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# Courting Abolition

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# BOOK REVIEWS

## COURTING ABOLITION

COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT. By Carol S. Steiker and Jordan M. Steiker. Cambridge, Mass.: Belknap Press of Harvard University Press. 2016. Pp. 390. \$29.95.

*Reviewed by Deborah W. Denno\**

### INTRODUCTION

The American death penalty is a shadow of what it once was. In 2016, states conducted fewer executions than they had in twenty-five years,<sup>1</sup> and juries delivered the lowest number of new death sentences since 1972,<sup>2</sup> the year the Supreme Court invalidated then-existing death penalty statutes.<sup>3</sup> Only five of the thirty-one death penalty states even carried out an execution — the smallest number since 1983<sup>4</sup> — and two of those five states (Georgia and Texas) performed eighty percent of all executions,<sup>5</sup> thus indicating that actively executing states are now outliers. In addition, approximately forty percent of Americans now oppose the death penalty, the highest rate in over four decades.<sup>6</sup> These trends are just a handful of many stunning developments occurring throughout the United States, demonstrating that the death penalty, one of this country's most entrenched institutions, now appears close to demise.

This decline, however, is not the first, nor even the most pronounced, episode of the death penalty's diminution. Over four de-

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<sup>1</sup> DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2016: YEAR END REPORT 1, 2 (2016), <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf> [<https://perma.cc/CVQ5-J67K>] (noting that there were just twenty executions in 2016).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

<sup>4</sup> DEATH PENALTY INFO. CTR., *supra* note 1, at 5; DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2017), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/S4RA-269M>] (listing the thirty-one death penalty states and the nineteen non-death penalty states).

<sup>5</sup> DEATH PENALTY INFO. CTR., *supra* note 1, at 2.

<sup>6</sup> *Id.* at 7; *see also* Press Release, Death Penalty Info. Ctr., Death Sentences, Executions Drop to Historic Lows in 2016, <http://www.deathpenaltyinfo.org/YearEnd2016#pressrelease> [<https://perma.cc/JU54-SYGG>] (“National public opinion polls also showed support for capital punishment at a 40-year low.”).

cedes ago, capital punishment was nearly eliminated. In 1972, in *Furman v. Georgia*,<sup>7</sup> the Supreme Court held that the imposition of the death penalty in the cases before it violated the Eighth and Fourteenth Amendments.<sup>8</sup> While the Justices deciding *Furman* were famously splintered in their reasoning,<sup>9</sup> most of them were troubled by the degree of discretion then allotted to sentencing juries along with the resulting arbitrariness in death-sentencing decisions.<sup>10</sup> As Justice Stewart declared: “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>11</sup> All told, *Furman*’s impact was dramatic, with virtually every death-sentencing system in the country struck down overnight<sup>12</sup> at a time when public support for the death penalty was also near its lowest level.<sup>13</sup>

The *Furman* Court’s abrogation was short-lived, however: states soon rallied to restore executions. In 1976, in *Gregg v. Georgia*,<sup>14</sup> the Court ruled that the death penalty was not a per se violation of the Eighth Amendment, upholding newly passed, guided-discretion approaches like Georgia’s against a renewed constitutional challenge.<sup>15</sup> *Gregg* therefore revitalized this country’s death penalty, ending a moratorium that had lasted nearly ten years (from 1967 to 1976).<sup>16</sup>

With this resurgence, however, came what many have called America’s “experiment” with the death penalty — the Court’s unpredictable attempt not only to reinstate, but also to reform a punishment that most thought had ended with *Furman* (p. 3).<sup>17</sup> As Professors Carol Steiker and Jordan Steiker contend in their book, *Courting Death: The Supreme Court and Capital Punishment*, such an effort has involved the Supreme Court’s “top-down” regulation of states’ applica-

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<sup>7</sup> 408 U.S. 238.

<sup>8</sup> *Id.* at 239–40 (per curiam).

<sup>9</sup> *Furman* was a per curiam decision consisting of just one paragraph and nine separate opinions. *Id.* at 239–470; see also STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 264 (2002) (discussing the nine opinions “divided along philosophical lines”).

<sup>10</sup> BANNER, *supra* note 9, at 260–66.

<sup>11</sup> *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

<sup>12</sup> See *id.* at 411 (Blackmun, J., dissenting).

<sup>13</sup> *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> [https://perma.cc/T6TA-WXVX] (showing that the year 1966 marked the only time between 1937 and 2016 that — responding to the question “Are you in favor of the death penalty for a person convicted of murder?” — more American respondents opposed the death penalty (47%) than favored it (42%)).

<sup>14</sup> 428 U.S. 153 (1976).

<sup>15</sup> *Id.* at 187, 206–07 (plurality opinion).

<sup>16</sup> See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 106–25 (1973).

<sup>17</sup> Justice Blackmun referred to this process as an “experiment.” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

tion of the death penalty by enforcing federal constitutional law, thereby attempting to establish a middle ground between completely abolishing capital punishment and allowing it to run amok (p. 3). In essence, this revised American death penalty would continuously undergo regulation by the federal courts, especially the Supreme Court, in an effort to “tame” the penalty’s “arbitrary, discriminatory, and excessive applications” by way of constitutional controls (p. 40).

At least initially, this regulation seemingly fueled the death penalty’s acceptability by instilling “faith among justice system participants and the general public in the reliability and fairness of the process” (p. 4). Yet, as the Steikers stress, such faith has not stood the test of time. The experiment has failed, and ironically so. The Court’s regulatory mechanisms are so cumbersome and complex, their goals so dubious and varied, that they have unwittingly propelled the death penalty’s “destabilization” and weakened status, its strength never to return again (pp. 4–5). Due to this byzantine regulation, the purported rationales for having a death penalty — retribution and deterrence — have been comparably diminished.

The end result is that “the Court has regulated the death penalty to death” (p. 4). In the next ten to twenty years, the authors predict, the Court will abolish the death penalty entirely, assuming the ideological balance of the Court remains at least as liberal as it was before Justice Scalia’s passing (pp. 287–89). (As is discussed in section II.C, however, this assumption is more tenuous than when the Steikers were writing.) While the Steikers foresee a *Furman II* coming (pp. 258, 287), they doubt there will be a *Gregg II* to bring the death penalty back again (p. 287). The Court will have experienced too many decades of failed efforts at intervention to give credence once again to a backlash (pp. 287–88).

*Courting Death* is a markedly compelling book, an achievement for its authors in light of the book’s extraordinary breadth, not simply about the death penalty, but also about the vast array of cultural, political, and historical forces that have helped steer its course. For the Steikers, a brother-and-sister team, the death penalty has been a shared passion that began with their respective stints as law clerks for the renowned abolitionist Justice Marshall and has grown, first in their years of practice and now further during their time as academics. Their book captures as much of the complicated story of the death penalty as any book can, exploring in rich relief factors that can both shape and stymie capital punishment’s future. In their academic and real-world experiences, the Steikers are primed to take on such an ambitious project, and they succeed.

In this Review, I first discuss the Steikers’ primary arguments and their comprehensive depiction of the death penalty as a failed experiment of judicial regulation that has “come full circle over the past fifty years,” bringing the country back to where it was in the lead-up to

*Furman* in 1972 (p. 3). I then consider the legitimate, if limited, success of reform efforts — driven both by the Court and by outside groups — and end by analyzing sources of reform independent of constitutional regulation, most particularly lethal injection litigation.

## I. THE STEIKERS' ACCOUNT

In *Courting Death*, the Steikers examine the Court's "extensive — and ultimately failed — effort to reform and rationalize" the United States death penalty process "through top-down[] constitutional regulation" (p. 3) over more than six decades to capture both the pre-*Furman* and post-*Furman* eras. Their book builds in part on their prior work from which I will occasionally draw in order to clarify or expand upon their current proposals. I focus especially on two pieces: the Steikers' 1995 article, *Sober Second Thoughts*,<sup>18</sup> which presents a relatively more streamlined discussion of the Court's constitutional regulation of the death penalty before this current era of greater complexity, as well as their invited report to the American Law Institute (ALI)<sup>19</sup> concerning how the ALI should handle Model Penal Code (MPC) section 210.6,<sup>20</sup> a provision that the ALI adopted in 1962 to delineate the procedure to be followed for imposing a death sentence. As the Steikers and others note, section 210.6 was adopted in whole or in part by a number of states immediately following *Furman*, and thereby substantially influenced how the Court regulated the death penalty.<sup>21</sup> This Part outlines the Steikers' arguments about regulation and their proposed solutions.

### A. How We Got Here

1. *The Genesis of Regulation.* — *Courting Death* first examines how the death penalty operated in the United States before the advent of modern constitutional regulation. This context provides fuel for the Steikers' views on modern regulation and highlights influences that their account does not fully address.

As the Steikers note, from the early colonial period through the late twentieth century, the American death penalty was not a target of concerted national regulation, but rather a punishment enforced under the auspices of the local criminal justice system directed at state and local

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<sup>18</sup> Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

<sup>19</sup> AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY annex B (2009) [hereinafter ALI 2009 REPORT] (Carol S. Steiker & Jordan M. Steiker, Report to the ALI Concerning Capital Punishment (Nov. 2008)).

<sup>20</sup> MODEL PENAL CODE § 210.6 (AM. LAW INST., Proposed Official Draft 1962).

<sup>21</sup> See *infra* section II.A.1, pp. 1852–56.

issues (pp. 6–8). Those officials who oversaw death penalty procedures hailed exclusively from the political branches of government (for example, legislators and prosecutors), a sharp contrast to the national judicial regulation that would begin in the early 1960s (p. 8). As the Steikers explain, “the Supreme Court fundamentally altered who controlled the American death penalty” because “[p]ower moved both from states and localities to the federal government, and from the political branches to the courts” (p. 8). These shifts thereby demonstrated “a profound break with the long sweep of American history” (p. 9).

Importantly, the Steikers note that even before the Court’s intervention, some death penalty practices were commonly transforming across jurisdictions (p. 9). For example, states and localities altered how they conducted executions, first by moving them from public to private places and then by implementing methods of execution that appeared to be more humane (pp. 9–16). Indeed, the Steikers state that, before the Court began regulating the death penalty, the most frequent constitutional challenges regarding death penalty practices were directed toward execution methods, particularly electrocution and the firing squad (pp. 26–31). Yet the Court avoided these early “invitations” to constitutional regulation (p. 26). Even to this day, execution methods have remained primarily regulated by states.<sup>22</sup>

One of the key forces prompting national judicial regulation, however, was the disparity between northern and southern states (p. 17). The Steikers detail in particular the deep connection between southern racial oppression and capital punishment (p. 17), noting, for example, that Southerners justified retaining the death penalty as a way of preventing or curtailing lynch mob violence (p. 23).<sup>23</sup> As the Steikers stress, “[o]ne of the strongest predictors of a state’s propensity to conduct executions today is its history of lynch mob activity more than a century ago” (p. 17). Not surprisingly, then, no state that was represented in the former Confederacy is included among the twenty-nine states that have either abolished the death penalty or carried out three or fewer executions since 1976 (p. 17).

The death penalty also exerted other forms of control and oppression when it was applied to blacks. First, it served as a threat in order to keep blacks in a slave status (and therefore economically valuable) because taking steps toward freedom could make blacks vulnerable to community resentment and vigilante justice (pp. 19–20). White

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<sup>22</sup> See *infra* section II.B.2.c, pp. 1867–71.

<sup>23</sup> The South did not exhibit many of the humanitarian concerns seen in other parts of the country concerning execution methods, choosing instead to exact public vengeance by way of lynching (pp. 25–26). “Lynchcraft,” the term used for the “lynching ritual,” frequently incorporated more extreme forms of violent punishment such as eye gouging or mutilation, to inflict more severe pain (p. 25).

Southerners' portrayal of black men as violent and sexually aggressive, especially against white women (pp. 22–25), was particularly pronounced. “Never was the (white) crowd’s desire to see lethal justice done stronger than in cases involving black rapists,” the Steikers write (p. 24).

Yet the South’s oppressive use of capital punishment against black men in particular was the very condition that initially prompted the Supreme Court to engage in constitutional regulation, first as a brief venture in the 1920s and 1930s and then as a way of promoting racial justice in the 1960s and 1970s (p. 26). “But for the dramatic regional divide on the death penalty, the Supreme Court might never have stepped in at all” (p. 26).

2. *The Supreme Court’s Involvement.* — The Court *did* begin to fully step in during the 1960s, at a time of surging changes in the United States reflected by the Civil Rights Act of 1964 and the Voting Rights Act of 1965, as well as massive cultural transformations in race relations, sex equality, the war on poverty, and attitudes toward the Vietnam War (p. 38). It was an opportune moment in our country’s history to start evaluating death penalty practices even though few could have predicted how quickly or thoroughly regulation would take root (pp. 38–39).

The impetus for change started in 1963 with *Rudolph v. Alabama*,<sup>24</sup> a case involving a black man sentenced to death for the alleged rape of a white woman (p. 40). While the Court declined review, Justice Goldberg wrote what would become a landmark dissent from denial of certiorari along with two other Justices, in which he questioned whether the Court should allow the death penalty for the crime of rape under the Eighth and Fourteenth Amendments (p. 40).<sup>25</sup> The NAACP Legal Defense Fund (LDF) — this country’s most prominent legal civil rights organization — took note of Justice Goldberg’s dissent and acted on it (pp. 41–43).

With fervor and urgency propelling it, the LDF started litigating these issues in the Supreme Court, garnering its first major win in 1968 when the Court rejected Illinois’s standard for determining the qualifications for death penalty juries (pp. 45–46).<sup>26</sup> But this would be just the start of the LDF’s moratorium strategy over the next several

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<sup>24</sup> 375 U.S. 889 (1963).

<sup>25</sup> *Id.* at 889–91 (Goldberg, J., dissenting from denial of certiorari). The Steikers describe the fascinating backdrop to *Rudolph* and Justice Goldberg’s agenda (pp. 40–41). For example, Chief Justice Warren “urg[ed]” Justice Goldberg to remove “any reference to race,” thus indicating what would become the Court’s longstanding reluctance to mention racial issues even in black defendant/white victim rape cases (p. 81).

<sup>26</sup> The authors cite *Witherspoon v. Illinois*, 391 U.S. 510, 514, 522 (1968).

years, an approach that, despite some losses along the way, ultimately led to *Furman v. Georgia* (pp. 42–48).

*Furman* in particular would highlight the arbitrary and capricious implementation of the American death penalty, forming in the center of a perfect storm of other legal and cultural developments (pp. 51–52). These would include the waning of the death penalty in other Western democracies, the application of constitutional criminal procedure protections to defendants charged with state crimes, and the growing awareness of racial inequities, as well as the increasing talent, sophistication, and knowledge base of the LDF (pp. 51–52). In addition, public support for the death penalty was at its lowest point ever, a sign of the impact of the social and cultural reforms during that time and relatively low crime rates (pp. 51–52). In particular, the nonviolent protests of the civil rights movement had highlighted the prevalence and serious extent of racial prejudice in the South (p. 52). Without this exposure, the Steikers contend, the Court likely would not have interfered with state criminal justice systems at all, much less with the death penalty (p. 52).

As the Steikers note, however, “[t]he confluence of events that made *Furman* possible did not make it inevitable” (p. 60). For example, not only had the Court bypassed a number of the LDF’s claims prior to *Furman* that were critical for success in future cases (such as a challenge to racial bias in rape cases), but the *Furman* Court itself was heavily divided with no definitive holding (p. 60). Moreover, crime rates were surging by the 1960s and 1970s, particularly in minority communities, enabling Republican politicians to appeal to racial prejudice to fuel the public’s unease (pp. 100–01).

A backlash against *Furman* quickly ensued. It was in politicians’ self-interest to preserve the death penalty, and yet, as the *Furman* opinions implied, limiting the discretion of previous sentencing schemes was critical to the death penalty’s survival. So by 1976, thirty-five states had passed new statutes directed toward limiting pre-*Furman* discretion (p. 61). While in 1972 capital punishment seemed to be on its last legs, by 1976 it appeared reinvigorated (p. 65) alongside a “Court on the defensive” (p. 67).

The Steikers duly trace the adverse reaction to *Furman* and the explanations for the country’s turnabout, including the most pronounced one — the uniquely interactive nature of American culture and politics. Some of the factors caught up in this interaction included the high and rising rate of violent crime, a stress on individualism, and the local administration of the criminal justice system (pp. 72–73). These factors also highlight the United States’ divergence from European states “where centralized political elites imposed abolition despite popular support for the punishment” (p. 73). The nature and organization of American society made federal abolition much more difficult.

Yet the Steikers rightly contend that such a focus on American exceptionalism omits three significant but easily forgotten characteristics of the death penalty. First, until 1970 America's death sentencing system and practices were comparable to those of other Western European countries and were moving in a similar direction (pp. 73–74). Second, the United States has not simply retained the death penalty; it has also sought to regulate the punishment aggressively (p. 74). In other words, “retention plus constitutional regulation . . . is exceptional in its own right” (p. 74). Third, America's death penalty was nearly abolished before it was eliminated in many European countries (p. 74). Indeed, had the anticipated abolition come about, the United States might even have been identified as the “leader” of a “human rights revolution” (p. 76).

3. *Regulation's Effects on Modern Capital Practice.* — Regulation brought with it vast changes in the process of capital representation both at the trial level and at the appellate level (p. 195). Before 1976, lawyers had little-to-no training in the death penalty, much less in the development of mitigating evidence on behalf of their clients; yet by the late 1980s to early 1990s, “mitigation specialists” had come onto the scene (p. 196). By 2000, a major goal for capital trial practice was the development of a defense team that would consist of lawyers, investigators, and mitigation specialists, who, in light of the new statutory schemes approved by *Gregg v. Georgia*, focused particularly on the punishment phase of a bifurcated trial (p. 196).

These changes ushered in a range of organizations and resource centers created to help with capital trials, eventually producing elite groups of lawyers, law students, and leaders all focused on eliminating or curtailing the death penalty (pp. 196–97). Of note are two particularly groundbreaking organizations and their leaders — the Equal Justice Initiative (headed by Bryan Stevenson) and the Southern Center for Human Rights (headed by Stephen Bright) (p. 197). Further support came from a number of law schools as well as experts representing a span of specialties, including forensics and psychiatry (p. 198). The level of legal sophistication expanded substantially, all as a consequence of regulation and as a way of introducing vast improvements in representation for death row clients.

These changes, along with many others, created a situation in which death penalty litigation became enormously expensive and time consuming. As the Steikers explain, two of the most “destabilizing” outcomes of the Court's regulation have been growing costs and delay (p. 204). Not only have the costs of capital prosecutions become far more exorbitant than their noncapital counterparts, but the cost of the death penalty as a whole, including that of an execution chamber, has also multiplied. In California, for example, the death penalty has cost the state an additional \$4 billion since 1976 — a total based on the expense of a capital trial and appeals, as well as on the expense of life

imprisonment on death row, as few inmates are actually executed (p. 205).<sup>27</sup>

Financial output and delays have only been exacerbated “by perhaps the most widely appreciated problem for the American death penalty” — wrongful convictions (p. 207). Before the late 1990s, the American public’s response to wrongful capital convictions was relatively muted (p. 208). That reaction changed markedly when news reports revealed the extent of innocent offenders sentenced to death, a problem that was dramatically spotlighted in a highly publicized conference on wrongful convictions at Northwestern University in 1998 (p. 208). Thereafter, public attention fell on the fallibility of capital cases, in part based on the work of the Benjamin N. Cardozo School of Law’s Innocence Project headed by Professors Barry Scheck and Peter Neufeld, both at the forefront of the use of DNA technology postconviction to discover erroneous convictions, particularly in capital cases (pp. 208–09). Over the years, more cases demonstrated the striking impact DNA technology would have in uncovering injustice (pp. 208–10). As the Steikers rightly conclude: “Only when the advent of DNA evidence revealed that an unexpectedly large number of innocent defendants had been sentenced to death did the legitimating effects of the Court’s constitutional regulation of capital punishment dissipate” (p. 230).

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<sup>27</sup> See CAL. LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 62: DEATH PENALTY. INITIATIVE STATUTE. 3 (2016), <http://www.lao.ca.gov/ballot/2016/Prop62-110816.pdf> [<https://perma.cc/H52S-MJJA>] (noting that California “currently spends about \$55 million annually [just] on the legal challenges that follow death sentences”); PAULA M. MITCHELL & NANCY HAYDT, ALARCÓN ADVOCACY CTR., LOYOLA LAW SCH., CALIFORNIA VOTES 2016: AN ANALYSIS OF THE COMPETING DEATH PENALTY BALLOT INITIATIVES 5, 9, 40 (2016), <http://www.lls.edu/media/loyolalawschool/newsroom/newsitems/FINAL%20Alarcon%20Advocacy%20Center%20Report%20Competing%20DP%20Initiatives.pdf> [<https://perma.cc/R63L-MUE5>] (explaining that California has invested approximately \$5 billion over the last 40 years (\$125 million per year) on a death penalty that has executed only 13 individuals and that capital trials required about \$1 million more to prosecute than noncapital first-degree murder trials handing down a sentence of life without the possibility of parole); Jennifer Medina, *Californians Face Stark Choices on Death Penalty*, N.Y. TIMES, Sept. 21, 2016, at A14 (stating that the death penalty costs approximately “\$150 million a year for trials, appeals and death row facilities”); see also Arthur L. Alarcón & Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform This November?*, 46 LOY. L.A. L. REV. 221, 241–50 (2012) (projecting that the death penalty will cost \$5–8 billion more than life without the possibility of parole between 2013 and 2050). But see Mark Peterson, Editorial, *Reform the Death Penalty, Vote Yes on Prop 66*, MERCURY NEWS (San Jose) (Aug. 10, 2016, 7:02 AM), <http://www.mercurynews.com/2016/08/10/peterson-reform-the-death-penalty-vote-yes-on-prop-66> [<https://perma.cc/NGG7-SSF9>] (contending that “the California Department of Corrections has never confirmed” that it costs the state an additional \$90,000 per year to accommodate a death row prisoner).

### B. How Death Penalty Regulation Works

1. *Regulating Uneven State Practice.* — A major part of the Steikers' project is the exploration of the unexpected and inadvertent outcomes of the Court's death penalty regulation. The goal of regulation is "uniformity" — consistent and stable procedures to make the application of the punishment more "regular" (p. 117). Yet any given regulation must be interpreted and carried out by an array of governmental entities and individuals, ranging from legislatures to multiple levels of courts to tiers of executive officials in the criminal justice system (p. 117). There can be resistance or receptivity at any step of the way, compounded by varying cultures and proceedings across or within different states (pp. 117–18). The regulation of a system as complex as the death penalty can thus foster "extraordinary opportunities for divergence — the possibility that the regulation will mean quite different things in different places" (p. 117). Indeed, the Supreme Court's regulation "has produced state capital systems that are worlds apart" from one another (p. 121). According to the Steikers, these divisions create much of the instability that has weakened the death penalty overall.

The Steikers posit that this divergence has created four types of death penalty jurisdictions in the United States: "abolitionist states," which have no death penalty (such as Michigan); "de facto or virtually abolitionist states," which have a death penalty on the books but very few death sentences and executions (such as Colorado); "symbolic states," which impose a substantial number of death sentences but rarely execute anyone (such as California); and "executing states," which impose a sizeable number of death sentences and carry out a relatively high proportion of them (such as Texas) (p. 118).<sup>28</sup>

Of the thirty-one states that have a death penalty,<sup>29</sup> just a few conduct the great majority of executions.<sup>30</sup> Thus a substantial number of states have a death penalty statute but rarely or never execute anyone. These "symbolic states" may not need much regulation because they are not the ones typically causing the constitutional disruption: the problems of death penalty regulation are greatest in the "executing states" because they are most apt to violate due process to reach their goals.

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<sup>28</sup> The "symbolic state" of California (p. 118), for example, has the largest death row population in the country (more than seven hundred inmates), yet the state has executed only thirteen inmates since 1978 (p. 1). In sharp contrast, the "executing state" of Texas, while having 244 inmates on death row, has put to death nearly 40% of the 1447 individuals executed in the United States since 1976. See DEATH PENALTY INFO. CTR., *supra* note 4, at 1–3.

<sup>29</sup> See DEATH PENALTY INFO. CTR., *supra* note 4, at 1 (listing the thirty-one death penalty states).

<sup>30</sup> See *supra* notes 4–5 and accompanying text.

According to the Steikers, execution rates are most strongly affected by how quickly death penalty cases proceed through state and federal mechanisms of review (p. 129). For example, Texas has procedures that expedite the review process (p. 130). In contrast, California has far more checks and safeguards (pp. 131–32), at least for now.<sup>31</sup> Similarly, the quality of representation is lower in Texas than in California, where lawyers meet higher standards and are better compensated than their Texan counterparts (pp. 130–32). As the Steikers explain, the differences between California and Texas in capital defense illustrate the broader differences between “symbolic states” — which have stronger legal protections — and “executing states,” which value speed and results at the expense of due process (pp. 147–48).

The Steikers query whether a state’s status as either “executing” or “symbolic” is especially stable (p. 153). One might expect that a symbolic state that carries out no executions may eventually abolish the punishment altogether. But the Steikers remind us that symbolic states may persist as they reap the benefits of capital punishment while avoiding the costs of actually carrying out any executions (p. 153). After all, during the seventeenth and eighteenth centuries, when basically all serious crimes were eligible for the death penalty, there were some offenders sentenced to “simulated executions” in which, for example, they experienced the preparatory steps to a hanging (standing for a time with a rope about their neck), but were spared actual death (p. 116). Presumably, simulated executions and last-moment reprieves enabled authorities to broadcast the state’s power and control without having to take a life — a helpful maneuver given that incarceration was not yet available as an alternative (p. 116).

Similarly, today, some symbolic states “might reflect a unique compromise that serves an ongoing, if unrecognized, social purpose of mediating the demands for harsh punishment and the realities of modern legal processes and sensibilities” (p. 153), seemingly irrespective of the substantial financial costs. California may well become an example of such a compromise. In November 2016, the state rejected Proposition 62, which would have eliminated the death penalty, but passed

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<sup>31</sup> California recently passed Proposition 66, which has the objective of accelerating the execution timeline. Jazmine Ulloa & Julie Westfall, *California Voters Approve an Effort to Speed Up the Death Penalty with Prop. 66*, L.A. TIMES (Nov. 22, 2016, 7:00 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-proposition-66-death-penalty-passes-1479869920-htmlstory.html> [https://perma.cc/58D9-HAGD] (noting that Proposition 66, which won by a preliminary count of 51.3% of the vote, “[was intended] to speed up executions by designating trial courts to hear petitions challenging death row convictions, limiting successive petitions and expanding the pool of lawyers who could take on death penalty appeals” — as opposed to Proposition 62, which lost with 46.1% of the vote and would have substituted life in prison without parole for the death penalty).

Proposition 66, which is intended to speed up executions.<sup>32</sup> California voters were nearly evenly split between the two propositions, and Proposition 66 was only slightly more popular. California thus exemplifies a state whose population is not unified on the death penalty but may appreciate the symbolic value of severity despite the expense.<sup>33</sup>

In order to limit the number of cases that “executing states” can render death eligible, the Supreme Court has created four doctrines that frame the Court’s regulatory approach (p. 158). Some of these doctrines, however, are unevenly enforced, some can backfire, and some provide meager guidance. Indeed it is through these four doctrines that the death penalty experiment has failed so profoundly, as the Steikers drive home in a remarkably comprehensive and detailed account of each doctrine’s weaknesses and contradictions.

2. *The Component Regulatory Doctrines.* — The first doctrine, *narrowing* (pp. 158–63), restricts the kinds of murders subject to the death penalty through specified aggravating factors (p. 158) in an effort to identify the “‘worst of the worst’ offenders according to community standards” (p. 159). The second doctrine, *proportionality*, limits the types of offenses and offenders that are death eligible (pp. 158, 163–65, 276–81). With respect to the types of offenses, the Court has deemed the death penalty unconstitutional for the rape of an adult woman<sup>34</sup> (p. 163) and the rape of a child<sup>35</sup> (pp. 280–81). It has also curtailed the types of felony murder that can be considered death eligible<sup>36</sup> and drawn limits on offender eligibility, exempting the intellectually disabled<sup>37</sup> and juveniles.<sup>38</sup> The third doctrine, *individualized*

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<sup>32</sup> *Id.*

<sup>33</sup> See *supra* note 27 and accompanying text (discussing the high cost of the California death penalty).

<sup>34</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (holding “that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape [of an adult woman] and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment”).

<sup>35</sup> See *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding that “a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments”).

<sup>36</sup> See *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (holding the death penalty unconstitutional for an individual “who neither took life, attempted to take life, nor intended to take life,” *id.* at 787). Five years later the Court limited the reach of *Enmund* with respect to the mental state of “reckless indifference to human life,” which the Court equated to *Enmund*’s concept of “culpability.” *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

<sup>37</sup> See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that imposing the death penalty on an intellectually disabled offender is cruel and unusual punishment prohibited by the Eighth Amendment).

<sup>38</sup> See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding unconstitutional under the Eighth and Fourteenth Amendments the imposition of the death penalty for juvenile offenders under the age of 18 at the time their offenses were committed).

*sentencing* (pp. 165–68), mandates that states allow jurors to use mitigating factors as a basis for a sentencing less than death (p. 158).<sup>39</sup>

The fourth doctrine, *heightened reliability* (pp. 168–75), is the Court’s vaguest category, and requires that states apply additional legal safeguards in capital cases because “death is different” from other kinds of sanctions. Such safeguards have included invalidating a death sentence because the sentencing judge was provided information about a defendant that was not shared with the defense attorney,<sup>40</sup> as well as enabling defense counsel to question potential jurors about their proclivities for racial bias in cases of interracial murder<sup>41</sup> or telling jurors about the actual consequences of a “life” sentence when “life” translates into life without the possibility of parole (pp. 168–69).<sup>42</sup>

The Steikers suggest that these doctrines make it appear as though the Court is “imposing a confusing morass of hyper-technical rules” when in fact “contemporary death penalty law is remarkably undemanding” (p. 175). Thus, as the following sections discuss, appearances belie a system that does not adequately protect capital defendants and exposes them to disparate treatment.

### C. *The Failures of Regulation*

The Steikers focus on four failures of the Court’s regulatory project. First, the Court has shirked its regulatory function. The key examples of this underregulation are inmate claims of innocence and racial bias. Second, the Court has distorted the reality of the death penalty by failing to candidly acknowledge the racial-justice motivations behind its regulatory project. Third, the project has failed “on its own terms” (p. 156), by neglecting to meaningfully address, and at times by exacerbating, the *Furman* Court’s vexations — arbitrariness

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<sup>39</sup> See *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (“[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion))); *Lockett*, 438 U.S. at 608 (plurality opinion) (holding that “a death penalty statute must not preclude consideration of relevant mitigating factors” under the Eighth and Fourteenth Amendments); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (holding unconstitutional under the Eighth and Fourteenth Amendments North Carolina’s statute mandating the death penalty for all persons convicted of first-degree murder).

<sup>40</sup> See *Gardner v. Florida*, 430 U.S. 349, 361–62 (1977) (plurality opinion) (holding that the “petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain,” *id.* at 362, after the state failed to disclose information to the defense that was provided to the sentencing judge).

<sup>41</sup> See *Turner v. Murray*, 476 U.S. 28, 36–37 (1986) (holding “that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias”).

<sup>42</sup> See *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (plurality opinion) (holding that defendant’s due process was denied “by the refusal of a state trial court to instruct the jury in the penalty phase of a capital trial that under state law the defendant was ineligible for parole”).

and caprice. Finally, regulation has had the unintended consequences of at first legitimizing and then destabilizing the practice of capital punishment altogether.

1. *The Court's Shirking.* — The classic examples of the Court shirking its regulatory function come by way of the Steikers' examination of postconviction review and most particularly the Court's reaction to an inmate's claim of actual innocence (pp. 173–75). So far the Court has not yet determined whether inmates possess a federal constitutional right to be freed from incarceration if they provide proof of their actual innocence.<sup>43</sup> As the Steikers note, even if a death-sentenced inmate uncovers undeniable evidence of his actual innocence, the Constitution does not necessarily require courts to save him from execution. Rather, states have rules concerning when inmates can raise such claims, necessitating that they be proffered relatively soon after conviction; if a claim comes too late, the courts then require the inmate to rely on executive clemency (p. 173). That said, in *Herrera v. Collins*,<sup>44</sup> the Court presumed that “in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.”<sup>45</sup> Likewise, in 2009 the Court took the historic step of mandating a new evidentiary hearing for Georgia inmate Troy Davis based upon his claims of innocence because, among other revelations, seven of the State's nine eyewitnesses who testified against him at trial later recanted.<sup>46</sup> While the burden of proving an actual-innocence claim is “extraordinarily high”<sup>47</sup> and there remain “inadequate protections against wrongful convictions” (pp. 173–74), the successful cases have had a powerful impact on public perception of the death penalty.<sup>48</sup>

For the Steikers and others, *McCleskey v. Kemp*<sup>49</sup> constitutes “[t]he most significant missed opportunity for heightened reliability” in light

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<sup>43</sup> *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 71 (2009) (“Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.”); *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (explaining the role of federal habeas courts, which is to protect individuals from being unconstitutionally imprisoned and not to rectify legal errors); BRIAN R. MEANS, *POSTCONVICTION REMEDIES* § 6:17 (2016 ed.) (noting that the Court has not “definitively resolve[d]” the federal constitutional rights associated with actual innocence).

<sup>44</sup> 506 U.S. 390.

<sup>45</sup> *Id.* at 417.

<sup>46</sup> *In re Davis*, 557 U.S. 952, 953 (2009) (Stevens, J., concurring) (“The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing.”).

<sup>47</sup> *Herrera*, 506 U.S. at 417.

<sup>48</sup> See *infra* notes 150–52 and accompanying text.

<sup>49</sup> 481 U.S. 279 (1987).

of a study of post-*Furman* Georgia conducted by Professor David Baldus showing how strongly race influenced capital sentencing (p. 174). Yet the Court was concerned about the slippery-slope consequences for the criminal justice system as a whole: the Eighth Amendment is relevant to all penalties, not just capital punishment, and the Court could foresee the expansion of racial bias claims for other types of sentences (pp. 174–75). Thus, the Court’s dismissal of the Baldus study’s results illustrates the extent to which the Court would turn a blind eye to substantial and sophisticated evidence of arbitrariness and highlights the constraints of the “death is different” doctrine (pp. 174–75). As the Steikers explain, this reaction exemplifies “the tendency of the Court to retreat from acknowledged or apparent constitutional norms when it regards remedial choices as unworkable or unattractive” (p. 236).

Despite the Court’s *heightened reliability* regulatory doctrine, the Steikers argue that there are few additional safeguards and those that exist are reflective more of the Court’s responses to particular cases than of a consistent and principled effort to protect capital defendants (p. 169). In addition, when it comes to the paltry standard of ineffective assistance of counsel<sup>50</sup> or the standard of review for peremptory strikes of jurors,<sup>51</sup> for example, death is *not* treated any differently than other types of punishment (pp. 168–72). Rather, the “death is different” doctrine has its own set of deficiencies that commonly render it ineffectual just when it is most needed.<sup>52</sup>

2. *The Disappearance of Race.* — In addition to substantive shortfalls, the Court has often failed to be candid about the motivations behind its regulatory project. As the Steikers explain: “One can read the entire canon of the Court’s pathbreaking cases on capital punishment during the 1960s and 1970s without getting the impression that the death penalty was an issue of major racial significance in American society” (p. 79). The Steikers think this finding is “at once mysterious and understandable,” suggesting that racial silence may reflect the Court’s “fears and anxieties” (p. 79). Regardless, silence has implications (p. 79), and one of its most troubling outcomes is the continuation of a death penalty that does not acknowledge all aspects of its devastating racial history.

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<sup>50</sup> See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that a “capital sentencing proceeding need not be distinguished from an ordinary trial” with respect to the standard for claims of ineffective assistance of counsel).

<sup>51</sup> See *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) (holding unconstitutional under the Fourteenth Amendment a prosecutor’s peremptory striking of jurors based on race).

<sup>52</sup> See Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1600 (2001).

The death penalty canon is replete with examples of the Court submerging race. In *Coker v. Georgia*,<sup>53</sup> for example, the Court chose a white defendant “as the face of the claim” (p. 95) and avoided any discussion of the racially discriminatory application of the death penalty in its holding that the death penalty for the crime of rape was disproportionate under the Eighth Amendment (pp. 95–98). This conclusion, however, shielded evidence that, as the LDF pointed out in its brief, Georgia’s “death penalty for rape was specifically devised as a punishment for the rape of white women by black men” (p. 96).<sup>54</sup> Likewise, *McCleskey* concerned the interpretation of a sophisticated statistical study demonstrating that black-defendant, white-victim combinations for murder cases were far more likely to receive a death sentence relative to other racial combinations (p. 102). Regardless, the Court upheld a death sentence involving that very racial combination, stressing that group statistics did not necessarily indicate that McCleskey himself had been a victim of racial discrimination (pp. 102–03).

The Steikers provide an insightful analysis of why the Justices took a race-neutral approach to the constitutionality of the death penalty. For example, they argue that while the Court considered race in cases such as *Brown v. Board of Education*,<sup>55</sup> the Court “hesitated to add capital punishment to the simmering pot of racial issues” (p. 99) because those accused of murder and rape are hardly as sympathetic as schoolchildren. Likewise, explaining a heated topic like the death penalty using procedural justice arguments “may have seemed less socially divisive than applying the lens of racial justice” (p. 103).

The Steikers are also right to contend that these kinds of explanations, however understandable, come at a cost to the Court’s later decisionmaking. The Court’s avoidance of discussing racial discrimination in cases such as *Rudolph* and *Coker*, for example, weakened the acceptance of such a claim when *McCleskey* was decided in 1987 (p. 111). In essence, then, the implications of the Court’s shunning of racial matters — no matter the reason — are cumulative over time, and therefore hinder efforts to create a race-conscious jurisprudence for future cases (pp. 112–13).

3. *The Failure to Cabin Arbitrariness.* — The Steikers stress that the Court’s doctrines have also neglected to address the jury discretion

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<sup>53</sup> 433 U.S. 584 (1977).

<sup>54</sup> The authors quote Brief for Petitioner at 54, *Coker*, 433 U.S. 584 (No. 75-5444).

<sup>55</sup> 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore . . . the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”).

and concomitant arbitrariness that *Furman* found constitutionally prohibited. Although the doctrine of *narrowing* attempts to rationalize capital sentencing, some of its aggravating factors are so vague and overbroad (for example, a defendant committing a murder in an “especially heinous, cruel, or depraved” way)<sup>56</sup> that they can actually expand the pool of those death eligible (p. 159). “Ultimately, the effort to achieve meaningful narrowing through aggravating factors has failed,” and jurors retain just as much discretion to impose the sentence they deem appropriate (p. 162).

Though the Steikers find *proportionality* to be the most successful of the regulatory doctrines (p. 164), it too has led to arbitrariness. By the early 2000s, the Court held the death penalty to be disproportionate for intellectually disabled offenders<sup>57</sup> and a few years later for juvenile offenders<sup>58</sup> (pp. 163–64, 277–78). Whereas the constraints on juveniles are designated in terms of a bright-line rule (anyone under age eighteen), there is no such bright line for assessing who is intellectually disabled. Over the years, courts have been resistant to establishing the precise criteria necessary for defining a category of intellectually disabled offenders, a problem that enables courts to continue to engage in arbitrary decisionmaking (p. 164).<sup>59</sup>

Finally, the Steikers argue, the doctrine of *individualized sentencing* reintroduces the jury discretion and accompanying arbitrariness that *Furman* attempted to root out of the capital system (p. 165). This outcome, to the Steikers, represents “the central tension in American death penalty law: its simultaneous command that states cabin discretion of who shall die while facilitating discretion of who shall live” (p. 165).

Within this context, the Steikers offer suggestions on how the Court could better regulate the death penalty. First, in terms of its *narrowing* doctrine, the Court could more accurately assess the reliability and precision of aggravating factors, for example, and retain those factors that can be more easily measured (such as the killing of a police officer) while eliminating those factors that allow for the most discretion (“especially heinous, atrocious, and cruel” acts) (p. 177). With respect

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<sup>56</sup> See *Walton v. Arizona*, 497 U.S. 639, 643 (1990) (noting that one of the ten aggravating factors under Arizona’s capital sentencing statute “is whether the defendant committed the offense in an especially heinous, cruel, or depraved manner”).

<sup>57</sup> See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>58</sup> See *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>59</sup> See *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (rendering a Florida statute unconstitutional under the Eighth Amendment because it precluded consideration of further evidence of a capital defendant’s degree of intellectual disability if that defendant’s test IQ score was greater than seventy); see also *Moore v. Texas*, No. 15-797, slip. op. at 2 (U.S. Mar. 28, 2017) (holding that the Texas Court of Criminal Appeals used outdated measures and ignored current medical standards in determining who was intellectually disabled and therefore ineligible for the death penalty).

to the *proportionality* doctrine, the Court could also exclude from death eligibility offenders with severe mental illness while more strongly enforcing its protections of inmates with intellectual disability (p. 178). Other recommendations for enhancing the “death is different” emphasis sweep more broadly: heighten the standards for attorney performance in capital cases, alter capital doctrine in light of the evidence on wrongful convictions, cap the use of future dangerousness experts, provide structural reform for attorneys, offer state or regional review of local decisionmaking among death penalty prosecutors, and conduct an investigation of the vast geographical disparities in executions (pp. 178–80, 184–85). Of course, as the Steikers recognize, others have made similar kinds of recommendations, but there have been few correctives stemming from them.

4. *Unintended Consequences of Regulation.* — According to the Steikers, all of the judicial oversight and regulation over the years has “legitimate[d]” the death penalty process by introducing “a false aura of rationality, even science, around the necessarily moral task of deciding life or death” (p. 188). “By ‘legitimate,’” the Steikers “do not mean a process in which the Court *actually* justified faith in the capital system, but rather one in which the Court induced a *false or exaggerated* belief in the normative justifiability of the workings of the American death penalty” (p. 188). Not only do jurors actually have more power in deciding cases than they think they do, but all the actors in the criminal justice system also wrongly believe that they have more layers of review for their decisions than actually exist (p. 190). While “sentencers may be comforted by the apparent mathematical precision of modern capital sentencing regimes, prosecutors may feel emboldened in seeking the imposition of the death penalty” (pp. 189–90).

The takeaway is that the LDF attorneys in *Furman* and *Gregg*, avid about abolishing the death penalty, inadvertently propelled a system that only *looked* legitimate but actually grounded the death penalty in its place (p. 191). Once the system was in force, death sentences and executions rapidly increased as polls demonstrated growing public support for the death penalty and legislative reviews of capital convictions decreased. Yet by the start of the millennium, the long-term destabilizing effects of constitutional regulation finally began to be revealed. The first chapter in this destabilizing story concerned new evidence of the many wrongly convicted inmates on death row (p. 192).

#### D. *Predictions for the Death Penalty's Demise*

The marked and continuing decline in both executions and the number of new death sentences nationwide — in addition to dwindling

public support and the decreasing number of states still retaining the death penalty<sup>60</sup> — fuels the Steikers' contention that the death penalty is becoming increasingly fragile (pp. 212–16). The Steikers rightly attribute some of the decline in executions to states' problems with implementing lethal injection and challenges in the acquisition of lethal injection drugs and proper protocols (pp. 212–13).<sup>61</sup> But there have also been substantial changes over the years in legal practice and politics that have contributed to the death penalty's newfound vulnerability (p. 255). Because other potential avenues of abolition are either difficult or foreclosed (pp. 255–58), the Steikers contend that if and when abolition occurs it will be the result of a Supreme Court ruling, a "*Furman II*" (p. 258). Of course, such a trajectory is conditional on the Court's composition and the assurance of at least five votes for abolition. For the Steikers, those votes do not appear that far away (p. 258).<sup>62</sup>

1. *The Steikers' Abolition "Blueprint."* — The Steikers offer one vision of a plan for abolition (p. 271), which can be based on several possible packages of tactical options in light of the various flaws detected in the death penalty's administration. While they view the proportionality principle of the Eighth Amendment as the superior path to constitutional abolition in part because it is the one that appears "most

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<sup>60</sup> See *supra* notes 1–6 and accompanying text. According to the Steikers, "the number of new death sentences nationwide is the best evidence of the prevailing commitment to the practice, because that total reflects the considered choices of prosecutors and jurors when faced with the concrete choice of death or life imprisonment" (p. 213).

<sup>61</sup> The Death Penalty Information Center has emphasized the importance of lethal injection challenges in particular. See DEATH PENALTY INFO. CTR., *supra* note 1, at 5 ("This continuing decline [in executions] reflects both the increasing geographic isolation and outlier application of capital punishment in the United States, but is unquestionably also affected by measures the American pharmaceutical industry have undertaken to prevent states from obtaining their medicines for use in executions, human rights regulations adopted by the European Union to prevent export of materials and supplies that can be used in executions or for purposes of torture, and a court order directing the federal Food and Drug Administration to prevent the illegal importation of execution drugs.").

<sup>62</sup> As the Steikers note, seven Justices — five former Justices and two current ones — have determined that the death penalty should be rendered unconstitutional since *Furman*: Justices Brennan and Marshall in *Furman* itself; Justice Blackmun in *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari); Justice Stevens in *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment); and Justice Powell, who changed his mind about the death penalty after he left the Court having authored *Furman* and casting the fifth vote in *McCleskey v. Kemp*, 481 U.S. 279 (1987) (pp. 258–59). Justices Breyer and Ginsburg have said that it is "highly likely that the death penalty" is unconstitutional. *Glossip v. Gross*, 135 S. Ct. 2726, 2776–77 (2015) (Breyer, J., dissenting). The Steikers suggest that such ideological movement among Justices comports with Justice Marshall's view — often called the "Marshall hypothesis" — that "even the most hesitant of citizens" could be convinced that the death penalty was "morally reprehensible" if provided enough of the right kind of information, most particularly that the death penalty is discriminatory (pp. 259–71) (quoting *Furman v. Georgia*, 408 U.S. 238, 363–64 (1972) (Marshall, J., concurring)).

likely” to result in a *Furman II* decision, they first discuss the downsides of certain “alternative paths” (p. 272) — the “most obvious rivals to the proportionality approach” (p. 275) — as a way of justifying their selection. These paths include: (1) wrongful convictions and the likelihood of executing innocent individuals (which faces the challenges of identifying both a workable definition of “innocence” and a constitutional basis<sup>63</sup>) (pp. 272–73); (2) general arbitrariness, including racial discrimination (which faces challenges related to collecting and analyzing empirical evidence) (pp. 273–74); as well as (3) long delays between sentencing and execution (which faces the challenges of marked variability among states in delay time and insufficient traction to garner a constitutional ban) (pp. 274–75). The Steikers note that, in sharp contrast, the proportionality principle has two advantages: first, it is broad enough to incorporate these three alternative paths and second, it has a long and established history within the Court’s Eighth Amendment doctrine, starting with the Court’s “evolving standards of decency” test as determined by “legislative enactments” and “jury verdicts” (p. 275).

The Steikers review the proportionality principle’s historical path and the factors that influenced the principle’s application to both offenses and offenders as a way of supporting their recommendation and its workability. The review starts with the *Coker* Court’s decision in 1977 to eliminate the death penalty for the rape of an adult woman<sup>64</sup> just a year after *Gregg* was decided (p. 276). *Coker* was based in part upon the Court’s finding that “relatively few death sentences for rapists” had been imposed in the previous few years (p. 276). Within five years, the Court in *Enmund* would also limit the extent to which felony murder would be considered death eligible,<sup>65</sup> applying an analysis similar to *Coker* but with “one notable addition”: the incorporation of “prosecutorial decisions, along with those of legislatures and juries, as objective evidence of society’s views” (p. 277). As the *Enmund* Court explained, if prosecutors hardly ever pursued the death penalty for accomplice felony murder, it would be some indication that they viewed death as disproportionate in this circumstance (pp. 276–77).

The Court would lay the foundation for its staunchest proportionality doctrine, however, in three decisions over a six-year period (from 2002 to 2008) in which it rendered the death penalty unconstitutional

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<sup>63</sup> See *supra* notes 43–48 and accompanying text for a discussion of the Court’s indecision concerning the constitutional validation of inmates’ claims of innocence.

<sup>64</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); see also *supra* note 34 and accompanying text.

<sup>65</sup> See *Enmund v. Florida*, 458 U.S. 782, 796 (1982). Even though *Tison v. Arizona*, 481 U.S. 137 (1987), limited the breadth of *Enmund*, see *supra* note 36, the Steikers contend that this constraint did not affect the Court’s ongoing reliance on the approach it used in *Coker* (p. 277).

for intellectually disabled offenders<sup>66</sup> and juvenile offenders,<sup>67</sup> as well as for the crime of child rape.<sup>68</sup> As the Steikers stress, “[i]t is these three decisions — two of which were authored by Justice Kennedy — that flesh out the Court’s proportionality doctrine as a potential blueprint for a categorical constitutional ruling” (p. 277).

These cases would incorporate even more factors relevant to such a blueprint. According to *Atkins v. Virginia*,<sup>69</sup> for example, it wasn’t just the number of states that were starting to prohibit the execution of the intellectually disabled, but also “the consistency of the direction of change” in which they were moving (p. 278).<sup>70</sup> The relatively small number of states at issue (eighteen) were all heading toward prohibition (pp. 277–78). Another factor supporting proportionality was the more amorphous and controversial “broader [social] and professional consensus” (p. 278).<sup>71</sup> The groups within this consensus category ranged from professional organizations of experts on intellectual disability to members of different religious communities to peer members of the international community, specifically European countries that had long disfavored the execution of the intellectually disabled (p. 278).

In *Roper v. Simmons*,<sup>72</sup> which eliminated the death penalty for juvenile offenders, the Court added yet another factor. Like in *Atkins*, the *Roper* Court highlighted that state legislatures were evolving in a similar direction. As the Steikers stress, though, “the centerpiece of the Court’s analysis was its reference to extensive expert opinion, presented in ‘scientific and sociological studies’” (p. 279),<sup>73</sup> concerning how juveniles differed from adults in three major ways: their immaturity and lessened self-control, their vulnerability to peer pressure, and their less developed identities. These differences diminished juveniles’ culpability as well as their receptivity to deterrence (pp. 279–80). The focus on scientific research was also relevant in noncapital cases in which the Court held that, for juveniles, the sentence of life without the possibility of parole (LWOP) was unconstitutional (pp. 281–82).<sup>74</sup>

The Steikers have assembled a multifactor framework rooted in the Court’s proportionality jurisprudence. Along with the Court’s “own

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<sup>66</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>67</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>68</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

<sup>69</sup> 536 U.S. 304.

<sup>70</sup> *Id.* at 315.

<sup>71</sup> The authors quote *Atkins*, 536 U.S. at 316 n.21.

<sup>72</sup> 543 U.S. 551.

<sup>73</sup> The authors quote *Roper*, 543 U.S. at 569.

<sup>74</sup> See *Graham v. Florida*, 560 U.S. 48, 82 (2010) (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”).

judgment” (p. 284),<sup>75</sup> this framework provides the “[b]lueprint for [c]onstitutional [a]bolition” (p. 271) that the Steikers suggest will produce a *Furman II* (p. 272). Such a structure incorporates into the Court’s evolving proportionality doctrine (p. 275) the three competing alternatives that the Steikers raised — the combination of wrongful convictions (pp. 272–73), general arbitrariness (pp. 273–74), and lengthy delays (pp. 274–75). Though based initially upon “legislative enactments” and “jury verdicts,” the proportionality jurisprudence has expanded to consider the contributions of other factors: the number of death sentences (p. 276), “prosecutorial decisions” (p. 277), the “direction of change” in legislative enactments, “societal and professional consensus” (p. 278), and expert opinion (pp. 279–80). While the framework is complex, its core is proportionality.

2. *Justice Breyer’s Dissent in Glossip v. Gross.* — Justice Breyer’s dissent in *Glossip v. Gross*<sup>76</sup> is one of the latest indications of the possibility of constitutional abolition. In *Glossip*, the Court upheld under the Eighth Amendment Oklahoma’s lethal injection procedure, which included the application of a potentially problematic drug (midazolam). The Court determined that the district court did not commit clear error in finding that Oklahoma’s execution protocol presented no “substantial risk of severe pain” and that “the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain.”<sup>77</sup> In a long and noteworthy dissent (joined by Justice Ginsburg), Justice Breyer concluded that the death penalty “now *likely* constitutes a legally prohibited ‘cruel and unusual punishment[t].’”<sup>78</sup>

Justice Breyer examined the death penalty’s continuous failures since 1976 based on decades of experience and the results of a range of social science research (p. 267). He noted three “fundamental constitutional defects” with the death penalty’s administration as well as a fourth factor — that most of the United States no longer employed the death penalty.<sup>79</sup> The first fundamental defect was “convincing evidence that . . . innocent people have been executed” and that other innocent people could have been executed had they not been entirely exonerated beforehand (p. 267).<sup>80</sup>

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<sup>75</sup> The authors quote *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (“[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”).

<sup>76</sup> 135 S. Ct. 2726 (2015).

<sup>77</sup> *Id.* at 2731.

<sup>78</sup> *Id.* at 2756 (Breyer, J., dissenting) (alteration in original) (emphasis added).

<sup>79</sup> *Id.* at 2755–56.

<sup>80</sup> The authors quote *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting).

Second, Justice Breyer focused on arbitrariness in the death penalty's application, looking especially to Professor John Donohue's striking study of Connecticut's death penalty (pp. 267–68).<sup>81</sup> According to Donohue, not only was a defendant's conduct (at best) weakly correlated with the chances of receiving a death sentence, but also other factors that should have been irrelevant (or extralegal<sup>82</sup>) were correlated — murder victims' race, defendants' and victims' gender, and the murder's location (p. 268).

The third fundamental defect, according to Justice Breyer, concerned the “excessively long periods of time” inmates were commonly housed on death row — an average of about eighteen years — which typically involved stretches of solitary confinement for most of their stays (p. 268).<sup>83</sup> In Justice Breyer's view, inmates' protracted isolation and lack of knowledge about when or whether they would be executed “undermine[] the death penalty's penological rationale” of deterrence and retribution, especially since any executions that did occur were often carried out decades after defendants committed their offenses (p. 268).<sup>84</sup> Expediting executions would not fix the problem because most delays resulted from courts' attempts to ensure a just and reliable process (p. 268). As Justice Breyer explained: “[W]e can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both” (p. 268).<sup>85</sup> Judge Cormac J. Carney, a federal district court judge in California, also put the problem into perspective, stressing that “systemic delay” has rendered executions “so unlikely” that a death sentence deliberated upon by a jury “has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death.*”<sup>86</sup>

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<sup>81</sup> *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting).

<sup>82</sup> “Extralegal” means “not regulated or sanctioned by law.” *Extralegal*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/extralegal> [<https://perma.cc/7KA6-VJRH>]. In some social science research, for example, extralegal factors are considered to be based on “jurors' sentiments.” Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 LAW & SOC'Y REV. 423, 427 (1986). Factors could include the “defendants' and victims' personal characteristics or life styles,” *id.*, such as the defendant's level of attractiveness or whether the victim was considered of “poor moral character,” *id.* at 428 tbl.1. In contrast, legal factors would include acceptable trial evidence, such as whether the victim was injured or a gun was recovered. *Id.*

<sup>83</sup> The authors quote *Glossip*, 135 S. Ct. at 2764 (Breyer, J., dissenting).

<sup>84</sup> The authors quote *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting).

<sup>85</sup> The authors quote *Glossip*, 135 S. Ct. at 2772 (Breyer, J., dissenting).

<sup>86</sup> *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014), *rev'd on other grounds sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

Finally, Justice Breyer detailed with a range of population measures the steep declines in executions and death sentences<sup>87</sup> (which have declined even more since 2015<sup>88</sup>), as well as the increasing tendency for death sentences and executions to concentrate geographically.<sup>89</sup> Likewise, Justice Breyer acknowledged the Court's decision to narrow the categories of offenders and offenses that could be considered death eligible and highlighted opinion polls indicating the public's growing preference for life without the possibility of parole as opposed to death (p. 269). All of these factors suggested to Justice Breyer that the death penalty was on the way out. The Steikers take care to note that these factors fit precisely into the "objective evidence" proportionality prong (pp. 282–83) and thus lend support for their blueprint.

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In their 1995 article, *Sober Second Thoughts*,<sup>90</sup> the Steikers compared the regulation of the death penalty to regulation in other constitutional contexts, albeit on a substantially smaller scale than in *Courting Death* (pp. 217–54). In both, they focused in particular on how *Furman* compared to *Brown v. Board of Education* and *Roe v. Wade*.<sup>91</sup>

To the Steikers, the most striking differences among these cases concerned not legal issues so much as "extra-legal" issues.<sup>92</sup> For example, the Court's striking down of death penalty laws in *Furman* only to revitalize them four years later in *Gregg* "certainly fits the classic backlash story" (p. 218). Yet the Steikers stress that the transition from *Furman* to *Gregg* was nuanced, not simple, and was affected by a range of factors (p. 219). In turn, "[m]any, though not all, of these factors were also observable to a degree" in *Roe*, which involved the Court's broadening of abortion rights (p. 219). *Roe* and its aftermath, too, are considered by some to be an illustration of the backlash theory (p. 219), although some scholars have questioned that view by documenting that the hostility toward abortion existed before the Court intervened (p. 223).

As the Steikers explain in *Sober Second Thoughts*, "[w]hat most distinguishes *Furman* from *Brown* and *Roe* is the fact that capital punishment is regulated entirely by legal procedures in the courtroom,

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<sup>87</sup> *Glossip*, 135 S. Ct. at 2772–73 (Breyer, J., dissenting).

<sup>88</sup> See *supra* notes 1–5 and accompanying text.

<sup>89</sup> *Glossip*, 135 S. Ct. at 2773–76 (Breyer, J., dissenting).

<sup>90</sup> Steiker & Steiker, *supra* note 18.

<sup>91</sup> 410 U.S. 113 (1973); see also Steiker & Steiker, *supra* note 18, at 404–12. In *Courting Death*, the Steikers discuss in considerable detail how the Court's regulation of the death penalty "reveals some generalizable features that can be observed in other contexts of constitutional regulation" (p. 217), including *Roe* (pp. 223–29).

<sup>92</sup> Steiker & Steiker, *supra* note 18, at 404; see also *supra* note 82 (defining "extralegal").

while education and abortion services necessarily implicate the participation of extra-legal institutions.”<sup>93</sup> The Steikers stressed that such differences illuminated the extent to which the Court could “transform” the capital punishment process because “the constraints on the Court that scholars have observed in the *Brown* and *Roe* contexts do not map well onto the distinctive terrain of the death penalty.”<sup>94</sup> Contrariwise, “the court-centered nature of capital punishment regulation may also operate to limit the possibilities for doctrinal change” because the Court may be loath to concede that its Eighth Amendment jurisprudence was inadequate.<sup>95</sup> Consequently, “the Court may doggedly pursue a reformist agenda even in the face of compelling evidence of failure.”<sup>96</sup>

The Steikers do not return to these particular conclusions in their book. Yet perhaps they should have. There is reason to argue that the death penalty has come to rely on, and be influenced by, extralegal factors far more than in the past, indicating that the death penalty is not nearly as “court-centered” as it once may have been. These factors may also explain some of the Court’s decisionmaking. The next Part investigates these extralegal factors and developments that the Steikers may have overlooked.

## II. WHAT MORE THERE IS TO SAY

The richness of ideas and recommendations that *Courting Death* offers provides an apt springboard for examining both the Steikers’ formidable arguments and other death penalty issues that the authors do not cover in depth. This Part offers a different take on two of the Steikers’ major themes: (1) the tension between effecting meaningful reform and legitimizing legal façades; and (2) the future of the American death penalty.

### A. *Genuine Reform or Legitimizing Façade?*

One of the Steikers’ central themes is a criticism of the Court’s tendency, through its regulatory project, to paper over the problems inherent in the system. But there is a different possible view of the extent to which reforms both endogenous and exogenous to the Court have improved capital punishment. First, this section examines the MPC and suggests it may have had a larger pre-*Furman* impact than the Steikers acknowledge, and that it may have contributed to greater uniformity among states — a positive development in the law. Second,

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<sup>93</sup> Steiker & Steiker, *supra* note 18, at 404.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

this section argues that the Court's regulatory project should be viewed in light of the empirical unknown: what was the alternative path the Court *should* have taken and where might we be if the Court had followed it?

In addition to the Steikers' criticisms of the MPC's death penalty provisions and the Court's efforts at regulation, there should be some recognition that the ALI and the Court have done some things right. Both institutions may also have chosen the best available path at the time. While the Steikers do not suggest that the Court should have avoided regulation altogether, their recommendations for either abolishing or improving the death penalty pertain only to what the death penalty looks like now, not how it looked after *Gregg*. Without specifying the blueprint the Court should have followed in 1976, the Steikers do not fully credit either the ALI or the Court with the regulation that *has* been successful, and that can serve as a foundation for future improvements.

1. *The Model Penal Code's Death Penalty Provisions.* — With *Gregg* came the realization that abolition would not be possible within the foreseeable future. When thirty-five states passed new capital statutes after *Furman*, a number of them mandated death for every capital offender. But most states selected a "guided-discretion" strategy by adopting in whole or in part the MPC's death penalty provision, section 210.6,<sup>97</sup> which the ALI published in 1962<sup>98</sup> (pp. 60–63). The MPC provision provided guidelines for states to follow along with some important revisions to then-current death penalty law (p. 61).<sup>99</sup> As the Steikers stress, however, there was an irony to the MPC provision's widespread marketability: the provision's adoption so soon after *Furman* was decided seemingly fueled the Court's efforts to regulate the death penalty process, while also entrenching and legitimizing it.

It would be decades before the ALI would even consider substantially revising any provision in the MPC, much less the death penalty provision. Finally, in 2002, the ALI initiated a project to revise the outdated MPC sentencing provisions,<sup>100</sup> an effort that remains on-

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<sup>97</sup> See MODEL PENAL CODE § 210.6 (AM. LAW INST., Proposed Official Draft 1962).

<sup>98</sup> See *id.*

<sup>99</sup> The MPC provision applied only to murder, mandated that a sentencer select at least one of eight "aggravating circumstances" (p. 61), and set up bifurcated proceedings consisting of a guilt phase and a sentencing phase (pp. 61–62). See also *infra* notes 110–16 and accompanying text (discussing these contributions of the MPC provision).

<sup>100</sup> See AM. LAW INST., MODEL PENAL CODE: SENTENCING: PLAN FOR REVISION (2002). For a discussion of the impetus behind the revision effort and the plan for the proposed sentencing structure, see generally Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525 (2002).

going<sup>101</sup> but that did not include a plan to reexamine section 210.6.<sup>102</sup> By 2007, however, two members of the ALI moved that the Institute make a public statement that it was “opposed to capital punishment,” a recommendation that the Institute wanted to consider after more study and evaluation.<sup>103</sup> As a result, in 2009, the ALI published an invited report by the Steikers concerning how the Institute should approach section 210.6, especially given the provision’s datedness and problematic history.<sup>104</sup> The report sought to answer whether the ALI should withdraw the provision, reform it, leave it alone, or provide some alternative corrective.

In their report, the Steikers emphasize the extent to which states have relied on MPC section 210.6 and the fact that the Court has tried to regulate the death penalty “largely on” the MPC’s model.<sup>105</sup> While the Steikers note in their report<sup>106</sup> and in their book (pp. 43–44) that the Court and other entities “ignored” the MPC provision for the first decade after its publication and before *Furman* (1962–1972), that characterization is somewhat misleading given the circumstances of the time. The United States’ near-decade-long execution moratorium started in 1967,<sup>107</sup> just five years after the MPC provision was released and when the LDF strategy was in operation. Executions and death sentences were rare and rapidly on the decline; there would have been little incentive for states or the Court to go looking for a new provision to adopt (indeed, the ALI Advisory Committee had wanted to abolish the death penalty but the Council considered it politically unfeasible<sup>108</sup>). The fact that the MPC provision was adopted so quickly and widely after *Furman* indicates the broad reach of the ALI’s influence at the time when a death penalty provision was most needed.

If the states had not had MPC section 210.6 available in 1976, it is difficult to predict what they would have otherwise done. Perhaps more states would have taken the option of instituting a mandatory death penalty, or they would have devised another set — or multiple sets — of guidelines of variable effectiveness, thereby enabling even greater nationwide differences among states.

The age of the MPC provision as well as its lack of revisions until recently can make it easy to forget that the provision had initially of-

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<sup>101</sup> A fourth tentative draft was submitted to the ALI in 2016. See AM. LAW INST., MODEL PENAL CODE: SENTENCING: TENTATIVE DRAFT NO. 4 (2016).

<sup>102</sup> ALI 2009 REPORT, *supra* note 19, annex B at 1.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 3.

<sup>106</sup> *Id.* at 4.

<sup>107</sup> See *supra* note 16 and accompanying text.

<sup>108</sup> See ALI 2009 REPORT, *supra* note 19, annex C:1 at 6 (Roger S. Clark & Ellen S. Podgor, Model Penal Code: Sentencing: Motion on Capital Punishment (Apr. 2, 2007)).

ferred some groundbreaking changes to death penalty doctrine.<sup>109</sup> First, the MPC provision pertained only to murder and not to rape, helping to set the stage for *Coker*'s elimination of adult rape from death eligibility (p. 61).<sup>110</sup> Second, the MPC provision required that at least one of eight "aggravating circumstances" be selected before a defendant could be considered death eligible, thereby representing the ALI's effort to narrow the relevant pool of defendants to those who were the most violent.<sup>111</sup> While the MPC aggravating factor concerning whether "[t]he murder was especially heinous, atrocious or cruel"<sup>112</sup> was vague and overbroad — and later rendered unconstitutional unless state courts applied their own limiting constructions<sup>113</sup> — the provision's other aggravating factors have the kind of objectivity that the Steikers cite in their list of recommendations for changing current death penalty doctrine (p. 177).<sup>114</sup> Lastly, the MPC introduced the

<sup>109</sup> A parallel argument can be made with respect to the sexual offense provisions of MPC section 213. These provisions, which are highly outdated but are now undergoing revision by the ALI, had initially offered modernized understandings of sexual behavior, particularly same-sex behavior, when they were first introduced in 1962. See Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 207–13 (2003); *Model Penal Code: Sexual Assault and Related Offenses*, AM. L. INST., <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> [<https://perma.cc/ULA9-L8YX>].

<sup>110</sup> See *Coker v. Georgia*, 433 U.S. 584, 599–600 (1977) (plurality opinion); MODEL PENAL CODE § 210.6(1) (AM. LAW INST., Proposed Official Draft 1962).

<sup>111</sup> See MODEL PENAL CODE § 210.6(3).

<sup>112</sup> *Id.* § 210.6(3)(h).

<sup>113</sup> See *Godfrey v. Georgia*, 446 U.S. 420, 432–33 (1980) ("[T]he validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase 'outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind . . . .' We conclude that the answer must be no. . . . [I]t 'is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" (first quoting GA. CODE § 27-2534.1 (b)(7) (1978); then quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1973))).

<sup>114</sup> Section 210.6 provides, in relevant part:

§ 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

...

(3) Aggravating Circumstances.

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

type of bifurcated proceedings that the LDF had attempted to convince the Court to require in *McGautha v. California*,<sup>115</sup> albeit unsuccessfully (p. 61).<sup>116</sup> Bifurcated proceedings are one of the major features that distinguish death penalty cases from other kinds of cases, and the MPC's adoption of them was a landmark move.

Ultimately the Steikers — and hence the ALI — recommended withdrawing the MPC provision<sup>117</sup> for two reasons. First, certain aspects of the provision had already been ruled unconstitutional, in particular the aggravating factor (in the absence of an appropriate construction) of “[t]he murder was especially heinous, atrocious or cruel.”<sup>118</sup> Second, the provision was “simply inadequate to address the endemic flaws of the current system,” especially because “its adoption rested on the false assumption that carefully-worded guidance to capital sentencers would meaningfully limit arbitrariness and discrimination in the administration of the American death penalty.”<sup>119</sup> Similarly, the ALI concluded that it would also not take on any projects to reform section 210.6.<sup>120</sup> Not only had other organizations already committed to studying the death penalty on the state and national level,<sup>121</sup> but the Steikers also noted that the death penalty had proven immune to reform in most jurisdictions.<sup>122</sup> If the ALI once again tried to reform the process, “it would run the risk not merely of failing to improve the death penalty, but also of helping to entrench or legitimate it.”<sup>123</sup> Indeed, to some scholars the provisions “have become . . . ‘a

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(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

MODEL PENAL CODE § 210.6.

<sup>115</sup> 402 U.S. 183 (1971).

<sup>116</sup> *Id.* at 221 (“It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds . . . . From a constitutional standpoint we cannot conclude that it is impermissible for a State to consider that the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment determined in a single trial than by focusing the jury’s attention solely on punishment after the issue of guilt has been determined.”).

<sup>117</sup> ALI 2009 REPORT, *supra* note 19, at 6 (Report of the Council); *see also id.* annex B at 8 (recommending that the Institute refrain from attempting to reform the provision and instead withdraw it).

<sup>118</sup> MODEL PENAL CODE § 210.6(3)(h); *see also Godfrey*, 446 U.S. at 432–33 (1980) (plurality opinion).

<sup>119</sup> ALI 2009 REPORT, *supra* note 19, annex B at 7.

<sup>120</sup> *Id.* at 6 (Report of the Council) (“The Council reports that there are no plans to begin an ALI project to draft language that would revise or replace § 210.6 or otherwise address the subject of capital punishment.”).

<sup>121</sup> *Id.* annex B at 3.

<sup>122</sup> *Id.* at 4.

<sup>123</sup> *Id.* at 5.

paradigm of constitutional permissibility,' a lifeline for the retention of capital punishment against constitutional attack."<sup>124</sup> The Steikers argued that no revision of a statutory provision could cure the problems with capital punishment.<sup>125</sup>

But the ALI's decision leaves the status of the death penalty in an odd position with respect to reform efforts. There is an argument to be made that this "ostrich" approach is a dangerous tack and one that banks too heavily on the estimated speed and certainty of abolition while leaving capital defendants vulnerable. As the Steikers note, a major reason for the Court's regulation was a need to curtail judicial and jury discretion due to racial justice concerns.<sup>126</sup> For the ALI to simply remove section 210.6 without doing more leaves the ALI no longer involved with the death penalty in any major capacity, a status that could continue for decades to come.

2. *The "Compared to What?" Question and the Court's Regulatory Successes.* — The empirical unknown — the "compared to what?" question — makes it hard to assess the impact of the Court's regulatory project. The Steikers do not provide a scenario of what would have happened had the Court refrained from its regulatory efforts or had it become only partially involved. There is some cause to believe the results could have been much worse: after all, a post-*Furman* President Richard Nixon desired the death penalty's return (pp. 49, 60), and crime rates were rising sharply (pp. 100–01).

Alternatively, perhaps, the impact of regulation was not as egregious as the Steikers' account might suggest. For example, Professor David McCord's statistical study testing some of the Steikers' contentions suggests that the Court's impact was more favorable than the Steikers claim: "The best available evidence shows that the Court's regulatory death penalty jurisprudence *has* been successful in decreasing overinclusion [especially with respect to racial bias], which is the primary vice that the Court has seen in death penalty systems for the last quarter of a century."<sup>127</sup> While the Steikers do offer recommenda-

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<sup>124</sup> *Id.* annex C:1 at 5 (quoting MODEL PENAL CODE AND COMMENTARIES § 210.6, at 171 (AM. LAW INST. 1980)).

<sup>125</sup> *Id.* annex B at 5.

<sup>126</sup> See *supra* notes 23–26 and accompanying text; see also David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545, 548 (1997) ("[T]he Court has had only one primary goal for its regulation of capital punishment: decreasing overinclusion, with particular interest in minimizing invidious overinclusion due to racial bias.").

<sup>127</sup> McCord, *supra* note 126, at 593. The Steikers note the overinclusion problem is related "at a general conceptual level" to the arbitrariness problem: "Overinclusion (the execution of a defendant in the absence of expressed legislative will) treats the defendant more harshly than he deserves, whereas underinclusion (the failure to execute some other defendants in the presence of expressed legislative will) treats other defendants more leniently than they deserve." Steiker & Steiker, *supra* note 18, at 366.

tions in their book for ways to improve the Court's regulation of the death penalty (pp. 176–87), they stress that, even with repair, legal regulation is not likely the answer to the death penalty's ongoing problems of "arbitrariness, discrimination, inefficacy, and error" (p. 177).

Yet the Steikers downplay or perhaps do not sufficiently acknowledge some of the Court's successes at regulation. Part of the difficulty in assessing these successes is that the Steikers tend to shift the goalposts designating what constitutes adequate death penalty reform without offering a full explanation for why and how the goalposts move over time. The proportionality doctrine is a particularly apt example. The Steikers select the Court's proportionality doctrine as their vehicle of choice for their "blueprint for constitutional abolition" (pp. 271–72) because of the advances the Court has made in that realm;<sup>128</sup> at the same time, they curiously disregard the extent of its overall impact or why it reflects a positive outcome of the Court's regulation. This stance is especially noticeable given the Steikers' discussion of proportionality in *Sober Second Thoughts*.<sup>129</sup> There, in 1995, the Steikers stressed the detrimental aspects of the Court's continuing inclusion of juvenile offenders and intellectually disabled offenders as death eligible even though both groups represented only a minimal proportion of homicide offenders<sup>130</sup>: "[A]llowing states to seek the death penalty against *all* offenders in these categories presents a real and substantial danger that many offenders will be selected for execution who do not 'deserve' it . . ." <sup>131</sup> Despite the Court's changing stance on these and other categories during the two decades following *Sober Second Thoughts*, however, the Steikers fail to step back and evaluate — in light of their regulation theory — the nature, speed, and extent of the positive direction in which the Court was heading, and why. As the Steikers put it, "[n]o longer can death be imposed for the crime of rape, or against juveniles or persons with intellectual disability, but beyond that, the state can seek the death penalty against virtually any murderer" (pp. 175–76). The "beyond that" language in their sentence represents a moving of the goalposts substantially further away from where the Steikers had set them in 1995.

Yet the Court's exclusion of those categories has made major inroads into reducing the number of individuals who are death eligible.<sup>132</sup> The Steikers acknowledge that the Court's 1977 ruling in

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<sup>128</sup> See *supra* notes 64–75 and accompanying text.

<sup>129</sup> See Steiker & Steiker, *supra* note 18, at 417–18.

<sup>130</sup> See *id.* at 417.

<sup>131</sup> *Id.* at 417–18.

<sup>132</sup> Studies of death row populations suggest that before *Atkins* and *Roper*, the number of now-excluded offenders was significant. See Robert J. Smith, Sophie Cull & Zoë Robinson, *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1231 (2014) (noting that in the authors' study of con-

*Coker v. Georgia*, which prohibited the death penalty for the rape of an adult woman,<sup>133</sup> “seemed promising for the future of constitutional regulation” because it narrowed defendants’ death eligibility in a way that aggravating factors could not (p. 163). They also acknowledge that the Court broadened the net of *Coker* even further when, over three decades later, it prohibited the death penalty for child rape (p. 164).<sup>134</sup> This decision foreclosed the death penalty “for any non-homicidal offense against persons” (distinguishing nonhomicidal crimes such as treason or terrorism, which are crimes against the state) (p. 164). Likewise, these exclusion cases were decided within a six-year span of time (from 2002 to 2008), a marked achievement for a Court that forestalled imposing proportionality for some decades after *Coker* (p. 163).<sup>135</sup> Indeed, if regulation were working as it should, one would expect death sentences and executions to decline as they have been — presumably because the system is selecting only the “worst of the worst.” Given these trends in proportionality doctrine, then, it can be challenging at times to decipher whether regulation is a failure or a tepid success.

Granted, bright-line proportionality limits (those for juveniles, for example) are easier to evaluate than the murkier categories (such as intellectual disability), which have engendered continuing litigation to establish clear boundaries.<sup>136</sup> That said, if the Court continues incorporating “extralegal” issues and institutions<sup>137</sup> into its decisionmaking as it has in recent decades, it must increase its scientific sophistication to avoid, to the extent possible, needless error and protracted litigation. Whether the Court is evaluating intellectual disability<sup>138</sup> or juvenile culpability,<sup>139</sup> DNA evidence<sup>140</sup> or lethal injection,<sup>141</sup> the Court has

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denied inmates, 15% had IQ scores that were less than eighty and half of that group had scores that were in the sixties); VICTOR L. STREIB, *THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES*, JANUARY 1, 1973–FEBRUARY 28, 2005, at 3 (2005), <http://www.deathpenaltyinfo.org/files/pdf/juvdeathstreib.pdf> [<https://perma.cc/DLS9-BPR6>] (noting that, of the 949 inmates executed from 1973 to 2005, twenty-two, or 2.3%, were juveniles).

<sup>133</sup> 433 U.S. 584, 592 (1977).

<sup>134</sup> See *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

<sup>135</sup> See, e.g., *id.* (describing the Court’s limited proportionality-based regulation in *Coker*’s aftermath).

<sup>136</sup> See *supra* note 59 and accompanying text (discussing *Hall* and *Moore*).

<sup>137</sup> See *supra* notes 92–96 and accompanying text (discussing the incorporation of extralegal issues into other areas of constitutional regulation).

<sup>138</sup> See, e.g., *Moore v. Texas*, No. 15-797 (U.S. Mar. 28, 2017) (rejecting Texas’s use of antiquated factors in determining if an inmate was intellectually disabled and therefore death ineligible).

<sup>139</sup> See generally Deborah W. Denno, *The Scientific Shortcomings of Roper v. Simmons*, 3 OHIO ST. J. CRIM. L. 379 (2006) (contending that some of the social science and psychological research in *Roper* is outdated).

<sup>140</sup> See *infra* notes 143, 150–54 and accompanying text.

<sup>141</sup> See *infra* notes 175–77, 182 and accompanying text.

shown many times over that it has work to do to master such extra-legal capabilities.

There is a genuine debate about the extent to which various actors should engage in regulation or reform efforts and whether such efforts legitimate capital punishment and therefore frustrate abolition. While the Steikers emphasize the ultimate effects on abolition, others might argue that reform should be pursued regardless of its purported legitimating effect. The promise of future abolition is cold comfort to the capital defendant denied protection today.

### *B. Independent Drivers of Reform and Nudges to Abolition*

The Steikers' regulation argument is all-encompassing, and therefore has the potential to obscure key contributors to the death penalty's decline that extend beyond its regulation by the Supreme Court. This section looks at two factors that may have profound effects on the future of the American death penalty: (1) the emergence of unforeseeable exogenous variables similar to the introduction of DNA evidence into criminal trials in 1980s; and (2) pressure points that exist largely outside of the constitutional regulatory framework, such as lethal injection litigation.

1. *Unforeseeable Exogenous Variables.* — Seemingly no factor has had greater sway on the decline of executions starting in 1999 than the "DNA revolution" and the accompanying surge in evidence of wrongful convictions.<sup>142</sup> Yet there is no clear evidence that the use of DNA in the courtroom was a byproduct of federal constitutional regulation of the death penalty. Rather it seems to be mostly, if not entirely, a byproduct of scientific advances and, only concomitantly, the increasing use of expert testimony and superior lawyering.

Before 1990 the public reacted little to news about wrongful convictions (pp. 207–08).<sup>143</sup> Pre-DNA innocence claims could always be questioned because of the nature and weakness of the study upon which they were based.<sup>144</sup> Yet 1989 marked a turning point when, for the first time in the United States, a prisoner who had been convicted of rape a decade earlier was exonerated by postconviction DNA testing.<sup>145</sup> DNA evidence would begin to offer the promise of showing with substantially greater certainty that defendants were innocent.<sup>146</sup>

<sup>142</sup> Cf. BANNER, *supra* note 9, at 304 ("The prospect of killing an innocent person seemed to be the one thing that could cause people to rethink their support for capital punishment.")

<sup>143</sup> See Jay D. Aronson & Simon A. Cole, *Science and the Death Penalty: DNA, Innocence, and the Debate over Capital Punishment in the United States*, 34 LAW & SOC. INQUIRY 603, 605, 608–10 (2009) (noting that before the advent of DNA evidence in criminal cases, inmates' claims of innocence were never entirely provable).

<sup>144</sup> See *id.* at 608–10.

<sup>145</sup> *Id.* at 610.

<sup>146</sup> *Id.* at 611.

This legal awakening would bolster the credibility of even non-DNA death row exonerations.<sup>147</sup> By 1996, sixty-five people had been cleared by DNA testing, with a National Institute of Justice report detailing these cases.<sup>148</sup>

In 2000, the founders of Cardozo Law School's Innocence Project, along with a journalist, published the book *Actual Innocence*, which described the cases they handled and presented their strong and heated critique of the American criminal justice system.<sup>149</sup> While most of the cases in the book were not death penalty cases and most of the exonerations post-*Gregg* occurred by methods other than DNA, those capital DNA exonerations had, and continue to have, a lasting and powerful effect on the death penalty's legitimacy.<sup>150</sup> Indeed, both Justice Stevens and Justice Breyer emphasized in particular a concern over the potential to execute innocent inmates in their anti-death penalty decisions in, respectively, *Baze v. Rees*<sup>151</sup> and *Glossip v. Gross*.<sup>152</sup> For Justice Breyer, the execution of the innocent is one of three "fundamental constitutional defects" of the death penalty's administration (p. 267).<sup>153</sup>

According to the Steikers, "the innocence issue . . . is fairly viewed as a foreseeable by-product of the Court's regulatory efforts [because] [t]he Court's regulation fueled the creation of a new set of institutional actors committed to capital defense" (pp. 209–10). While the Court's regulation may have led to superior lawyering, the development of DNA science and evidence is also clearly an exogenous variable, one that was unforeseeable to the legal world and that exerted tremendous influence on the rate of capital punishment in America. It was not until 1985 that DNA technology played a crucial role in criminal investigation,<sup>154</sup> and, as mentioned, most of the innocence claims at the start were not capital cases. The fact that attorneys such as Barry Scheck

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 610.

<sup>149</sup> *Id.*; see BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (2003); see also Barry C. Scheck, *Barry Scheck Lectures on Wrongful Convictions*, 54 *DRAKE L. REV.* 597, 600–04 (2006) (discussing the "165 postconviction DNA exonerations in the United States" at the time of the 2005 lecture, *id.* at 600, a number that had grown to 175 by 2006, *id.* n.4).

<sup>150</sup> Aronson & Cole, *supra* note 143, at 610–11.

<sup>151</sup> 553 U.S. 35, 85–86 (2008) (Stevens, J., concurring in the judgment).

<sup>152</sup> 135 S. Ct. 2726, 2755–59 (2015) (Breyer, J., dissenting) ("[T]here is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law's view) do not warrant the death penalty's application." *Id.* at 2759.).

<sup>153</sup> *Id.* at 2755–56.

<sup>154</sup> Aronson & Cole, *supra* note 143, at 610. Although "the first American prisoner to be cleared by postconviction DNA testing" was exonerated in 1985, he was only paroled at that time. *Id.* It was not until 1989 that the conviction was removed from his record. *Id.*

and Peter Neufeld became sufficiently expert to use the evidence in criminal and capital cases is a credit not only to the ingenuity of the defense bar, but also to the growing numbers of scientists and specialists who became involved as a result of the impact of DNA testing on criminal convictions.

In sum, an argument can be made that one factor that has had a strong effect on decreasing executions starting in 1999 may well have had little or no association with constitutional regulation of the death penalty. Furthermore, DNA cases have the backing of science, suggesting that the death penalty, like other constitutional contexts, has become more extralegal.

Indeed, there are other independent variables that may, with time, start to approximate the impact of DNA evidence, most notably those measures that fall under the broad rubric of “neuroscience,” defined as “the branch of the life sciences that studies the brain and nervous system.”<sup>155</sup> Neuroscience evidence can include both brain imaging techniques (such as an MRI or PET scan) and nonimaging techniques (such as paper and pencil tests of intelligence).<sup>156</sup> Such measures were critical to the Court’s evaluation of the culpability of juvenile offenders in a range of cases,<sup>157</sup> including *Roper v. Simmons*.<sup>158</sup> In addition, this burgeoning field of science can contribute to attempts to narrow the range of defendants rendered eligible for the death penalty, thereby contributing to proportionality-based efforts to exclude the severely mentally ill from consideration. Research has also shown that capital defendants are more likely to win claims of ineffective assistance of counsel if their attorneys failed to introduce relevant neuroscience evidence on their behalf or introduced the wrong kind of evidence or expert.<sup>159</sup>

As measures of the human brain and behavior become more sophisticated, they will play an increasingly important role in litigation. Other kinds of extralegal factors have also profoundly shaped lethal injection litigation, which itself has played a central role in molding today’s death penalty system.

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<sup>155</sup> NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE 206 (Brent Garland ed., 2004).

<sup>156</sup> Deborah W. Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 56 B.C. L. REV. 493, 505 (2015).

<sup>157</sup> See generally Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions About Adolescents’ Criminal Culpability*, 14 NATURE REVIEWS NEUROSCIENCE 513 (2013) (discussing *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); and *Thompson v. Oklahoma*, 487 U.S. 815 (1988)); see also generally Denno, *supra* note 139, at 381–96 (discussing the support the Court used for its decision in *Roper*, including briefs examining scientific research on topics including neuroscience).

<sup>158</sup> 543 U.S. at 569–70.

<sup>159</sup> See Denno, *supra* note 156, at 506–11.

## 2. *Lethal Injection Litigation.*

(a) *Backdrop.* — After *Gregg*, many states were concerned about implementing electrocution, long considered a problematic form of execution due to a number of highly publicized and gruesomely botched electrocutions.<sup>160</sup> As a result, lethal injection was first adopted by Oklahoma in 1977 upon the recommendations of two physicians who created a three-drug lethal injection protocol consisting of the following: (1) a barbiturate anesthetic that would induce unconsciousness (sodium thiopental); (2) a total muscle relaxant that would paralyze an individual's voluntary muscles (pancuronium bromide); and (3) a toxin that would induce cardiac arrest (potassium chloride). This method was supposed to put an inmate to death easily and humanely, with the appearance of merely falling asleep.<sup>161</sup>

A large cluster of states quickly adopted lethal injection as their sole or primary mode of execution, even before the first lethal injection execution ever took place. It was not until 2009, however, that every death penalty state in the country used lethal injection either as its sole execution method or as one of two execution methods (along with electrocution, lethal gas, hanging, or the firing squad).<sup>162</sup> Yet, from the first lethal injection execution in 1982<sup>163</sup> to one of the most recent executions in 2017,<sup>164</sup> lethal injection has been an egregious method of execution that has only worsened over time.

With rare exception, lethal injection has not been subject to the Court's top-down regulation of states through the enforcement of fed-

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<sup>160</sup> See generally RICHARD MORAN, EXECUTIONER'S CURRENT (2002) (discussing the history and development of the electric chair and the botched electrocution of William Kemmler); AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 179–210 (2014) (archiving botched executions, including by electrocution, from 1890 to 2010); Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551 (1994) (detailing botched electrocution executions); *Botched Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> [<https://perma.cc/KN6T-GE43>] (providing examples of the more familiar botched executions from 1982 to 2016).

<sup>161</sup> See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 65–70 (2007).

<sup>162</sup> See Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1341–43 (2014).

<sup>163</sup> See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 428–29 (1997) (discussing the execution of Charles Brooks, Jr., by lethal injection).

<sup>164</sup> See Rachel Weiner, *Ricky Gray's Execution Took More than 30 Minutes. His Attorneys Want to Know Why.*, WASH. POST (Jan. 19, 2017), [https://www.washingtonpost.com/local/public-safety/ricky-grays-execution-took-more-than-30-minutes-his-attorneys-want-to-know-why/2017/01/19/89233530-de63-11e6-ad42-f3375f271c9c\\_story.html](https://www.washingtonpost.com/local/public-safety/ricky-grays-execution-took-more-than-30-minutes-his-attorneys-want-to-know-why/2017/01/19/89233530-de63-11e6-ad42-f3375f271c9c_story.html) [<https://perma.cc/LG6U-3HJZ>] (stating that the execution of Ricky Gray exceeded half an hour and was partially hidden from view because executioners faced challenges inserting an intravenous line).

eral constitutional law.<sup>165</sup> Rather, all execution statutes, including lethal injection statutes, have been state created, with the exception of the Federal Death Penalty Act.<sup>166</sup> My examination of all lethal injection statutes in the country shows that there are six main types;<sup>167</sup> state legislatures often share information and approaches and therefore influence one another as they change from one method of execution to the next. From the late 1800s to the present, states commonly followed one another in a pattern, changing execution methods in the same general direction and order, from hanging to electrocution to lethal gas and then lethal injection.<sup>168</sup> As my two surveys (in 2001 and 2005) of all lethal injection protocols in all death penalty states showed, lethal injection protocols were deficient and lacking in numerous ways, however, ranging from the types and amounts of lethal injection drugs given to inmates, to the paltry selection, training, and qualifications of the lethal injection teams and the lack of medical oversight.<sup>169</sup>

Indeed, century-long efforts by departments of corrections to seek the contributions of physicians, nurses, and other medical personnel in executions have demonstrated mixed results in terms of quality and accountability. While much of the involvement of medical personnel has been covert given the professional repercussions that could result, there is substantial evidence that physicians and other medical professionals have long participated in the development and application of methods of execution.<sup>170</sup> At the same time, the presence of doctors or medical personnel does not ensure a humane execution. For example, in the incident that spurred *Glossip* — Clayton Lockett's terribly botched 2014 execution in Oklahoma — both a doctor and an emer-

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<sup>165</sup> The two exceptions are *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion); and *Glossip v. Gross*, 135 S. Ct. 2726 (2015), in which the Court rejected challenges to state lethal injection protocols.

<sup>166</sup> 18 U.S.C. §§ 3591–3598 (2012).

<sup>167</sup> See Denno, *supra* note 163, at 409–11.

<sup>168</sup> *Id.* at 364–70, 373–75; Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 90–125 (2002).

<sup>169</sup> Denno, *supra* note 168, at 116–25 (discussing the survey conducted in 2001); see Denno, *supra* note 161, at 91–101 (discussing the survey conducted in 2005).

<sup>170</sup> See AM. COLL. OF PHYSICIANS ET AL., BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES 44 (1994) (“In the course of our research, we found that physicians are involved in all methods of executions, especially ones performed by lethal injection, in violation of professional ethical guidelines.”); see generally Ty Alper, *The Role of State Medical Boards in Regulating Physician Participation in Executions*, J. MED. LICENSURE & DISCIPLINE, Fall 2009, at 16, 18; Denno, *supra* note 163, at 412–38; Deborah W. Denno, *The Firing Squad as “A Known and Available Alternative Method of Execution”* Post-*Glossip*, 49 MICH. J.L. REFORM 749, 769–70 (2016).

gency medical technician attempted to infuse Lockett with drugs in a situation that suggested gross incompetence.<sup>171</sup>

Moreover, doctors' ethical obligations can unexpectedly interact with legal dictates in ways that preclude their participation in executions. This clash was evident in *Morales v. Hickman*.<sup>172</sup> In *Morales*, a federal judge ordered California either to provide Michael Morales with qualified medical personnel who could ensure he was unconscious during his execution, or to allow the Department of Corrections to give one drug rather than the typical protocol of three drugs.<sup>173</sup> While the state chose to have the medical personnel present, both doctors resigned hours before the scheduled execution because their court-ordered roles conflicted with their ethical responsibilities.<sup>174</sup> This incident led to California's 2006 stalemate on executions. Thus, while helpful in some cases, medical professionals generally would not necessarily provide the extralegal remedy that lethal injection needs to survive without warranted scrutiny.

(b) *Impact*. — By 2007, there were so many legal challenges to the constitutionality of the three-drug protocol — particularly targeting the pain inflicted when the barbiturate fails to render the inmate unconscious — that states had trouble carrying out executions. The Court ultimately tried to resolve this uncertainty in *Baze v. Rees*, where it rejected an Eighth Amendment challenge to Kentucky's three-drug lethal injection protocol.<sup>175</sup> As the *Baze* Court explained, the petitioners failed to show that Kentucky's protocol created a “substantial risk of serious harm” or “an ‘objectively intolerable risk of harm’”<sup>176</sup> to the inmate compared to “known and available alternative[]” methods of execution.<sup>177</sup>

Ironically, within a year of *Baze*, a national shortage of sodium thiopental — the crucial first drug in the three-drug protocol — began to affect every death penalty state's ability to carry out lethal injection.<sup>178</sup> States scrambled for a substitute either domestically or from abroad,

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<sup>171</sup> See Cary Aspinwall & Ziva Branstetter, *Records Reveal Lack of Protocol in Clayton Lockett's Oklahoma Execution*, TULSA WORLD (Mar. 16, 2015, 11:47 PM), [http://www.tulsaworld.com/homepagelatest/records-reveal-lack-of-protocol-in-clayton-lockett-s-oklahoma/article\\_e4f17853-160c-530a-9f36-928aofd9f605.html](http://www.tulsaworld.com/homepagelatest/records-reveal-lack-of-protocol-in-clayton-lockett-s-oklahoma/article_e4f17853-160c-530a-9f36-928aofd9f605.html) [https://perma.cc/2P8M-4ZR3] (documenting that both a paramedic and a doctor were attempting to locate a vein on Lockett and to start an IV for his lethal injection).

<sup>172</sup> 415 F. Supp. 2d 1037 (N.D. Cal. 2006).

<sup>173</sup> *Id.* at 1047; Denno, *supra* note 161, at 51–53.

<sup>174</sup> Denno, *supra* note 161, at 51–53. For a fuller discussion of *Morales* and its aftermath see *infra* note 199.

<sup>175</sup> 553 U.S. 35, 41 (2008) (plurality opinion).

<sup>176</sup> *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)); *id.* (quoting *Farmer*, 511 U.S. at 846).

<sup>177</sup> *Id.* at 61.

<sup>178</sup> Denno, *supra* note 170, at 765–69.

particularly in European countries. Yet, not only did European sources of lethal injection drugs run dry, but also the FDA ultimately prohibited the importation of lethal injection drugs from all countries.<sup>179</sup> States next began adopting a number of different substitutes for lethal injection drugs, creating a multitude of protocols.<sup>180</sup> Because all of these drugs were made for healing, arguments were made that their use in bringing about death was essentially experimental.<sup>181</sup>

In 2015, seven years after *Baze* had validated the original three-drug protocol, the issue of drug substitutes came to the Court in *Glossip v. Gross*. The *Glossip* Court upheld Oklahoma's use of a controversial drug (midazolam), concluding that it did not create "a substantial risk of severe pain" and that petitioners failed to "identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims."<sup>182</sup>

Both *Baze* and *Glossip* have hardly sapped the ongoing strength of lethal injection litigation. As my research has shown, because of the drug shortages, *Baze* was greatly weakened as precedent — in essence, the decision upholds a lethal injection protocol that relies on one drug that is no longer available. Conversely, *Glossip* upholds the use of a controversial lethal injection drug that many states still will not use despite the Supreme Court's stamp of approval. While lethal injection litigation has continued full force, it is clear that the medical profession and, increasingly, pharmaceutical companies are the prime extralegal institutions that help steer the litigation's direction.

The Steikers credit "[s]ome of the decline" in executions to challenges associated with lethal injection litigation, most particularly because of drug shortages and problematic injection protocols (pp. 212–13). Yet the Death Penalty Information Center's (DPIC)<sup>183</sup> year-end

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<sup>179</sup> *Id.*; see also *Cook v. FDA*, 733 F.3d 1, 12 (D.C. Cir. 2013) ("The FDA acted in derogation of [its] duties by permitting the importation of thiopental, a concededly misbranded and unapproved new drug, and by declaring that it would not in the future sample and examine foreign shipments of the drug despite knowing they may have been prepared in an unregistered establishment.").

<sup>180</sup> Denno, *supra* note 162, at 1380.

<sup>181</sup> For discussions of how the lethal injection drug shortage led to experimentation with executing inmates, see *Glossip v. Gross*, 135 S. Ct. 2726, 2789–91, 2796 (2015) (Sotomayor, J., dissenting); Brief for the Louis Stein Center for Law and Ethics at Fordham University School of Law as Amicus Curiae in Support of Petitioners at 12–25, *Glossip*, 135 S. Ct. 2726 (No. 14-7955); Ty Alper, *The United States Execution Drug Shortage: A Consequence of Our Values*, BROWN J. WORLD AFF., Fall 2014, at 27, 31, 36; and James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215, 1229–36, 1273–74 (2015). See also generally Seema K. Shah, *Experimental Execution*, 90 WASH. L. REV. 147 (2015); Paul Litton, *On the Argument that Execution Protocol Reform Is Biomedical Research*, 90 WASH. L. REV. ONLINE 87 (2015).

<sup>182</sup> *Glossip*, 135 S. Ct. at 2731 (citing *Baze*, 553 U.S. at 61 (plurality opinion)).

<sup>183</sup> The DPIC is a national nonprofit organization that provides the media and public with reports and information on a variety of death penalty topics.

report for 2016 makes a substantially stronger statement about lethal injection's role. It attributes the past year's execution decline not only to the growing "geographic isolation and outlier application" of the death penalty, but also "unquestionably" to the American pharmaceutical industry's efforts "to prevent states from obtaining their medicines for use in executions."<sup>184</sup> In addition, the report notes that European Union human rights regulations and actions by the FDA to prevent illegal importation of execution drugs also have contributed to the decline in executions.<sup>185</sup> The DPIC report provides no other explanations for the decline.

The impact of lethal injection litigation on the decrease in executions and on public opinion regarding the death penalty generally has been evident for over a decade and started before the problems with drug shortages. According to Richard Dieter, former executive director of the DPIC, lethal injection challenges have had a major influence on derailing and preventing executions. Writing in 2008, Dieter noted that such challenges "have already held up more executions, and for a longer time than appeals involving such broad issues as race, innocence, and mental competency."<sup>186</sup>

Dieter made this observation right after the Supreme Court granted certiorari in *Baze*, the Court's first constitutional review of a state's lethal injection protocol, but seven years before *Glossip*, the Court's second such case. While Dieter's commentary indicates that lethal injection litigation substantially hindered states' abilities to execute nearly a decade ago, that influence has become only more pronounced with each passing year, as the statistics for 2016 indicate. Lethal injection litigation potentially involves every capital defendant who is facing death, whereas other types of litigation pertain only to discrete groups of individuals — juveniles, those with intellectual disabilities, and so on. Thus, based on numbers alone, lethal injection litigation has a substantially wider reach.

Perhaps because of the expansiveness of their project and their focus on death eligibility, the Steikers do not discuss lethal injection litigation extensively. But the litigation — which exists largely outside the constitutional regulatory framework — has itself had a markedly destabilizing effect on the death penalty and will likely remain one of the most critical influences on its future.

(c) *State and Local Control.* — The administration of all execution methods, including lethal injection, has primarily been a matter of

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<sup>184</sup> DEATH PENALTY INFO. CTR., *supra* note 1, at 5.

<sup>185</sup> *Id.*

<sup>186</sup> Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 789, 789 (2008) (noting that legal challenges like that in *Baze* had "resulted in executions being placed on hold for nearly six months").

state and local, rather than national, regulation.<sup>187</sup> Accordingly, examining state regulation of execution methods, particularly lethal injection, might help to flesh out the Steikers' regulatory argument. Lethal injection challenges present an alternative to the Steikers' vision of a *Furman II* route to the abolition of the death penalty, one of the "multiple possible paths to the same destination" that they acknowledge (p. 271).

The Court's relative lack of oversight concerning execution procedures is striking because, as the Steikers note, the earliest and most frequent constitutional challenges involved execution methods (p. 26). While the Court did review late-nineteenth-century challenges concerning the firing squad and electrocution, these cases focused on issues other than whether such methods were cruel and unusual under federal constitutional law.<sup>188</sup> Indeed, it was not until 1962 that the Eighth Amendment was even applied to the states.<sup>189</sup> Thus, as I have argued elsewhere, the Court did not engage in a full constitutional assessment of any method of execution in this country until 2008, when it decided *Baze*, and then only because challenges to lethal injection protocols were impeding the execution process.<sup>190</sup>

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<sup>187</sup> David Garland's insightful account of the U.S. death penalty, including execution methods, emphasizes in particular state and local historical and contemporary influences. See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 32–38 (2010).

<sup>188</sup> See *In re Kemmler*, 136 U.S. 436, 443 (1890) (holding that the Eighth Amendment did not apply to the states and deferring to the assessment of the New York legislature that electrocution was not a cruel and unusual punishment); *Wilkerson v. Utah*, 99 U.S. 130, 137 (1878) (holding that the trial court was authorized to pass a death sentence that required the plaintiff to be publicly shot even though the method of execution was not specified by statute). In *Wilkerson*, the Court determined in dicta only that shooting does not violate the Eighth Amendment. See 99 U.S. at 134–35. Indeed, the petitioner never raised the cruelty of shooting but rather challenged the application of a Utah statute authorizing a death sentence for first-degree murder. See *id.* at 131, 136–37 ("Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual, within the meaning of the eighth amendment to the Constitution, which is not pretended by the counsel for the prisoner." *Id.* at 136–37.); see also Denno, *supra* note 170, at 761–62 (discussing *Wilkerson* in the context of *Glossip v. Gross*, 135 S. Ct. 2726 (2015)). Likewise, *In re Kemmler*, 136 U.S. 436 (1890), did not determine electrocution to be constitutional under the Eighth Amendment, even though courts have relied on *Kemmler* to dismiss challenges to the constitutionality of electrocution. See Denno, *supra* note 160, at 616–23 (providing an analysis of all cases from 1890 to 1993, totaling to 226, that cited *Kemmler* and showing that state and federal courts regularly refer to *Kemmler* to counter petitioners' arguments that electrocution (as well as the other four methods of execution) are unconstitutionally cruel and unusual methods of punishment).

<sup>189</sup> See *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

<sup>190</sup> Denno, *supra* note 162, at 1344–45. For discussions of how challenges to lethal injection protocols impeded the execution process, see Eric Berger, *Gross Error*, 91 WASH. L. REV. 929, 938–39 (2016); and Linda Greenhouse, *Justices to Enter the Debate over Lethal Injection*, N.Y. TIMES (Sept. 26, 2007), <http://nytimes.com/2007/09/26/washington/26lethal.html> [<https://perma.cc/19ZB8-AMED>].

There are a number of reasons, both historic and cultural, why execution methods have not been subject to concerted national regulation. First, legislatures and courts delegate nearly *all* responsibility for the organization and implementation of execution methods to prison officials, who often lack the expertise in this area to justify such a wide-ranging delegation of authority.<sup>191</sup> This “down-top” process is facilitated by vague and ill-defined lethal injection statutes as well as courts that err on the side of endorsing the death penalty and dismissing execution methods claims, particularly those targeting lethal injection.<sup>192</sup> As the Steikers emphasize, in order for regulations to work, they must filter through various governmental organizations and individuals spanning from legislatures to different levels of courts and then down to prison officials and personnel (pp. 117–18). This complex, trickle-down system, however, can be marked by confusing stop-and-go signs and influenced by varying cultural forces across different states. Yet execution methods remain in the basement tier, thereby providing prison officials with an inordinate degree of discretion in how they will implement an execution protocol.

Second, until *Baze*, the Court had never reviewed evidence concerning the constitutionality of any method of execution under the Eighth Amendment, a circumstance that left states to continue to act on their own. Prior to *Baze*, the Court had granted certiorari in two cases challenging the use of electrocution and lethal gas, but both were mooted when the states revised their statutes to adopt lethal injection as their execution method.<sup>193</sup> And in the first thirty years that states used lethal injection for executions, the Court declined to review a lethal injection case under the Eighth Amendment.<sup>194</sup> The Court resisted getting involved in execution methods, seemingly believing that delegating the responsibility to the states, and hence state departments of corrections, worked most effectively.<sup>195</sup>

State legislatures have also impeded the Court’s involvement and chances to regulate. Elsewhere I have documented every shift a death penalty state in this country has made in its choice of execution methods over a 125-year period. As a regular practice during this period,

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<sup>191</sup> See Denno, *supra* note 168, at 116–25; Denno, *supra* note 161, at 91–117.

<sup>192</sup> See Denno, *supra* note 168, at 92–95, 100–12; Denno, *supra* note 161, at 93–95, 101–17.

<sup>193</sup> See *Bryan v. Moore*, 528 U.S. 960 (1999) (granting certiorari to review a challenge to the use of electrocution), *cert. dismissed as improvidently granted*, 528 U.S. 1133 (2000) (dismissing certiorari following Florida’s legislative change); *Gomez v. Fierro*, 519 U.S. 918 (1996) (vacating and remanding the Ninth Circuit decision finding lethal gas unconstitutional in light of California’s legislative change).

<sup>194</sup> Denno, *supra* note 170, at 754–63.

<sup>195</sup> See, e.g., *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion) (warning against “embroil[ing] the courts in ongoing scientific controversies beyond their expertise [and] . . . intrud[ing] on the role of state legislatures in implementing their execution procedures”).

states would switch to new execution methods as soon as it looked as though their old methods could be considered unconstitutional, thereby rendering inviolate the constitutional integrity of the purportedly problematic method. For example, California, like all states, started with hanging. When hanging became controversial, the state then changed to lethal gas. But when the Court had granted certiorari to review the constitutionality of lethal gas in light of horrific accounts of the excruciatingly slow rates at which those subjected to it suffocated to death, California changed to a procedure allowing a choice between lethal gas and lethal injection, which the state has maintained to this day. The transition to include lethal injection mooted the potential constitutional problem since inmates then had the opportunity to select a method of execution other than lethal gas.<sup>196</sup> Similarly, Florida also started with hanging, and then changed to electrocution, before finally adopting lethal injection. These moves mooted the Court's grant of certiorari to review the constitutionality of electrocution in light of a long string of botched executions.<sup>197</sup>

States now engage in comparable types of switches with lethal injection protocols and drugs, aiming not only to perpetuate the death penalty, but also to evade the Court's review. For example, when sodium thiopental was no longer available starting in 2009, fourteen states switched to pentobarbital over the following two years. When the manufacturer of pentobarbital subsequently foreclosed the drug's sale to departments of corrections for purposes of execution, states started seeking lethal injection drugs wherever they could find them and modifying their lethal injection protocols accordingly. My study of over 300 lower court cases that cited *Baze* found that these modifications took place with disturbing speed, with states doing so both out of necessity (because drugs were not available) and also to evade detection (to keep the details of the process unavailable).<sup>198</sup> Until lethal injection litigation started to gain traction,<sup>199</sup> federal and state court

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<sup>196</sup> See generally Denno, *supra* note 168, app. 2; Denno, *supra* note 163, app. 1 tbls.3-7, app. 3; Denno, *supra* note 162, at 1339-43; *Methods of Execution*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/methods-execution> [<https://perma.cc/VE3Q-LE7T>].

<sup>197</sup> Denno, *supra* note 168, at 78-81, 137-38, 191; see also SARAT, *supra* note 160, at 2-3, 7, 23-25, 78, 81-82, 86-87, 171-72 (detailing botched electrocutions in Florida).

<sup>198</sup> See generally Denno, *supra* note 163, at 1346-66.

<sup>199</sup> Litigation concerning the constitutionality of lethal injection started as soon as lethal injection was adopted. See Denno, *supra* note 163, at 375-76. That said, the litigation did not start to gain substantial traction until the mid-2000s, when a federal district court in California became involved in the details of the procedure's application as well as the administration of California's three-drug protocol. See *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006). The *Morales* court was particularly concerned about expert testimony indicating that an inmate who received an insufficient amount of sodium thiopental might still be conscious and aware when executioners inject the pancuronium bromide and potassium chloride. *Id.* at 1044. As a result, the court determined that, in order to execute Michael Morales, California would either have to

judges often turned a blind eye to problems with execution methods, especially lethal injection, again deferring to prison officials' purported expertise regarding the execution process.<sup>200</sup>

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provide qualified medical personnel to ensure that Morales was unconscious during the procedure or change the Department of Corrections' protocol so that only sodium thiopental would be administered and not the two more controversial drugs. *Id.* at 1047. The State chose to involve medical experts (two anesthesiologists) rather than change the protocol. Yet when the experts were more fully informed of their duties and the extent of their involvement in the execution, they resigned hours before Morales was to be executed. For a discussion of *Morales* and its repercussions, see Denno, *supra* note 161, at 51–58. California has not conducted an execution since. *State by State Database (California)*, DEATH PENALTY INFO. CTR., [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) [<https://perma.cc/C7EV-2UG2>] (select “California” from the drop-down menu). The *Morales* case broke ground in a range of different ways that enhanced the litigation buildup to *Baze*: (1) the federal district court judge (Judge Fogel) became proactively involved in the process, thereby exposing to great effect the flaws and ignorance of the California Department of Corrections and the marked degree of its discretionary decision-making; (2) Judge Fogel also held an extensive evidentiary hearing about California's procedures, which brought transparency to an otherwise hidden and highly inadequate process; (3) *Morales* revealed the medical profession's role in executions, particularly lethal injection, in a way that demanded a public response from medical societies and practitioners; and (4) judges in other states, such as Chief Judge Gaitan of the U.S. District Court for the Western District of Missouri, stopped deferring as much to departments of corrections and instead became more involved in the lethal injection process. An overview of other developments at the time that contributed to this trajectory, in addition to personalized accounts by Judge Fogel and Chief Judge Gaitan, can be found in Symposium, *The Lethal Injection Debate: Law and Science*, 35 *FORDHAM URB. L.J.* 701 (2008).

<sup>200</sup> The first Eighth Amendment challenge to the constitutionality of lethal injection aptly illustrates the extent to which legislatures and courts deferred (and still defer) to departments of corrections personnel due to the vagueness of lethal injection statutes and the reluctance of judges to be more involved. In *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978) (en banc), the Texas Court of Criminal Appeals rejected the inmate's challenge by noting that cases including *In re Kemmler* had been cited to support the proposition that other methods of execution were constitutional and that lethal injection was consistent with evolving standards of decency. See *id.* at 509. The court underscored the fact that the Texas statute did not specify the drugs that were supposed to be used in a lethal injection. Such a gap was no less transparent than the statutes that set forth other execution methods. For example, no court had found an electrocution statute to be unconstitutionally vague. *Id.* at 511–13. Lastly, the court stressed that, even though the director of the Department of Corrections decided which lethal injection drugs and procedures were to be used for executions, such a role did not constitute an inappropriate delegation of the state's legislative power. *Id.* at 514. Rather, a legislative body “may delegate to the administrative tribunal or officer power to prescribe details.” *Id.*

The themes in *Granviel* would carry forward in lethal injection litigation during the ensuing decades, albeit in different iterations depending on the circumstances. See Denno, *supra* note 163, at 375–98. As I have detailed in two national studies of lethal injection protocols in 2001 and 2005, some states historically refused to reveal what drugs they were using or their amounts despite lethal injection challenges attempting to acquire such information. See Denno, *supra* note 161, at 91–116; Denno, *supra* note 162, at 1346–71; Denno, *supra* note 168, at 105–260. Secrecy has prevailed throughout the process and up to the present day: the bulk of lethal injection litigation concerns attorneys' efforts to discover what drugs departments of corrections are using, the amounts and sources of those drugs, the executioners' qualifications, and other basic details surrounding death penalty administration. In sum, apart from the occasional involvement from the judiciary, departments of corrections generally still control the lethal injection process in death penalty states. See *Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www>

In essence, then, there has been a collective, concerted effort over the decades to perpetuate the death penalty on the legislative, judicial, and prison-administrative levels. If it appeared as though a method of execution were going to come under constitutional attack, then a state would routinely switch to another method of execution (usually lethal injection). Similarly, if the last lethal injection drug started to cause problems, then prison officials would find a new one. Moreover, at all three levels of administration, states have commonly made similar kinds of decisions with regard to their lethal injection procedures in order to overcome national-level challenges to the death penalty. These similarities may come about when one state simply follows what another state is doing or when states share strategies or sources of pharmaceuticals. States that wish to continue lethal injections have an incentive to keep the process out of the federal purview as much as possible.

Prison officials also avoid federal regulation by keeping much of the lethal injection process secret. Such secrecy has existed even from the start, when Oklahoma adopted lethal injection, and it has continued in full force ever since. This secrecy makes it very difficult for attorneys to fairly represent their clients and for legislatures and courts to assess the constitutionality of the method at issue.<sup>201</sup>

For decades, most states made some decisions about lethal injection and other execution methods with a degree of uniformity that approximated de facto national regulation. For example, until 2009 nearly all states used the same three-drug lethal injection protocol that Oklahoma adopted in 1977 and that was under Eighth Amendment review in *Baze*, thereby bolstering the *Baze* plurality's holding that Kentucky's protocol was not "objectively intolerable."<sup>202</sup>

(d) *Conflating Lethal Injection Litigation with Abolition.* — Perhaps more than any other death penalty doctrine, lethal injection challenges are conflated by legislatures, courts, and the public with the goal of abolition more generally. There are several reasons for this association. Because lethal injection challenges can apply to all inmates, their impact can be more expansive. If a method of execution were found to be unconstitutional, states would not be able to execute anyone until they acquired another viable execution method. In contrast, efforts to exclude and protect a particular category or class of defend-

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.deathpenaltyinfo.org/lethal-injection [https://perma.cc/K76H-LBAM] (detailing past and current litigation by state).

<sup>201</sup> For discussions of states' efforts to keep the process secretive, see generally Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367 (2014); Denno, *supra* note 168, at 90–125; Denno, *supra* note 161, at 91–101, 117–23; and Denno, *supra* note 162, at 1376–81.

<sup>202</sup> *Baze v. Rees*, 553 U.S. 35, 62 (2008).

ants, such as juveniles, would only be relevant to a limited number of individuals who fit that age range. For example, after juveniles became excluded from death eligibility following *Roper*, the total national number of inmates was only moderately affected.<sup>203</sup>

The abolition focus also plays out at the Court. As mentioned, the Court was late to review the constitutionality of an execution method. *Baze* was the Court's first case, followed by *Glossip*. Yet both cases include in-depth statements by Justices expressing their disagreement with the death penalty — Justice Stevens's concurrence in *Baze*<sup>204</sup> and Justice Breyer's dissent in *Glossip*.<sup>205</sup>

Even though Justice Stevens felt bound by precedent to continue to support the death penalty and therefore upheld the death sentence in *Baze* (p. 266), he used his concurrence as a platform to make what was then a startling pronouncement. Long a death penalty advocate, Justice Stevens concluded on the basis of his decades of experience on the Court that *Furman* was right and that the death penalty violates the Eighth Amendment (p. 266).<sup>206</sup> In turn, Justice Scalia attempted to contradict Justice Stevens's arguments point by point, making much of *Baze* a focus on the death penalty itself.<sup>207</sup>

In *Glossip*, Justice Breyer's dissent was a comprehensive and sophisticated overview of the major arguments against the death penalty. Justice Breyer also signed onto Justice Sotomayor's dissent, which was highly critical of the way lethal injection is practiced in Oklahoma.<sup>208</sup> Yet, in contrast to *Baze*, much of *Glossip* concerned a debate about the death penalty and its link to lethal injection litigation. Writing for the majority, Justice Alito stressed, for example, that “anti-death-penalty advocates” were responsible for the drug shortages because they intentionally pressured pharmaceutical companies to withhold their drugs.<sup>209</sup> Justice Alito went into significant detail, but the takeaway is that in the only two cases in which the Court constitutionally evaluated a method of execution (that being lethal injection), both cases included substantial discussion and debate about abolition.<sup>210</sup>

How do these cases further explain why execution methods are not nationally regulated? To the extent that lethal injection challenges appear to be a gateway to abolition, they may be viewed as needing less regulation and representing more of a political stance. Courts may al-

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<sup>203</sup> See STREIB, *supra* note 132, at 3.

<sup>204</sup> *Baze*, 553 U.S. at 71–87 (Stevens, J., concurring in the judgment).

<sup>205</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., dissenting).

<sup>206</sup> *Baze*, 553 U.S. at 71–87 (Stevens, J., concurring in the judgment).

<sup>207</sup> *Id.* at 87–93 (Scalia, J., concurring in the judgment).

<sup>208</sup> *Glossip*, 135 S. Ct. at 2780–97 (Sotomayor, J., dissenting).

<sup>209</sup> *Id.* at 2733 (majority opinion).

<sup>210</sup> *Id.* at 2733, 2737–39.

so believe that acceptance of a challenge to lethal injection poses far too great a risk of leading to the abolition of the death penalty. While there may be some merit to this argument due to lethal injection's litigation success, such an approach disregards the evidence suggesting that lethal injection is one of the most troublesome of all execution methods and in need of repair.

Regardless, neither *Baze* nor *Glossip* has provided much, if any, regulatory framework. The three-drug protocol upon which *Baze* was based is no longer available, rendering the decision relatively ineffectual. Likewise, *Glossip*'s reach has been limited because states generally do not want to take the risk of relying on a drug as problematic as midazolam, especially when other drugs or execution methods are available.

Looking to the Court's treatment (or lack thereof) of execution-method challenges generally, and lethal injection challenges specifically, the Steikers might have argued that some of the most important aspects of the death penalty process simply evade review or resist national regulation. Consequently, the Court's project seems increasingly doomed to fail. Alternatively, perhaps execution methods are an extreme example of the Court's shirking — simply failing to regulate where it really should — and the solution isn't abolition necessarily, but instead taking seriously the Cruel and Unusual Punishments Clause vis-à-vis execution methods. And if that regulation cannot be accomplished, then the Eighth Amendment requires abolition. Either way, the Steikers' model would benefit from exploring and articulating how the constitutionality of execution methods fits their focus on national constitutional regulation.

(e) *Destabilization*. — In 2009, states' uniformity in lethal injection protocols ended when the United States experienced a nationwide shortage of sodium thiopental, the first of the three drugs used in the standard protocol.<sup>211</sup> This shortage was not the result of lethal injection litigation, but rather of the inability of the drug's sole manufacturer, Hospira, to acquire the component chemicals.<sup>212</sup> But the incident triggered a series of destabilizing events that contributed to the boom in lethal injection challenges.

Lethal injection states throughout the country adopted a scatter-shot approach to acquiring lethal injection drugs and increasingly experimented with new and untried drugs.<sup>213</sup> While the FDA may become even more involved in remedying the drug-shortage issue in the future, at the present time there are a range of typically short-lived

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<sup>211</sup> Denno, *supra* note 162, at 1360.

<sup>212</sup> *Id.* at 1360–61.

<sup>213</sup> *Id.* at 1362–68.

drug protocols available. There are growing teams of sophisticated litigators who question the continual array of drugs and drug protocols that are recommended. It is this kind of destabilization that has perpetuated lethal injection challenges throughout the country and forced a fair number of states to cease using any drugs at all for the foreseeable future because they are unable to acquire them.<sup>214</sup> This drug fiasco has raised doubts about the humaneness and effectiveness of lethal injection, thus fostering a legal, cultural, and scientific story that will continue to have a devastating effect on the lethal injection process and, perhaps, on the death penalty as a whole.

### C. *An Uncertain Future*

The death penalty can be vulnerable to unanticipated influences. Indeed, observers of the death penalty are continuously reminded that, while there are trends going in the direction of abolition, the system is elastic. Currently, two New Jersey state senators are trying to bring back the state's death penalty (it was voted out in 2007), and Nebraska voted the penalty out only to bring it back a year later.<sup>215</sup> If abolition is to take place at some point, it will be a variable, nonlinear process with marked irregularities and inconsistencies.

Does a Donald Trump presidency, for example, threaten the Steikers' prediction that the Supreme Court will strike down the death penalty within the next decade or two?<sup>216</sup> After all, President Trump

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<sup>214</sup> See Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES (Nov. 8, 2013), <http://www.nytimes.com/2013/11/09/us/executions-stall-as-states-seek-different-drugs.html> [https://perma.cc/T857-A7VL]; see also *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> [https://perma.cc/8N88-J643] (providing the latest update on which states are not able to access lethal injection drugs).

<sup>215</sup> See Michael Boren, *Reviving the Death Penalty in N.J.: The Case For and Against*, PHILLY.COM (Nov. 25, 2016, 11:59 PM), [http://www.philly.com/philly/news/new\\_jersey/20161125\\_Reviving\\_the\\_death\\_penalty\\_in\\_N\\_J\\_The\\_case\\_for\\_and\\_against.html](http://www.philly.com/philly/news/new_jersey/20161125_Reviving_the_death_penalty_in_N_J_The_case_for_and_against.html) [https://perma.cc/7UK9-RF6G]; Aliyah Frumin, *Election 2016: Nebraska, Oklahoma Vote in Favor of Death Penalty*, NBC NEWS (Nov. 9, 2016, 12:45 PM), <http://www.nbcnews.com/storyline/2016-election-day/election-2016-nebraska-oklahoma-vote-favor-death-penalty-n681301> [https://perma.cc/985V-SYS8].

<sup>216</sup> See Chris McDaniel & Chris Geidner, *How Donald Trump Could Revitalize the Death Penalty*, BUZZFEED NEWS (Nov. 10, 2016, 11:49 AM), <https://www.buzzfeed.com/chrismdaniel/how-donald-trump-could-revitalize-the-death-penalty> [https://perma.cc/564R-SDTR] (noting then-President-elect Donald Trump's "steadfast" endorsement of the death penalty and the potential for him to revitalize it in three ways through: (1) the selection of a pro-death penalty Supreme Court nominee; (2) greater support of the federal death penalty; and (3) more flexibility about states' acquisition of lethal injection drugs); Austin Sarat, *Opinion, A Comeback for the Death Penalty?*, CNN (Nov. 14, 2016, 9:39 AM), <http://www.cnn.com/2016/11/14/opinions/comeback-for-death-penalty-opinion-sarat> [https://perma.cc/2XMY-R4BP] ("Trump's election is likely to put on hold any prospect that the Supreme Court will take up Justice Stephen Breyer's recent invitation to his fellow justices to reconsider the constitutionality of capital punishment.")

has expressed strong support for the death penalty when his views were evoked regarding the killing of police officers.<sup>217</sup>

A crystal ball is always murky when a viewer tries to see the future of the death penalty, particularly when predictions rest so heavily on the makeup and decisionmaking power of the Supreme Court. As the Steikers point out, when examining the death penalty over the decades, “[a]gain and again, the Supreme Court’s constitutional interventions took unexpected turns and produced results that were not anticipated by the Court or by knowledgeable observers, [the Steikers] included” (p. 5).<sup>218</sup> That said, the Steikers build in contingencies for

Justice Gorsuch, President Trump’s first appointee to the Supreme Court, has been primarily characterized as pro–death penalty. While those who know him praise his independence and open-mindedness, he has also long embraced “conservative values” and leanings. See Kimberly Kindy, Sari Horwitz & William Wan, *Simply Stated, Gorsuch Is Steadfast and Surprising*, WASH. POST (Feb. 18, 2017), <https://www.washingtonpost.com/graphics/politics/gorsuch-profile> [<https://perma.cc/7RN5-W99T>]. In addition, a wide range of commentators view him as pro-death penalty. See, e.g., Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch> [<https://perma.cc/3WXM-LKEW>] (“Gorsuch, like Scalia, has not been a friendly vote for death penalty petitioners pursuing relief from their sentences through federal habeas . . . . Whatever the source of the position, however, it is clear that Gorsuch’s position in death penalty cases is likely to be quite close to Scalia’s, and very unlikely to make the court any more solicitous of the claims of capital defendants.”); Andrew Cohen, *Neil Gorsuch: Scalia Without the Scowl*, MARSHALL PROJECT (Jan. 31, 2017, 8:02 PM), <https://www.themarshallproject.org/2017/01/31/neil-gorsuch-scalia-without-the-scowl> [<https://perma.cc/6TBZ-RQ6G>] (“Like Scalia, Gorsuch strongly supports the death penalty and has consistently voted against death row inmates seeking relief at the 10th Circuit. What is less clear is what Gorsuch thinks of the cutting-edge issues in capital law — issues like lethal injection secrecy, judicial overrides, and the execution of intellectually disabled prisoners.”); *Who Is Judge Neil Gorsuch?*, FOX NEWS (Jan. 31, 2017) <http://www.foxnews.com/politics/2017/01/31/who-is-judge-neil-gorsuch.html> [<https://perma.cc/PLA2-TA9L>] (“An academic study from November comparing top court prospects to Scalia — based on judicial philosophy and other factors — put Gorsuch second among Trump’s ‘List of 21’ for his ‘Scalia-ness.’ His views on criminal law (including the death penalty), interstate commerce, and religious liberty match much of Scalia’s jurisprudence.”); *Why Democrats Are Challenging Neil Gorsuch’s Nomination*, THE ECONOMIST (Feb. 8, 2017), <http://www.economist.com/blogs/economist-explains/2017/02/economist-explains-6> [<https://perma.cc/2QMD-AM6D>] (“Mr. Gorsuch also supports the constitutionality of capital punishment . . .”).

<sup>217</sup> Jeremy Diamond, *Trump: Death Penalty for Cop Killers*, CNN (Dec. 11, 2015, 9:25 AM), <http://www.cnn.com/2015/12/10/politics/donald-trump-police-officers-death-penalty> [<https://perma.cc/2DXQ-HXX5>] (assuring members of the New England Police Benevolent Association that, as President, he would provide a “strong, strong statement” that he would support the death penalty for “anybody killing a police officer”).

<sup>218</sup> In a very recent example, voters in three states (California, Nebraska, and Oklahoma) reaffirmed support for the death penalty in the November 2016 election. See Emily Lane, *How Will a Trump White House Impact the Death Penalty in Louisiana?*, TIMES-PICAYUNE (Nov. 15, 2016, 11:04 AM), [http://www.nola.com/crime/index.ssf/2016/11/how\\_will\\_a\\_trump\\_white\\_house\\_i.html](http://www.nola.com/crime/index.ssf/2016/11/how_will_a_trump_white_house_i.html) [<https://perma.cc/F27G-4LED>]. Nebraska voters reinstated the death penalty, reversing its legislature’s 2015 decision to repeal it. As mentioned above, California voters approved a proposal to quicken appeals to speed the execution process and rejected a proposal to repeal the state’s death penalty altogether. In turn, Oklahoma approved a measure that further protected the death penalty by providing contingency methods of execution in anticipation of the Supreme Court declaring other methods unconstitutional. See DEATH PENALTY INFO. CTR., *supra* note 1, at 8–9.

such challenging scenarios, including a section in their book on five Justices who have switched from their pro-death penalty stances (pp. 258–71). In addition, there are other forces that the Steikers include in their abolition net that suggest they are not entirely relying on the Court's composition in their optimistic argument about abolition. This Book Review has sought to add perspective on that abolition argument from a multidisciplinary framework, focusing on extralegal pressures and variables.

### CONCLUSION

Writing a book on the death penalty is difficult on many levels, not the least of which is that it involves the need to recognize continual cultural and political shifts that could impact how a nation punishes its citizens. Shortly after *Courting Death* was released, the United States voted in a new pro-death penalty President, Nebraska's citizens reinstated their death penalty, and California's citizens chose to speed up executions rather than eliminate the state's death penalty entirely.<sup>219</sup>

None of these developments should change a reader's interpretations of the Steikers' book. The death penalty remains the most fragile it has been since 1976, and our current society seems comfortable with that status. The Steikers' prediction — that, when abolition seems right, it will come by way of a Supreme Court decision (pp. 258, 321) — readily comports with the death penalty's trajectory over the last fifty years under a range of different administrations and Supreme Court Justices. In addition, the Steikers offer an abolition "blueprint" (p. 271) that is thoughtful and sound. Whether there will be a "*Furman II*" (p. 258) remains to be seen, but the Steikers' book will surely be at the forefront of the debate about that possibility.

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However, as commentators have argued, particularly regarding California, these outcomes may be more a result of the divided views on the death penalty throughout the country and less a result of broader political trends. See Jazmine Ulloa, *Analysts Caution Against Blaming So-Called 'Trump Effect' for Death Penalty Repeal's Defeat*, L.A. TIMES (NOV. 14, 2016, 1:45 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-analysts-caution-against-blaming-the-1479149162-htmlstory.html> [<https://perma.cc/P5PX-TC8J>].

<sup>219</sup> DEATH PENALTY INFO. CTR., *supra* note 1, at 8–9.