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The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century

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INTRODUCTION

*Now this is not the end. It is not even the beginning of the end.
But it is, perhaps, the end of the beginning.*

– Winston Churchill, 1942

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At 11:08 p.m. on September 21, 2011, amidst national and international media attention, the state of Georgia killed Troy Davis, despite evidence suggesting that he was not guilty.¹ The U.S. Supreme Court, while delaying Mr. Davis's execution for a few hours, failed to intervene. Unfortunately, Mr. Davis's execution was not unique or even unusual. Many are on death row or have gone to their deaths despite questionable evidence,² prosecutorial misconduct,³ jury selection problems,⁴ incompetent defense counsel,⁵ defense counsel burdened by conflicts of interest,⁶ as well as other procedural and due process defects.⁷ However, as reflected in the media and public reaction to Mr. Davis's death, his execution occurs at an important juncture in the macabre world of capital punishment. Mr. Davis's death symbolizes the end of the beginning of America's failed experiment with the modern death penalty.

The United States has been executing people for thirty-five years under the modern death penalty regime that killed Mr. Davis. For much of that time, politicians and a majority of the American public appeared to embrace capital punishment with great enthusiasm. Slowly over the past ten years, however, America's relationship with capital punishment has frayed, and our conversation about the death

¹ Kim Severson, *Davis Is Executed in Georgia*, N.Y. TIMES, Sept. 22, 2011, at A1.

² For example, see the case of Todd Willingham executed in Texas in 2004. See David Grann, *Trial by Fire: Did Texas Execute the Wrong Man*, NEW YORKER, Sept. 7, 2009, at 42.

³ In 1998, Florida executed Willie Darden whose capital trial was rife with prosecutorial misconduct. See *Darden v. Wainwright*, 477 U.S. 168 (1986).

⁴ Florida killed Johnny Witt in 1995. The Supreme Court eased the standards for death qualifying a jury in a death penalty case and thus rejected Witt's claim that the trial court committed constitutional error in dismissing certain jurors for cause based on their views about the death penalty. See *Wainwright v. Witt*, 469 U.S. 412 (1985).

⁵ Missouri executed Alan Bannister in 1997. Bannister's lawyer rarely spoke with his client prior to trial, presented no defense to the intentional murder charge, and in sentencing presented no mitigating evidence. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 307–10 (Harvard Univ. Press 2002).

⁶ Virginia killed Walter Mickens even though defense counsel failed to disclose to Mickens that counsel previously represented the murder victim. See *Mickens v. Taylor*, 535 U.S. 162 (2002).

⁷ Georgia killed Warren McCleskey in 1991. By a five-to-four vote, the Supreme Court affirmed McCleskey's conviction and death sentence despite evidence of racial bias in the death sentencing process of Georgia. Justice Powell, who voted with the majority in *McCleskey*, later stated that if he could go back, he would change his vote in that case. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (Charles Scribner's Sons 1994).

penalty has shifted.⁸ Doubts about the accuracy of convictions and death sentences, worries about procedural safeguards, and questions about the high cost of the death penalty have emerged. This observation about the current state of the death penalty debate does not mean that the death penalty is near its end; it is not, at least not yet. But what does appear to be happening is that the country's initial infatuation with the death penalty is over and a new phase of the modern death penalty has begun.

This shift not only may foreshadow the increased probability of abolition of the death penalty at least in some parts of the United States, but also it may play an important role in the development of the Eighth Amendment and the protection of human rights. The protection of human rights and human dignity is a dynamic process engaging both democratic and judicial policy and decision-making processes. This interplay is particularly interesting in light of the recent actions of the legislatures of New Jersey,⁹ New Mexico,¹⁰ and Illinois,¹¹ which have now legislatively abolished the death penalty, as well as the New York legislature's decision not to revise its death penalty statute after it was struck down by the New York Court of Appeals.¹²

In the parlance of the Eighth Amendment, the determination of human dignity and the corresponding constitutional constraints on government to protect that dignity depends on whether there exists an evolving standard of decency reflecting the progress of a maturing society that would limit or outright ban a particular form of punishment such as torture or capital punishment under certain circumstances.¹³ This long-standing, well-accepted principle reflects

⁸ It is of interest to note that a recent poll in California indicated that while sixty-eight percent of voters support the death penalty, voters prefer life without the possibility of parole to the death penalty by forty-eight percent to forty percent. Marisa Lagos, *Field Poll: Less Voter Support of Death Penalty*, S.F. CHRON., Sept. 29, 2011, at C2.

⁹ New Jersey abolished the death penalty in 2007. See N.J. STAT. ANN. § 2C:11-3 (West 2007). For a discussion of the development of abolition in New Jersey see *infra* Part IV.B.

¹⁰ New Mexico abolished the death penalty in 2009. See *infra* Part IV.A.

¹¹ Illinois abolished the death penalty in 2011. See *infra* Part IV.C.

¹² See *infra* notes 128–32 and accompanying text.

¹³ See *Graham v. Florida*, 130 S. Ct. 2011 (2010) (prohibiting the imposition of life without the possibility of parole on non-homicide juvenile offenders); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting the imposition of the death penalty for ordinary offenders whose actions do not result in death); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (prohibiting mandatory death penalty); *Furman v. Georgia*, 408 U.S. 238

an understanding that the Eighth Amendment is not static but rather evolves to protect and reflect current human rights norms.¹⁴ The progression toward greater human rights protection under the Eighth Amendment does not often come about simply because of some top-down decision-making process; rather, it usually arises out of the efforts of a few individuals, lawyers, legislators, and organizations committed to protecting human rights and dignity.

This Article examines the evolution of the death penalty in the United States, focusing on the modern death penalty regime that the U.S. Supreme Court sanctioned in 1976. As Mr. Davis's execution demonstrates, the conversation around the death penalty has undergone a marked change in the last decade. Since 2007, a few states have abolished the death penalty, signaling an important turning point in America's modern experiment with capital punishment. This Article traces these developments and the effect they may have on the future of the U.S. death penalty and the protection the Eighth Amendment affords.

(1972) (prohibiting the death penalty in a system allowing unfettered jury sentencing discretion); *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (“Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.”).

¹⁴ See, e.g., *Graham*, 130 S. Ct. at 2021 (“To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to “the evolving standards of decency that mark the progress of a maturing society.”); *Kennedy*, 554 U.S. at 419 (asserting that whether the prohibition against cruel and unusual punishment “has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that ‘currently prevail’”); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (“[W]e have held repugnant to the Eighth Amendment punishments which are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society’”); *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (“The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” (citation omitted)); *Weems v. United States*, 217 U.S. 349, 373 (1910) (“This was the motive of the [Cruel and Unusual Punishment C]lause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts’, or to prevent only an exact repetition of history.”). It is worth noting that Justices Scalia and Thomas have questioned this application of the Eighth Amendment, although their position is a minority view and inconsistent with doctrine spanning more than one hundred years. See, e.g., *Graham*, 130 S. Ct. at 2044–46 (Thomas, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 607–08 (2005) (Scalia, J., dissenting).

I

HISTORICAL DEVELOPMENT OF CAPITAL PUNISHMENT IN THE
UNITED STATES

Long before the ratification of the Constitution and the Bill of Rights, societies, including those in the Americas, punished offenders by killing them. Indeed, the Fifth Amendment of the U.S. Constitution provides that no person shall “be deprived of life, liberty or property, without due process of law,” reflecting a recognition of government’s power to take a human life. Yet, the consideration and application of the death penalty, even in early American history, proved more complicated than simply recognizing and accepting that governments could execute an individual as punishment.¹⁵

Even in the late 1700s, Americans debated the morality, appropriateness, and efficacy of the death penalty.¹⁶ Of particular note during this time period was *On Crimes and Punishments and Other Writings* by Cesare Beccaria.¹⁷ Influenced by the philosophical writings of the day,¹⁸ Beccaria, the son of an Italian nobleman, advocated abolition of capital punishment and torture and proposed graduated punishment for crimes.¹⁹ At least in part as a result of Beccaria’s writings, combined with the Enlightenment thinking that influenced the framers of the Constitution, some prominent early Americans, including Benjamin Franklin, John Jay, James Madison, and Thomas Jefferson,²⁰ advocated limiting the death penalty to the most serious offenses.²¹ Others, most notably Benjamin Rush,

¹⁵ For a discussion on the history of the death penalty in the United States and the meaning and development of Eighth Amendment protections, see *Furman*, 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

¹⁶ GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 492–94 (Oxford Univ. Press 2009); *Furman*, 408 U.S. at 296–97 (Brennan, J., concurring).

¹⁷ CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (Cambridge Univ. Press 1764).

¹⁸ WOOD, *supra* note 16, at 492–94.

¹⁹ See John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL’Y 195, 196–203 (2009).

²⁰ See LOUIS P. MASUR, *rites of execution: capital punishment and the transformation of American culture, 1776–1865*, at 53–54 (Oxford Univ. Press 1989); WOOD, *supra* note 16, at 492. State constitutions appeared to embrace the idea of more enlightened and proportional punishment, even though the constitutions did not outright prohibit capital punishment altogether.

²¹ See MASUR, *supra* note 20, at 52–53; WOOD, *supra* note 16, at 493.

strongly advocated for abolition of the death penalty altogether.²² Republican ideals of the early United States, as well as Christian tenets, served as a key impetus to the early death penalty debate and opposition to capital punishment.²³

Perhaps reflecting this aspect of early American thinking, Alexis de Tocqueville observed in the 1830s,

In no country is criminal justice administered with more mildness than in the United States. While the English seem disposed carefully to retain the bloody traces of the Middle Ages in their penal legislation, the Americans have almost expunged capital punishment from their codes. North America is, I think, the only country upon earth in which the life of no one citizen has been taken for a political offense in the course of the last fifty years.²⁴

Tocqueville found, however, that these principles of criminal justice and compassion did not extend to slaves; to the contrary, enslaved people in the United States continued to be subjected to “horrid sufferings” and “barbarous punishments.”²⁵ The brutal legacy of slavery and the pattern of differential and harsher treatment for African Americans continued well into the twentieth, and indeed the twenty-first, century.

As early as the seventeenth and eighteenth centuries, American jurisdictions began rejecting the British mandatory death penalty practice and started moving toward a procedure that provided for judge or jury sentencing discretion.²⁶ At least in part, the motivation for such sentencing discretion arose out of the concern that a harsh mandatory death penalty could cause juries to render a not guilty verdict as the only way to spare the life of a guilty defendant.²⁷ During the nineteenth and early twentieth centuries, states increasingly adopted discretionary capital sentencing systems.²⁸

An abolition movement to end capital punishment emerged in the 1840s,²⁹ and a few states abolished capital punishment during this

²² MASUR, *supra* note 20, at 62–70.

²³ WOOD, *supra* note 16.

²⁴ 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 176–77 (Henry Reeve trans., 4th ed. 1840).

²⁵ *Id.* at 177.

²⁶ BANNER, *supra* note 5, at 9–10.

²⁷ *Id.*

²⁸ *Id.* at 214–15.

²⁹ MASUR, *supra* note 20, at 117–24.

time period. Michigan abolished the death penalty in 1847,³⁰ Rhode Island and Wisconsin abolished the death penalty in the 1850s,³¹ and Iowa and Maine abolished the death penalty in the 1870s.³² In the late nineteenth century, the Supreme Court considered the constitutionality of certain methods of execution.³³ While the Court upheld executions by firing squad³⁴ and the electric chair,³⁵ it observed, “[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment] to the Constitution.”³⁶

In the early twentieth century, fifteen states greatly restricted or abolished the death penalty, although seven of these states reinstated the death penalty within a few years.³⁷ During the 1950s and 1960s, a movement toward abolition reasserted itself as public support for capital punishment declined and actual executions decreased. A few states abolished or greatly restricted capital punishment,³⁸ and by the late 1960s, those jurisdictions that still retained the death penalty had essentially stopped executions. A number of observers assumed that the United States would just quietly phase out capital punishment.³⁹

³⁰ BANNER, *supra* note 5, at 134. The most recent state to abolish the death penalty is Illinois, which abolished the death penalty in 2011.

³¹ *Id.*

³² *Id.* at 220. Notably, Iowa reinstated the death penalty in 1878 and then abolished it again in 1965.

³³ *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878). It is worth noting that at the time these cases were decided the Eighth Amendment had not been incorporated to the states.

³⁴ *Wilkerson*, 99 U.S. at 132–33.

³⁵ *In re Kemmler*, 136 U.S. at 449.

³⁶ *Wilkerson*, 99 U.S. at 136.

³⁷ BANNER, *supra* note 5, at 222–23.

³⁸ *Id.* at 221–23. New Mexico, New York, and Vermont partially abolished the death penalty, and Iowa and Oregon abolished capital punishment altogether.

³⁹ See Carol S. Steiker, *Furman v. Georgia: Not an End, but a Beginning*, in *DEATH PENALTY STORIES* 95, 124 (John H. Blume & Jordan Steiker eds., 2009); Lyn Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 *AKRON L. REV.* 529, 537–38 (2011).

II

EMERGENCE OF THE MODERN DEATH PENALTY REGIME

It was against this background that the Supreme Court in 1972, in *Furman v. Georgia*,⁴⁰ examined whether the death penalty violated the Eighth Amendment. Since states had discarded mandatory sentences,⁴¹ the death penalty in place in the early 1970s allowed juries complete or almost complete discretion to decide whether to sentence the defendant to life or death. In *Furman*, the Supreme Court ruled that this discretionary death penalty system was too arbitrary, too capricious, and too unpredictable in its application; the Court ruled that the system gave juries too much unrestricted and unguided discretion to decide whether to allow the defendant to live or die.⁴² As a result, the Court, in a five-to-four decision, concluded that allowing unfettered discretion in imposing the death penalty violated the Eighth Amendment of the Constitution.⁴³ Notably, the Court did not find that the death penalty constituted a *per se* violation of the Eighth Amendment.⁴⁴

Issued as a *per curiam* opinion with each Justice writing separately, *Furman* provides insight into the complicated and differing rationales the majority relied upon in striking down the death penalty in 1972. Some of the Justices, particularly Justices Douglas and Marshall, found that the arbitrariness and capriciousness of the death penalty was further tainted or exacerbated by racism and poverty.⁴⁵ Justice Stewart opined,

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.⁴⁶

Further, Justice White observed,

I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts

⁴⁰ 408 U.S. 238 (1972).

⁴¹ BANNER, *supra* note 5, at 214.

⁴² *Furman*, 408 U.S. at 239–40.

⁴³ *Id.*

⁴⁴ *See id.*

⁴⁵ *Id.* at 240–57, 314–74.

⁴⁶ *Id.* at 309–10 (footnotes omitted).

and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries—a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence—has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course.⁴⁷

Furman rendered all death sentences across the country void and struck down as unconstitutional all existing capital punishment statutes. Even with states' waning use of the death penalty, *Furman* displayed sweeping use of federal judicial power over the sovereign interests and prerogatives of states.⁴⁸ Yet, if the statutes violated the Eighth Amendment, if states imposed the death penalty in an arbitrary or discriminatory manner, then it seems the basic and fundamental duty of the Court to strike down such statutes.⁴⁹

Notwithstanding Justice White's prediction that the death penalty had "run its course,"⁵⁰ shortly after *Furman* a number of state legislatures revised their death penalty laws to address the objections expressed by the *Furman* Court. Many of these states used the Model Penal Code, a framework that the American Law Institute (ALI) recently abandoned as unworkable, as a guide to rewrite their death penalty statutes.⁵¹ In the 1960s, section 210.5 of the Model Penal

⁴⁷ *Id.* at 313.

⁴⁸ Indeed one of the concerns of the dissenters in *Furman* was the sweeping use of federal judicial power and the interference with state sovereign interests. *Id.* at 375–470.

⁴⁹ This concept is as fundamental as judicial review under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁵⁰ *Furman*, 408 U.S. at 313.

⁵¹ The ALI drafts the Model Penal Code as well as other model statutes. The ALI sets forth the following summary of its work and mission:

The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute (made up of 4000 lawyers, judges, and law professors of the highest qualifications) drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education. ALI has long been influential internationally and, in recent years, more of its work has become international in scope.

Code set out a death penalty sentencing statute that arguably created a less arbitrary capital punishment system that included a separate sentencing hearing before a jury or judge.⁵² Under this system, the fact finder had to find the existence of an aggravating factor to make the defendant eligible for the death penalty; only if the fact finder found an aggravating factor could he consider the imposition of death. In deciding whether to ultimately sentence an offender to death, the fact finder also could consider mitigating factors warranting leniency. While some post-*Furman* statutes used this formula or some variation of it, other states experimented with alternative procedures purportedly designed to address the concerns of *Furman*, including mandatory death penalty systems. In all, thirty-five states and the federal government enacted revised death penalty statutes.⁵³

In 1976, the Supreme Court granted certiorari to review the constitutionality of the revised death penalty statutes in five states: Georgia,⁵⁴ Florida,⁵⁵ Texas,⁵⁶ Louisiana,⁵⁷ and North Carolina.⁵⁸ The Court found the death penalty systems in Georgia, Florida, and Texas constitutional,⁵⁹ but struck down as unconstitutional the mandatory death penalty systems in Louisiana and North Carolina.⁶⁰ In *Furman*, Justice White stated,

The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to

AM. LAW INST., ALI OVERVIEW, <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited Jan. 16, 2012).

⁵² In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court recognized a constitutional requirement for jury sentencing in capital cases at least with respect to determining the existence of aggravating factors that qualify a defendant for the death penalty.

⁵³ DEATH PENALTY INFO. CTR., PART I: HISTORY OF THE DEATH PENALTY, <http://www.deathpenaltyinfo.org/part-i-history-death-penalty#reinst> (last visited Jan. 16, 2012).

⁵⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵⁵ *Proffitt v. Florida*, 428 U.S. 242 (1976).

⁵⁶ *Jurek v. Texas*, 428 U.S. 262 (1976).

⁵⁷ *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁵⁸ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁵⁹ *Gregg*, 428 U.S. 153; *Proffitt*, 428 U.S. 242; *Jurek*, 428 U.S. 262.

⁶⁰ *Roberts*, 428 U.S. 325; *Woodson*, 428 U.S. 280.

any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.⁶¹

The *Furman* Court left unresolved the ultimate question of whether the death penalty is *per se* a violation of the Eighth Amendment.⁶²

The statutes before the Court in *Gregg v. Georgia*⁶³ forced the Court to tackle this issue. In a plurality opinion authored by Justices Stewart, Powell, and Stevens, the Court recognized the long history of capital punishment in the United States⁶⁴ as well as the legislative response to *Furman*.⁶⁵ The Court further expressed the belief that the death penalty could deter certain offenses⁶⁶ and/or serve as appropriate retribution for the offender's crime.⁶⁷ Because the Court accepted the view that the death penalty advanced the legitimate penal goals of retribution and/or deterrence, the Court found that the death penalty itself did not offend the evolving standards of decency that mark the progress of a maturing society.⁶⁸ This finding opened the door to the modern death penalty system by allowing states the freedom to experiment with different death penalty processes, provided that those processes did not otherwise violate the Constitution.

The Court then turned to the revised death penalty systems to determine whether the new procedures established by the states were constitutional. In *Furman*, the Court found that the old sentencing systems, which allowed unguided jury discretion in imposing death sentences, created an arbitrary, capricious, random process that could not withstand constitutional scrutiny. Louisiana⁶⁹ and North Carolina⁷⁰ responded to that constitutional concern by establishing a mandatory death penalty system. The Court held, however, that while the death penalty system in *Furman* violated the Constitution because the system allowed too much discretion, the mandatory death penalty

⁶¹ *Furman v. Georgia*, 408 U.S. 238, 312 (1972).

⁶² *Gregg*, 428 U.S. at 168–69.

⁶³ 428 U.S. 153.

⁶⁴ *Id.* at 169–79.

⁶⁵ *Id.* at 179–81.

⁶⁶ *Id.* at 183, 186–87.

⁶⁷ *Id.* at 183–86.

⁶⁸ *Id.* at 187.

⁶⁹ *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁷⁰ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

systems of Louisiana and North Carolina violated Constitution because those systems allowed no discretion.⁷¹ In an oft-quoted part of its decision in *Woodson v. North Carolina*, the Court stated,

This conclusion [that mandatory death sentences are unconstitutional] rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.⁷²

Accordingly, the Court concluded that while the jury could not have unfettered discretion to choose life or death, the jury had to have some discretion to impose a sentence less than death in a capital case to assure that death was the appropriate punishment as to that particular defendant and his or her crime.

The Court, however, upheld the capital punishment systems of Georgia,⁷³ Florida,⁷⁴ and Texas.⁷⁵ While these systems allowed, to varying degrees, some jury discretion, the systems also arguably provided juries guidance in the imposition of the death penalty. These systems set up processes whereby a jury had to find the existence of certain aggravating factors in order to qualify a case as egregious enough that the death penalty might be an appropriate sentence.⁷⁶ Moreover, the systems provided the jury discretion to impose a sentence of less than death usually based upon consideration of mitigating factors that would warrant leniency.⁷⁷

⁷¹ *Roberts*, 428 U.S. at 331–36; *Woodson*, 428 U.S. at 302–03.

⁷² *Woodson*, 428 U.S. at 305.

⁷³ *Gregg*, 428 U.S. 153.

⁷⁴ *Proffitt v. Florida*, 428 U.S. 242 (1976).

⁷⁵ *Jurek v. Texas*, 428 U.S. 262 (1976).

⁷⁶ See *Jurek*, 428 U.S. 262; *Proffitt*, 428 U.S. 242; *Gregg*, 428 U.S. 153. Of note, Texas had the jury answer questions about the defendant's future dangerousness and the nature of the crime to narrow the class of offenders. In his dissent in *Roberts*, Justice White found the Louisiana mandatory death penalty statute constitutionally indistinguishable from the Texas statute approved by the Court in *Jurek*. *Roberts*, 428 U.S. at 359–60 (White, J., dissenting). In subsequent years, the Supreme Court found constitutional concerns with the Texas death penalty system as well as the ability of a defendant to present mitigating evidence and the jury's ability to give effect to that evidence. See, e.g., *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam); *Penry v. Johnson*, 532 U.S. 782 (2001); *Penry v. Lynaugh*, 429 U.S. 302 (1989).

⁷⁷ See *Jurek*, 428 U.S. 262; *Proffitt*, 428 U.S. 242; *Gregg*, 428 U.S. 153.

These cases—*Furman* in 1972 and *Gregg* and the four companion cases from 1976—form the constitutional framework of the modern death penalty system in the United States. In essence, to the extent that the death penalty carries out the legitimate goals of retribution and deterrence, it is not *per se* unconstitutional.⁷⁸ Further, the Court permits states to experiment with different death penalty processes. The Court tolerates states' experimentation with the death penalty, provided that states (1) give juries some criteria—usually in the form of aggravating factors—to determine whether the defendant is eligible for the death penalty, and (2) allow juries the opportunity to consider mitigating evidence and to perform individualized sentencing to impose a sentence less than death, if warranted.

It is worth observing that there was a change in personnel in the four years between *Furman* and *Gregg*—Justice John Paul Stevens replaced Justice William O. Douglas. Notably, Justice Douglas voted to strike down the death penalty statutes in *Furman* whereas Justice Stevens voted to uphold the death penalty in *Gregg*.⁷⁹ It is unlikely, however, that this simple change in personnel alone accounts for the upholding of the new death penalty statutes. Indeed, only two Justices—Justices Marshall and Brennan—would have struck down all of the revised death penalty statutes in 1976. Justices Stewart and White, who joined the majority in *Furman*, voted to uphold the death penalty systems in Georgia, Florida, and Texas.

Perhaps the new systems were appreciably better and adequately eliminated arbitrariness and randomness in the death penalty process. Whether the systems were better or not, however, was not readily apparent in 1976. The new death penalty statutes were an experiment to see whether, in practice, these systems could provide a rational and constitutional method of allowing the death penalty to be exacted on the worst of the worst. By a number of accounts, the experiment has failed. By 2009, the ALI, which drafted the Model Penal Code death penalty provision that served as the basis for many of the modern death penalty statutes, forcefully disavowed its model death penalty

⁷⁸ Interestingly, Justices Blackmun and Stevens, who both voted to uphold the death penalty systems in Georgia, Florida, and Texas, subsequently questioned or wholly abandoned America's experiment with death. See *Baze v. Rees*, 553 U.S. 35, 71–87 (2008) (Stevens, J., concurring); *Callins v. Collins*, 510 U.S. 1141, 1143–59 (1994) (Blackmun, J., dissenting from denial of certiorari).

⁷⁹ But see Justice Stevens's more recent discussion of the modern death penalty. *Baze*, 553 U.S. at 71–87 (Stevens, J., concurring).

statute.⁸⁰ In 2008, Justice Stevens, one of the authors of the plurality opinion in *Gregg*, observed in a concurring opinion,

In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”⁸¹

Likewise, Justice Blackmun, who dissented in *Furman* and voted to uphold the death penalty in 1976, concluded in 1994:

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, . . . and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.⁸²

It is possible also that the Court’s constitutional sanctioning of the new statutes reflected the Court’s willingness and desire to protect states’ prerogatives in the structure of their criminal justice systems. Yet, a majority of the Court struck down mandatory death penalty statutes that a number of the states enacted in reaction to *Furman*. Thus, the decisions in *Woodson* and *Roberts* reflect the recognition that the Court asserts constitutional norms even at the expense of state sovereign interests.⁸³

⁸⁰ See *infra* notes 103–07 and accompanying text.

⁸¹ *Baze*, 553 U.S. at 86 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

⁸² *Callins*, 510 U.S. at 1143–44 (Blackmun, J., dissenting from denial of certiorari) (citations omitted).

⁸³ Certainly this observation is true in a number of contexts outside of the death penalty. For a contemporary example, see, e.g., *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

While there are important legal and constitutional distinctions between the statutes at issue in *Furman* and the statutes at issue in *Gregg*, changes and developments in the law do not happen in a vacuum, and many factors influence court decisions and judicial development of the law. In this regard it is important to recognize the legislative and public backlash to *Furman* that occurred across the country.⁸⁴ Although some Justices thought that *Furman* would end capital punishment in the United States, thirty-five state legislatures made clear their decisions to retain the death penalty as a sentencing option.

Moreover, during this period of time, the United States experienced a rather dramatic shift in social views and policy on imprisonment and punishment generally. According to some scholars, from the 1920s to 1970s, the dominant, albeit not always consistent, view of prison and criminal justice was a rehabilitation model.⁸⁵ But in the 1970s this view changed, and changed rather dramatically.⁸⁶ By the mid-1970s, there was a growing dissatisfaction with the rehabilitation model of prisons and criminal justice and increased academic criticism about the efficacy of the rehabilitation model of prisons.⁸⁷ At the same time, crime rates rose and there were mounting public concerns about crime, social unrest, and the dramatic social change at play in the country during this period.⁸⁸ By the end of the 1970s, the goals of rehabilitation were no longer the primary purpose of

⁸⁴ A number of articles have discussed the backlash to *Furman*, including Amanda Frost, *Defending the Majoritarian Court*, 2010 MICH. ST. L. REV. 757 (2010); Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17 (2009); Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 46–55 (2007); Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117 (2010).

⁸⁵ Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87, 92–98 (2008).

⁸⁶ *Id.* at 98–101.

⁸⁷ *Id.*

⁸⁸ For a general history of the 1960s and 1970s in the United States see MARK KURLANSKY, 1968: THE YEAR THAT ROCKED THE WORLD (Ballantine Books 2004); JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974 (Oxford Univ. Press 1996); James T. Patterson, RESTLESS GIANT: THE UNITED STATES FROM WATERGATE TO BUSH V. GORE (2005); see also Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LAW & SOC. INQUIRY 489, 493–95 (2010) (book review); Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 850–51 (2010).

incarceration; rather, arguably more punitive or retributive goals emerged as the dominant purposes of prisons and incarceration.⁸⁹

Some commentators have speculated that, in part, the shift from *Furman* to *Gregg* reflects the Court's reaction to the political and social backlash seen in the wake of the *Furman* decision.⁹⁰ Likewise, the decision may mirror the changing political climate of the mid-1970s, in particular the changing climate regarding prisons and punishment in general. Further, this shift may indicate the Court's concern over the appropriateness of the Court's depriving states of the ability to experiment with death penalty schemes. Regardless of the various motivations and justifications behind *Gregg* and its companion cases, these cases ushered in the modern death penalty in the United States.

III

AFTERMATH OF *GREGG*

After *Gregg*, the country seemed to engage in a full-throttled acceleration of capital punishment and executions. In 1999 alone, states executed ninety-eight condemned prisoners,⁹¹ and the country experienced one of the highest rates of executions in the twentieth century.⁹² In 2009, the United States ranked fourth in the world in the number of people executed, exceeded only by China, Iraq, and Saudi Arabia.⁹³ Support for the death penalty in the last decades of the twentieth century emerged as a "can't lose" political tool.⁹⁴ During

⁸⁹ Haney, *supra* note 85, at 98–101.

⁹⁰ See, e.g., Frost, *supra* note 84; Hills, *supra* note 84; Lain, *supra* note 84, at 46–55.

⁹¹ DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Jan. 15, 2012).

⁹² BANNER, *supra* note 5, at 303.

⁹³ AMNESTY INT'L, THE DEATH PENALTY IN 2009, <http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2009> (last visited Jan. 15, 2012).

⁹⁴ See Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. C.L. & C.R. 191, 194 (2003) ("Support for the death penalty became part of conventional political wisdom while the voices for abolition were rendered impotent. Since Michael Dukakis's defeat in 1988, attributed in part of his opposition to the death penalty, presidential candidates of both major political parties have all unequivocally supported the death penalty."); Corinna Barrett Lain, *The Doctrinal Side of Majority Will*, 2010 MICH. ST. L. REV. 775, 791–92 n.81 (2010) (observing that during the 1980s, politicians successfully campaigned on platforms of more executions faster); William W. Wilkins, *The Legal, Political, and Social Implications of the Death Penalty*, 41 U. RICH. L. REV. 793, 803 (2007) ("To put it briefly, the death penalty is a political minefield. In many states, including South Carolina, most political analysts agree that it is virtually

his first run for the presidency, then-Arkansas Governor Bill Clinton oversaw the execution of Ricky Ray Rector, a mentally disabled man on Arkansas's death row.⁹⁵ This stance on execution contrasted sharply with the stance of 1988 Democratic presidential candidate Michael Dukakis, whom pundits derided and the public punished for his opposition to the death penalty.⁹⁶ The execution of Rector demonstrated that Clinton, a Democrat, was not "soft on crime" or soft on the death penalty.⁹⁷

This political backlash against those who opposed, or even expressed reservations about, the death penalty extended to the judicial branches of state and federal governments.⁹⁸ In a number of states, both trial and appellate judges are elected to their positions or subject to retention ballots. This electoral process raises the specter of politicization of the judicial branch.⁹⁹ In 1996, Tennessee Supreme Court Justice Penny White lost her seat on that state's high court primarily because of a concurring vote in a death penalty case.¹⁰⁰ Likewise, Chief Justice Rose Bird and two associate justices lost their seats on the California Supreme Court because of opinions critical of capital punishment.¹⁰¹

impossible to be a successful candidate for statewide public office without being in favor of capital punishment, lest one be painted as 'soft on crime' by an opponent.").

⁹⁵ Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 317–18 (2008) ("Determined not to repeat the mistake of the preceding Democratic nominee for President, Massachusetts Governor Michael Dukakis, of opposing the death penalty, Clinton suspended campaigning on the eve of the 1992 New Hampshire Democratic primary to return to Arkansas to preside over an execution. The condemned man was 'a brain-damaged, African-American' who had saved part of his last meal 'thinking that he was going to come back and eat it after the execution.'").

⁹⁶ See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 36–37 (2007); Leland Ware & David C. Wilson, *Jim Crow on the "Down Low": Subtle Racial Appeals in Presidential Campaigns*, 24 ST. JOHN'S J. LEGAL COMMENT. 299, 313 (2009); see also Alan Rogers, *The Death Penalty and Reversible Error in Massachusetts*, 6 PIERCE L. REV. 515, 530 (2008).

⁹⁷ Smith, *supra* note 95, at 318.

⁹⁸ See Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817 (1998).

⁹⁹ *Id.* at 845.

¹⁰⁰ See Kenneth J. Aulet, *It's Not Who Hires You but Who Can Fire You: The Case Against Retention Elections*, 44 COLUM. J.L. & SOC. PROBS. 589, 606 (2011); Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 1990 (2011).

¹⁰¹ See *id.*

But the dawning of the twenty-first century began an important shift in America's experiment with the modern death penalty. Evidence suggests increasing acceptance of and appreciation for Justice Stevens's observation that

current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.¹⁰²

Further, as noted above, the ALI abandoned its model statute for capital punishment in October 2009.¹⁰³ In reaching this decision, the ALI Council overwhelmingly concluded "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment,"¹⁰⁴ a model death penalty should not be offered. The ALI found that its model death penalty statute had "not withstood the tests of time and experience."¹⁰⁵ Among the concerns expressed by the ALI were the following:

(a) the tension between clear statutory identification of which murders should command the death penalty and the constitutional requirement of individualized determination; (b) the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers; (c) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice system that has resulted in statistical disparity in death sentences based on the race of the victim; (d) the enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided to some criminal defendants is inadequate; (e) the likelihood, especially given the availability and reliability of DNA testing, that some persons sentenced to death will later, and perhaps too late, be shown to not have committed the crime for which they were sentenced; and (f) the politicization of judicial elections, where—even though nearly all state judges perform their tasks conscientiously—candidate

¹⁰² *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring).

¹⁰³ AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 4 (2009); Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353 (2010).

¹⁰⁴ AM. LAW INST., *supra* note 103, at annex B, at 1.

¹⁰⁵ *Id.* at 4.

statements of personal views on the death penalty and incumbent judges' actions in death-penalty cases become campaign issues.¹⁰⁶

The ALI now rejects the very model that served as the basis for the constitutionally approved modern death penalty statutes.¹⁰⁷

Further, in 2002 and 2005, the Court restricted states' prerogatives in structuring their capital sentencing regimes by forbidding the imposition of the death penalty on mentally retarded offenders¹⁰⁸ and juvenile offenders.¹⁰⁹ By finding that there are classes of individuals who, as a group, are not sufficiently culpable for their actions to be subjected to death, the Court signaled that the Eighth Amendment confines the imposition of the death penalty and that states do not have unfettered discretion as to whom and when they may kill. In significant part, the Court's decision to exempt juveniles and mentally retarded offenders from the death penalty resulted from the fact that a significant number of states had legislatively prohibited the imposition of the death penalty on these two vulnerable groups.¹¹⁰ In *Atkins* and *Roper*, eighteen death penalty states and twelve non-death-penalty states prohibited the death penalty against mentally retarded offenders and juvenile offenders. When legislative death-penalty restrictions reach this critical mass, the Court has indicated that it will find sufficient evidence of a national consensus that the nation has turned its face on the use of the death penalty in this manner and that evolving standards of decency preclude the use of the death penalty under these circumstances.¹¹¹

Likewise, in *Kennedy v. Louisiana*,¹¹² the Court held that a Louisiana statute that provided the death penalty for the crime of rape of a young child was unconstitutional. In reaching its decision, the Court made clear that the death penalty is limited to the worst of the worst, the most egregious crimes and offenders.¹¹³ Accordingly, the

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.* at 3–4.

¹⁰⁸ *Atkins v. Virginia*, 536 U.S. 304, 319–21 (2002). In 1989, the Court upheld the imposition of the death penalty on mentally retarded offenders. *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated in part by Atkins*, 536 U.S. 304.

¹⁰⁹ *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005). In 1989, the Court upheld the imposition of the death penalty on sixteen- and seventeen-year-olds. *Stanford v. Kentucky*, 492 U.S. 361 (1989), *overruled by Roper*, 543 U.S. 551.

¹¹⁰ *Roper*, 543 U.S. 551; *Atkins*, 536 U.S. 304.

¹¹¹ *Roper*, 543 U.S. 551; *Atkins*, 536 U.S. 304.

¹¹² 554 U.S. 407 (2008).

¹¹³ *Id.* at 420.

Court found that the death penalty is an excessive punishment for ordinary crimes in which the victim is not murdered.¹¹⁴ Again, a substantial part of the Court's evolving standards of decency analysis relied on state legislation and the fact that only six states had the penalty of death for child rape.¹¹⁵

Although, in all of these cases, the Court asserts that ultimately its judgment on the excessiveness and/or proportionality of the punishment controls the constitutional standard, strong evidence exists suggesting that state legislative action may push the Court forward or backward in its Eighth Amendment analysis.¹¹⁶ Indeed, it appears that the Court's Eighth Amendment analysis depends, at least in part and maybe in critical part, on what state legislatures do.¹¹⁷

IV

LEGISLATIVE ACTION IN THE TWENTY-FIRST CENTURY

In a departure from the early enthusiasm for post-*Gregg* death sentences, over the last decade, states have questioned and examined their death penalty statutes. For example, some states, including California,¹¹⁸ Connecticut,¹¹⁹ Illinois,¹²⁰ Indiana,¹²¹ and New Jersey,¹²² created commissions to study the fairness, efficiency, cost-effectiveness, and appropriateness of the death penalty. Certain consistent concerns or themes emerge in these reports, including the high economic cost of capital punishment, the quality of defense counsel, the potential racial disparity in the capital sentencing process, and the danger of executing an innocent person. Kansas, which reinstated the death penalty in 1994, issued a post-audit report

¹¹⁴ *Id.* at 421.

¹¹⁵ *Id.* at 422–26.

¹¹⁶ See *Kennedy*, 554 U.S. 407; *Roper*, 543 U.S. 551; *Atkins*, 536 U.S. 304.

¹¹⁷ See generally *Kennedy*, 554 U.S. 407; *Roper*, 543 U.S. 551; *Atkins*, 536 U.S. 304; *Enmund v. Florida*, 458 U.S. 782 (1982).

¹¹⁸ CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA (2008).

¹¹⁹ STATE OF CONN. COMM'N ON THE DEATH PENALTY, STUDY PURSUANT TO PUBLIC ACT NO. 01-151 OF THE IMPOSITION OF THE DEATH PENALTY IN CONNECTICUT (2003).

¹²⁰ ILL. COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002).

¹²¹ IND. CRIMINAL LAW STUDY COMM'N, THE APPLICATION OF INDIANA'S CAPITAL SENTENCING LAW: FINDINGS OF THE INDIANA CRIMINAL LAW STUDY COMMISSION (2002).

¹²² N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT (2007).

in late 2003 concluding that the capital cases cost approximately seventy percent more than noncapital cases.¹²³ States have reacted to reports about the failures of the death penalty by legislative limitations, judicial and executive decisions not to act on death penalty statutes, and legislative abolition.

Some states implemented statutory changes to deal with the fairness and efficacy problems of capital punishment. For example, North Carolina implemented the Racial Justice Act, which provides a greater opportunity for an offender to raise challenges based on racial bias in capital prosecutions.¹²⁴ Maryland dramatically restricted the death penalty and placed higher evidentiary burdens in cases where the state seeks death.¹²⁵

Likewise, judges have expressed misgivings about the death penalty. For example, Judge Boyce Martin of the U.S. Court of Appeals for the Sixth Circuit stated,

Now in my thirtieth year as a judge on this Court, I have had an inside view of our system of capital punishment almost since the death penalty was reintroduced in the wake of *Furman v. Georgia*. During that time, judges, lawyers, and elected officials have expended great time and resources attempting to ensure the fairness, proportionality, and accuracy that the Constitution demands of our system. But those efforts have utterly failed. Capital punishment in this country remains “arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.” At the same time, the system’s necessary emphasis on competent representation,

¹²³ LEGISLATIVE DIV. OF POST AUDIT, STATE OF KAN., PERFORMANCE AUDIT REPORT: COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 10–19 (2003). Studies and audits of other states’ capital punishment systems confirm that the cost of a capital trial and appeals greatly exceeds costs incurred in noncapital trials. See PHILIP COOK & DONNA SLAWSON, TERRY SANFORD INST. OF PUB. POLICY DUKE UNIV., THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA (1993); JOHN G. MORGAN, STATE OF TENN., TENNESSEE’S DEATH PENALTY: COSTS AND CONSEQUENCES (2004); JOHN ROMAN ET AL., URBAN INST. JUDICIAL POLICY CTR., THE COST OF THE DEATH PENALTY IN MARYLAND (2008).

¹²⁴ See N.C. GEN. STAT. §§ 15A-2010 to -2012 (2009); Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031 (2010). In late 2011, the North Carolina legislature voted to repeal the Racial Justice Act, but North Carolina Governor Bev Perdue, a death penalty supporter, vetoed the repeal effort stating, “[I]t is simply unacceptable for racial prejudice to play a role in the imposition of the death penalty in North Carolina.” Gary D. Robertson, *Beverly Perdue, North Carolina Governor, Vetoes Repeal of Racial Justice Act*, HUFFINGTON POST (Dec. 14, 2011, 6:06 PM), http://www.huffingtonpost.com/2011/12/14/racial-justice-act-bev-perdue-death-penalty-north-carolina_n_1148776.html.

¹²⁵ MD. CODE ANN., CRIM. LAW § 2-202 (West 2009).

sound trial procedure, and searching post-conviction review has made it exceedingly expensive to maintain.¹²⁶

In September 2011, Chief Justice O'Connor of the Ohio Supreme Court convened a committee to review that state's death penalty, although the purpose of the committee is not to debate whether Ohio should retain capital punishment.¹²⁷

The New York Court of Appeals found that the New York death penalty statute, which New York enacted in 1995, included a jury deadlock instruction that violated article I, section 6 of New York's state constitution.¹²⁸ In particular, the New York Court of Appeals concluded that the deadlock instruction might coerce jurors to impose a death sentence.¹²⁹ Recognizing that the New York Constitution provided greater due process protection than the federal constitution and concluding that U.S. Supreme Court precedent offered less protection than due process deserved, the New York Court of Appeals struck down the deadlock instruction in the New York death penalty statute.¹³⁰ Because the deadlock instruction was a critical part of the New York statute, this decision rendered the capital sentencing statute invalid unless and until the state legislature amended the statute to cure the defect.¹³¹ The New York legislature did not reinstate the death penalty.¹³²

On November 22, 2011, Oregon Governor John Kitzhaber declared a moratorium on executions in that state through the duration of his term in office.¹³³ Oregon reinstated the death penalty in 1984, and during his previous terms as governor from 1995 to 2003, Kitzhaber oversaw the only two modern executions carried out in the state.¹³⁴ Returning to the governor's office for his third term, Governor

¹²⁶ *Wiles v. Bagley*, 561 F.3d 636, 642 (6th Cir. 2009) (Boyce, J., concurring) (citations omitted).

¹²⁷ Andrew Welsh-Huggins, *Ohio's Top Judge Calls for Death Penalty Review*, ASSOCIATED PRESS (Sept. 8, 2011).

¹²⁸ *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).

¹²⁹ *Id.* at 356–59.

¹³⁰ *Id.* at 364–65.

¹³¹ *Id.* at 365–67; see *People v. Taylor*, 878 N.E.2d 969, 970 (N.Y. 2007).

¹³² Steiker & Steiker, *supra* note 103, at 363; Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment*, WASH. POST, Apr. 13, 2005, at A3.

¹³³ Press Release, Office of the Governor, Governor Kitzhaber Issues Reprieve—Calls for Action on Capital Punishment (2011), available at <http://www.deathpenaltyinfo.org/gov-john-kitzhaber-oregon-declares-moratorium-all-executions>.

¹³⁴ *Id.*; William Yardley, *Oregon Governor Says He Will Block Executions*, N.Y. TIMES, Nov. 23, 2011, at A14.

Kitzhaber, a Democrat who is opposed to the death penalty, refused to oversee a third execution.¹³⁵ In explaining his reasons for the moratorium, Governor Kitzhaber stated,

Oregonians have a fundamental belief in fairness and justice—in swift and certain justice. The death penalty as practiced in Oregon is neither fair nor just; and it is not swift or certain. It is not applied equally to all. It is a perversion of justice that the single best indicator of who will and will not be executed has nothing to do with the circumstances of a crime or the findings of a jury. The only factor that determines whether someone sentenced to death in Oregon is actually executed is that they volunteer. The hard truth is that in the 27 years since Oregonians reinstated the death penalty, it has only been carried out on two volunteers who waived their rights to appeal.

In the years since those executions, many judges, district attorneys, legislators, death penalty proponents and opponents, and victims and their families have agreed that Oregon's system is broken.

But we have done nothing. We have avoided the question.

And during that time, a growing number of states have reconsidered their approach to capital punishment given public concern, evidence of wrongful convictions, the unequal application of the law, the expense of the process and other issues.¹³⁶

Governor Kitzhaber also set out more personal reasons for the moratorium:

[The death penalty] has been carried out just twice in [the] last 49 years in Oregon. Both were during my first administration as Governor, one in 1996 and the other in 1997. I allowed those sentences to be carried out despite my personal opposition to the death penalty. I was torn between my personal convictions about the morality of capital punishment and my oath to uphold the Oregon constitution.

They were the most agonizing and difficult decisions I have made as Governor and I have revisited and questioned them over and over again during the past 14 years. I do not believe that those executions made us safer; and certainly they did not make us nobler as a society. And I simply cannot participate once again in something I believe to be morally wrong.¹³⁷

¹³⁵ Yardley, *supra* note 134.

¹³⁶ Press Release, *supra* note 133.

¹³⁷ *Id.*

Governor Kitzhaber called for the Oregon legislature to consider reforms to the death penalty and urged the people of Oregon to “engage in the long overdue debate” on the death penalty.¹³⁸

In the last four years, three state legislatures—New Mexico,¹³⁹ New Jersey,¹⁴⁰ and Illinois¹⁴¹—have abolished the death penalty outright. These legislative acts are a remarkable departure from the trend of the first thirty years after *Gregg* and may prove informative for the debates that are bound to arise in Oregon as well as in other states revisiting the death penalty. In looking at the changes in legislative responses to the death penalty, it is worth considering the experiences of New Mexico, New Jersey, and Illinois.¹⁴²

A. *New Mexico Legislative Abolition of Capital Punishment*

As noted earlier, in the years following *Gregg*, states and politicians eagerly embraced capital punishment, making it a prominent and seemingly intractable part of the criminal justice system. New Mexico offers an interesting study of how this status changed and how the legislative process can result in abolition of the death penalty.

Prior to *Furman*, the death penalty statute in New Mexico provided,

When a defendant has been convicted of a capital felony the judge shall sentence that person to death, unless the jury trying the case shall recommend life imprisonment, the judge shall sentence that person to life imprisonment; provided that in cases wherein the defendant has entered a plea of guilty to the commission of a capital felony, the court may in lieu of sentencing such person to death, sentence the defendant to life imprisonment.¹⁴³

Like other pre-*Furman* death penalty statutes, the New Mexico statute allowed the jury discretion to impose a sentence less than death, but did not provide criteria to guide the jury in this process.¹⁴⁴ In 1969,

¹³⁸ *Id.*

¹³⁹ N.M. STAT. ANN. § 31-18-14 (West 2009).

¹⁴⁰ N.J. STAT. ANN. § 2C:11-3 (West 2007).

¹⁴¹ 725 ILL. COMP. STAT. ANN. 5/119-1 (West 2011).

¹⁴² For a discussion of the history of the death penalty in New Mexico, see Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 Through December 2007: An Empirical Analysis*, 38 N.M. L. REV. 255 (2008).

¹⁴³ N.M. STAT. ANN. § 40A-29-2 (1963).

¹⁴⁴ See *State v. Pace*, 456 P.2d 197, 204–05 (N.M. 1969) (finding that the pre-*Furman* death penalty statute did not violate the Eighth Amendment).

perhaps reflecting the national anti-death-penalty trend of the years immediately preceding *Furman*, the New Mexico legislature limited the death penalty to the following offenses:

Punishment by death for any crime is abolished except for the crime of killing a police officer or prison or jail guard while in the performance of his duties and except if the jury recommends the death penalty when the defendant commits a second capital felony after the time for due deliberation following the commission of a capital felony.¹⁴⁵

The same sentencing process of undirected jury discretion continued to apply to this more limited range of capital offenses. *Furman*, however, rendered this death penalty system in New Mexico unconstitutional because the sentencing statute allowed juries unguided discretion in imposing a sentence less than death, which was the practice that *Furman* condemned.¹⁴⁶

Like some other states, New Mexico responded to *Furman* by creating a new death penalty statute that provided, “When a defendant has been convicted of a capital felony, he shall be punished by death.”¹⁴⁷ New Mexico, thus, removed the jury’s sentencing discretion that rendered its previous statutes unconstitutional under *Furman*. As noted earlier, however, in 1976, the Supreme Court in *Woodson v. North Carolina* and *Roberts v. Louisiana* concluded that such mandatory death penalty statutes violated the Eighth Amendment.¹⁴⁸ In particular, the Court noted that “by the end of World War I, all but eight States, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether. By 1963, all of these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury sentencing.”¹⁴⁹ The Court concluded that the pre-*Furman* legislative rejection of mandatory death penalty statutes evidenced that states had found that mandatory death sentences were “unduly harsh and unworkably rigid.”¹⁵⁰ Although

¹⁴⁵ N.M. STAT. ANN. § 40A-29-2.1 (1963) (repealed 1973). Section 40A-29-2.3 further provided that “[a]ny person currently under the penalty of death shall have such penalty revoked, a penalty of life imprisonment substituted.” See *Pace*, 456 P.2d at 205 (applying the statute retroactively to a case pending on direct appeal).

¹⁴⁶ See *supra* notes 141–43 and accompanying text.

¹⁴⁷ N.M. STAT. ANN. § 40A-29-2.1 (1973).

¹⁴⁸ See *supra* note 60 and accompanying text.

¹⁴⁹ *Woodson v. North Carolina*, 428 U.S. 280, 291–92 (1976) (footnote omitted).

¹⁵⁰ *Id.* at 293.

the Court recognized that some states had enacted mandatory death penalty statutes in the wake of *Furman*, it nonetheless found that such statutes ran afoul of the Cruel and Unusual Punishment Clause.¹⁵¹ This determination rendered the New Mexico's first post-*Furman* statute invalid.

The New Mexico legislature responded to *Woodson* by crafting a statute that captured the elements that the Court sanctioned in *Gregg v. Georgia*. Specifically, section 31-18-14 of the New Mexico Code provided,

When a defendant has been convicted of a capital felony, he shall be punished by life imprisonment or death. The punishment shall be imposed after a sentencing hearing separate from the trial or guilty plea proceeding. However, if the defendant has not reached the age of majority at the time of the commission of the capital felony for which he was convicted, he may be sentenced to life imprisonment but shall not be punished by death.¹⁵²

Capital felonies were broader than the death-eligible felonies specified by the legislature in 1969.¹⁵³ In the post-*Gregg* system, capital felonies were no longer as limited as they were pre-*Furman*, but rather section 30-2-1 provided,

A. Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused:

- (1) by any kind of willful, deliberate and premeditated killing;
- (2) in the commission of or attempt to commit any felony; or
- (3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.

Whoever commits murder in the first degree is guilty of a capital felony.

Thus, more offenders were eligible for a death sentence under the post-*Gregg* statutes than were eligible for the death sentence in the years immediately preceding *Furman*.

Nonetheless, while New Mexico adopted new and even broader death penalty statutes after *Furman* and *Gregg*, New Mexico did not

¹⁵¹ *Id.* at 305.

¹⁵² The New Mexico Legislature repealed section 31-18-14 in 2009 replacing it with the following language: "When a defendant has been convicted of a capital felony, the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole."

¹⁵³ See *supra* notes 143–45.

display the unbridled enthusiasm for the death penalty that could be found in other states such as Texas or Arizona. For example, New Mexico was one of the first states to forbid the execution of juvenile offenders.¹⁵⁴ In addition to its early decision to create this categorical limitation on the death penalty, New Mexico never accumulated a large death row population.¹⁵⁵ From 1997 to 2007, New Mexico sentenced fifteen men to death¹⁵⁶ and executed only one condemned prisoner, Terry Clark.¹⁵⁷ Evidently, Clark instructed his lawyers to drop his appeal and allow the state to execute him.¹⁵⁸ By contrast, since reinstating the death penalty after *Furman*, neighboring state Arizona has executed twenty-eight people and currently has 134 condemned prisoners on death row;¹⁵⁹ Texas has executed 477 people and currently has 321 individuals on death row.¹⁶⁰

Another example of New Mexico's ambivalence about the death penalty occurred in 1986 when Governor Toney Anaya commuted the death sentences of all five condemned prisoners who occupied New Mexico's death row at that time.¹⁶¹ Governor Anaya opposed capital punishment and stated his position prior to his election.¹⁶² His position on the death penalty and its commutations starkly contrasts the position of most politicians, who readily embraced the death penalty in the 1980s.¹⁶³ These commutations represent an executive abolition effort, at least with respect to those already sentenced to

¹⁵⁴ DEATH PENALTY INFO. CTR., NEW MEXICO: GENERAL INFORMATION, <http://www.deathpenaltyinfo.org/new-mexico-1> (last visited Jan. 16, 2012).

¹⁵⁵ See Wilson, *supra* note 142, at 266.

¹⁵⁶ *Id.*

¹⁵⁷ DEATH PENALTY INFO. CTR., STATE BY STATE DATABASE: NEW MEXICO, http://www.deathpenaltyinfo.org/state_by_state (last visited Jan. 16, 2012). The condemned prisoner, Terry Clark, died by lethal injection in 2001. Wilson, *supra* note 142, at 271. It was the first execution in New Mexico since 1960. *Id.*

¹⁵⁸ See Wilson, *supra* note 142, at 271.

¹⁵⁹ DEATH PENALTY INFO. CTR., STATE BY STATE DATABASE: ARIZONA, http://www.deathpenaltyinfo.org/state_by_state (last visited Jan. 16, 2012).

¹⁶⁰ DEATH PENALTY INFO. CTR., STATE BY STATE DATABASE: TEXAS, http://www.deathpenaltyinfo.org/state_by_state (last visited Jan. 16, 2012).

¹⁶¹ See Richard E. Meyer, *Governor Calls Practice 'Anti-God': Anaya Spares All Inmates on New Mexico Death Row*, L.A. TIMES, Nov. 27, 1986, at 1; Dave Maass, *Former New Mexico Governor, Toney Anaya, Talks Death Penalty Politics*, HUFFINGTON POST (Sept. 25, 2009, 5:56 PM), http://www.huffingtonpost.com/dave-maass/former-new-mexico-governo_b_298557.html.

¹⁶² Maass, *supra* note 161.

¹⁶³ *Id.*

death, as opposed to abolition by the legislative or judicial branches of government. Such executive commutations play another vital role in the evolution of the death penalty and the development of the Eighth Amendment's evolving standards of decency.¹⁶⁴ The recent moratorium by Oregon Governor Kitzhaber may play a similar role in that state's death penalty evolution.

In 2009, New Mexico took the final step toward abolition. With only two prisoners on death row,¹⁶⁵ the New Mexico legislature passed a bill abolishing the death penalty. On March 18, 2009, Governor Bill Richardson, a Democrat and death penalty supporter,¹⁶⁶ signed the abolition bill into law.¹⁶⁷ In signing the bill, Richardson stated,

This has been the most difficult decision of my political career. . . . I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. . . . If the State is going to undertake this awesome responsibility, the system to impose this ultimate penalty must be perfect and can never be wrong.¹⁶⁸

The two prisoners on New Mexico's death row at that time, however, did not receive a reprieve from their death sentences since the state

¹⁶⁴ A more recent and limited example of executive commutation occurred in Ohio. On September 28, 2011, Ohio Governor John Kasich granted clemency to Joseph Murphy. This was Gov. Kasich's second commutation since he took office in January 2011. DEATH PENALTY INFO. CTR., CLEMENCY: OHIO DEATH ROW INMATE GRANTED CLEMENCY, CITING 'BRUTALLY ABUSIVE UPBRINGING,' <http://www.deathpenaltyinfo.org/clemency-ohio-death-row-inmate-granted-clemency-citing-brutally-abusive-upbringing> (last visited Jan. 16, 2012).

¹⁶⁵ STATE BY STATE DATABASE: NEW MEXICO, *supra* note 157.

¹⁶⁶ Interestingly, Lieutenant Governor Diane D. Denish, a Democrat, supported the repeal of the death penalty, and she expressed her views to Governor Richardson. Trip Jennings, *Richardson Abolishes N.M. Death Penalty*, N.M. INDEPENDENT, Mar. 18, 2009, <http://newmexicoindependent.com/22487/guv-abolishes-death-penalty-in-nm>. When the repeal process began during the legislative session, it at first appeared that Governor Richardson, a death penalty supporter, would be leaving the governor's post for a position in the Obama Administration and that Denish, a death penalty opponent, would fill the post. Richardson did not take a position in the Obama administration, however, and stayed on as New Mexico's governor. See Felicity Barringer, *In Santa Fe, Staying Can Also Be Such Sweet Sorrow*, N.Y. TIMES, Jan. 5, 2009, at A16; Brian Knowlton, *Obama Names Richardson as Commerce Secretary*, N.Y. TIMES, Dec. 3, 2008, <http://www.nytimes.com/2008/12/04/us/politics/04transition.html>; Andy Barr, *Bill Richardson Tarnished by Scandal*, POLITICO, Feb. 12, 2009, <http://www.politico.com/news/stories/0209/18741.html>.

¹⁶⁷ Jennings, *supra* note 166; *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16.

¹⁶⁸ *Id.*

did not extend its change in the death penalty law retroactively to these individuals.¹⁶⁹

The abolition of the death penalty in New Mexico came about through the democratic process: a slow, arduous labor that engaged the efforts of many individuals. Among the many people involved in the repeal process were Viki Elkey, who served as Executive Director of the New Mexico Coalition to Repeal the Death Penalty during this legislative effort,¹⁷⁰ and State Representative Gail Chasey, a Democrat from Albuquerque, who first introduced a bill to abolish the death penalty in 1999.¹⁷¹

The New Mexico Coalition to Repeal the Death Penalty began its abolition campaign in 1997 and underwent twelve years of successes and setbacks until its ultimate triumph in 2009. Several themes resonated throughout this process and perhaps proved helpful in the Coalition's ultimate success.¹⁷² First, the Coalition linked the needs of the murder victim's family with the inadequacy of the death penalty system. Murder Victims' Families for Reconciliation supported the repeal of the death penalty, and surviving family members testified that the death penalty did not remedy or bring closure to their families.¹⁷³ In this regard, the legislation tied the costs savings from abolishing the death penalty to services for families of victims. Thus, rather than simply abandoning or neglecting the interests and needs of the murder victims and their families, the abolition efforts tied abolition to directly helping victims' families. In addition, the punishment of death was replaced with life imprisonment without the possibility of parole, which is a harsh punishment that prevents the offender from returning to society.

¹⁶⁹ See STATE BY STATE DATABASE: NEW MEXICO, *supra* note 157.

¹⁷⁰ Viki Elkey, *Abolishing the Death Penalty in New Mexico: Lessons Learned in a Long Campaign*, PEACEWORK, May 2009, available at <http://www.peaceworkmagazine.org/abolishing-death-penalty-new-mexico-lessons-learned-long-campaign>. Elkey is a remarkable, spirited, vivacious woman who appears to have taken on her abolition task with utter determination and grit.

¹⁷¹ N.M. LEGISLATURE, BILLS SPONSORED BY: GAIL CHASEY, 1999 REGULAR SESSION, <http://www.nmlegis.gov/lcs/legdetails.aspx?SPONCODE=HCHAS> (last visited Jan. 16, 2012).

¹⁷² Interview with Viki Elkey, Exec. Dir. of the N.M. Coal. to Repeal the Death Penalty (July 1, 2010).

¹⁷³ Press Release, Death Penalty Info. Ctr., New Mexico's Legislature Votes to Abolish Death Penalty—Part of National Trend Away from Capital Punishment (Mar. 13, 2009).

Second, a powerful component of the abolition process revolved around the danger of executing an innocent person. As Elkey explained, exonerated men and women changed the tone of debate with personal stories.¹⁷⁴ The fear of New Mexico killing an innocent person and the face of those innocent individuals who barely escaped the executioner's needle echoed throughout the death penalty debate.¹⁷⁵ Among those telling stories of exoneration was Juan Melendez, who had been convicted and sentenced to die in Florida, and who spent eighteen years on death row before he was exonerated.¹⁷⁶ Uneasiness over executing an innocent person has become an important topic in the debate over the legitimacy of the death penalty.¹⁷⁷ As Justice Souter observed in his concurring opinion in *Marsh v. Kansas*, "Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests."¹⁷⁸

The faith community also played a critical role in advocating abolition of the death penalty with officials from the Roman Catholic Church lobbying hard for repeal.¹⁷⁹ Of note, Pope John Paul II issued encyclical "Evangelium Vitae" (The Gospel of Life) on March 25, 1995, stating,

It is clear that, for these purposes to be achieved, the *nature and extent of the punishment* must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.¹⁸⁰

¹⁷⁴ Elkey, *supra* note 172.

¹⁷⁵ *Id.*

¹⁷⁶ Shari Allison & Cathy Ansheles, *Taking Death off the Table in the Land of Enchantment*, CHAMPION, June 2009, at 42.

¹⁷⁷ As noted in the Introduction, perhaps one of the most prominent recent examples of this problem was the execution of Troy Davis. See, e.g., Editorial, *A Grievous Wrong*, N.Y. TIMES Sept. 20, 2011, at A30; Kim Severson, *Georgia Execution to Proceed; Bids to Halt It Go On*, N.Y. TIMES, Sept. 20, 2011, at A21.

¹⁷⁸ *Kansas v. Marsh*, 548 U.S. 163, 207–08 (2006).

¹⁷⁹ *Death Penalty Is Repealed in New Mexico*, *supra* note 167.

¹⁸⁰ POPE JOHN PAUL II, ENCYCLICAL LETTER, EVANGELIUM VITAE (THE GOSPEL OF LIFE) ¶ 56 (1995).

The Catholic Church, as well as other religious denominations, presented moral pressure for abolition.¹⁸¹

Third, cost proved a strong argument to abolish the death penalty. In the fiscal impact report prepared in connection with the New Mexico bill to abolish the death penalty, the Public Defender Department claimed that abolition would save millions of dollars.¹⁸² The State Bar Task Force on the Administration of the Death Penalty also explained that the death penalty entails certain significant costs not found in noncapital cases.¹⁸³ Elkey nonetheless advised that although cost was an important issue, it was not determinative.¹⁸⁴

Instead, the death penalty debate evoked a more emotional, moral, visceral decision-making process. To that end, the religious component, particularly in a state like New Mexico with a strong Catholic community, and the very real risk of executing an innocent person proved critical. Reflecting an evolving standard of decency, at least by New Mexico standards, the risk of executing someone who is innocent, particularly given the increasing evidence of this problem, makes the death penalty unsustainable.

B. New Jersey Legislative Abolition of Capital Punishment

Two years before the legislative abolition of the death penalty in New Mexico, the New Jersey legislature abolished the death penalty. New Jersey enacted its modern death penalty statute in 1982 and modeled the statute after the Model Penal Code although the legislature subsequently amended the statute a number of times.¹⁸⁵ During the modern death penalty era, sixty individuals were sentenced to death, fifty-two of those individuals had their sentences reversed by the courts, and no one was executed.¹⁸⁶ The last execution in New Jersey took place in 1963.¹⁸⁷

The abolition efforts in New Jersey came about as a result of a few committed individuals, including Jack Callahan, Lorry W. Post, and

¹⁸¹ *Death Penalty Is Repealed in New Mexico*, *supra* note 167.

¹⁸² LEGISLATIVE FINANCE COMMITTEE FOR THE NEW MEXICO LEGISLATURE, FISCAL IMPACT REPORT, H.B. 285, Regular Session, at 2 (2009).

¹⁸³ *Id.*

¹⁸⁴ Elkey, *supra* note 172.

¹⁸⁵ N.J. DEATH PENALTY STUDY COMM'N, *supra* note 122, at 6, 8–10.

¹⁸⁶ *Id.* at 7.

¹⁸⁷ *Id.* at 5.

Celeste Fitzgerald as well as the dedicated work of several state legislators.¹⁸⁸ New Jerseyans for a Death Penalty Moratorium (NJDPM) spearheaded the lobbying effort, and its members, as well as other organizations such as the NAACP and Amnesty International, worked tirelessly to end the death penalty in New Jersey.¹⁸⁹ In their lobbying and education efforts, these organizations often highlighted the risk of executing an innocent person and the failure of the death penalty to provide satisfaction to the victim's family.¹⁹⁰

Among the first successes for NJDPM was the establishment of a commission to study the death penalty; the commission issued its findings in January 2007.¹⁹¹ In relevant part, the Commission concluded the following: the death penalty served no legitimate purpose, the death penalty was inconsistent with evolving standards of decency, the death penalty cost more than life imprisonment without the possibility of parole, a sentence of life imprisonment without the possibility of parole adequately met public safety and penal interests, and funds should be made available to families of murder victims.¹⁹² The Commission then recommended that New Jersey abolish the death penalty and recommended that cost savings from abolition be used for services for surviving family members of murder victims.¹⁹³

After the issuance of the Commission report, the state legislature took up the charge during a lame duck session.¹⁹⁴ Senators Raymond Lesniak and Robert Martin and House Speaker Joseph Roberts played critical roles in pushing the abolition legislation through the state legislature. While the New Jerseyans for an Alternative to the Death Penalty and other organizations lobbied extensively for repeal, vocal opposition argued against it.¹⁹⁵ The battle for repeal in the state

¹⁸⁸ See Robert J. Martin, *Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute*, 41 U. TOL. L. REV. 485, 497–98 (2010) (providing a detailed and firsthand account of the repeal of capital punishment in New Jersey).

¹⁸⁹ *Id.* at 497–501.

¹⁹⁰ *Id.* at 502.

¹⁹¹ *Id.* at 499; N.J. DEATH PENALTY STUDY COMM'N, *supra* note 122.

¹⁹² N.J. DEATH PENALTY STUDY COMM'N, *supra* note 122, at 21–65.

¹⁹³ *Id.* at 67.

¹⁹⁴ Martin, *supra* note 188, at 540.

¹⁹⁵ *Id.* at 526–27.

legislature was heated, contentious, and dramatic.¹⁹⁶ Like in New Mexico, abolitionist arguments that proved effective included the risk of executing an innocent person, the cost savings achieved by abolishing the death penalty and replacing it with a sentence of life without the possibility of parole, and the benefits of tying the savings earned from abolishing capital punishment to services for family members of murder victims.¹⁹⁷ In addition, given that New Jersey had not executed anyone since the early 1960s, some argued that sentencing individuals to death was a fraud since no one was executed after the state reinstated the death penalty in 1982.¹⁹⁸ Opposing repeal of the death penalty, several victims' family members spoke passionately about the need to retain the death penalty to vindicate the victims' deaths and argued for effective enforcement of the capital punishment statute rather than abandoning it.¹⁹⁹

Ultimately, the abolition legislation passed both houses, and Governor Corzine, an opponent of capital punishment,²⁰⁰ signed the bill into law at a public ceremony on December 17, 2007.²⁰¹ In anticipation of the repeal, Governor Corzine commuted the sentences of the eight men who were on New Jersey's death row.²⁰² In signing the bill, Governor Corzine stated, "Today New Jersey is truly evolving. . . . Society must determine if its endorsement of violence begets violence and undermines the sanctity of life. . . . I answer yes, and therefore I believe we must evolve to ending that endorsement."²⁰³

¹⁹⁶ *Id.* at 533–35.

¹⁹⁷ *See id.*; Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3.

¹⁹⁸ Martin, *supra* note 188, at 537.

¹⁹⁹ Richburg, *supra* note 197.

²⁰⁰ Jeremy W. Peters, *New Jersey Moves to End Death Penalty*, N.Y. TIMES, Nov. 19, 2007, at B1.

²⁰¹ Martin, *supra* note 188, at 537–38.

²⁰² *Id.* at 538.

²⁰³ Deborah Howlett, *Death Row Disappears as Corzine Signs Bill*, STAR-LEDGER, Dec. 18, 2007, at 1. Although there have been some efforts to reintroduce death penalty legislation in New Jersey, those efforts have not been met with much enthusiasm and to date have been unsuccessful. *See* Erik Larsen, *Death Penalty Debate Is Revived in N.J.*, NJ.COM, Apr. 2, 2011, http://www.nj.com/news/index.ssf/2011/04/nj_death_penalty_debate_is_rev.html.

C. *Illinois Legislative Abolition of Capital Punishment*

In the spring of 2011, Illinois became the third and most recent state to legislatively abolish capital punishment.²⁰⁴ Drama, corruption, and turmoil left an indelible mark on Illinois's experience with the modern death penalty.²⁰⁵ Shortly after *Furman*, Illinois amended its death penalty statute, setting out factors that would render an offender eligible for death and also providing for a three-judge panel to decide the sentence;²⁰⁶ the Illinois Supreme Court, however, struck down that statute as unconstitutional under both the state and federal constitutions.²⁰⁷ A new death penalty statute enacted in 1977 appeared to follow the model sanctioned by *Gregg*,²⁰⁸ although subsequent amendments to this statute broadened the crimes and criteria for death eligibility.²⁰⁹ Unlike New Mexico or even New Jersey, Illinois had a sizeable death row. From 1977 to 2011, Illinois sentenced 311 individuals to death.²¹⁰ The state executed twelve individuals and exonerated at least twenty other condemned prisoners.²¹¹

In early 2000, prompted by notorious cases of wrongful convictions and death sentences, Governor George Ryan declared a moratorium on executions and established a commission to study the death penalty in Illinois.²¹² The Commission released its report on April 15, 2002. Although the Commission did not call for abolition of the death penalty, it did set out a number of recommendations

²⁰⁴ John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011, at A18.

²⁰⁵ See Christina McMahon, *Illinois Abolishes the Death Penalty*, 16 PUB. INT. L. REP. 83 (2011).

²⁰⁶ ILL. COMM'N ON CAPITAL PUNISHMENT, *supra* note 120, at 3.

²⁰⁷ *People ex rel. Rice v. Cunningham*, 336 N.E.2d 1 (Ill. 1975); ILL. COMM'N ON CAPITAL PUNISHMENT, *supra* note 120.

²⁰⁸ See 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2011); ILL. COMM'N ON CAPITAL PUNISHMENT, *supra* note 120, at 3.

²⁰⁹ See 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2011); ILL. COMM'N ON CAPITAL PUNISHMENT, *supra* note 120, at 3.

²¹⁰ McMahon, *supra* note 205, at 84; ILL. COMM'N ON CAPITAL PUNISHMENT, *supra* note 120, at 5, 9 (indicating that when the Commission began its work, Illinois had sentenced more than 250 individuals to death although more than half of these reversed on appeal or subsequent review).

²¹¹ ILL. COMM'N ON CAPITAL PUNISHMENT, *supra* note 120, at 5.

²¹² *Id.* at 1. For an interesting and personal reflection on the Commission, see SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTION ON DEALING WITH THE DEATH PENALTY* (2003).

including the following: videotaping the questioning of capital suspects, reforms related to eyewitness identification, greatly limiting death eligibility, greater review of prosecutorial decisions to seek the death penalty, better training for capital lawyers, and requiring proportionality review by the state supreme court.²¹³

Even though the Commission did not recommend abolishing the death penalty, in 2003, Governor Ryan emptied the row by commuting the sentences of 167 death row inmates to life and pardoning four other condemned prisoners.²¹⁴ Nonetheless, Illinois's death penalty statute remained in effect after Ryan's massive commutation. After 2003, fifteen more capital offenders were condemned to death,²¹⁵ although the state did not kill any of these individuals.²¹⁶ In 2011, the Illinois Coalition to Abolish the Death Penalty, as well as a number of other organizations, successfully concluded a two-year legislative campaign to abolish the death penalty in Illinois.²¹⁷ The debate in the state house and senate was passionate and contentious on both sides.²¹⁸ Supporters of the repeal raised passionate concerns about wrongful convictions and argued persuasively the very real specter of executing an innocent person.²¹⁹ This concern proved compelling in Illinois, where there were a significant number of well-publicized cases of exonerations.²²⁰ Those favoring retention of the death penalty argued that it should be available for the worst of the worst and to provide retribution for victims and their families.²²¹ Like in New Mexico and New Jersey, the savings from abolishing death row were to go, in part, to services

²¹³ ILL. COMM'N ON CAPITAL PUNISHMENT, *supra* note 120, at i–ii.

²¹⁴ Schwartz & Fitzsimmons, *supra* note 204.

²¹⁵ *Id.*

²¹⁶ See ILLINOIS COALITION TO ABOLISH THE DEATH PENALTY, <http://www.icadp.org/legislative-action> (last visited Jan. 16, 2012).

²¹⁷ *Id.*

²¹⁸ Schwartz & Fitzsimmons, *supra* note 204.

²¹⁹ Steve Mills, *What Killed Illinois' Death Penalty*, CHI. TRIB., Mar. 10, 2011, http://articles.chicagotribune.com/2011-03-10/news/ct-met-illinois-death-penalty-history-20110309_1-death-penalty-death-row-death-sentences; Schwartz & Fitzsimmons, *supra* note 204; Todd Wilson & Ray Long, *Illinois Death Penalty Ban Sent to Gov. Pat Quinn*, CHI. TRIB., Jan. 11, 2011, http://newsblogs.chicagotribune.com/clout_st/2011/01/illinois-death-penalty-ban-a-step-closer-to-governors-desk.html.

²²⁰ Mills, *supra* note 219; Schwartz & Fitzsimmons, *supra* note 204; Wilson & Long, *supra* note 219.

²²¹ Wilson & Long, *supra* note 219.

for surviving members of the victim's family.²²² In the end, the bill passed both houses, and Governor Quinn, a Democrat and death penalty supporter, signed the bill abolishing the death penalty in Illinois.²²³ Quinn also commuted the sentences of the remaining condemned prisoners on Illinois's death row.²²⁴ In signing the legislation, Governor Quinn stated,

We cannot have a death penalty system in our state that kills innocent people. . . . Unfortunately that system was in grave danger of doing exactly that in 20 different instances in Illinois. And so what's really in question is the system itself. If the system can't be guaranteed 100 percent error-free, then we shouldn't have the system. It cannot stand. It just is not right in our democracy and system of justice.²²⁵

Sixteen states have abolished the death penalty; four of these sixteen states ended the death penalty in the last few years. This abolition effort stands in marked contrast to the first thirty years of the modern death penalty. Of course, this abolition effort did not occur overnight, but rather was part of an ongoing effort by a number of different individuals, organizations, and legislators who, for a variety of reasons, wanted to end capital punishment in their state. The efforts of New Mexico, New Jersey, and Illinois provide useful guidance as to why this change occurred and what that change means for the American death penalty system.

²²² 725 ILL. COMP. STAT. ANN. 5/119-1(b) (West 2011) ("All unobligated and unexpended moneys remaining in the Capital Litigation Trust Fund on the effective date of this amendatory Act of the 96th General Assembly shall be transferred into the Death Penalty Abolition Fund, a special fund in the State treasury, to be expended by the Illinois Criminal Justice Information Authority, for services for families of victims of homicide or murder and for training of law enforcement personnel."); see Mary Massingale, *House Narrowly Approves Abolition of Death Penalty*, ILL. STATEHOUSE NEWS, Jan. 6, 2011, <http://illinois.statehousenewsonline.com/4846/house-narrowly-approves-abolition-of-death-penalty>.

²²³ Christopher Wills, *Illinois Death Penalty Abolished, State Clears Death Row*, CHRISTIAN SCI. MONITOR, Mar. 10, 2011, <http://www.csmonitor.com/USA/Latest-News-Wires/2011/0310/Illinois-death-penalty-abolished-state-clears-death-row>.

²²⁴ *Id.*

²²⁵ Dave McKinney & Stephen Di Benedetto, *Quinn Signs Bill Repealing Illinois Death Penalty*, CHI. SUN TIMES, Mar. 9, 2011, <http://www.suntimes.com/news/politics/4225981-418/gov.-pat-quinn-signs-bill-repealing-illinois-death-penalty>; accord Patrick Yeagle, *Illinois Death Penalty Repealed*, ILL. TIMES, Mar. 17, 2011, <http://www.illinoistimes.com/Springfield/article-8452-illinois-death-penal.html>.

V

END OF THE BEGINNING OF THE MODERN DEATH PENALTY

In rejecting the death penalty, New Mexico, New Jersey, and Illinois found that the standards of decency of their states cannot abide the risk of the state killing an innocent man or woman. The danger of killing the wrong person is even more problematic in the modern death penalty system, which faces intractable problems, including lack of competent lawyers to represent capital offenders, high economic costs, and the politicization of the judicial process. Further, and on a more fundamental level, the modern death penalty sets up a system that requires juries to do two incompatible tasks: (1) give a rational, reasoned determination of whether the defendant is eligible for the death penalty, and (2) use discretion to spare the life of an offender if warranted. As Justice Blackmun recognized, these goals are inconsistent, incompatible, and ultimately unworkable.²²⁶ But more than that, the death penalty asks the jury to always get it right. That is, convict the right man or woman and assure that a death sentence is proper in each particular case. As the governors in New Mexico, New Jersey, and Illinois indicated when they signed the repeal legislation into law, this task is not one that the modern death penalty is capable of achieving.

It is also interesting to note that the abolition efforts occurred after the terrorist attacks on the United States in 2001. One might think that the terrorist attacks, and the accompanying insecurity that the nation might feel about its safety would ramp up support for the death penalty. Surveys show, however, that, while a majority of Americans support capital punishment, when offered the life without the possibility of parole as a sentencing option, the support for the death penalty drops.²²⁷ Increased attention on wrongful convictions, and the mounting number of wrongful convictions, adds further doubts about the reliability of the death penalty. Indeed, politicians in three very different states, in different parts of the country, voted against the death penalty without political ramifications. These actions indicate an important shift in the death penalty debate.

²²⁶ *Callins v. Collins*, 510 U.S. 1141, 1143–59 (1994) (Blackmun, J., dissenting from denial of certiorari).

²²⁷ Frank Mace, *It's Time to Kill the Death Penalty*, HARV. POL. REV., Sept. 26, 2011, <http://hpronline.org/united-states/its-time-to-kill-the-death-penalty>.

Yet, this observation should not be overstated. No state in the Deep South has abolished the death penalty, and as demonstrated recently in Texas and Georgia, these states have no qualms about carrying out executions. At most, North Carolina has addressed some important death penalty issues in enacting the Racial Justice Act, and Maryland has tightened the evidentiary standards in death penalty cases. Until there is a successful abolition of the death penalty in the states in the Old Confederacy, however, the death penalty will remain an entrenched part of the American landscape.

The danger of executing an innocent man or woman loomed large in the recent abolition debates. The importance and prominence of this concern has increased dramatically in the last ten to fifteen years as DNA and other evidence have resulted in the exoneration of more than 130 condemned prisoners. Illinois, in particular, faced the daunting reality that the State sent as many as twenty innocent men to death row. In New Mexico, the testimony of Juan Melendez had a significant impact on the debate. The conversation about the death penalty now poses the very real question of whether we as a society can live with killing innocent people as part of our death penalty ritual.

Related to this concern is the option of sentencing someone to life without the possibility of parole. In all three states that recently abolished the death penalty, it was replaced with a sentence of life without the possibility of parole. This sentencing option provides an alternative that assures public safety by keeping the offender out of society until the end of his or her life.

Another issue of significance in the abolition efforts is the high economic cost of the death penalty. In New Jersey this issue played a compelling role, particularly given that the state had not executed anyone who had been sentenced to death in the modern era. The legislature found it important that the cost did not deliver the intended punishment—an execution. Moreover, in all three states the savings, or at least part of the savings, derived from the death penalty were to be tied to services for the surviving victim's family. This factor may have been critical. One of the main arguments for continuing the death penalty is to vindicate the loss of the victim to society and to his or her family. It is important not to forget that the crime at issue in these cases is murder—frequently a senseless, horrible murder—and a number of individuals suffer as a result of that murder. The emotional tug for those supporting the death penalty is the appeal of vindication or closure for the surviving members of the victim's

family. The successful abolition lobbying efforts also focused on the victim's family and the failures of the death penalty system to meet the needs of these individuals who are truly aggrieved by the defendant's actions.

In signing the law repealing New Jersey's death penalty statute, Governor Corzine stated that New Jersey was evolving. To what extent then do the recent legislative abolition actions affect the evolution of the standards of decency that frame the Eighth Amendment? In *Atkins*, *Roper*, and *Kennedy* the Court sought a national consensus that states have rejected a particular punishment as inconsistent with evolving standards of decency. The actions in New York, New Mexico, New Jersey, and Illinois to some extent indicate that at least some states have found that the death penalty is inconsistent with their state's standards of decency. Yet thirty-four states still have the death penalty, which is only one fewer than the number of states that revised their death penalty statutes after *Furman*. The number of total abolition states is not yet comparable to the numbers the Court found persuasive in *Atkins* and *Roper* when the Court found that the imposition of the death penalty on mentally retarded and juvenile offenders violated evolving standards of decency. It is unlikely, then, that at this point of time, the Supreme Court would find that the evolving standards of the Eighth Amendment preclude the death penalty.

The struggle for abolition has turned a corner, but a long road lies ahead. The next stage of the death penalty debate will be fought in the state legislatures. If the three recent abolition states are any guide, this fight will be contentious and emotional. It will also shape the course of capital punishment in the United States in the twenty-first century.

