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## DEATH PENALTY COMMENTARY SERIES

### CAPITAL PUNISHMENT AND THE COURTS

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Whether and to what extent governments should use capital punishment turn on hotly contested empirical and philosophical questions, and tradeoffs between competing and sometimes incommensurable policy objectives.

Consider first the disputed empirical questions: Does capital punishment save innocent lives by deterring murder? There are some studies suggesting that it does,<sup>1</sup> others suggesting that it does not.<sup>2</sup> If capital punishment deters murder, how large is that effect?<sup>3</sup> To what extent are criminals rational actors who will be deterred by the prospect of capital punishment? Might capital punishment *increase* the murder rate by inuring people to brutality and violence?<sup>4</sup> Is death by lethal injection painless, or does it inflict incalculable suffering?<sup>5</sup> How many innocent people have been executed, and what is the risk that an innocent person might be wrongfully convicted and executed in the future?

Then there are the philosophical questions: Is retribution an appropriate purpose of criminal punishment?<sup>6</sup> Should the morality of capi-

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<sup>1</sup> See, e.g., Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453 (2003); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163 (2004).

<sup>2</sup> See, e.g., Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003); see also John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (“[T]he existing evidence for deterrence is surprisingly fragile . . .”).

<sup>3</sup> Compare Dezhbakhsh et al., *supra* note 1, at 344 (“[E]ach execution results, on average, in eighteen fewer murders . . .”), with Zimmerman, *supra* note 1, at 166 (“[I]t is estimated that each state execution deters approximately fourteen murders per year on average.”), and Mocan & Gittings, *supra* note 1, at 453 (“The results show that each additional execution decreases homicides by about five . . .”).

<sup>4</sup> Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. 203, 206 (2005) (“[E]ach execution has two opposing effects. First, the execution creates a brutalization effect: it contributes to creating a climate of brutal violence. The execution sets an example of killing to avenge grievances, an example that some private individuals then follow. Second, the execution creates some deterrence: potential criminals recognize that the state is willing to wield the ultimate penalty.”).

<sup>5</sup> See *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015); *Baze v. Rees*, 553 U.S. 35, 41 (2008).

<sup>6</sup> See, e.g., IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 105–07 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) (arguing that it is).

tal punishment be judged according to consequentialist or deontological considerations, or some combination of the two? To what extent does a murderer choose to kill of his own free will, and to what extent are his actions determined by circumstances beyond his control?<sup>7</sup> When, if ever, is it morally acceptable for the government to purposefully kill human beings in the hopes of saving an even greater number of human lives?<sup>8</sup>

Finally, one must decide how to trade off competing policy objectives. Detering crime is a worthy goal, but if taken too far it can come at the expense of other priorities, such as preventing brutality and barbarism. Many people would oppose the public hangings and beheadings used in Iran and Saudi Arabia — even if there were evidence proving that those methods of execution do more to deter murder than lethal injection — because they regard these practices as excessively vicious, and they are willing to accept a higher crime rate in exchange for keeping these methods of execution out of the United States. For others, the tipping point might occur at a different spot. Some people, for example, regard *any* form of capital punishment as unacceptably brutal and oppose it regardless of what it might bring in the way of deterrence. The precise point at which concern for the humane treatment of criminals should supersede efforts to deter crime is far from clear — and an individual's choice along this spectrum will often rest on intuitions and social norms that may very well be shaped by the government's current practices.

There are other tradeoffs that go into deciding whether (and to what extent) capital punishment should be used. The cost to the State of litigating capital cases far exceeds the cost of life imprisonment,<sup>9</sup> so at some point the marginal deterrence and retribution produced by an additional execution will not justify the diversion of resources from noncapital prosecutions or other crime-prevention measures. And capital punishment will always present the risk (however small) that an innocent person might get executed, a risk that increases as capital punishment is used with more frequency.

There are no obviously right answers to the empirical and philosophical questions that undergird the capital-punishment debate. And

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<sup>7</sup> See, e.g., Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 766–67 (2005) (“Though capital defendants have usually committed (or participated in) heinous murders, they very frequently are extremely intellectually limited, are suffering from some form of mental illness, are in the powerful grip of a drug or alcohol addiction, are survivors of childhood abuse, or are the victims of some sort of societal deprivation (be it poverty, racism, poor education, inadequate health care, or some noxious combination of the above). In such circumstances, it is difficult to say that these defendants deserve all of the blame for their terrible acts . . .” (footnote omitted)).

<sup>8</sup> See, e.g., Judith Jarvis Thomson, Comment, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

<sup>9</sup> See CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH* 204–06 (2016).

there are no obviously right answers to the tradeoffs that must be made when deciding how much capital punishment should be used. Abolition is certainly a respectable stance to take: Given that the evidence of deterrence is hotly disputed, one might reasonably conclude that capital punishment offers only speculative benefits that do not justify the purposeful killing of another human being. But this conclusion is hardly inevitable. A retributivist might believe that acts of deliberate murder warrant capital punishment regardless of whether it will deter future crimes — and that retribution of this sort is a good in itself that justifies or outweighs the costs of capital punishment.

Yet policy must be made in the face of these empirical uncertainties and intense philosophical disagreements. And for most of the nation's history, the disputes and tradeoffs surrounding capital punishment were left to be resolved almost entirely by the political branches.<sup>10</sup> But for the last forty-five years, the Supreme Court has tried to regulate and restrict the use of capital punishment through a series of court-created doctrines that it purports to derive from the Constitution.

In *Courting Death*, Professors Carol Steiker and Jordan Steiker present a thoughtful and trenchant critique of the Supreme Court's efforts in this regard. They note that what began as an effort to cabin juror discretion and reduce arbitrariness in capital sentencing<sup>11</sup> has devolved into a regime that compels the states to give jurors unfettered discretion to withhold a death sentence.<sup>12</sup> These supposed constitutional commands to avoid both arbitrary decisionmaking, on the one hand, and anything that might limit a jury's consideration and use of potentially mitigating evidence, on the other hand, are not easily reconciled.<sup>13</sup> And the Steikers present data and anecdotes to show that capital punishment today is no less "arbitrary" than it was before the Supreme Court's intervention<sup>14</sup> — leaving us with a regime that imposes costly, arcane, and highly technical rules on capital-

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<sup>10</sup> See *id.* at 6–37.

<sup>11</sup> See *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring); see also STEIKER & STEIKER, *supra* note 9, at 49–50.

<sup>12</sup> See *Brewer v. Quarterman*, 550 U.S. 286, 296 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007); see also STEIKER & STEIKER, *supra* note 9, at 167.

<sup>13</sup> See STEIKER & STEIKER, *supra* note 9, at 180. One of the more colorful ways of describing this paradox appears in a pre-*Furman* brief filed by the NAACP Legal Defense Fund, which the Steikers quote in their book: "'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language." *Id.* (quoting Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the NAACP Legal Defense & Educational Fund, Inc., and the National Office for the Rights of the Indigent at 69, *McGautha v. California*, 402 U.S. 183 (1971) (No. 70-203)).

<sup>14</sup> See *id.* at 158 ("[T]hese doctrines have neither improved capital practices nor solved the problems of arbitrariness, discrimination, and error.").

punishment jurisdictions without any payoff in reducing arbitrary decisionmaking.<sup>15</sup>

The Steikers also observe that many of these court-created doctrines suffer from vagueness and indeterminacy.<sup>16</sup> The standard for assessing ineffective assistance of counsel is especially open ended,<sup>17</sup> and the courts (unsurprisingly) have applied this standard with varying degrees of rigor.<sup>18</sup> And it is especially hard to determine whether a capital defendant was prejudiced by alleged attorney errors at the sentencing phase. The Supreme Court instructs courts to evaluate “whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.”<sup>19</sup> But a court can only guess at how a now-disbanded jury might have applied a balancing test of this sort in a counterfactual scenario. The upshot is a regime that gives courts lots of discretion in deciding whether to vacate or affirm death sentences — which further aggravates the arbitrary features of capital punishment.

The Steikers even suggest that the Supreme Court’s efforts to restrict the death penalty have had the paradoxical effect of strengthening and entrenching the institution of capital punishment. The Supreme Court’s ruling in *Furman v. Georgia*<sup>20</sup> prompted states to enact new capital-punishment statutes at a time when public support for the death penalty was waning,<sup>21</sup> and the lengthy rounds of postconviction review that the Court has enabled induced Congress to enact the Antiterrorism and Effective Death Penalty Act of 1996.<sup>22</sup> The Steikers also argue that the Court’s regulatory efforts promote complacency among prosecutors, jurors, and elected officials — who become less vigilant in their efforts to prevent wrongful or unjust death sentences because they trust the courts to catch their mistakes.<sup>23</sup>

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<sup>15</sup> See *id.* at 155 (“The body of doctrine produced by the Court is enormously complex and its applicability to specific cases is difficult to discern. Yet, it remains unresponsive to the central concerns that inspired the Court to embark on its regulatory regime.”).

<sup>16</sup> See *id.* at 124–26.

<sup>17</sup> See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (“[T]he proper standard for attorney performance is that of reasonably effective assistance.”).

<sup>18</sup> See STEIKER & STEIKER, *supra* note 9, at 125–26.

<sup>19</sup> *Strickland*, 466 U.S. at 695.

<sup>20</sup> 408 U.S. 238 (1972).

<sup>21</sup> See STEIKER & STEIKER, *supra* note 9, at 188–92.

<sup>22</sup> Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code); see also STEIKER & STEIKER, *supra* note 9, at 138–39.

<sup>23</sup> STEIKER & STEIKER, *supra* note 9, at 155–56. The Steikers’ argument is a variation on the “judicial overhang” thesis invoked by critics of judicial review: the idea is that vigorous judicial review of legislation induces legislators to become less concerned with whether the laws that they enact comport with the Constitution, because they expect the courts to catch whatever unconstitutional legislation they might enact. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–65 (1999); Adrian Vermeule, *The Supreme*

The extent to which the Court's actions have had this "legitimizing"<sup>24</sup> effect on capital punishment is an empirical question that is difficult to prove or falsify, but it is certainly a plausible hypothesis, and it serves as a useful reminder that judicial policymaking may have unintended and counterintuitive consequences.

Yet the pathologies with these court-created doctrines go even beyond what the Steikers have identified. Let us first consider what the Steikers describe as the Court's "proportionality" doctrine, which categorically forecloses the use of capital punishment for certain classes of offenders (such as rapists, juveniles, and people with mental disabilities). In these cases, the Court purports to determine whether a "national consensus" opposes the use of capital punishment in these situations. And if the Court finds that enough states either prohibit the death penalty or rarely apply it to the relevant subset of offenders, it will declare *any* use of the death penalty in these situations to be contrary to society's "evolving standards of decency"<sup>25</sup> — and therefore unconstitutional.

There are many problems with this doctrine. The first is that it rests on a non sequitur: That capital punishment is rarely applied to juveniles or people with mental disabilities does not indicate that a national consensus exists against *any* use of capital punishment in those situations. The most that one can infer from a jurisdiction that authorizes but rarely carries out death sentences against juveniles and people with mental disabilities is a belief that capital punishment should be used sparingly against these offenders — not that it should never be used at all. Every jurisdiction treats youth and mental disability as mitigating factors when deciding whether to impose the death penalty, and these mitigating factors will often but not always outweigh the aggravating circumstances of a murder. That does not signify that *any* use of the death penalty against juveniles or people with mental disabilities violates contemporary "standards of decency." At most, it shows that capital punishment should be reserved for exceptionally aggravated offenses committed by these individuals.<sup>26</sup>

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*Court, 2008 Term — Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 51 (2009).

<sup>24</sup> STEIKER & STEIKER, *supra* note 9, at 188.

<sup>25</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>26</sup> Execution rates can also drop for reasons that have nothing to do with public support for the death penalty. Professor Deborah Denno's book review, for example, provides an illuminating discussion of lethal-injection litigation and the difficulties that states have confronted in their efforts to obtain lethal-injection drugs. See Deborah W. Denno, *Courting Abolition*, 130 HARV. L. REV. 1827, 1864–66 (2017) (reviewing STEIKER & STEIKER, *COURTING DEATH*, *supra* note 9). All of this has prevented states from carrying out executions that they *want* to occur, so any decline in the execution rate caused by these forces should not be treated as a reflection of society's "evolving standards of decency."

It is also wrong to infer “evolving standards of decency” from a state’s decision to establish minimum age or IQ thresholds for the death penalty. Governments often choose to legislate by rule for reasons that have nothing to do with standards of decency. A state might establish a minimum age or IQ simply to economize on decision costs, or to eliminate the risk of false positives, or to preserve taxpayer money given the expense of litigating capital cases. One can favor a rule of this sort even if one believes that it will spare some murderers who richly deserve the death penalty. No one thinks that a state that establishes a minimum age for driving or voting is declaring or suggesting that *every* person under the specified age is incapable of driving safely or voting responsibly. There is likewise no basis for assuming that a minimum age for the death penalty embodies a belief that *any* execution of *any* murderer under the specified age is disproportionate or contrary to contemporary standards of decency.

Finally, the Court’s “proportionality” doctrine creates perverse incentives for prosecutors and elected officials, because it threatens to eliminate capital punishment across the board — or at least as applied to specified categories of offenders — unless the government produces enough executions to defeat a claim that a death sentence is no longer consistent with “evolving standards of decency.” This creates incentives for policymakers to pursue a suboptimally high number of executions. Former Attorney General John Ashcroft was criticized for pursuing death sentences in federal prosecutions against the recommendation of U.S. Attorneys.<sup>27</sup> Yet behavior of this sort should be expected when the Supreme Court invokes rarity or reductions in executions to justify rulings that permanently inter the use of the death penalty against specified categories of offenders. Death-penalty jurisdictions must produce a “critical mass” of executions in order to preserve their ability to have any. But it is hard to understand why constitutional doctrine should foreclose a regime in which capital punishment is available but rarely applied.

Perhaps the most troubling aspect of the Supreme Court’s regulation of capital punishment has been its failure to persuasively explain why the Court’s judgments surrounding the use of capital punishment should prevail over the decisions made by the political branches. Judgments surrounding the proper scope of the death penalty rest on empirical and philosophical disputes on which reasonable people disagree — so it is not apparent why the Supreme Court (of all institutions) should have the final word on any of these matters. None of the

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<sup>27</sup> See Richard B. Schmitt, *Ashcroft Is Undeterred in Push for Capital Cases*, L.A. TIMES (Sept. 29, 2004), <http://articles.latimes.com/2004/sep/29/nation/na-death29> [https://perma.cc/E93Z-WTP8].

Court's opinions conclusively refute the empirical or philosophical beliefs of those who support the widespread application of capital punishment, and until the Court can do so it will remain vulnerable to the charge that it is simply imposing its beliefs on the rest of us. The Steikers are right to critique the Court's efforts to regulate capital punishment, but the problems go beyond what they identify in their thorough and comprehensive book.