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# THE PUZZLING PERSISTENCE OF CAPITAL PUNISHMENT

CRAIG S. LERNER\*

*Perhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life.*

—Benjamin N. Cardozo, *Law and Literature* 93–94 (1931).

*The instinct for retribution is part of the nature of man.*

—Potter Stewart, *Furman v. Georgia* (1972).

## ABSTRACT

*For over 250 years, Western intellectuals have been pronouncing capital punishment a barbarity doomed to be swept into the dustbin of history. The death penalty, we have repeatedly been told, is an “anachronism” inconsistent with the spirit of the modern age—a relic that would, in a generation or two, fade away. What is distinctive about recent decades is the confidence and monolithic quality of elite opinion, at least in the West. There is a swelling confidence that the death penalty is, at last, at the cusp of extinction.*

*This Article questions the descriptive claim that the death penalty is dying, either in the United States or in the world at large. Simply counting the number of nations that have technically abolished the death penalty fails to capture the apparent permanence of capital punishment. Many non-Western civilizations retain the death penalty with a vigor that surprises and disappoints Western intellectuals. And even within the United States, given the prohibitive cost of imposing a death sentence, it is remarkable how determined so many Americans are to continue to execute the worst of criminals.*

*As argued in this Article, the simplest answer to the puzzle of capital punishment’s persistence is that the retributive impulse is, as Justice Potter Stewart observed, “part of the nature of man.” The answer is so obvious that what is puzzling is not the persistence of the death penalty but that some people regard this persistence as puzzling. The dismay of modern Western intellectuals at the*

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*recurring failure of abolitionist efforts points to defining features of that intelligentsia. Since the Enlightenment, many intellectuals have regarded nature as a weak and even nonexistent constraint on human progress. It is from this perspective that the persistence of capital punishment, so seemingly rooted in human nature, comes to sight as such a puzzling disappointment.*

#### INTRODUCTION

Law professors often puzzle over the persistence of a legal doctrine—it is a conceit that has launched, if not thousands, at least dozens of articles. Perhaps the simplest resolution of many puzzles is that lawyers are, by nature and training, inclined to conserve the past.<sup>1</sup> Thus, the persistence of the “best interests of the child” standard in custody disputes, notwithstanding its lamented indeterminacy,<sup>2</sup> the persistence of pleading practice, in an era characterized by notice pleading,<sup>3</sup> the persistence of unenforceable contract terms, even by sophisticated actors,<sup>4</sup> and many more persistent puzzles that had gone unnoticed until a law student or professor saw fit to identify, meditate upon, and then resolve them.<sup>5</sup> This Article enters upon the same path, but it will not only ruminate upon a puzzle, it will then flout the genre’s conventions by engaging in a meta-analysis of the puzzle: *why* and *to whom* is the persistence of the death penalty puzzling?

For over 250 years, Western intellectuals have been pronouncing capital punishment a barbarity doomed to be swept into the dustbin of history. Cesare Beccaria was the first to make the case for the abolition of the death penalty, and the cause was quickly taken up by such luminaries as Voltaire, Jeremy Bentham, and Victor Hugo. Success was achieved in far-flung locations—Portugal banned the death penalty in 1867 and within the United States, the State of Michigan did so in 1846—but these were outliers. Through at least the first half of the nineteenth century, capital punishment was almost universally a feature of criminal justice systems. Notwithstanding this obstinate reality, Western intellectuals persisted in criticizing capital punishment as a relic of a

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1. On the instinctive conservatism of lawyers, especially those trained in common law countries, see ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252 (Harvey C. Mansfield & Delba Winthrop trans., 2000) (1835) (“Men who have made the laws their special study have drawn from their work the habits of order, a certain taste for forms, a sort of instinctive love for the regular sequence of ideas, which naturally render them strongly opposed to the revolutionary spirit and unreflective passions of democracy.”).

2. Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 L. & CONTEMP. PROBS. 69 (2014).

3. Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998).

4. Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009).

5. For other examples, see Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in *FEDERALISM AND SUBSIDIARITY: NOMOS LV* 34 (James E. Fleming & Jacob T. Levy eds., 2014); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52 (1987); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

benighted age.<sup>6</sup> As reflected in the quotation from Benjamin Cardozo that introduced this Article, such intellectuals regarded the institution as an “anachronism” inconsistent with the spirit of the modern age—indeed, one that would, in a generation or two, fade away.

After the carnage of the Second World War, hopeful predictions along these lines seemed, after so many earlier disappointments, to be poised to come to fruition. Setting the stage for developments throughout Europe, West Germany abolished capital punishment in 1949. One should be cautious in discerning major shifts in public opinion, however. Germany’s abolition only occurred because of a determined effort by political and legal elites, circumventing ordinary channels of reform: there was no groundswell of support for abolition, a point to which this Article will return.<sup>7</sup> Within the United States, abolition also seemed (at least to elites) like a movement whose time had come. Several articles in leading journals mused that the death penalty was itself dying. Death sentences and executions were declining; the influential California Supreme Court outlawed the punishment; and the Democratic Party included abolition in its 1972 national platform.<sup>8</sup> When in that same year the Supreme Court decided *Furman v. Georgia*,<sup>9</sup> apparently foreclosing capital punishment, it seemed anticlimactic: whether by judicial fiat or legislative enactment, abolition felt inevitable. As Professor Corinna Lain observes, three of the four dissenters in *Furman* expressed misgivings with the death penalty: with friends like that, one could hardly regard the institution as having a long life.<sup>10</sup>

But then, in a development that shocked the U.S. Supreme Court, and the nation’s intellectual elites more generally, the American public denounced the 1972 decision more comprehensively than any decision in modern history. Other candidates for “most unpopular decision” might include *Brown v. Board of Education*<sup>11</sup> and *Dobbs v. Jackson Women’s Health Organization*,<sup>12</sup> but in each of those cases, the opposition was localized, along geographical or partisan lines. By contrast, roughly three-quarters of American states re-enacted death

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6. See generally John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria’s Forgotten Influence on American Law*, 37 MITCHELL HAMLINE J. PUB. L. & POL’Y 1 (2017) (listing many writers influenced by Beccaria’s rejection of capital punishment). Through 1900, however, the list of writers on the opposite side of the debate, presupposing or advocating the justice of the death penalty, was long and, frankly, more illustrious—e.g., Immanuel Kant, Adam Smith, Thomas Jefferson, James Madison, Georg Wilhelm Friedrich Hegel, John Stuart Mill, and James Fitzjames Stephen.

7. Andrew Hammel, *Civilized Rebels*, in IS THE DEATH PENALTY DYING? EUROPEAN AND AMERICAN PERSPECTIVES 173, 188–89 (Austin Sarat & Jürgen Martschukat eds., 2011). See *infra* at text accompanying notes 140–42.

8. Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 36–39 (2007).

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

10. Lain, *supra* note 8, at 43.

11. *Brown v. Board of Education*, 347 U.S. 483 (1954). Notwithstanding *Brown*’s canonical status today, few Supreme Court decisions were met with as much hostility at the time, which included calls from members of Congress for “massive resistance.” See Gregory Briker & Justin Driver, *Brown and Red: Defending Jim Crow in Cold War America*, 74 STAN. L. REV. 447, 485–95 (2022).

12. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

penalty laws within four years of the *Furman* decision.<sup>13</sup> Sensing the direction and violence of the political winds, the Supreme Court issued a decision in 1976 that effectively retracted its earlier one and gave cautious approval to capital punishment.<sup>14</sup>

At that point, American and European death penalty practice diverged. In 1977, France used its notorious guillotine for the last time.<sup>15</sup> England had already abolished the death penalty, and by 1990 the practice had ceased to exist throughout Western Europe.<sup>16</sup> After the fall of the Soviet Union, nations in Central and Eastern Europe rapidly followed suit. Meanwhile, the death penalty was making a comeback in the United States. Ramping up in 1980, capital punishment peaked in 1999, when nearly 100 people were executed.<sup>17</sup>

Over the past decade, however, the American revival of capital punishment has come to an almost crashing halt. Executions have plummeted, and actual death sentences have become rare; many prosecuting attorneys have renounced seeking the punishment; and the number of states that have formally abolished capital punishment is growing. Virtually every American academic invested in the issue of capital punishment has, warily, come to regard the previous generation as an historical blip, a last gasp of American exceptionalism. The mantras that the “death penalty is dying” and, relatedly, “capital punishment is a relic of a barbaric age” are tirelessly repeated, without contradiction in organs of elite opinion.

As set forth in the first section of this Article, these claims are not, in fact, new. For over two centuries, Western elites have been proclaiming the imminent death of the death penalty. What is distinctive about the recent era is the confidence and monolithic quality of elite opinion, at least in the West, on the morality of capital punishment. There is a swelling confidence that the death penalty is, at last, at the cusp of extinction.

The second section assesses this descriptive claim that the death penalty is, in fact, dying. To be sure, if we simply count the number of nations in the world, and states in the United States, that have abolished capital punishment, the abolitionist trend is unmistakable. But this section probes whether this is a sound approach. Surely, China and Japan—both of which retain the death penalty—count more than Lichtenstein and Guatemala, at least if one’s goal is to predict the future. And, at the risk of offending some potential readers, might the same be said for Texas and Florida, compared to Rhode Island and Minnesota? There can be little doubt that elites have made the cost of imposing a death sentence prohibitive in the United States, but precisely for that reason, is it not remarkable how determined so many Americans are to continue to execute the worst of criminals?

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13. Craig S. Lerner, *Justice Scalia’s Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J.L. & PUB. POL’Y 91, 131 (2019).

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

15. Kathryn A. Heard, *Unframing the Death Penalty*, in *IS THE DEATH PENALTY DYING? EUROPEAN AND AMERICAN PERSPECTIVES* 126, 141 (Austin Sarat & Jürgen Martschukat eds., 2011).

16. John Quigley & S. Adele Shank, *Why Europe Abolished Capital Punishment*, 17 OHIO ST. J. CRIM. L. 95, 102 (2019).

17. *Executions by State and Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last visited Oct. 29. 2023).

The third section takes its cue from the other quotation that introduced the article—Justice Potter Stewart’s claim that the “instinct for retribution is rooted in the nature of man.” That the vengeful impulse is innate would seem so obvious that, at the risk of deflating the premise of this article, there is no mystery in why capital punishment persists. If two young men set off a bomb, with no other immediate purpose than to maim and kill strangers, and they succeed in this goal, with the additional externality of scarring an entire community gathered for a festive purpose, then there may be some people who have the capacity to forgive them without imposing the ultimate punishment. But it turns out that even men and women who would otherwise disclaim any interest in capital punishment are roused to impose the death penalty in such circumstances.<sup>18</sup>

Indeed, what is puzzling is not the persistence of the death penalty but why some people regard the persistence of the death penalty as puzzling. As argued below, the persistent dismay of modern Western intellectuals at the failure of abolitionist efforts points to defining features of that intelligentsia. Since the Enlightenment, many intellectuals have regarded nature as a weak and even nonexistent constraint on human progress. It is from this perspective that the persistence of capital punishment, so seemingly rooted in human nature, comes to sight as such a puzzling disappointment.

#### I. THE TIMELESSLY ANACHRONISTIC DEATH PENALTY

Since the Enlightenment, Western societies have become, on balance, more “civilized,” as reflected in attitudes towards table manners, bodily functions, and violence.<sup>19</sup> Another prominent manifestation of this development is a growing hostility to the death penalty. The trend is, however, not linear. It is, rather, one of cycles of abolition and re-adoption of capital punishment. As explored in the first part of this section, abolitionists have for centuries framed their argument in a similar way, emphasizing the barbaric and anachronistic character of the death penalty, and the supposed inevitability of its demise. Repeatedly, however, encouraging steps towards abolition have fueled optimism, which has been shattered by the resilience of capital punishment. As explored in the second part of this section, global developments since the end of the Cold War have convinced abolitionists that “this time is different.” The section concludes with the consensus, shared widely among global elites, that the death penalty is a lingering relic of a barbaric age and is at the cusp of extinction.

##### A. *Cycles of Optimism and Disappointment*

“The history of mankind,” wrote the Italian criminologist Cesare Beccaria in 1764, “is an immense sea of errors, in which a few obscure truths may here and there be found.”<sup>20</sup> It was the goal of Enlightenment thinkers such as

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18. The reference is to the Boston Marathon bombing, which culminated in the imposition of a death sentence. See *infra* at text accompanying notes 140–41 & 209–17.

19. See generally NORBERT ELIAS, *THE CIVILIZING PROCESS* (1939); STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011).

20. CESARE BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* 106 (Edward D. Ingraham trans., Stanford, Ca.: Academic Reprints 1953) (1819).

Beccaria to illuminate these truths and in so doing rescue mankind from barbarism. One such barbarism, in Beccaria's account, was capital punishment. He likened the death penalty to "human sacrifices" that may once have been "common in almost all nations," but are now almost universally decried.<sup>21</sup> Beccaria anticipated a "happy time" in which the views of "one philosopher" would be widely adopted.<sup>22</sup> As he noted, even in his time, there were a few "benevolent monarchs" who had ameliorated the severity of criminal punishments.<sup>23</sup> Leopold of Tuscany abolished the death penalty; kings in Prussia, Sweden, and Austria softened their criminal codes; Empress Catherine even wrote to Beccaria himself to try to lure him to Russia.<sup>24</sup> Beccaria's truths seemed to be more and more widely recognized: would capital punishment, like human sacrifice, soon be discarded into the dustbin of history?

Alas, Beccaria was not only the first exponent of death penalty abolition; he was also the first abolitionist to see his hopes disappointed. The enlightened age of the "benevolent monarch" would soon combust in the French Revolution. Beccaria would die in 1794, alone and unheralded in his native land. But in a posthumous sort of victory, the abolitionist banner would cross the Atlantic and be carried on in the United States. Beccaria was widely read and admired by America's founders, and under his influence, justice systems in the newly created country pared the crimes that could produce a death sentence.<sup>25</sup> There were even occasional voices for outright abolition. The Pennsylvania doctor Benjamin Rush, a confidant of many prominent statesmen, popularized the claim that the death penalty was a holdover of premodern forms of government. He wrote in 1792 that "capital punishments are the natural offspring of monarchical governments."<sup>26</sup> Like Beccaria, Rush likened capital punishments to "human sacrifices": "An execution in a republic is like a human sacrifice in religion." The connection between the death penalty and undemocratic regimes implied, in an age of growing equality, that the death penalty would itself wither away.

The invention and popularization of prisons as a form of punishment fueled the idea that capital punishment was unnecessary: substitutes equally suited to deter crime were within the power of the state. Alphonse de Lamartine told the French Chamber of Deputies in 1837, "Today society is armed with powers of repression and punishment that do not require the shedding of blood."<sup>27</sup> In Europe, pockets of abolition emerged.<sup>28</sup> Victor Hugo famously

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21. *Id.* at 107.

22. *Id.*

23. *Id.* at 108; Bessler, *supra* note 6, at 2.

24. *Id.* at 108; Bessler, *supra* note 6, at 2. See Roger Hood, *The Death Penalty in International Perspective*, Amnesty Int'l (Sept. 16, 1991), <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior520031991en.pdf>.

25. Bessler, *supra* note 6, at 171.

26. Benjamin Rush, *On Punishing Murder by Death*, in 5 *THE FOUNDERS' CONSTITUTION* 378 (Philip B. Kurland & Ralph Lerner eds., 1986).

27. DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 89 (2010).

28. San Marino effectively abolished capital punishment in 1865, and Portugal followed in 1867. See Elena Molaroni Berguido, *Statement on Death Penalty in the OSCE Area by the Representative of the Republic of San Marino to the OSCE*, OSCE (May 13, 2010),

railed against the death penalty, pronouncing it, in what was quickly becoming familiar language, “the special and eternal sign of barbarity.”<sup>29</sup> It was, however, in the United States that the cause made its deepest inroads. To the extent that capital punishment truly was a feature of undemocratic ages and a sign of barbarity, it makes sense that America, on the vanguard of political modernity, would provide the most receptive soil for the abolitionist project. The State of Michigan abolished the death penalty in 1846 and a few other states soon followed suit.

The movement to abolish the death penalty gained traction in the Progressive Era. From 1897 to 1917, ten states abolished the death penalty, and a recurring theme in the debates at the time was that the punishment was out of step in a civilized age.<sup>30</sup> In marking Oregon’s abolition of the death penalty through a referendum in 1914, Governor Oswald West announced that the “old barbarous system of capital punishment has been abolished.”<sup>31</sup> To the same effect, Governor Hunt of Arizona intoned in 1912: “capital punishment is [a] relic of barbarism; . . . the legalized taking of life is a straining of Christ’s law which has no place in modern civilization.”<sup>32</sup> The rhetoric of the era was evocative of Beccaria’s claim that the death penalty should be viewed as a remnant of a benighted age.<sup>33</sup> Several critics of capital punishment rhetorically elided America’s first successful abolitionist crusade (against slavery) with the second. “[N]ow is the time to strike from our limbs the last shackles of barbarism[,]” rallied an abolitionist in South Dakota.<sup>34</sup>

The rolling wave of abolition did not simply fail to sweep the nation, however; it crashed, and then the tide retreated. Within a few decades, eight of the ten states that had abolished the death penalty reinstituted it.<sup>35</sup> South Dakota’s history illustrates the historically cyclical nature of capital punishment’s popularity and usage. It also provides a convenient vehicle to explore the topic without the confounding variable of race relations in America: the state is roughly ninety percent white, with the majority of the remaining population being Native Americans. The oft-repeated claim that capital punishment is little more than a vestige of America’s other peculiar

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<https://www.osce.org/files/f/ documents/0/5/68298.pdf>; *The Death Penalty: List of Abolitionist and Retentionist Countries*, AMNESTY INT’L (Oct. 9, 1991), <https://www.amnesty.org/en/wp-content/uploads/2021/06/ act500071991en.pdf>.

29. ÈVE MORISI, CAPITAL LETTERS: HUGO, BAUDELAIRE, CAMUS, AND THE DEATH PENALTY 3 (2020).

30. John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 543–673 (1992).

31. *Id.* at 550.

32. *Id.* at 551.

33. A citizen petition to the North Dakota legislature, which would go on to abolish the death penalty, stated that “the death penalty is barbarous . . . [and] contrary to the dictates of humanity . . . .” *Id.* at 555. After Governor Lister of Washington signed a law abolishing capital punishment in 1913, a local paper said that the death penalty was “relegated to history.” *Id.* at 547.

34. *Id.* at 549.

35. *Id.* at 551.



institution—slavery—would have no purchase here.<sup>36</sup> And yet, South Dakota is a small, if illuminating case study in the puzzling persistence of capital punishment.

The death penalty, even prior to abolition in 1915, had only rarely been applied in South Dakota. It was (and is) a state with very little violent crime. And given the ethnic homogeneity of the state, here was a place where criminals were least apt to be vilified and scapegoated as enemies of the community. Surely this was fertile soil for a permanent abolition of capital punishment. For two decades this seemed like a story one could confidently tell. And then, in 1938, seventeen-year-old Betty Schnaidt was kidnapped, raped, and murdered, a crime “so hideous that it . . . resulted in a nearly unanimous demand for the legalization of capital punishment in South Dakota.”<sup>37</sup> In a telling inversion of the metaphorical language typically invoked by abolitionists, who nest their crusade in the so-called “progress of civilization,” a newspaper editorial demanded the reinstatement of capital punishment to ward off “the enemies of civilization.”<sup>38</sup>

Subsequent events grimly illustrate how determined South Dakota was to reinstate the death penalty. The 1939 South Dakota law designated the electric chair as the method of execution, but no chair was available, and by 1942 wartime regulations foreclosed the construction of a new one.<sup>39</sup> South Dakota sent its warden to Vermont to collect an electric chair, only to discover, upon his return, that the difference in voltages in the two states rendered the chair inoperable.<sup>40</sup> So another foray abroad was necessary, this time to Illinois, where a usable chair was identified and brought back to South Dakota,<sup>41</sup> only to be returned when, in 1944, the War Production Board at last permitted South Dakota to construct its own.<sup>42</sup> In 1947, South Dakota, after decades without capital punishment, executed the notorious George Sitts, an escaped murderer who had then murdered two sheriffs in the course of his escape.<sup>43</sup>

At this point, South Dakota’s use of capital punishment came to a halt, matching a retreat throughout the nation. The Second World War seemed to have finally (again) marked a turning point, not just in America but throughout the world. As noted in the Introduction, the abolitionist movement seemed to be on the cusp of complete victory. The crusade, having swept Europe, turned its attention to the United States. In 1967, *Time* magazine twice opined on what

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36. Susan A. Bandes, *All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty*, 116 MICH. L. REV. 905, 905 (2018) (rooting the death penalty in “slavery and the use of lynching to enforce a racial caste system”).

37. Galliher, *supra* note 30, at 572.

38. *Id.* at 573.

39. *Appeal for Electric Chair Refused by WPB*, DAILY ILLINI at 3 (July 10, 1942), <https://idnc.library.illinois.edu/?a=d&d=DIL19420710.2.37&e=-----en-20--1--img-txIN-electric+chair----->.

40. *Vermont Electric Chair Can’t Be Used by S. Dakota*, BURLINGTON FREE PRESS (July 13, 1942), <https://www.newspapers.com/clip/12794830/the-burlington-free-press/>.

41. Gail E. Myers, *We Gave One the Chair*, S.D. MAG. (Mar./Apr. 2009), <https://www.southdakotamagazine.com/electric-chair>.

42. *Sitts May Be First to Die in Electric Chair in State*, ARGUS-LEADER at 1 (Mar. 22, 1946), <https://www.newspapers.com/article/argus-leader-daily-argus-leader-march-2/35144289/>.

43. *See State v. Sitts*, 26 N.W.2d 187, 191–92 (S.D. 1947).

it called the “dying death penalty.”<sup>44</sup> A 1968 article pronounced abolition a global phenomenon, with America an embarrassing moral laggard. Executions were becoming rarer and rarer.<sup>45</sup> In the wake of *Furman*, the nation’s intellectuals collectively yawned, with Philip Kurland writing in the 1972 *Supreme Court Review* that “the inevitable came to pass.”<sup>46</sup>

Apparently escaping the attention of the nation’s intellectuals, but not the nation’s voters, crime was surging in America. A series of highly publicized crimes, such as Robert Speck’s murder of eight nurses in Chicago, convulsed the nation, and support for the death penalty was returning to pre-World War II levels.<sup>47</sup> Like a zombie, the death penalty proved, to the astonishment of many observers, simply unkillable. After thirty-five states reenacted death penalty laws, almost in defiance of *Furman*, the Court beat a hasty retreat. The next few decades saw the creation of a death penalty jurisprudence of ever-increasing complexity. Satisfying the Court’s punctilious demands often required deft lawmaking and indefatigable advocacy, but states were willing to incur those costs to expand the death penalty.

Even in South Dakota. For sixty years, the state never used the electric chair it had made such painstaking efforts to acquire. And then in 2007, like a lightning bolt in its violent randomness,<sup>48</sup> the state executed Elijah Page. He was one of three men who had engaged in an appalling torture-murder that received widespread attention at the time.<sup>49</sup> Within the next thirteen years, South Dakota would execute four more men, meaning that in the nascent twenty-first century, the state has already used the punishment only one fewer time than in the entire twentieth century.<sup>50</sup> If the death penalty is dying, the news hasn’t made it to South Dakota.

### B. The Modern Moment

Or has it? There is now only one person on death row in South Dakota, for a crime that occurred over twenty years ago.<sup>51</sup> No South Dakota jury has returned a death sentence in over a decade. The state is, in this respect, emblematic of a nationwide trend. Even in Texas, notorious as a retentionist

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44. Lain, *supra* note 8, at 41–42.

45. Chris Wilson, *Every Execution in U.S. History in a Single Chart*, TIME (Apr. 25, 2017), <https://time.com/82375/every-execution-in-u-s-history-in-a-single-chart/>.

46. Lain, *supra* note 8, at 42.

47. Corky Siemaszko, *How Richard Speck’s Rampage 50 Years Ago Changed a Nation*, NBC NEWS (July 13, 2016), <https://www.nbcnews.com/news/crime-courts/how-richard-speck-s-rampage-50-years-ago-changed-nation-n606211>.

48. *Cf. Furman v. Georgia*, 408 U.S. 238, 309 (Stewart, J., concurring) (“[D]eath sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”).

49. Murder in America, *The Torture & Murder of Chester Poage*, YOUTUBE (Oct. 21, 2022), [https://www.youtube.com/watch?v=sKnnMrbYyeY&ab\\_channel=MurderInAmerica](https://www.youtube.com/watch?v=sKnnMrbYyeY&ab_channel=MurderInAmerica). Alas, the method of execution was lethal injection, so George Sitts was the only victim of South Dakota’s electric chair.

50. *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?state=South+Dakota&federal=No> (last visited Feb. 28, 2023).

51. Briley Piper is on death row for a crime committed in 2000. *State v. Piper*, 709 N.W.2d 783, 790 (S.D. 2006).

holdout, there were only two death verdicts returned in 2022, which continues a decades-long trend.<sup>52</sup> Annual executions in America, which are already at a post-*Furman* low are, it has been argued, a lagging indicator; even in their paltry numbers, they overstate the declining support for capital punishment. Fewer and fewer juries, in fewer and fewer counties, in fewer and fewer states, are returning death sentences.

Nor is this phenomenon an exclusively American one. Abolitionism has swept the globe, as predicted decades ago by political scientist Francis Fukuyama. Writing in 1989, Fukuyama argued that the end of the Cold War signaled, more monumentally, “the end of history,” by which he meant the fulfillment of “mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of government.”<sup>53</sup> Fukuyama allowed that rearguard actions would persist, but “[t]he war of ideas is at end.” Western civilization would emerge as what writer V. S. Naipaul called a “universal civilization,” which could “blow away” all other “rigid systems.”<sup>54</sup> This emerging “universal civilization” would, unlike its predecessors, be distinguished by expanding “circles of altruism,”<sup>55</sup> which soften mores and culminate in a repudiation of state-orchestrated violence. Fukuyama predicted that “modern liberal societies” will be defined by “the spread of compassion, and a steadily decreasing tolerance for violence, death, and suffering. This comes to light, for example, in the gradual disappearance of capital punishment among developed countries.”<sup>56</sup>

Fukuyama’s thesis was influenced by Hegel and one of Hegel’s most acclaimed twentieth-century exponents, Alexandre Kojève. It invites us to reflect less on year-to-year fluctuations and more on the deep currents of history, as manifestations of an evolving human spirit. From that perspective, the death penalty story is less of abolition and re-adoption and more of a mounting rejection of capital punishment as inconsistent with basic precepts of liberal democracy—the political form that has come to be seen as the only one that is legitimate. The tenuous state in which capital punishment survives in America is evidence, from this perspective, that it is no longer viewed as a defensible exercise of state power.

The highest-profile capital murder trial of 2022—that of Victor Cruz—is illustrative of the extraordinary difficulty American prosecutors today face in securing death sentences, even for the most outrageous crimes. Cruz was, notoriously, responsible for the murder of fourteen children and three adults at Parkland High School in 2018.<sup>57</sup> He had videotaped himself days before the

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52. Ken Camp, *Death Penalty Diminishing in Texas but Disparities Remain*, BAPTIST STANDARD (Dec. 19, 2022), <https://www.baptiststandard.com/news/texas/death-penalty-diminishing-in-texas-but-disparities-remain/>.

53. Francis Fukuyama, *The End of History?*, 16 THE NAT’L INTEREST, Summer 1989, 3, 4. He turned the essay into a book, published in 1992. See *infra* at text accompanying note 56.

54. V.S. Naipaul, *Our Universal Civilization*, N.Y. REVIEW OF BOOKS (Jan. 31, 1991).

55. PETER SINGER, THE EXPANDING CIRCLE 120 (1981).

56. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 260 (Free Press 2006).

57. Patricia Mazzei & Nicholas Bogel-Burroughs, *Gunman Who Killed 17 in Parkland is Spared the Death Penalty*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/us/parkland-trial-verdict-gunman.html>.

massacre boasting that he would be a school shooter.<sup>58</sup> Cruz disclaimed an insanity defense and conceded guilt. The only remaining question was punishment. In an era in which capital punishment was securely part of the criminal justice system, it is hard to imagine Cruz's trial being particularly long or his punishment in doubt. The fact that four years separated the crime and the trial (only some of that attributable to COVID-19 precautions) is the first clue that ours is not such an era. Much of that time was spent assembling the armies of lawyers—on both sides—that would square off at Cruz's trial. After three months of jury selection, and another two months of trial, the jury deadlocked, resulting in a sentence of life without parole. As the fathers of one of the victims lamented, if a criminal justice system does not execute Cruz, one cannot help but wonder why it bothers to retain capital punishment even as an option.<sup>59</sup>

Had the jury imposed a death sentence, decades of appeals would have inevitably followed. For the eleven people executed in the United States in 2021, twenty-four years on average separated the crime and the punishment.<sup>60</sup> And even if, improbably, the State of Florida had prevailed in every appeal, and preserved the verdict, a final, almost insurmountable obstacle awaited: the method of execution. How hard is it, really, to kill a human being? The answer, it turns out, is that, at least for a twenty-first-century American legal system, it is nearly impossible. Having rejected the historically tested methods, America has settled on lethal injection, but for reasons too numerous to catalog, this approach has generated its own difficulties. The most sensible alternative, Judge Alex Kozinski observed, is a firing squad, which “can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood.”<sup>61</sup> He added that “[i]f we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf.”

As Professor Brandon Garrett observes in *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice* (2017), many Americans are unwilling to face this horrendous brutality.<sup>62</sup> His book was one of several in recent years that, while lamenting the persistence of the death penalty in America, are hopeful of its eventual demise.<sup>63</sup> Echoing sentiments in

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58. Frances Robles, “You’ll All Know Who I Am,” *Parkland Suspect Said in Video*, N.Y. TIMES (May 30, 2018), <https://www.nytimes.com/2018/05/30/us/nikolas-cruz-parkland-video.html>.

59. Kelly Hayes, “Stunned, Devastated”: Parents of Parkland Victims React to Shooter’s Life Sentence, FOX 13 TAMPA BAY (Oct. 13, 2022), <https://www.fox13news.com/news/parents-parkland-shooting-victims-react-nikolas-cruz-sentence>.

60. *List of People Executed in the United States in 2021*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_people\\_executed\\_in\\_the\\_United\\_States\\_in\\_2021](https://en.wikipedia.org/wiki/List_of_people_executed_in_the_United_States_in_2021) (last visited Feb. 28, 2023).

61. *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir.) (Kozinski, J., dissenting), *vacated on other grounds*, 573 U.S. 976 (2014).

62. BRANDON L. GARRETT, *END OF ITS ROPE* (2017).

63. In *EXECUTING FREEDOM: THE CULTURAL LIFE OF CAPITAL PUNISHMENT IN THE UNITED STATES* (2016), Daniel LaChance argues that Americans will abolish capital punishment when they recognize that the punishment, with decades separating crime and punishment and with executions scrubbed of any visceral satisfaction, “cannot be made to live up to its retributive

Fukuyama's work, Professor Garrett argued that as society has become "more merciful," we have learned to expand our circle of compassion to take account of the "full life story of the person being convicted of a crime."<sup>64</sup> Fewer and fewer offenders, however egregious their crimes, will be deemed to merit the death penalty. And the very infrequency of executions generates its own negative feedback loop: the rarer executions are, the more unfair any execution appears, as it singles out a hapless soul among many equally culpable criminals.<sup>65</sup>

A few years ago, when Connecticut Governor Daniel Malloy signed a law abolishing the death penalty, he boasted that his state was joining "almost every other industrialized nation" in the world.<sup>66</sup> But, many observers have argued, it is not only industrialized nations jettisoning capital punishment. Amnesty International has been releasing annual global reports on "death sentences and executions," and the general tenor has been one of cautious optimism that capital punishment is retreating. Many continents, such as Europe and South America, have abolished it altogether. Others have progressed in this direction. According to a 2018 Amnesty International Report, some of the "greatest strides" in this direction have recently been achieved in sub-Saharan Africa.<sup>67</sup> The report added: "Now that twenty countries in sub-Saharan Africa have abolished the death penalty for all crimes, it is high time that the rest of the world follows their lead and consigns this abhorrent punishment to the history books."<sup>68</sup>

The claim that the death penalty is a barbaric anachronism, destined for the dustbin of history, is now over two centuries old. What was once, in the days of Cesare Beccaria, a crank's opinion is now received wisdom:

- Like the whipping post and the pillory, already relegated to the discard pile of history, the death penalty is—at bottom—a vestige of a bygone era when barbaric practices like slavery and ear cropping were still in use.<sup>69</sup>
- Today, . . . hard work has brought the machinery of death close to the point of collapse.<sup>70</sup>
- [I]t is inevitable that the death penalty will eventually be prohibited in all circumstances, as the law of torture should be

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promise." See also CAROL S. STEIKER AND JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016), discussed *infra* at text accompanying notes 148 and 149.

64. GARRETT, *supra* note 62, at 259.

65. *Id.* at 203.

66. Keith M. Phaneuf, *With House Vote, Malloy to Sign Death Penalty Repeal*, CT MIRROR (Apr. 11, 2012), <https://ctmirror.org/2012/04/11/house-vote-malloy-sign-death-penalty-repeal/>.

67. *Death Sentences and Executions 2017: Sub-Saharan Africa a "Beacon of Hope"*, AMNESTY INT'L (Apr. 2018), <https://www.amnesty.org/en/latest/news/2018/04/death-penalty-sentences-and-executions-2017/>.

68. *Id.*

69. John D. Bessler, *The Death Penalty in Decline: From Colonial America to the Present*, 50 CRIM. L. BULLETIN 245, 262 (2014).

70. Brian S. Kammer, *The Death Penalty in Retreat*, 37 CRIM. JUST. 14, 16 (2023).

interpreted today as prohibiting the barbaric practice of capital punishment.<sup>71</sup>

- I think we will see the death penalty decline to a point where it seems irrelevant to our politics and our daily life.<sup>72</sup>
- The penalty of death was made inessential by the formation of a stable bureaucratic state, secure in its monopoly of violence, supported by a criminal justice apparatus of police and prisons, and relatively effective in its control of interpersonal violence. It was made problematic by the development of liberal-democratic and welfare state institutions, and by an associated culture of civilized refinement and humanism, all of which worked to limit state violence and surround it with prohibitions and taboos.<sup>73</sup>
- The global trend away from the death penalty is unmistakable.<sup>74</sup>
- The death penalty is becoming an anachronism nationally, in part because society has evolved, matured and better understands that it's a flawed system of punishment.<sup>75</sup>
- Capital punishment is a vestige of monarchical prerogatives which allow a single person to decide who lives or dies. In today's world, autocrats love capital punishment and use it to crush and intimidate political opponents.<sup>76</sup>
- Capital punishment is cruel and unusual. It is cruel because it is a relic of the earliest days of penology, when slavery, branding, and other corporal punishments were commonplace.<sup>77</sup>
- Many death penalty abolitionists now feel a sense of hope that the writing is on the wall for the barbaric practice everywhere

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71. Jonathan Perez, *Barbaric Retributivism: New Hampshire and Washington Are Two of the Latest States to Abolish the Death Penalty*, 45 NOVA L. REV. 115, 141 (2020).

72. Interview by Rose Calahan with Maurice Chammah, in *Why is the Death Penalty on the Decline in Texas?*, TEX. MONTHLY (Jan. 28, 2021), <https://www.texasmonthly.com/arts-entertainment/why-is-death-penalty-on-decline-texas/>.

73. David Garland, *Why the Death Penalty is Disappearing*, Address to the Oslo Symposium on Capital Punishment (June 20, 2016), [https://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_074425.pdf](https://www.law.nyu.edu/sites/default/files/ECM_PRO_074425.pdf).

74. *Joint Statement of the Foreign Ministers of Australia, Canada and New Zealand on the Execution of Protesters in Iran*, MINISTER FOR FOREIGN AFFAIRS (Dec. 16, 2022) <https://www.foreignminister.gov.au/minister/penny-wong/media-release/joint-statement-foreign-ministers-australia-canada-and-new-zealand-execution-protesters-iran>.

75. Editorial, *The End of the Death Penalty Is a Proud Day for Washington*, SEATTLE TIMES, (Oct. 11, 2018) <https://www.seattletimes.com/opinion/editorials/the-end-of-the-death-penalty-is-a-proud-day-for-washington/>.

76. Austin Sarat & Dennis Aftergut, *Ending the Federal Death Penalty Would Bolster Our Democracy*, THE HILL, (Oct. 19, 2021), <https://thehill.com/opinion/judiciary/577301-ending-the-federal-death-penalty-would-bolster-our-democracy/>.

77. American Civil Liberties Union, *The Case Against the Death Penalty* (Dec. 11, 2012), <https://www.aclu.org/other/case-against-death-penalty>.

else. . . . A state that asserts a right to take the life of someone who no longer threatens the lives of others is asserting something like ownership over its subjects. That's an abomination that no democratic society should tolerate.<sup>78</sup>

- There is a growing consensus that the death penalty is cruel and unusual in any form, for any person. This feeling has helped fuel the current debate regarding execution methods. . . . For the first time in the nearly thirty years that I have been studying and writing about the death penalty, the end of this troubled system is creeping into view. . . .<sup>79</sup>

Closely related to the claim that the death penalty is a doomed barbarism is the argument that the punishment is inconsistent with “human dignity.”<sup>80</sup> European courts have invoked the concept of “dignity” in various contexts, including that of the death penalty.<sup>81</sup> A protocol to the European Convention on Human Rights, enacted in 2002, pronounces the “abolition of the death penalty in all circumstances” essential for “the protection of . . . the inherent dignity of all human beings.”<sup>82</sup> American intellectuals were wary of “dignity” as a political argument in the 1990s, when deployed by conservatives to express concerns about various medical innovations, such as cloning and stem cells.<sup>83</sup> Yet many intellectuals have warmed to the idea of dignity when cited in opposition to the death penalty.

Curiously, the complaints about “dignity” in the 1990s—that the concept was so vague as to provide inconclusive practical guidance—would seem to have equal force in the context of capital punishment. One can argue a respect for human dignity forecloses capital punishment; but one can equally argue that a respect for human dignity requires capital punishment.<sup>84</sup> The plausibility of

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78. Ben Burgis, *There's Absolutely No Good Argument for Keeping the Death Penalty*, JACOBIN, (Apr. 2, 2021), <https://jacobin.com/2021/04/abolish-death-penalty-virginia-capital-punishment>.

79. Lily Hughes, *Killing Capital Punishment*, JACOBIN, (Apr. 22, 2015), <https://jacobin.com/2015/04/death-penalty-public-support-firing-squad/>.

80. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 675 (Brennan, J., dissenting) (“[T]he death penalty is wholly inconsistent with the constitutional principle of human dignity.”).

81. See Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 203–04 (2008).

82. Protocol 16, *European Convention on Human Rights*, EUR. CT. HUM. RTS. at 53, [https://www.echr.coe.int/documents/d/echr/convention\\_eng](https://www.echr.coe.int/documents/d/echr/convention_eng) (last visited Feb. 2, 2024).

83. Steven Pinker, *The Stupidity of Dignity*, THE NEW REPUBLIC (May 28, 2008), <https://newrepublic.com/article/64674/the-stupidity-dignity>.

84. Immanuel Kant is most often cited in this regard. See IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 4:434–36 (Thomas Hill ed. 2003). For a modern argument, grounded in religion, consider Leon Kass: “By equating a life for a life—no more than a life for a life, and the life only of the murderer, not also of his wife and children—the threatened punishment implicitly teaches the *equal* worth of each human life. Such equality can be grounded only in the equal *humanity* of each human being . . . . The fundamental reason that makes murder wrong—and that even justifies punishing it homicidally!—is man’s divine-like status.” Leon R. Kass, *Death with Dignity and the Sanctity of Life*, COMMENTARY (March 1990), <https://www.commentary.org/articles/leon-kass/death-with-dignity-the-sanctity-of-life/>.

the latter argument has fallen into disfavor, as Western intellectuals are swept along in the conviction that capital punishment is at the cusp of extinction.

And this conviction is deep and abiding in Western intellectual life. As no lesser authority than the *New York Times* editorial page pronounced: Death penalty retentionists are oblivious to the “clear movement of history.”<sup>85</sup> In his recent celebration of the Enlightenment, Steven Pinker traces the moral arc of recent centuries; and he finds spreading doubts, throughout the world, in the “state’s mandate to exercise to violence.”<sup>86</sup> As Pinker put it in a tweet a few years ago, “Capital Punishment is on death row—if trends continue, it will be gone from the world by 2026.”<sup>87</sup> To be sure, Western intellectuals have pronounced the death of the death penalty before, but this time, we are told, is different.

## II. THE PERSISTENT DEATH PENALTY

As described in the preceding section, the mantra that the death penalty is dying is often cast in the language of historical inevitability. Reinforcing this conviction is the claim that, before our eyes, the death penalty is retreating to fewer and fewer nations—forlorn islands of barbarism amidst a rising tide of civilization. As argued in this section, however, this depiction of the current state of affairs is misleading. In both the world at large and in the United States, capital punishment has proven surprisingly tenacious. Hence the puzzle of capital punishment’s persistence, even in the face of a widespread conviction that it is doomed.

### A. A Civilizational Perspective

The previous section discussed political scientist Francis Fukuyama, whose 1992 book *The End of History* emphasized a global trend towards political liberalism and a recognition of human rights.<sup>88</sup> Four years after Francis Fukuyama published his work, Samuel Huntington published *Clash of Civilizations*.<sup>89</sup> Whereas Fukuyama envisioned the global embrace of liberalism, Huntington predicted the intransigent preservation of cultural diversity. In Huntington’s account, there are nine civilizations: Western, Latin American, African, Islamic, Sinic, Hindu, Orthodox, Buddhist, and Japanese.<sup>90</sup> This section proposes to consider the status and capital punishment in each of these civilizations.

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85. Editorial, *The Death Penalty Endgame*, N.Y. TIMES (Jan. 16, 2016), <https://www.nytimes.com/2016/01/17/opinion/sunday/the-death-penalty-endgame.html>.

86. STEVEN PINKER, ENLIGHTENMENT NOW (2018).

87. Steven Pinker (@sapinker), X (Dec. 30, 2013, 9:16 AM), <https://twitter.com/sapinker/status/417660422058041345?lang=en>.

88. See *supra* text accompanying notes 53–56.

89. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER* (1996).

90. *Id.* at 47–48. Huntington does not at first distinguish a Buddhist civilization, but he then goes on to write: “What can legitimately be described as a Theravada Buddhist civilization, however, does exist in Sri Lanka, Burma, Thailand, Laos, and Cambodia.” *Id.* This article treats the Buddhist as a separate civilization.



There are difficulties with this approach, some of which Huntington acknowledges. An obvious one is that some nations are not easily categorizable. Ukraine, for example, tragically straddles the Western and Orthodox civilizations. Other nations, such as Israel and Ethiopia, are perhaps best understood as *sui generis*, but Huntington collapses them into imperfectly congruent civilizations. This Article operates on the hypothesis that the Huntington framework, although imperfect, is an improvement on the much-publicized approach proposed by Amnesty International in its Annual Report on Capital Punishment.<sup>91</sup> This gives Andorra the same status as China, Liechtenstein the same as Japan. Whatever the merits of such an approach when casting votes in the United Nations General Assembly, it is absurd when predicting global trends. Moreover, when we consider humanity as a collection of civilizations, contrarian results emerge about the global popularity of capital punishment. As set forth below, some nations, including the most populous, richest, and fastest-growing, do not seem, as in Fukuyama's account, to be "ascending" to the world envisioned by many Western elites.

#### 1. Abolitionist civilizations.

Of the nine civilizations, only two can be categorized as completely abolitionist: Latin America and Orthodox.

Latin America presents the cleanest case of an abolitionist civilization. Among the first nations to abolish capital punishment can be found here,<sup>92</sup> and for over twenty years, there have been no executions on the continent of South America or in the Caribbean.<sup>93</sup> Only two small nations on the continent (Guyana and Belize) even nominally preserve the punishment *de jure*.<sup>94</sup> And yet, of the thirty nations with the highest homicide rates in the world, twenty-

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91. See generally AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2021/22: THE STATE OF THE WORLD'S HUMAN RIGHTS (2022), <https://www.amnesty.org/en/documents/pol10/4870/2022/en/>.

92. Venezuela formally abolished capital punishment in 1863. See Press Release, Inter-Am. Comm'n on Hum. Rts., 25 Years after the Adoption of the Protocol, the IACHR Urges States to Abolish the Death Penalty or Take Steps toward Its Abolition, OAS (June 8, 2015), [https://www.oas.org/en/iachr/media\\_center/preleases/2015/062.asp](https://www.oas.org/en/iachr/media_center/preleases/2015/062.asp). The last execution in Brazil was in 1876. *Death Penalty All but Abolished in LatAm as Citizens Face Execution Elsewhere*, SAN DIEGO UNION-TRIBUNE (Apr. 30, 2015), <https://www.sandiegouniontribune.com/en-espanol/sdhoy-death-penalty-all-but-abolished-in-latam-as-2015apr30-story.html>.

93. *Id.* (noting that the last Latin American executions were carried out in Cuba in 2003).

94. See AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2021, 62 (2022) [hereinafter 2021 AMNESTY RPT.]. In Guyana, twenty-seven people were under the sentence of death as of 2021. *Id.* at 15. In Belize, there were no inmates on death row, and no executions were carried out that year. *Id.* Guyana's highest court rejected a constitutional challenge to the death penalty in late December 2022, despite pressure from European NGOs. See *Death penalty remains Law in Guyana*, KAIETEUR NEWS (Dec. 23, 2022), <https://www.kaieteurnewsonline.com/2022/12/23/death-penalty-remains-law-in-guyana/>; Press Release, *Guyana's Court of Appeal Refuses to Declare the Death Penalty Unconstitutional*, DOUGHTY ST. CHAMBERS (Dec. 22, 2022), <https://www.doughtystreet.co.uk/news/guyanas-court-appeal-refuses-declare-death-penalty-unconstitutional>.

five are located here.<sup>95</sup> Given that staggering level of private violence, and the significant political instability, there can be little confidence that Latin America will remain abolitionist. It is worth recalling that former President of Brazil, Jair Bolsonaro, campaigned on a promise to reinstate the death penalty.<sup>96</sup>

Of the Orthodox nations, only Belarus has officially preserved capital punishment.<sup>97</sup> And the leader of another Orthodox nation has chided America for its retention, observing that the punishment is nothing more than “vengeance on the part of the state.”<sup>98</sup> Alas, that leader’s name was Vladimir Putin.

Amnesty International categorizes Russia as “abolitionist in practice,” apparently on the premise that as long as enemies of the state are pushed out of windows without trial,<sup>99</sup> the prohibition against capital punishment has been observed.<sup>100</sup> It is a precious distinction. Russia places in bold relief the problem of coding a nation that officially disclaims capital punishment as abolitionist when the rule of law has only the most tenuous of purchase.

In short, the only two civilizations that are completely abolitionist should enjoy that title with an asterisk, owing to the extraordinary level of private violence and political instability in Latin America and the extraordinary hypocrisy of Russia’s nominal embrace of abolitionism.

## 2. Mostly abolitionist civilizations.

Two civilizations present a mixed picture, but at least for the past decade have been generally abolitionist in practice: the Hindu and Buddhist. These are civilizations where some constituent nations retain the death penalty as a punishment, but executions have been rare.

The Hindu civilization is, for all intents and purposes, the country of India. With 1.5 billion people, this is a nation that exceeds the population of the Latin American, Orthodox, and Western civilizations combined. India’s homicide rate is roughly half that of the United States, but given the nation’s size there are roughly 40,000 homicides per year.<sup>101</sup> Although the death penalty is theoretically possible for several variations of aggravated murder, the ultimate

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95. *List of Countries by Intentional Homicide Rate*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_intentional\\_homicide\\_rate](https://en.wikipedia.org/wiki/List_of_countries_by_intentional_homicide_rate) (last visited Jan. 22, 2023).

96. *See Brazil Election: Bolsonaro Hands Out Tough Anti-Crime Message*, BBC NEWS (Oct. 7, 2018), <https://www.bbc.com/news/world-latin-america-45774849>.

97. *See* 2021 AMNESTY RPT., *supra* note 94.

98. AGATA FIJALKOWSKI, *European Policy on the Death Penalty*, in *IS THE DEATH PENALTY DYING: EUROPEAN AND AMERICAN PERSPECTIVES* 286 (Austin Sarat & Jürgen Martschukat eds., 2011).

99. *See* Elaine Godfrey, *Sudden Russian Death Syndrome*, THE ATLANTIC (Dec. 29, 2022), <https://www.theatlantic.com/ideas/archive/2022/12/russian-tycoon-pavel-antov-dies-putin-ukraine/672601/> (noting the suspicious deaths of more than two dozen Putin critics in 2022, including several that “fell” from upper-level windows).

100. *See* 2021 AMNESTY RPT., *supra* note 94 (describing Russia as “abolitionist in practice” because the nation has an official moratorium on the death penalty).

101. *See India Murder/Homicide Rate 1990–2023*, MACROTRENDS, <https://www.macrotrends.net/countries/IND/india/murder-homicide-rate> (last visited Jan. 22, 2023) (reproducing World Bank data).

penalty is rarely exacted. In the preceding decade, only seven people have been executed: one in 2012; one in 2013; one in 2015; and four in 2020,<sup>102</sup> producing an infinitesimal execution/homicide rate of  $7/400,000$ , or  $1.75 \times 10^{-5}$ .

Executions are also rare in the countries that form the Buddhist civilization, which includes Cambodia, Thailand, Sri Lanka, and Myanmar (but is defined to exclude China, Korea and Singapore). In Thailand, the last execution occurred in 2018; in Myanmar, four people were executed in 2021. As a rough estimate, there are 2,000 homicides per year in the Buddhist civilization,<sup>103</sup> for an execution/homicide rate of only  $5/20,000$ , or  $2.5 \times 10^{-4}$ .

Yet the rarity of executions in Hindu and Buddhist civilizations arguably belies deeper trends. In India, the popular Prime Minister Narendra Modi has spoken in favor of capital punishment on multiple occasions, even championing the penalty in the aftermath of several rape-murders that convulsed the nation.<sup>104</sup> He has overseen a judicial system that regularly seeks, and obtains, death sentences. At the end of 2022, there were 539 people on death row, a number that has grown steadily in recent years.<sup>105</sup> India is a nation that is, according to many metrics, growing in self-confidence and assertiveness in its stance relative to the West, which is hardly surprising given its current population and projections of its wealth and power. Polls suggest that there is widespread support for the death penalty in India,<sup>106</sup> and the foundational texts in Hinduism are notably less abolitionist than, say, the Sermon on the Mount.<sup>107</sup> There is

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102. *List of People Executed in India*, WIKIPEDIA [https://en.wikipedia.org/wiki/List\\_of\\_people\\_executed\\_in\\_India](https://en.wikipedia.org/wiki/List_of_people_executed_in_India) (last visited Feb. 2, 2024). From 2000 to 2010, India only carried out one execution. Anup Surendranath & Maulshree Pathak, *Legislative Expansion and Judicial Confusion: Uncertain Trajectories of the Death Penalty in India*, 11 INT'L J. FOR CRIME, JUST., & SOC. DEMOCRACY 67, 67 (2022).

103. *See List of Countries by Intentional Homicide Rate*, *supra* note 95 (in 2017, there were 1,787 homicides in Thailand, in 2020, there were 196 homicides in Mongolia, and only a smattering in other Buddhist nations).

104. *See* James Tapper & Bhanvi Satija, *India to Introduce Death Penalty for Child Rapists*, GUARDIAN (Apr. 21, 2018), <https://www.theguardian.com/world/2018/apr/21/india-poised-to-introduce-death-penalty-for-child-rapists>.

105. Himanshi Dhawan, *165 Sentenced to Death in 2022, Highest in 2 Decades*, THE TIMES OF INDIA (Jan. 30, 2023), <https://timesofindia.indiatimes.com/india/165-sentenced-to-death-in-2022-highest-in-2-decades/articleshow/97424728.cms?from=mdr>. *Compare* AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2020 24 (2021), <https://www.amnesty.org/en/documents/act50/3760/2021/en/> (404 inmates) *with* 2021 AMNESTY RPT., *supra* note 94, at 26 (488 inmates).

106. *See* SANJEEV P. SAHNI & MOHITA JUNNARKAR, THE DEATH PENALTY 99–100 (2020) (showing nearly eighty percent support for the death penalty, among a sample of 25,210, primarily well-educated, Indians).

107. *See* Maria Anna Muryani & Noor Rosyidah, *The Concept of Death Penalty in a Pancasila State (Perspective of Official Religion in Indonesia)*, 2 WALISONGO L.R. 131, 143–44 (Oct. 2020) (noting that Hinduism does not generally disapprove of the death penalty, and that one Hindu text, the Kutara Manawa, specifically endorses it for three categories of offenses). It should be acknowledged that the Christian teaching on capital punishment is complex. Jesus famously exhorted Christians to render under Caesar the things that are Caesar's. And Abraham Lincoln invoked the following passage from the New Testament in his Second Inaugural: "Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh." Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in THE AVALON

thus little ground for confidence that India will not revert to a more energetic use of capital punishment in coming decades.

The infrequency of executions in Buddhist civilizations also fails to reflect popular support for capital punishment. There are 212 people on death row in Thailand,<sup>108</sup> and polls suggest that over ninety percent of the population supports the penalty.<sup>109</sup> As in India, the criminal law has even recently been amended to expand the circumstances in which capital punishment is viable.<sup>110</sup> Last year, Canada refused to extradite an accused murderer to Thailand without an assurance that the death penalty would not be pursued.<sup>111</sup>

The small country of Sri Lanka is perhaps a harbinger of future trends in the region. Although there has been a general moratorium on executions since 1976, a recent upsurge in violence has resulted in the reinstatement of capital punishment for drug crimes.<sup>112</sup> In response, the European Union threatened to strip Sri Lanka of favored nation status in trade matters, resulting in some backtracking.<sup>113</sup> But one might wonder whether this capitulation reflected a genuine change in sentiment or simply an acknowledgment of the nation's

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PROJECT, [https://avalon.law.yale.edu/19th\\_century/lincoln2.asp](https://avalon.law.yale.edu/19th_century/lincoln2.asp). As Walter Berns observed, "Christian nations have not hesitated to be the agents by which those who offend against those who believe in Him are hanged by the neck, burned at the stake, broken on a wheel, or (although not so frequently) drowned in the depth of the sea." WALTER BERNs, *FOR CAPITAL PUNISHMENT* 15 (2005). The topic is well beyond the scope of this article and competence of its author, but for a perspective at odds with that of the current Pope on this issue, see EDWARD FESER & JOSEPH M. BESSETTE, *BY MAN SHALL HIS BLOOD BE SHED: A CATHOLIC DEFENSE OF CAPITAL PUNISHMENT* (2017). For a criticism of the latter book, see David Bentley Hart, *Christians & The Death Penalty*, *COMMONWEAL*, Nov. 16, 2017.

108. INT'L FED'N FOR HUM. RTS., *THAILAND ANNUAL PRISON REPORT 2023* 17 (2023), <https://www.fidh.org/IMG/pdf/thailandprison804a.pdf>.

109. *See Poll: Majority Want to Keep Death Sentence*, *BANGKOK POST* (June 23, 2018), <https://www.bangkokpost.com/thailand/general/1491050/poll-majority-back-death-sentence>; *see also Polls Point to Strong Backing Among Thais for Death Penalty*, *THE NATION THAI* (June 20, 2018), <https://www.nationthailand.com/in-focus/30348235> (summarizing four unscientific online polls with similar results).

110. In 2018, Thailand expanded the number of capital crimes to sixty-three, which is eight more than a few years prior. INT'L FED. FOR HUM. RTS. & UNION FOR C.L., 39TH SESSION OF THE WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW 2 (2021) [https://www.fidh.org/IMG/pdf/fidh\\_ucl\\_upr\\_thailand\\_march\\_2021.pdf](https://www.fidh.org/IMG/pdf/fidh_ucl_upr_thailand_march_2021.pdf). To be fair, the overall trends are uncertain: Thailand narrowed the categories of drug offenses eligible for the death penalty in 2014. *See* Giada Girelli, 'Alternative Facts': *Public Opinion Surveys on the Death Penalty for Drug Offenses in Selected Asian Countries*, 92 INT'L J. DRUG POL'Y 1, 2 (2021). And in response to international pressure, the nation also abolished the death penalty for minors in 2012. *See* Natthanun Kunnamas, *Normative Power Europe, ASEAN and Thailand*, 17 INT'L ECONS. & ECON. POL'Y 765, 775 (2020).

111. Andrew Weichel, *Death Penalty Concerns Delay Thailand Extradition for Man Held 1,200 Days in B.C. Custody*, *CTV NEWS* (July 8, 2022), <https://bc.ctvnews.ca/death-penalty-concerns-delay-thailand-extradition-for-man-held-1-200-days-in-b-c-custody-1.5980115>.

112. Shihar Aneez & Ranga Sirilal, *Sri Lanka Reinstates Death Penalty for Drug Crimes Ahead of Polls*, *REUTERS* (June 26, 2019), <https://www.reuters.com/article/us-sri-lanka-drugs/sri-lanka-reinstates-death-penalty-for-drug-crimes-ahead-of-polls-idUSKCN1TR0EA>.

113. Resolution on the Situation in Sri Lanka, in Particular the Arrests under the Prevention of Terrorism Act, EUR. PARL. DOC. P9\_TA(2021)0290 (2021).

vulnerability. Given future population trends, there is reason to doubt that Europe will continue to exert its imperialistic role as the world's economic and moral hegemon over such remote nations as Sri Lanka.

### 3. Partly retentionist civilizations.

Next are two civilizations where capital punishment is seldom imposed, but where there is considerable evidence of persisting support for the death penalty: the West (defined as Europe, North America, Australia, and New Zealand) and sub-Saharan Africa.

In the West, all nations except America are completely abolitionist, but America, given its extraordinary global power—which in the realm of ideas and culture even exceeds that of economics—is a major exception and will be considered more completely in the next part of this section.

Huntington divides the African continent into the northern countries (plus Eritrea, and Somalia), which are collapsed into the Islamic civilization, and the sub-Saharan remainder, which forms a region that is extraordinarily diverse and could be further subdivided. But for present purposes, it is worth noting that what Huntington calls the African civilization includes four of the ten countries expected to be the most populous in 2100 (Nigeria, Congo, Ethiopia, and Tanzania).<sup>114</sup> By contrast, not a single nation in Europe is expected to be in the top twenty.

Amnesty International has at times touted developments in Africa as evidence of a globally dying death penalty.<sup>115</sup> And it is accurate to say that executions have become rare in Africa. In 2021, only two nations in this civilization executed anyone: South Sudan (nine), and Botswana (three).<sup>116</sup> In 2022, South Sudan executed five people and Botswana none.<sup>117</sup> In the four largest countries listed above, along with South Africa, Uganda, and Kenya, there has not been a single execution for over a decade. Most African countries have, nevertheless, preserved capital punishment as a possible punishment, and death sentences are soaring in recent years. The number of people on death row in Congo quadrupled in 2021, to eighty-one.<sup>118</sup> There are over 3,000 people on

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114. See Iman Ghosh, *The World Population in 2100, by Country*, VISUAL CAPITALIST (Sept. 2, 2020), <https://www.visualcapitalist.com/world-population-2100-country/>.

115. See, e.g., AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2020, 8 (2021), <https://www.amnesty.org/en/documents/act50/3760/2021/en/> (citing abolition in Chad as "confirm[ation of] trends from recent years which saw the world make continuous progress towards abolition of the death penalty").

116. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2021, 10 (2022), <https://www.amnesty.org/en/documents/act50/5418/2022/en/>.

117. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2022, 11 (2023), <https://www.amnesty.org/en/documents/act50/6548/2023/en/>.

118. Nabeel Biajo, *Abolish Death Penalty, Africa: Amnesty Report*, VOA AFR. (May 25, 2022), <https://www.voaafrica.com/a/demolish-death-penalty-africa-amnesty-report/6589005.html>.

death row in Nigeria,<sup>119</sup> more than in the United States.<sup>120</sup> In a news story that received considerable attention last year, it was reported that an American couple faced the death penalty in Uganda, in connection with a charge that they had tortured their ten-year-old foster child.<sup>121</sup>

So what is the future of capital punishment in the African civilization? The answer turns on whether actual executions or judicial death sentences are a better predictor. If Fukuyama is correct, the former better reflects Africa's gradual rejection of capital punishment. If Huntington is correct, the swelling numbers on death row suggest that the African civilization has a fundamentally different attitude towards capital punishment than that held by many Western intellectuals. In recent years, Western Europe, acting through government actors and NGOs, has been able to pressure less wealthy parts of the world to accede to demands that capital punishment be abolished. Yet, as already suggested, global power is shifting and European influence may be waning. Furthermore, in at least one area of acute moral concern to many in the West, LGBTQ+ rights, several African leaders have been unapologetically prepared to go their way, even at the risk of offending Western elites.<sup>122</sup> Whether this portends a willingness to chart their own course on capital punishment remains to be seen.

#### 4. Retentionist civilizations.

We finally come to three civilizations that regularly impose the death sentence and exact the penalty: Japanese, Islamic, and Sinic.

Except for a brief moratorium in 2020, executions are a regular occurrence in Japan:<sup>123</sup>

Year	Number of executions
2012	7
2013	8
2014	3
2015	3

119. Victor Ojeme, *Nigeria Harbours 53% of Death Row Inmates in Sub-Saharan Africa*, VANGUARD (Oct. 11, 2022), <https://www.vanguardngr.com/2022/10/nigeria-harbours-53-of-death-row-inmates-in-sub-saharan-africa/>.

120. See *Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> (last visited Jan. 28, 2023) (showing 2,331 death row inmates as of January 1, 2023).

121. Meredith Deliso, Bea Wangonde & Aicha El Hammar Castano, *American Couple Could Face Death Penalty for Allegedly Torturing Foster Child in Uganda*, ABC NEWS (Dec. 23, 2022), <https://abcnews.go.com/International/american-couple-face-death-penalty-allegedly-torturing-foster/story?id=95752653>.

122. Afr. Diaspora News Channel, *CNN Attempted to Corner President of Kenya but Regretted It After His Response*, YOUTUBE (Sept. 14, 2022), <https://www.youtube.com/watch?v=tAYM89fDec&t=183s> (interview of recently elected Kenyan president defending his country's policy).

123. See *Capital Punishment in Japan*, NIPPON (July 27, 2022), <https://www.nippon.com/en/features/h00239/>. The numbers in 2012, 2013, and 2018 involved the execution of members of the Aum Shinrikyo cult, which perpetrated a series of sarin-gas attacks that killed many people.

2016	3
2017	4
2018	15
2019	3
2020	0
2021	3
2022	1
2023	0

The numbers are small, but Japan records roughly only 300 homicides year.<sup>124</sup> With an average of about three executions per year (excluding outliers that push that number even higher), Japan registers one execution for every 100 homicides. To put this in perspective, the state of Texas averaged about eight executions per year<sup>125</sup> over the past decade, with about 2,000 homicides,<sup>126</sup> for an execution-per-homicide rate of 1 in 250, or less than half that of Japan. Indeed, if Japan were a state in the United States, it would probably have the highest homicide-adjusted execution rate.

Japan poses a problem for those who claim that the “civilized” world has abandoned capital punishment. It is a wealthy nation with a rich culture—it boasts 413 Michelin-starred restaurants (second only to France),<sup>127</sup> which very imperfectly may be taken as an approximation of cultural sophistication. And yet Japan is unabashedly and unapologetically retentionist.

The Islamic world is overwhelmingly retentionist. Here is data from 2018–2021:<sup>128</sup>

Country	Executions/yr	Homicides/yr	Execution/hom’rate
Iran	314+	1,795	0.17
Saudi Arabia	250	285	0.88
Egypt	83+	2,207	0.04

124. *Intentional Homicides (per 100,000 People) – Japan*, THE WORLD BANK, <https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?end=2020&locations=JP&start=1990&view=chart> (last visited Jan. 28, 2023) (reproducing UN data showing an intentional homicide rate below 0.3 per 100,000).

125. *See Executions by State and Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year> (last visited Jan. 28, 2023). Texas also has eight executions scheduled for 2023. *See Texas Death Penalty Facts*, TEX. COAL. TO ABOLISH THE DEATH PENALTY, <https://tcadp.org/get-informed/texas-death-penalty-facts/> (last visited Jan. 28, 2023).

126. *Total Number of Homicides in the United States in 2021, by State*, STATISTA (Oct. 14, 2022), <https://www.statista.com/statistics/195331/number-of-murders-in-the-us-by-state/>.

127. *Countries with the Highest Density of Michelin-Starred Restaurants*, CHEF’S PENCIL (Sept. 22, 2021), <https://www.chefspencil.com/density-of-michelin-starred-restaurants/>. Texas has not had a single Michelin-starred restaurant. Brian Reinhart, *Don’t Get Too Eager for Michelin Stars to Arrive in Texas*, D MAG. (Aug. 1, 2022), <https://www.dmagazine.com/food-drink/2022/08/dont-get-too-eager-for-michelin-stars-in-texas/>.

128. *Executions Around the World*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international/executions-around-the-world> (last visited Jan. 28, 2023).

Syria	24	149	0.16
Somalia	21	?	?

Many people are executed in all of the countries above for crimes other than homicide, which can include apostasy. The most populous nations in the Islamic world, Pakistan and Indonesia, have not executed anyone in five years, but nonetheless have vast death rows, and continue to impose many death sentences.<sup>129</sup> There was some optimism twenty years ago that pockets of the Islamic civilization were trending in an abolitionist direction, but events in recent years have dashed these hopes. Jordan presents a case study in this regard. In 2005, King Abdullah II announced a death penalty moratorium, eliciting praise and hopeful murmurings that this was a harbinger of broader developments in the Muslim world.<sup>130</sup> In 2014, however, the country executed eleven persons.<sup>131</sup> Fifteen more were executed on one day in 2017,<sup>132</sup> and executions have continued through the present, although at a somewhat declining rate.<sup>133</sup>

The Islamic world, with a birth rate nearly twice that of Europe,<sup>134</sup> has notably preserved its independence from many Western trends. The foundational texts of Islam have generally been construed to be consistent with the imposition of capital punishment, and at this point there is little reason to predict a convergence with Western attitudes.<sup>135</sup>

129. Muhammad Reza, Anadolu Agency, *The Use of Capital Punishment in Pakistan*, INT'L FED. OF HUM. RTS. (Oct. 10, 2022), <https://www.fidh.org/en/region/asia/pakistan/World-Day-Against-Death-Penalty-capital-punishment-Pakistan>; Anugerah Rizki Akbari, *Finding Certainty in an Uncertain Indonesian Death Penalty*, THE JAKARTA POST (Aug. 31, 2022), <https://www.thejakartapost.com/opinion/2022/08/30/finding-certainty-in-an-uncertain-indonesian-death-penalty.html> (noting that, despite a moratorium on executions, Indonesia has seen an “uptick in death row sentences”).

130. *Jordan Resumes Death Penalty, Executes 11*, HUM. RTS. WATCH (Dec. 21, 2014), <https://www.hrw.org/news/2014/12/21/jordan-resumes-death-penalty-executes-11>.

131. *Id.*

132. Mariano Castillo & Jomana Karadsheh, *Jordan Executes 15 Inmates, Including 10 Convicted of Terrorism*, CNN (Mar. 4, 2017), <https://www.cnn.com/2017/03/04/middleeast/jordan-inmates-execution/index.html>.

133. Although Amnesty International reported no executions in 2021, a Jordanian man was hanged that year for burning his wife alive. Khitam Al Amir, *Jordanian Executed by Hanging for Burning Wife to Death*, GULF NEWS (Aug. 4, 2021), <https://gulfnews.com/world/mena/jordanian-executed-by-hanging-for-burning-wife-to-death-1.81303112>.

134. *Compare Fertility Rate, Total (Births per Woman) - Middle East & North Africa*, THE WORLD BANK, <https://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=ZQ> (last visited Jan. 21, 2023) (2.7 births per woman in 2020), *with Fertility Rate, Total (Births per Woman) - European Union*, THE WORLD BANK, <https://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=EU> (last visited Oct. 17, 2023) (1.5 births per woman in 2020).

135. The Koranic teaching is complex, but even an observer hopeful of a movement in an abolitionist direction concedes that “there is some basis for the claim that capital punishment is part of Islamic law.” William A. Schabas, *Islam and the Death Penalty*, 9 WM & MARY BILL RTS. J. 223, 234 (2000).



The largest country in the Sinic civilization is China—a country whose use of capital punishment is at once clear and enshrouded in mystery. It is clear that death sentences are imposed on a wide range of crimes, including murder and drug trafficking. What is unclear is the exact number of executions. Amnesty International concludes that “thousands” of executions occurred in 2021. A recent despairing United Nations report observed that China had completely rebuffed recommendations to alter its death penalty practices.<sup>136</sup>

Other countries in the Sinic civilization include South Korea, which has abolished the death penalty, Taiwan, in which the death penalty exists but is rarely applied, and North Korea, about which no commentary is needed. Most interesting is Singapore, which is often ranked among the world’s most livable countries, with a homicide rate less than one-tenth that of the United States. From 2013 to 2021, the number of executions ranged from zero to thirteen per year. There were, however, no executions at all in 2020 and 2021, prompting optimism that Singapore had drifted into the abolitionist camp.

Then, in 2022, Singapore executed eleven people (all for drug-related offenses). In 2023, another five people were executed.<sup>137</sup>

Over the 2014 to 2023 period, Singapore executed a total of forty-one people.<sup>138</sup> Estimating the total number of homicides in this period at 100, the execution per homicide rate in Singapore is .41, higher than every country in the Islamic world except Saudi Arabia.<sup>139</sup> Like Japan, Singapore is undeniably civilized (an astonishing forty-nine Michelin star restaurants for a population of just five million, the seventh highest ratio in the world, ahead of Italy, Spain, Germany, and the United States).<sup>140</sup> It is one thing to mock Texas and Florida as benighted in their retention of capital punishment, but what can account for the convenient disregard of Japan and Singapore when pronouncing capital punishment inconsistent with civilization? Is it ignorance—or chauvinism?

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136. THE RTS. PRAC., UN UNIVERSAL PERIODIC REVIEW OF CHINA MID-TERM REPORT 3 (Nov. 2021) [https://www.ohchr.org/sites/default/files/2021-11/TheRightsPractice\\_UPR\\_of\\_China\\_Mid-term\\_Report\\_November2021.pdf](https://www.ohchr.org/sites/default/files/2021-11/TheRightsPractice_UPR_of_China_Mid-term_Report_November2021.pdf) (“China did not support, or accept, any recommendations on the death penalty made at the last UPR.”).

137. *Capital Punishment in Singapore*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Capital\\_punishment\\_in\\_Singapore](https://en.wikipedia.org/wiki/Capital_punishment_in_Singapore) (last visited Feb. 2, 2024); see also AMNESTY INT’L, *supra* note 117, at 11, 14.

138. *Capital Punishment in Singapore*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Capital\\_punishment\\_in\\_Singapore](https://en.wikipedia.org/wiki/Capital_punishment_in_Singapore) (last visited Feb. 2, 2024).

139. Given Singapore’s population of five million, and estimating the homicide rate over the decade at 0.2/100,000, there have been roughly 100 homicides over the previous decade. *List of Countries by Intentional Homicide Rate*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_intentional\\_homicide\\_rate](https://en.wikipedia.org/wiki/List_of_countries_by_intentional_homicide_rate) (last visited Feb. 2, 2024). In 2022, for example, there were seven homicides. *Singapore Murder/ Homicide Rate 1990–2024*, MACROTRENDS, <https://www.macrotrends.net/countries/SGP/singapore/murder-homicide-rate#:~:text=Singapore%20murder%2Fhomicide%20rate%20for,a%2018.87%25%20decline%20from%202017> (last visited Feb. 2, 2024).

140. *Countries with the Highest Density of Michelin-Starred Restaurants*, *supra* note 127.

### B. *Clinging in America?*

There was a striking moment at the Supreme Court's oral argument in the case involving the death sentence of the surviving Boston Marathon bomber, Dzhokhar Tsarnaev. Justice Amy Coney Barrett asked the Solicitor General to explain why the Department of Justice was seeking to reinstate the death sentence, which had been overturned by the Court of Appeals, when President Biden had announced that he would not pursue execution orders against any inmate on death row. As Justice Barrett observed, if the government prevailed, Tsarnaev would be "relegated to living under a death sentence that the government doesn't plan to carry out . . ."<sup>141</sup> The government lawyer responded that the "sound judgment of [the jury] . . . should be respected."<sup>142</sup> This was, however, a disingenuous response. To respect the "sound judgment of [the jury]" would mean to seek to impose the judgment they imposed: death. The jurors in the Tsarnaev case agonized over the fate of the defendant, as they were compelled to do by the government. The government is now saying that it "respect[s]" what they decided but will not abide by it.<sup>143</sup> This is a strange definition of "respect."

President Biden is navigating a perilous political situation. He is the first presidential candidate of a major party to campaign on a promise to abolish capital punishment.<sup>144</sup> To this end, he has announced a moratorium on all executions.<sup>145</sup> The Innocence Project has started a petition urging President Biden to commute all federal death sentences,<sup>146</sup> as, for example, Governor

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141. Kevin Breuninger, *Supreme Court Hears Death Penalty Arguments for Boston Marathon Bomber Dzhokhar Tsarnaev*, CNBC (Oct. 13, 2021), <https://www.cnbc.com/2021/10/13/boston-marathon-bomber-supreme-court-to-consider-death-sentence-for-dzhokhar-tsarnaev.html#:~:text=%E2%80%9Cyou%20win%20presumably%20that,the%20point%2C%E2%80%9D%20Barrett%20said>.

142. Tyler Olson & Bill Mears, *Boston Bomber: Barrett Asks DOJ Lawyer Why Biden Admin Wants to Reinstate Death Sentence Amid Execution Pause*, FOX NEWS (Oct. 13, 2021), <https://www.foxnews.com/politics/barrett-doj-lawyer-execution-moratorium-boston-bomber-supreme-court>.

143. Transcript of Oral Argument at 54–55, *United States v. Tsarnaev*, 595 U.S. 302 (2022) (No. 20–443), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/20-443\\_086c.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-443_086c.pdf). The government's lawyer suggested that the administration remains open to the possibility of executing people, if it could ever figure out an acceptable protocol. Attorney General Merrick Garland had earlier repudiated the Trump administration's use of a single drug, pentobarbital. The Justice Department subsequently solicited public comment on "the risk of pain and suffering associated with [that drug]." Request for Information Regarding the Use of Pentobarbital in Federal Executions, 87 Fed. Reg. 58529, 58529 (Sept. 27, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-09-27/pdf/2022-20886.pdf>. Two years later, it has yet to identify what, if any, its plan for an execution protocol would be.

144. Michael Tarm & Alanna Durkin Richer, *Explainer: Biden Inaction, Mixed Signals on Death Penalty*, AP NEWS (Jan. 18, 2023), <https://apnews.com/article/biden-legal-proceedings-homicide-us-department-of-justice-merrick-garland-b7d8fae2f3ba2fcf1157b7c4dd5fd71>.

145. *Id.*

146. Petition, *Urge Pres. Biden to Commute the Federal Death Row*, INNOCENCE PROJECT, <https://innocenceproject.org/petitions/urge-pres-biden-to-commute-the-federal-death-row/> (last visited Feb. 2, 2024).

Newsom did for the hundreds of inmates on California's death row.<sup>147</sup> This could be understood as part of a top-down, elite-driven abolition of capital punishment, which Professors Carol and Jordan Steiker advocated in *Courting Death: The Supreme Court and Capital Punishment* (2016).<sup>148</sup> The Steikers, while skeptical that many Americans will undergo a change of heart on the issue of capital punishment, nonetheless envision a straightforward path to abolition—from the Supreme Court.<sup>149</sup>

Such a top-down process worked with respect to capital punishment in Western Europe. After Germany abolished capital punishment in 1947, in a stunning development orchestrated by political elites, popular efforts arose to re-introduce capital punishment. Justice Minister Thomas Dehler was forthright and unapologetic that he was imposing his abolitionist views on a public that did not share his views: "I say in all clarity: I do not care about the 'people's conviction', that is, the opinion of the man on the street."<sup>150</sup> At the time, polls suggested that seventy-four percent of Germans supported capital punishment for crimes involving murder.<sup>151</sup> Dehler discounted these polls, observing that those who favored the death penalty did so because of "genetically inherited" dispositions. Likewise, in France, several politicians outspokenly promoted the abolitionist cause, despite the absence of any popular support, and they prevailed in 1981.<sup>152</sup>

American political institutions are more democratic than those of Western Europe, and robust federalism has insulated populist enclaves from elite pressure.<sup>153</sup> Nonetheless, the legalization of same-sex marriage suggests a plan for the gradual—and then sudden—abolition of capital punishment. In that context, some politicians announced their support for same-sex marriage; a scattering of state supreme courts endorsed the idea; national support grew; and then a blockbuster Supreme Court decision relegated opposition to the dustbin

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147. Eric Westervelt, *California Says It Will Dismantle Death Row. The Move Brings Cheers and Anger*, NPR (Jan. 13, 2023), <https://www.npr.org/2023/01/13/1148846720/california-says-it-will-dismantle-death-row-the-move-brings-cheers-and-anger>.

148. CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016).

149. *Id.* at 256 ("[N]ationwide abolition cannot reasonably be expected through legislative means, either on the state or federal level") and 271–85 (proposing a "blueprint for constitutional abolition" that focuses on the United States Supreme Court holding capital punishment to be unconstitutional under the Eighth Amendment).

150. Hammel, *supra* note 7, at 189.

151. *Id.* at 188.

152. See Mugambi Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, 71 AM. J. COMPAR. L. 46 (2023); see also Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT'L L. 273, 283 n.45 (1993) (noting that the French representative to the United Nations supported adding abolitionist language to the Universal Declaration of Human Rights as early as 1948).

153. For a thoughtful discussion of this hypothesis with respect to the politics of the death penalty, see Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 114–18 (2002).

of history.<sup>154</sup> Within a decade, polls went from a majority opposed to same-sex marriage to over seventy percent of the population in support.<sup>155</sup>

It is possible that elite pressure will, similarly, effect a change in popular attitudes towards the death penalty. We are, in this view, in the midst of the final phase of death penalty abolition in America. The most important takeaway from the Tsarnaev case is that the Biden administration will not seek to enforce the death sentence on one of the most detested murderers in recent American history. And elite opinion is trickling down: governors, state supreme courts, and state legislatures have lent their support to the abolitionist crusade;<sup>156</sup> and popular support for the death penalty is declining.<sup>157</sup>

Nonetheless, the recent American experience with capital punishment is amenable to competing interpretations. Those doubtful that elite pressure will result in durable change can present the facts thus: What is striking about the Biden administration's stance in the Tsarnaev case is not its stated opposition to capital punishment but its determination to preserve the sentence on appeal. It is this latter fact that has agitated death penalty abolitions and provoked criticism. Given his campaign promises, the President has disappointed many supporters by dodging the opportunity presented by the Tsarnaev case to emphatically reject capital punishment.<sup>158</sup> And President Biden has given no indication that he will fail to defend other death sentences on appeal.

Indeed, his Department of Justice announced its intention to pursue the death penalty against Sayfullo Saipov (who drove a pickup truck into a crowd in Manhattan in October 2017) and Robert Bowers (who killed eleven people at the Tree of Life Synagogue in Pittsburgh in 2018). Artfully or cynically, depending on one's perspective, the Department of Justice insisted that it is doing so because capital charges were originally filed under President Trump.<sup>159</sup>

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154. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

155. See Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), <https://news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx>.

156. States to recently abolish the death penalty include Virginia (2021, legislative); Colorado (2020, legislative); New Hampshire (2019, veto override); and Washington (2018, judicial decision). See *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>. See also *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity> (detailing legislative efforts to curtail or abolish the death penalty).

157. The Gallup poll, for instance, shows that support for the death penalty has declined from a peak of eighty percent in September 1994, to just fifty-five percent in October 2022. *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> (last visited Jan. 29, 2023).

158. See Erwin Chemerinsky, *Op-Ed: Biden's Death Penalty Hypocrisy*, L.A. TIMES (Oct. 16, 2021), <https://www.latimes.com/opinion/story/2021-10-16/joe-biden-death-penalty-hypocrisy-boston-bombing>.

159. See Benjamin Weiser, *Suspect in Bike Path Killing Faces First Death Penalty Trial Under Biden*, N.Y. TIMES (Jan. 7, 2023), <https://www.nytimes.com/2023/01/07/nyregion/garland-biden-saipov-death-penalty.html>. The jury was unable to unanimously agree on a death sentence for Saipov and he was sentenced to life without parole. U.S. Att'y's Off., S. Dist. N.Y., *Sayfullo Saipov to Be Sentenced to Life in Prison for 2017 Truck Attack for ISIS*, DEP'T JUST. (Mar. 13, 2023), <https://www.justice.gov/usao-sdny/pr/sayfullo-saipov-be-sentenced-life-prison-2017-truck-attack-isis>. The jury sentenced Bowers to death. Off. of Pub. Affs., *Jury Recommends Sentence of Death*

This latter claim strains the credulity of even the most credulous observer: prosecutors regularly file capital charges, before eventually agreeing to seek only a life without parole sentence. The Department of Justice could have done so here. In fact, this is exactly what it has done in another, far lower-profile case.<sup>160</sup> Furthermore, while this Article was in the publication process, the Biden administration announced that it was seeking the death penalty for Payton Gendron, who killed ten black people in Buffalo, New York, in 2022.<sup>161</sup> The cover provided by the former president is absent. This is entirely and indisputably within the discretion of the Biden administration.

Notwithstanding its campaign promises, the Biden administration is apparently engaging in a political calculation. The president's advisors seem to have doubts that the American electorate will react positively to a complete renunciation of capital punishment. And there certainly is reason to have such doubts. The last time the death penalty was presented to electorates in the United States was in 2016. Three states—Oklahoma, Nebraska, and California—had referenda on capital punishment.<sup>162</sup> The voters in the first two states overwhelmingly voted to retain capital punishment, but remarkably, Californian voters also rejected a referendum to abolish capital punishment.<sup>163</sup> It is revealing that death penalty abolitionists have not been tempted to put the matter to the electorate in any state again.

Capital punishment has arguably evolved into a partisan issue, with leading national Democrats more transparent and vigorous in advancing the cause of abolition. Although Democratic politicians were once coy about their stance on the issue,<sup>164</sup> the most recent party platform states without equivocation

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for Pennsylvania Man Convicted of Tree of Life Synagogue Shooting, DEP'T JUST. (Aug. 2, 2023), <https://www.justice.gov/opa/pr/jury-recommends-sentence-death-pennsylvania-man-convicted-tree-life-synagogue-shooting>. The Bowers case is discussed *infra* at text accompanying note 191.

160. Victor Everette Silvers murdered his estranged wife, an Army sergeant, in 2018. State charged were filed (and culminated in a conviction and a life sentence) but federal charges were also filed in February 2021, with a death sentence sought. U.S. Att'y's Off., W. Dist. Ky., *Death Penalty Sought for Murder of Fort Campbell Soldier*, DEP'T JUST. (Feb. 25, 2021), <https://www.justice.gov/usao-wdky/pr/death-penalty-sought-murder-fort-campbell-soldier>. In April 2021, federal prosecutors announced that they had withdrawn the intent to seek the death penalty. Sen. Tom Cotton, *Cotton Demands Answers from DOJ About Reversal in Death Penalty Case*, TOM COTTON SEN. FOR ARK. (Apr. 15, 2022), <https://www.cotton.senate.gov/news/press-releases/cotton-demands-answers-from-doj-about-reversal-in-death-penalty-case>.

161. *U.S. Department of Justice Authorizes First Death Penalty Case for Payton Gendron*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/news/u-s-department-of-justice-authorizes-first-federal-death-penalty-case-for-payton-gendron-teen-who-killed-ten-black-people-in-2022>.

162. Aliyah Frumin, *Election 2016: Nebraska, Oklahoma Vote in Favor of Death Penalty*, NBC NEWS (Nov. 9, 2016), <https://www.nbcnews.com/storyline/2016-election-day/election-2016-nebraska-oklahoma-vote-favor-death-penalty-n681301>.

163. *Id.* Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM L. & CRIMINOLOGY 521, 530 (2017). Despite the claims of a dramatic shift in sensibilities, over the past decade, only four state legislatures (Maryland (2013), Colorado (2020), New Hampshire (2019), and Virginia (2021)) have enacted laws abolishing capital punishment.

164. President Barack Obama, for instance, described capital punishment as “troubling” in his second term, but his administration still pursued the death penalty for the most notorious criminals, like the Boston Marathon bomber. Maurice Chammah, *How Obama Disappointed on the*

the intention to end the death penalty in America.<sup>165</sup> Leading organs of thought have taken notice of the apparent fact that the death penalty has become a “red state” phenomenon.<sup>166</sup> Of the fourteen American states that have executed people over the past decade,<sup>167</sup> only three (Arizona, Georgia, and Virginia) cast their electoral votes for Joe Biden in 2020.<sup>168</sup> And only two of the states where the death penalty is illegal—North Dakota and West Virginia—cast their votes for Donald Trump.<sup>169</sup> The evidence of a partisan divide is also compelling at a more local level. When the Virginia legislature abolished the death penalty in 2021, the votes in the House of Delegates and the Senate were both on almost completely party lines.<sup>170</sup> As Democrats gain control of more state houses, one can thus expect even more progress in ending the death penalty in America.

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*Death Penalty*, THE MARSHALL PROJECT (Jan. 18, 2017), <https://www.themarshallproject.org/2017/01/18/how-obama-disappointed-on-the-death-penalty>. When Obama was a candidate in 2008, by contrast, he endorsed the death penalty for child rapists. *Obama's Fall from Favor*, DEUTSCHE WELLE (June 28, 2008), <https://www.dw.com/en/germans-disappointed-in-obamas-stance-on-death-penalty/a-3446397>. Similarly, candidate Bill Clinton took the significant step of returning to Arkansas to oversee an execution in person, despite opposition to the death penalty earlier in his career. See Alexander Nguyen, *Bill Clinton's Death Penalty Waffle*, AM. PROSPECT (July 2000), <https://www.encyclopedia.com/law/educational-magazines/bill-clintons-death-penalty-waffle>. These stances were, perhaps, in response to the failures of the previous Democratic standard-bearers. Hubert Humphrey, for instance, opposed the death penalty and was soundly defeated. John Wicklein, *Aspirants Differ on Death Penalty; Nixon, Urging Retention, Is Opposed by Humphrey*, in *Replies to Queries*, N.Y. TIMES (Apr. 10, 1960), <https://www.nytimes.com/1960/04/10/archives/aspirants-differ-on-death-penalty-nixon-urging-retention-is-opposed.html>; Paul C. Atkinson, *Hubert Humphrey and the Politics of Backlash*, HILL (Aug. 1, 2020), <https://thehill.com/opinion/civil-rights/510127-hubert-humphrey-and-the-politics-of-backlash/>. Michael Dukakis infamously said that he would oppose the death penalty even for the hypothetical rapist and murderer of his own wife. M.J. Stephey, *Top 10 Memorable Debate Moments*, TIME (Sept. 26, 2008), <https://content.time.com/time/specials/packages/completelist/0,29569,1844704,00.html>.

165. *Protecting Communities and Building Trust by Reforming Our Criminal Justice System*, DEMOCRATIC NAT'L COMM., <https://democrats.org/where-we-stand/party-platform/protecting-communities-and-building-trust-by-reforming-our-criminal-justice-system/> (last visited Feb. 19, 2023).

166. Philip Bump, *Executions Are Mostly a Red-State Phenomenon – Which Helps Explain Trump's Advocacy*, WASH. POST (Mar. 13, 2019), <https://www.washingtonpost.com/politics/2019/03/13/executions-are-mostly-red-state-phenomenon-which-helps-explain-trumps-advocacy/>.

167. These states are Alabama, Arkansas, Arizona, Florida, Georgia, Mississippi, Missouri, Ohio, Oklahoma, Nebraska, South Dakota, Tennessee, Texas, and Virginia. *Executions by State and Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year> (last visited Feb. 13, 2023).

168. *Presidential Results*, CNN, <https://www.cnn.com/election/2020/results/president> (last visited Feb. 4, 2023).

169. *Compare State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Feb. 4, 2023), with *Presidential Results*, *supra* note 168.

170. All twenty-six of the bill's sponsors in the House of Delegates were Democrats. *HB 2263*, PLURAL POL'Y, <https://openstates.org/va/bills/2021/HB2263/> (last visited Feb. 4, 2023). Only

Still, there are reasons to be skeptical. First, the death penalty has always been a partisan issue, and it is unclear that it divides the parties today in a sharper way than was the case decades ago. In the first Gallup poll to distinguish Republicans from Democrats, there was a twenty-two percent difference in death penalty support between Republicans and Democrats (ninety percent to sixty-eight percent).<sup>171</sup> In the most recent Pew poll, in 2021, the difference is thirty-one percent (seventy-seven percent to forty-six percent).<sup>172</sup> Over the course of decades, the difference had remained within a relatively narrow band, from fifteen percent to thirty-five percent. This is markedly closer than polls on abortion, where the difference between Republicans and Democrats on whether they self-identify as pro-life is sixty percent.<sup>173</sup>

Second, to the extent that capital punishment has become a partisan issue, it is more likely to remain alive as a political issue. The two national parties in the United States are almost in equipoise among the electorate (although not in the professoriate),<sup>174</sup> so the ascendancy of one of the parties in the executive, legislative, and judicial branches is unlikely to be stable. And despite the call for abolition by the national Democratic Party, local politicians in “purple” states tend to be less outspoken on the issue, as will be explored below. It suffices here to observe the nervous laughter of narrowly elected Arizona Governor Katie Hobbs, when pressed to clarify her stance on the issue.<sup>175</sup>

Third and most importantly, elite consensus on the death penalty is unrepresentative of the opinion of non-elites, even of those who self-identify as Democrats. In the most recent Gallup poll, forty-six percent of those who identify as Democrats or lean-Democrat support the death penalty. It is, by contrast, hard to identify even a handful of law professors in the entire country who support the death penalty.<sup>176</sup> Every top fourteen (T14) law school, as calculated by U.S. News, includes clinics, classes, or professors that pursue the

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three Republicans voted for the abolition bill in the House, and only one did so in the Senate. *Id.* By contrast, every Democrat in both houses voted for the bill. *Id.*

171. *Political Affiliation and the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/political-affiliation-and-the-death-penalty> (last visited Feb. 4, 2023).

172. PEW RSCH. CTR., MOST AMERICANS FAVOR THE DEATH PENALTY DESPITE CONCERNS ABOUT ITS ADMINISTRATION (June 2, 2021), <https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/>.

173. *Abortion Trends by Party Identification*, GALLUP, <https://news.gallup.com/poll/246278/abortion-trends-party.aspx> (last visited Feb. 4, 2023).

174. See, e.g., Meimei Xu, *More Than 80% of Surveyed Harvard Faculty Identify as Liberal*, HARV. CRIMSON (July 13, 2022), <https://www.thecrimson.com/article/2022/7/13/faculty-survey-political-leaning> (less than two percent of Harvard professors identify as conservative).

175. Citizen Free Press (@CitizenFreePres), X (Jan. 31, 2023, 10:15 AM), <https://twitter.com/CitizenFreePres/status/1620440544223830017>.

176. For many years the most prominent spokesman of the retentionist position was Robert Blecker, who recently retired from his position at New York Law School. Paul Cassell is the only current law professor at a top fifty law school who has ever written approvingly of the death penalty, but that was only in a short essay over fifteen years ago. Paul Cassell, *In Defense of the Death Penalty*, 42 PROSECUTOR (Number 4) 10 (2008).

abolitionist cause.<sup>177</sup> There is not a single pro-death penalty professor on any T14 law school faculty, nor has the flagship law review of any T14 school published an article that advocates on behalf of the death penalty in decades;

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177. Yale: <https://yaleconnect.yale.edu/cap/home/> (a clinic in which “[s]tudents gain experience in capital defense and advocacy work while contributing to the anti-death penalty movement”); Stanford: Randee Fenner, *Faculty Research Spotlight: Race and the Death Penalty*, STAN. LAW. (June 17, 2020) <https://law.stanford.edu/stanford-lawyer/articles/faculty-research-spotlight-race-and-the-death-penalty/> (highlighting the work of a professor to abolish capital punishment); Chicago: a professor “was a leader in the movement to end capital punishment in Illinois,” Pozen Fam. Ctr. Hum. Rts., *Alice Kim*, UNIV. OF CHI., <https://humanrights.uchicago.edu/people/alice-kim>; Columbia: A course on the death penalty is taught by a professor, Jeffrey Fagan, who has written several articles critical of capital punishment, *Advanced Criminal Law: The Death Penalty*, COLUM. L. SCH. <https://www.law.columbia.edu/academics/courses/32983> (last visited Feb. 2, 2024); Harvard: *Capital Punishment Clinic*, HARV. L. SCH. <https://hls.harvard.edu/clinics/externship-clinics/capital-punishment-clinic/#:~:text=The%20Capital%20Punishment%20Clinic%20offers,at%20capital%20punishment%20resource%20centers> (last visited Feb. 2, 2024); Penn: *Course Finder: Browse Courses*, PENN CAREY L. <https://goat.law.upenn.edu/cf/coursefinder/course-details/?course=externship-federal-defender-death-penalty&sec=LAW%20826001&term=2022A&page=1> (last visited Feb. 2, 2024) (a clinic for capital defendants); NYU: *Equal Justice and Defender Externship*, N.Y.U. L., <https://www.law.nyu.edu/academics/clinics/semester/equaljustice> (last visited Feb. 2, 2024); University of Virginia: Eric Williamson, *As He Rose in His Career, Bonnie Made Case Against Capital Punishment*, UNIV. VA. SCH. L. (Apr. 1, 2021), <https://www.law.virginia.edu/news/202104/he-rose-his-career-bonnie-made-case-against-capital-punishment> (faculty profile celebrating work for capital defendants); Jennifer L. Givens, UNIV. VA. SCH. L. <https://www.law.virginia.edu/faculty/profile/jlg2ac/2579841> (last visited Feb. 2, 2024) (director of the “Innocence Project Clinic” worked for capital defendants); Berkeley: *Death Penalty Clinic*, BERKELEY L., <https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/> (last visited Feb. 2, 2024) (clinic for capital defendants); Michigan: *Advisory Board*, NATIONAL REGISTRY OF EXONERATIONS <https://www.law.umich.edu/special/exoneration/Pages/Staff.aspx> (last visited Feb. 2, 2024); Samuel R. Gross, MICH. L., <https://michigan.law.umich.edu/faculty-and-scholarship/our-faculty/samuel-r-gross> (last visited Feb. 2, 2024); Duke: *Wrongful Convictions Clinic*, DUKE L. <https://law.duke.edu/wrongfulconvictions/> (last visited Feb. 2, 2024) (both faculty advisors signed a letter calling for a commutation of everyone on death row); Brandon L. Garrett, DUKE L., <https://law.duke.edu/fac/garrett/> (last visited Feb. 2, 2024) (faculty profile noting book advocating abolitionism); Cornell: *Death Penalty Project*, CORNELL L. SCH., <https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/death-penalty-project/> (last visited Feb. 2, 2024) (although it proclaims “no official position on the wisdom or desirability of the death penalty,” the program is devoted to “assist[ing] in the representation of capital defendants,” and its directors are all opponents of the penalty); Northwestern: Stephanie Kulke, *Northwestern’s Role in Overturning the Illinois Death Penalty Observed*, NORTHWESTERN NOW (Apr. 12, 2021), <https://news.northwestern.edu/stories/2021/04/northwesterns-role-in-overturning-the-illinois-death-penalty-observed/> (an event celebrating the school’s contribution to the abolition of the penalty in Illinois); Georgetown: *Cliff Sloan*, GEO. L., <https://www.law.georgetown.edu/faculty/clifford-sloan/> (last visited Feb. 2, 2024) (faculty profile noting abolitionist work); Diann Rust-Tierney Joins Georgetown Law as the Drinan Chair in Human Rights, GEO. L. (Sept. 7, 2021), <https://www.law.georgetown.edu/news/diann-rust-tierney-joins-georgetown-law-as-the-drinan-chair-in-human-rights/> (“[N]ational advocate for ending capital punishment Diann Rust-Tierney is joining Georgetown Law as the 2021–22 Robert F. Drinan, S.J., Chair in Human Rights.”).



articles critical of the death penalty are, however, generated unceasingly, and in the most nation's most prominent law journals.<sup>178</sup>

The persistence of support for capital punishment in the general public is all the more remarkable when viewed in light of the extreme discrepancy in resources available to the pro- and anti-death penalty camps. The total assets of the most prominent anti-death penalty think tank (the Equal Justice Institute)<sup>179</sup> is more than 100 times larger than that of its pro-death penalty analog (the Criminal Justice Foundation).<sup>180</sup> The status rewards in promoting death penalty abolition are equally lopsided. The most well-known abolitionists include Macarthur Genius Prize winner Bryan Stevenson<sup>181</sup> and the globally celebrated nun Helen Prejean.<sup>182</sup> The most prominent pro-death writer in the

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178. See, e.g., Terence Andrus, *Reflection on Andrus v. Texas*, 134 HARV. L. REV. F. 78 (2020) (reproducing the abolitionist rhetoric of a death row inmate); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) (calling for the abolition of the death penalty as a product of slavery); Judith Resnick, *(Un)Constitutional Punishments: Eight Amendment Silos, Penological Purposes, and People's "Ruin"*, 129 YALE L.J. F. 365, 410 (2020) ("[W]ere my view of the constitutional import of punishment law embraced . . . it would also make death a sanction beyond state power."); Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163 (2019) (criticizing the existing death penalty system as arbitrary and proposing centralized reforms).

179. *Equal Justice Initiative*, PROPUBLICA, <https://projects.propublica.org/nonprofits/organizations/631135091/202200109349300935/full> (last visited Feb. 19, 2023) (tax filing showing total assets of \$293,662,827 in 2020).

180. *Criminal Justice Legal Foundation*, PROPUBLICA, [https://projects.propublica.org/nonprofits/display\\_990/942798865/download990pdf\\_03\\_2022\\_prefixes\\_86-95%2F942798865\\_202107\\_990\\_2022030219676440](https://projects.propublica.org/nonprofits/display_990/942798865/download990pdf_03_2022_prefixes_86-95%2F942798865_202107_990_2022030219676440) (last visited Feb. 19, 2023) (tax form declaring total assets of \$2,294,749 in 2020).

181. Stevenson's advocacy has earned him numerous awards, including the ABA's Thurgood Marshall Award, the NAACP William Ming Advocacy Award, the ACLU National Medal of Liberty Award, National Lawyers Guild Lawyer for the People Award, the Stanford Law School National Public Service Award, and the Gruber Foundation International Justice Prize (which is bundled with a half-million-dollar check). *Curriculum Vitae, Bryan A. Stevenson* (retrieved Feb. 19, 2023), <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=20315>. He has also received honorary degrees from, among many others: Princeton University; Yale University; Georgetown University School of Law; Loyola University; Southern Methodist University; City University of New York School of Law; the University of Pennsylvania; and the John Marshall Law School. *Id.*

182. Prejean received DePaul University's "highest award" in 2022. *Sister Helen Prejean Awarded St. Vincent de Paul Award by DePaul University*, DEPAUL UNIV. NEWSROOM (Sept. 27, 2022) <https://resources.depaul.edu/newsroom/news/press-releases/Pages/sister-helen-st-vincent-de-paul-award.aspx#:~:text=Sister%20Helen%20Prejean%2C%20CSJ%2C%20is,singer%20Mahalia%20Jackson%20>. She was nominated for a Nobel Peace Prize in 1999. *Catholic Opponent of Death Penalty Nominated for Nobel Prize by Quakers*, TAMPA BAY TIMES (Feb. 27, 1999), <https://www.tampabay.com/archive/1999/02/27/catholic-opponent-of-death-penalty-nominated-for-nobel-prize-by-quakers/>. On her website, Prejean lists numerous other awards, including: a Lifetime Achievement Award from the National Coalition to Abolish the Death Penalty; the Gaudium et Spes Award from Fordham University; the Champion of Liberty Award from the National Association of Criminal Defense Lawyers; and the National Civil Liberties Award from the ACLU and a Commendation for Humanitarian Efforts from the State of Mississippi. *Sister*

legal academy today is Robert Blecker, who recently retired from his position at a law school outside the top 100.<sup>183</sup> The most famous American scholars who wrote in support of the death penalty (Walter Berns and Ernest van den Haag)<sup>184</sup> died over a decade ago.

From the fact that elite opinion is robust and unified, one might conclude that the abolitionist cause is destined to triumph. Yet elite opinion has been robust and unified for decades, which makes the resilience of the death penalty all the more noteworthy. The next part will explore that resilience in several high-profile murder cases over the past decade.

### C. *Murder Most Foul*

Polling data on capital punishment is notoriously manipulable. The question, “Are you in favor of the death penalty for a person convicted of murder?” explores a congeries of complex moral issues, and in such a detached and abstract way, that it has the approximate validity, as a test of real-world attitudes, of the runaway trolley car problem perennially deployed to torture freshman philosophy students.<sup>185</sup> When polling organizations probe with specific hypotheticals, more nuanced explorations of the issue are possible. In 1996, for example, the Princeton Survey Research Associates/Newsweek first asked whether respondents favored the death penalty. They found that sixty-six percent did.<sup>186</sup> When, however, the pollsters added various mitigating circumstances, that percentage dropped, in some circumstances all the way down to twenty-five percent. That same year, three academics, Alexis Durham, H. Preston Elrod, and Patrick Kinkade, pursued an even more elaborate survey that included thirty-four scenarios, with layered mitigating and aggravating

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*Helen Prejean – Honorary Degrees and Awards*, MINISTRY AGAINST THE DEATH PENALTY, <https://www.sisterhelen.org/honors-awards/> (last visited Feb. 19, 2023). She also lists many honorary degrees, notably from: the University of North Carolina, Chapel Hill, Drury University, Marquette University, Loyola University, City University of New York, and many more obscure schools. *Id.*

183. Robert Blecker, N.Y. L. SCH., <https://www.nyls.edu/faculty/robert-blecker/> (last visited Feb. 19, 2023); Robert Blecker, THE FEDERALIST SOC’Y, <https://fedsoc.org/contributors/robert-blecker/> (last visited Feb. 19, 2023) (“Professor Blecker still espouses his carefully considered, yet almost universally unpalatable position in the academic community. . . . [H]e was also the lone American advocate at an international conference in Geneva on the death penalty sponsored by Duke University Law School.”). See also *New York Law School*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools/new-york-law-school-03109#:~:text=New%20York%20Law%20School%202023,%20in%20Part%2Dtime%20Law> (last visited Feb. 19, 2023) (ranking Blecker’s institution 129th among American law schools).

184. Berns, affiliated at various times with Cornell, Georgetown, and the American Enterprise Institute, was the author of *For Capital Punishment* (2005). Van Den Haag, affiliated with Fordham University and the National Review, was the co-author of *The Death Penalty: A Debate* (1983).

185. See Adrian Rennix & Nathan J. Robinson, *The Trolley Problem Will Tell You Nothing Useful About Morality*, CURRENT AFFS. (Nov. 3, 2017), <https://www.currentaffairs.org/2017/11/the-trolley-problem-will-tell-you-nothing-useful-about-morality>.

186. Francis T. Cullen, Bonnie S. Fisher, & Brandon K. Applegate, *Public Opinion about Punishment and Corrections*, 27 CRIME & JUST. 1, 16 (2000).

scenarios.<sup>187</sup> The percentage of respondents voting for the death penalty ranged from a low of 29.4% to a high of 93.2%. Remarkably, across all scenarios, only 5.2% never chose the death penalty.

Murder is always an awful crime, but some murders most excite our indignation and horror. Shakespeare and Bob Dylan to the contrary,<sup>188</sup> murders most foul do not necessarily involve kings and presidents. The victims can include ordinary people—schoolchildren, churchgoers, spectators at parades and sporting events—slaughtered in acts of shocking malice. Although it is impossible to specify with objective criteria the most heinous murders, it is nonetheless indisputable that certain murders are somehow set apart. When confronted in bloody detail with such crimes, a majority, and perhaps an overwhelming majority of Americans, continue to regard the death penalty as appropriate.

One can discount these murders as outliers, which fortunately they are. Yet perceptions of the criminal justice system are formed by the outlier cases that receive disproportionate publicity. The claim that the death penalty will fade away depends on the expectation that such murders will cease, for which there is no evidence, or that a generous impulse to forgive such murderers will eventually predominate, for which the evidence is at best equivocal.

The recent trial of Nikolas Cruz is illustrative of this equivocality. Cruz's massacre of fourteen children and three adults at Marjory Stoneman Douglas High School<sup>189</sup> was likely America's most notorious crime of 2018.<sup>190</sup> The trial, which was delayed because of COVID, concluded in late 2022. Cruz conceded guilt, and the only issue for jury deliberation was whether the death penalty was justified. The trial, despite its limited charter, was the predictable extravaganza, culminating in a sentence of life imprisonment.<sup>191</sup>

Those inclined to see in this trial the impending death of capital punishment can find evidence to support their view. First and foremost, the spectacle of a three-month jury selection process does not suggest that this is a country that can long persist in maintaining the "machinery of death." America is a wealthy country, but even wealthy countries operate with limited resources: if capital trials require empaneling 1,800 prospective jurors for a three-month trial on largely uncontested facts,<sup>192</sup> then the death penalty cannot long continue

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187. *Id.* (showing that, in the poll, twenty-six percent of respondents favored the death penalty if the perpetrator was "provoked to violence by the victim," while twenty-five percent supported it when the accused "was only an accomplice" to a killing).

188. Shakespeare, coining the phrase, referred to the murder of Hamlet's father, the King of Denmark. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5, l. 31 ("Murder most foul, as in the best it is . . ."). Bob Dylan's 2020 song *Murder Most Foul* refers to the murder of President John F. Kennedy. BOB DYLAN, *MURDER MOST FOUL* (Columbia Records 2020), <https://www.bobdylan.com/songs/murder-most-foul/>.

189. Mazzei & Bogel-Burroughs, *supra* note 57.

190. Google search traffic for "parkland shooting" in 2018 peaked at sixty percent of peak search frequency for "midterm results." *Compare*, GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=2008-01-13%202023-02-13&geo=US&q=parkland%20shooting,midterm%20results> (last visited Feb. 13, 2023).

191. Mazzei & Bogel-Burroughs, *supra* note 57.

192. Taylor Lang, *Full Recap: Jury Sworn in to Sentencing Trial for Parkland High School Shooter*, ABC 25 WPBF NEWS, <https://www.wpbfl.com/article/florida-parkland-nikolas-cruz-trial->

as a feature of our legal system. Furthermore, the inability of prosecutors to achieve a death sentence in this case, given the abundant evidence of premeditation,<sup>193</sup> raises doubts that prosecutors in the future will even bother to pursue capital trials.

On the other hand, the cost of the process was well-known to the local prosecutor before he made the decision to pursue the death penalty—a decision that cost Broward County tens of millions of dollars. That prosecutor, Mark Satz, had won eleven consecutive terms as the County’s prosecutor, spanning forty-four years,<sup>194</sup> so it is fair to assume that he had his finger on the pulse of the local community more accurately than, say, the editorial page of the *New York Times*, which lamented that capital charges were brought. Nor can Broward County be cast as a benighted, Republican, racist backwater—its longtime representative in Congress, Debbie Wasserman Schultz, is one of that body’s most liberal members.<sup>195</sup> In recent elections, Broward County has distinguished itself as one of the most liberal counties in Florida.<sup>196</sup> Satz himself, at the age of eighty, chose not to run for re-election in 2022. He was succeeded by a young African American man, who, promptly, upon election, announced that he would continue to seek the death penalty—and retain Satz to lead the prosecution.

It is, furthermore, worth emphasizing that Cruz escaped a death sentence by the narrowest of margins. Postmortem interviews suggest that there were one to three holdouts in the jury’s deliberations; the rest of the jury was prepared to return a death sentence.<sup>197</sup> It is possible, if not likely, that Cruz would have

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jury-attorneys-delay/40207816 (last visited Feb. 25, 2023). More than 1,200 jurors were screened before the circuit judge restarted the process. *Parkland Shooter’s Jury Selection to Restart after Judge’s Error*, AP NEWS (Apr. 25, 2022), <https://www.wtsp.com/article/news/crime/judge-parkland-school-shooters-jury-selection-to-start-over/67-20ea8e8e-57ee-433e-a46f-ffc5b75cef94>.

193. Cruz recorded three videos in anticipation of his crime, revealing “a chilling lack of emotion and a meticulous plan” to murder his former classmates. Frances Robles, ‘*You’ll All Know Who I Am, Parkland Suspect Said in Video*’, N.Y. TIMES (May 30, 2018), <https://www.nytimes.com/2018/05/30/us/nikolas-cruz-parkland-video.html>.

194. Samantha Joseph, *Broward State Attorney Mike Satz Won’t Run for Re-election, Will Focus on Parkland Shooter*, DAILY BUS. REV. (June 4, 2019), <https://www.law.com/dailybusinessreview/2019/06/04/broward-state-attorney-mike-satz-wont-run-for-re-election-will-focus-on-parkland-shooter/?slreturn=20230113202417>.

195. Wasserman Schultz has a lifetime score of six percent from the conservative Heritage Action Network. *Rep. Debbi Wasserman Schultz*, HERITAGE ACTION FOR AM., <https://heritageaction.com/scorecard/members/W000797/117> (last visited Feb. 2, 2024). She chaired the Democratic National Committee from 2011 to 2016. Dan Roberts, Ben Jacobs & Alan Yuhas, *Debbie Wasserman Schultz to Resign as DNC Chair as Email Scandal Rocks Democrats*, GUARDIAN (July 25, 2016), <https://www.theguardian.com/us-news/2016/jul/24/debbie-wasserman-schultz-resigns-dnc-chair-emails-sanders>.

196. In 2020, less than thirty-five percent of Broward County voters went for Donald Trump. *2020 General Election*, BROWARD SUPERVISOR OF ELECTIONS (May 18, 2023), <https://enr.electionsfl.org/BRO/2807/Summary/>. In 2018, Republicans Senator Rick Scott and Ron DeSantis won the support of around 31% of voters. *2018 General Election*, BROWARD SUPERVISOR OF ELECTIONS (May 18, 2023), <https://enr.electionsfl.org/BRO/Summary/1985/>.

197. Patricia Mazzei & Audra D.S. Burch, *Juror Describes Last-Ditch Bid to Deliver Death Sentence in Parkland Trial*, N.Y. TIMES (Oct. 15, 2022), <https://www.nytimes.com/>

been sentenced to death had there been no unanimity requirement. Florida law today arguably condones nonunanimous jury verdicts imposing death,<sup>198</sup> and in the aftermath of the Cruz verdict, Governor DeSantis endorsed a clarifying statutory change to ratify this position.<sup>199</sup>

In the course and aftermath of the trial, internet articles on Nikolas Cruz were pasted with comments that regarded the death penalty as not simply appropriate but charitable, at least in the painless form in which the punishment is imposed today. One commenter suggested that the State of Florida “[s]kin him alive. Start with his little toes and work upward.”<sup>200</sup> Another more constructively suggested that the state “just take his organs away and give them to the needy. Take one organ away every year and let him live with that until you take them all away.”<sup>201</sup> My point is obviously not to endorse such sentiments nor to suggest that these opinions are somehow typical. It is, however, arguable that such sentiments more closely capture the modal view on the death penalty than the editorial pages of the *New York Times* or the *Harvard Law Review*.

As already discussed, even President Biden, who ran on a campaign to end the death penalty, has overseen a Department of Justice that has failed to follow through on this promise. Two years ago, it filed pleadings in the Supreme Court to preserve the death sentence imposed on Dylan Roof, the white supremacist who killed nine people at African American church in South Carolina in 2015.<sup>202</sup> And last year, the Biden Department of Justice succeeded in securing a death sentence in the case of Robert Bowers, who killed eleven congregants at a Pittsburgh synagogue in 2018. Despite the president’s supposed renunciation of the death penalty, his Department of Justice issued a press release celebrating its achievement: “The horrific attack at the Tree of Life Synagogue on October 27, 2018, stole the lives of eleven innocent victims, shattered their families, gutted their congregation and the Pittsburgh community, and struck fear in the lives of Jewish people across the country.”<sup>203</sup> It is striking that the government’s defense of the death penalty focuses on how

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2022/10/15/us/parkland-trial-juror-death-sentence.html (stating that all but three jurors favored death).

198. *Compare* State v. Poole, 297 So.3d 487, 505 (Fla. 2020) (permitting nonunanimous verdicts) with FLA. STAT. § 921.141 (2023) (requiring unanimous verdicts).

199. Anthony Izaguirre & Terry Spencer, *Florida Could End Unanimous Jury Requirement for Executions*, AP NEWS (Feb. 2, 2023), <https://apnews.com/article/ron-desantis-florida-state-government-crime-legal-proceedings-nikolas-cruz-e86c7e9e7ff92fbaa025677fbf96d8fe>.

200. Katherine Donlevy, *Nikolas Cruz Reveals Why He Chose Valentine’s Day for Parkland Massacre*, N.Y. POST (Oct. 6, 2022), <https://nypost.com/2022/10/06/nikolas-cruz-chose-valentines-day-for-parkland-massacre/>.

201. Selim Algar, *Parkland Killer Nikolas Cruz “Studied” Columbine, Virginia Tech Massacres*, N.Y. POST (Oct. 3, 2022), <https://nypost.com/2022/10/03/parkland-parkland-killer-nikolas-cruz-studied-columbine-virginia-tech-massacresd-killer-nikolas-cruz-studied-other-gun-massacres/>.

202. Brief for Appellant, Roof v. United States, 143 S.Ct. 303 (2022) (No. 21-7234).

203. Off. Pub. Affs., *Jury Recommends Sentence of Death for Pennsylvania Man Convicted for Tree of Life Synagogue Shooting*, DEP’T JUST. (Aug. 2, 2023), <https://www.justice.gov/opa/pr/jury-recommends-sentence-death-pennsylvania-man-convicted-tree-life-synagogue-shooting>.

the worst of murders strike at an entire community, well beyond the narrow circle of victims and their families.<sup>204</sup>

At local levels, prosecutors, even in Democratic jurisdictions, continue to disappoint the hopes of liberal elites. Consider the case of Chunli Zhao, who killed seven people in Half Moon Bay, California in January 2023.<sup>205</sup> In San Mateo County, where the crime occurred, Joseph Biden received seventy-eight percent of the presidential vote in 2020.<sup>206</sup> The Democratic local prosecutor, Stephen Wagstaffe, has run unopposed in recent elections. The crime, however, has left Wagstaffe expressing an openness to pursuing a capital case, for the first time in his career. He said: “This one is in a category that is way beyond anything we’ve ever dealt with. I’m sorry that we have joined the list of counties around this country that have had to deal with this. I always hoped that that would not be something that would occur in my career. But now that it’s here, we’ll step up. We’ll see that justice gets done.”<sup>207</sup> Wagstaffe is speaking here in naive Kantian language: his suggestion that “justice” might require an evening of the scales, death for death, is without the nuance that even self-described retributivists in the American academy have condoned.<sup>208</sup> Indeed, academics would be embarrassed to suggest that “justice” requires the slaughter of a man who no longer poses any risk to the community, who can be incarcerated for the duration of his life at less cost than pursuing a likely symbolic death sentence, and who was doubtless struggling with inner demons that rendered his “crimes” worthy of understanding and forgiveness, not brutal revenge. Stephen Wagstaffe, elected D.A. of San Mateo County, sees it differently, and is now at least toying with the idea of pursuing a capital case, even though Governor Newsom has announced a moratorium on executions.

One of the most publicized murders in recent years occurred a decade ago, in 2013. Two Chechnyan brothers detonated makeshift bombs near the finish line of the Boston Marathon, killing three people and injuring scores more.<sup>209</sup> President Obama had for years expressed misgivings about capital punishment,

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204. As noted earlier, this year the Biden Department of Justice also filed capital charges in the case of Payton Gendron, who murdered ten people in Buffalo, New York, in 2022. *See supra* note 161.

205. Eliza Fawcett & Soumya Karlamangla, *Suspect in Half Moon Bay Shooting Pleads Not Guilty*, N.Y. TIMES (Feb. 16, 2023), <https://www.nytimes.com/2023/02/16/us/half-moon-bay-shooting-suspect-plea.html?searchResultPosition=1>.

206. *November 3, 2020 Presidential General Election: Official Results*, OFF. OF MARK CHURCH, CHIEF ELECTIONS OFF. & ASSESSOR-CNTY. CLERK-RECORDER, [https://www.livevoteturnout.com/SanMateoCA/LiveResults/en/Index\\_4.html](https://www.livevoteturnout.com/SanMateoCA/LiveResults/en/Index_4.html) (last visited Feb. 25, 2023).

207. Terry Castleman et al., *Half Moon Bay Shooting Suspect Charged with 7 Counts of Murder, Could Face Death Penalty*, L.A. TIMES (Jan. 25, 2023), <https://www.latimes.com/california/story/2023-01-25/half-moon-bay-shooting-gunman-victims>. As of the time of the writing of this article, July 2023, Wagstaffe has not clarified his intentions.

208. *See* Dan Markel, *State Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407 (2005).

209. A total of 264 people were injured in the bombing. Nate Raymond, *Boston Marathon Bombing Victims Split on Death Penalty in Supreme Court Case*, REUTERS (Oct. 11, 2021), <https://www.reuters.com/world/us/boston-marathon-bombing-victims-split-death-penalty-us-supreme-court-case-2021-10-10/>.

at one point declaring it “deeply troubling.”<sup>210</sup> Troubling or not, his Department of Justice decided to seek the death penalty against the surviving brother, Dzhokhar Tsarnaev. Had President Obama been so inclined, it would have been relatively easy to justify seeking only life imprisonment. The surviving brother was only nineteen at the time of the crime and almost certainly under the influence of his older brother.<sup>211</sup> The last execution in Massachusetts had occurred over sixty years ago<sup>212</sup> and the State’s highest court had, over thirty years ago, abolished the punishment.<sup>213</sup> President Obama could have announced that he was deferring to the wishes of the local community, as evidenced by their long-held opposition to capital punishment.

As it turned out, President Obama’s misgivings about the death penalty, as well as those of the people of Massachusetts, were not as deep as advertised. Prosecutors easily established Tsarnaev’s guilt, but difficulties arose at the sentencing phase. Inevitably, Tsarnaev had a team of no fewer than five exemplary defense lawyers,<sup>214</sup> with experts and pundits rallying to his cause. (During the trial, the Boston Globe published a front-page interview of the parents of one of the victims, pleading for Tsarnaev’s life.)<sup>215</sup> Included in the catalog of witnesses on Tsarnaev’s behalf was Helen Prejean, a Catholic nun, best-selling author, and renowned death penalty abolitionist. Prejean testified that she had met with Tsarnaev in his prison cell, and he was “absolutely sincere” in his plea for forgiveness.<sup>216</sup>

For the prosecutors, the question was who and how to cross-examine a witness whom many Catholic jurors would regard favorably. The natural choice was the Catholic Justice Department lawyer, flown in from Louisiana to be part

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210. Kevin Liptak, *Barack Obama Says Death Penalty “Deeply Troubling,”* CNN POLS. (Oct. 23, 2015), <https://www.cnn.com/2015/10/23/politics/obama-death-penalty-deeply-troubling/index.html>.

211. On appeal, Tsarnaev’s lawyers focused one of their two arguments on the possibility that his older brother was responsible for a triple-murder two years before. *See* Petition for a Writ of Certiorari, *United States v. Tsarnaev*, 595 U.S. 302 (2022) (No. 20-443).

212. Massachusetts has not executed anyone since 1947. *Massachusetts*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/massachusetts> (last visited Feb. 25, 2023).

213. *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 122 (Mass. 1984).

214. *See* Zeninor Enwemeka, *Who’s Who in the Dzhokhar Tsarnaev Trial*, WBUR (June 5, 2015), <https://www.wbur.org/news/2015/01/05/dzhokhar-tsarnaev-bombing-trial-bios>. Tsarnaev’s lead counsel also helmed the successful efforts to avert the death penalty for the Unabomber, Zacarias Moussaoui, and the gunman who injured Representative Gabbi Giffords and killed six others. Patrick Radden Keefe, *The Worst of the Worst*, NEW YORKER (Sept. 7, 2015), <https://www.newyorker.com/magazine/2015/09/14/the-worst-of-the-worst>.

215. Bill and Denise Richard, *To End the Anguish, Drop the Death Penalty*, BOSTON GLOBE (Apr. 16, 2015), <https://www.bostonglobe.com/metro/2015/04/16/end-anguish-drop-death-penalty/ocQLejp8H2vesDavItHIEN/story.html>. *See also* *Boston Bombing: Parents of Youngest Victim Oppose Execution*, BBC NEWS (April 17, 2015), <https://www.bbc.com/news/world-us-canada-32359044> (stating that the Richards’ statement was published on the front page).

216. G. Jeffrey MacDonald, *Both Sides Rest After Jury Is Told Boston Marathon Bomber Is “Sorry”*, USA TODAY (May 11, 2015), <https://www.usatoday.com/story/news/nation/2015/05/11/tsarnaev-sentencing-boston-bombing-prejean/27113135/>.

of the trial team. But in a move that surprised observers and the defense, a Jewish—Boston-based and –accented—prosecutor was tasked with the assignment. His cross-examination was brief but pointed:

Q: Sister, you're not based in Massachusetts, are you?

A. Correct.

Q. You don't live here?

A. No.

Q. And your order is not located here?

A. Some -- sisters are related in different branches, so some of our cousin sisters of St. Joseph are here.

Q. But not you?

A. But not me.<sup>217</sup>

At their best, cross-examinations provoke jurors: they are, like Platonic dialogues, not didactic but rather invitations to thought. And the cross-examination of Sister Prejean may have roused the Bostonian jurors to think: *Aren't you, Sister Prejean, holier than thou to lecture us about the "sincerity" of the defendant? You are not from the community that this man ripped apart. You have no business here.* Four simple questions had transformed Sister Helen Prejean from gentle nun to self-righteous intermeddler. The jury unanimously voted death.<sup>218</sup>

### III. REFRAMING THE PUZZLE

The simple answer to the puzzle of capital punishment's persistence is that the desire to execute the worst of criminals is rooted in human nature. The answer is so obvious that it hardly seems to qualify as a puzzle. This section's first part argues that, given man's vengeful nature, it is not at all puzzling that the death penalty persists. The section's second part engages in what one might pompously call meta-analysis—i.e., what is puzzling is not that the death penalty persists, but why, for centuries, Western intellectuals have been puzzled by the failure of their abolitionist efforts. This meta-puzzle points to defining features of that intelligentsia. Since the Enlightenment, many intellectuals have regarded human nature as a frail constraint on human progress. For such intellectuals, the persistence of capital punishment, even if rooted in human nature, is such a puzzling disappointment.

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217. Transcript of Jury Trial – Day Fifty-Eight at 58–15, *United States v. Tsarnaev*, No. 13-10200, 58-15 (D. Mass. May 11, 2015). The author thanks Assistant United States Attorney Steve Mellin, who was on the Tsarnaev trial team, for sharing the transcript with me. Our conversations about that case stimulated my academic interest in capital punishment, which, after some initial ruminations, culminated in this article. Craig S. Lerner, *Is The Death Penalty Dead?*, CLAREMONT REV. BOOKS (Summer 2019), <https://claremontreviewofbooks.com/is-the-death-penalty-dead/>; Craig S. Lerner, *Rendering Judgments on America's Death Penalty*, LAW & LIBERTY (Nov. 3, 2022), <https://lawliberty.org/rendering-judgments-on-americas-death-penalty/>.

218. The jury, in fact, recommended death on six separate counts. Katharine Q. Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May 15, 2015), <https://www.nytimes.com/2015/05/16/us/dzhokhar-tsarnaev-death-sentence.html?searchResultPosition=6>.



### A. *The Nature of Man*

Criminal punishment, including the ultimate punishment of death, is conventionally justified in terms of retribution and deterrence. With respect to the latter, whether capital punishment deters would-be murders is a vigorously debated topic; but even if studies proved some level of deterrence, it would be difficult, although not impossible, to infer from such studies a moral obligation to impose that penalty.<sup>219</sup> Nonetheless, executing a defenseless human being, whatever crimes he had committed, is the infliction of a “horrendous brutality”;<sup>220</sup> and however convincing the multiple regressions, and however significant the z-score, empirical studies compel agreement only at the level of reason. The impulse to impose the death penalty arises overwhelmingly in the mass of humankind from the retributive impulse.

And, as Justice Potter Stewart observed in *Furman v. Georgia*, “[t]he instinct for retribution is part of the nature of man.”<sup>221</sup> The debates between retributivists and consequentialists are best understood as post hoc arguments as to how to justify what many men and women are naturally disposed to do—that is, punish those who have harmed them or members of the community with which they identify. Apart from the normative question of how to legitimate punishment, there is the descriptive question of what motivates human beings in this regard.<sup>222</sup> In their survey of primitive cultures, evolutionary biologists Martin Daly and Margo Wilson found that fifty-seven of the sixty societies had “some reference to blood feud or capital punishment as an institutionalized practice, or specific accounts of particular cases or, at the least, some articulate expression of the desire for blood revenge.”<sup>223</sup> As the impulse to punish animals—and even inanimate objects—that have caused harm suggests, the psychological disposition to avenge wrongs does not seem to be motivated, in crucial respects, by consequentialist concerns.

We (or a certain kind of intellectual) can ridicule the impulse to avenge wrongs as irrational, a point explored in the next section, but the impulse nonetheless seems to be as much a part of humanity as the impulse to love: “[they] imply each other,” James Fitzjames Stephen wrote, “as convex and concave.”<sup>224</sup> If the vengeful impulse truly is intractable, the political question is how to manage it. Justice Stewart argued in *Furman v. Georgia* that the judicial system must, to some extent, satisfy this impulse: “When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.”<sup>225</sup> The scare quotes

219. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required?: Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005).

220. *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting from the denial of rehearing en banc), *vacated*, 573 U.S. 976 (2014).

221. *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

222. See Geoffrey P. Goodwin & Adam Benforado, *Judging the Goring Ox: Retribution Directed Toward Animals*, 39 COGNITIVE SCI. 619, 620 (2015).

223. MARTIN DALY & MARGO WILSON, *HOMICIDE* 226 (Routledge 2017) (1988).

224. 2 SIR JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 82 (Burt Franklin New York) (1883).

225. 408 U.S. at 308.

around “deserve” presumably reflect Justice Stewart’s aim to distance himself from this opinion. By contrast, Stephen made this argument unapologetically and in his own name. The imposition of criminal punishment, he wrote approvingly, channels the retributive impulse, much as the institution of marriage channels sexual passion. Modern legal theorists, according to this view, have deceived themselves into thinking that retribution is simply one of the purposes of criminal punishment—and indeed, one that can gradually be discarded. The efforts to excise retribution from the stated goals of punishment in the myriad criminal codes have all failed, however: modern legal commentators are in denial about the primary driver of criminal punishment.<sup>226</sup>

Capital punishment, in this line of thought, is essential in providing a legal outlet for the vengeful emotions inevitably aroused by atrocious crimes. The outpouring of denunciations of the criminal justice system that occurred after Nikolas Cruz escaped a death sentence<sup>227</sup> suggests that the failure to execute a criminal can undermine respect for the legal system. “Lynch law,” in Justice Stewart’s almost oxymoronic phrase, captures the idea that the public, after witnessing a judicial system repeatedly fail to administer justice, may resolve to administer its own “law,” with calamitous consequences for civil society and the perpetuation of the political order.<sup>228</sup>

If the retributive impulse is rooted in man’s nature, indulging it through capital punishment does not simply avoid bad outcomes; it arguably sustains and promotes the sense of community that republican government presupposes. Republicanism depends on a robust sense of identification with one’s fellow law-abiding citizens; criminal punishment—preeminently capital punishment—can reflect and cultivate the solidarity of the community. In Émile Durkheim’s account, punishment “constitutes essentially a reaction of passionate feeling, graduated in intensity, which society exerts through the mediation of an organized body over those of its members who have violated certain rules of conduct.”<sup>229</sup> The “real function” is “to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor.”<sup>230</sup> Echoing Durkheim, unwittingly to be sure, Chief Justice Burger wrote of the “community catharsis” that occurs in a criminal trial.<sup>231</sup> Given the “nature of man,” Justice Stewart wrote in *Gregg v. Georgia*, “the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an

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226. See Michele Cotton, *Back with a Vengeance: The Resilience of Retribution As an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1361 (2000) (“The usual litany of retribution, deterrence, rehabilitation, and incapacitation is thus misleading insofar as it implies that the criminal law has been deployed like a Swiss Army knife to accomplish multiple purposes. Criminal law is a retributive tool for which utilitarians have thus far found such auxiliary uses as deterrence, rehabilitation, and incapacitation.”).

227. See *supra* text accompanying notes 200–201.

228. See ABRAHAM LINCOLN, Address Before the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1837), in I COMPLETE WORKS OF ABRAHAM LINCOLN (John G. Nicolay & John Hay eds., 1894) (criticizing “mob rule”).

229. ÉMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY 52 (W.D. Halls trans., 1984).

230. *Id.* at 63.

231. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980).

affront to humanity that the only adequate response may be the penalty of death.”<sup>232</sup>

If Justice Stewart is right about the “nature of man,” and that it includes the vengeful impulse to punish, it is not at all puzzling that capital punishment persists. What is puzzling is that, for centuries, many Western intellectuals have regarded its demise as imminent. Just a few months ago, Amnesty International released its 2023 survey of global death penalty trends. After several years of upbeat accounts of widespread progress, the authors of the latest report are dismayed—and apparently stunned—by recent developments. Introducing its annual report, the authors immediately observe that “[r]ecorded executions in 2022 reached the highest figure in five years, as the Middle East and North Africa’s most notorious executioners carried out killing sprees . . . .”<sup>233</sup>

Lest the authors suggest that their optimism is in any way diminished, the report proceeds to identify “glimmers of hope.”<sup>234</sup> The more apt cliché, however, is “clutching at straws.” The so-called glimmers include the fact that the Central African Republic abolished the death penalty last year. True, the nation’s parliament voted to end capital punishment,<sup>235</sup> but context is relevant—to wit, that there are 1,000 soldiers of the Russian mercenary organization Wagner Group given free rein to police much of the nation.<sup>236</sup> Does Amnesty International think that the Wagner Group observes all the requirements of Western rule of law, from the Magna Carta to the Universal Declaration of Human Rights?

The puzzling persistence of the death penalty decomposes into the puzzling persistence of Western intellectuals predicting the demise of capital punishment—and then being astonished when these predictions prove wrong, *and then* engaging in contortions to blind themselves to this reality. Which brings us to the real puzzle: why are these elites so *persistently* confident that the death penalty is dying?

### B. *Dreams of Utopia*

In answering this question, a starting point is to recognize that for many intellectuals it is irrational to indulge the vengeful impulse and, consequently, retribution as a theory of punishment is illegitimate. The view is encapsulated in H. L. A. Hart’s memorable likening of retribution to “moral alchemy in which the combination of the two evils of moral wickedness and suffering are

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232. *Gregg v. Georgia*, 428 U.S. 153, 183–84 (1976).

233. *Death Penalty 2022: Recorded Executions Skyrocket to Highest Figure in Five Years*, AMNESTY INT’L (May 16, 2023), <https://www.amnesty.org/en/latest/news/2023/05/death-penalty-2022-executions-skyrocket/>.

234. *Id.*

235. *UN Rights Chief Hails CAR Decision to End Death Penalty*, AL JAZEERA (June 1, 2022), <https://www.aljazeera.com/news/2022/6/1/un-rights-chief-hails-c-africa-decision-to-end-capital-punishment>.

236. William Rampe, *What Is Russia’s Wagner Group Doing in Africa*, COUNCIL ON FOREIGN RELS. (May 23, 2023), <https://www.cfr.org/in-brief/what-russias-wagner-group-doing-africa>.

transmuted into good . . . .”<sup>237</sup> Retributivists often speak of “desert” and “evening the scales,” but such metaphorical language obscures, in this line of thinking, the faulty logic of retribution. As already suggested, the scare quotes Justice Stewart placed around “deserve” in *Furman* signal his reservations with the confident retributive claim that criminal offenders “deserve” punishment.<sup>238</sup> But there is nothing novel in these arguments. Plato’s insistence that a good man never returns evil with evil<sup>239</sup> is an indictment not only of vengeance but retribution as a basis for punishment. Even more bracingly, his argument that all evildoing is involuntary<sup>240</sup> dissolves the moral indignation that is a precondition of retribution and therewith the moral foundation of capital punishment. As Alfred North Whitehead suggested, all subsequent philosophers merely add footnotes to Plato,<sup>241</sup> and the modern critique of retribution, supposedly enriched by insights from modern philosophy and science, may have added very little to what is already present in the Platonic corpus.

Even if the vengeful impulse is irrational, however, it is not therefore unnatural. Human beings are composites—part angel, part brute—so the irrationality of retribution does not deny its place in the human soul. Plato was keenly aware of this. In his most pragmatic work, *The Laws*, the Athenian Stranger raises the radical critique of retribution—that all wrongdoing is involuntary;<sup>242</sup> but he then recognizes the inevitable place the vengeful impulse has in any real-world criminal code. The death penalty is taken for granted in *The Laws* as the appropriate punishment for the most serious crimes.<sup>243</sup> It is, after all, the only punishment that will satisfy the deep, if irrational and unphilosophic, demand for vengeance. As Thomas Pangle writes, “It appears that in practice the Athenian [Stranger] must abandon his theorizing and give in to the naïve view of punishment rooted in human anger, which always tends to assign responsibility to the agent who inflicts hurt.”<sup>244</sup>

Starting with the Enlightenment, however, thinkers regarded the broad dissemination of philosophical claims as not only possible, but also advisable. Hobbes may have been the first philosopher openly to propose deterrence as the

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237. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 234–35 (1968).

238. See *supra* text accompanying note 225.

239. PLATO, *Crito*, in FIVE DIALOGUES 45, 52 (G. M. A. Grube trans., Hackett Publ’g Co. 2d. ed. 2002) (“One should never do wrong in return, nor do any man harm, no matter what he may have done to you.”).

240. The theme appears regularly. See, e.g., GORGIAS, starting at 509d; THE APOLOGY (the exchange with Meletus); and most famously in Book 1 of THE REPUBLIC (the exchange with Thrasymachus). See generally LORRAINE SMITH PANGLE, VIRTUE IS KNOWLEDGE: THE MORAL FOUNDATIONS OF SOCRATIC POLITICAL PHILOSOPHY (2014).

241. See ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 39 (David Ray Griffin & Donald W. Sherburne eds., Free Press corrected ed. 1979).

242. PLATO, THE LAWS OF PLATO 253 (Thomas L. Pangle trans., Basic Books, Inc. 1980) (“[T]he bad are all bad involuntarily in every respect. . . . [E]veryone does injustice involuntarily.”).

243. See, e.g., *id.* at 247 (death penalty for impiety); *id.* 248 (death penalty for sedition); *id.* 252–70 (death penalty for various forms of intentional and even unintentional homicide).

244. *Id.* at 500.

exclusive basis of criminal punishment.<sup>245</sup> The practical effect of his reforms would eventually be a dramatic reduction in the severity of legal punishments, the viability of which depends on a concomitant reduction in man's violent and vengeful nature. Which brings us to the crucial step in the modern argument—the malleability of human nature. According to Montesquieu, man is “that flexible being who adapts himself in society to the thoughts and impressions of others.”<sup>246</sup> His *Spirit of the Laws* emphasizes the staggering variation of human behavior, and therefore the thinness of what can qualify as a constraining “human nature.” Montesquieu envisioned, accurately, that the spread of commerce would reduce man's propensity to violence, and he believed that as men became more peaceful, the need for harsh criminal penalties would be reduced.<sup>247</sup>

The death penalty was, according to Montesquieu, the “remedy . . . for a sick society.”<sup>248</sup> It is a telling phrase. The vengeful impulse that inspires the demand for capital punishment is not rooted in a fixed human nature; it is, in this view, a disease that can be cured. And accepting an evolutionary account of human origins, why should we assume that human nature itself cannot evolve—for the better? Montesquieu's great successor, Jean-Jacques Rousseau, questioned the relevance of human behavior in our primal state in establishing guideposts for men and women in civilization. He went so far as to suggest that the only thing innate in human nature was its so-called “perfectibility,” which has drawn us inexorably away from our natural state.<sup>249</sup> Echoes of this view can be heard from intellectuals ever since. Consider one of the last writings of Richard Rorty, perhaps America's most celebrated philosopher of the twentieth century. He observed the “profound changes in Western social life” that have been achieved by the “dreams of socialists, feminists, and others.”<sup>250</sup> He added that it is fair to imagine, and presumably regard as attainable, “dream[s] of utopias in which human beings . . . become as wonderfully different from us as we are from Neanderthals.”<sup>251</sup>

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245. Hobbes curiously used the language of revenge but in a way that transforms its meaning into deterrence. THOMAS HOBBS, *LEVIATHAN* 210 (C.B. Macpherson ed., 4th prtg. 1985) (“That in Revenges . . . Men look not at the greatnesse of the evill past, but the greatnesse of the good to follow.”). For an insightful discussion of the philosophical theories of punishment, as they have evolved over time, see ARTHUR SHUSTER, *PUNISHMENT AND THE HISTORY OF POLITICAL PHILOSOPHY* 53–64 (2016).

246. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, at xlv–xlv (Anne M. Cohler et al. trans., 1989).

247. See SHUSTER, *supra* note 245, at 76–90.

248. MONTESQUIEU, *supra* note 246, at 191.

249. Jean-Jacques Rousseau, *Discourse on the Origin and Foundation of Inequality Among Men*, in ROUSSEAU, *THE DISCOURSES AND OTHER POLITICAL WRITING* 141 (Victor Gourevitch ed., Victor Gourevitch trans., 1997) (“It would be sad for us to be forced to agree that [perfectibility] is the source of all of man's miseries; that it is the faculty which, by dint of time, draws him out of his original condition in which he would spend tranquil and innocent days; that it is the faculty which, over the centuries, causing his enlightenment and his errors, his vices and his virtues to bloom, eventually makes him his own and Nature's tyrant.”).

250. Richard Rorty, *Philosophy-Envy*, 133 *DAEDALUS* 18, 24 (2004).

251. *Id.* at 23–24.

That fifty-seven of sixty primitive societies practiced capital punishment<sup>252</sup> is not a constraint on human life today. Material conditions and human nature itself are so vastly different that there should be no expectation that the death penalty needs to continue. Nor can this be discounted as simply a utopian “dream,” i.e., a fantasy of head-in-the-clouds intellectuals. Europe today—with very low rates of violent crime and the abolition of capital punishment—demonstrates that high-functioning societies do exist without the death penalty. Even on those rare moments when Western Europe is convulsed by horrible crimes, there is no demand for a resort to the brutal practices of primitive societies. Consider that Anders Breivik, the Norwegian convicted of murdering seventy-seven people in 2011, was sentenced not to death, but twenty-one years in prison.<sup>253</sup> Likewise, the mastermind of the Madrid train bombings in 2004, which killed 191 people, was given a prison sentence that, in practice, confers an expectation of release in forty years.<sup>254</sup> Crime such as these have not dislodged Europeans from their conviction, codified in the European Convention on Human Rights, that the death penalty is, in all cases, an abomination.<sup>255</sup> The absolute rejection of capital punishment in Europe today (and several places elsewhere in the world) proves that human nature can evolve to the point that the expectation of vengeance, even in the face of outrageous provocation, can be effectively cauterized.

This is widely understood to be moral progress—the logic being that more enlightened people recognize that a respect for “human dignity” extends even to the worst of criminals.<sup>256</sup> This is, however, a contestable version of human dignity.<sup>257</sup> Furthermore, the abolitionist trend could also be cast as moral decline—the logic being that citizens in abolitionist countries are so indifferent to the fate of other citizens, and so reduced to the status of selfish consumers and “last men,” that they cannot be roused to pursue justice even in the worst of crimes.<sup>258</sup> However it is viewed, here we have the resolution of the puzzle of why intellectuals are so astonished by the persistence of capital punishment. The answer is that those intellectuals believe that human nature has evolved and

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252. Michael E. McCullough, *The Forgiveness Instinct*, GREATER GOOD MAG. (Mar. 1, 2008), [https://greatergood.berkeley.edu/article/item/forgiveness\\_instinct](https://greatergood.berkeley.edu/article/item/forgiveness_instinct).

253. Mark Lewis & Sarah Lyall, *Norwegian Mass Killer Gets the Maximum: 21 Years*, N.Y. TIMES (Aug. 24, 2012), <https://www.nytimes.com/2012/08/25/world/europe/anders-behring-breivik-murder-trial.html>.

254. *\$1.4m for Victims of Madrid Bombings*, ABC NEWS (AUS. BROAD. CORP.) (Nov. 2, 2007), <http://www.abc.net.au/news/2007-11-03/14m-for-victims-of-madrid-bombings/714664>.

255. See *European Convention on Human Rights*, *supra* note 82; see also Vincent Manancourt, *Macron to Use EU Presidency to Push for Worldwide End of Death Penalty*, POLITICO (Oct. 9, 2021), <https://www.politico.eu/article/macron-eu-presidency-death-penalty-china-india/>.

256. See *supra* text accompanying notes 80–82.

257. See *supra* text accompanying note 84.

258. See FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 114 (Walter Kaufmann trans., Vintage Books 1989). (“There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining “punishment” and “being supposed to punish” hurts it, arouses fear in it. “Is it not enough to render him undangerous? Why still punish? Punishing itself is terrible.”); see Berns, *supra* note 184.

today no longer includes the vengeful impulse that once rendered the death penalty a practical and moral necessity.

As this article has argued, this is not a conviction shared by much of the world.<sup>259</sup> Western intellectuals seem to be persistently puzzled that the peoples of the world have failed to embrace the European Convention of Human Rights, with its enshrinement of death penalty abolitionism, as their guiding principles. One might wonder whether it is Euro-centric to expect the world to converge upon European attitudes towards human rights generally and the death penalty specifically. Viewed from this perspective, the confident belief, persistently disappointed, that the rest of the world will adopt Europe's notions of human dignity appears to be both parochial and chauvinistic.

#### CONCLUSION

The Russian invasion of Ukraine in February 2022 was a shocking development for many reasons.<sup>260</sup> That a land war could arise between major European powers upset many confident expectations about the trajectory of civilization. In the context of this article, the Russo-Ukrainian war prompts reflections on the durability of human progress. Francis Fukuyama's prediction that the end of history is imminent seems to have been proven, yet again, to be at best premature. As long as violence and conflict persist, the passion to punish those who have wronged *our* community, will remain a brutal testament to human vengefulness. And as long as intellectual elites expect our species to evolve into something less vengeful, the persistence of capital punishment will remain, at least to those elites, a puzzle.

One can imagine a future that is so rich and peaceful that all men and women regard capital punishment as unnecessary and unjust. The abolition of the death penalty would, in such circumstances, likely reflect a more thoroughgoing rejection of the punitive impulse altogether. What would such a world look like? In *3001*, the final volume of his *2001* tetralogy, Arthur C. Clarke depicts a world in which prisons have vanished and criminals are no longer "punished," but are simply conditioned to be servants for a finite term. There are no rivalrous nations, the problem of scarcity has been conquered, religion of any kind has disappeared, and men and women are stimulated to contentment by computer-generated images.<sup>261</sup> Perhaps this is our human, or not-so-human destiny, but, for better or worse, it seems a long way off—at least a millennium.

Until then, the vengeful impulse will remain with us. Of course, it co-exists with gentler impulses, towards empathy and forgiveness, and of course,

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259. See *supra* Part II.A (in particular the subsections on the Sinic, Japanese, and Islamic civilizations).

260. *The Invasion That Shook the World*, COUNCIL ON FOREIGN RELS. (Feb. 22, 2023), <https://www.cfr.org/councilofcouncils/global-memos/invasion-shook-world>.

261. The implication that human beings will evolve away from the "punishment" model—and eventually abandon the death penalty—is prevalent in science fiction literature. Cixin Liu's monumental trilogy—*The Three-Body Problem* (2006); *The Dark Forest* (2008); and *Death's End* (2010)—is unusual, for this genre, in its depiction of the issue: governments abandon capital punishment in the future, only to reinstate it as conditions change, suggesting that the abandonment of the death penalty is not a stable human destiny.

the vengeful impulse can be moderated and, under perfect conditions, almost extinguished. So a straightforward engagement with reality would seem to lead to the expectation that the appeal of the death penalty will ebb and flow but its persistence in some form is as ineradicable as human nature itself. What is striking is not the persistence of the death penalty, but the mental gymnastics Western intellectuals are willing to engage in to blind themselves to this reality.