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The American Death Penalty: Past, Present, and Future

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THE AMERICAN DEATH PENALTY: PAST, PRESENT, AND FUTURE

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DANIEL LACHANCE, EXECUTING FREEDOM: THE CULTURAL LIFE OF CAPITAL PUNISHMENT IN THE UNITED STATES (UNIVERSITY OF CHICAGO PRESS 2016). PP. 272. HARDCOVER $35.00.

CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT (BELKNAP PRESS 2016). PP. 400. HARDCOVER $29.95.

INTRODUCTION

The modern history of the death penalty in America begins with the decision of the Supreme Court in *Furman v. Georgia*.[1] There, the Court, in a five to four decision, held the death penalty, as then administered, violated the Eighth Amendment. Prior to the *Furman* decision, although forty-one states had death penalty statutes on the books, the use of, and support for, the death penalty had been in decline for a number of years.[2] However, the decision seemed to spark renewed enthusiasm for the death penalty. By 1976, when the Court considered the constitutionality of death penalty statutes enacted to meet the Court's *Furman* concerns, thirty-five states had reenacted death penalty statutes.[3] In subsequent years, death sentences rose, to a high of 315 in 1996,[4] and executions followed, reaching a high of ninety-eight in 1999.[5] More recently, that picture has changed dramatically. Since 2000, seven states have abandoned the death penalty.[6] Popular support for the death penalty, as measured by opinion polls, is now at its lowest point in the post-

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1. 408 U.S. 238 (1972).

2. *Id.* at 291–93 (Brennan, J., concurring); *Id.* at 341 (Marshall, J., concurring).

3. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

4. *Death Sentences by State and Year*, DEATH PENALTY INFO. CTR. ("DPIC"), https://deathpenaltyinfo.org/death-sentences-united-states-1977-present.

5. *Execution Database*, DPIC, https://deathpenaltyinfo.org/views-executions.

6. *Death Sentences by State and Year*, *supra* note 4.

Furman era.[7] In 2016, there were only thirty death sentences in the country and twenty executions.[8] Underlying these figures are two facts central to an understanding of the modern death penalty. First, the death penalty is a regional phenomenon. The eleven former Confederate states plus Oklahoma (a "Confederate territory" during the Civil War) all are death penalty states and together account for eighty percent of the executions in the modern era.[9] Second, the death penalty is differentially applied according to race. Numerous empirical studies of the death penalty, the most well-known being the Georgia study by Professor David Baldus and his colleagues used to challenge the death sentence in *McCleskey v. Kemp*,[10] have found state-wide or county-wide racial disparities in death-charging and death-sentencing.[11]

Both of the books under review describe, and seek to explain, this history, although from very different perspectives. In *Executing Freedom: The Cultural Life of Capital Punishment in the United States*, Professor Daniel LaChance, a social and cultural historian who writes about punishment and popular culture,[12] seeks to explain the cultural factors supporting the death penalty and the reasons for the increased support post-*Furman*.[13] In *Courting Death: The Supreme Court and Capital Punishment*, Carol and Jordan Steiker, law professors who have been writing about the death penalty for more than two decades,[14] analyze and criticize the Supreme Court's treatment of the death penalty over the last half century.[15] The books are complementary because the cultural and legal histories of the modern death penalty are interrelated, as the authors of both books acknowledge. Thus, LaChance's discussion of cultural history includes a review of the three critical Supreme Court cases during the period—*Furman v. Georgia*[16] (holding the death penalty unconstitutional), *Gregg v. Georgia*[17] (upholding various revised death penalty statutes), and *McCleskey v. Kemp*[18] (upholding Georgia's death penalty scheme despite evidence that it operated in a racially discriminatory manner)—as well as several other Supreme Court decisions. For their part, the Steikers, in describing the history of the

7. Baxter Oliphant, *Support for Death Penalty Lowest in More Than Four Decades*, PEW RES. CTR. (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades. *See also* Emily Williams et al., *Americans Are Turning Against the Death Penalty: Are Politicians Far Behind?*, WASH. POST (Dec. 7, 2015), http://www.washingtonpost.com/news/monkey-cage/wp/2015/12/07/americans-are-turning-against-the-death-penalty-are-politicians-far-behind.

8. DPIC, THE DEATH PENALTY IN 2016 (2016), https://deathpenaltyinfo.org/documents/2016YrEnd.pdf.

9. *Execution Database*, *supra* note 5.

10. 481 U.S. 279 (1987).

11. *See* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman, McCleskey, *and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1246–51 (2013) (discussing studies).

12. *See, e.g.*, Daniel LaChance, *Rehabilitating Violence: White Masculinity and Harsh Punishment in 1990s Popular Culture*, *in* PUNISHMENT IN POPULAR CULTURE 163–96 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2015).

13. DANIEL LACHANCE, EXECUTING FREEDOM: THE CULTURAL LIFE OF CAPITAL PUNISHMENT IN THE UNITED STATES (2016) [hereinafter EXECUTING FREEDOM].

14. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 107 HARV. L. REV. 355 (1995).

15. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT (2016) [hereinafter COURTING DEATH].

16. 408 U.S. 238 (1972).

17. 428 U.S. 153 (1976).

18. 481 U.S. 279 (1981).

death penalty in America, emphasize that the death penalty was an expression of "vigilante values"[19] (a point made by LaChance, as well) and identify the death penalty as a product of distinctively American "cultural commitments" to populism, localism, anti-statism, individuality, and religiosity.[20] Both books contain more useful insights than can be mentioned in this review, and reading both books tells you all you need to know about the modern death penalty in America.

I. CULTURAL VALUES AND THE DEATH PENALTY

LaChance begins his argument with the proposition that, during the last half of the twentieth century, support for the death penalty varied inversely with the majority's trust in the federal government.[21] In the aftermath of World War II, White, middle-class men were the beneficiaries of the federal government's welfare programs, which encouraged "positive" freedom (i.e., autonomy and the ability to pursue one's self-interest).[22] In the late 1960s, however, trust in the federal government fell because the beneficiaries of the government's welfare programs were increasingly non-White and/or poor Americans, crime rates were rising and the criminal justice system was seen to be failing because of the Supreme Court's excessive concern with protecting the rights of defendants.[23] White middle class Americans became more concerned with "negative" freedom, protection from harm, and that concern fueled renewed support for the death penalty and other harsh punishments.[24] Retribution became the dominant penological goal. Citing the writings of professor and death penalty supporter Walter Berns, LaChance argues that the death penalty was seen as an antidote to the nihilism of modern life: "A nation that executes . . . 'will remind its citizens that it is a country worthy of heroes.'"[25]

The strength of *Executing Freedom* is in its identification of the disparate strands of the death penalty culture that fostered its post-*Furman* revival. LaChance describes the ideology of the death penalty supporters as "a mixture of the frontier libertarianism . . . with the civilizing virtues of family—'family values libertarianism.'"[26] By "frontier libertarianism," he means the libertarian distrust of the criminal justice system, including judges, parole boards, and governors. The death penalty and other harsh punishments were seen as a corrective for a legal and technocratic culture unwilling to exact retribution for horrible crimes.[27] LaChance argues that support for the death penalty also came from "family values" conservatives, who conceived of crime as a product of a culture that encouraged immoral behavior and prevented families from effectively transmitting moral values to their children.[28] The death penalty was a rebuke to the paternalistic state that had

19. COURTING DEATH, *supra* note 15, at 24.
20. *Id.* at 73.
21. EXECUTING FREEDOM, *supra* note 13, at 1–2.
22. *Id.* at 7.
23. *Id.* at 10–11.
24. *Id.* at 9–12.
25. *Id.* at 44 (quoting WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 176 (1979)).
26. EXECUTING FREEDOM, *supra* note 13, at 156.
27. *Id.* at 148–49.
28. *Id.* at 158–59.

displaced the family as the moral locus of society and thereby undercut the role of the father within the family.[29] According to LaChance, it was this concern to reemphasize family values that led to the victims' rights movement and established the right of the victims' families to offer victim impact evidence at the penalty phase of a capital trial.[30] Support for the death penalty also had a religious dimension. "Christianity has long-shaped the meaning of the death penalty in American society."[31] Executions provided the occasion for a drama of moral reckoning, with the defendant forced to confront the enormity of his crime and the victim's family present to witness the triumph of good over evil. In this context, LaChance refers to the film *Dead Man Walking* as a "sympathetic portrayal of the death penalty."[32] Although, at first, this seems like an odd statement because Sister Helen Prejean, the author of the book, and Tim Robbins, the director of the movie, are outspoken opponents of capital punishment, in fact, many have seen the movie as LaChance does: the condemned man confronting his impending execution, by taking responsibility for his crimes, attains a sense of grace. Underlying all is a belief in the need for righteous violence. The execution of a murderer is not viewed as a necessary evil, to rid society of a poisonous presence, but as a positive virtue. As LaChance puts it, the death penalty represents "the possibility that feudal virtues—masculine honor, radical independence, patriarchal clannishness, raw physical strength—could still flourish in a technologically advanced, civilized world."[33]

As LaChance explains, the modern death penalty represents an uneasy compromise with that instinct for righteous violence.[34] Nowhere is that compromise more evident than in the struggle over lethal injection. The rise in support for the death penalty coincided with a rejection of the rehabilitative (medical) model of punishment and the prison bureaucracy that implemented it. The death penalty was the antithesis of the rehabilitative model—it was retribution, pure and simple.[35] However, in an effort to distinguish the death penalty from lynchings—where the victims were usually tortured before being killed and their bodies often mutilated afterward—executions were to be as painless as possible. So began a search for a "humane" execution method that, forty years ago, settled on lethal injection. Whether, in fact, lethal injection is a humane execution method is far from clear because it has produced a higher percentage of botched executions than any other execution method.[36] But, humane or not, lethal injection is seen by death penalty proponents as a bureaucratic quasi-medical procedure on a docile subject that completely

29. *Id.* at 156.

30. *Id.* at 159–63.

31. EXECUTING FREEDOM, *supra* note 13, at 23.

32. *Id.* at 19.

33. *Id.* at 133. LaChance is not alone in seeing the connection between the death penalty and feudal values. *See* Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER, LAW & JUST. 64 (2012) (arguing that chivalry may explain various disparities in death sentencing).

34. EXECUTING FREEDOM, *supra* note 13, at 45–48.

35. *Id.* at 44–46.

36. AUSTIN SARAT, GRUESOME SPECTACLES 5, 120 (2014); Austin Sarat, *What Botched Executions Tell Us About the Death Penalty*, BOS. GLOBE (Apr. 27, 2014), https://www.bostonglobe.com/ideas/2014/04/27/what-botched-executions-tell-about-death-penalty/n857QsoDKDLN7fdNB6fimO/story.html.

undercuts its retributive effect.[37]

Two questions, alluded to by LaChance, might have been more fully addressed. First, LaChance tells a national story. His data about support for the death penalty are taken from national surveys, and his cultural evidence—from movies, television shows, books – is national in character. However, as noted above, the death penalty is very much a regional phenomenon.[38] What explains Southerners' enthusiasm for the death penalty? Far from being a post-*Furman* cultural phenomenon, the South's support for the death penalty may be rooted in long-standing cultural differences between the South and other regions. The Civil War itself reflected a contest between, to use LaChance's terms, the North's belief in a government that could effect positive freedom and the South's distinctive commitment to negative freedom.[39] Second, support for the death penalty post-*Furman* has tended to track support for incarceration in general.[40] During the last quarter of the twentieth century, as a result of lengthened sentences for many crimes, mandatory minimums, and "three strikes" laws, the prison population in the United States exploded, but, recently, that trend has been reversed.[41] Was the rise in support for the death penalty after *Furman*, and particularly its decline post-2000, simply a manifestation of a more general attitudinal change with regard to punishment, rather than the death penalty-specific issues that are LaChance's focus?

II. THE SUPREME COURT AND THE DEATH PENALTY

Courting Death, the Steikers' history of the modern death penalty, is the story of the Supreme Court's failed attempt to regulate the states' administration of capital punishment—its failure to find a tenable middle position between according the states the virtual free rein they enjoyed pre-*Furman* and striking down the death penalty as unconstitutional. The Steikers begin with the history of the death penalty before 1972 and emphasize, as LaChance does not, the regional disparities in its administration, disparities which continued into the post-*Furman* era. Drawing on earlier works,[42] the Steikers describe how the death penalty evolved from the lynch mobs who took more than 3000 lives in the South—mostly African-American men—in the period 1880-1930.[43] In fact, many death penalty supporters in the first half of the twentieth century argued the need for a "legal" death penalty to avert lynchings.[44] The Supreme Court itself was afraid of lynch

37. EXECUTING FREEDOM, *supra* note 13, at 188.

38. LaChance acknowledges that regional variations impose significant limitations on the use of nationally circulating ideas to explain the death penalty. *Id.* at 21.

39. JAMES MCPHERSON, BATTLE CRY OF FREEDOM 866 (2d ed. 2003).

40. LaChance refers to this phenomenon as the "retributive revolution." EXECUTING FREEDOM, *supra* note 13, at 12.

41. SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1 (2015), *available at* http://www.sentencingproject.org/publications/trends-in-u-s-corrections.

42. *See* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 66 (2003). *See also* FROM LYNCH MOBS TO THE KILLING STATE (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

43. COURTING DEATH, *supra* note 15, at 22–23. The Steikers' estimate of the number of lynching victims is on the low end. Professor Zimring puts the number of lynchings in the period 1882–1968 at 4743. ZIMRING, *supra* note 42, at 90. The Equal Justice Initiative identifies 4084 "racial terror" lynchings in the twelve Southern states during the period 1877–1950. *See* EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3d ed. 2015), *available at* https://lynchinginamerica.eji.org/report.

44. COURTING DEATH, *supra* note 15, at 23.

mobs. The Steikers tell the story of Ed Johnson, a Black man, who, in 1906, was convicted of rape (on very flimsy evidence) and sentenced to death by an all-White Tennessee jury.[45] When Justice Harlan, as circuit judge, accepted review of the case, a mob took Johnson from his cell and shot and lynched him, and a deputy sheriff pinned a note to his body, saying: "To Justice Harlan. Come get your nigger now."[46] This fear of lynch mobs led the Supreme Court to avoid taking up the issue of the death penalty until the wave of lynchings subsided.[47] When the Court, responding to the litigation campaign undertaken by the NAACP Legal Defense Fund ("LDF"), finally did begin to examine the death penalty in the 1960s, the death penalty seemed to be on its way out.[48] In the Steikers' view, the Court might have successfully abolished the death penalty if it had acted several years earlier, before President Nixon's four appointments to the Court (all of whom dissented in *Furman*) and before his successful politicization of criminal justice issues that fueled the backlash to *Furman*.[49]

When the Supreme Court held the death penalty unconstitutional in *Furman*, there was no majority opinion, and each of the five justices in the majority wrote his own opinion. The opinions of Justices Stewart and White—both finding an unconstitutional risk of arbitrariness in the infrequent application of the death penalty—were later said to embody the holding of the Court.[50] In subsequent cases, the Court sought to enforce *Furman* and limit the risk of arbitrariness with two requirements: (1) state legislatures had to "genuinely narrow" the death-eligible class;[51] and (2) state courts had to engage in meaningful review of death cases to assure that, in any given case, the sentence was proportionate.[52] With these requirements, the Supreme Court invited the states—through their legislatures and courts—to participate with the Court in rationalizing the death penalty by constraining the discretion of prosecutors and juries. Then, in *Woodson v. North Carolina*,[53] and *Lockett v. Ohio*,[54] the Court held that the Eighth Amendment required individual consideration of a defendant's background and record and the circumstances of the crime (i.e., the defendant must be allowed to present, and the sentencer had to consider, mitigating evidence). And, in *Gregg*, although the Court refused to find the death penalty disproportionate, at least when imposed for intentional murder, it recognized that the Eighth Amendment barred disproportionate punishments and applied a two-part test for determining whether the death penalty would be proportionate to a particular crime: (1) whether the penalty comported with evolving standards of decency, and (2) whether, in

45. *Id.* at 33.

46. *Id.* at 33–34.

47. *Id.* at 37. As late as 1976, lynching was still on the justices' minds. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) ("When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.").

48. COURTING DEATH, *supra* note 15, at 59–60

49. *Id.* at 74.

50. *See* Maynard v. Cartwright, 486 U.S. 356, 362 (1988); *Gregg*, 428 U.S. at 188–89 (plurality opinion).

51. Zant v. Stephens, 462 U.S. 862, 877 (1983).

52. Parker v. Dugger, 498 U.S. 308, 321 (1991).

53. 428 U.S. 280 (1976).

54. 438 U.S. 586 (1978).

the Court's view, it was excessive, that is, whether it served a penological purpose.[55] Thus, in the decade following *Furman*, the Court articulated three constitutional principles for a constitutional death penalty scheme. The scheme had to: limit the risk of arbitrariness; require the sentencer to consider mitigating evidence; and impose the death penalty only where proportionate.[56]

The Steikers' comprehensive and critical review of the Supreme Court's forty years of regulation of the death penalty covers all the significant court decisions. Their argument is that the Supreme Court's infrequent and inconsistent enforcement of its Eighth Amendment principles, along with questionable decisions on more general criminal procedure issues, such as ineffective assistance of counsel, the use of peremptory challenges, evidentiary rules for scientific evidence, and right to counsel in state post-conviction, has given the illusion of regulation without the substance.

> [T]he fact of minimal regulation … is filtered through time-consuming, expensive proceedings that ultimately do little to satisfy the concerns that led the Court to regulate this country's death penalty practices in the first place. In short, the last four decades have produced a complicated regulatory apparatus that achieves extremely modest goals while maximizing political and legal discomfort.[57]

Although the Steikers' critique is wide-ranging, what stands out is the Supreme Court's twin failures with regard to the very issues that prompted its intervention in *Furman*: its failure to enforce its *Furman* requirements limiting the discretion of prosecutors and juries and its failure to address racial disparities in the administration of the death penalty. Although the Court has never deviated from its holding that *Furman* requires the states, by statute, to narrow the death-eligible class, it has also never, since *Gregg*, examined a single state scheme to see whether the state's death eligibility factors collectively effected any meaningful narrowing. That failure to police its core holding had the predictable result that the states simply ignored the requirement in drafting and redrafting statutes and that, over time, there was "aggravator creep," as the states steadily broadened their definitions of death eligibility with additional aggravators.[58] In *Furman*, the Court found that the then fifteen to twenty percent death sentence rate made death sentences so infrequent as to create an unconstitutional risk of arbitrariness.[59] Today,

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55. *Gregg*, 428 U.S. at 172–73.

56. The Steikers suggest that the Court adopted a fourth Eighth Amendment principle in *Woodson*: the need for "heightened reliability" in capital sentencing. COURTING DEATH, *supra* note 15, at 168–72. Although the Steikers cite a handful of cases where the Court referred to the concept, in fact, there seem to be only two cases where the Court arguably used such an Eighth Amendment principle to overturn a death sentence. *See* Johnson v. Mississippi, 486 U.S. 578, 584–85 (1988); Beck v. Alabama, 447 U.S. 625, 637–38 (1980). The Steikers themselves point out a number of examples where the Court refused to apply such a principle, and they conclude: "In the post-*Furman* regime, the doctrine of heightened reliability, like the death penalty itself, seems to strike like lightning, randomly and with no broad effect." COURTING DEATH, *supra* note 15, at 176.

57. COURTING DEATH, *supra* note 15, at 176.

58. *Id.* at 161.

59. Although there was conflicting data before the Court as to the exact death sentence rate at the time, the Chief Justice, writing for the four dissenters, used the fifteen to twenty percent figure, as did Justice Stewart in his separate opinion. Furman v. Georgia, 408 U.S. 238, 386 n.1 (1972) (Burger, C.J., dissenting); *Id.* at 309 & n.10 (Stewart, J., concurring). In *Gregg*, the plurality relied on the same estimate. 428 U.S. at 182 n.26. Post-*Furman* research determined that the pre-*Furman* death sentence rate in Georgia was fifteen percent. *See* DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 80 (1990).

studies in various states have calculated a death sentence rate among death-eligible defendants to be well below that threshold.[60] Far from limiting the death penalty to the "worst of the worst," the states have chosen to make the overwhelming majority of murderers death-eligible. The Court's other *Furman* requirement—that the state courts engage in meaningful review of death sentences—has had a similar fate. After *Gregg*, many states copied the Georgia scheme and required intercase proportionality review of death sentences, and state courts in a number of states set aside death sentences as disproportionate.[61] Then, in *Pulley v. Harris*, the Court held that the mandated "meaningful appellate review" did not have to be *intercase* proportionality review.[62] The states took the hint that the Court was not serious about proportionality review and most effectively abandoned it.[63] The Supreme Court, only once, more than twenty-five years ago, intervened to enforce its meaningful appellate review requirement.[64]

The failure of the Supreme Court to enforce its statutory narrowing and appellate review requirements has left prosecutors with virtually unfettered discretion to seek death and jurors with virtually unfettered discretion to impose it. As a result, there are wide variations in states' administration of the death penalty and consequent wide variations in the states' execution rates, those variations being determined by political, institutional, and legal culture of the particular state.[65] The Steikers divide the states into four categories: (1) states without a death penalty, "abolitionist states" (nineteen states at the time of this writing); (2) states with a death penalty on the books, but with a trivial number of death sentences and executions, "de facto abolitionist states"; (3) states with significant numbers of death sentences, but few executions, "symbolic states"; and (4) states with frequent executions.[66] Using California and Texas as examples, the Steikers explore the differences between symbolic and execution states, identifying a number of factors leading to California's much lower execution rate, including the greater commitment to providing competent counsel, the much slower processing of cases by the California Supreme Court, the Ninth Circuit's reversal rate (which has been much higher than that of the Fifth Circuit), and a "blue state" political climate and "due process" legal culture.[67] The Steikers

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Given the Court's reliance on this estimate, the Steikers' recommendation to limit death-eligibility is mystifying. They say if statutory aggravators in a given jurisdiction collectively apply to no more than 10% or 15% of murders, it is much more tolerable to have death sentences in only 1% or so of murders overall. COURTING DEATH, *supra* note 15, at 177. Under the Steikers' scenario, 1 in 10 or 1 in 15 death-eligible murderers would be sentenced to death, roughly 7–10%. They do not explain why a 7–10% death sentence rate would be "tolerable" when the Supreme Court found a 15–20% death sentence rate made death so infrequent as to create an unconstitutional risk of arbitrariness.

60. *See, e.g.*, Justin Marceau & Sam Kamin, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1112 (2013) (death sentence rate in Colorado of 0.56%); Shatz & Shatz, *supra* note 33, at 93 (death sentence rate in California of 5.5%).

61. *See* Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After* Pulley v. Harris, 70 COLO. L. REV. 813, 845 n.170 (1999).

62. 465 U.S. 37, 43–45 (1984). It has been argued that proportionality review without comparison of like cases is an oxymoron. *See* White, *supra* note 61, at 834–35 ("To truly determine proportionality, a sentence must be viewed in light of other sentences; in other words, it must be compared.").

63. White, *supra* note 61, at 847–49.

64. Parker v. Dugger, 498 U.S. 308 (1991).

65. COURTING DEATH, *supra* note 15, at 144–49.

66. *Id.* at 118.

67. *Id.* at 119–53.

adopt Frank Zimring's explanation of the basic problem: "A nation can have full and fair criminal procedures, or it can have a regularly functioning process of executing prisoners; but the evidence suggests it cannot have both."[68] The substantial variation among states may be dwarfed by enormous geographic disparities within states because each county prosecutor is free to determine how often to seek death.[69] Thus, two percent of the counties in the country have produced the majority of executions post-*Furman*.[70] LaChance makes the same point with his descriptions of Johnny Holmes, district attorney of Harris County, Texas (1980–1999) and Bob Macy, district attorney of Oklahoma County, Oklahoma (1980–2001).[71] These two counties rank first and second, respectively, in executions since *Furman*.[72] Both Holmes and Macy were highly popular, larger-than-life lawmen who embodied frontier masculinity with their string ties and handlebar mustaches and whose vigorous pursuit of the death penalty set them against a technocratic bureaucracy and a due process judiciary.[73] With the states free to adopt overbroad definitions of death-eligibility, with no check on prosecutors' and jurors' discretion, and with county prosecutors free to effect their own personal notions of frontier justice, the death penalty today appears to be no less arbitrary than the death penalty the justices addressed in *Furman*.

As to the Supreme Court's other fundamental failure, the Steikers argue that underlying the Court's failed regulation of the death penalty was its refusal to address the "original sin" of racism.[74] In the 1960s, LDF, believing that capital punishment generally, and for the crime of rape in particular, was applied in a racially discriminatory fashion, decided to challenge the death penalty with a litigation strategy that eventually produced *Furman*.[75] Nonetheless, in the cases leading up to *Furman*, the Court said nothing about the race issue, and, in *Furman* itself, the majority justices, except for Justice Douglas, had little to say about race, even though Furman and the defendants in the two cases decided with *Furman* were Black men sentenced to death in the South. Justice Powell's opinion for the four dissenters actually had the most to say about race. Foreshadowing his opinion for the Court fifteen years later in *McCleskey v. Kemp*, he dismissed the likelihood of racial discrimination with the assurance that "the possibility of racial bias . . . has diminished in recent years" and "discriminatory imposition of capital punishment is far less likely today than in the past."[76] Most striking was the Court's decision five years later in *Coker v.*

68. *Id.* at 148. The Steikers conclude their comparison by asking why a "bizarre" death penalty regime like California's—one that, at great cost, has produced many death sentences, but few executions—has survived, and they offer the provocative suggestion that symbolism is the point; California may "reap much of the benefit of the death penalty without actually having to kill." *Id.* at 153 (quoting STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 62 (2002)).

69. COURTING DEATH, *supra* note 15, at 185.

70. RICHARD C. DIETER, DPIC, THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL (2013), *available at* https://deathpenaltyinfo.org/twopercent.

71. EXECUTING FREEDOM, *supra* note 13, at 130–54.

72. DIETER, *supra* note 70.

73. EXECUTING FREEDOM, *supra* note 13, at 139.

74. COURTING DEATH, *supra* note 15, at 3.

75. *Id.* at 40–56.

76. Furman v. Georgia, 408 U.S. 238, 450 (Powell, J., dissenting).

Georgia, where the Court held unconstitutional the death penalty for rape.[77] The evidence of racial discrimination in rape sentencing was overwhelming. From 1930 until the decision in *Furman*, 455 men were executed for rape in the United States, and almost ninety percent of them were Black, and all of the 455 were executed for raping White women.[78] Nonetheless, in *Coker*, the Court accepted a case where the defendant was White, and none of the opinions in the case mentioned the race issue. The Steikers suggest that the Court's race-neutral approach was appealing for several reasons: the Court had its hands full dealing with the fallout from *Brown v. Board of Education*[79] and did not want to tackle racism on another front; the Court was afraid of a similar backlash, especially because the death penalty was so popular in the South; crime rates were rising; and there was no good empirical evidence on race and the death penalty.[80]

In 1987, the Supreme Court finally addressed the race issue in *McCleskey v. Kemp*,[81] the most important post-*Furman* death penalty case. There, McCleskey, an African-American sentenced to death for the murder of a White police officer, presented a sophisticated empirical study of Georgia homicide prosecutions conducted by David Baldus and his colleagues demonstrating statistically significant racial disparities in the administration of the Georgia death penalty. The study found that, other factors being equal, Blacks were more likely to be sentenced to death than Whites, and, even more strikingly, defendants charged with killing White victims were 4.3 times as likely to be sentenced to death as those charged with killing Blacks.[82] Based on these disparities, McCleskey challenged his death sentence as a violation of the Equal Protection Clause and as a violation of the Eighth Amendment (invoking *Furman*). The Court assumed the study's findings were valid, but, in a five to four decision, ruled against McCleskey, finding that he failed to prove an equal protection violation because the study did not demonstrate *intentional* discrimination by any actor in the criminal justice system and finding that his proof of racial disparities did not amount to proof of a substantial enough risk of arbitrariness to violate the Eighth Amendment. The Steikers offer a number of reasons for the Court's rejection of McCleskey's claim: the belief that times had changed, and racism was no longer a major problem; the Court's preference for addressing process issues rather than outcomes;[83] the reluctance to base constitutional decisions on statistical evidence (Justice Powell, in a memo, admitted he did not understand the regression analysis used in the study);[84] and a concern about future capital and non-capital cases and the courts' ability to fashion a remedy.[85] Could the Court have ruled otherwise and taken on the issue of racism and the death penalty? After the decision, Professor Baldus and his colleagues argued that there were at least three approaches, short of abolition, the Court

77. 433 U.S. 584 (1977).

78. STEVEN F. SHATZ, CALIFORNIA CRIMINAL LAW: CASES AND PROBLEMS 735 (3d ed. 2011).

79. 347 U.S. 483 (1954).

80. COURTING DEATH, *supra* note 15, at 98–102.

81. 481 U.S. 279 (1987).

82. *Id.* at 287.

83. COURTING DEATH, *supra* note 15, at 104–08. "[T]he Court is often better suited to address the risk of evil than evil itself." *Id.* at 241.

84. *Id.* at 102.

85. *Id.* at 108–09.

could have taken: (1) requiring the states to narrow the class of death-eligible cases;[86] (2) requiring standards to limit prosecutorial discretion; or (3) recognizing claims of discrimination in individual cases based on proof similar to that used in other areas of the law.[87] The Steikers disagree, arguing, "[t]he widespread influence of race on capital sentencing is not amenable to constitutional regulation short of abolition . . . ."[88]

After setting out their critique of the Supreme Court's death penalty record, the Steikers contextualize the Court's death penalty jurisprudence with useful comparisons to other recent and problematic regulatory attempts by the Court.[89] They cite *Roe v. Wade*[90] as another example of a bold decision by the Court being crippled by the popular "backlash." There was no majority in the country for abolition of the death penalty or for abortion on demand, so Republicans were able to successfully politicize both issues in the pursuit of their Southern Strategy to woo away voters from the Democratic Party.[91] The Steikers compare *Furman* with the Warren Court's "criminal procedure revolution," arguing that, in both contexts, the Court's subsequent cases gave the illusion of regulation without the substance, thereby "legitimating" practices that should have been condemned.[92] The Steikers analogize the Court's attempt to deal with arbitrariness and racism in the death penalty with its treatment of gerrymandering after *Baker v. Carr* held that electoral districting had to be done on an equipopulous basis.[93] In both instances, the Court neglected the issue for a century, intervened, and then retreated in the face of remedial constraints.[94] As the Steikers point out, the Court was better equipped to order procedural reforms—"one person, one vote" in the case of voting rights, statutory narrowing and appellate review in the case of the death penalty—than it was to police substantive outcomes—political gerrymandering and racial disparities in the death penalty.[95] Lastly, the Steikers see the Court's death penalty cases as having a "discourse shaping" pattern similar to that of the same-sex marriage cases, where, in both instances, the Court's decisions moved the debate from moral to utilitarian grounds.[96]

III. THE FUTURE OF THE AMERICAN DEATH PENALTY

What explains the declining support for, and use of, the death penalty post-2000, and what does that say about the death penalty's future? For the most part, the authors agree on the reasons for the death penalty's recent decline.[97] Crime rates have declined, and,

86. The Baldus study itself found that, in the most aggravated cases, "the race effects go away." *McCleskey*, 481 U.S. at 287 n.5 (1987).

87. David Baldus, George Woodworth & Charles Pulaski, Jr., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 362 n.7 (1994).

88. COURTING DEATH, *supra* note 15, at 182.

89. *Id.* at 217–54.

90. 410 U.S. 113 (1973).

91. COURTING DEATH, *supra* note 15, at 226.

92. *Id.* at 230.

93. 369 U.S. 186 (1962).

94. COURTING DEATH, *supra* note 15, at 242–46.

95. *Id.* at 241.

96. *Id.* at 246–54.

97. *See* EXECUTING FREEDOM, *supra* note 13, at 184; COURTING DEATH, *supra* note 15, at 193–95.

consequently, criminal justice has ceased to be a wedge political issue. The Supreme Court's half-regulation of the death penalty has produced complexity and uncertainty in death penalty prosecutions and appeals, raising costs and delaying executions. At the state level, study after study has shown that executing a convicted murderer is far more costly than imprisoning him for life, and at the local level, the expenses associated with capital trials have priced many counties out of the death business. The average delay from sentence to execution has continued to rise—now more than twelve years nationwide, with far longer delays in some states—robbing executions of much of their impact when they eventually occur. In recent years, some states, which had not previously done so, have authorized life without parole sentences, and, given an alternative guaranteeing that the defendant will not be released, many prosecutors and jurors have rejected the death penalty. Lastly, the number of recent exonerations of death row defendants, many as a result of DNA testing, has resulted in increased caution about the use of the death penalty.

Both books finish with speculations about the future of the American death penalty. LaChance and the Steikers published their books before the 2016 election, an election which arguably upended all earlier predictions. LaChance's speculations appear in the last chapter of *Executing Freedom*, appropriately titled "Epilogue," because it apparently was written separately from the rest of the book, as an expanded version of a 2014 op-ed piece in the *New York Times*.[98] He argues that abolition will occur, not because of some moral awakening or because of exonerations, botched executions or evidence of racial disparities, but only when supporters recognize "that capital punishment cannot be made to live up to its retributive promise."[99] To that end, he urges abolitionists to shift their focus to victims with the message that the death penalty is just "another failed government program" doing more harm than good.[100] Interestingly, as LaChance points out, the failure of the death penalty to satisfy supporters' desire for "righteous violence" may be responsible, in part, for the recent passage of expanded self-defense statutes in twenty-two states.[101] As to whether abolition will occur, LaChance seems ambivalent: "The conditions that make it increasingly difficult for the death penalty to generate retributive meaning have existed for years, and it is unclear whether they can, on their own, erode support for capital punishment."[102]

Unlike LaChance, the Steikers, in Chapter Eight of *Courting Death*, offer a clear prediction about how abolition will occur.[103] In their view abolition does not depend on changing the cultural values supporting the death penalty because it will be accomplished by the Supreme Court, not the legislatures.[104] Their blueprint for abolition predicts that the Court will utilize its "capacious" proportionality jurisprudence, rather than reviving

98. EXECUTING FREEDOM, *supra* note 13, at xiii.

99. *Id.* at 185.

100. *Id.* at 191. This suggestion is consistent with the Steikers' point that the death penalty discourse has shifted from moral to utilitarian grounds. *See supra* note 96 and accompanying text.

101. EXECUTING FREEDOM, *supra* note 13, at 180.

102. *Id.* at 189.

103. They follow up their prediction regarding the end of the death penalty with a last chapter, *Life After Death*, which, in the guise of discussing how the criminal justice system will benefit from the predicted abolition, revisits the policy arguments against the death penalty. COURTING DEATH, *supra* note 15, at 290–322.

104. *Id.* at 255–59.

Furman (risk of arbitrariness), reversing *McCleskey* (racial disparities) or, as some lower courts have done, finding other aspects of the death penalty—the risk of executing innocent persons[105] or the inordinate delays in executions[106]—unconstitutional.[107] The Steikers are right that only a ruling finding the death penalty disproportionate for all crimes will result in abolition. Even if the Court were to issue a favorable ruling on one of the other grounds mentioned (which the Court has shown no inclination to do), such a ruling would not invalidate the death penalty, but, like *Furman*, would require the states to go back and retool their death penalty schemes for another round of litigation. Is there really any likelihood that the Court will reverse its decision in *Gregg* and find the death penalty disproportionate?[108] The Steikers make the case that the death penalty no longer comports with contemporary standards by pointing to the number of states that are abolitionist or de facto abolitionist (thirty), the significant decline in death verdicts and executions, moratoria imposed in several states by their governors, the concentration of the death verdicts in just a few jurisdictions, and the extraordinarily low death sentence rate among death-eligible murderers.[109] And the Steikers suggest that the Court could look to the number of exonerations, the arbitrariness of death sentences, and the execution delays to conclude that the death penalty serves no penological purpose.[110]

While such a decision is of course possible, it seems fairly unlikely. For the Court to determine that the death penalty no longer comports with contemporary standards, when thirty-one states still have the death penalty on their books, risks the same misreading of public opinion as occurred in *Furman*. Further, the results of the 2016 elections seem to refute any argument that there is a trend toward abolition. Not only did the voters elect Donald Trump, a long-time death penalty enthusiast, to the presidency,[111] but, at the same time, Nebraska voters overturned the legislative repeal of their death penalty,[112] and California voters rejected an initiative to abolish the death penalty in favor of an initiative to speed up executions.[113] Nor has the Court has given any indication that it would

105. *See* United States v. Quinones, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002).

106. *See* Jones v. Chappell, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd sub nom.* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

107. COURTING DEATH, *supra* note 15, at 271–75.

108. The Steikers qualify their expectation that the Court will declare the death penalty unconstitutional "within the next decade or two" with the statement that such an outcome will depend on the appointment of liberal justices. *Id.* at 289.

109. *Id.* at 118. This last point actually argues for the Court holding the death penalty unconstitutional on the very ground used in *Furman*, risk of arbitrariness.

110. *Id.* at 284.

111. Trump once spent $85,000 to place full-page ads in the four New York papers calling for the return of the death penalty. Sarah Burns, *Why Trump Doubled Down on the Central Park Five*, N.Y. TIMES (Oct. 16, 2016), https://www.nytimes.com/2016/10/18/opinion/why-trump-doubled-down-on-the-central-park-five.html. He has also put forward two currently unconstitutional proposals to expand the death penalty. First, a mandatory death penalty for killing a police officer. *See* World News Today, *Trump Tells Police Group Every Cop Killer Gets Death Penalty If I Win*, YOUTUBE (Dec. 11, 2015), https://www.youtube.com/watch?v=lDvg9kc9uxc. Second, a mandatory death penalty for all pedophiles. Donald Trump (@realDonaldTrump), TWITTER (Oct. 8, 2012, 6:13 AM), https://twitter.com/realdonaldtrump/status/255294883680632833.

112. Paul Hammel, *Nebraskans Vote Overwhelmingly to Restore Death Penalty, Nullify Historic 2015 Vote by Legislature*, OMAHA WORLD-HERALD (Nov. 9, 2016), http://www.omaha.com/news/politics/nebraskans-vote-overwhelmingly-to-restore-death-penalty-nullify-historic-vote/article_38823d54-a5df-11e6-9a5e-d7a71d75611a.html.

113. Jazmine Ulloa, *Analysis: State's Death Penalty Isn't Going Away*, L.A. TIMES (Nov. 11, 2016),

consider such a bold move. Despite the Court's declaration in its more recent proportionality cases that the death penalty can only be imposed on "offenders who commit 'a narrow category of the most serious crimes'"[114] and not on the "average murderer,"[115] the Court has not used its "capacious" proportionality jurisprudence for the modest end of weeding out some of those average murderers now made death-eligible, such as the non-killing accomplice who had no intent to kill[116] or the felony-murderer who killed negligently or accidentally.[117]

If both scenarios for ending the death penalty discussed by the authors—popular rejection based on a realization that the penalty is not serving its retributive purpose or abolition by the Supreme Court—seem improbable, is there a path to abolition? Perhaps, but it will likely require a combination of factors, cultural and political as well as judicial, to bring about that result.[118] If the Court continues to engage with the death penalty, its half-regulation will inevitably produce, in the Steikers' words, "destabilizing consequences."[119] That may cause the "de facto abolitionist states" and the "symbolic states" finally to formally abandon the death penalty, not because of popular rejection, but for the same reasons that are now at work reversing mass incarceration policies: the symbolic value of harsh punishment is simply not worth the cost. And, if enough of those states take themselves out of the game, leaving just the hard-core execution states, a tipping point may be reached, allowing the Court to finally deliver the *coup de grace*.

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http://www.readingeagle.com/ap/article/analysis-californias-death-penalty-battle-isnt-going-away.

114. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)).

115. *Roper*, 543 U.S. at 570 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

116. *See* Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371 (2011) (arguing that the Eighth Amendment bars the death penalty for defendants who neither killed nor intended to kill).

117. *See* Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintended Felony Murder*, 82 NOTRE DAME L. REV. 1141 (2017) (arguing that the Eighth Amendment bars the death penalty for defendants who kill with less than the mental state of reckless indifference to human life).

118. It is not inconceivable that the Court might choose to revisit one of the two core issues – arbitrariness or racism. It might decide that a given state's scheme is unconstitutional under its "narrowing" or "appellate review" principles, or it might qualify *McCleskey* by permitting challenges to the death penalty in a given jurisdiction based on demonstrable racial disparities. However, while the Court's reengagement with these core issues would be welcome, as noted above, the remedy in either area is not likely to be total abolition.

119. COURTING DEATH, *supra* note 15, at 204.