaves” relied upon by some nineteenth-century defenders of slavery in the United States can be traced back to Aristotle. See generally Fred Miller, *Aristotle’s Political Theory*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2002), <http://plato.stanford.edu/entries/aristotle-politics/>.

(even lifetime) imprisonment. The argument has become so ubiquitous in contemporary debates about the death penalty that it is hard to imagine that it was virtually non-existent until a few decades ago. Indeed, in one generation, the cost argument has become perhaps the greatest threat to the continued robust use of capital punishment in the United States. This section will examine how and why the cost argument emerged over the past few decades as well as the reasons for its virtual absence in death penalty discourse during the first centuries of capital practice in this country. The section will also highlight the particular prominence of the cost argument in the past few years and its critical role in efforts to limit and repeal the death penalty. The cost argument is important not simply because it is new, but because it significantly broadens the constituency concerned about the death penalty. The utilitarian, community-oriented cast of the cost argument has much more traction in popular and legislative debate than its longstanding counterparts emphasizing equality and individual rights-based objections to capital punishment.

A second important “new” argument in the death penalty debate focuses on another aspect of contemporary capital practice distinctive to our time: the prolonged interval between the pronouncement of sentence and execution, often endured by the condemned in essentially solitary confinement. Unlike concerns about cost, concerns about excessive death row confinement have not emerged in public discourse or legislative debate as the most pressing grounds for challenging the death penalty. But the claim that prolonged death row confinement is unconstitutionally cruel exposes some of the central failings of the prevailing capital system. Although presently cast as a claim of individual deprivation, it also calls into question whether the American death penalty as a *system* can continue on its present course. Moreover, the central fact behind the claim—that death sentences are often hollow pronouncements—has generated a new, victim-oriented assault on the death penalty emphasizing the inability of our capital system to provide meaningful redress for victims’ families.

A. THE ABSENCE AND EMERGENCE OF COST CONSIDERATIONS IN THE AMERICAN DEATH PENALTY DEBATE

At one level, the explanation for the absence of the cost argument prior to the modern era is rather straightforward. Before the U.S. Supreme Court embarked on its course of constitutional regulation of capital punishment in the early 1970s, the costs associated with the death penalty were relatively

minimal.⁹⁰ This was true both in comparison to the cost of available non-capital sanctions throughout our history and in comparison to the cost of the death penalty in the present day. Prior to the Court's intervention, capital trials were not categorically different from cases involving non-capital serious felonies, and the length and costs associated with such trials were modest compared to contemporary practice. Post-conviction expenses in capital cases were likewise relatively modest, both in terms of litigation costs (state and federal habeas) and incarceration costs. For most of our country's history, the average time between pronouncement of sentence and execution was measured in weeks and months (not years and decades), so there was little reason to believe that the pronouncement of a sentence of death imposed a significant ongoing financial burden for the state. Hence, to the extent financial considerations bore on the death penalty debate prior to the modern era, they tended to support rather than undermine the case for capital punishment.

Yet interestingly, throughout our country's history, the question of cost and the death penalty was rarely broached—even during times of economic crisis and even when the relative cost advantages or disadvantages of executions seemed obvious. During the colonial era, for example, the death penalty was likely more expensive than its alternatives. Incarceration was not yet a viable penal option (jails were used primarily for debtors and pre-trial incarceration), and the most common non-capital sanctions—fines, corporal punishments (whippings, brandings), and shaming punishments (the stock and the public cage)—involved fewer community resources than those expended on public executions.⁹¹ It was common to allow a period of several weeks or even months to elapse between sentencing and execution to facilitate the offender's repentance and to make arrangements for the edifying spectacle that the execution was expected to offer.⁹² The costs associated with even this short-term delay were not insignificant (the simple housing and feeding of the condemned was a "significant expense,"⁹³ as well as the cost of pursuing and recapturing condemned inmates who

⁹⁰ A more sustained discussion of the role of the cost argument in past and present American death penalty discourse can be found in Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 CHI. L. F. 93.

⁹¹ David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 111, 112 (Norval Morris & David J. Rothman eds., 1995).

⁹² See BANNER, *supra* note 6, at 17.

⁹³ *Id.*

escaped from the often insecure jails⁹⁴), but these expenses were absorbed without much reflection or reservation. The unquestioned willingness to incur such costs reflected a consensus about the importance of the criminal's salvation (to be secured by the power of the impending execution to focus an offender's attention on his redemption) as well as the assumption that public attendance at executions served valuable functions in terms of general deterrence and community cohesiveness.

Toward the end of the colonial era, influential Founding era thinkers, including Benjamin Franklin and James Madison, offered the first sustained critique of the American death penalty, urging restriction and even abolition in the new republic. These and other early American critics of the death penalty borrowed heavily from the enormously influential work of Cesare Beccaria, whose essay *Of Crimes and Punishments*, published in 1764, called for the wholesale abolition of capital punishment.⁹⁵ Beccaria's essay included arguments from political theory (individuals lacked the right to commit suicide and thus could not delegate that power to the state) as well as instrumental claims (the threat of "perpetual slavery" was a sufficient deterrent to crime and the purported benefits of public executions were undermined by their "barbarity"). Beccaria's arguments framed the debate about the death penalty on both sides of the Atlantic during the late eighteenth and early nineteenth centuries, and the question of "cost" in its modern sense (e.g., the relative financial costs to the state of imposing death versus some alternative punishment) was entirely absent from his lengthy critique notwithstanding his strongly utilitarian approach to the issue. Some other influential theorists, including Jeremy Bentham and Thomas Jefferson, observed that the death penalty prevented offenders from engaging in labor which could provide compensation to their victims or the State,⁹⁶ but these observations were not tied to a more comprehensive calculus of the financial costs of the death penalty versus its alternatives. In

⁹⁴ See *id.* at 18 ("The expenses of twice recapturing John Brown [a condemned burglar who twice escaped from the Litchfield jail], for example, formed a major part of the bill submitted to the Connecticut Assembly by William Stanton, Litchfield's jailer.").

⁹⁵ See BECCARIA, *supra* note 7.

⁹⁶ See HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 76-78 (1987) (discussing Bentham's essay, *The Rationale of Punishment*, published in 1775, in which Bentham argues that imprisonment was a superior punishment to execution because the death penalty was "not convertible to profit" and lacked "frugality" in that convicts could not provide "compensation" to victims or to the state); BANNER, *supra* note 6, at 95 (discussing Jefferson's argument in favor of abandoning capital punishment for lesser felonies in the newly independent state of Virginia in 1778 because criminals who were not executed might "be rendered useful in various labors for the public").

any event, it is clear that questions of financial cost took a back seat to the more prevalent arguments about optimal deterrence and appropriate moral education that lay at the heart of the new utilitarian critique of the death penalty.

Nor did the question of financial cost emerge during the great prison-building period of the early and mid-nineteenth century. Pennsylvania, New York, and other states through the Northeast and Midwest inaugurated a new era of criminal justice with the establishment of penitentiaries, founded on the belief that wrongdoers could be reformed if removed from pernicious societal influences and subjected to a regimen of strict discipline in a “corruption-free environment.”⁹⁷ The construction of prisons required enormous outlays of public funds and offered a previously unavailable alternative to the death penalty: lengthy incarceration. Notwithstanding the obvious financial impact of the penitentiary movement, and the possibility that the death penalty might provide a less expensive alternative for serious offenders, there is little indication that the debate over the death penalty shifted toward considerations of cost in the wake of massive public expenditures on the newly constructed, imposing prisons. The absence of such argument is likely attributable to the confidence of reformers that the new prisons would produce greater social benefits than costs.⁹⁸ On the one hand, the penitentiaries were expected to provide the conditions for genuine repentance (and thus salvation), a benefit that the religiously motivated reformers were unlikely to subject to a conventional “cost-benefit” analysis. In addition, reformers believed that penitentiaries would significantly reduce recidivism through reformation, a promise that, if realized, might outweigh the costs of the prisons themselves.⁹⁹ Perhaps most importantly, the penitentiary system was organized around the principle of compelled labor, a highly valuable commodity in an era of increased industrialization.¹⁰⁰ Prison labor greatly offset the cost of building and

⁹⁷ DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 71 (1971).

⁹⁸ Rothman, *supra* note 91, at 121 (“Given the promise of reform, legislatures readily appropriated the funds for construction, and when more cells were needed, they made the funds available.”).

⁹⁹ See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 80 (1993) (describing the confidence of “almost all prison reformers” that the new penitentiary “was stern but effective medicine” for shaping the characters and promoting the rehabilitation of prisoners).

¹⁰⁰ See, e.g., MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION 1750-1850*, at 109-11 (1978) (describing how Jeremy Bentham touted the Panopticon as a source of free labor).

maintaining prisons and thus muted concerns about the potential costs to the state of lengthy incarceration.

Hence, even during the Progressive Era, when many states revisited the wisdom of capital punishment, references to the costs associated with lengthy incarceration are difficult to find. Indeed, in the widely available *Debaters' Handbook* on capital punishment discussed above, few references to cost appear in the dozens of collected excerpts from newspapers, magazines, and scholarly journals, and when the subject arises, it is treated rather perfunctorily. For example, one author lists as the sixth of eight arguments in favor of the death penalty that "[i]t saves the community all cost of keeping criminals for many years," but the author quickly acknowledges the "rude truth" that "men under a life sentence could be placed in a position to earn the cost of their keep and a good margin over in addition."¹⁰¹ Overall, from the Founding era well into the early twentieth century, one gets the sense that both capital punishment and imprisonment were relatively cheap compared to their costs today, so that no one spent much time trying to figure out which was cheaper or arguing for or against the death penalty on such grounds. Moreover, the strong ideological and religious commitments which motivated the use of the death penalty and imprisonment appear to have overwhelmed considerations of cost in the modern sense.

By the mid-twentieth century, a consensus seemed to have emerged that long-term incarceration was in fact more expensive than capital punishment, despite any offset from prison labor. Capital trials, especially in the South, involved minimal safeguards¹⁰² and often were completed, from jury selection to sentencing, in a matter of hours or (a few) days. Moreover, the interval between sentence and execution remained quite modest well into the twentieth century, as state and federal postconviction remedies remained relatively unintrusive. That capital punishment produced economic advantages vis-à-vis long-term incarceration was "a very pervasive belief"¹⁰³ in the second half of the twentieth century, so much so that the public continued to assume that capital punishment was the cheaper option even as the costs of administering the death penalty began to rise in the later decades of the twentieth century.¹⁰⁴

¹⁰¹ Vicars, *supra* note 75, at 142.

¹⁰² See *supra* notes 3-5 and accompanying text.

¹⁰³ RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 187 (1991).

¹⁰⁴ See Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 142 tbl.6 (1983) (finding that 73.4% of respondents thought that the death penalty cost taxpayers less than life imprisonment).

The 1960s produced a sustained reexamination of capital punishment both in the public sphere and especially in the courts. Capital sentences and executions declined substantially in the decades following World War II, and several states legislatively limited or abolished the death penalty in the early 1960s. The Civil Rights movement and the Vietnam War generated considerable skepticism about the benign character of governmental power. A Gallup Poll in 1966 found for the first and only time that more Americans opposed capital punishment than supported it.¹⁰⁵ Concerns about discrimination and abuse in the criminal justice system—particularly the perfunctory trials of the old South—prompted the Warren Court to extend many of the criminal procedure protections in the Bill of Rights against the states, including the exclusionary rule of the Fourth Amendment, the rights to counsel and jury trial in the Sixth Amendment, and the prohibition against cruel and unusual punishment in the Eighth Amendment. When several members of the Court signaled in 1963 that the death penalty might be disproportionate when used to punish the crime of rape,¹⁰⁶ the nation's leading civil rights organization, the Legal Defense Fund of the NAACP (LDF), embarked on an ambitious "moratorium" strategy to bring executions in the country to a halt.¹⁰⁷

In defending death-sentenced inmates, LDF lawyers made use of the many newly recognized procedural protections available in state criminal proceedings. They also developed a distinctive set of arguments focused on the failings of the American death penalty itself. These core arguments emphasized the discriminatory and arbitrary administration of the death penalty, the lack of continuing public support for the punishment, the anachronistic character of "retributive" defenses of the death penalty, and the inability of the death penalty to serve any important social values (including deterrence), especially in light of its rare imposition.

The LDF strategy succeeded in bringing executions to a halt, and the Supreme Court agreed to decide whether the American death penalty comported with "evolving standards of decency" under the Eighth Amendment. The resulting decision in *Furman v. Georgia*¹⁰⁸ invalidated

¹⁰⁵ Frank Newport, *In U.S., Two-Thirds Continue to Support Death Penalty*, GALLUP, Oct. 23, 2009, <http://www.gallup.com/poll/123638/In-U.S.-Two-Thirds-Continue-Support-Death-Penalty.aspx>.

¹⁰⁶ *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting) (lamenting the Court's unwillingness to decide whether "the imposition of the death penalty by those States which retain it for rape violate[s] 'evolving standards of decency that mark the progress of [our] maturing society' or 'standards of decency more or less universally accepted'").

¹⁰⁷ MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 107 (1973).

¹⁰⁸ 408 U.S. 238 (1972).

prevailing capital statutes largely because of their failure to provide adequate guidance to sentencers in choosing between life and death. The case generated the most sustained judicial consideration of the American death penalty in U.S. history, with almost 250 pages in the U.S. Reports offering arguments supporting and opposing its continued use.¹⁰⁹ Notably absent from the extensive discussions is any sustained focus on the question of cost. Indeed, the sole mention of cost was offered by Justice Marshall to rebut the claim that the death penalty is a cheaper alternative than imprisonment: "As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect."¹¹⁰ The absence of the cost argument in the various opinions stems in part from the fact that the cost argument is not a *constitutional* argument against the death penalty (though it might be part of a constitutional *defense* of the punishment, in response to the claim that the death penalty serves no valid state goals). But the absence of the cost argument is likely also attributable to the widespread belief (and perhaps reality) that the death penalty was comparatively cheaper than long-term imprisonment. At the time of *Furman* and well into the 1980s, supporters of the death penalty were much more likely than opponents to list the cost of the death penalty as a reason supporting their position.¹¹¹

Furman itself, though, would radically reshape the economics of capital punishment. By embarking on a course of constitutional regulation of the death penalty—the defining feature of the "modern era" of the American death penalty—the Court would significantly increase the costs of capital litigation. Neither the increase in costs nor the shift in public opinion would occur overnight. It would take more than a quarter century before the conventional wisdom regarding the comparatively higher cost of imprisonment would give way to a new, widespread belief that the death penalty is substantially more expensive than the alternative of imprisonment—even life imprisonment without the possibility of parole.

In the wake of *Furman*, numerous states sought to cure the constitutional defect of standardless discretion by redrafting their capital statutes. Some states made the death penalty mandatory for certain offenses, while others sought to structure the death penalty decision through the use of aggravating and mitigating factors. When the Supreme Court

¹⁰⁹ *Id.* at 239-470.

¹¹⁰ *Id.* at 357 (Marshall, J., concurring).

¹¹¹ Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 90, 98 (Hugo Adam Bedau ed., 1997).

revisited capital punishment in 1976, reviewing five of the new capital schemes, it upheld the guided discretion statutes and invalidated the mandatory ones.¹¹² It rejected the mandatory statutes because of the “qualitative difference” between capital and non-capital punishment, inaugurating a new constitutional commitment to the death-is-different principle.¹¹³

The defining feature of the guided discretion schemes was the establishment of a distinct punishment phase in capital proceedings during which the jury (or judge) would be focused solely on the question of punishment. The guided discretion statutes no longer permitted the death penalty to be imposed for the crime of murder or rape without a separate finding of at least one “aggravating” factor. Moreover, the bifurcated structure of capital proceedings suggested that defense attorneys should devote substantial energy and resources not only to the question of guilt or innocence, but also to developing and presenting “mitigating” evidence that might justify a sentence less than death.

As a result of the recasting of state capital statutes, as well as the Court’s embrace of the “death-is-different” principle, the costs associated with capital trials would grow exponentially in the following decades. The new model of bifurcated proceedings with a focused punishment phase would gradually become the national norm, and the Court’s emerging capital doctrines would substantially alter many state capital trial practices, including voir dire, the use of experts, the expectations of defense counsel, and, especially, the investigation and presentation of mitigating evidence. In addition, post-trial litigation costs would become vastly greater in capital cases. At the state level, most states gradually developed schemes requiring the appointment of counsel for death-sentenced inmates in state postconviction proceedings even though non-capital inmates had no such right to post-trial representation. Congress likewise made provision for appointment of counsel in capital federal habeas proceedings (with non-capital inmates enjoying no comparable entitlement).¹¹⁴

The Supreme Court’s development of intricate doctrines governing capital proceedings greatly extended the average time between sentence and execution. During the first two decades of constitutional regulation, capital sentences were subject to a remarkable reversal rate, with about 68% of

¹¹² See *Gregg v. Georgia*, 428 U.S. 153, 206-208 (1976); *Proffitt v. Florida*, 428 U.S. 242, 259-260 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976).

¹¹³ *Woodson*, 428 U.S. at 305 (joint opinion of Stewart, Powell, and Stevens, JJ.).

¹¹⁴ 21 U.S.C. § 848(q)(4)(B) (2006) (repealed by Pub. L. No. 109-177, 120 Stat. 231, 232 (2006)).

capital verdicts invalidated on direct appeal or in postconviction.¹¹⁵ As a result, the number of inmates on death rows throughout the country increased dramatically in the 1980s and 1990s, reaching a modern era nationwide high of over 3,500 inmates by 2000—over five times the size of the national death row that accumulated during the five-year moratorium on executions preceding *Furman*.¹¹⁶

The bulk of the new expenses in capital litigation are incurred at trial. But the cost of managing large death rows has also become quite substantial. In California, for example, a recent report indicated that death-row incarceration costs the state an additional \$90,000 per inmate, per year (above the cost of non-capital incarceration), or \$60 million a year overall.¹¹⁷ Moreover, in a number of states (including California), the prospects for converting death sentences into executions remain quite remote. The multiple opportunities for review at different stages and in different courts allow for executions to be avoided almost altogether in jurisdictions where there is not a sustained political will for them to go forward. Given the intricate doctrines surrounding the implementation of the death penalty, executions require a “perfect storm” of cooperation involving numerous actors, including local prosecutors and judges, state-wide prosecutors and judges, state executive officials, and federal judges. As a result, only a handful of the thirty-five states that currently authorize the death penalty have carried out significant numbers of executions over the past thirty-five years (with only five carrying out more than fifty, and with three—Texas, Virginia, and Oklahoma—accounting for more than half (661) of the executions nationwide (1,261)).¹¹⁸

The combination of increased trial costs, increased postconviction litigation costs, and increased incarceration costs in capital cases, together with the absence of significant numbers of executions in many states, has changed the way in which the “costs” of the death penalty are understood and discussed. The relative cost of the death penalty is no longer captured by a simple comparison of the cost of a capital trial together with the cost of

¹¹⁵ James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX L. REV. 1839, 1850 (2000).

¹¹⁶ For the increase in death row inmates during the 1980s and 1990s, see Death Penalty Information Center, *Death Sentences in the United States from 1977 to 2008* (2010), <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008>. For the number of people on death row at the time of *Furman*, see MELTSNER, *supra* note 107, at 292-93.

¹¹⁷ CALIFORNIA COMM’N ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT 141 (Gerald Uelman ed., 2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

¹¹⁸ *State by State Database*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state_by_state (last visited Aug. 18, 2010).

carrying out an execution, on the one hand, versus the cost of a non-capital trial and the cost of lengthy imprisonment, on the other. Rather, the relative cost of administering the death penalty post-*Furman* now often requires a comparison of the cost of *multiple* capital trials *and* the cost of lengthy, often indefinite imprisonment on death row versus the cost of a single, non-capital trial and the cost of lengthy (non-capital) imprisonment.

Indeed, the modern era has inaugurated a new measure of the cost of the death penalty: the *cost per execution* in a particular state. This accounting method divides the total expenditures on capital cases within a jurisdiction (trial costs, postconviction litigation costs, death-row incarceration costs) by the number of death sentences the jurisdiction actually consummates with an execution. In jurisdictions with few executions, the figures are staggering. Using this approach, a recent editorial in the *New York Times* suggested that California's thirteen executions over the past thirty-five years cost about a quarter of a *billion* dollars each.¹¹⁹ In Maryland, which came close to abolishing the death penalty in its recent legislative session, a 2008 study indicated that the state spent at least an additional \$37.2 million for each of the state's five executions in the modern era.¹²⁰

Concerns about the cost of capital punishment were first voiced with some frequency beginning in the 1990s, as changes in capital practice and the growth of death rows began to transform the economics of capital punishment. Such concerns undoubtedly have contributed to the extraordinary decline in capital sentencing over the past fifteen years. In the mid-1990s, the yearly number of death sentences obtained nationwide averaged about 326.¹²¹ Since that time, capital sentences have declined over 60%, with annual death sentences over the past three years hovering around 112.¹²² This remarkable decline in death sentences is not attributable to the relatively modest decline in murders during this period (in fact, the murder rate has remained virtually constant from 2000-2007, at the same time that death sentences dropped about 50%).¹²³ Although there

¹¹⁹ Editorial, *High Cost of Death Row*, N.Y. TIMES, Sept. 28, 2009, at A22.

¹²⁰ JOHN ROMAN ET AL, URBAN INSTITUTE JUSTICE POL'Y CTR., THE COST OF THE DEATH PENALTY IN MARYLAND 3 (2008), http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf (estimating total cost of capital cases at about \$186 million).

¹²¹ *Death Sentences in the United States from 1977 to 2008*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Aug. 18, 2010).

¹²² *Id.*

¹²³ *Death Penalty Sentences Have Dropped Considerably in the Current Decade*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/death-penalty-sentences-have-dropped-considerably-current-decade> (last visited Aug. 18, 2010).

is no comprehensive data definitively establishing the causes of the decline, the available evidence points to the decreased willingness of district attorneys to seek the death penalty, in large part because of cost concerns. Prosecutors declining to seek death have repeatedly defended their decisions on cost-cutting grounds,¹²⁴ and numerous editorials and news reports have brought public attention and scrutiny to expensive cases in which prosecutors chose to seek death.¹²⁵

The most tangible evidence of the emergence of the cost argument has surfaced in contemporary legislative debates about whether to retain the death penalty. The cost argument may well have been decisive in the legislative repeals of the death penalty in New Jersey (2007) and New Mexico (2009), as well as the decision not to reinstate the death penalty in New York after its statute was found defective in 2004. In New Jersey, public opinion leaned toward retention at the time the legislature acted.¹²⁶ The state commission charged with studying capital punishment concluded that the death penalty was no longer consistent with evolving standards of decency.¹²⁷ But, as newspaper coverage of the legislative decision reflects, “equally persuasive to lawmakers was not saving lives but saving money,”¹²⁸ given the increased costs of death-row incarceration. A policy report indicated that New Jersey had spent over a quarter of a billion dollars on the death penalty in the two or so decades prior to repeal (over and above what the state would have spent on life without the possibility of parole)¹²⁹ even though the death-row population numbered only ten and no executions had been carried out by the time repeal was achieved. In low

¹²⁴ See, e.g., Jimmie E. Gates, *Budget Kills Capital Cases*, CLARION-LEDGER (Jackson, MS), Oct. 26, 2009, at A1; Patrick Orr, *Idaho Prosecutors Opting Not to Seek Death Penalty*, IDAHO STATESMAN (Nov. 3, 2009), <http://www.idahostatesman.com/1441/v-print/story/959060.html>.

¹²⁵ See, e.g., Logan Carver, *Death Penalty Cases More Expensive than Lifetime Imprisonment, But Local CDA Says Cost Never a Consideration*, LUBBOCK AVALANCHE-J. (Dec. 13, 2009), http://lubbockonline.com/stories/121309/loc_535156806.shtml; Shawn Day, *Virginia's Budget Woes Slow Down Capital Cases*, VIRGINIAN-PILOT, Dec. 7, 2009, <http://hamptonroads.com/2009/12/state%E2%80%99s-budget-woes-bring-slowdown-capital-cases>; Russell Gold, *Counties Struggle With High Cost Of Prosecuting Death-Penalty Cases—Result Is Often Higher Taxes, Less Spending on Services*, WALL ST. J., Jan. 9, 2002, at B1; Jon Murray, *Is Death Penalty Worth the Price?*, INDIANAPOLIS STAR, Dec. 10, 2009, at A1.

¹²⁶ Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Mary E. Forsberg, *Money for Nothing?: The Financial Cost of New Jersey's Death Penalty*, N.J. PERSPECTIVE, Nov. 2005, at 16.

death-sentencing, low executing states like New Jersey, the cost of the death penalty is measured by the cost of maintaining a capital *system* and not simply the cost of particular cases. Along these lines, New Hampshire is presently considering whether to repeal its capital statute, and one of the six questions to be addressed by a specially formed commission is whether “there is a significant difference in the cost of prosecution and incarceration between capital punishment and life without possibility of parole for the convicted capital murderer.”¹³⁰ Like New Jersey, New Hampshire has a relatively dormant capital system, with only one inmate on death row and no executions since 1939; one of the immediate financial considerations, though, is whether to construct and staff a lethal injection death chamber, as a recent state department of corrections master plan indicated that such an effort would cost the state over \$3 million.¹³¹ In New York, after the state’s capital statute (enacted in 1995) was invalidated by the state courts in 2004, the state assembly conducted extensive public hearings to inform its decision whether to fix the eminently correctable defect in the statute. Among the prominent considerations in its decision not to act was the high cost of administering a capital system. The assembly’s report on the public hearings cited testimony from a district attorney that the state spent as much as \$200 million on capital prosecutions in the decade or so that the statute had been in effect and that the reinstatement of the death penalty might cost the state an additional \$500 million over twenty years, while likely yielding only two or three executions during that period.¹³²

In New Mexico, the only state to repeal its capital statute since the economic downturn of late 2008, the cost issue may have tipped the balance. As one commentator observed:

[T]he New Mexico abolition campaign made use of an argument never used in death penalty debate in the 1960s and 1970s but which probably helped turn the tide in 2009—the cost of administering the death penalty, from trial to appeal to post conviction relief to federal habeas corpus to isolation of men on death row to costs of

¹³⁰ Kevin Landrigan, *Panel Puts Death Penalty on Trial*, THE TELEGRAPH (Nashua, N.H.), Oct. 22, 2009, at 3.

¹³¹ *Id.*

¹³² JOSEPH LENTOL, HELENE WEINSTEIN & JEFFRION AUBRY, THE DEATH PENALTY IN NEW YORK 27-30 (2005), available at <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf> (reporting on five public hearings on the death penalty in New York conducted by the Assembly standing committees on Codes, Judiciary, and Correction, December 15, 2004-February 11, 2005).

execution was simply an expenditure of too much public money when the state was starving for dollars for good programs.¹³³

The cost argument has also been prominent in several other states in which repeal has been considered but not accomplished. In Colorado, for example, the effort to repeal the death penalty was explicitly tied to freeing up funds to solve “cold cases.”¹³⁴ Despite its small death row (three), Colorado apparently spends approximately four million dollars a year on capital costs.¹³⁵ The proposed legislation mandated that the money saved by abolishing the death penalty would be dedicated to funding eight state investigators who would reopen more than 1,400 cold case homicides.¹³⁶ Although the measure was barely defeated, the striking aspect of the Colorado experience was the abolitionist strategy to drive home the opportunity costs of retention by highlighting in concrete terms the alternative goods that death penalty dollars could purchase.

References to the issue of cost have exploded over the past two years in response to the global fiscal crisis. Cash-strapped states face increasing pressure to moderate their use of the death penalty or abandon it altogether. Recent editorials in California, with titles such as “Save \$1 Billion in Five Years—End the Death Penalty,”¹³⁷ and “California Can’t Afford the Death Penalty,”¹³⁸ capture the prevailing mood. Similar editorials have appeared throughout the country lamenting the expense of capital punishment. The National Coalition to Abolish the Death Penalty—the leading abolitionist organization in the country—now lists as its first (of ten) public policy arguments against the death penalty: “Executions are carried out at a staggering cost to taxpayers.”¹³⁹ The Death Penalty Information Center, which both reports on, and editorializes about, the American death penalty, has stepped up its coverage of the financial implications of capital

¹³³ Galen Barnett, *A Golden Opportunity to End the Death Penalty*, OREGONIAN, Apr. 6, 2009, http://www.oregonlive.com/opinion/index.ssf/2009/04/a_golden_opportunity_to_end_th.html.

¹³⁴ Morgan Carroll & Paul Weissmann, *Revisit Death Penalty Bill*, DENVER POST, May 21, 2009, at B11.

¹³⁵ *Id.*

¹³⁶ Tim Hoover & John Ingold, *Ritter Keeps Death-Penalty View to Himself*, DENVER POST, May 8, 2009, at 4B.

¹³⁷ Natasha Minsker, *Save \$1 Billion in Five Years—End the Death Penalty in California*, L.A. PROGRESSIVE (May 25, 2009), <http://www.laprogressive.com/healthcare-issues/save-1-billion-in-five-years%E2%80%94end-the-death-penalty-in-california/>.

¹³⁸ John Van de Kamp, *California Can’t Afford the Death Penalty*, PRESS DEMOCRAT, June 14, 2009, at B7.

¹³⁹ *Death Penalty Overview: Ten Reasons Why Capital Punishment is Flawed Public Policy*, NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, <http://www.ncadp.org/index.cfm?content=5> (last visited Nov. 10, 2010).

punishment. The heading of its recently released year-end summary declared: “Fewest Death Sentences Since Death Penalty Reinstated in 1976; As Costs Rose in a Time of Economic Crisis, Eleven States Considered Abolishing the Death Penalty.”¹⁴⁰ This coverage followed the release of the Center’s earlier special report on the cost issue: “Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis.”¹⁴¹

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

Thus, while the cost argument’s appearance may be the product of changed fiscal realities, it owes its special prominence and power to the way in which it focuses on uncontroversial, instrumental, collective goals rather than contentious claims about disputed individual “rights.” The recent effort in Colorado to tie legislative repeal of the death penalty to increased funding for the investigation of unsolved murders is a clear example of the turn from focusing on the condemned to focusing on alternative collective goods. In terms of practical politics, this change in focus toward instrumental argument has created a “bigger tent” for those concerned about capital punishment. To accommodate this broader constituency (including politicians who have no interest in rejecting the death penalty as inhumane), advocates for withdrawal of the death penalty

¹⁴⁰ *The Death Penalty in 2009: Year End Report*, DEATH PENALTY INFORMATION CENTER (2009), <http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf>.

¹⁴¹ RICHARD C. DIETER, *SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS* (Death Penalty Information Center 2009), available at <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.

have recast their efforts in terms of “repeal” rather than “abolition.” The repeal movement—with its focus on pragmatic reassessment of the costs and benefits of the death penalty—has in many respects supplanted the narrower and less successful “abolition” movement, which, as the term connotes, has long been rooted in a moral imperative comparable to the effort to end slavery.

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

The claim of deterrence by death penalty supporters has long been contested. In the era preceding *Furman*, the claim that deterrence of murder was a justification for retaining capital punishment was generally accepted to be unproven, perhaps even unprovable.¹⁴² More recently, many economists and statisticians have revisited the question whether the death penalty deters, with some studies purporting to find statistically significant deterrent effects. Although these studies have been subject to withering criticism from detractors, opponents of the death penalty have found themselves increasingly on the defensive about the possible value of the death penalty as a deterrent.¹⁴³ The cost argument provides a powerful

¹⁴² See Steiker & Steiker, *supra* note 90, at 156-57 (describing the pre-*Furman* consensus on the deterrence question based on the work of Thorsten Sellin).

¹⁴³ For summaries of both the new generation of deterrence studies and the criticisms the studies have engendered, see John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 804-820 (2005); Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital*

rejoinder to the deterrence argument, because the unstated premise of the deterrence claim is that the resources expended on the death penalty are roughly comparable to those incurred via other sanctions. If capital punishment were no more expensive than life imprisonment, then it would seem natural to focus largely on their comparative efficacy as alternative punishment options. But if abolishing capital punishment would result in cost savings above and beyond the costs of lifetime incarceration, the additional money saved could be used for other projects—whether law enforcement initiatives such as Colorado’s proposed “cold case” funding or social programs such as funding for early childhood education—that might offer better crime control than the foregone executions. Thus, even *granting* the claim that the death penalty deters homicide better than life imprisonment, opponents can still argue that the cost savings produced by abolition would yield maximum benefits to public safety. The cost argument thus allows abolitionists to put deterrence in its (subsidiary) place in the larger calculus of crime prevention and to differentiate being “smart on crime” from being “tough on crime.”

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

B. THE DEATH ROW PHENOMENON: A DISTINCTIVE FEATURE OF MODERN CAPITAL PRACTICE

The modern death penalty debate does not present a choice between lengthy imprisonment and execution. Rather, the choice is between lengthy

Punishment, 4 OHIO ST. J. CRIM. L. 255, 269-89 (2006); Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 ANN. REV. L. SOC. SCI. 151, 153-163 (2005).

imprisonment and lengthy imprisonment *followed by* execution. Or, more accurately, the choice is between (1) lengthy imprisonment, and (2) lengthy imprisonment under extreme conditions (usually solitary confinement) followed by execution, or death in prison while still under a sentence of death. The unprecedented length of the interval between sentence and execution, as well as the increasingly harsh conditions of death row, have generated a new and powerful concern about the American death penalty—a concern that might well have significant constitutional ramifications.

At the outset, it must be conceded that concerns about the interval between pronouncement of sentence and execution are not entirely “new.” Over a century ago, the Supreme Court invalidated the application of a Colorado law that had altered the post-sentence protocol for consummating death sentences with executions.¹⁴⁴ The law became operative after the petitioner had committed his offense and been sentenced to death. Among the changes in the protocol were substituting imprisonment in the county jail with solitary confinement in the state penitentiary and giving the warden discretion to set the date of execution whereas previously it had been fixed by the court. The Supreme Court found that both of these changes violated the Ex Post Facto Clause of the Constitution because they amounted to “greater punishment.” The Court explained that solitary confinement had long been viewed as an additional punishment, citing an English statute passed under King George II that added solitary confinement to the punishment of death as a “further terror and peculiar mark of infamy” to deter “the horrid crime of murder [that had] of late been more frequently perpetrated.”¹⁴⁵ The Court also cited the negative experiences associated with solitary confinement in this country, describing how, in prisons housing non-capital inmates, a

considerable number of the prisoners [subjected to solitary confinement] fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others become violently insane . . . while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.¹⁴⁶

On the second issue, the Court insisted that affording the warden discretion to determine when the execution would be held (and to keep the date secret from the prisoner and the public) increased the petitioner’s punishment because “one of the most horrible feelings to which [the condemned] can be subjected during [the time confined in the penitentiary awaiting execution]

¹⁴⁴ *In re Medley*, 134 U.S. 160 (1890).

¹⁴⁵ *Id.* at 170.

¹⁴⁶ *Id.* at 168.

is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place.”¹⁴⁷

What makes the Court’s ruling extraordinary in light of contemporary practice is not the suggestion that solitary confinement and uncertainty as to the date of execution constitute additional punishments. It is the fact that the Colorado law set an outside limit of four weeks before the execution would be conducted and the warden’s discretion amounted only to deciding when, after at least two but not more than four weeks of confinement, the execution would be conducted.

Today, of course, the interval between sentence and execution is often measured in decades rather than weeks (as in Colorado of the late nineteenth century) or months and years (as in the practice preceding *Furman*). Moreover, the interval continues to increase; inmates executed in 2007 had spent an average of 153 months on death row, compared to an average of about 140 months in 2000 and 95 months in 1990.¹⁴⁸ In addition, the conditions of death row confinement have become appreciably worse over the past several decades. Solitary confinement for as much as twenty-three hours a day has become the national norm, and most states prohibit death-sentenced inmates from group recreation or having any contact visits with family members or friends. Until recently, Texas, which houses the third largest death row in the country, had permitted death-sentenced inmates with good disciplinary records to participate in a work program (a garment factory) and group recreation. But the state eliminated both programs in the wake of an escape incident from death row in 1998; as a result, death row was moved to a “super-max” facility in which death-sentenced inmates are locked in their cells twenty-three hours a day and are permitted no physical contact with any other persons.

As the American death penalty stabilized in the two decades following *Furman*—in the sense that questions about the constitutionality of the punishment itself receded from view—concerns about the cruelty and constitutionality of prolonged death row confinement began to be voiced. One catalyst for such reflections was the decision of the Privy Council in the early 1990s declaring that two Jamaican death sentences should be overturned based on the “inhuman” length of confinement awaiting execution (at the time of the decision, the appellants had spent about fourteen years in prison post-trial).¹⁴⁹ American death-row prisoners had

¹⁴⁷ *Id.* at 172.

¹⁴⁸ *Time on Death Row*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/time-death-row#INTRODUCTION> (last visited Aug. 18, 2010).

¹⁴⁹ *Pratt v. Att’y Gen. for Jamaica*, [1994] 2 A.C. 1 (P.C.) 4 (en banc).

challenged their length of confinement prior to the Privy Council decision,¹⁵⁰ perhaps most famously in the efforts of Caryl Chessman to avoid execution in the early 1960s,¹⁵¹ but the issue had very little traction in the state or federal courts. Most courts embraced the view expressed in Chessman's case that "[i]t may show a basic weakness in our government system that a case like this takes so long, but I do not see how we can offer life (under a death sentence) as a prize for one who can stall the processes for a given number of years."¹⁵²

The Privy Council decision was important not simply because it found the lengthy imprisonment intolerable, but because it identified the problem as a systemic one in the Jamaican system. The Privy Council noted that numerous other prisoners had spent at least ten years awaiting execution and that such delays "had never happened in Jamaica before independence" or in the United Kingdom when it administered the death penalty.¹⁵³ Chessman's lengthy death-row incarceration (twelve years) had been aberrational. By the early 1990s, though, such incarceration in the U.S. while awaiting execution was increasingly becoming the norm.

Soon after the Privy Council decision, Justice Stevens announced his interest in the constitutional question surrounding prolonged death-row incarceration in *Lackey v. Texas*,¹⁵⁴ a case in which the Court denied certiorari. He did not dissent from the Court's refusal to hear the claim of the inmate (who had spent seventeen years on death row), recognizing that the "novel" issue should percolate in the state and lower federal courts.¹⁵⁵ He also identified some issues he thought relevant to the claim, such as the reasons for the delay in a particular inmate's case (e.g., whether the inmate had submitted frivolous filings or whether the State's negligent or deliberate actions had contributed to the delay).¹⁵⁶ But his agnosticism about the claim was tempered by his suggestions of its merit, citing the rarity of delays at the time of the Founding, the suggestion in *Medley* that prolonged uncertainty about one's fate generates "horrible feelings," and

¹⁵⁰ See, e.g., *Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1990) (rejecting a constitutional claim based on length of death-row incarceration).

¹⁵¹ *Chessman v. Dickson*, 275 F.2d 604 (9th Cir. 1960).

¹⁵² *Id.* at 607.

¹⁵³ *Pratt*, 2 A.C. at 17 ("The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal even to the House of Lords within a matter of months. Delays in terms of years are unheard of").

¹⁵⁴ 514 U.S. 1045 (1995).

¹⁵⁵ *Id.* at 1047.

¹⁵⁶ *Id.*

the persuasive power of the Privy Council decision.¹⁵⁷ Justice Breyer also indicated his agreement “that the issue is an important undecided one.”¹⁵⁸

Justice Stevens’s opinion respecting the denial of certiorari prompted inmates to raise “*Lackey*” claims with increasing frequency. Together with the Privy Council decision, Stevens’s opinion also led to more extensive scholarly attention to both the psychological and legal aspects of the “death row phenomenon”—the physical and emotional consequences of prolonged incarceration under a sentence of death. Over the past fifteen years, Justices Stevens and Breyer have repeatedly called for the Court to address the issue, with Justice Breyer characterizing the claim as “serious”¹⁵⁹ and “particularly strong,”¹⁶⁰ and Justice Stevens ultimately declaring that prolonged death row incarceration is “unacceptably cruel.”¹⁶¹

What should we make of the repeated, unsuccessful efforts to bring the *Lackey* claim before the Court, with the most recent efforts¹⁶² occurring last year? The claim clearly has enough staying power to command the sustained attention of members of the Court, and yet has not been embraced by any lower courts or been advanced as a major anti-death penalty argument in public discourse. On the one hand, the problem is getting worse. Whereas few inmates had been on death row as long as twenty years at the time *Lackey* was (not) decided, there are now considerable numbers of inmates who have been on death row at least two decades. Indeed, William Lee Thompson, the inmate whose *Lackey* claim was most recently before the Court in 2009, arrived on death row in 1976, about two years before *Lackey*; the additional fourteen year interval between the denial in *Lackey*’s case and the denial in his case meant that Thompson had spent over thirty-two years on death row (the *Lackey* claim itself has now been subject to prolonged limbo). In addition, death-row confinement is much more severe than in the pre-*Lackey* era. Justice Stevens made no mention of death-row conditions in his *Lackey* opinion, but his *Thompson* opinion describes the petitioner’s “23 hours per day in isolation in a 6- by 9-foot cell.”¹⁶³

¹⁵⁷ *Id.* at 1045-47.

¹⁵⁸ *Id.* at 1047.

¹⁵⁹ *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari).

¹⁶⁰ *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari).

¹⁶¹ *Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., opinion respecting denial of certiorari).

¹⁶² *Johnson v. Bredesen*, 130 S. Ct. 541 (2009) (Stevens, J., joined by Breyer, J., statement respecting the denial of certiorari); *Thompson*, 129 S. Ct. at 1300.

¹⁶³ 129 S. Ct. at 1299.

On the other hand, the repeated unwillingness of other members of the Court to hear the *Lackey* claim reflects some obvious difficulties underlying the claim. There is the Chessman problem, the reluctance to reward inmates who manage to keep their appeals (and themselves) alive long enough to challenge prolonged incarceration. Justice Thomas, who has repeatedly criticized the Stevens-Breyer effort to bring the claim before the Court, has been particularly vehement in highlighting this concern, insisting that he is “unaware of any support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”¹⁶⁴ But even if that problem could be solved (by focusing on delays wholly or mostly attributable to the state, or by rejecting the notion that seeking enforcement of constitutional guarantees forfeits the right against excessively prolonged death-row incarceration), there remains the line-drawing problem. Does the Constitution set an outside limit on death-row incarceration (five years? twenty years?)? If a “rule” could be devised, how would the rule affect the behavior of lawyers and courts? Would the recognition of a *Lackey* right to be free of excessive death-row incarceration lead to summary consideration of constitutional claims? One of the likely reasons why the “prolonged incarceration” claim has not been vigorously embraced by abolitionists (the National Coalition Against the Death Penalty omits this argument in its list of ten reasons to oppose the death penalty¹⁶⁵) is that one obvious response to the claim is to truncate protections in capital cases. Moreover, specific concerns about the deprivations of death row (particularly solitary confinement) are also unlikely to find much resonance in either legal or popular opinion, given the extent to which concerns about prison conditions generally fall on deaf ears in both arenas. Although states do not make solitary confinement a prescribed punishment for given offenses, solitary confinement has become increasingly common as an instrument of control in prisons. The general deference afforded to prisons in maintaining order and discipline (both as a matter of law and public opinion) undermines any challenge to the conditions of confinement on death row.

The real power of the *Lackey* claim is not in its potential to yield fruit as a cognizable claim of individual deprivation. Rather, the issue sheds light on the dysfunctional character of our capital system. In *Lackey* itself,

¹⁶⁴ *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari).

¹⁶⁵ *Death Penalty Overview: Ten Reasons Why Capital Punishment is Flawed Public Policy*, NATIONAL COALITION TO ABOLISH THE DEATH PENALTY 2010), <http://www.ncadp.org/index.cfm?content=5>.

Justice Stevens, echoing Justice White's opinion in *Furman*, intimated that the death penalty might become an unconstitutionally cruel punishment if it "ceases realistically to further" the purposes of retribution or deterrence.¹⁶⁶ Justice White had made this argument in light of the rarity of death sentences and executions in the era preceding *Furman*. The increased death-sentencing in the wake of *Furman* likely persuaded Justice White that retention would not, as in the pre-*Furman* era, lead to "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."¹⁶⁷ But if executions are endlessly delayed, and carried out only after inmates have already suffered extensive, long-term deprivation, it is hard to see what additional retributive or deterrent value is secured by consummating the delayed executions. In this respect, the argument about prolonged death row incarceration draws attention to the inability of states to carry out executions in a sufficiently timely fashion to claim any public benefit. Concerns about the "death row phenomenon"—the cruelty visited upon particular inmates—is a window into the failure of the American death penalty to satisfy the minimal conditions for its continued use.

It is thus not surprising that Justice Stevens, who had voted to uphold the death penalty in 1976,¹⁶⁸ and who later declared that the American death penalty was no longer constitutionally sustainable in 2008,¹⁶⁹ wove his argument about prolonged incarceration into his broader critique of the American system of capital punishment. In *Baze*, Justice Stevens argued that the retention of the death penalty in the United States was "the product of habit and inattention rather than an acceptable deliberative process"¹⁷⁰ because the penalty no longer served the purposes of incapacitation, deterrence, or retribution. It failed along these lines, in Justice Stevens's view, because the widespread embrace of life-without-possibility-of-parole sentences had rendered the incapacitation goal unnecessary, the claim of deterrence had not been established, and the retributive value of the death penalty was undercut by its sanitized administration in the modern era.¹⁷¹ In *Thompson*, Justice Stevens's second-to-last word on *Lackey*,¹⁷² he

¹⁶⁶ *Lackey v. Texas*, 514 U.S. 1045, 1046 (1995) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

¹⁶⁷ *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring).

¹⁶⁸ *Gregg v. Georgia*, 428 U.S. 153, 206-208 (1976); *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

¹⁶⁹ *Baze v. Rees*, 553 U.S. 35, 78, 86 (2008) (Stevens, J., concurring in the judgment).

¹⁷⁰ *Id.* at 78.

¹⁷¹ *Id.* at 78-81.

¹⁷² Justice Stevens's final opinion respecting the Court's refusal to entertain a *Lackey* claim was issued in *Johnson v. Bredesen*, 130 S. Ct. 541 (2009), in which he criticized the

invoked his dissent in *Baze*, arguing that “the diminished justification for carrying out an execution after the lapse of so much time”¹⁷³ reinforced his view that the death penalty cannot withstand review via “an acceptable deliberative process.”¹⁷⁴

Interestingly, Justice Stevens’s position finds some support from an otherwise unlikely ally. In the first few years following the reinstatement of the death penalty in *Gregg v. Georgia*¹⁷⁵ and its companion cases,¹⁷⁶ Justice Rehnquist expressed concern about what he then regarded as inordinate delays in capital litigation. Writing in 1981—fewer than five years post-*Gregg* and at a time in which no inmate had spent as much as a decade on death row—Justice Rehnquist lamented that “hundreds of prisoners condemned to die [] languish on the various ‘death rows,’ [and] few of them appear to face any imminent prospect of their sentence being executed.”¹⁷⁷ Presaging Justice Stevens’s later critique, Justice Rehnquist went on to say that delays between sentence and execution undermine the deterrent and retributive value of the death penalty.¹⁷⁸ Justice Rehnquist made these observations not to lay the building blocks of a constitutional assault on the death penalty, but to encourage the Court to use its discretionary jurisdiction to accelerate executions. His opinion—like many of those lamenting the failure of the Court to review *Lackey* claims—was framed as a dissent from the Court’s denial of certiorari in a capital case. The case, *Coleman v. Balkcom*,¹⁷⁹ has largely been lost to history, even though it contains one of the more striking suggestions in capital litigation. Although Justice Rehnquist was unpersuaded that the Georgia courts had committed federal constitutional error in the petitioner’s case, he argued that the Court should grant certiorari in the case to expedite consideration of

refusal of the lower federal court to review petitioner’s *Lackey* claim under 42 U.S.C. § 1983.

¹⁷³ *Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (2009).

¹⁷⁴ *Id.*

¹⁷⁵ 428 U.S. 153, 206-08 (1976).

¹⁷⁶ *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

¹⁷⁷ *Coleman v. Balkcom*, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari).

¹⁷⁸ *Id.* at 959 (“When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system.”); *id.* at 960 (“There can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution.”).

¹⁷⁹ 451 U.S. 949 (1981).

his claims and to speed his execution.¹⁸⁰ According to Justice Stevens, who agreed with the Court's denial of certiorari, Justice Rehnquist was advancing the proposition "that we should promptly grant certiorari and decide the merits of every capital case coming from the state courts in order to expedite the administration of the death penalty."¹⁸¹ Justice Stevens rejected this call, observing that "the Court wisely declines to select this group of [capital] cases in which to experiment with accelerated procedures."¹⁸² Interestingly, *Coleman* is the first case in which Justice Stevens confronted the nascent *Lackey* problem, and he seemed to acquiesce in the "inevitab[ility] that there must be a significant period of incarceration on death row during the interval between sentencing and execution."¹⁸³

Justice Rehnquist's attempt to accelerate federal review of state death sentences was on its own terms designed to give states the freedom to reap the benefits of capital punishment. But lurking in the opinion is undoubtedly also the concern that continued extensive delays in the administration of the death penalty might call into question the desirability—and perhaps constitutionality—of the death penalty itself. Justice Rehnquist's lament that the Court's constitutional regulation of the death penalty had "made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes"¹⁸⁴ seems almost quaint given how early his concerns were voiced in the modern experiment with federal constitutional regulation. And it certainly is ironic that Justice Stevens, who rejected the call for accelerated procedures and accepted as inevitable some significant pre-execution incarceration, would insist almost thirty years later that such prolonged incarceration, together with other dysfunctional features of states' death penalty practice, had rendered the American system of capital punishment unconstitutional.

Ultimately, then, the significance of the "death row phenomenon" argument is the way in which it highlights the "American capital punishment phenomenon"—the prevailing fragility of the death penalty in this country given the ongoing, pronounced inability of states to

¹⁸⁰ *Id.* at 963 ("If capital punishment is indeed constitutional when imposed for the taking of the life of another human being, we cannot responsibly discharge our duty by pristinely denying a petition such as this, realizing full well that our action will simply further protract the litigation.").

¹⁸¹ *Id.* at 949 (Stevens, J., concurring).

¹⁸² *Id.* at 953.

¹⁸³ *Id.* at 952.

¹⁸⁴ *Id.* at 959 (Rehnquist, J., dissenting).

consummate death sentences with executions. Even high executing states such as Texas and Florida have inmates who have been on death row since the late 1970s (as reflected by the fact that Lackey himself was a Texas inmate and another *Lackey* dissent-from-denial, in *Knight v. Florida*,¹⁸⁵ came to the Court from the Florida Supreme Court). The problem is particularly pronounced in states such as California and Pennsylvania, where death-sentencing is high and executions are low or non-existent. Indeed, the Ninth Circuit *Capital Punishment Handbook* has a separate section called “Tenure on Death Row,”¹⁸⁶ replete with citations to relevant cases and articles.

Neither his comments in *Baze* nor his statement in *Thompson* were joined by any other members of the Court, but Justice Stevens’s attack on the *administration* of the death penalty (rather than the death penalty itself) resonates with recent Court opinions expressing concern about the American death penalty. Over the past ten years, the Court has imposed strict proportionality limits on the death penalty, eliminating its availability for juveniles,¹⁸⁷ persons with mental retardation,¹⁸⁸ and for non-homicidal offenses against persons, such as the rape of a child.¹⁸⁹ Dissenting justices have also expressed concerns about the lack of safeguards against the execution of the innocent,¹⁹⁰ the potential disconnect between capital sentences and community values,¹⁹¹ and continuing arbitrariness in the distribution of death sentences and executions.¹⁹² It seems likely that any future effort to radically limit or constitutionally abolish the death penalty will be rooted not in a judicial declaration that the death penalty itself is inhumane or violative of human dignity, but in an opinion similar to the ones authored by Justice Stevens cataloguing the failure of the American death penalty to secure the goals the death penalty is said to advance, or to do so in an acceptable way. Thus, the lingering claim of unacceptably cruel prolonged death row incarceration remains a potent reminder of the unmet promises of the American death penalty, and it could ultimately provide a wedge for reconsideration of the death penalty’s ultimate constitutionality.

¹⁸⁵ 528 U.S. 990 (1999).

¹⁸⁶ Office of the Circuit Executive, U.S. Court of Appeals for the Ninth Circuit, Ninth Circuit Capital Punishment Handbook, at Section 1.9 (Tenure on Death Row), *available at* <http://207.41.19.15/web/sdocuments.nsf/3779242195bb2339882568480080d277/24338af313e4f4f588256849006a4914?OpenDocument>.

¹⁸⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁸⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁸⁹ *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).

¹⁹⁰ *Kansas v. Marsh*, 548 U.S. 163, 207 (2006) (Souter, J., dissenting).

¹⁹¹ *Ring v. Arizona*, 536 U.S. 584, 618 (2002) (Breyer, J., concurring in judgment).

¹⁹² *Id.* at 617.

Outside of the courts, concerns about prolonged death-row incarceration have contributed to a powerful new policy argument against the death penalty: the claim that the death penalty disserves the families and loved ones of murder victims. For many years, the claim that the death penalty should be retained to ease the pain of the victim's family went largely unchallenged and unanswered. Over the past two decades, though, coinciding with the dramatic expansion of the length of death-row incarceration, many opponents of the death penalty have highlighted the pain and frustration for victims' families caused by extensive post-trial delays. A recent editorial opposing capital punishment by a former district attorney in Oregon captures this new form of argument (as well as the cost argument): "Let me say that my compunctions primarily are not on moral or ethical grounds involving putting a convicted murderer to death, but on the way it is used (or not used) in this state, and the enormous expense in dollars and emotional capital for the families of homicide victims."¹⁹³ In a recent California case, the father of the murder victim agreed with the district attorney's decision to accept a non-death plea in the multiple victim case because of the likely length of appeals.¹⁹⁴ The father stated that "[w]hile our unequivocal first choice is the death penalty, we acknowledge that in California that penalty has become an empty promise," and the district attorney indicated that her decision to accept the plea was motivated in part to spare the victims' families the years of "suffering" that post-trial review would entail. In New Jersey, Kathleen Garcia, a member of the state's Death Penalty Study Commission who had lost a family member to murder, based her support of repeal on the harm to victims' families caused by delays in the capital system. In an editorial directed to the reconsideration of the death penalty in New Hampshire, Garcia wrote:

Make no mistake—I am a conservative, a victims' advocate and a death penalty supporter. But my real life experience has taught me that as long as the death penalty is on the books in any form, it will continue to harm survivors. For that reason alone, it must be ended.¹⁹⁵

¹⁹³ Dan Glode, Editorial, *Death Penalty Conflicts*, NEWPORT NEWS TIMES, June 25, 2010, http://www.newportnewstimes.com/v2_news_articles.php?heading=0&story_id=23050&page=72.

¹⁹⁴ Teri Figueroa & Mark Walker, *State's Death Penalty Lacks Urgency: Chances of Dying from Old Age, Sickness or Suicide Are Greater than Lethal Injection*, NORTH COUNTY TIMES, Apr. 17, 2010, http://www.nctimes.com/news/local/sdcounty/article_f54f505a-2993-5c54-a248-ca751d3091ed.html.

¹⁹⁵ Kathleen M. Garcia, Editorial, *Death Penalty Hurts—Not Helps—Families of Murder Victims*, NASHUA TELEGRAPH, Mar. 28, 2010, <http://www.nashuatelegraph.com/opinion/perspectives/687551-263/death-penalty-hurts--not-helps-.html>.

Thus, the argument about the excessive cruelty to prisoners caused by delays in the system has lent significant support to the claim that our present system is excessively cruel to the families and loved ones of victims. The irony, of course, is that the prisoners' suffering is insufficient to console the survivors' unmet expectation of, and hope for, executions, but the suffering on both sides leads to the same place—great reservations about the sustainability of the death penalty.

Contemporary death penalty discourse thus increasingly avoids conflict over the abstract rightness or wrongness of punishing crime with death. The debate over capital punishment has become a debate about the American system of capital punishment (with its costs and delays), and this turn has provided momentum to the repeal/abolition side. The future stability of the death penalty depends either on a real shift on the ground in the economics and efficiency of the death penalty or on the ability of supporters to refocus the American death penalty debate on abstract retributive arguments, with their longstanding popular appeal in American culture, emphasizing that some crimes can be appropriately met only with death.

IV. CONCLUSION

We have paid scant attention to the continuity across generations in arguments about the morality and wisdom of capital punishment. As any high school debater could attest, there is a set of relatively stable arguments that appear and reappear with regularity in different times and places. However, the foregoing discussion puts to rest the much stronger notion that death penalty debates are entirely static. Rather, it is clear that there are discontinuities across eras—discontinuities so dramatic that participants from an earlier era could not have anticipated, and those from a later era might not even remember, some of the central claims and arguments made at a different time. So, as we have reflected on the nature of capital punishment on the one-hundredth anniversary of this important journal, we have highlighted ways in which the discontinuity in arguments surrounding the death penalty has revealed significant discontinuities in the broader legal and political culture. In our examination of the changing debates, we have illuminated the different fundamental values that were thought to be implicated by the abolition or retention of the death penalty at different times. In addition, we have uncovered the ways in which debates about the death penalty are not hermetically sealed from other controversial issues of the day, such as the pressing problem of lynchings in the early twentieth century, and the deep financial crisis in the early twenty-first century. The metamorphosis of the values and issues involved, and the terms in which

they are addressed, shows that there is surprising elasticity in what is encompassed and at stake in death penalty debates over time.

Moreover, discontinuities in discourse can be understood only in the full context of how the death penalty was actually administered in the different eras. The debates reveal enormous changes in the practice of the death penalty on the ground, including the types of offenses thought to be death-worthy, the kinds of victims and perpetrators involved, the procedures for adjudicating guilt and sentence, the modes of execution, and the nature of death row confinement and prisons more broadly—in short, the entire criminal justice apparatus surrounding the death penalty. The debates about the death penalty in different eras thus shed light not only on the values and issues that are thought to be implicated by the practice of capital punishment in the abstract, but also on the particularities of the practice of capital punishment at a given time. In other words, changes in discourse reveal not only what capital punishment meant or symbolized but also what capital punishment was or is.

When we look back one hundred years to Ed Johnson's rudimentary trial and extrajudicial execution in the face of the Supreme Court's effort to exercise jurisdiction over his case, we cannot help being struck by the foreignness of Ed Johnson's world. It is easier, however, to forget the strangeness of the discourse of the past, in part because words fade more quickly than deeds. By being attentive to the actual debates of the past, we can recapture the particularity of the everyday world in which the death penalty operated, and engage what the abolition or retention of the death penalty meant at different historical moments. Such reflection also allows us to see how the language and arguments of present death penalty discourse reveal important aspects of our own world. The foreignness of the past in both practice and discourse helps reveal the contingency of the present and suggests new possibilities for the future.

