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## Minority Practice, Majority's Burden: The Death Penalty Today

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## Minority Practice, Majority's Burden: The Death Penalty Today

James S. Liebman\* & Peter Clarke\*\*

*Although supported in principle by two-thirds of the public and even more of the States, capital punishment in the United States is a minority practice when the actual death-sentencing practices of the nation's 3000-plus counties and their populations are considered. This feature of American capital punishment has been present for decades, has become more pronounced recently, and is especially clear when death sentences, which are merely infrequent, are distinguished from executions, which are exceedingly rare.*

*The first question this Article asks is what forces account for the death-proneness of a minority of American communities? The answer to that question—that a combination of parochialism and libertarianism characterizes the communities most disposed to impose death sentences—helps to answer the next question addressed here: Why so few death sentences end in executions? It turns out that the imposition of death sentences, particularly for felony murder (a proxy for the out-of-the-blue stranger killings that generate the greatest fear among parochial communities), provides parochial and libertarian communities with a quick and cheap alternative to effective law enforcement.—And that alternative is largely realized whether or not death sentences are ultimately carried out. This explanation sheds light on two other criminal law conundrums—the survival of the most idiosyncratic manifestation of the felony murder doctrine (which mysteriously transmogrifies involuntary manslaughter into capitally aggravated murder) and the failure of the death penalty to have a demonstrable deterrent effect (which is not surprising if the death penalty operates as a weak substitute for, rather than a powerful addition to, otherwise effective law enforcement strategies). The explanation also reveals a number of costs the capitally prone minority imposes on the majority of citizens and locales that can do without the death penalty, including more crime, a cumbersome process for reviewing systematically flawed death sentences whose execution is of less interest to the death sentences' originators than their imposition, and a heightened risk—to*

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*the judicial system as well as individual defendants—of miscarriages of justice.*

*These explanations, in turn, beg the most important and difficult question considered here. Why do the majority of communities and citizens who can live without the death penalty tolerate a minority practice with serious costs that the majority mainly bears? With a bow towards Douglas Hay's famous explanation for the survival over many decades of eighteenth century England's no less universally vilified death-sentencing system—which likewise condemned many but executed few—we offer some reasons for the minority's success in wagging the majority. In response to recent evidence of a (thus far largely counterproductive) majority backlash, we conclude by offering some suggestions about how the majority might require the minority of death-prone communities to bear more of the costs of their death-proneness without increasing the risk of miscarriage of justice.*

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## I. A LOCAL INSTITUTION

As Tip O'Neill famously quipped about "all politics" in the United States, almost all there is to know about its death penalty is local, not national.<sup>1</sup> Only local differences can explain, for example, the simultaneous vilification of the United States as the only Western nation to punish personal and civilian crimes with death<sup>2</sup> and celebration of the State of Michigan as the vanguard of abolition in the Western world.<sup>3</sup>

Until relatively recently, the decision to impose death and carry out executions was a local affair across most of the Western world.<sup>4</sup> For example, Douglas Hay's classic article *Property, Authority and the Criminal Law* vividly depicts eighteenth century England's bloody assizes as a distinctly local spectacle.<sup>5</sup> He explains that period's prodigious number of death verdicts as a diabolically ingenious tool used by the small gentry class in each community to customize the maintenance of social order to local conditions and protect local prerogatives against centralization of law enforcement in the hands of the Crown.<sup>6</sup>

By the twentieth century, however, most Western nations had witnessed a transformative "delocalization" of capital punishment, placing capital institutions in the hands of national authorities who, for example, carried out executions at a great distance from the site of the offense.<sup>7</sup> Typically, the effect of nationalization was to rationalize the process, reduce regional capital-sentencing disparities and the frequency of executions overall, and eventually pave the way for national elites to abolish the penalty against the wishes of the majority.<sup>8</sup>

Although, capital punishment in the United States has fitfully followed some of these trends—especially since the Supreme Court began examining the penalty's constitutionality in the late 1960s<sup>9</sup>—American federalism has largely frustrated this nationalizing tendency.<sup>10</sup> In the United States, state, not federal

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<sup>1</sup> See CHRISTOPHER COLLIER, ALL POLITICS IS LOCAL: FAMILY, FRIENDS, AND PROVINCIAL INTERESTS IN THE CREATION OF THE CONSTITUTION 2 (2003) (claiming that Tip O'Neil "built his enormously successful political career on the conviction that all politics is local. . .").

<sup>2</sup> See DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 11 (2010) (noting that "all other Western nations have decisively abandoned" capital punishment).

<sup>3</sup> See *id.*

<sup>4</sup> *Id.* at 108.

<sup>5</sup> Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17–18 (Douglas Hay et al. eds., 1975).

<sup>6</sup> *Id.* at 18 (describing England's localized "system of criminal law based on terror" that was used in place of a national police force that "the gentry would not tolerate").

<sup>7</sup> GARLAND, *supra* note 2, at 108, 116.

<sup>8</sup> *Id.* at 109.

<sup>9</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

<sup>10</sup> GARLAND, *supra* note 2, at 188.

legislation, is the source of nearly all of the nation's capital crimes,<sup>11</sup> and nearly all of its death sentences are imposed and executed in the name of a state.<sup>12</sup> All but a handful of the nation's condemned prisoners await their fate on death row in state prisons;<sup>13</sup> state governors have the power to commute their sentences or to pardon them;<sup>14</sup> and state courts are and have always been responsible for the vast majority of court rulings affirming *and reversing* capital verdicts.<sup>15</sup> Currently, 68% of all States (34 of 50) retain the death penalty,<sup>16</sup> which neatly matches up with polling figures showing that public support for the death penalty has hovered between 65% and 70% over the last decade or so.<sup>17</sup> Michigan's pioneering constitutional abolition of the death penalty in 1846, as well as more recent legislation in New Jersey, New Mexico, and Illinois amply demonstrate that abolition is also a state affair in this country.<sup>18</sup>

None of this has gone unnoticed. Much superb recent commentary on the death penalty has treated States and regional groupings of States as the key unit of

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<sup>11</sup> Eileen M. Connor, *The Undermining Influence of the Federal Death Penalty on Capital Policymaking and Criminal Justice Administration in the States*, 100 J. CRIM. L. & CRIMINOLOGY 149, 151 (2010) ("[T]he number of federal capital prosecutions remains low, and the vast majority of homicide prosecutions are undertaken by state criminal justice systems.").

<sup>12</sup> *Death Sentences in the United States from 1977 by State and Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Oct. 17, 2011) [hereinafter *Death Sentences by State and Year*] (listing the 112 individuals executed in the United States in 2009, of whom 108 were executed by one of the several states); *Execution List 2011*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2011>, (last visited Oct. 17, 2011) (listing the fifteen executions thus far in 2011, all of which were carried out by one of the several states).

<sup>13</sup> *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Sept. 29, 2011) [hereinafter *Facts*] (listing 3251 death row inmates in the United States as of January 1, 2011, of whom only sixty-eight were under federal sentence of death).

<sup>14</sup> See, e.g., Richard A. Devine, *The Death Penalty Debate: A Prosecutor's View*, 95 J. CRIM. L. & CRIMINOLOGY 637, 639 (2005) (criticizing Illinois Governor George Ryan's order commuting the sentence of, or pardoning, every death row inmate in the state in the waning days of his administration as a policy matter but acknowledging the governor's power to issue the order).

<sup>15</sup> Andrew Gelman et al., *A Broken System: The Persistent Pattern of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 214, 222 (2004) (noting that, despite frequent complaints about federal court interference with the death penalty via habeas corpus review, state courts have been responsible for 90% of reversals of death verdicts).

<sup>16</sup> See *Facts*, *supra* note 13, at 1.

<sup>17</sup> *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited April 6, 2011); but cf. Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low*, GALLUP (Oct. 13, 2011) <http://www.gallup.com/poll/150089/Support-Death-Penalty-Falls-Year-Low.aspx> (finding that only 61% of Americans now support the death penalty, the lowest level of support in nearly four decades).

<sup>18</sup> See GARLAND, *supra* note 2, at 36–38; Press Release, Governor Pat Quinn, Statement from Governor Pat Quinn on Senate Bill 3539 (Mar. 9, 2011), <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265> [hereinafter Governor Quinn's Abolition Statement].

analysis.<sup>19</sup> Summarizing and contributing to that commentary, Professor David Garland identifies a four-fold typology of American States and the death penalty—(1) abolishing States; (2) States such as Colorado, Connecticut and Wyoming that have death penalty statutes but only rarely invoke them; (3) States such as California, Pennsylvania, and Tennessee that frequently impose death sentences but rarely execute them; and (4) States such as Ohio, Oklahoma, and Texas that impose and execute death sentences fairly frequently.<sup>20</sup> The historical, political, demographic, and other explanations these observers have offered for differences in the use of the death penalty have also tended to be state-centric—focused, for example, on States that did and did not practice slavery, join the Confederacy, or tolerate lynching.<sup>21</sup>

<sup>19</sup> See, e.g., GARLAND, *supra* note 2; FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 72–78 (2003); Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1870 (2006) [hereinafter Steiker & Steiker, *Tale*] (noting that the United States is not monolithic in its death penalty practices and dividing the nation into “abolitionist” states, “symbolic” states and “executing” states). A sampling of the rich literature on the American death penalty includes DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990); STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002); FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* (2008); BEYOND REPAIR? *AMERICA’S DEATH PENALTY* (Stephen P. Garvey ed., 2003); CHARLES L. BLACK JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed. 1981); *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* (Elizabeth Beck & Hugo Adam Bedau eds., 1997); SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989); CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* (2005); *MACHINERY OF DEATH: THE REALITY OF AMERICA’S DEATH PENALTY REGIME* (David R. Dow & Mark Dow eds., 2002); CHARLES OGLETREE, JR. & AUSTIN SARAT, *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* (2006); SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (2005); Judge Arthur L. Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S. CAL. L. REV. 697 (2007); Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982); James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1 (2007); Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283 (2008); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

<sup>20</sup> GARLAND, *supra* note 2, at 200.

<sup>21</sup> See, e.g., GARLAND, *supra* note 2; ZIMRING, *supra* note 19, at 72–78; William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505 (2002); Steiker & Steiker, *Tale*, *supra* note 19, at 1916; Andrew Ditchfield, Note, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801 (2007). Although there is a robust scholarship on intrastate geographic disparities in the imposition of the death penalty, it focuses on the legal implications, if any, of the fact that defendants committing essentially the same capital-eligible crime in different counties of the same state often are predictably sentenced to the death penalty in some counties and to a lesser sentence in others. See, e.g., Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B. U. L. REV. (forthcoming in January 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1914638##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914638##) (arguing that the death penalty’s increasingly isolated use by a shrinking cluster of counties provides an opportunity for targeted litigation under the Eighth Amendment prohibition against arbitrary capital sentencing); see generally

As revealing as it is, this state-focused commentary misses important facets of the death penalty's localism. For example, these analyses typically pit States like Texas—the so-called “Death Penalty Capital of the Western World,” with nearly 500 executions since 1982<sup>22</sup>—against more politically liberal States like Maryland, which rarely carry out executions and are on no one's list of the nation's bloodiest.<sup>23</sup> Yet, just under two-thirds of the counties in Texas did not carry out a single execution in the past thirty-five years.<sup>24</sup> Texas's El Paso County—the seventy-fifth most populous county in the nation<sup>25</sup>—carried out only four executions during those three and one-half decades.<sup>26</sup> By contrast, Baltimore

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*supra* note 19. Recently, Adam Gershowitz has taken the analysis further, identifying the death penalty's localism as a policy, as well as a legal, problem that not only contributes to “geographic arbitrariness,” but also to uneven procedures, poor legal representation and high error rates. See Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 311, 318–28 (2010) [hereinafter Gershowitz, *Statewide Capital Punishment*]; see also Adam M. Gershowitz, *Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty*, 41 U. RICH. L. REV. 861, 871 (2007); *infra* notes 445–52 and accompanying text. But see Stephen F. Smith, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC. 105, 107, 109–15 (2011) (responding to Gershowitz and concluding that county-by-county death sentencing disparities “are not troubling at all, but rather the inevitable effect of any system of nationally varying law enforcement.”). In considering why counties have different approaches to the death penalty, Professor Gershowitz mainly blames differential spending. Gershowitz, *Statewide Capital Punishment*, *supra* at 318–23; but *cf. id.* at 318 (“[I]t is hard to explain the wide variations in counties' use of the death penalty.”). As Professor Stephen Smith points out, however, Gershowitz's explanation boils down to a matter of differences in “local preferences,” including preferences for approaches to and levels of support for public safety. Smith, *supra* at 110–11. As we develop below, understanding the reasons for local differences—what Professor Smith refers to generically as “the values, priorities, and felt needs of local communities” to which local criminal justice strategies respond, see *id.* at 110—is helpful in resolving the question whether the penalty's localism is a good or bad thing.

<sup>22</sup> State by State Database, DEATH PENALTY INFO. CTR., [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited May 11, 2011).

<sup>23</sup> David Michael Smith, *The Death Penalty Capital of the Western World*, 13 PEACE REV. 495, 495 (2001) (“When it comes to the death penalty, Texas has the dubious distinction of being the bloodiest state in the U.S., outstripping all others in sheer numbers of executions” (quoting Curt Goering, an official of Amnesty International)); see also Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 45 (2007) (“Texas [in 2000] was the undisputed capital of capital punishment among the states”); Adam Liptak, *At 60% of Total, Texas is Bucking Execution Trend*, N.Y. TIMES, Dec. 26, 2007, at A1.

<sup>24</sup> Professor Baumgartner identified the originating county of all executions in the United States between 1977 and 2007. His data shows that only ninety of Texas's 254 counties (35%) carried out at least one execution between the Supreme Court's reinstatement of the death penalty in 1976 and 2010. Frank R. Baumgartner, *Spreadsheet of Executions by County*, <http://www.unc.edu/~fbaum/Innocence/NC/execs-by-county-since-1976.xlsx> (last updated Oct. 2010) [hereinafter Baumgartner, *Spreadsheet*].

<sup>25</sup> Population figures are from the 2000 Census. *Resident Population Estimates for the 100 Largest U.S. Counties Based on July 1, 2009 Population Estimates: April 1, 2000 to July 1, 2009*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/counties/CO-EST2009-07.html> (last visited Oct. 17, 2011).

<sup>26</sup> Baumgartner, *Spreadsheet*, *supra* note 24. See U.S. CENSUS BUREAU, *supra* note 24.



County, Maryland—the nation’s seventy-first most populous county—registered the twenty-third most death sentences of any county of any size in the United States between 1973 and 1995.<sup>27</sup>

More generally, many of the most important capital decisions are exclusively the domain of local actors—including whether to investigate, charge, convict, and condemn a suspect. Applying the same statute, moreover, and faced with similar circumstances, local actors often make these decisions quite differently from their counterparts in neighboring locales.<sup>28</sup> There even is evidence that state appellate courts and federal habeas corpus courts exercise different levels of scrutiny of death verdicts depending upon which locality generates them.<sup>29</sup> More than anything else, therefore, it is the practices, policies, habits, and political milieu of local prosecutors, jurors, and judges that dictate whether a given defendant in the United States—whatever his crime—will be charged, tried, convicted, and sentenced capitally and executed.

By focusing on county rather than state data, this Article paints a new and surprising portrait of the death penalty in the United States. Unlike state-by-state analyses or national polling numbers—which portray the penalty as a penological tool of choice of a comfortable majority of Americans and American

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Compare Texas’s Potter and Brazos counties, each with about one-fifth the population of El Paso County, and which executed eleven and twelve individuals, respectively, during the same period. See U.S. Census Bureau, Annual Estimates of the Resident Population for Counties: April 1, 2000 to July 1, 2009, <http://www.census.gov/popest/counties/CO-EST2009-01.html>.

<sup>27</sup> See James S. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, Table 11A, at B-2, (2002), <http://www2.law.columbia.edu/brokensystem2/> [hereinafter Liebman et al., *Broken System II*]. Over the 1973–1995 period, suburban Baltimore County accounted for over 55% of Maryland’s death sentences, despite having less than 15% of the state’s population (1990 census) and being only its third most populous county. See *id.*, Table A1 at A-18 & Table 11A at B-2; see U.S. CENSUS BUREAU, *Time Series of Maryland Intercensal Population Estimates by County: April 1, 1990 to April 1, 2000*, [www.census.gov/popest/archives/2000s/vintage\\_2001/CO-EST2001-12/CO-EST2001-12-24.xls](http://www.census.gov/popest/archives/2000s/vintage_2001/CO-EST2001-12/CO-EST2001-12-24.xls) (last visited Oct. 17, 2011). Baltimore County’s proportion of Maryland’s death row population actually increased in subsequent years. Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 MARGINS: MD. L.J. ON RACE, RELIGION, GENDER & CLASS 1, 2 (2004) (noting that, as of 2004, fully two-thirds of those on death row in Maryland were convicted by Baltimore County).

<sup>28</sup> See, e.g., BALDUS ET AL., *supra* note 19, at 117–33; GARLAND, *supra* note 2, at 117; Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Saliency for Issues of Cost*, 100 J. CRIM. L. & CRIMINOLOGY 1301, 1324–41 (2010); G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 433 (2010); Gershowitz, *Statewide Capital Punishment*, *supra* note 21, at 308–10, 314–28; Paternoster et al., *supra* note 27, at 2; Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 62 (2002); Smith, *supra* note 21, at 106–14.

<sup>29</sup> See Gelman et al., *supra* note 15, at 247 (presenting statistical analysis indicating that state courts are more likely to overturn death verdicts from urban than from rural and small-town counties, while federal habeas corpus decisions exhibit the opposite trend); *infra* notes 192–94 and accompanying text.

jurisdictions<sup>30</sup>—county-level analysis reveals that the modern American death penalty is a distinctly minority practice across the United States and in most or all of the thirty-four so-called death penalty States. Indeed, analyzed in this way, the data pose a modern analogue to the puzzle at the heart of Douglas Hay's examination of England's eighteenth century capital punishment: how a small minority of capital punishment partisans gained control over the nation's killing machine and administered it for decades in a costly—even facially irrational—manner, and why everyone else went along.<sup>31</sup>

Part II discusses the raw numbers, which show that American counties responsible for the vast majority of death sentences and executions represent a minority of Americans. Moving from simple counts to an uneasy combination of statistical analysis and cultural speculation, Part III identifies two threads that appear to link communities that frequently use the death penalty—parochialism and libertarianism—and shows how their intersection enhances the penalty's appeal. Part IV uses the confluence of the same two forces to explain another puzzle confounding death penalty practice both in the United States today and in eighteenth century England: how a large number of death verdicts can yield only a small number of executions. In both periods, post-conviction review—by clemency officials in England, by courts in the United States—is the most common explanation, yet in neither period did centralized review have the expected, chastening effect on local practice. Again analogizing to Hay's solution to a parallel quandary, Part IV explains why this is so in the United States today.

The remainder of the Article discusses the implications of the minority's use of the death penalty for the majority of jurisdictions that do not much use it. Part V catalogues the myriad and escalating costs locally practiced capital punishment imposes on residents of the majority of communities that rarely or never use it, and asks why the majority continues to tolerate those costs. Part VI complicates the analysis by distinguishing the last dozen years of capital punishment practice from the two-dozen preceding years, noting important changes that suggest that the majority is fighting back. If so, however, the unintended effect has only been to increase the disparity between the costs and benefits of the death penalty for the majority. Part VII suggests how the majority might better align costs and benefits. Part VIII provides policy options.

## II. A MINORITY PRACTICE

There are two obvious ways to measure usage of the death penalty: how often it is imposed, and how often it is carried out. Although the former sets an upper boundary on the latter, the correlation between the two can be less pronounced than one would expect. Thus, although eighteenth century wags across the Channel sneered that England might as well adopt the gallows as its

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<sup>30</sup> See *supra* notes 16–18 and accompanying text.

<sup>31</sup> See Hay, *supra* note 5, at 18–19.

national symbol considering how many crimes received death sentences, in fact, even in its capital punishment heyday, Georgian England executed only about 20% of those it condemned to die.<sup>32</sup> An even greater disparity exists in the United States today, which—since the Supreme Court permitted executions to proceed in 1976 after a ten-year hiatus—has executed only about 15% of those it has sentenced to die.<sup>33</sup> In this Part, we examine the frequency of both death sentences and executions in the United States in the recent past.

### A. Death Sentences

The only comprehensive county-by-county analysis of modern death sentencing in the United States is our own *Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can Be Done About It*, which examines death sentences imposed in the United States between 1973 and 1995.<sup>34</sup> During that period, thirty-four states sentenced at least one person to death, yet fully 60% of the counties in those States did not impose a single sentence of death over the twenty-three year period despite an estimated 332,000 homicides and 120,000 murder convictions occurring there during that time.<sup>35</sup> Even in Texas, nearly 60% of its counties did not impose a single death sentence in the period.<sup>36</sup>

Not only have many counties *de facto* abolished the death penalty, but many others have employed it only sparingly—once or twice a decade. Fairfax County, Virginia, for example, with a population of nearly one million, imposed only five death sentences between 1973 and 1995.<sup>37</sup> Conversely, a relatively small number of counties account for an extraordinary proportion of the nation's death verdicts. During the same period, Seminole County, Georgia, had the same number of death sentences as Virginia's Fairfax County but had a population more than 100 times smaller.<sup>38</sup> Similarly, Hillsborough County (Tampa), Florida, with about the same population as Fairfax, imposed over *thirteen times* more death sentences (sixty-seven).<sup>39</sup> More than half of the death sentences imposed nationwide over the twenty-three-year *Broken System* study period originated in only sixty-six, or

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<sup>32</sup> England and Wales capitally sentenced about 580 people a year between 1770 and 1830, but executed only about 115 a year. See V. A. C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770–1868*, at 7, 618 (1994).

<sup>33</sup> *Executions per Death Sentence*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-death-sentence> (last visited May 12, 2011).

<sup>34</sup> See Liebman et al., *Broken System II*, *supra* note 27 (reprinted in abbreviated form in Gelman et al., *supra* note 15); see also James S. Liebman, *Rates of Reversible Error and the Risk of Wrongful Execution*, 86 JUDICATURE 78 (2002).

<sup>35</sup> See Gelman et al., *supra* note 15, at 214, 252.

<sup>36</sup> See Liebman et al., *Broken System II*, *supra* note 27, at 246.

<sup>37</sup> Liebman et al., *Broken System II*, *supra* note 27, at B-5. All county populations are from the 2000 census.

<sup>38</sup> *Id.* at B-1.

<sup>39</sup> *Id.* at B-3, B-5.

2%, of the nation's 3143 counties, parishes, and boroughs.<sup>40</sup> Sixteen percent of the nation's counties (510 out of 3143) accounted for 90% of its death verdicts in the period.<sup>41</sup>

As the death-sentencing disparities just noted between the equally populous Fairfax and Hillsborough Counties reveal, these numbers are not a result of the heavy use of the death penalty by a small number of densely populated counties. Between 1973 and 1995, the counties where only a fifth of all Americans lived imposed two-thirds of its death sentences.<sup>42</sup> Counties with 10% of the nation's residents imposed 43% of its death sentences.<sup>43</sup> Even considering only death-sentencing States, counties comprising around 10% of the population were responsible for over 38% of the death sentences.<sup>44</sup>

In short, county-level data reveal something that state-level analyses do not: notwithstanding broad public and statutory support, the vast bulk of death sentences are imposed on behalf of a small minority of Americans. A given defendant's likelihood of receiving a sentence of death depends greatly on the county in which he was tried.<sup>45</sup>

### B. Executions

The figures are even more striking when we focus on counties where death sentences end in actual executions. Recently, University of North Carolina political scientist Frank Baumgartner found that only 454 (14%) of the nation's 3143 counties, parishes and boroughs carried out an execution between 1976,

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<sup>40</sup> See Peter Clarke, *County-by-County Death Sentencing Spreadsheet* (Apr. 2011) (on file with the authors) [hereinafter Clarke Spreadsheet] (showing that from 1973 to 1995, sixty-six counties imposed 2569 of the 5131 total death sentences imposed in the period). This spreadsheet reports the death sentences per capita for all counties in the United States in which at least one death sentence was imposed during one of two periods, 1973–95 (the *Broken System II* period) and 2004–09. The death sentence data for the earlier period is from Liebman et al., *Broken System II*, *supra* note 27, or the NAACP Legal Defense Fund's quarterly death row census, DEATH ROW USA. NAACP LEGAL DEF. FUND, <http://naacpldf.org/death-row-usa> (last visited Oct. 17, 2011) [hereinafter DEATH ROW USA]. *Broken System II* is the source for all 1973–95 county data for counties five or more death verdicts in the 1973–95 period; DEATH ROW USA is the source for all county data for counties with one to four death verdicts during that period. Death sentences by county for the later period are from a compilation created by Robert J. Smith of the Charles Hamilton Houston Institute, Harvard University Law School, for research he is conducting on regional disparities in death sentencing. Smith's compilation reports the number of death sentences handed down by county, by year, between 2004 and 2009. In the Clarke Spreadsheet, Smith's data for each of those years have been summed into a six-year total. We are deeply grateful to Mr. Smith for sharing his data with us. Population figures are from the 2000 census.

<sup>41</sup> Clarke Spreadsheet, *supra* note 40.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., Bienen, *supra* note 28.

when the Supreme Court permitted executions to go forward again, and 2007, when Baumgartner's study ends.<sup>46</sup> Six-sevenths of all American counties have not carried out an execution in four and a half decades.<sup>47</sup>

From this perspective, the localism and small proportion of American communities that use the death penalty are startling. Fourteen counties—about four-tenths of a percent of all U.S. counties, encompassing less than 5% of the nation's population—carried out over half (53%) of its executions between 1976 and 2007.<sup>48</sup> Nearly one-quarter (23%) of all executions came from only *six* counties, with fewer than 2% of the country's population.<sup>49</sup>

Although jurisdictions with only a tenth of Americans account for 43% of its death *sentences*, that same small slice of the population accounts for nearly 70% of all *executions*.<sup>50</sup> Between 1976 and 2007, half of all executions were carried out on behalf of less than 5.5% of Americans.<sup>51</sup> Twenty-eight percent of Americans account for over 95% of its executions.<sup>52</sup> A clear majority (57%) of Americans live in counties that have not executed a soul for nearly a half-century.<sup>53</sup> Over 70% of citizens reside in counties that have executed one person or less during the period.<sup>54</sup>

Despite the comfortable majorities that profess to telephone pollsters that they favor the death penalty, its actual imposition has been a minority practice in the United States for decades.<sup>55</sup> Moreover, the actual execution of the penalty is an even rarer phenomenon. It is employed on behalf of a small fraction of Americans who reside in a minuscule proportion of its communities.

### III. AN EXPLANATION OF THE DEATH PENALTY'S LOCALISM

The irregular pattern of modern American death sentencing cries out for a

<sup>46</sup> Baumgartner, *Spreadsheet*, *supra* note 24. Because of the moratorium on executions in the nation between 1966 and 1976, the same figure holds if one commences the period in question in 1966. See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 106–25 (1973) (describing the moratorium). In this Article, we use 1976, not 1966, as the start date for our relevant analyses.

<sup>47</sup> Baumgartner, *Spreadsheet*, *supra* note 24. Baumgartner records 454 different county and county-equivalents that originated at least once sentence of death. There are 3143 counties and county-equivalents in the United States (3143 minus 454 equals 2689; 2689 of 3143 is 85.6%).

<sup>48</sup> *Id.*; Clarke Spreadsheet, *supra* note 40.

<sup>49</sup> Frank R. Baumgartner, *Race, Innocence, and the Death Penalty*, 19 (Apr. 7, 2010), <http://www.unc.edu/~fbaum/Innocence/NC/Baumgartner-Race-DP-UNC-presentation-April-7-2010.pdf>; Clarke Spreadsheet, *supra* note 40.

<sup>50</sup> Clarke Spreadsheet, *supra* note 40.

<sup>51</sup> See Clarke Spreadsheet, *supra* note 40.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See *supra* notes 16–18 and accompanying text.

local explanation. What common thread holds together the minority of locales that regularly impose and execute death verdicts and separates them from the majority of communities that do not use the penalty? Given that the rest of the Western world has formally abolished the civilian death penalty—and the great majority of Americans and their localities have largely managed without it for decades—what is it that impels a narrow sliver of communities to cling to a seemingly anachronistic institution?

At this point, the available hard data fail us. There is no comprehensive study of the demographic, sociological, ideological, or penological characteristics that distinguish high death-sentencing counties from the rest, much less any that support causal explanations. There are, however, some tantalizing clues in our *Broken System II* study.<sup>56</sup> In addition to other authors' suggestions about the death penalty's localism, we rely on these inferences in offering hypotheses about why these particular counties choose to practice capital punishment at all and at higher rates than other communities. Our premise is that localities that "use" the death penalty—that execute it or at least impose it with any degree of frequency—are not random idiosyncrasies, but share notable traits, tendencies, and traditions. Specifically, we propose that these localities are led to cling to the death penalty and favor it over other potential responses to violent crime by a set of common instincts that lie at the intersection of what we call "parochialism" and "libertarianism."

*Broken System II* is a comprehensive set of regression studies of the features of states and counties that—and of possible explanations for *why*—experience high rates of serious (i.e., prejudicial and reversible) error in the capital verdicts they impose. The study is only suggestive for present purposes because it does not seek to explain the comparative *use* of the death penalty (the topic of this Article), but instead comparative rates of judicially identified serious *error* when it is used.

The reason we can use *Broken System II* at all for our current purposes is because—at both the state and county levels—the strongest distinguishing feature it associated with high error rates was high capital-sentencing rates. In other words, states and counties that produced the most error-prone death verdicts were also the ones that generated the most verdicts per 1000 homicides. At the state level, rates of serious reversible error found in capital cases increase from less than 15% to more than 75% as death-sentencing rates per 1000 homicides move from the lowest to the highest end of the spectrum observed across states and years in the study.<sup>57</sup> The same is true at the county level; the more death verdicts per homicide a county imposes, the more likely it is that each new death sentence will be infected with reversible error.<sup>58</sup> This county factor operates independently of,

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<sup>56</sup> See Liebman et al., *Broken System II*, *supra* note 27, at 82–145 (reprinted in Gelman et al., *supra* note 15, at 253–54). For the reasons emphasized in the next paragraph, even the *Broken System II* study provides only clues, nothing more.

<sup>57</sup> *Id.* at 342 (reprinted in Gelman et al., *supra* note 15, at 241–42 & fig.6(a)).

<sup>58</sup> *Id.* at 349 (reprinted in Gelman et al., *supra* note 15, at 254).

and in addition to, the similar dynamic that operates at the state level.<sup>59</sup> At both the state and the county levels, the link between error rates and death-sentencing rates was powerful. Holding all other factors constant, death verdicts imposed in jurisdictions with the highest rates of death-sentencing per 1000 homicides were nine times more likely to be reversed as a result of serious error than capital verdicts imposed in jurisdictions with the lowest rates of death-sentencing per 1000 homicides.<sup>60</sup>

*Broken System II* also identified a variety of other features associated with high rates of serious error in death verdicts at the state and county level.<sup>61</sup> Because those features are associated with high rates of capital-sentencing error, which in turn are associated with high rates of capital-sentencing *per se*, we hypothesize—fully acknowledging that we are nowhere near *proving*—that those features are also characteristic of high death-sentencing jurisdictions.

A further caveat is that some of the associations *Broken System II* established were only at the state, and not at the county level, because data on that feature were available only at the state level.<sup>62</sup> As to features for which we did have data at both the state and county level, the county effects tended to be about as strong as the state effects.<sup>63</sup> We cannot say the same for certain as to features for which there is no county-level data. In those cases, our hypotheses about the attributes of high death-sentencing counties are doubly speculative, because they are extrapolated based on features of jurisdictions with high rates of reversible error in capital cases and are based on features of the states in which the counties are located.

## A. Parochialism

### 1. Parochialism Defined

The term “parochial” can have a pejorative connotation of closed-mindedness or self-serving behavior.<sup>64</sup> That is not our intent here. Rather, by “parochial” we mean the attribution of innate importance and validity to the values and experiences one shares with the members of—and thus to the security, stability and continuity of—one’s closely proximate community. We mean something like “localism for its own sake”—in much the way that the phrase “parochial schools” is used to distinguish schools attractive to families with a common set of religious

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<sup>59</sup> *Id.* at 349 (reprinted in Gelman et al., *supra* note 15, at 253–54).

<sup>60</sup> *Id.* at 224 (reprinted in Gelman et al., *supra* note 15, at 241).

<sup>61</sup> *Id.* at 239–41 (reprinted in Gelman et al., *supra* note 15, at 243–44).

<sup>62</sup> *See, e.g.,* Liebman et al., *Broken System II*, *supra* note 27, at 96.

<sup>63</sup> *Id.* at 269 (reprinted in Gelman et al., *supra* note 15 at 252–53).

<sup>64</sup> *See, e.g.,* Jedediah Purdy, *The Coast of Utopia*, N.Y. TIMES, Feb. 22, 2009, at BR10, available at <http://www.nytimes.com/2009/02/22/books/review/Purdy-t.html> (“It has never been clearer that the country’s best self is a global inheritance, its worst a parochial self-certainty.”)

beliefs from the majority of public and also other private schools.<sup>65</sup>

We also understand the concept to convey a sense of anxiety or threat. Given the recent acceleration of national and worldwide cultural integration, we understand "parochialism" to include fears that prized local values and experiences are embattled, slipping into the minority and at risk from modernity, cosmopolitanism, immigration-driven demographic change, and a coterie of "progressive" and secular influences, including permissiveness and crime.<sup>66</sup> We assume that the perceived agents of this unwanted change include government officials at the state and especially federal levels, including "unelected," "elitist" judges and the outside lawyers who appeal to them.<sup>67</sup> From this perspective, the boundaries of the immediate community represent a bulwark against outside influences that threaten to dilute or entirely dissolve the community's cohesion, and parochialism compels a spirited defense of those frontiers.

## 2. Death-Sentencing Localities as Parochial Communities

There is evidence that the minority of localities that frequently impose the death penalty is parochial in the sense described above. To begin with, studies consistently find that localities with higher death-sentencing rates tend to have traditional rather than modern political values, a resonance with masculine honor codes and revenge, Old Testament, and evangelical Christian religious beliefs, and Republican Party affiliation.<sup>68</sup> In addition, *Broken System II* found evidence that communities with high rates of capital error—which are strongly correlated with

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<sup>65</sup> For an example of a largely favorable comparison between "parochial" and public schools (e.g., on grounds of the moral reasoning capacity, self-esteem, and educational aspirations of students), see *Morality in Education: Morality in Parochial vs. Public Schools*, UNIV. MICH. DEP'T PSYCHOL., [http://sitemaker.umich.edu/356.dworin/parochial\\_vs\\_public\\_schools](http://sitemaker.umich.edu/356.dworin/parochial_vs_public_schools) (last visited Oct. 18, 2011).

<sup>66</sup> See GARLAND, *supra* note 2, at 158–61, 170–71 (discussing the "localism" of American politics generally and Americans' distrust of groups of people different from themselves who they believe exercise excessive power over the national state).

<sup>67</sup> Consider, for example, a local prosecutor's reaction to a federal habeas judge's reversal of a death sentence:

Where's the fairness for the law-abiding citizens? How many appeals are you entitled to? The constitution demands finality of punishment.

Us good folks here in Tennessee are able to take care of our business in the criminal justice system. We're bright enough to understand the system. Once the [Tennessee] Criminal Court has spoken, and the Tennessee Supreme Court has spoken, that's enough.

We don't need this guy telling us we're wrong. If he had to stand for election every eight years or so and let the people speak, we wouldn't be seeing opinions like this. We don't need a federal judge involved in our justice system. He needs to be held accountable for what he's doing.

Tom Chester, *Prosecutor Lashes Judge for Reversal of Death Sentence*, KNOXVILLE NEWS-SENTINEL, May 21, 1994, at A1.

<sup>68</sup> See, e.g., Gelman et al., *supra* note 15, at 224.



high death-sentencing rates—are ones where influential citizens feel they are under particular threat from crime.<sup>69</sup> Interestingly, neither crime nor homicide rates themselves predict high reversal rates and the high death-sentencing rates that go with them.<sup>70</sup> What is predictive, however, is a high rate of homicide victimization of *white* residents relative to the rate of homicides affecting *black* residents.<sup>71</sup> While in virtually all communities, the homicide rate experienced by African-American citizens is greater than that experienced by whites, in heavy death-sentencing communities that disparity is smaller. Other things equal, the smaller the disparity is between white and black homicide victimization, the higher the death-sentencing rate is.<sup>72</sup> Heavy use of the death penalty thus seems to occur when the worst effects of crime have spilled over from poor and minority neighborhoods and are particularly salient to parts of the community that we can predict will have greater influence over local law enforcement, prosecution, and judicial officials.<sup>73</sup>

In view of the importance of relative rates of white and black criminal victimization, not crime rates themselves, we also hypothesize that it is this cross-boundary, cross-class, and cross-race spill-over effect of crime—or the elevated fear of it—that disposes communities towards the harshly retributive response of capital punishment. In other words, we hypothesize that a “parochial” tendency to feel embattled from “outside” influences, including crime, disposes communities to use the death penalty.

There are at least four ways that the *Broken System II* data support this hypothesis. First, of course, crime typically is, and is perceived to be, an intrusive act of deviance from the accepted social order. In this sense, the criminal is always an *outside* threat to a given community. Second, as we just noted, the crime experienced in high death-sentencing communities is statistically more likely to be, or to appear to influential members of the community to be, spilling over from the precincts where poor and minority citizens live into their own communities.<sup>74</sup> Third, *Broken System II* strongly associated high capital-error rates and usage of the death penalty with proximity to a large population of either African-American citizens or citizens receiving government welfare support.<sup>75</sup> This is particularly striking because African-American

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<sup>69</sup> *Id.* at 228.

<sup>70</sup> Liebman et al., *Broken System II*, *supra* note 27, at iii (reprinted in Gelman et al., *supra* note 15, at 217).

<sup>71</sup> *Id.* (reprinted in Gelman et al., *supra* note 15, at 244).

<sup>72</sup> *Id.* (reprinted in Gelman et al., *supra* note 15, at 242, 244); *see also id.* at 166–67 (noting that higher error rates are correlated with higher death-sentencing rates); *supra* notes 57–63 and accompanying text (noting that we are extrapolating from factors associated with high error rates to ones associated with high death-sentencing rates).

<sup>73</sup> *See* Gelman et al., *supra* note 15, at 248.

<sup>74</sup> Liebman et al., *Broken System II*, *supra* note 27, at 166.

<sup>75</sup> *Id.* at 241 (reprinted in Gelman et al., *supra* note 15, at 248).

communities and jurors themselves are far less likely than their white counterparts to impose the death penalty.<sup>76</sup> Fourth, there is an “interaction effect” between the second and third factors above. In communities where both conditions are present—a large African-American community nearby *and* a high rate of white homicide victimization relative to black homicide victimization—the death-sentencing rate is higher than one would expect by simply summing the effect of each of those factors by itself.<sup>77</sup> In other words, the combination of a large African-American population nearby *and* a larger proportion of the risk of homicide being borne by whites relative to blacks has a particularly strong association with more frequent resort to the death penalty and higher rates of reversible error in death verdicts imposed.<sup>78</sup>

Everything we know about the psychology of racial stereotypes and crime suggests a dynamic that links this combination of high comparative crime victimization in white communities and their close proximity to poor and minority communities to a disposition to impose harsh punishment:

Ethnicity comes into play for two reasons. First, ethnicity is associated with political power. Threats to the safety and security of the white community tend to be taken more seriously by law enforcement officials than threats to minority communities. Second, partially through the unfortunate operation of racial stereotypes, citizens and officials tend to use the ethnicity of suspects (particularly if the suspects are African-American) and the size of nearby minority populations (especially African-American populations) as proxies for the threat of violent crime posed by particular individuals and present in particular social environments.<sup>79</sup>

As the perceived<sup>80</sup> threat rises, so does the likelihood of a punitive response.

We thus hypothesize that the relatively greater share of the risk of crime falling on whites in high death-sentencing communities, together with the misperceived threat from large nearby populations of poor African-Americans, gives influential members of these communities a partly accurate, partly inflated, sense of threat from crime emanating from outside. By “outsider,” we certainly mean transient individuals who do not reside in the community and are just passing

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<sup>76</sup> See Gelman et al., *supra* note 15, at 227 & n.47 (citing sources).

<sup>77</sup> Liebman et al., *Broken System II*, *supra* note 27, at 240 (reprinted in Gelman et al., *supra* note 15, at 244).

<sup>78</sup> *Id.*

<sup>79</sup> Gelman et al., *supra* note 15, at 228.

<sup>80</sup> A crucial feature of this dynamic is the combination of *actual* threats, measured by homicide rates, and *inaccurately perceived* threats, as measured by proximity to African-American populations. The research literature, discussed in Gelman et al., *supra* note 15, at 248 & n.99, demonstrates that white populations consistently associate proximity to African-Americans with a much higher threat of crime than actually exists.

through. The association of capital crimes with gas station and convenience store hold-ups and home invasion crimes along major interstate arteries is a manifestation of this effect.<sup>81</sup> But "outsider" also includes individuals who cross racial and economic boundaries *within* communities in order to commit crimes. The perceived threat posed from outsiders disposes parochial, more than other, communities to invoke the death penalty in response to the threat—especially when they can directly and powerfully communicate their fears to elected officials.<sup>82</sup> The importance of the last-mentioned element is suggested by the *Broken System II* finding that excessive imposition of the death penalty increases with the extent to which local judges are subject to political pressure—as measured by the type, frequency and partisan nature of elections used to select judges.<sup>83</sup>

The use of the death penalty in response to perceived threats to influential members of insular communities from cross-boundary crime helps explain the high death-sentencing rate in communities that otherwise do not fit the capital punishment stereotype. An example mentioned earlier is Baltimore County, Maryland—the predominantly white, suburban donut that encircles the majority African-American Baltimore City.<sup>84</sup> The consistent pattern across the United States of a two to five times greater chance of being sentenced to die for killing a white victim than for the same killing of a black victim may be a more generalized repercussion of the same dynamic.<sup>85</sup>

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<sup>81</sup> See, e.g., *Houston v. Dutton*, 50 F.3d 381, 383 (6th Cir. 1995) (affirming reversal of a capital conviction for an out-of-towners' gas station armed robbery and murder), *cert. denied*, 516 U.S. 905 (1995); *Mitchell v. Hopper*, 538 F. Supp. 77, 85–86 (S.D. Ga. 1982) (upholding death sentences for men recently released from prison in Florida who crossed the border into southern Georgia and killed a fourteen-year-old boy and shot his mother several times after marching them into a meat cooler at the roadside grocery store where they worked), *aff'd*, 827 F.2d 1433 (11th Cir. 1987), *cert. denied*, 483 U.S. 1050 (1987); *Coleman v. State*, 226 S.E.2d 911, 913 (Ga. 1976) (affirming death sentence of one of four capitally sentenced defendants who broke into a rural mobile home in southern Georgia in order to burglarize it, then successively killed, and in one case raped, six extended family members over the course of the day as each arrived home or came to check on the family members who had already been killed; discussed *infra* notes 216–23 and accompanying text), *cert. denied*, 431 U.S. 909 (1977).

<sup>82</sup> Liebman et al., *Broken System II*, *supra* note 27, at 351 (reprinted in Gelman et al., *supra* note 15, at 249).

<sup>83</sup> See Gelman et al., *supra* note 15, at 256. This finding probably applies as well to district attorneys, virtually all of whom in the United States are locally elected. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–35 & n.117 (2001) (noting that over 95% of district attorneys are elected, giving them incentives to produce prosecutions and convictions the public favors).

<sup>84</sup> See *supra* note 27 and accompanying text. Other similar localities with high death-sentencing rates include Cleveland, Ohio (Cuyahoga County); Gary, Indiana (Lake County); Oakland, California (Alameda County); Philadelphia, Pennsylvania; and St. Louis County, Missouri. See Gershowitz, *Statewide Capital Punishment*, *supra* note 21, at 314–18; Liebman et al., *Broken System II*, *supra* note 27, at B-3–6. See also *infra* notes 385–99 and accompanying text (discussing Los Angeles and Phoenix).

<sup>85</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987) (discussing "an extensive analysis" of racial death sentencing patterns in Georgia, which found that "even after taking account

## B. Libertarianism

### 1. Death-sentencing Localities as Libertarian Communities

The evidence from *Broken System II* and elsewhere suggests that the counties that frequently use the death penalty exhibit libertarian as well as parochial impulses.<sup>86</sup> By libertarian beliefs, we mean preferences for more rather than less protection of acts of individual autonomy, for less over more frequent exercises of state power, and for low taxes over high services.<sup>87</sup> Libertarianism also is associated with a vigilante streak—a willingness to take the law into one's own hands and out of the untrustworthy hands of government.<sup>88</sup> In other words, the

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of . . . nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks [and that] black defendants were 1.1 times as likely to receive a death sentence as other defendants," indicating "that black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty"); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 55 (1984). ("In Georgia, those who killed whites were ten times as likely to be sentenced to death as those who killed blacks; in Florida the ratio was about to eight to one, and in Illinois about six to one."); Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LA. L. REV. 647 (2011) (finding a 2.6 times higher chance of being sentenced to death in East Baton Rouge Parish if the victim is white, rather than black). See generally DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 133 (1999) (discussing *McCleskey v. Kemp*, *supra*); RANDALL KENNEDY, RACE, CRIME AND THE LAW 328 (1997) (discussing *McCleskey v. Kemp*, *supra*).

Consider also the prominent use of the death penalty by communities in the South to punish a black man's rape of a white woman, even after the penalty had stopped being imposed there and elsewhere for other crimes short of murder. See Charles Lane, *The Death Penalty and Racism: The Times Have Changed*, AM. INTEREST ONLINE (Nov./Dec. 2010), <http://www.the-american-interest.com/article.cfm?piece=901> (noting that of the 455 men executed for rape in the United States between 1930 and 1967, 90% were African American). Cf. *Coker v. Georgia*, 433 U.S. 584 (1977) (barring the death penalty for rape of an adult woman); *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (extending *Coker*'s holding to bar the death penalty for rape of a child). In an earlier time and segment of the nation, interracial rape constituted the quintessential cross-boundary, stranger crime against members of a privileged community.

<sup>86</sup> See *infra* notes 89–92 and accompanying text.

<sup>87</sup> See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM 199 (1964) (arguing that "the greater part of new ventures undertaken by government in the past few decades"—what Friedman calls "the visible hand for retrogression"—"have failed to achieve their objectives," but that the nation has progressed nonetheless because of "initiative and drive of individuals co-operating through the free market"); JAN NARVESON, THE LIBERTARIAN IDEA 207 (1988) ("[L]ibertarians are notoriously unhappy with the state . . ."); LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 855 (1949) (arguing that "[t]he interventionist policies as practiced for many decades by all governments of the capitalistic West have brought about . . . wars and civil wars, ruthless oppression of the masses by clusters of self-appointed dictators, economic depressions, mass unemployment, capital consumption, and famines," which governments then have claimed "demonstrate the necessity of intensifying interventionism").

<sup>88</sup> See Angela M. Schadt & Matt DeLisi, *Is Vigilantism on Your Mind? An Exploratory Study of Nuance and Contradiction in Student Death Penalty Opinion*, 20 CRIM. JUST. STUD. 255, 259 (2007) ("[P]ublic concerns for the costs and perceived effectiveness of the official criminal justice system have served as the impetus for various forms of vigilante justice . . .").

uneasy combination of a desire for seriously retributive responses to non-consensual acts interfering with another's autonomy, yet little or no spending on police, prosecutors, investigators, courts, corrections, rehabilitative services, and other methods of combating crime may dispose libertarians towards self-help, even in the realm of criminal justice and law enforcement.

The *Broken System II* study found that states with high rates of reversible error in capital cases also have three other features of interest here: high death-sentencing rates, low clearance rates for serious crime, and low levels of expenditure on criminal courts.<sup>89</sup> Holding other factors constant at their average value, jurisdictions with the highest capital-error rates have seven times higher capital-sentencing rates than jurisdictions with the lowest capital error rates; are seven times less likely to capture, convict and incarcerate criminals for serious crimes committed there; and spend a third as much on their criminal courts.<sup>90</sup> *Broken System II* also found that the large numbers of capital verdicts awaiting state court appellate review that are in jurisdictions with high death-sentencing

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<sup>89</sup> See Liebman et al., *Broken System II*, *supra* note 27, at 352–54 (reprinted in Gelman et al., *supra* note 15, at 240–43, 244–46). The study defined clearance rates as the number of prisoners incarcerated in the state compared to the number of FBI Index Crimes committed. See *id.* at 352. Comparable figures on state and county expenditures on capital defense costs are not available, but there is ample evidence that high death-sentencing counties do what they can to skimp on these costs. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1851 (1993) (surveying indigent defense systems across many states and finding that “gross underfunding . . . pervades indigent defense” making it impossible “to attract and keep experienced and qualified attorneys because of lack of compensation and overwhelming workloads”); Matt Thacker, *Clark County Prosecutor Supports Limits on Death-Penalty Payments*, NEWS & TRIB., (Dec. 18, 2010), <http://newsandtribune.com/local/x1666507751/Clark-County-prosecutor-supports-limits-on-death-penalty-payments/print> (reporting on county prosecutor's efforts to limit reimbursement of capital defense lawyers for their fees, experts and investigators as a way to be able to afford to prosecute more cases capitally); Robert Weisberg, *Who Defends Capital Defendants?*, 35 SANTA CLARA L. REV. 535, 536–38 (1995) (noting that “whenever a political official tries to attack expenditures for public defenders [handling capital cases], she is likely to point to the absurdity of paying lawyers who are constantly attacking their employers”). Professor Weisberg provides a typical example, from the *Mitchell* case cited *supra* note 81 which he handled in a federal habeas corpus proceeding, of the poor quality of local lawyers appointed to represent defendants in capital cases:

[In the] second capital case I worked on . . . the defense lawyer [at trial] was paid \$150 for the entire case, and believe me, he earned every penny of it. He only interviewed his client once, as he was arranging a plea bargain for the guilt phase. He did not identify or reach out to any of the several, excellent mitigation witnesses—teachers, coaches, ministers, or whatever—who were only a few hours' drive away. The reason for the omission, he said, was that he thought the case hopeless. He never attacked the confession in the case, even though, as it later became obvious, the defendant was left alone in the interrogation room with an off-duty police officer who was a cousin of the victim, and who threatened the defendant with a gun. He did not try to interview the officer, because he did not like the man.

*Id.* at 537–38.

<sup>90</sup> See Liebman et al., *Broken System II*, *supra* note 27, at 352–53 (reprinted in Gelman et al., *supra* note 15, at 240–46).

rates generally tend to *depress* reversal rates, further revealing an unwillingness in those jurisdictions to provide sufficient resources to permit appellate courts to do their work and identify the full range of serious error that high death-sentencing rates cause.<sup>91</sup> In short, residents of jurisdictions with high death-sentencing and high capital-error rates are far less disposed than others to empower state actors, create effective government and professional structures, and pay taxes to investigate, apprehend, prosecute, provide representation for, provide judges to review the convictions and sentences of, and imprison perpetrators of serious crimes.<sup>92</sup> All of these are libertarian tendencies.

Curiously, Douglas Hay noted a similar dynamic in Georgian England.<sup>93</sup> Hay marshals evidence showing that the peasantry's new-found mobility and proneness to riot and crime on the eve of the Industrial Revolution greatly frightened the rural gentry.<sup>94</sup> Although the most efficient solution would have been for Parliament to fund and empower the royal government to create a national police force to maintain order, for the strongly localist and libertarian gentry, escaping the frying pan of local anarchy into the fire of royal dominance had no appeal.<sup>95</sup> Instead, the lords relied on the most powerful local lever they had—the criminal justice system and the power it gave them to strategically dole out death sentences and pardons as a form of “terror” to cower the lower classes.<sup>96</sup>

Whatever the merits of Hay's controversial explanation of the death penalty in eighteenth century England, we conclude that analogous dispositions help explain the uneven use of the death penalty in the United States today. In place of the terroristic tool Hay describes, however, we see a device that parochial and libertarian communities use to ration costly, state-empowering government responses to cross-cultural crime.

## 2. The Death Penalty as a Libertarian Tool for Self-Protection

In a number of respects, capital punishment fits well within a libertarian—which is to say staunchly retributive<sup>97</sup>—theory of justice. In a world

<sup>91</sup> See *id.* at 370–72 (reprinted in Gelman et al., *supra* note 15, at 242–43).

<sup>92</sup> See *id.* at iv (reprinted in Gelman et al., *supra* note 15, at 243). For a powerful discussion of the historical relationship in the United States, and particularly the South, between underinvestment in law enforcement, low clearance rates, high crimes rates and highly punitive sentences imposed on criminals who are caught, see William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1984–85, 1992–93 (2008).

<sup>93</sup> Hay, *supra* note 5, at 18.

<sup>94</sup> *Id.* at 20–21.

<sup>95</sup> *Id.* at 41; David Friedman, *Making Sense of English Law Enforcement in the 18th Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 476 (1995) (“Eighteenth-century England viewed a system of professional police and prosecutors, government-paid and -appointed, as potentially tyrannical and, worse still, French”).

<sup>96</sup> Hay, *supra* note 5, at 25; see *supra* notes 5–6 and accompanying text.

<sup>97</sup> See, e.g., RONALD HAMOWY, *THE ENCYCLOPEDIA OF LIBERTARIANISM* 430 (2008).

where citizens are free of government influence in making individual decisions, they also deserve to be fulsomely punished for making antisocial, unacceptable choices.<sup>98</sup> Libertarians are deeply skeptical of determinist explanations for crime. In their view, crime is not predestined by nature, nurture, or social inequality but is a choice that individuals freely make that merits serious punishment.<sup>99</sup>

Among possible punishments, moreover, the death penalty may have a particular appeal to libertarian communities. As we have noted, those communities tend to be skeptical of government's ability to do anything very well, and the longer and more complicated the task, the greater the skepticism. This suggests a preference for a single act of state "execution" over a lifetime of state efforts to securely incarcerate a murderer. And researchers have consistently identified this preference as a distinguishing feature of jurors most prone to impose the death penalty.<sup>100</sup> As these jurors tell researchers, they prefer death over life sentences for fear that incompetent parole officials will one day free the defendant to offend again—a sentiment that might easily extend to the view that paying prison and parole officials to exercise that discretion, not to mention paying to feed and house killers, is the worst waste of tax dollars.<sup>101</sup>

We hypothesize that, taken together, these dispositions dispose libertarian communities towards the death penalty. Suspicion of government and taxation leads to weak and unprofessional law enforcement, which in turn generates low clearance rates and a heightened fear of crime. Still not willing to pay and build the institutions needed to respond systematically, libertarian communities turn to

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(discussing "the common libertarian insistence that there are principles of justice that must be respected in the treatment of individuals even if violations of those principles were socially expedient"); MICHAEL TONRY, *WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT* 311 (2011) (describing the "libertarian conceptions of free will on which retributivism depends").

<sup>98</sup> See, e.g., N. Stephan Kinsella, *A Libertarian Theory of Punishment and Rights*, 30 LOY. L.A. L. REV. 607, 645 (1997) (arguing that libertarian "justice requires that the aggressor be held responsible for the dilemma he has created as well as the aggression he has committed").

<sup>99</sup> *Id.* at 626 n.46.

<sup>100</sup> Studies showing that death-prone jurors tend to have the least amount of faith in the willingness and ability of the government to identify and continue incarcerating the most dangerous prisoners and to apprehend them a second time if they are paroled include John H. Blume et al., *Lessons from the Capital Jury Project*, in *BEYOND REPAIR? AMERICA'S DEATH PENALTY* 144, 167 (Stephen P. Garvey ed., 2002); Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011, 1053 (2000); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1499 (1998); William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 675 (1999); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 L. & HUM. BEHAV. 575, 579–80 (1997); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1177 (1995).

<sup>101</sup> See e.g., Bowers & Steiner, *supra* note 100, at 675; Luginbuhl & Howe, *supra* note 100, at 1177.

the death penalty as an extreme, but only episodic and after-the-fact response that can (indeed, constitutionally must<sup>102</sup>) be limited to the small number of offenses that result in capture and conviction and involve a homicide. The death penalty thus provides libertarian communities with a starkly expressive and retributive *substitute* for routine, ongoing and professional surveillance, apprehension, conviction and incarceration across the run of all serious crimes. Through the death penalty, libertarian communities can express their abhorrence for the most serious of transgressions against their and their fellows' autonomy without having to pay the price for effective law enforcement, courts and corrections.

There are numerous risks and ironies here. By leaving criminals at large, the reluctance of libertarian communities to pay for professional law enforcement directly threatens the autonomy of law-abiding citizens that libertarians hold so dear. The communities' reluctance to pay for incarceration and correctional resources likewise leads directly to lenient parole practices that in turn dispose libertarian jurors to doubt the government's will and ability to incapacitate dangerous criminals. Worse, the slapdash law enforcement and low clearance rates triggered by libertarian communities' aversion to public spending seems to increase their disposition to impose the death penalty in cases where it is not appropriate. As we said in *Broken System II*, public pressures generated by "[w]ell-founded doubts about a state's ability to catch criminals may lead officials to extend the death penalty" to cases in which the evidence of guilt or desert of the death penalty is weak.<sup>103</sup> In contrast:

[S]tates with relatively more effective *non-capital* responses to crime—i.e. arrest, conviction and imprisonment—may be under less pressure than states with weaker law enforcement records to [impose] the death penalty. That in turn may dampen the penalty's use in weak cases in which the temptation to use unreliable procedures is high.<sup>104</sup>

### 3. The Death Penalty as a Libertarian *and* Parochial Tool for Self-Protection

Perhaps the biggest irony, however, is the disposition of libertarian communities to tolerate—indeed, to esteem—the most powerful civilian exercise of state power known to our society.<sup>105</sup> One might rather expect libertarians to deny government this most powerful of tools and to fear state incompetence and

<sup>102</sup> See *supra* note 85 and *infra* notes 122, 125, 141 and accompanying text.

<sup>103</sup> Liebman et al., *Broken System II*, *supra* note 27, at iii.

<sup>104</sup> *Id.* at 168–69.

<sup>105</sup> Noting the same irony in regard to penalties other than the death penalty is FRANKLIN ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 171–74, 231–32 (2001) (concluding that mistrust of government is associated, counter-intuitively, with a greater willingness to use extreme penal sanctions, such as California's mandatory minimum punishments for three-time offenders, even though the punishments trigger more government control and a larger public sector).



overreaching in administering it. And, indeed, a passel of libertarians, including George Will, Richard A. Viguerie, Pat Robertson, Oliver North, and Bob Barr, have expressed exactly these reservations.<sup>106</sup> As we note above, however, there are reasons why the death penalty might appeal to libertarians as the best, because most episodic, way for the state to wield the power to punish. As we discuss further below, moreover, it is not pure libertarianism of the George Will sort, but a mix of it and *parochialism* that characterizes communities that frequently use the death penalty. This section describes the interaction of the two forces.

Consider first how parochial and libertarian tendencies can feed on one another. Parochialism indicates a strong apprehension of serious outsider crime,<sup>107</sup> the ineffective law enforcement that attends the libertarian preference for low spending, weak institutions, and aversion to surveillance likely aggravates this fear.<sup>108</sup> Indeed, a feature of libertarian communities in relatively close proximity to each other may be the movement of offenders from one community to the other as the simplest way to escape the unsophisticated law enforcement efforts that are likely to prevail where they last committed a crime.

Indeed, this mixture of conspicuous fear of outsider crime, demand for harsh punishment when the community is invaded and autonomy is threatened, and doubts about government's intestinal fortitude when it comes to punishment can be a toxic brew. Historically, one result in the United States has been lynching. In the face of doubts about officials' willingness or ability to exact the retribution demanded by parochial and libertarian communities under siege from outside forces, members of the public stood ready to take matters into their own hands.<sup>109</sup> The echo of this same impulse in the disposition of modern death-prone jurors to doubt the willingness or ability of officials to exact deserved punishment is, we suggest, not accidental but a manifestation of the same parochial and libertarian proclivity for death as the surer and more expressive punishment in a context of fear of outsiders and weak state institutions.<sup>110</sup>

There are also reverberations in modern practice in high death-sentencing

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<sup>106</sup> For collections of these statements, see *New Voices—Conservative Voices*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/new-voices-conservative-voices> (last visited June 16, 2011); *New Voices: Prominent Conservative Calls for Death Penalty Moratorium*, DEATH PENALTY INFO CTR., <http://www.deathpenaltyinfo.org/new-voices-prominent-conservative-calls-death-penalty-moratorium> (last visited July 11, 2011); Liebman et al., *Broken System II*, *supra* note 27, at 4; see also E. J. Dionne, *Only Conservatives Can End the Death Penalty*, WASH. POST, (Sept. 25, 2011), [http://www.washingtonpost.com/opinions/only-conservatives-can-end-the-death-penalty/2011/09/25/gIQA8MLGxK\\_story.html](http://www.washingtonpost.com/opinions/only-conservatives-can-end-the-death-penalty/2011/09/25/gIQA8MLGxK_story.html) (arguing that political realities make abolition an untouchable issue for Democratic Party politicians, leaving it to conservatives to lead any abolitionist movement with a serious chance of succeeding).

<sup>107</sup> See *supra* notes 66–85 and accompanying text.

<sup>108</sup> See *supra* notes 87–92 and accompanying text.

<sup>109</sup> See GARLAND, *supra* note 2, at 172 (describing how, during the nineteenth century, “Southern whites claimed this private power [over law enforcement represented by lynching] as a means to maintain white supremacy”).

<sup>110</sup> See *supra* notes 81–85, 100–04.

communities of lynchers' low regard for the administrative and professional niceties of investigation, prosecution, trial, and correction, and the tendency to see death verdicts and executions as a quick and unvarnished communal expression of retribution for a heinous cross-boundary crime. Extending the parallel still further, as lawless and vicious as lynching was, it often carried with it a patina of democratic sanction, as a paroxysm of communal, and community-protecting violence.<sup>111</sup> Albeit now with due process, judicial supervision, and decorum restored, a jury's public pronouncement of a death sentence has this same quality of a democratic expression of community comeuppance of the offending outsider.

We are not the first to draw these parallels. Professor Zimring, for example, has demonstrated a telling geographical overlap between today's high frequency death-imposing counties and those that frequently carried out lynchings in the past.<sup>112</sup> Professor Garland has noted the paradox that lynching and the death penalty are simultaneously opposites and the same and has pointed to the parochialism and libertarianism of communities that have favored both practices as an explanation. In his words, the modern death penalty is consciously designed as an "antilynching,"<sup>113</sup> yet acts as "a radical inversion of form, a mirror image" of the lynchings of yore.<sup>114</sup> On the one hand:

[e]xecutions, if they actually occur, take place not in the local town square but instead at a great distance from the crime, both in time and in space. Executions methods are avowedly "non-violent," designed to minimize bodily injury and degradation. Bureaucratic protocols dictate a dispassionate administrative routine with crowds, ceremony, and cruelty reduced to a minimum.<sup>115</sup>

Yet, "[c]ontemporary capital punishment continues to have many substantive features in common with those lynchings," that it tries to but cannot disavow: It continues to be driven by local politics and populist politicians. It continues to be imposed by leaders and lay people claiming to represent the local community. It continues to give a special place to victims' kin. It continues disproportionately to target poorly represented blacks, convicted of atrocious crimes against white victims. . . Finally, the collective killing of hated criminals (or merely assertion of the right to do so) remains one of the ways in which groups of people express their

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<sup>111</sup> See GARLAND, *supra* note 2, at 33 (noting that lynching was fuelled by "the furious demands of 'popular justice' that emerge when local majority sentiment is outraged by crime" and concluding that "[t]he self-righteous power of 'the people', emboldened by ideologies of popular democracy and myths of self-rule, is an incendiary force in American politics").

<sup>112</sup> ZIMRING, *supra* note 19, at 89–118; see also OGLETTREE & SARAT, *supra* note 19, at 7–8.

<sup>113</sup> GARLAND, *supra* note 2, at 34.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

autonomy, invoke their traditional values, and assert their local identity.<sup>116</sup>

We agree that, as different as the two practices are, lynching and capital punishment are responsive to the same parochial and libertarian impulses towards cataclysmic expression of a community comeuppance of perceived outside threats. We simply add that when parochialism and libertarianism coincide, a temptation—or even a felt necessity—arises to invoke the starkly retributive, unvarnished, and ostensibly deterrent force of the death penalty to compensate for the crime-solving shortcomings of localities disposed towards meager spending on law enforcement. The death penalty, that is, substitutes as a locally reassuring and externally intimidating demonstration of the community's disposition to defend itself against criminal invasions where pervasive and effective law enforcement is considered unaffordable or unpalatable.<sup>117</sup>

### *C. A Parochial and Libertarian Explanation of the Resilience of the Felony-Murder Doctrine*

#### 1. Felony Murder's Puzzling Resilience

Further support for our thesis may be found in the puzzling resilience of the Capital Felony Murder Doctrine in American criminal jurisprudence.<sup>118</sup> Waves of reform, typified by the Model Penal Code, have sought to constrain the application of the criminal law, particularly the law of homicide, by using mental states specified for each element of the crime to mark lesser and greater gradations of culpability and desert of punishment.<sup>119</sup> In this sea of precise mental states tied

<sup>116</sup> *Id.* at 35.

<sup>117</sup> Cf. James M. Inverarity, *Populism and Lynching in Louisiana, 1889-1896: A Test of Erikson's Theory of the Relationship Between Boundary Crises and Repressive Justice*, 41 AM. SOC. REV. 262, 264 (1976) ("[M]any prominent white Southerners . . . viewed lynching as a necessary and legitimate adjunct of the legal system . . .").

<sup>118</sup> Consider the following analysis:

[F]elony murder . . . is one of the most widely criticized features of American criminal law. Legal scholars are almost unanimous in condemning [it] as a morally indefensible form of strict liability, . . . an anomaly, [and] a primitive relic of medieval law that unaccountably survived the Enlightenment and the nineteenth-century codification of criminal law . . . [and most believe there is] no way to rationalize its rules . . . and no reforms worth urging . . . short of its utter abolition. [The] author of the leading criminal law textbook, called the felony murder doctrine "rationally indefensible," and the American Law Institute's Model Penal Code Commentaries observed that "[p]rincipled argument in favor of the felony-murder doctrine is hard to find."

Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966–67 (2008) (citations omitted). *But see id.* at 966, 1032–46 & n.4 (defending the felony murder rule as expressive of the community's reaction to harm caused in the course of felonies and citing other defenses of the rule). Felony murder has long been abolished in other Anglo-American jurisdictions. See DAVID LANHAM ET AL., CRIMINAL LAWS OF AUSTRALIA 180 (2006) (discussing the felony murder doctrine's abolition through the United Kingdom's Homicide Act of 1957).

<sup>119</sup> Danyne Holley, *The Influence of the Model Penal Code's Culpability Provisions on State*

to each element of a crime, the Felony Murder Doctrine is an anomalous island, given its omission of any culpability requirement as to the element of death. The doctrine is controversial because of the alchemy it uses to manufacture a higher culpability level and punishment than otherwise would be allowed.<sup>120</sup> Its main use is to transform an accidental killing in the course of a felony—which normally would merit at most a manslaughter charge based on the inference that the felon must have recognized the risk of death—into the equivalent of purposeful murder.<sup>121</sup> If the predicate felony is one of the “big four”—robbery, rape, kidnapping, or burglary—the same alchemy transforms the manslaughter into *first-degree* murder, which otherwise would require premeditation and deliberation.

## 2. Felony Murder's Symbiotic Relation to the Death Penalty

The Felony Murder Doctrine is associated with the broad—and overbroad—use of the death penalty<sup>122</sup> and with high rates of error and

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*Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 229–30 (1997) (noting that “[o]ne of the greatest changes made by the Model Penal Code was its redefinition and reformulation of culpable mental states . . . . The Code obliterated ill-defined, confusing common law language and concepts and replaced them with four specifically defined hierarchical levels of culpability...”)

<sup>120</sup> See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 515 (3d ed. 2001); SAMUEL H. PILLSBURY, JUDGING EVIL 106–08 (1998); Charles Liebert Crum, *Causal Relations and the Felony-Murder Rule*, 1952 WASH. U. L. Q. 191, 203–10; George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 415–16 (1981); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 706–08; Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695–97 (1994); H. L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 3–4 (1973); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 451–52, 490–91 (1985); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1498–99 & n.2 (1974); see also Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 404–05 & nn.1–4 (2011) (“The felony murder doctrine . . . is part of the law of almost every American jurisdiction[, but] . . . is also one of the most widely criticized features of American criminal jurisdiction”) (citing authority).

<sup>121</sup> See, e.g., *State v. Middlebrooks*, 840 S.W.2d 317, 336 (Tenn. 1992) (“The result of the felony murder doctrine in Tennessee is thus to impose a rule of strict liability allowing the underlying felonious intent to supply the required mens rea for the homicidal actus reus and to impose vicarious liability for the acts of another.”), *cert. dismissed*, *Tennessee v. Middlebrooks*, 510 U.S. 124 (1993); Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 74 (1990) (“When a criminal kills a victim during the course of a robbery, for example, the criminal is guilty of murder by operation of the felony-murder rule without any inquiry into the killer’s mental state respecting the killing.”).

<sup>122</sup> See, e.g., *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (placing constitutional limits on imposition of the death penalty on minor participants in felonies in which a homicide occurs); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (setting somewhat stricter limits on the death penalty for minor participants in felonies in which a homicide occurs, later modified by *Tison*, *supra*); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion) (holding that Ohio unconstitutionally

arbitrariness in its administration.<sup>123</sup> This is not surprising, given the doctrine's use, in another feat of legal magic, to remove constitutional obstacles to a death sentence that otherwise would clearly bar it.

In *Gregg v. Georgia*, after a decade and a half of uncertainty about the constitutionality of the death penalty,<sup>124</sup> the Supreme Court concluded that "when a life has been taken *deliberately* by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."<sup>125</sup> To assure, however, that the "extreme sanction" did not become "disproportionate" through its application to defendants guilty of something *less* than "the most extreme of crimes,"<sup>126</sup> the Court required States to "narrow" the circumstances in which the death penalty could be imposed to killings more *aggravated* than the jurisdiction's base definition of capital

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limited the aggravating circumstances capital jurors could consider, including by barring the defendant from arguing in favor of a sentence less than death based on her limited participation in a felony in which a man was killed); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion) (concluding that the mandatory death penalty for all participants in a felony murder, including the wheel person who was outside during the crime, violated the Eighth Amendment); see also Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1128 n.64 (1990) (collecting studies finding that felony murders constitute anywhere from 48% to 83% of capital eligible or capital punished crimes); *Report of the Governor's Commission on Capital Punishment: George H. Ryan Governor*, ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002) [hereinafter ILLINOIS DEATH PENALTY COMMISSION REPORT]; other sources cited *infra* note 123.

<sup>123</sup> For example, the Illinois Governor's Commission on the Death Penalty recommended eliminating the felony-murder aggravating factor from the Illinois capital punishment statute. "Commission members [concluded] that this eligibility factor swept too broadly and included too many different types of murders within its scope . . . ." ILLINOIS DEATH PENALTY COMMISSION REPORT, *supra* note 122, at 72 (2002). Because "so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state . . . [and is the] eligibility factor . . . most likely subject to . . . discretionary decision-making" by prosecutors and jurors. *Id.*; see *id.* at 3 (finding that even "[a]fter eliminating those cases in which the 'multiple murder' factor and the 'course of a felony' factor appear together, the 'course of a felony' eligibility factor accounts for just over 40% of the cases in which the death penalty has been imposed"); see also David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 138 n.14 (1986) (collecting studies); David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence?—An Empirical and Normative Analysis*, 49 SANTA CLARA L. REV. 1, 1 (2009) (finding that over 60% of defendants committed murder in the course of one of five predicate felonies, triggering death eligibility and criticizing the felony murder aggravating factor as overbroad as currently applied across the United States); Chelsea Creo Sharon, Note, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. CIV. RTS.-CIV. LIB. L. REV. 223, 234 (2011) (criticizing the felony murder aggravating factors in capital sentencing statutes nationwide due to its "extraordinary breadth").

<sup>124</sup> See MELTSNER, *supra* note 46, at 149–287.

<sup>125</sup> *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) (emphasis added).

<sup>126</sup> *Id.*

homicide (classically, premeditated and deliberate first-degree murder).<sup>127</sup> To satisfy this narrowing requirement, a jury must find at least one statutorily enumerated aggravating factor that distinguishes the killing from the jurisdiction's definition of capital homicide.<sup>128</sup> An aggravating factor that applies to "every first-degree murder" does not suffice because it does "not narrow the class of defendants eligible for the death penalty."<sup>129</sup>

Although the Court has never expressly deviated from these principles, inexplicably, it has never applied them to felony murder cases. To begin with, felony murder deviates from the category of homicide to which *Gregg* ostensibly limited the death penalty and from the type of culpability otherwise required for first-degree murder—where "life has been taken *deliberately* by the offender."<sup>130</sup> The whole point of felony murder is to permit murder liability though the killing was accidental and *not* deliberate.<sup>131</sup> Yet, the Supreme Court has not hesitated to affirm non-deliberate felony murder as a sufficient basis for the death penalty.<sup>132</sup>

In addition, one of the most common aggravating factors enumerated in state capital sentencing statutes is that the killing occurred in the course of one of the "big four" felonies of robbery, rape, kidnapping, or burglary.<sup>133</sup> And a number of

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<sup>127</sup> *Id.* at 196–97; see *Arave v. Creech*, 507 U.S. 463, 474–75 (1993) (noting that the Eighth Amendment requires States to "genuinely narrow the class of persons eligible for the death penalty" (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)); *Pulley v. Harris*, 465 U.S. 37, 50 (1984) (describing the "constitutionally necessary narrowing function"); *Godfrey v. Georgia*, 446 U.S. 420, 430 (1980) (overturning death sentence because Georgia failed to interpret the relevant statutory aggravating circumstance to assure that "[e]ach of the cases [in which death was imposed] is at the core and not the periphery" of the category of death-eligible murders" (citations omitted)); *Gregg*, 428 U.S. at 194, 197–98.

<sup>128</sup> See, e.g., *Arave*, 507 U.S. at 463, 474–75; *Lewis v. Jeffers*, 497 U.S. 764, 775 (1990); see also *Ring v. Arizona*, 536 U.S. 584, 606, 609 (2002) (describing the Court's Eighth Amendment jurisprudence regulating the death penalty as having "interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope" and holding that the Constitution requires that element to be found by a jury beyond a reasonable doubt).

<sup>129</sup> *Arave*, 507 U.S. at 475 (emphasis added).

<sup>130</sup> *Gregg*, 428 U.S. at 187 (emphasis added).

<sup>131</sup> See, e.g., *People v. Brackett*, 510 N.E.2d 877, 882 (Ill. 1987) (affirming conviction for felony murder where, as a result of a rape, the victim refused to eat and accidentally choked to death on a feeding tube inserted by her doctors); *People v. Hickman*, 297 N.E.2d 582, 586 (Ill. 1973) (affirming conviction for felony murder where one police officer accidentally shot another during a manhunt for the unarmed burglars).

<sup>132</sup> See, e.g., *Schad v. Arizona*, 501 U.S. 624, 644 (1991); see also *State v. Middlebrooks*, 840 S.W.2d at 337 (Tenn. 1992) ("[T]he vast majority of states that have the death penalty permit it to be imposed in cases of felony murder under some circumstances." (citations omitted)), *cert. dismissed*, *Tennessee v. Middlebrooks*, 510 U.S. 124 (1993).

<sup>133</sup> See *Rosen*, *supra* note 122, at 1120, 1125–29 & nn.41, 62, 63, 65 (noting that "[a] large majority of states that enacted new death penalty laws after *Furman* [*v. Georgia*, 408 U.S. 238 (1972)] retained . . . one form or another of the felony murder rule as [a] bas[i]s for a conviction of capital murder," and many of them also recognize a killing in the course of robbery, rape, burglary and kidnapping as an aggravating factor supporting the imposition of death (collecting statutes)).

states allow death sentences when the accompanying felony is the *only* statutory aggravating factor present in the case.<sup>134</sup> In other words, after using felony murder to raise an unintentional killing in the course of a felony that otherwise would qualify as no more than *manslaughter* to *murder*, and then—if the felony is one of the “big four”—using the same magical reasoning to raise the offense to *capital-eligible, first-degree* murder, many high death-sentencing states allow the prosecution to use the same felony as the ostensible *additional* factor that aggravates the offense to a category “narrow[er]” than first-degree murder.<sup>135</sup> Through this sleight of hand, every killing in the course of a “big four” felony automatically qualifies for the death penalty.

A few state courts have ruled as a matter of local law that a felony cannot provide both the sole basis for first-degree murder and the sole aggravating factor in support of a death sentence.<sup>136</sup> But when the Tennessee Supreme Court premised a similar ruling on the Federal Constitution’s capital narrowing requirement, the Supreme Court promptly granted a writ of certiorari, as if to reverse.<sup>137</sup> The Tennessee Supreme Court subsequently made clear that it reached the same conclusion under state law, and the Supreme Court dismissed the writ of certiorari as improvidently granted.<sup>138</sup> But the Court has repeatedly denied certiorari and permitted states to execute death sentences premised on accompanying felonies that were the sole basis for a murder conviction and the single statutory aggravating circumstance.<sup>139</sup> Felony murder cases thus are the lone category in which the Supreme Court tolerates death sentences absent any “narrowing” of death-eligibility beyond the minimal threshold for first-degree murder.<sup>140</sup>

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<sup>134</sup> See Rosen, *supra* note 122, at 1127, 1134–35 nn.62, 63, 79, 83, 86 (citing decisions).

<sup>135</sup> *Arave*, 507 U.S. at 475 (emphasis added); see Rosen, *supra* note 122, at 1121–24, 1135 (noting that “defendants continue to be sentenced to death solely because they committed a murder during the course of a felony, that is, simply because they fit into a class of murder defendants that, in some states, is no narrower than” before the Supreme Court imposed the narrowing requirement in *Gregg* and subsequent cases).

<sup>136</sup> See *State v. Middlebrooks*, 840 S.W.2d at 346 (“We hold that, when the defendant is convicted of first-degree murder solely on the basis of felony murder, the [state’s felony murder] aggravating circumstance . . . does not narrow the class of death-eligible murderers sufficiently under the . . . Tennessee Constitution because it duplicates the elements of the offense.”); *Engberg v. Meyer*, 820 P.2d 70, 89–92 (Wyo. 1991) (“We now hold that where an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase.”); *State v. Cherry*, 257 S.E.2d 551, 566–68 (N.C. 1979) (prohibiting use of a felony murder aggravating circumstance if the defendant had been convicted solely of felony murder), *cert. denied*, 446 U.S. 941 (1980).

<sup>137</sup> *Tennessee v. Middlebrooks*, 507 U.S. 1028 (1993) (per curiam) (granting certiorari to review *State v. Middlebrooks*, *supra*).

<sup>138</sup> *Tennessee v. Middlebrooks*, 510 U.S. 124, 125 (1993) (per curiam).

<sup>139</sup> See Rosen, *supra* note 122, at 1126–27 nn.62–63, 1134–35 nn.79, 83, 86 (citing decisions).

<sup>140</sup> Some observers understand the Supreme Court’s decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), to embody a *holding* that approves the questionable practice we describe the Court

The extent of the anomaly here is revealed by comparing how existing law currently applies to two hypothetical defendants: Bill, who purposefully robs Vic at gunpoint; and Bob, who purposefully kills Vic with a gun. If no one dies in the course of Bill's robbery, Bill may not constitutionally be executed despite his purpose to rob Vic.<sup>141</sup> But if Vic accidentally knocks into Bill's gun, causing it to fire and kill Vic, then without more, Bill can be executed for the accidental killing. The felony mysteriously elevates the manslaughter to murder, then to first-degree murder, then to aggravated capital punishable murder. If, however, Bob interrupts Bill's robbery in order to *purposefully* shoot Vic dead, Bob *cannot*, without more, be executed for intentionally killing Vic.<sup>142</sup> Although, unlike Bill, Bob clearly meant to end Vic's life, no aggravating factor is present, and the law will not magically manufacture one.

### 3. Capital Felony Murder as a Tool for Parochial Self-Protection

What, then, is the clandestine "compelling state interest" that trumps fundamental legal values that otherwise would have buried felony murder long ago, and that makes a purpose to commit a felony-less-than-homicide and an accidental death more worthy of execution than a purpose to kill and a resulting death? The solution to this legal conundrum, we believe, lies in the Felony

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as merely having *tolerated* by thus far refusing to forbid it. See, e.g., JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 472 (6th ed. 2008) ("[Under *Lowenfield*], as a matter of federal constitutional law, the Supreme Court would permit the [accompanying-felony aggravating circumstance] 'bonus' . . . where the underlying murder charge was solely based on a felony-murder ground . . ."). *Lowenfield* is to the contrary. It clearly reprises the requirement that state capital statutes "narrow" death eligibility to a category smaller than every first-degree murder, see *Lowenfield*, 484 U.S. at 244; finds that narrowing to be generally satisfied by the list of aggravating factors that Louisiana uses to distinguish "first-degree murder," for which the death penalty is not available, from "capital murder" for which death may be imposed, *id.* at 246; and concludes that narrowing occurred in the particular case as a result of the jury's finding that the killing not only was premeditated and deliberate, thus establishing first-degree murder, but also that it was committed in a manner that created a "great risk of death to more than one person," thus elevating the crime to "capital murder," *id.* at 245. What seems to have confused the authors of KAPLAN ET AL., *supra*, is that the jury found the aggravating factor at the guilt phase, not the separate sentencing phase, but that procedural detail in no way undermines the Court's usual requirement (except, inexplicably, in felony murder cases), of proof of a circumstance that makes the offense more aggravated than bare first-degree murder.

<sup>141</sup> Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (strongly suggesting that interpersonal crimes—short of homicide—may not constitutionally be punished with death).

<sup>142</sup> This example gives the lie to the traditional "transferred intent" explanation of felony murder as substituting the intent to rob for the intent to kill. See, e.g., KAPLAN ET AL., *supra* note 140, at 423 (listing justifications for the felony-murder rule). If an intent to kill and a resulting dead body cannot, by themselves elevate a killing to first-degree murder and automatic capital eligibility, how can an intent to rob and a resulting dead body do so? Nor for the same reason, and another given at notes 143–45 and accompanying text below, can deterrence of felonies that are intrinsically dangerous or committed in a dangerous manner account for the felony-murder alchemy that turns accidental homicide into first-degree and capital-eligible homicide.



Murder Doctrine's symbiotic relation to the death penalty and that penalty's appeal to the minority of parochial and libertarian localities that frequently use it.

The key clue to the felony murder riddle is the "big four" predicate felonies—robbery, rape, kidnapping, and burglary—particularly the last one, burglary. The predicate felonies often are explained, and the felony murder rule sometimes is said to be justified, because those felonies are so dangerous in and of themselves or so likely to be committed with a dangerous weapon.<sup>143</sup> But neither of these things is true of burglary.<sup>144</sup> Other offenses, such as car-jacking and various drug- and gun-related crimes, are much more dangerous than burglary yet are not standard predicates for the felony bump-up to first-degree murder or the accompanying-felony bump-up to aggravated, death-eligible murder. What does set *all* of the big four felonies apart from others is how effectively they serve as proxies for "stranger" or "invasion" crimes. Both *interpersonally* in the physical manner of their commission and *sociologically* in the way they manifest themselves to members of privileged communities, the "big four" offenses cross boundaries, come frighteningly "out of the blue" and are the handiwork of frightening outsiders.<sup>145</sup>

The surreptitiously compelling interest that explains the law's otherwise inexplicable treatment of accidental deaths in the course of "big four" felonies as worse-than-purposeful, *capitally* aggravated murder is, we suggest, the same

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<sup>143</sup> See, e.g., Binder, *supra* note 118, at 1045 (arguing that felony murder is justified as long as it is limited to predicate felonies "inherently involving violence or destruction," which excludes burglary and drug offenses but includes such crimes as robbery); Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1121–24 (1997) (defending felony murder liability predicated on inherently dangerous felonies).

<sup>144</sup> See, e.g., KAPLAN ET AL., *supra* note 140, at 424 (presenting data showing that deaths occur in only fewer than four out of every 100,000 burglaries, compared to ten deaths per 100,000 for auto theft, 350 per 100,000 for rape, and just under 600 per 100,000 for robbery).

<sup>145</sup> We are indebted to WALTER GORDON, *CRIME AND CRIMINAL LAW: THE CALIFORNIA EXPERIENCE 1960-1975*, at 7–8, 10–14, 52–53 (1981) for this sociological insight. Of course, most robberies, rapes, kidnappings and burglaries are committed by and against poor individuals from the same poor neighborhood. But it should not surprise us to find, and the *Broken System II* results bear out, that anomalies in the criminal law are most strongly influenced by the most politically powerful, not the most numerous, of victims. See KENNEDY, *supra* note 85, at 3–4; Stuntz, *supra* note 92, at 1984–85; see *supra* notes 68–85 and accompanying text. It is also true that other so-called "inherently dangerous" crimes, beyond the "big four," serve as predicates for second- and even first-degree felony murder. See KAPLAN ET AL., *supra* note 140, at 439–42. But here, too, the "cross-boundary" concept described in text helps explain, if not justify, the notoriously arbitrary judgments states and courts make about what crimes do and do not qualify as "inherently dangerous" for purposes of being recognized as predicates for felony murder. See *id.* at 441–42 (collecting cases identifying the following offenses as *not* inherently dangerous enough to be a predicate for felony murder: fraud by chiropractors inducing patients with curable cancer to forgo surgery in favor of futile treatments; possession of a firearm and an illegal sawed-off shotgun by a felon; reckless firing of a gun illegally possessed by a convicted felon; and also collecting cases identifying the following offenses as "inherently dangerous" predicates to felony murder: theft by tow-truck of an automobile from a deserted used car lot (the intoxicated perpetrators crashed the tow truck into another car on the highway) and furnishing heroin).

impulse that leads parochial communities to value the death penalty itself: a powerful fear of cross-boundary crime. Both tools—and in particular their frequently conjoined use<sup>146</sup>—provide law enforcement officials with a powerful device for assuaging fears and communicating how seriously they take, and how harshly they are prepared to punish, outsider crime.<sup>147</sup>

Understanding Felony Murder Doctrine as a response to cross-cultural, invasion crimes explains a number of the doctrine's bizarre nuances. When an innocent person, not a party to the felony, kills a co-felon in the course of the crime, the trend is against finding the surviving felon guilty of felony murder.<sup>148</sup> Some states exclude killings committed by anyone other than a felon.<sup>149</sup> Other states exclude all killings of co-felons.<sup>150</sup> Only a handful of states make any foreseeable killing of anyone by anyone during a felony a basis for felony murder liability.<sup>151</sup> Commentators struggle to explain these rules.<sup>152</sup> The doctrine itself refuses to acknowledge the standard reasons for exculpating defendants for harm for which they were a "but for" cause—that they did not advert to or proximately cause the harm. Yet, through these collateral rules, the doctrine does grant mercy based on fortuities that typically make no difference and violate the usual rule that, formally at least, the law treats all victims the same.<sup>153</sup>

Our analysis again solves the riddle. The trend is to impose excessive punishment—measured by rules that apply in all other cases—only when the victim is a member of the community and the killer is not. The compelling interest that surreptitiously trumps the normal rules arises only when the identity of the killer and victim make the death a cross-boundary offense against a member of the local community. In truth, the Felony Murder Doctrine does not target

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<sup>146</sup> See *supra* notes 123, 133, 145. This symbiosis between felony murder and the death penalty is further evidenced by the United Kingdom's abolition of the felony murder doctrine and the death penalty around the same time—in 1957 in the former case and 1965 in the latter. See *Murder (Abolition of Death Penalty) Act, 1965*, NAT'L ARCHIVES (1965 Chapter 71), <http://www.legislation.gov.uk/ukpga/1965/71>.

<sup>147</sup> To a substantial extent, we agree with other observers who recognize a deeply "expressive" connotation to the Felony Murder Doctrine. See, e.g., Binder, *supra* note 118, at 1032. What we add is a description of what is being expressed—a fear not of especially dangerous or violent crimes but of outsider, cross-boundary crimes—a fear, we understand, but unlike the expressivist apologists for felony murder, we do not consider sufficient to justify the doctrine's departure from jurisprudential fundamentals and privileging of some communities over others.

<sup>148</sup> See, e.g., WAYNE R. LAFAVE, *CRIMINAL LAW* 793–94 (5th ed. 2010) ("Although it is now generally accepted that there is no felony-murder liability when one of the felons is shot and killed by the victim, a police officer, or a bystander, it is not easy to explain why this is so.").

<sup>149</sup> Famous holdings to this effect include *People v. Washington*, 44 Cal. Rptr. 442, 445 (Cal. 1965), and *Commonwealth v. Redline*, 137 A.2d 472, 476 (1958).

<sup>150</sup> See, e.g., *State v. Canola*, 374 A.2d 20, 30 (N.J. 1977).

<sup>151</sup> See LAFAVE, *supra* note 148, at 793–96.

<sup>152</sup> See *supra* note 148.

<sup>153</sup> See, e.g., MODEL PENAL CODE AND COMMENTARIES § 3.02 (1985) (noting principle that, for purposes of balancing of evils recognized by the criminal law, all victim's lives are valued the same).

dangerous felonies in the course of which someone dies; it targets stranger crimes in the course of which an outsider kills a privileged member of the local community.

Consider, as well, the so-called “merger rule” limiting felony murder. If the underlying felony is an aggravated assault in which the assailant intends to scare the victim with a gun, which accidentally fires killing the victim, the crime does not qualify as a felony murder in most states and is not first-degree murder or capital-eligible.<sup>154</sup> Ostensibly, this is because the act that killed the victim and the one constituting the predicate felony “merge” into a single act. But so what? If every burglary resulting in an accidental killing of the homeowner is the moral equivalent of deliberate, first-degree, capitally aggravated murder, then why is not every aggravated assault resulting in an unintended killing its moral equivalent as well?<sup>155</sup> In both cases, the defendant caused a death, and intending to frighten someone with a gun is considerably more dangerous and evil than a cat burglar’s plan to break into a home and steal. And why, as we have already asked, does the law treat an intent to *kill* constituting second-degree murder as less culpable and worthy of the death penalty, than an accidental killing in the course of a cat burglary? Given our analysis, the answer is simple: regardless of its potential dangerousness, assault rarely is a stranger crime and is not expressive of cross-class or cross-cultural invasion.<sup>156</sup> Burglary is both.

#### 4. Capital Felony Murder as a Tool for Parochial and Libertarian Self-Protection

Parochialism helps explain the Felony Murder Doctrine and why insular communities demand extra punishment, especially death, for cross-cultural crime. Yet, if punishing cross-cultural crime is the goal, why stop at felonies resulting in death? Why not punish all robbers, rapists, kidnappers and burglars with death?

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<sup>154</sup> Indeed, if the defendant was not grossly reckless, for example, because she thought the gun was unloaded or a toy, the crime does not even constitute bare murder. For discussion of the merger rules, see, e.g., KAPLAN ET AL., *supra* note 140, at 442–48; LAFAVE, *supra* note 148, at 803–05.

<sup>155</sup> Or put the other way around, if an assault that accidentally turns deadly merges, why shouldn’t an armed robbery in which the victim is killed merge, too, given that armed robbery is simply an assault with a deadly weapon (which merges) plus larceny (which is not a recognized predicate crime)? See *People v. Burton*, 491 P.2d. 793, 801 (Cal. 1971) (rejecting this argument on the ground that the intended robbery is “independent” of the killing, but an intended assault is not). The illogic of the merger rule has been clear from the beginning. See *State v. Shock*, 68 Mo. 552, 574 (1878) (Norton, J., dissenting) (“If B starts out with a fixed felonious purpose to ‘inflict great bodily harm’ on A . . . without intending to kill but to stop with the infliction . . . harm and death ensues, the felony committed in inflicting the great bodily harm is no more merged in the killing than would a rape perpetrated by B upon A, which resulted in the death of A . . .”).

<sup>156</sup> The assault, battery and child abuse predicate crimes that are most commonly held to “merge” with the killing, and thus to provide no basis for felony murder alchemy, are offenses that classically and typically afflict (usually poor) acquaintances and family members. See cases cited in KAPLAN ET AL., *supra* note 140, at 442–48; LAFAVE, *supra* note 148, at 803–05.

The answer, we think, is that felony murder, like the death penalty itself, is also a libertarian rationing device. Libertarian communities can be expected to resist the massive expansion of government infrastructure and taxes that such a policy would require. By using the Felony Murder Doctrine to make an example of an occasional stranger-criminal whose offense had especially tragic result these communities can express how seriously they take stranger crime, without actually taking it very seriously most of the time.

To be sure, from a libertarian perspective, both the Felony Murder Doctrine and punishment itself impose costs—felony murder violates the principle that we measure evil by the extent to which individuals *choose* to interfere with the autonomy of others; punishment withdraws the criminal's autonomy while empowering the state in ways that threaten everyone's freedom. Rationing is important, therefore, as a way to balance the autonomy harms that crime and punishment inflict on innocent and guilty individuals. Using the victim's death to mark the rare occasions when the law will most harshly and retributively intervene, and using the criminal's death to express how seriously the community regards the evil of intruding on a victim's autonomy, makes libertarian sense. What libertarianism by itself cannot explain, however, is the use, not of *any* victim's *intended* death, but of a *particular* victim's even *accidental* death in the course of a "big four" felony, to mark the point where the most harshly retributive state intervention, the extinguishing of the offender's becomes justified. It takes the parochial impulse to explain that aspect of the rationing device provided by the Felony Murder Doctrine.

On the other hand, were parochialism the only important influence, one would expect insular communities to erect other bulwarks than the death penalty against depraved and dangerous outside influences. They might, that is, respond to their fear of outsider crime with well-funded, professional police forces, high-powered prosecutorial and judicial law enforcement mechanisms, and a disposition to do whatever it takes to put all robbers, rapists, kidnappers, and burglars behind bars for life. Yet, as we have seen, the opposite is frequently the case: these jurisdictions tend to suffer from some of the poorest quality, underfunded law enforcement institutions. In this case, it takes the conjoining of the libertarian impulse and the parochial one to explain the anomalous operation of the Felony Murder Doctrine.

#### *D. The Death Penalty and the Illusion of Self-Protection*

Based on the available data, we conclude that the small set of jurisdictions that propel the modern American death penalty are driven by the combined instincts of parochialism and libertarianism. These communities exhibit a fear of outside influences that threaten the local values and experiences that set them off from the national and global mainstream. Whites in these communities, who we take to be a proxy for more privileged residents, tend to have high rates of homicide victimization relative to the rates experienced by African-American

residents, and the white population tends to be located in close proximity to poor and African-American communities—factors we associate with a partly justified, partly inflated apprehension of crime. These jurisdictions also tend to have more populist electoral mechanisms through which fears of this sort can be powerfully communicated to local officials. Taken together, these factors generate an elevated fear of stranger crime on the part of privileged members of capially prone communities that is forcefully communicated to local officials whose jobs depend on the adequacy of their response to the fear.

Ironically, however, these communities' crime fears are aggravated by their parsimonious public spending habits and mistrust of government actors and institutions. These factors lead to low-quality law enforcement, as indicated by low rates at which the communities clear serious crimes by arrest, conviction and incarceration; an inability to protect privileged residents from the kinds of homicide rates that are common in poor and minority neighborhoods; and high rates of serious error in the many capital verdicts the communities impose.

This peculiar combination of fear of cross-boundary crime and unwillingness to support and systematize law enforcement leads these communities directly to the death penalty. Capital punishment provides them with the seemingly incongruent conditions they seek: It provides a public, powerfully expressive and harshly retributive—but, on the other hand, carefully rationed, inexpensive and episodic demonstration of the community's and officials' abhorrence for outsider crime. Through the ultimate punishment, and the preference for it over alternative responses to crime that rely more heavily on state institutions, the communities have adapted and domesticated a vigilante tradition with deep roots in their localities.

Given their parochial and libertarian proclivities, it is easy to see why death-prone communities insist on preserving the anachronistic and doctrinally dubious Capital Felony Murder Doctrine. Wielding this penological magic wand, the communities can simultaneously make a lot more of *and* a lot less of the crimes that particularly plague them. Using the proxy of the "big four" felonies, the communities can conjure up successive strata of otherwise nonexistent culpability out of the stranger crimes they abhor. Using the rare fortuity of a community member's death in the course of one of those felonies, the localities can shrink the body of crimes to which a concerted response is required to a number small enough to avoid having to empower the state to respond systematically. Through their retributive and expressive synergy, the Felony Murder Doctrine and the death penalty enable parochial and libertarian communities to create the illusion of a powerful response to the cross-boundary crimes that most frighten them without having to empower or pay the state to provide a truly effective response.

The death penalty's particular attraction to simultaneously parochial and libertarian communities helps explain the penalty's markedly uneven use among and within states and the puzzling resilience of the Capital Felony Murder Doctrine. As of yet, however, we have shed little light on the other central paradox of the modern American death penalty: why so few of the offenders we

sentence to die are actually executed. We turn next to that question.

#### IV. AN EXPLANATION OF THE DEATH PENALTY'S FREQUENT IMPOSITION AND INFREQUENT EXECUTION

##### A. *The Paradox at the Heart of the System*

The defining paradox of the American system of capital punishment is the stark discrepancy between the number of people sentenced to die and the number actually executed. As we demonstrated in the *Broken System* studies, an American sentenced to die has about a two-to-one chance of having his death sentence overturned on appeal or post-conviction review.<sup>157</sup> Often, the decision for community prosecutors and courts to "go capital" is a gamble the house does not seem to win.

As high as the reversal rate is, it greatly overestimates the likelihood of execution. After the jury imposes a sentence of death, the verdict enters a multi-layered system of state and federal judicial review, which has proven necessary to uncover the high number of reversible errors in capital cases.<sup>158</sup> This litigation takes, on average, over twelve years before the appellate system is able to sign-off on an execution.<sup>159</sup> As a result, most death-row inmates are many years away from being executed, and in the meantime, a number of them will die of natural causes, commit suicide, or be killed by other inmates.<sup>160</sup>

In *Overproduction of Death*, published in 2000, we illustrated this process by

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<sup>157</sup> See Gelman et al., *supra* note 15, at 216–17 (estimating the total error rate during the 1973–1995 study period as 68%); see also Michael O. Finkelstein & Bruce Levin, *The Machinery of Death*, 18 CHANCE 34, 36 (2005) ("[The 68 percent figure in the *Broken System*] study has received overwhelming academic approval and has been repeatedly cited by the federal courts and federal judges, including Supreme Court justices."); Michael O. Finkelstein et al., *A Note on the Censoring Problem in Empirical Case-Outcome Studies*, 3 J. EMPIRICAL LEGAL STUDIES, 375, 382 (finding after recalculating the *Broken System* data that "the complete case estimate of the reversal rate was 67.8 percent (which is quite close to the published estimate of 68 percent) and the self-consistent estimate [after conducting additional statistical analyses to account for "censoring" or the possibility of change over time in regard to verdicts still under review when the study ended] was 62.2 percent").

<sup>158</sup> See Liebman et al., *Broken System II*, *supra* note 27, at 69 (comparing the 40% reversal rate in the third and last stage of review, after the preceding stages have already found serious error in and removed, respectively, 41% of all capital verdicts entering the review process and 10% to 18% of verdicts that survived the first round of review, and concluding that these numbers reveal both a high rate of error and the need for multiple levels of inspection to remedy the problem); Liebman, *supra* note 34, at 82 ("The 41 percent-10 percent-40 percent pattern of reversal rates at the three successive review stages does not exhibit the sharply downward trend of remaining flaws . . . that one expects in a fully effective progression of inspections.")

<sup>159</sup> See Liebman et al., *Broken System II*, *supra* note 27, at 36; *infra* note 413 and accompanying text.

<sup>160</sup> See, e.g., Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, DEATH PENALTY INFO. CTR. 14, 21 (2009) <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.

tracking the outcomes of the 263 death sentences imposed nationwide eleven years earlier in 1989. Of the 263 verdicts, 160 (61%) had not completed the review process. Among the 103 verdicts that had reached the end of the appeal process, 78 (30% of those imposed; 77% of those finally reviewed) had been overturned by a state or federal court based on a finding of serious legal error. Nine of the condemned inmates died on death row while awaiting a decision. Only thirteen were executed.<sup>161</sup>

The ordeal of state and federal review that every capital sentence must endure in order to be cleansed of error and reach execution is a central feature of American capital punishment today. A hefty majority of death sentences are ultimately overturned due to serious flaws in the conviction or sentence. In the process, most of them are suspended for well over a decade while the detection process proceeds. The most poignant illustration of our broken system is that, of the 5826 people sentenced to die between 1973 and 1999, only 313, roughly one in nineteen, were executed during that period.<sup>162</sup> About four times as many had their convictions overturned or were granted clemency.<sup>163</sup> Of these myriad cases sent back for retrial at the second appeal phase (the only phase for which data are available), 82% ended in sentences less than death, and 9% ended in *not guilty verdicts*.<sup>164</sup>

#### B. *A New View, from Without*

In deciding what to make of a legal regime that operates this way, there are two perspectives an observer can take. The first is to analyze the regime on its own terms. From the law that governs the regime, one can discern its goals and aspirations. With some empirical research, one then can determine whether the regime's implementation accomplishes what is intended. The regime describes its own logic, and the observer evaluates it based on how well it succeeds. This is the view from within.<sup>165</sup>

The reality revealed by the *Broken System* findings, particularly the paradox of an affinity for death sentences and an aversion to executions, satisfies no one's stated goals for the death penalty in America. No constitutional principle, statute, judicial decision, politician, pundit, or think-tank advocates a capital punishment system in which the majority of verdicts are overturned and the average defendant languishes on death row for well over a decade while an exhaustive and expensive review process grinds along to an uncertain outcome.<sup>166</sup> Yet, these conditions

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<sup>161</sup> James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2055–56 (2000).

<sup>162</sup> See Liebman et al., *Broken System II*, *supra* note 27, at A–1.

<sup>163</sup> *Id.* at 77–78.

<sup>164</sup> See *id.* at i; Liebman, *supra* note 34, at 82.

<sup>165</sup> A good example of this approach is Steiker & Steiker, *Second Thoughts*, *supra* note 19.

<sup>166</sup> See Liebman, *supra* note 19, at 4 n.3 (citing sources decrying the evident incoherence of

more or less define the steady equilibrium that our capital system seems to have reached.<sup>167</sup> In light of the glaring discontinuity between policy and outcome, the view from within fails to explain the stasis that characterizes our seemingly broken system.

A second perspective observes the regime from without. By taking a birds-eye view of the pattern and practices through which the regime operates in actual fact, as a whole, over an extended period of time, and without accepting everything the system says about itself, this approach attempts to uncover a hidden logic that cannot be discerned from within.<sup>168</sup>

In *Albion's Fatal Tree*, Douglas Hay famously took this second perspective, puzzling over a capital system in which the ranks of those sentenced to death swelled year upon year, but that actually sent only one in five condemned prisoners to the gallows.<sup>169</sup> Stays and clemency were endemic to the system, triggering a glaring discrepancy between the penalty's imposition and its execution.<sup>170</sup> From all sides of the political spectrum, among courts and informed observers alike, the capital system was an object of near universal derision for its seeming irrationality and inability to accomplish its straightforward objectives.<sup>171</sup> Yet, despite this, the system proved exceptionally stable over time, resisting numerous calls for reform. Although Hay wrote about the death penalty in eighteenth century England, his vivid description of a seemingly broken capital system has eerie echoes in the American death penalty of today.

Hay's view from without broke from previous scholarship of the regime by noteworthy observers such as Blackstone, Radzinowicz, and Romilly, who had examined the system from within.<sup>172</sup> Hay rejected the belief—unanimous from the eighteenth century onward—that despite its remarkable stability, the legal regime had consistently failed to meet its proponents' goals.<sup>173</sup> Instead, he posited a strong, but previously hidden, logic to the system that revealed it to be a powerful tool for achieving its users' deepest objectives, namely, the terroristic social control of a restive peasantry by the rural English aristocracy.<sup>174</sup>

Hay describes a capital system over which the members of the local gentry

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American death penalty doctrine and results); Governor Quinn's Abolition Statement, *supra* note 18 (giving Governor Quinn's reasons for signing legislation abolishing the death penalty in Illinois).

<sup>167</sup> But cf. *infra* notes 371–400 and accompanying text (discussing changes in the nation's death penalty equilibrium since 2000).

<sup>168</sup> See, e.g., Greenberg, *supra* note 19.

<sup>169</sup> See *supra* notes 5–6, 93–96 and accompanying text (discussing Hay); see also GATRELL, *supra* note 32, at 7 (discussing outcomes of capital sentences between 1770 and 1830 and finding that only about 20% were carried out).

<sup>170</sup> Hay, *supra* note 5, at 40–49, 57.

<sup>171</sup> *Id.* at 23–24, 56.

<sup>172</sup> *Id.* at 22–24.

<sup>173</sup> *Id.* at 39.

<sup>174</sup> *Id.* at 25–26.



held sway, through their power over the definition of capital crimes (via their membership in Parliament), prosecutions (which they often initiated and funded<sup>175</sup>), trial judges (who came from their ranks), executive clemency (by officers of the Crown acting on the gentry's advice), and public hangings (which the gentry's clergy framed for the public in commanding sermons delivered to the assembled masses as they waited for the trapdoor to drop).<sup>176</sup> Using these powers, the gentry obtained life or death power over huge swathes of the peasantry by making capital virtually every invasive transgression through which criminals availed themselves of the lords' silver or linens;<sup>177</sup> by strategically doling out prosecutions and mandatory death sentences to the miscreants, followed in many cases by acts of slow-acting mercy undertaken on behalf of relatives who humbly supplicated themselves to the lords; by increasing the number of prosecutions in times of riot and stress, then, using mercy as a form of mass plea bargaining to entice the rabble to go back indoors;<sup>178</sup> and, finally, by using trial judges' statements upon imposing death verdicts and the clergy's well-attended sermons upon the occasion of public executions to shape the public meaning conveyed by the rest of these actions.<sup>179</sup> Through this power to take life (swiftly and demonstratively) and give it back (excruciatingly slowly and quietly), Hay concludes, the gentry exercised a virulent "terror" over the masses that they cloaked in the calming and obscuring ideology of evenhanded due process and beneficent mercy.<sup>180</sup>

Hay argues that the death penalty particularly appealed to the gentry as a form of social control because of its extreme and expressive, but only episodic and after-the-fact, response to the demands of law and order. As such, it shielded them from their existential fear: a strong central government bolstered by a national police force, prosecuting corps and law enforcement regime.<sup>181</sup>

Clearly, Hay's Marxian explanation of England on the verge of the industrial revolution does not translate well to the modern United States. Indeed, many

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<sup>175</sup> See, e.g., Friedman, *supra* note 95, at 475–76 (“England in the eighteenth century had no public officials corresponding to . . . police or district attorneys. . . . A victim of crime who wanted a constable . . . to apprehend the perpetrator was expected to pay the expenses of doing so. . . . [T]he prosecutor was usually the victim . . . [who undertook] to file charges . . . present evidence to the grand jury, and, if the grand jury found a true bill, provide evidence for the trial.”).

<sup>176</sup> Hay, *supra* note 5, at 27; see, e.g., Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 2016 (2010) (presenting findings from empirical research suggesting that evidence injustices committed by prosecutors or the judicial system can undermine the justice system's moral credibility, with crime-control costs as citizen's become reluctant to support, assist, and defer to the system).

<sup>177</sup> Hay, *supra* note 5, at 18, 21.

<sup>178</sup> *Id.* at 40–49.

<sup>179</sup> *Id.* at 17–18, 26–30.

<sup>180</sup> *Id.* at 32–39.

<sup>181</sup> *Id.* at 40–41.

question the validity of Hay's interpretation as applied to the era he depicts.<sup>182</sup> We find much to admire, however, in the model he provides of an analysis from outside the system that aims to identify the hidden logic of a stable, yet seemingly illogical, system of capital punishment.

Until now, our own writing has considered the death penalty largely from within, arriving at a conclusion that is close to the starting point for Hay's explorations. The *Broken System* studies described a modern American death penalty system so fraught with reversible error that fewer than 6% of the 5826 death verdicts imposed were carried out during the twenty-three years studied from 1973 to 1995.<sup>183</sup> Coupled with evidence that defendants are overwhelmingly sentenced to a penalty less than death on retrial after reversal, the findings reveal a capital punishment system with little to be said in its defense from within. Although *Broken System* begged, it did not answer, the question of why we allow a system like this to persist.

In *Overproduction of Death*, we discovered a set of skewed incentives that help explain why there is little supply-side constraint on the number of flawed death sentences that localities produce. Local prosecutors stand to gain by imposing as many death verdicts as possible, regardless of the verdicts' failure rate on appeal, because they quickly realize the political gains, and the costs of review and reversal are slow to materialize and shouldered by others.<sup>184</sup> Across the aisle, the modest resources of the anti-death-penalty bar require them to focus only on those clients that face the most imminent threat of execution. With their cases clustered at the narrower, post-conviction end of the capital appeals funnel, these lawyers understandably value reversals for their immediate clients over a doubtful promise of fairer, more reliable trial procedures for hypothetical, future capital defendants whom the lawyers do not now represent.<sup>185</sup> Again, however, although *Overproduction of Death* explained how these incentives keep the systems' repeat players from exposing and resisting the capital system's stable diseconomies, the article did not consider why the legislatures that created the system, the courts that regulate it or the taxpayers who underwrite it allow it to survive.

More recently, *Slow Dancing with Death* explored the Supreme Court's tortuous and ambivalent regulation of the nation's capital punishment architecture.<sup>186</sup> The article describes how the Court's responsibility for directly

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<sup>182</sup> See, e.g., John H. Langbein, *Albion's Fatal Flaws*, 98 PAST AND PRESENT 96, 120 (1983) (reviewing Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND (Douglas Hay et al. eds., 1975)); Robert B. Shoemaker, *The 'Crime Wave' Revisited: Crime, Law Enforcement and Punishment in Britain, 1650-1900*, 34 HISTORICAL J. 763, 763 (1991) ("Albion's fatal tree attracted considerable criticism, and a large body of published work now exists which calls into question . . . Douglas Hay's argument that criminal law was manipulated by the ruling class as a means of social control.").

<sup>183</sup> See Liebman et al., *Broken System II*, *supra* note 27, at 36.

<sup>184</sup> Liebman, *supra* note 161, at 2097, 2101.

<sup>185</sup> *Id.* at 2076.

<sup>186</sup> Liebman, *supra* note 19.

superintending a system of court-administered state violence that often, even blatantly, lacks the trappings of law has compelled the Court to intervene in matters of substantive criminal law and punishment that it traditionally has left to the States.<sup>187</sup> However, the Court has ended up being paralyzed by the responsibility it has undertaken to exercise—unwilling, on the one hand, to accept the moral exposure entailed by the substantive review it originally promised;<sup>188</sup> yet fearful, on the other hand, of the public reaction if it tried to abolish this raw, but democratically adopted form of state violence that it has been unable to domesticate.<sup>189</sup> In the latter regard, the parochial and libertarian proclivities of the communities that support the penalty, and their history of taking matters violently into their own hands when they doubt the state's willingness or capacity to protect them, suggests that the Court has good reason to fear the reaction to abolition imposed from on high.<sup>190</sup>

*Slow Dancing with Death* finds the Court in about the same situation vis-à-vis the American system of capital punishment as the nation at large—helplessly watching the system churn out case after flawed case, seemingly without purpose or direction. The article helps explain why the Supreme Court has not succeeded in altering a situation it believes is untenable, but still leaves unanswered the question of why the system arose in the first place and why it remains so stable, despite the vilification it receives from death penalty proponents, detractors and the agnostic alike. Following Hay, and informed by our above discovery of the minority status of the death penalty and the characteristics of the relatively few communities that value it, we are now prepared to take a fresh look from without.

### C. *The True Course of a Capital Case*

One way to obtain this view is to write the story of the death penalty, not the way a lawyer would, but as a documentarian might. Informed by the facts revealed in the *Broken System* study, we undertake something like that task in this section.

#### 1. The Trial Stage

A home invasion murder occurs in a small town—the victim is well known, the details are disturbing. The community is stricken, a family cries out for

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<sup>187</sup> *Id.* at 16 (noting, *inter alia*, that the Due Process Clauses of both the Fifth and Fourteenth Amendments appear to bless the death penalty as a substantive matter).

<sup>188</sup> *Id.* at 125 (arguing that the Court “lost heart” and renounced many of the supervisory responsibilities its earlier decisions regulating the death penalty promised).

<sup>189</sup> *Id.* at 122 (arguing that the Court is at once tormented by sanctioning the continuation of raw, state-imposed violence and fearful of the “struggle with the political branches that banning the violence would ignite”).

<sup>190</sup> See *supra* notes 64–117 and accompanying text.

justice. The accused, a stranger to the community, has committed a senseless and despicable act. He must be punished.

Amid public grief and cries for vengeance, the prosecutor goes for death. That is what the community wants. It believes itself to be under siege from the outside and demands immediate steps to allay its fear and express its anger. In another era, in a county of self-reliant citizens like this one, the accused might not have made it this far. But today, the community trusts the prosecutor to carry the case forward to the desired capital conclusion. The prosecutor's ability to repay the public trust and remain in office depends on her success.

A jury is empanelled and delivers its verdict: *guilty*. But the community, the victim's family and the state are not ready to exhale. A final matter remains for the representative dozen: to choose between life and death.

At this stage of his long and uncertain journey to execution, the accused has few friends. The community is angry. Skilled lawyers willing to represent the hated and hateful likes of this defendant are not available to him—they concentrate their fire on those who have moved further along the conveyor belt and are in more imminent danger of being executed. The accused must make do with the less clearly competent and committed legal assistance that the victimized community is willing and able to provide.<sup>191</sup>

Facing facts, it is clear that none of the participants sees the function of this stage as conducting a perfect trial or constructing an air-tight case that will withstand appeal. Indeed, truly facing the facts, it is clear that the goal of this stage is not even a verdict with a fifty-fifty prospect of being upheld. Historical error rates are simply too high to permit that assumption, particularly in communities that use the death penalty the most.<sup>192</sup> Instead, the evident function of this stage of the proceeding is to visit upon the stranger-perpetrator an awful judgment, that proclaims the community's anger and abhorrence at his violation of their sanctity and its resolve to deal immediately and harshly with those whose insidiously invasive acts put the entire community in fear.

It is not lost on the community that there are other ways to improve public safety. A more vigorous and professional law enforcement apparatus, for instance, might catch more who offend and deter more who think about doing it. Yet, true to its libertarian self-sufficiency and mistrust of government, the community is unwilling to tax and spend to accomplish this greater efficiency.<sup>193</sup> Instead, the community prefers to wager its scarce law enforcement resources on

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<sup>191</sup> See *supra* note 89.

<sup>192</sup> See, e.g., Liebman et al., *Broken System II*, *supra* note 27, at 295–99, B-4, B-5 (listing counties with at least five death sentences and 100% reversal rates: Baltimore County, MD; Orange, CA; De Kalb, GA; Tulsa, OK; San Bernardino, CA; Lake, IN; Richmond, GA; Camden, NJ; Pasco, FL; Jefferson, AR; Calcasieu, LA; Knox, TN); *supra* notes 57–60, 157–64, 183; *infra* notes 198–208 and accompanying text.

<sup>193</sup> See Gelman et al., *supra* note 15, at 243. The high rates of serious error found when the community's death verdicts are reviewed on appeal further attests to its unwillingness to invest in high-quality law enforcement and court systems.

the death penalty—infrequently in the scheme of *all* stranger crime but frequently when the cross-boundary offense fortuitously or intentionally kills. The penalty is not part of a comprehensive strategy or penology. It is the unvarnished expression of communal retributive anger that, although infrequent, is visible and dramatic and signals reassuringly to itself and wrathfully to outsiders how seriously it takes the invasive offense.

The jury's verdict is death. The sentence is pronounced. God's mercy on the invader's soul is invoked. He is branded with the scarlet letter of being worthy of death.

Whether he is actually executed will be for others to decide, years down the road. But for now, the community achieves the catharsis that is its main objective in imposing the death penalty. As Professor Weisberg has pointed out, "[s]imply having many death sentences can satisfy many proponents of the death penalty who demand capital punishment, because in a vague way they want the law to make a statement of social authority and control."<sup>194</sup>

Of course, other things equal, police, prosecutors, and the assembled public *want* the sentence to be executed. If out-of-town judges overturn it years later, those in the community who are still paying attention may curse the outsiders' insensitivity and elitism.<sup>195</sup> But facing facts again, an unmistakable feature of this first scarlet letter stage, at least for most of the players, is that they do not deeply care if the condemned man lives or dies. How else can we explain the fact that the highest-frequency death sentencing counties have long coped with significantly higher capital-error and reversal rates than the already staggering national two-thirds average? Indeed, until the Supreme Court put its foot down, prosecutors frequently encouraged juries to abandon their hesitation to choose death on the grounds that mistakes would be reversed on appeal.<sup>196</sup> Though these communities wish for eventual executions, the real dividend they receive evidently comes from the death verdict itself, irrespective of its quality or aftermath.

Given a choice between narrowing the focus and securing higher-quality death verdicts that stand up on appeal and, instead, sticking with the quick and unvarnished verdicts the community has been imposing, it chooses the latter. When faced with a trade-off between more sentences and more executions, the community opts for the ceremony and spectacle, the expressive comeuppance and revenge, attending each additional death verdict.

For the condemned man, however, things are different. And the same is true for the family of the victim. If the defendant is properly advised by trial counsel (a fifty-fifty proposition, at best) and if members of the victim's family are properly informed by the police, prosecutor, or judge (in our experience, this

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<sup>194</sup> Weisberg, *supra* note 19, at 387.

<sup>195</sup> See *supra* note 67; *infra* notes 216–25 and accompanying text.

<sup>196</sup> See, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 329, 333, 334 & nn.4, 5 (1985) (imposing constitutional ban on arguments, frequently made, that the jury should be less than fully concerned about the life-or-death responsibility it bears, given that the outcome will be scrutinized on appeal).

almost never happens<sup>197</sup>), these parties with a keen interest in the actual outcome will know that the capital trial and verdict are so much sound and fury. For them, the process is only beginning; the real outcome is in doubt and will not be clear for years.

## 2. The Death Row Stage

When the condemned man arrives on death row, he takes his place at the back of the line of thousands of other death row inmates awaiting their turn for each of three successive inspections of their conviction and sentence. First comes the state direct appeal, usually lasting about five years.<sup>198</sup> During the *Broken System* study period (1973–95), the elected state high court judges who preside at this stage found 41% of the verdicts they examined so prejudicially flawed that reversal and a do-over were required.<sup>199</sup> In other words, as a result of the first stage of review, over two out of every five defendants is back at square one, awaiting trial.<sup>200</sup>

The prisoners whose verdicts survive direct appeal (59% in the *Broken System* period) trudge on to the next, state post-conviction stage of review, which examines the case for a separate set of errors. Few of the decisions at this stage are published, making it difficult to discern how many death verdicts that cleared the first hurdle are overturned at this stage and how many simply languish awaiting decision. The limited information established that no fewer than 10% of the surviving verdicts were found lacking at this stage because of an error sufficiently egregious that it probably affected the outcome of the trial—again requiring re-trial if the defendant was to be executed.<sup>201</sup> The figure could be as high as 78% if every surviving case for which an outcome is unknown ended in a reversal. *Broken System II*'s very conservative estimate of the actual number is 18%.<sup>202</sup> This is itself a remarkable number when it is considered that the inspector at this stage is the *same locally elected* trial judge who imposed the verdict in the first place and is reviewing her own handiwork, to which her judicial superiors already have given their stamp of approval at the first stage of review.<sup>203</sup>

Publicly-accessible decisions again become available at the third, habeas corpus level of inspection, where federal judges look for federal constitutional

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<sup>197</sup> See Liebman, *supra* note 161, at 2134 & nn.247, 248 (discussing the toll the review process takes on the victim's family who typically are left uninformed by the other players).

<sup>198</sup> See James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1975*, 43–44 (2000), [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf).

<sup>199</sup> Liebman et al., *Broken System II*, *supra* note 27, at 8.

<sup>200</sup> See *id.* (reprinted in Gelman et al., *supra* note 15, at 216–17).

<sup>201</sup> *Id.* (reprinted in Gelman et al., *supra* note 15, at 216–17).

<sup>202</sup> *Id.* at 8 & n.88, 17–18 & n.103.

<sup>203</sup> See Gelman et al., *supra* note 15, at 215.

errors in the half or so of the original verdicts still standing.<sup>204</sup> Even though federal courts can only examine claims of error already rejected at one or both of the previous state court stages,<sup>205</sup> during the *Broken System* period, they found prejudicial violations in two out of five capital verdicts that survived both prior stages of review.<sup>206</sup> Reversals at this final stage occurred on average about thirteen years after the prisoner was sentenced to die; final decisions approving death verdicts typically occurred about a year earlier on average.<sup>207</sup>

Using the 10% underestimate of reversals at stage two and ignoring a handful of reversals at an intermittent fourth level of review, the odds during the *Broken System* period were better than two to one (68%) that a man sentenced to death in modern America would have his case overturned and sent back to its originating county.<sup>208</sup> In other words, the massive error detection process consumes over a dozen years on average and considerable public treasure before a conclusion is reached.

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<sup>204</sup> The reversal rate at the second phase is no less than 10%, and a 10% reduction of the 59% of cases that survived the first level of review (i.e., subtracting 5.9% of the original set), means that 53% of verdicts survive the first two stages. See Gelman et al., *supra* note 15, at 216–17. A more likely, although still conservative estimate, is that there is an 18% second-stage reduction of the 59% of cases surviving the first stage (subtracting 11% of the original set), see *supra* note 202 and accompanying text, in which case only 48% of the original set survive the first two stages. See Liebman et al., *Broken System II*, *supra* note 27, at 18 n.103.

<sup>205</sup> See 28 U.S.C. § 2254(b) (1996) (requiring exhaustion of state remedies as a prerequisite to federal habeas corpus review).

<sup>206</sup> Liebman et al., *Broken System II*, *supra* note 27, at 8.

<sup>207</sup> See *id.* at 91; see also Nancy J. King et al., *Executive Summary: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, NAT'L CRIMINAL JUSTICE REFERENCE SERVICE, at 10, <http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf> (last visited Sept. 12, 2011) (noting that capital federal habeas corpus cases resulting in reversal of death verdicts in the 2000–02 period took longer to complete than cases resulting in an affirmance of the death verdict). The figures in text are, of course, averages. Individual cases take much longer. See, e.g., Alarcón, *supra* note 19, at 711 & n.75 (showing that of the thirteen men executed in California between 1992 and 2006, ten had been on death row for fourteen years or more, and of those ten, five had been there for twenty or more years); see Gershowitz, *supra* note 21, at 346–47 (discussing a Tennessee death row inmate sentenced to die in 1984, whose case was under review in the Supreme Court twenty-four years later, at a point about midway through the third tier of review); *infra* notes 216–23 and accompanying text (describing Carl Isaacs, who Georgia executed in 2003, thirty years after he first arrived on death row).

<sup>208</sup> Liebman et al., *Broken System II*, *supra* note 27, at 8, 58 (reprinted in Gelman et al., *supra* note 15, at 216–17). The full reversal-rate equation, reflecting the findings at all three phases of review is  $.41 + .10(.59) + .40(.53) = .68$ . See *id.* Using a sophisticated methodology to project future changes in reversal rates and apply them to the cases that were still under review when the *Broken System* study was completed, Finkelstein and colleagues re-estimated the 68% figure as 62%. See *supra* note 157. Using the still conservative, but likely more accurate, 18% reversal rate at the second stage, the 68% figure climbs to 71%. See Liebman et al., *Broken System II*, *supra* note 27, at 18 n.103 (presenting a full reversal-rate equation, reflecting a more realistic estimate of reversals at the second stage of review as:  $.41 + .18(.59) + .40(.48) = .71$ ); *supra* notes 203–04 and accompanying text.

Decisions in capital cases are highly visible and closely scrutinized by the public,<sup>209</sup> and judges do not lightly reverse capital verdicts and order costly do-overs. Nine out of ten of the nearly 2400 reversals during the *Broken System* period were ordered by state judges elected to office by voters who profess to support the death penalty, willing to remove judges who they believe do not,<sup>210</sup> and so chasten the governors they elect that state chief executives have all but stopped awarding capital clemency even in egregious cases.<sup>211</sup> Most of the remaining 10% of reversals were ordered by federal judges appointed by “law and order” Presidents Nixon, Reagan, and Bush (the elder)—judges whose reversal rate in non-capital habeas corpus cases is a few percent or less.<sup>212</sup> The sensitivity of elected state judges to the political risks from reversals is suggested by another *Broken System II* finding. State judges are less likely, on average, to overturn error-laden death verdicts originating in rural and small-town communities—where reversals are likely to be more visible and controversial—than from cities, leaving it to their life-tenured federal counterparts to weed out the rural and small-town bad apples.<sup>213</sup>

The willingness of state and federal judges to overturn flawed capital verdicts reveals something important about them, however. On the whole,<sup>214</sup> and despite their conservative and pro-death penalty proclivities and susceptibility to political pressures, these judges are different from denizens of the communities that impose most death sentences. They are less parochial and libertarian. By definition, they have absorbed at least some cosmopolitanism and respect for layers of government. They have sojourned at college and law school and work in state capitals and urban hubs—at a distance from the personally and communally invasive reality of the crimes they review. They listen attentively to the out-of-state, big-firm, big-city lawyers who prosecute the appeals of many death row inmates and have the best record of success of all capital lawyers.<sup>215</sup> Their

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<sup>209</sup> See Gelman et al., *supra* note 15, at 231, n.64.

<sup>210</sup> See Liebman et al., *Broken System II*, *supra* note 27, at 37–38; see Liebman, *supra* note 161, at 82. The rare state judges who have reversed all or nearly all death sentences they reviewed have been unceremoniously voted out of office and often have been replaced by judges even more loath to overturn any death sentence than the original judge was loath to affirm the sentence—more than counterbalancing the effect of the former. See Liebman et al., *Broken System II*, *supra* note 27, at 39, 65 & nn.161, 209.

<sup>211</sup> See Liebman, *supra* note 161, at 2117 n.211 (citing sources).

<sup>212</sup> Liebman et al., *Broken System II*, *supra* note 27, at 38–39; see also King et al., *supra* note 207, at 10 (reporting on district court (i.e., non-final) outcomes of a sample of federal habeas corpus petitions filed in a sample of federal courts between 2000 and 2002, in which the reversal rate for capital cases was 35 times higher than that in non-capital cases).

<sup>213</sup> Liebman et al., *Broken System II*, *supra* note 27, at 336 (reprinted in Gelman et al., *supra* note 15, at 247).

<sup>214</sup> For an exception, see *infra* note 225 and accompanying text.

<sup>215</sup> Liebman et al., *Broken System II*, *supra* note 27, at 318 (reprinted in Gelman et al., *supra* note 15, at 250–52) (noting that capital prisoners are more likely to have their convictions reversed in federal habeas proceedings when they are represented by out-of-state, big-firm lawyers than when



work lives are governed by, and their decisions turn on, standard legal operating procedures. In some basic way, they have made universalizing professional commitments—sworn oaths—to uphold the law, making national law supreme over local edicts, and they practice a craft that requires them to hear out both sides and base a decision on only the law and the facts.

Whether advised by counsel from the start or by the acuity of hindsight, the condemned man comes to see that if he can stick it out for a decade or more, he has a better than even chance of surviving his death verdict. Likewise, the family of the victim comes to see that the passions that drove the trial to its conclusion—the sense of outsider violation, the communal and expressive retribution, and the episodic singularity of their loved one’s case—have little grip on appeal. Something very different, and probably unexpected and ill-explained, takes place. The divergence between these reactions and those of the community itself become clear when the matter arrives back in the county for retrial.

### 3. The Retrial Stage

Upon reversal of the death verdict, the capital prisoner typically remains on death row while the prosecutor decides whether to try him again. His “case” comes home to the county where it originated. Years have elapsed since the crime and original verdict. The modest time and resources the community is willing to expend, even on cases like this, have been depleted and the passage of time and scattering of witnesses make a second go-round costly. How does the community react? In fact, there are two responses, one dominated by a parochial impulse, the other by a libertarian disposition.

#### i. The Parochial Response to Reversal

The first response is a rather rare situation. It arises when the reaction to the reversal fuses with a still palpable sense of outsider violation from the original crime or a more recent one. An example is the notorious Alday case in Seminole County, Georgia, in which several members of an extended family were murdered over the course of an entire day as each came to check on the earlier victims of a rural home-invasion robbery.<sup>216</sup> Then-Governor Jimmy Carter dubbed the 1973 murders “the most heinous crime in Georgia.”<sup>217</sup> Despite unequivocal evidence of the codefendants’ guilt, the federal court of appeals overturned the convictions, a decade and a half later, due to “inflammatory and prejudicial pre-trial publicity [that] so pervaded the community as to render virtually impossible a fair trial

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they are represented by other counsel).

<sup>216</sup> *Isaacs v. State*, 386 S.E.2d (Ga. 1989).

<sup>217</sup> Jerry Schwartz, *1973 Georgia Murders Back in Courts*, N.Y. TIMES, Jan. 4, 1988, at A13, available at <http://www.nytimes.com/1988/01/04/us/1973-georgia-murders-back-in-courts.html>.

before an impartial jury.”<sup>218</sup> Rousing the same sentiments again, the reversal prompted 100,000 Georgians to send Congress a truckload of petitions calling for the federal judges’ impeachment.<sup>219</sup> Unsurprisingly, the county prosecutor opted to go capital again for two of the four defendants.<sup>220</sup> A jury again sentenced the ringleader, Carl Isaacs, to death, but imposed a life sentence on his accomplice Wayne Carl Coleman.<sup>221</sup> Even under these circumstances, the District Attorney decided not to pursue a death sentence against a third accomplice, George E. Dungee, because he was mentally retarded.<sup>222</sup> The fourth accomplice, Isaacs’ younger brother Billy, who was fifteen at the time of the crime, testified against his brother in exchange for a reduced sentence and has since been paroled.<sup>223</sup> Carl Isaacs was executed in 2003, by which point he had become the longest serving death row inmate in the United States.<sup>224</sup>

As to Isaacs (although, interestingly, *not* as to the other three killers), the dynamic is clear. When the magnitude of the communal violation and fears it engendered remain fresh in mind—or are rekindled by a new crime—the outlander’s cross-boundary offense merges with the faraway judges’ secular and universalizing assault on community safety and values, magnifying the parochial sense of threat from outside. Although the localist instinct dominates, libertarian disgust at the judges’ impeachable inability to protect the community also comes into play, triggering a desire to take matters once again in the community’s hands.

Professor Garland describes this dynamic when explaining why abolitionists gain so little traction in even strongly religious communities that value the death penalty:

Support for capital punishment came to be seen as an integral part of the “traditionalist” worldview, just as opposition to it became standard for liberal “progressives.” Depriving people of the right to impose capital punishment—like depriving them of their guns or their right to school prayer, or their right to ban abortion—came to be viewed as a kind of

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See Bill Montgomery, *What Ever Happened to . . . George Elder Dungee: Man Convicted of Role in Alday Family Murders*, ATL. J.-CONST., March 19, 2007, at B1, available at 2007 WLNR 5136443.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> See Jay Apperson, *After 20 Years, Freedom Nears*, BALTIMORE SUN, Oct. 21, 1993, at I13, available at 1993 WLNR 790515, available at [http://articles.baltimoresun.com/1993-10-21/news/1993294001\\_1\\_isaacs-fugitives-baltimore-county](http://articles.baltimoresun.com/1993-10-21/news/1993294001_1_isaacs-fugitives-baltimore-county); Schwartz, *supra* note 216.

<sup>224</sup> See Ariel Hart, *National Briefing South: Georgia Longtime Inmate Executed*, N.Y. TIMES, May 8, 2003, at A30, available at <http://www.nytimes.com/2003/05/08/us/national-briefing-south-georgia-longtime-inmate-executed.html>.

elite contempt for common people, for their faith, and for their way of life.<sup>225</sup>

Illustrating the response, Garland quotes Alabama judge Tom Parker's response to a Supreme Court decision banning the execution of juveniles:

[T]he liberals on the U.S. Supreme Court already look down on the pro-family policies, Southern heritage, evangelical Christianity and other blessings of our great state. We Alabamians will never be able to sufficiently appease such establishment liberals, so we should stop trying and instead stand up for what we believe without apology.<sup>226</sup>

When the distant judges' and the stranger criminal's assaults on the community's way of life fuse, the result is to *confirm* the community's need for the death penalty and re-create the conditions for its episodic use as an expression of the seriousness with which the community takes the incursions on its sanctity.

## ii. The Libertarian Response to Reversal

Libertarian impulses dominate the second, more usual response to reversals, which is to let the death penalty go, and sometimes let the defendant go. *Broken System II's* study of the aftermath of reversals at the second review stage shows that 82% of the do-overs end in sentences less than death, including 9% ending in a decision to release the defendant for insufficient evidence that he committed the crime.<sup>227</sup> In some cases, the jury reaches this conclusion after the prosecutor brings new charges. In other cases, the prosecutor chooses not to re-prosecute at all. More times than not, however, the prosecutor and defendant agree to the result out of court, in a plea bargain for a life sentence—typically, with both sides doing everything they can to make the outcome as low-key as possible, with no news coverage.<sup>228</sup>

In other words, most members of the community hear little or nothing about the reversal and subsequent—usually noncapital—result. From their perspective, the matter reached a satisfying conclusion years before, when a jury of their fellows issued a very public, very expressive and merciless rebuke of the invader and warning to others via their verdict of death. The one exception is the victim's family, who is quietly asked to acquiesce in the bargain. This they often are willing to do, after years of anguish at each unexpected and unexplained twist and turn in the appeals process, the hard won recognition of what a new appeals

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<sup>225</sup> See GARLAND, *supra* note 2, at 251.

<sup>226</sup> *Id.*

<sup>227</sup> Liebman et al., *Broken System II*, *supra* note 27, at i (reprinted in Gelman et al., *supra* note 15, at 221).

<sup>228</sup> See Liebman, *supra* note 161, at 2119, 2127.

process would look like, and a promise that the man they (unlike the rest of the community) continue every day to fear will remain in prison until he dies.<sup>229</sup>

We now have a first important insight from our view from without: the main value the capital-prone community gets from the death penalty is its imposition, not its execution. Most of what the community wants comes with the spasm of retributive anger it expresses contemporaneously with its experience of the homicidal invasion by publicly condemning the killer to die. It is then that it exorcizes its fear and economically signifies its anti-crime mettle. Later, however, when the case returns after reversal, it rarely has any of the attributes of the expressive proxy for systematic law enforcement that the libertarian death penalty is there to provide. By then, the case is little more than an expense the community need not bear.

#### *D. A New Explanation of Why Reversals Have No Chastening Effect*

A second insight follows close behind, once we acknowledge that neither response the death-prone community gives to reversals is the one the logic of appellate inspection assumes. According to that logic, the community will be chastened by the error its officials made and educated by the decision explaining the reversal. Voters will consider dismissing the offending district attorney or judge, in hopes of more certain and timely executions in the future. To head off that result, those officials will look to sanction their employee or the appointed defense lawyer who let the county down. Everyone will resolve to do better in the future. Or so the reversing judges hope. But, as we saw, the denizens of the local community are quite different from those judges,<sup>230</sup> and so is their view of reversals.

Consider, for example, San Bernardino County, California. Between 1973 and 1995, the county imposed thirty death sentences, more than one a year, at one of the highest rates in California.<sup>231</sup> All thirty death verdicts were overturned on appeal.<sup>232</sup> In contrast, neighboring Riverside County imposed about the same number of capital verdicts during the period (twenty-seven), albeit at a much lower rate per homicide, but only 31% were reversed.<sup>233</sup> If execution was the sincere goal of San Bernardino County, one might expect it to follow its neighboring county's example and align its trial practices more fully with the legally ordained rules for securing a valid capital conviction. But the facts do not bear out the assumption that the county will learn from its mistakes. As of May 2011, only

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<sup>229</sup> See *id.* at 2134 n.247.

<sup>230</sup> See *supra* notes 64–85, 214–15 and accompanying text.

<sup>231</sup> See Liebman et al., *Broken System II*, *supra* note 27, at B-7. During the period from 1980 to 1992, the County grew quickly, averaging about a million residents. *Demographics*, COUNTY OF SAN BERNARDINO, <http://www.sbcounty.gov/main/demographics.asp> (last visited Sept. 11, 2011).

<sup>232</sup> See Liebman et al., *Broken System II*, *supra* note 27, at B-7.

<sup>233</sup> See *id.*

one of San Bernardino's many dozens of death sentences since the late 1970s had matured into an execution.<sup>234</sup> Yet, despite this abysmal record, the county continues to churn out death sentences at one of the highest rates in the nation—fourteen between 2000 and 2007 alone, costing an estimated \$15.4 million—or the equivalent of thirty-two additional homicide investigators *each year*.<sup>235</sup>

In *The Overproduction of Death*, we offered an explanation for the lack of an effective feedback loop between appellate reversals and county level trials. We noted, for example, that the local officials who secured the flawed verdict are not required to defend it on appeal. That task falls to bureaucrats in the state attorney general's office—lower status officials who are in no position to take the district attorney to task for generating losing verdicts the state must defend.<sup>236</sup> The case-specific and claim-specific nature of review also militates against effective feedback, because no single judge or panel of judges observes the county's overall pattern of corner-cutting and shoddy miscues;<sup>237</sup> the focus is on procedure (often read as “technicalities”), not the substantive desert of punishment;<sup>238</sup> the remedy ordered is a do-over directed at no one in particular and calling for neither the aberrant office to be revamped or the offending official to be punished;<sup>239</sup> in any event, given the many years that elapse between a verdict and reversal, the responsible official is often long gone by the time the reversal occurs.<sup>240</sup> Finally, even if the error does somehow get connected to the responsible official, the onus is unlikely to outweigh the political and career capital the official accrued at the time of the original conviction.<sup>241</sup>

From our bird's-eye view here, it is clear that the problem is larger than flaws

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<sup>234</sup> See *Execution Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions> (last visited Sept. 21, 2011) (revealing that since 1973, California has executed thirteen people, only one of whom was convicted by San Bernardino County); Kevin Fagan et al., *Condemned Murderer Executed at San Quentin for 1980 Slaying*, SFGATE.COM (Jan. 29, 2002), [http://articles.sfgate.com/2002-01-29/news/17525855\\_1\\_death-row-elizabeth-lyman-stephen-wayne-anderson](http://articles.sfgate.com/2002-01-29/news/17525855_1_death-row-elizabeth-lyman-stephen-wayne-anderson).

<sup>235</sup> See *Death by Geography, A County by County Analysis of the Road to Execution in California*, ACLU OF N. CAL., [http://www.aclunc.org/issues/criminal\\_justice/death\\_penalty/death\\_by\\_geography\\_a\\_county\\_by\\_county\\_analysis\\_of\\_the\\_road\\_to\\_execution.shtml](http://www.aclunc.org/issues/criminal_justice/death_penalty/death_by_geography_a_county_by_county_analysis_of_the_road_to_execution.shtml) (last visited May 13, 2011).

<sup>236</sup> Liebman, *supra* note 161, at 2121.

<sup>237</sup> *Id.* at 2129.

<sup>238</sup> *Id.* at 2126–27.

<sup>239</sup> *Id.* at 2121. The rhetorical convention is to name no names, and the wrongdoers are immune from damages in any event. *Id.* at 2126. See *Thompson v. Connick*, 131 S.Ct. 1350, 1357–58 (2011) (citing immunity as the basis for reversing a \$14 million damages award against a district attorney whose lack of supervision allowed an assistant to withhold forensic evidence he knew exonerated the capital defendant who subsequently was convicted); see also Bienen, *supra* note 28, at 1363 (noting that sanctions are rarely meted out to state's attorneys in cases of wrongful capital convictions); Liebman, *supra* note 161, at 2121 (similar).

<sup>240</sup> Liebman, *supra* note 161, at 2120.

<sup>241</sup> *Id.* at 2127.

in the feedback mechanism for informing local citizens of the errors and the actors responsible for them, so they can demand steps to assure the scrupulous proceedings and executable verdict everyone wants. As this description suggests, feedback assumes a common goal—to learn how to do better next time the task tried and found wanting the first time. As we have seen, however, what communities that most use capital punishment want from death verdicts, and what the appeals process reviews the verdicts for, are two different—even irreconcilable—things.

The appeals process seeks to let executions go forward as long as they are based on professionally acceptable law enforcement and judicial procedures, and there is no “reasonable probability” of unreliability in the determinations of guilt beyond a reasonable doubt and of sufficient aggravation net of mitigation to warrant death.<sup>242</sup> The law enforcement science, standard procedures and professional norms these protocols entail for evaluating verdicts lie at oblique angles, or are positively anathema, to the parochial and libertarian values that prevail in communities that most use the death penalty. What those communities wanted—and what they more or less already got—from the verdict are different. Their goal is a simple, unyielding expression, with no institutional or professional frills, of what they think of cross-boundary invaders. What they aim to convey is a straightforward message about how harshly they mean to punish such killers now and in the future, leave aside the fine points of how to catch and try them.

When the community confronts the reversing court’s directive to spend a little more, tighten up on standards and processes, engineer a more professionally reasonable and probabilistically reliable product, the result is not the corrective dialogue the appellate apparatus assumes,<sup>243</sup> but dissonance. At worst, the order and its aftermath are the mirror image of feedback—not a neutral outside evaluator’s advice from which to learn about how to improve, but a confirmation of the pernicious outside threat against which the community imposed the flawed penalty in the first place—a red cape before angry eyes. More often, however, the order simply falls on the uncomprehending ears of people who cannot make any sense of it and have already moved on.

The indifferent reaction to reversals years later is not the only evidence of how unimportant actual executions are. Also indicative is where and how

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<sup>242</sup> See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 435, (1995) (defining a *Brady* violation as a “showing that the favorable evidence [that the prosecution failed to disclose to the defense] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict”); *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984) (providing that the assistance of counsel violates constitutional norms if (1) “counsel’s representation fell below an objective standard of reasonableness”—as to which “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides”—and (2) “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”; a “reasonable probability is a probability sufficient to undermine confidence in the outcome”).

<sup>243</sup> See, e.g., Robert M. Cover & T. Alex Aleinikoff, *Dialogic Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1044 (1977) (characterizing federal habeas corpus review of criminal convictions as a dialogue between federal and state courts).

executions are conducted—not, as Hay described, in the central square on market day, with a fiery object lesson projected from a makeshift pulpit about to scaffold a public hanging. Instead, our executions are in a geographically isolated penitentiary separated from the public by brick walls, barbed wire, and an inviolable TV blackout, in the darkest of night, with a few last words murmured by a man on a gurney about to be injected with drugs initially designed to put beloved pets to sleep.<sup>244</sup> The death-prone community, that is, having long since taken matters in its own hands and projected the stern and unforgiving message it desired, has little concern for the sanitized way the carceral state carries out what Professor Garland calls the “anti-lynching” of modern execution.<sup>245</sup>

#### V. THE COSTS OF A BROKEN SYSTEM: IMPOSED BY FEW, BORNE BY MANY

Capital punishment is a minority practice in the United States today; a relative handful of counties drive a huge proportion of death sentences. These communities get a lot from the death penalty, but in unexpected ways that are far more bound up with the verdict than the execution. For them, the visceral message about invasive crime that the verdict—and in the rare cases where it occurs, the execution—convey outward and especially inward substitute for systematic state efforts to protect the community from crime. Because the death penalty substitutes for systematic crime prevention and penology, one might expect these localities to lose something in terms of the objectives traditionally associated with criminal enforcement, such as incapacitation, deterrence and retribution.<sup>246</sup> In fact, there are quite a number of costs associated with these communities’ use of the death penalty. This section identifies those costs and who bears them.

There is no national figure for the cost of the death penalty,<sup>247</sup> which of course varies from state to state and county to county. Nor is there consensus on how to measure the cost. On one point there is agreement, however. Capital punishment in the United States always costs *more* than non-capital proceedings and penalties.<sup>248</sup>

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<sup>244</sup> Liebman, *supra* note 161, at 2057 & n.104.

<sup>245</sup> GARLAND, *supra* note 2, at 34–35.

<sup>246</sup> Given these communities’ indifference between life without parole and the death penalty once a death verdict has initially been imposed, their use of the death penalty provides little in the way of additional incapacitation—even assuming the death penalty has an incapacitative advantage over life without parole. Deterrence is likewise questionable, given the improbability that the death penalty will be carried out and for the reasons discussed *infra* notes 330–34 and accompanying text. Finally, although these communities are good at expressing capital retribution, they are not so good at exacting it.

<sup>247</sup> For one take on the issue, see Dieter, *supra* note 160.

<sup>248</sup> See, e.g., Robert M. Bohm, *The Economic Costs of Capital Punishment: Past, Present, and Future*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 592 (James R. Acker et al. eds., 1998); Kelly Phillips Erb, *Death and Taxes: The Real Cost of the Death Penalty*, FORBES, Sept. 22,

When a prosecutor seeks the death penalty, additional layers of investigative, evidentiary, procedural and legal complexity automatically arise.<sup>249</sup> To begin with, virtually every capital case goes to trial (because the defendant has nothing to lose), while the vast majority of non-capital cases, including murder cases, are resolved without trial, on a plea to a lesser crime.<sup>250</sup> Additionally, the body of legal doctrine and case law governing capital cases is vastly more complicated than the law that applies in non-capital cases.<sup>251</sup> Most importantly, capital cases entail two full-blown trials, one on guilt and the other on sentence, in contrast to other criminal proceedings which require only a guilt trial and a summary sentencing proceeding.<sup>252</sup>

Each component of the typical criminal trial process—for example, pretrial investigation<sup>253</sup> and motions practice—also takes far longer and is more costly in capital trials. An example is jury selection, which in capital cases not only must examine the usual questions of juror competency and impartiality, but also must delve into a prospective juror's opinions and beliefs on capital punishment.<sup>254</sup> Because of its sensitivity, this “death qualification” process takes longer than other selection steps, as each juror is questioned separately while sequestered from other prospective jurors.<sup>255</sup> Death qualification leads to significantly more prospective jurors being excused “for cause” than in non-capital cases, requiring many more to be summoned and put through the lengthy selection process. In addition, the prosecutor and defense typically have twice as many preemptory challenges in capital than in non-capital cases, leading to more excusals and the need for more

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2011, *available at* <http://www.forbes.com/sites/kellyphillipserb/2011/09/22/death-and-taxes-the-real-cost-of-the-death-penalty/> (“Death penalty cases are, from start to finish, more expensive than other criminal cases including those that result in life without parole. How expensive is the death penalty? Just over a year ago, Fox News issued this alarming statement: Every time a killer is sentenced to die, a school closes.”); other authority cited *supra* note 234; *infra* notes 248–94.

<sup>249</sup> See RONALD J. ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 1161 (2d. ed. 2005) (“Of felony convictions nationwide, 94 percent are obtained by guilty plea.”); Liebman, *supra* note 161, at 2099 (noting the frequency with which capital cases go to trial).

<sup>250</sup> See Liebman, *supra* note 161, at 2100 n.171; FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC DEFENSE, WASHINGTON STATE BAR ASSOCIATION 14–17 (2006), *available at* <http://www.wsba.org/lawyers/groups/finalreport.pdf> [hereinafter WASHINGTON STATE BAR REPORT].

<sup>251</sup> See Liebman, *supra* note 161, at 2108.

<sup>252</sup> See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303 (1983); WASHINGTON STATE BAR REPORT, *supra* note 249, at 17.

<sup>253</sup> See Goodpaster, *supra* note 251, at 344; *infra* note 428 (citing Supreme Court decisions discussing the comprehensive investigations required in capital cases to satisfy constitutional requirements).

<sup>254</sup> See, e.g., *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (permitting states to excuse jurors for cause if the trial judge finds that their views on the death penalty will keep them from imposing the death penalty although the evidence warrants it).

<sup>255</sup> See, e.g., WASHINGTON STATE BAR REPORT, *supra* note 250, at 16.



prospective jurors.<sup>256</sup> The pretrial publicity, length, and sequestration requirements that typically attend capital trials require still more excusals and prospective jurors. Although 100 potential jurors are sufficient to permit a panel of twelve to be selected for most non-capital criminal trials, it is not uncommon for courts to summon over ten or even twenty times that many in capital case.<sup>257</sup> Instead of the hours or day or so that suffice in other criminal cases, jury selection in capital cases can take weeks.<sup>258</sup>

There is an even greater discrepancy in the cost of capital and non-capital appeals. All three levels of appeals discussed above are automatic, or nearly automatic, in every capital case. Because most non-capital cases are disposed by plea bargain, which substantially limits the defendants' bases to appeal, the strong tendency in those cases is not to appeal at all.<sup>259</sup>

### *A. Direct Costs Compared to Life Without Parole*

The usual way to estimate the cost of a death penalty case is to compare it to the cost of a comparable murder case in which the next most serious punishment—life without parole—is imposed. In this section, we make that comparison per trial, per appeal, per execution and on an annual statewide basis.

#### 1. Additional Costs per Trial

Indianapolis prosecutors estimate that “a death penalty trial . . . demands the resources of five normal murder cases.”<sup>260</sup> Because of these additional costs, a single capital case can cripple a county's criminal justice budget.<sup>261</sup> For example, county costs for defense lawyers alone (a fraction of all costs) in a 2005 murder case in Yakima County, Washington, exceeded \$2 million, even though the prosecutor eventually reached a plea bargain with both defendants.<sup>262</sup> Given this

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<sup>256</sup> See *id.*

<sup>257</sup> See *id.*

<sup>258</sup> See, e.g., REPORT 31, NEW JERSEY DEATH PENALTY STUDY COMM'N (2007), available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf) [hereinafter NEW JERSEY DEATH PENALTY REPORT] (noting that jury selection takes four to six weeks in a capital case as opposed to one or two days in an otherwise comparable noncapital case).

<sup>259</sup> See Liebman, *supra* note 161, at 2053 n.90.

<sup>260</sup> Tim Sparks, *Cost of Death Penalty Trial Can Tip Decision*, FORT WAYNE J. GAZETTE, Oct. 25, 2001, at 1, available at 2001 WLNR 9660434.

<sup>261</sup> See Gershowitz, *supra* note 21, at 319–23 (collecting examples of prosecutors deciding not to pursue capital sentences for highly aggravated murders either explicitly because of the cost of doing so or under circumstances in which a cost-saving motivation seems likely).

<sup>262</sup> Chris Bristol, *Death Penalty: The Cost Is High*, YAKIMA HERALD-REPUBLIC, Mar. 19, 2011, available at <http://www.yakima-herald.com/stories/2011/3/18/03-19-11-death-penalty>. A plea deal was reached in one codefendant's case a year before the deal in the other case, explaining why the defense costs in the former case were \$500,000 and in the latter case were three times that much. See *id.*

history, when Yakima County Prosecutor Jim Hagarty recently considered capitally indicting an alleged triple murderer, a dust-up broke out between him and a county court administrator. Hagarty said cost would not affect his decision; the administrator complained about “overspend[ing] in a capital case” at a time when “we have no reserves left.”<sup>263</sup> Statewide, a Washington State Bar Association study estimated prosecution, defense and court costs at just the trial phase of a capital case to be roughly \$520,000 more than if same case were prosecuted non-capitally.<sup>264</sup>

Our main concern, however, is not the trial costs counties cover for themselves but those that the rest of the state bears as a result of subsidies and state-funded services such as courts and public defender offices.<sup>265</sup> In that regard, a Maryland study estimates that each additional death penalty trial costs *the state* \$1.9 million—or about \$1 million more than a non-death penalty murder trial.<sup>266</sup> A report the New Jersey Death Penalty Commission issued before the state abolished the death penalty in 2009 estimated that the state’s public defender service, which in that state provides defense representation for local prosecutions, cost the state \$1.5 million more a year because of the death penalty. Although the report did not break these costs cost down per case, there were only nine inmates on the state’s death row at the time.<sup>267</sup> A Kansas study found that trial costs for death cases were sixteen times greater for capital than for non-capital murder cases.<sup>268</sup>

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<sup>263</sup> *Id.*; see also Bienen, *supra* note 28, at 1308 (“[A]t a time when state governments are not meeting their most basic obligations, how can the state’s policy of maintaining capital punishment alone be immune from considerations of cost and relative value?”); Smith, *supra* note 21, at 113 (describing a similar dust-up recently between an Ohio prosecutor and county board chair on the one hand and a trial judge on the other, who all agreed that “seeking the death penalty would have a catastrophic effect on the county’s budget,” but disagreed over whether the prosecutor should be permitted to proceed capitally; in the end the trial judge took the “extraordinary [step of] invok[ing] cost concerns as grounds for precluding the prosecutor from seeking the death penalty”); *id.* at 113–14 nn.24–28 (citing instances of counties raising taxes, even multiple times, taking out loans, and cutting police and fire budgets to be able to afford a single capital prosecution).

<sup>264</sup> WASHINGTON STATE BAR REPORT, *supra* note 250, at 18. (estimating that pursuing the same case capitally as opposed to non-capitally costs, on average, an additional \$217,000 for prosecutors, \$246,000 for public defenders, and between \$46,640 and \$69,960 in trial court operations).

<sup>265</sup> See Gershowitz, *supra* note 21, at 353–54 (describing arrangements in a number of states for reimbursing localities for substantial portions of the costs of capital prosecutions).

<sup>266</sup> J. Roman et al., *The Cost of the Death Penalty in Maryland*, THE URBAN INSTITUTE, 2 (Mar. 2008).

<sup>267</sup> NEW JERSEY DEATH PENALTY REPORT, *supra* note 258, at 36.

<sup>268</sup> See *Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections*, KANSAS LEGISLATIVE POST AUDIT COMMITTEE 13, 41 (App. B) (2003), [http://www.kansas.gov/postaudit/audits\\_perform/04pa03a.pdf](http://www.kansas.gov/postaudit/audits_perform/04pa03a.pdf) (comparing estimated average trial cost of a murder case resulting in a death sentence (\$508,000) to estimated cost for a murder trial where a death sentence is not sought (\$32,000); noting that a substantial portion of these costs, especially for defense counsel, are borne by state taxpayers).

## 2. Additional Costs per Appeal

That same Kansas study estimated that appeals costs for capital cases are about *twenty-one times greater* than comparable non-death cases.<sup>269</sup> States and the federal government bear these additional costs, because states fund the judges and typically the lawyers for both sides who are provided at the first two levels of appellate review, and the state (vis-à-vis state's attorneys) and the federal government (vis-à-vis judges and defense lawyers) entirely fund the third level of review.<sup>270</sup> Greatly increasing the non-capital/capital differential is the fact that, in non-capital cases, prisoners have no right to state-funded defense counsel at the second and third stages of appeals, and very few pursue those appeals.<sup>271</sup> In contrast, capital prisoners have such a right for capital prisoners under state law in many states and federal law governing all states, and capital prisoners typically pursue all levels of review.<sup>272</sup> The upshot is that the dramatically higher appellate costs instigated by a decision to proceed capitally are mainly triggered by the small set of counties that impose most death sentences and are largely subsidized by state and federal taxpayers who themselves make do with life without parole, at a savings of 95% or more.<sup>273</sup>

Analyzing only the first, direct appeal stage of review and only the cost of defense representation, the Washington State Bar Association estimated that each death penalty case cost the state \$100,000 more on average than a comparable non-capital case.<sup>274</sup> A 2010 Indiana study found that the average cost to the state of a capital trial and only the first stage of review is *ten times* greater than the comparable cost of the average life-without-parole case.<sup>275</sup> These comparisons of costs per *filed* appeal vastly underestimate the scale of additional capital costs, given that every death sentence is automatically reviewed on appeal, while only a small fraction of non-capital sentences are appealed even at the first stage and even fewer are challenged at the second two stages.<sup>276</sup> Because it is a rare capital defendant who can pay for his own defense,<sup>277</sup> this additional cost, again, is borne

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<sup>269</sup> *Id.* at 13 (comparing average estimated cost for capital direct appeals (\$401,000) to cost of appeal of similar case in which the death penalty was not imposed (\$19,000)).

<sup>270</sup> See Liebman, *supra* note 161, at 2048, 2051 n.85.

<sup>271</sup> See RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 7.2, 12.2–12.5 (6th ed. 2011).

<sup>272</sup> See *id.*

<sup>273</sup> See, e.g., *supra* note 268 and accompanying text.

<sup>274</sup> See WASHINGTON STATE BAR REPORT, *supra* note 250, at 32.

<sup>275</sup> THE COST OF SEEKING THE DEATH PENALTY IN INDIANA, INDIANA GEN. ASSEMBLY LEGISLATIVE SERVS. AGENCY FOR SB 43, at 1 (2010), <http://www.in.gov/ipdc/general/DP-COST.pdf> (estimating state capital costs as \$449,887, compared to \$42,658 for each non-capital case).

<sup>276</sup> See *supra* notes 258, 270–71 and accompanying text.

<sup>277</sup> See Weisberg, *supra* note 89, at 535 (“The State virtually always pays for the defense of those whom it seeks to execute.”); HERTZ & LIEBMAN, *supra* note 271, at §§ 7.2[f], 12.3[b]; Liebman, *supra* note 161 at 2053–54 n.90.

by state taxpayers most of whose own communities impose no such costs on the state.

Security considerations affecting the conditions of incarceration during lengthy appeals also drive up the cost of incarcerating capital inmates—so much so, that even the *incarceration* costs of the death penalty are greater than the cost of imprisoning a murderer until he dies. For example, the New Jersey Department of Corrections estimated that state taxpayers would save about \$1 million *per inmate* over the life of the prisoner if (as eventually occurred) the death penalty was abolished and capital sentences were converted to life without parole.<sup>278</sup> The California Commission on the Fair Administration of Justice found that the per-prisoner cost of death row incarceration is *four times* greater than if the same man or woman were sentenced to life without parole—costing the state \$63.3 million more per year to maintain its (as of then) 670-person death row than it would cost to incarcerate the same prisoners under sentences of life without parole.<sup>279</sup> Although this figure is annual, not over the life of the prisoner, the fact that California now has over 700 inmates incarcerated on death row, and has executed only thirteen over the last thirty-plus years, suggests that the life expectancy of death-row inmates and of prisoners serving life without parole is not very different.<sup>280</sup>

Many of the additional costs are caused by the high rates of serious legal error that afflict capital verdicts, particularly from localities with high capital sentencing rates.<sup>281</sup> The costs are even greater when the errors lead to the conviction of the innocent. Between 2000 and 2009, for example, Illinois taxpayers (statewide) shelled out \$65 million in damages to innocent men whom local communities had sentenced to die as a result of egregiously flawed investigations and trials.<sup>282</sup>

### 3. Additional Cost per Execution

From the standpoint of a taxpayer assessing the burden of different law-and-order strategies, the sole distinguishing feature of a costly capital case and a much less expensive life-without-parole case is the execution. That, in other words, is what the taxpayer “buys” for the additional cost. Because essentially all capital verdicts cost anywhere from five to twenty-one times more than a life-without-parole alternative, but (as a result of high reversal rates) fewer than

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<sup>278</sup> See Bienen, *supra* note 28, at 1385–86.

<sup>279</sup> See CALIFORNIA COMM’N ON THE FAIR ADMINISTRATION OF JUSTICE, OFFICIAL RECOMMENDATIONS ON THE FAIR ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 69–70 (June 30, 2008), <http://www.ccfaj.org/tr-dp-official.html> [hereinafter CALIFORNIA DEATH PENALTY COMM’N].

<sup>280</sup> See DEATH ROW USA, *supra* note 40 at 38 (Spring, 2010), [http://naacpldf.org/files/publications/DRUSA\\_Spring\\_2010.pdf](http://naacpldf.org/files/publications/DRUSA_Spring_2010.pdf).

<sup>281</sup> See *supra* notes 57–60, 157–61, 185, 198–208 and accompanying text.

<sup>282</sup> See Bienen, *supra* note 28, at 1326.

15% of death verdicts nationwide eventuate in an execution,<sup>283</sup> excess costs *per execution* are extremely high.

In Florida, for example, the *Miami Herald* estimated that, between 1973 and 1988, a capital case cost the state \$3.2 million from indictment to execution, or six times more than the overall cost to the state of seeking *and carrying out* a sentence of life without parole.<sup>284</sup> But noting that few capital cases actually end in execution, the *Palm Beach Post* in 2000 estimated that the excess cost of the death penalty to the state *per execution that actually does occur* was \$23 million.<sup>285</sup> Florida citizens may be getting a bargain. A Maryland legislative commission found that its taxpayers bore an additional expense of \$186 million between 1978 and 1999 to obtain fifty-six death verdicts, of which five were carried out. It estimated the incremental capital cost to the state per execution as \$37 million.<sup>286</sup> As high as the Florida and Maryland figures are, they pale in comparison to the price paid per execution in California.

#### 4. Overall Additional Cost

In California, it takes over two decades on average for a death verdict to run the appellate marathon. Keeping cases moving at this snail's pace costs state taxpayer's \$137 to \$184 million extra every year, according to the 2008 report of a state commission.<sup>287</sup> To reduce that average lapse of time to around the national

<sup>283</sup> See *supra* notes 33, 259–81 and accompanying text; *infra* note 315 and accompanying text.

<sup>284</sup> David Von Drehle, *Bottom Line: Life in Prison One-Sixth as Expensive*, MIAMI HERALD, July 10, 1988, at 12A.

<sup>285</sup> S.V. Date, *The High Price of Killing Killers*, PALM BEACH POST, Jan. 4, 2000, at 1A.

<sup>286</sup> See JOHN ROMAN ET AL., URB. INST. JUST. POLICY CTR., THE COST OF THE DEATH PENALTY IN MARYLAND 1, 3 (2008), available at [http://www.urban.org/UploadedPDF/411625\\_md\\_death\\_penalty.pdf](http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf).

<sup>287</sup> Compare CALIFORNIA DEATH PENALTY COMM'N, *supra* note 279, at 6, 83–85 (estimating annual cost of the death penalty in California as \$137 million) with Judge Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters? A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S109, available at [http://media.lls.edu/documents/Executing\\_the\\_Will\\_of\\_the\\_Voters.pdf](http://media.lls.edu/documents/Executing_the_Will_of_the_Voters.pdf) (concluding based on a comprehensive cost analysis that “\$4 billion of state and federal taxpayer money has been expended administering the death penalty in California since 1978, with a cost in 2009 of approximately \$184 million above what taxpayers would spend without the death penalty,” and noting that this analysis is more complete than the California Death Penalty Commission’s analysis because it “incorporates the costs associated with federal habeas litigation,” which were omitted from the commission’s cost estimate of \$137 million per year). See generally Gil Garcetti, Response to Op-Ed, *California's Death Penalty Doesn't Serve Justice*, L.A. TIMES, March 25, 2011, available at <http://opinion.latimes.com/opinionla/2011/03/gil-garcetti-californias-death-penalty-doesnt-serve-justice.html> (noting that author “was the Los Angeles County district attorney for eight years and chief deputy district attorney for four years” during which he “was responsible for my office's decision to seek the death penalty in dozens of cases” and concluding based on more recent evidence that California’s death penalty is “an incredibly costly penalty, and the money would be far better spent keeping kids in school, keeping teachers and counselors in their schools and giving the juvenile justice system the resources it needs.”).

average of twelve years, the commission concluded that California would have to spend approximately twice this amount.<sup>288</sup> The commission estimated that commuting the sentence of everyone currently on death row to life in prison without parole would save the state over \$125 million annually.<sup>289</sup> Although the commission did not analyze cost increases over time, they are substantial. Its estimate of an annual additional statewide cost of the death penalty of \$125 million is about a 40% increase over a similar estimate made fifteen years earlier.<sup>290</sup> Nor did the commission calculate a per-execution cost. But the state's track record over the last twenty years of executing a prisoner on average about once every year and a half generates a cost to the state of *\$187.5 million per execution*.<sup>291</sup>

Estimates from other states are also sobering. Conservatively, between Governor George Ryan's January 2003 commutation or pardon of all 167 men and women on Illinois's death row<sup>292</sup> and Governor Pat Quinn's March 2011 decision to sign abolition legislation,<sup>293</sup> Illinois spent over \$150 million on the seventeen men sentenced to die between 2000 and 2010—on average, about \$20 million overall per year, and \$880,000 per condemned inmate per year.<sup>294</sup> Between 1994 and 2003, before giving up the endeavor, New York State spent about \$170 million imposing seven death verdicts, executing none—an average of about \$17 million overall per year and \$2.4 million per condemned inmate per year.<sup>295</sup>

The anecdotal quality of available cost information makes averages and comparisons difficult. There is, however, ample evidence that a local community's decision to initiate a capital prosecution, and particularly to impose a death sentence, foists tens of millions of dollars per execution on the rest of the state that would be saved if the sentence instead were life without parole.

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<sup>288</sup> CALIFORNIA DEATH PENALTY COMM'N, *supra* note 279, at 83.

<sup>289</sup> See *id.* at 84 (noting that the \$125 million estimate is derived by subtracting the annual cost to the state of the same number of life-without-parole inmates as there are death row inmates—\$11.5 million—from the state's \$137 million annual death penalty cost to state taxpayers). The comparable savings to North Carolina from substituting life without parole for the death penalty is about \$11 million a year. See Philip J. Cook, *Potential Savings From Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498, 522–25 (2009).

<sup>290</sup> See Stephen Maganini, *Closing Death Row Would Save State \$90 Million a Year*, SACRAMENTO BEE, Mar. 28, 1988, at A1.

<sup>291</sup> See *supra* note 40, at 13–37.

<sup>292</sup> Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at L1, available at <http://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html>.

<sup>293</sup> See *supra* note 18 and accompanying text.

<sup>294</sup> Bienen, *supra* note 28, at 1338.

<sup>295</sup> NEW YORK ASSEMBLY STANDING COMMITTEE ON CODES, JUDICIARY AND CORRECTIONS, THE DEATH PENALTY IN NEW YORK, at 1 (Apr. 3, 2005), <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf> (“In the past ten years, the state and local governments have spent over \$170 million administering the [death penalty] law. Yet, not a single person has been executed. Only seven persons have been sentenced to death.”).

Because a relatively small number of communities in so-called “capital” states instigate a disproportionate—and disproportionately error-laden—share of these costly verdicts, and because most of the costs are borne by the majority of taxpayers whose communities don’t much use the death penalty, the majority might well ask whether the subsidy is worthwhile. That question becomes more pressing when we consider the magnitude of the *indirect* costs the death-prone minority inflicts on the majority.

### B. *Indirect Costs*

The communities that most use the death penalty do not simply choose to impose a surfeit of death sentences, each costly in itself. In addition, their parochial and libertarian dispositions lead them to use the death penalty—often for felony-killings<sup>296</sup>—as an episodic, if deeply expressive, rationing device, in lieu of systematic effective law enforcement. The result is that, compared to less death-prone communities, these localities tend to spend considerably less on law enforcement, courts and legal representation for capital defendants<sup>297</sup> and have substantially lower clearance rates for violent crimes.<sup>298</sup>

When a state or county uses the death penalty to broadcast its disposition to deal harshly with stranger crimes affecting some neighborhoods, while in fact declining to fund and empower government to enforce the criminal law comprehensively in all neighborhoods—and when the result is low clearance rates for serious crime—inevitably, more dangerous criminals go free. The lucky criminals no doubt continue to prey on the same communities, perhaps contributing to their high homicide victimization rates among whites relative to blacks.<sup>299</sup> But the notorious transience of criminals, and the opportunity to leave rather than get caught for a past crime or for a later one that turns deadly and gets a death sentence, also puts neighboring communities at risk. There is a triple irony here. First, communities whose parochial tendencies make them particularly fearful of outside invaders stoke their own fear by doing a bad job—as a result of their libertarianism—of catching, convicting and incarcerating criminals. Instead, they focus only on the tiny proportion of cross-boundary felonies in which a privileged victim dies.<sup>300</sup> Second, and as a result, communities that live in fear of criminals invading their communities end up propelling more than their share of local criminals into other communities. Third, to the extent that the criminals’ new victims are in communities that prefer systematic law enforcement to the death penalty, those communities end up subsidizing their death-prone neighbors yet again, by expending their law enforcement dollars to apprehend criminals that

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<sup>296</sup> See *supra* notes 122–56 and accompanying text.

<sup>297</sup> See *supra* note 89–90 and accompanying text.

<sup>298</sup> See *supra* notes 89–92 and accompanying text.

<sup>299</sup> See *supra* notes 69–77 and accompanying text.

<sup>300</sup> See *supra* notes 118–56 and accompanying text.

their libertarian neighbors did not bother to catch.

There is no way to know how many violent crimes non-death-prone communities suffer because of low clearance rates in death-prone neighboring communities, or how much their crime control costs increase. But there is reason to think the costs are substantial.<sup>301</sup>

### C. Other Externalized Costs

We already have shown how death-prone counties' quick and unvarnished use of the death penalty generates exceptionally high rates of serious error<sup>302</sup> and risks the conviction and execution of innocent individuals.<sup>303</sup> And we have shown how their parochialism and libertarianism blinds them to the corrective feedback from the many reversals their verdicts generate.<sup>304</sup> These conditions are costly to taxpayers statewide<sup>305</sup> and sow disrespect for law and legal institutions.<sup>306</sup> They also take a heavy toll on the victims' families.

The parochial and libertarian community is prepared to minimize law enforcement and skimp on trial process, while ostentatiously imposing the death penalty for the occasional stranger crime that turns deadly. It is resigned, as well, to the length and likely disappointing results of the inevitable appeals—which the majority of less death-prone communities subsidize in any event—and to take a pass on most capital re-trials.<sup>307</sup> Regrettably, however, no one prepares the relatives of the victim for this aftermath.

The loved ones of homicide victims and others disagree on what psychological "closure" means, and whether executions provide it.<sup>308</sup> But whatever else closure means, it surely includes knowing the final result, one way or another. For the community, the pronouncement of the *verdict* is the final, satisfying result.<sup>309</sup> But not so for the victim's family, for whom each milepost in the appellate marathon is a fresh reopening of wounds, and for whom reversal and

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<sup>301</sup> Charles M. Blow, *High Cost of Crime*, N.Y. TIMES, Oct. 8, 2010, at A21, available at <http://www.nytimes.com/2010/10/09/opinion/09blow.html> (discussing research estimating the cost to victims, including in lost productivity, and to the criminal justice system of each murder (\$17.25 million), rape (\$448,532), robbery (\$335,733), and burglary (\$41,288)).

<sup>302</sup> See *supra* notes 57–60, 157–61, 183, 198–208 and accompanying text.

<sup>303</sup> See Steve Mills & Maurice Possley, 'I didn't do it. But I know who did: New evidence suggests a 1989 execution in Texas was a case of mistaken identity', CHI. TRIB., June 25, 2006, at 20; *supra* notes 164, 280–81 and accompanying text.

<sup>304</sup> See *supra* notes 229–44 and accompanying text.

<sup>305</sup> See *supra* notes 245–94 and accompanying text.

<sup>306</sup> See, e.g., Robinson et al., *supra* note 176, at 2016.

<sup>307</sup> See *supra* notes 226–28 and accompanying text.

<sup>308</sup> See Michelle Goldberg, *The "Closure" Myth*, SALON (Jan. 21, 2003), <http://www.salon.com/news/feature/2003/01/21/closure> (reprising the "closure" debate).

<sup>309</sup> See *supra* notes 102, 110, 192–96, 226–44 and accompanying text.



retrial mean a replaying of the ghastly crime itself.<sup>310</sup> As dozens of murder victims wrote Illinois Governor Pat Quinn before he signed abolition into law in the state in 2011, “to be meaningful, justice should be swift and sure. The death penalty is neither. [It] drag[s] victims’ loved ones through an agonizing and lengthy process, which often does not result in the intended punishment.”<sup>311</sup>

Quinn addressed victims directly in his signing statement:

To those who say we must maintain a death penalty for the sake of the victims’ families, I say it is impossible not to feel the pain of loss that all these families share or to understand the desire for retribution that many may hold. But, as I heard from family members who lost loved ones to murder, maintaining a flawed death penalty system . . . will not bring closure to their pain . . . . We must instead devote our resources toward the prevention of crime and the needs of victims’ families, rather than spending [the enormous sums of] money [needed] to preserve a flawed system.<sup>312</sup>

Notice that Quinn responds in the voice of the majority of communities for whom spending public resources on prevention and social services for victims is the modal response to the problem of crime. It is the antithesis of the parochial and libertarian voice of the communities that pronounce the lion’s share of verdicts and infuse them with the largest proportion of prejudicial error. What Quinn could not say is that a good portion of the costs he described—the anguish of victims in the face of error and delays, and extra crime prevention costs on taxpayers—are foisted on victims and the majority by the parochial and especially libertarian choices capital prone communities make.

To be sure, the ultimate blame for all these costs belongs to the killer himself—assuming he was the killer and was not wrongly condemned.<sup>313</sup> But here, too, our view from without requires us honestly to face facts. Since the reinstatement of the death penalty in 1976,<sup>314</sup> capital states have executed death sentences for only a vanishingly small fraction of homicides (about one-tenth of 1%) and of murders resulting in convictions (about three-tenths of 1%).<sup>315</sup> Even

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<sup>310</sup> See Goldberg, *supra* note 308.

<sup>311</sup> Governor Quinn’s Abolition Statement, *supra* note 18 (quoting victims’ statement); see Goldberg, *supra* note 307 (“Death penalty advocates claim victims’ families need [closure]—and deserve it—in order to move on. But some of those family members say dealing with death row issues for years only prolongs their pain.”).

<sup>312</sup> Governor Quinn’s Abolition Statement, *supra* note 18.

<sup>313</sup> See *supra* notes 164, 280–81, 302 and accompanying text.

<sup>314</sup> Compare *Furman*, 408 U.S. 238 (1972) (striking down all death penalty statutes then in effect in the United States for arbitrary and capricious selection of condemned), with *Gregg*, 428 U.S. at 187 (1976) (plurality opinion) (upholding the constitutionality of “guided discretion” capital statutes adopted in the wake of *Furman*).

<sup>315</sup> See Gelman et al., *supra* note 15, at 214 (noting the during the 1973–1995 Broken System

among the small fraction of convicted murders for which a death penalty is *imposed* (less than 5% of the total), capital states have only executed about 15% of the sentences since 1976.<sup>316</sup> The few executions that do take place, moreover, are typically more than a dozen years after the crime.<sup>317</sup> As a matter of honestly faced fact, therefore, the *death penalty* is not the punishment for murder in the United States; the penalty instead is *life without the possibility of parole, but with a small chance of execution a decade later*.<sup>318</sup>

This too has a cost. A precursor is Fyodor Dostoevsky's famous mock execution in St. Petersburg's Semyonovsky Square—a terrifying event, staged by Czar Nicholas I himself, that caused another prisoner to go mad.<sup>319</sup> Perhaps channeling his existential forbearer, Albert Camus based his abolitionism on "[t]he devastating, degrading fear that is imposed on the condemned for months or years is a punishment more terrible than death."<sup>320</sup> Based on the same psychological torture, the Judicial Committee of the Privy Council—the highest court of the United Kingdom—unanimously ruled that a fourteen-year delay between a trial and execution rendered a pending Jamaican execution illegally "cruel" and "inhuman".<sup>321</sup> Such an inordinate delay, the court noted, would never have been permitted under English common law.<sup>322</sup> Although before retiring, Justice Stevens failed to convince a majority of his colleagues on the Supreme Court to consider whether even longer capital delays violate the United States Constitution's Cruel and Unusual Punishment Clause,<sup>323</sup> our bird's-eye view

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study period, 331,949 homicides in capital states generated an estimated 300,257 arrests and 118,992 murder convictions, but only 5826 capital verdicts (1.8% of homicides; 4.9% of murder convictions) for which the judicial reversal rate was 68% and the resulting number of executions was 326 (.1% of homicides; .3% of murder convictions; 5.6% of death verdicts)); *supra* note 354 and accompanying text.

<sup>316</sup> See *supra* note 33 and accompanying text.

<sup>317</sup> See *supra* notes 159–60 and accompanying text; *infra* note 413 and accompanying text.

<sup>318</sup> In a state like Pennsylvania, where only three death row inmates out of hundreds have been executed since 1976, and all three chose to end their appeals prematurely and volunteered to be executed, see *infra* notes 414–20 and accompanying text & Table 5, the penalty for murder is perhaps better characterized as "life without possibility of parole but with the option of suicide-by-state."

<sup>319</sup> See FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* v (Constance Garnett transl., 1996) (describing the mock execution of Dostoevsky and several others, including one man driven insane by the exercise); see also FYODOR DOSTOEVSKY, *MEMOIRS FROM THE HOUSE OF THE DEAD* ix (Jessie Coulson transl., 1985) (similar).

<sup>320</sup> ALBERT CAMUS, *REFLECTIONS ON THE GUILLOTINE*, in *RESISTANCE, REBELLION AND DEATH* 173, 200 (1961).

<sup>321</sup> *Pratt v. Att'y Gen. of Jamaica*, 4 All E.R. 769, 783 (P.C. 1993) (collecting decision by other courts).

<sup>322</sup> *Id.*

<sup>323</sup> See *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting the denial of certiorari) (concurring in the denial of certiorari but suggesting that the Court eventually would have to consider the question presented there, "whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual

compels us to treat that as a foregone conclusion. From that perspective, we must assume that a system that strongly tends to operate in a particular way for many years is *meant* to operate in that fashion. And no one doubts that a choice, like Czar Nicholas I's, to exact an extra increment of psychological torture and retribution by threatening many, but carrying out only a few, executions violates our Constitution.

## VI. AN EXPLORATION OF WHY THE MAJORITY ACCEPTS THE COSTS THE MINORITY IMPOSES

Our view from without also compels us to ask why we continue employing this (from all perspectives) torturous and facially irrational system. We have already explained why the minority of death-prone, parochial, and libertarian communities do so—almost literally with abandon, given how thoroughly they discard the costs into others' laps.<sup>324</sup> The question raised, then, is why the majority of jurisdictions and taxpayers that *do not* employ the death penalty, or employ it only rarely and judiciously, are willing to pick up the tab?

### A. *The Opaque Nature of the Costs*

The most obvious reason that non-death imposing communities allow their high death-prone neighbors to reach into their wallets and impinge on their safety is that the costs are hidden and thinly spread. Much may be at stake for the majority in the aggregate, but very little of the cost is apparent to any one person at any given time. Modern death sentencing practices and costs thus are a standard “public choice” situation in which concentrated minorities with a clear sense of what they want can fleece “anonymous and diffuse” majorities with a less clear sense of the interests they have at stake.<sup>325</sup>

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punishment”); *Id.* at 1047 (noting that “Justice Breyer agrees with Justice Stevens that the issue is an important undecided one.”). Since *Lackey*, Justice Breyer has repeatedly urged the Court to consider the issues. See *Valle v. Florida*, Nos. 11-6029, 11A229, 2011 WL 4475201 (Sept. 28, 2011) (mem.) (Breyer, J., dissenting from the denial of a stay); *Allen v. Ornoski*, 546 U.S. 1136 (2006) (Breyer, J., dissenting from denial of certiorari); *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J., dissenting from same); *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from same); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from same). For arguments that lengthy death row incarceration raises serious penological concerns or is unconstitutional, see, for example, Alarcón, *supra* note 19, at 711 n.75 (arguing that “[e]xtraordinary delays are indeed unacceptable” and showing that of the thirteen men executed in California between 1992 and 2006, ten had been on death row for fourteen years or more, and five had been there for twenty or more years); Jeremy Root, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 283 (2001–2002); Jessica Feldman, Comment, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187, 219 (1999).

<sup>324</sup> See *supra* Parts III–IV.

<sup>325</sup> Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985).

The way both abolitionists and advocates typically frame the death penalty debate also obscures the penalty's costs. This is because the debate so often and heatedly focuses on the practice's moral aspects—whether it is wrong, or instead imperative, to respond to killing by killing. On these terms, the death penalty is a matter of personal choice, which Americans like to think everyone gets to make for herself, following which, majority rules. The importance of how the death penalty debate is framed is highlighted by polling results and their treatment in the debate. It is commonplace that just under two-thirds of Americans say they favor the death penalty (64% vs. 29%).<sup>326</sup> In fact, however, Americans are about evenly split on whether they prefer death to life without parole (49% vs. 46%).<sup>327</sup> The former, morally salient question and its two-thirds statistic frame the death penalty debate. But the latter, pragmatic question and its fifty-fifty statistic actually control behavior: the only choice prosecutors and jurors have in real capital murder cases, in every state in the nation, is between death and life without parole.<sup>328</sup>

The naiveté of logic and rationality also probably interfere with the majority's protection of its self-interest. Given the usual assumption that irrational systems do not persist for decades, most members of the public may be excused for believing the death penalty system we have probably deters crime, even in communities that do not much use it, and that it costs less than incarcerating a prisoner for life.<sup>329</sup> In other words, we can excuse the majority of non—or infrequent—users of the death penalty for assuming their death-prone neighbors are doing them a deterrent and fiscal favor, rather than fleecing them.

Just how far to push these excuses for the majority's credulity is unclear. The usual antidote to public-choice bamboozlement is for groups to form with the express purpose of pooling and publicizing the individually small but collectively large interests of their constituents. The Death Penalty Information Center, which we repeatedly cite in this article, fills exactly that role—rather effectively, we might add—focusing at least as much of its attention and information gathering on

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<sup>326</sup> See GALLUP, *supra* note 17 (showing 64% for, 29% against and 6% no opinion when respondents were asked, "Are you in favor of the death penalty for a person convicted of murder?"; the corresponding results were 49%, 46% and 6%, when the question was, "If you could choose between the following two approaches, which do you think is the better penalty for murder—[ROTATED: the death penalty (or) life imprisonment, with absolutely no possibility of parole]?").

<sup>327</sup> *Id.*

<sup>328</sup> See Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 28 (2010) (noting that "only Alaska [which has no death penalty] provides the possibility of parole for all life sentences"); LIFE WITHOUT PAROLE, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/life-without-parole> (last visited May 14, 2011).

<sup>329</sup> See *infra* notes 332–34 and accompanying text (offering explanation of why the death penalty as practiced in the United States today does not deter crime); *supra* notes 245–94 and accompanying text (documenting the far greater cost of the death penalty compared to life without parole).

the actual cost and other pragmatic considerations, as on moral arguments.<sup>330</sup> We suspect that other explanations are also at play.

*B. Why Deterrence Is Not the Explanation (and Why our Parochial and Libertarian Death Penalty Does Not Deter)*

First, we consider whether localities that do not use the death penalty do in fact receive a “deterrence dividend” from locales that do use it. That is, one community’s investment in a death sentence might deter crime region-wide—protecting surrounding localities and lowering their enforcement costs, even if they do not reciprocate with their own death sentences.

In fact, as we note above, high death imposing counties are not net *suppressers* of crime. On the contrary, they are inordinately bad at catching, convicting, and incarcerating serious criminals.<sup>331</sup> This indeed appears to be by their parochial and libertarian choice. They use the death penalty—expressively, but only episodically—to demonstrate that they really mean business about cross-boundary crime, when in fact the penalty is a substitute for engaging in the *real* business of systematically fighting crime.<sup>332</sup>

The probable result is a decline in deterrence. As criminologists have theorized and shown empirically, differences in the *probability of capture* and *sureness and swiftness of punishment* are likely to have more of an effect on deterrence than differences in the *amount* of punishment once an offender is apprehended, convicted and sentenced.<sup>333</sup> This is especially likely to be so when the choice is between punishments that in all cases are extremely harsh, as is true of the exclusive life without parole and death penalty options for capital murder.<sup>334</sup> Given these principles, we can expect that death-prone localities’ libertarian aversion to funding effective law enforcement, trials and corrections, and their resulting low clearance and high reversal rates, more than offset any deterrent

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<sup>330</sup> DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/>; see *supra* notes 12–13, 22, 33, 106, 233; *infra* notes 372, 374, 376, 421.

<sup>331</sup> See *supra* notes 89–92 and accompanying text.

<sup>332</sup> See *supra* notes 102, 110, 192–96, 226–44 and accompanying text.

<sup>333</sup> See, e.g., Jeffrey Fagan, *Death and Deterrence Redux: Science, Law, and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 273 (2006); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 J. CRIME & JUST. 1, 21 (1998); Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 866 (2001); VALERIE WRIGHT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT, THE SENTENCING PROJECT, 3–8, nn.3–22 (2010), available at [http://www.asca.net/system/assets/attachments/1463/Deterrence\\_Briefing\\_.pdf?1290182850](http://www.asca.net/system/assets/attachments/1463/Deterrence_Briefing_.pdf?1290182850).

<sup>334</sup> See Fagan, *supra* note 333, at 271–72. Eleven percent of all modern executions in this country have taken place after prisoners elected to give up their appeals and be executed, rather than exercise their better than even chance of living in prison for the rest of their lives. See *supra* note 317; *infra* notes 394–420 and accompanying text. This pattern suggests the harshness of life without parole, though not its equivalence to death.

advantage the death penalty otherwise has over life without parole. In other words, more costly, competent, and scientific investigation leading to prison sentences—and more professional trials ending in rarely-reversed verdicts—are likely to be a more effective deterrent than sloppy investigation and trials, followed by oft-reversed death verdicts and only a few executions years later.

This dynamic helps explain a conundrum that has vexed capital punishment scholars for decades. Why doesn't heavy use of the death penalty generate a measurable decline in predicted crime?<sup>335</sup> The question has vexed researchers because it is the wrong question. Given modern death sentencing practices in the United States, the comparison is not between the death penalty and life without parole, *everything else equal*. The comparison is between the death penalty as a conscious *substitute* for systematic law enforcement, professional adjudication, and scientific penology and, on the other hand, life without parole under conditions closer to those sought by modern penology. The increment in deterrence from imposition of the death penalty is cancelled out by the decrement in deterrence from the predominant use of that penalty to starve law enforcement, in the process punishing fewer crimes and delaying imposition of sentence.

An actual deterrence dividend thus cannot explain the majority's willingness to subsidize the minority's heavy use of the death penalty. Imposing more death verdicts correlates with less, not more, law enforcement. We need other explanations for the majority's forbearance.

### C. The Death Penalty as a Back-Pocket Option

Perhaps a better explanation for the non-death-prone majority's willingness to

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<sup>335</sup> To date, no convincing empirical support for the proposition that the death penalty deters murders has been provided. Each time a new study suggesting a deterrent effect is published, contrary analyses appear to knock it down. See, e.g., *Gregg*, 428 U.S. at 184–85 (1976) (plurality opinion) (“Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate [but t]he results simply have been inconclusive . . .”); Hashem Dezbakhsh et al., *Does Capital Punishment Have a Deterrent Effect: New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 368 (2003) (arguing that authors’ econometric model demonstrates that executions reduce the murder rate); John J. Donahue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 841 (2005) (conducting exhaustive statistical analysis concluding that none of the recent deterrence studies—for example, by Dezbakhsh et al., *supra*, and Shepherd, *infra*—“suggested that the death penalty has large effects on the murder rate”); Fagan, *supra* note 333, at 261 (identifying methodological “flaws and omission” in recent empirical studies claiming to show a deterrent effect from capital punishment, which “render [them] unreliable as a basis for law or policy” and concluding that there is “no, reliable, scientifically sound evidence . . . identify[ing] whether [the death penalty] can exert a deterrent effect”); Kenneth Jost, *Death Penalty Debates: Is the Capital Punishment System Working?*, 20 CONG. Q. RESEARCHER 965, 969–71 (2010) (citing studies reaching opposite conclusions); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 307–08 (claiming that statistical analysis reveals that each additional execution in the United States in 1999 resulted in approximately three fewer murders, and that each death sentence resulted in approximately 4.5 fewer murders).

pay, even dearly, for others to use the death penalty is that they want to keep the penalty in their own back pocket. They may sense that there is a murderer out there somewhere on whom even they would want to impose the penalty. They preserve it “just in case” and pay for others to use it more liberally.

The recent Steven Hayes trial in Connecticut is illustrative.<sup>336</sup> In 2007, Hayes and another man, Joshua Komisarjevsky, broke into the suburban home of Dr. William Petit. After terrorizing the household for hours, beating Petit with a baseball bat and raping his wife, Hayes and the other man set Petit’s two daughters, then the home on fire.<sup>337</sup> Only Dr. Petit survived.<sup>338</sup> In the midst of the case in June 2009, the state legislature approved a bill to abolish the death penalty.<sup>339</sup> After then-Republican Governor Jodi Rell vetoed the measure, the Democratic candidate to replace her in the 2010 election, Dan Malloy, said he would sign similar legislation.<sup>340</sup> In response, Petit and others argued for keeping the penalty for the rare crimes like Hayes’ triple homicide.<sup>341</sup> Almost simultaneously with Malloy’s election as Governor, the Hayes jury deliberated for many hours before sentencing him to die.<sup>342</sup> Even Hayes himself expressed relief, not wanting, he said, to live any longer with the crimes he committed.<sup>343</sup> Then, in May 2011, as the legislature seemed poised to enact and the governor to sign abolition legislation, state Senator Edith Prague, a capital punishment opponent whose vote would make a majority for repeal, withheld her vote at Dr. Petit’s request.<sup>344</sup> “I actually believe in repealing the death penalty,” Prague said.<sup>345</sup> But “[f]or Dr. Petit, for me to do one more thing to cause him some kind of angst, I can’t do it.”<sup>346</sup> The eighty-five-year-old Senator asked to delay the

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<sup>336</sup> Connecticut v. Komisarjevsky, 2011 WL 1168532 (Conn. Super. Ct. 2011)

<sup>337</sup> See Jill Lepore, *Rap Sheet*, THE NEW YORKER, Nov. 9, 2009, available at [http://www.newyorker.com/arts/critics/atlarge/2009/11/09/091109crat\\_atlarge\\_lepore](http://www.newyorker.com/arts/critics/atlarge/2009/11/09/091109crat_atlarge_lepore); Alison Leigh Cowan, & Christine Stuart, *Suspect in Connecticut Killings Left Long Trail of Lawbreaking*, N.Y. TIMES, Aug. 4, 2007, at B1, available at [http://www.nytimes.com/2007/08/04/nyregion/04slay.html?\\_r=1](http://www.nytimes.com/2007/08/04/nyregion/04slay.html?_r=1).

<sup>338</sup> Lepore, *supra* note 337, at 2.

<sup>339</sup> See William Glaberson, *Reliving Horror in a Test for the Death Penalty*, N.Y. TIMES, Jan. 19, 2010, at A1, available at <http://www.nytimes.com/2010/01/19/nyregion/19cheshire.html?pagewanted=all>.

<sup>340</sup> See *id.*

<sup>341</sup> *Id.* (quoting Dr. Petit telling Connecticut legislators that “[m]y family got the death penalty, and you want to give murderers life. That is not justice.”).

<sup>342</sup> Susan Campbell, *Death Penalty Support Must be Absolute*, HARTFORD COURANT, Nov. 10, 2010, at B1.

<sup>343</sup> Steven Hayes, Statement, HARTFORD COURANT, Dec. 2, 2010, <http://www.courant.com/community/cheshire/cheshire-home-invasion/hc-hayes-statement-1203-20101130,0,7354278.story>.

<sup>344</sup> Mark Pazniokas, *At Petit’s Request, Two Senators Stop Repeal of Death Penalty*, THE CONNECTICUT MIRROR (May 11, 2011), <http://www.ctmirror.org/story/12559/petits-request-prague-stop-repeal-death-penalty-year>.

<sup>345</sup> *Id.*

vote for a year, evidently so Hayes' codefendant could first be tried capitally.<sup>347</sup>

Although Connecticut currently has a dozen men on its death row, it has only executed one since the reinstatement of the death penalty in the mid-1970s, and that man voluntarily ended his appeals and asked to be executed.<sup>348</sup> Still, the chance to brand men like Hayes and his codefendant as *death-worthy*—the only action that can explain Senator Prague's simultaneous request to delay the matter and intention to vote to abolish a year later—may explain the majority's willingness to subsidize counties and states that impose the death penalty with greater frequency.

It is hard to assess the strength of this explanation for the majority's willingness to pay for a costly penalty they do not use. Half of Americans prefer life without parole over the death penalty,<sup>349</sup> even when the abstract nature of the question invites them to imagine the back-pocket case for which they might want to impose death. For many people, therefore, the back-pocket option does not seem to be decisive. In any event, this explanation casts the death penalty as at best a luxury—something we might be able to afford in flush times, but not necessarily when budgets are tight.

#### D. *The Majority's Fear of the Minority's Reaction to Abolition*

There may be a darker reason for the majority's passive acquiescence: fear. In this regard, the Supreme Court's deeply ambivalent behavior towards the death penalty<sup>350</sup> may be a microcosm of the majority's.

In our federal system in which crime and punishment are mainly the domain of states and localities, subject only to the Constitution, it falls to the Court to set national policy and limits on the death penalty. As Professor Garland has shown, the Court's actions in this regard reveal a keen attention to the public mood.<sup>351</sup> Consider, for example, the fierce late-sixties, early-seventies backlash against the antiwar and civil rights movements' perceived assaults on "states' rights" and mainstream values.<sup>352</sup> Those concerns helped drive the nearly unanimous state response to the Court's 1972 decision in *Furman*,<sup>353</sup> rejecting the death penalty as then applied. In turn, the alacrity and vehemence with which the states re-upped for the death penalty no doubt contributed to the Court's own decision four years

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<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> David Owens, *Ross Execution First Death Penalty Imposed in New England in 45 Years*, HARTFORD COURANT, Dec. 22, 2009, at B1.

<sup>349</sup> See *supra* notes 327–29 and accompanying text.

<sup>350</sup> See Liebman, *supra* note 19, at 89–106.

<sup>351</sup> GARLAND, *supra* note 2, at 206–30.

<sup>352</sup> *Id.* at 232.

<sup>353</sup> 408 U.S. 238, *supra* note 9. See GARLAND, *supra* note 2, at 209.



later in *Gregg*<sup>354</sup> to protect its credibility and acknowledge the primacy of the states by leaving the new capital statutes in place.<sup>355</sup> After years of incendiary decisions inflaming passions in the South and elsewhere, to strike a blow at another revered institution might have threatened a national schism. The Court opted not to find out.<sup>356</sup>

There are several reasons to think that the Court's discretion was the better part of valor. As Professor Garland notes, in many areas of the country, support for the death penalty soon became a proxy—or our analysis might suggest, a substitute—for public officials' support for a suitably "tough-on-crime" agenda.<sup>357</sup> We also have noted the association between communities' commitment to the death penalty and their desire for strict populist electoral constraints of judges and district attorneys,<sup>358</sup> as well as a correlation between that commitment and state appellate courts' timidity in reversing their capital verdicts.<sup>359</sup>

Another hint of the fear the Supreme Court felt is found in a sentence in Justice Stewart's plurality opinion in *Gregg* that has long puzzled the elder one of us. The sentence is in the crucial passage where Stewart, a key member of the *Furman* majority who had long been a focus of abolitionist hopes,<sup>360</sup> explained why the Court had decided to validate capital punishment. The death penalty, Stewart wrote, is "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."<sup>361</sup> Understanding Justice Stewart to be worrying that an inflamed family member might take the law into his own hands, what Justice Stewart deemed "essential" seemed to me to be a make-weight, not worthy of a decision to allow the state systematically to kill its own people. The perspective introduced here, however, clarifies that what Stewart feared was not individual self-help but the vengeance of entire, close-knit, self-sufficient communities. In the wake of *Furman*, these communities had demanded new capital statutes to keep punishment of violently invasive outsiders in their own hands. And the same communities had a history of violent and grisly communal vengeance when they sensed that outside government actors with alien values were compromising their ability to defend themselves.

If politicians, judges and even Supreme Court Justices live in fear of inflaming parochial and libertarian communities' passions by taking away their

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<sup>354</sup> 428 U.S. 153 (1976).

<sup>355</sup> See GARLAND, *supra* note 2, at 221–23; Liebman, *supra* note 19, at 32–33.

<sup>356</sup> See Liebman, *supra* note 19, at 33.

<sup>357</sup> See GARLAND, *supra* note 2, at 246 (noting that despite its narrow application, the rarity of its use and the utter implausibility of the idea, capital punishment became the "solution" to crime that dominated public debate, and that voicing unquestioning support for the death penalty was necessary to show that one was for law and order).

<sup>358</sup> See *supra* note 83 and accompanying text.

<sup>359</sup> See *supra* notes 29, 83, 213 and accompanying text.

<sup>360</sup> See MELTSNER, *supra* note 46, at 157, 270.

<sup>361</sup> *Gregg*, 428 U.S. at 183 (1976).

death penalty, perhaps the majority of non-and infrequent death penalty users fears the same reaction if they stop subsidizing the penalty. Going further, we might conclude that symbolic self-help is a rational underpinning of our capital punishment system that our current capital system is well-tailored to serve, and that the majority is wise to subsidize appellate review to take some of the vengeful edge off of it. The death-imposing community gets to demonstrate where it stands on stranger crime; most defendants eventually get their reversals, albeit after years of retributive torture; and in the end most cases are quietly retried to the non-capital conclusion the majority would have imposed in the first place. This analysis harkens back to Professor Robert Weisberg's hypothesis that the Supreme Court manipulates death penalty doctrine with an eye on the number of executions it believes a small portion of the populace demands and the temperance others prefer.<sup>362</sup> Although Weisberg's *modus vivendi* is between hotheads on both sides, his analysis easily accommodates our view of a death-prone parochial and libertarian minority and a more pragmatic majority. The goal, Weisberg wrote, is to "have some executions, but not very many. A small number of executions offers a logical, if crude, compromise between the extreme groups who want either no executions or as many as possible"; it allows enough executions to "keep the art form alive, but not so many as to cause excessive social cost."<sup>363</sup>

Still, we wonder. Facing facts, a system that notoriously lacks "face validity," that massively churns lives (those of the family of the victim and of the condemned) and three levels of judicial proceedings, that exacts psychological torture, that risks executing the innocent, that imposes heavy monetary and public safety costs on the majority to serve little more than the symbolically expressive needs of a parochial and libertarian minority, may not deserve the acquiescence Professor Weisberg imagines.

#### *E. The Resonance of the Minority's Parochial and Libertarian Values*

It may be, as well, that the "us against them"—or "us grudgingly accommodating them"—tenor of our discussion misses an important point. It is true that most Americans have made peace with a modern world that sometimes requires us to be each other's keeper, flaunts our dependence on others around the world whose values we abhor, and threatens us with powerful forces against which we need the government to protect us. But many Americans may still wish it were not so. They thus may resonate with the minority of parochial and libertarian communities that refuse to capitulate to the onslaught of these outside, entangling forces. The death penalty, and the values that inform its peculiar use in death-prone communities, may appeal to a powerful sense of nostalgia for a bygone era, akin to the romanticizing of the frontier and Old West.

This brings us back to Professor Garland's account of the 1970s reinvention

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<sup>362</sup> Weisberg, *supra* note 19, at 386.

<sup>363</sup> *Id.*

of the death penalty after *Furman* as a populist response to the perceived overreaching of the “soft-on-crime” liberal politicians and judges of the 1960s.<sup>364</sup> “In post-1970s America,” Professor Garland writes, the death penalty became “not so much a policy or a penal sanction as a commitment, a symbolic badge that declared the wearer’s position on ‘law and order’ issues—and on so much else besides.”<sup>365</sup> Even without throwing in their lot with communities that base their entire law enforcement strategy on a version of this symbolism projected by the death penalty, members of the majority might feel that a refusal to subsidize capital punishment would constitute a repudiation of traditional values with which they strongly resonate.

#### *F. Hay’s America?*

Why, in sum, does the majority quietly allow an idiosyncratic minority of death-prone communities to impinge so substantially on its aggregate welfare? And why does the majority continue to abide the taint capital punishment practices impose on the integrity of a judicial system on which we all rely? Although our explanations may not be entirely convincing, they do reveal in our times what Douglas Hay thought he discovered about capital punishment in England a few centuries ago: that it has been ingeniously designed to serve the needs of a few while imposing substantial, if hidden, costs on the many.<sup>366</sup>

America’s current capital practices parallel Hay’s description of Georgian England more fully than at first appeared. Akin to the landed gentry, wary of the traditional order’s destabilization by incipient urbanization and a national leviathan, death-prone communities feel themselves under siege from disruptive outside forces and the entanglements of the modern state. In England, the gentry responded by using its control of the levers of criminal justice to dole out strategic increments of terror and mercy in lieu of ongoing surveillance provided by a national police force.<sup>367</sup> In the United States, parochial and libertarian communities use capital felony murder to ration episodically ferocious responses to stranger crime in lieu of systematic law enforcement. In both times and places, actual executions yield to the benefits of the death verdict itself. And in both, revered moral principles—due process and mercy in eighteenth century England, close-knit communities and self-reliance in modern America—are used to blind the majority to the advantage being taken of them by the minority.

Hay suggested that if the peasants had not been so blinded by “ideology,” they would have risen up and overturned the system and its “terror.”<sup>368</sup> We don’t espouse such a drastic response for the United States today. Nor do we think the

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<sup>364</sup> See GARLAND, *supra* note 2, at 234–44.

<sup>365</sup> See GARLAND, *supra* note 2, at 244–45.

<sup>366</sup> See *supra* notes 5–6, 93–96, 169–82 and accompanying text.

<sup>367</sup> See *supra* notes 93–96, 174–80 and accompanying text.

<sup>368</sup> See *supra* note 180 and accompanying text.

majority has been so thoroughly hoodwinked. In the next Part, however, we do identify strong evidence of a majority fighting back, albeit ineffectively. In the following Part, we suggest ways for the majority to strengthen their response.

## VII. THE NEW MILLENNIUM: DECLINE AND FALL?

Although the basic operation of the nation's death penalty has remained the same for decades, the number of death verdicts and (less so) of executions has declined recently. In this Part we consider whether the decline modifies the uneven distribution of death sentences and executions that we have described above.

In 1996, American jurisdictions sentenced 315 men and women to death nationwide.<sup>369</sup> No year since has witnessed as many, and, with two minor exceptions, the count has declined every year since then.<sup>370</sup> New death sentences reached a post-*Gregg* low of 112 in both 2009 and 2010, representing a 64% plunge since the mid-1990s.<sup>371</sup> The largest declines occurred in the two years between 1999 and 2001, when the number of death sentences fell precipitously to 159 from 277 (a 43% decline).<sup>372</sup> More recently, the decline has been modest—from 123 in 2006 to 112 in both 2009 and 2010.<sup>373</sup>

The number of executions each year also has declined but not as much. Executions peaked at ninety-eight in 1999, falling since then to about fifty each in the last two full years—about where they were in the mid-1990s.<sup>374</sup> Owing to declines in death sentencing and the huge backlog of the condemned on death rows around the country—3,259 inmates as of 2010<sup>375</sup>—the annual number of executions has even *exceeded* annual new death sentences in a small number of states, including Ohio and Virginia.<sup>376</sup> Nationally, however, death sentences

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<sup>369</sup> *Death Sentences by State and Year*, *supra* note 12.

<sup>370</sup> *Id.* (noting that death sentences in the year 2002 were up slightly from 2001, and that 2010 had the same number of death sentences as 2009.).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last visited May 14, 2011) (showing that annual executions averaged 81 between 1997 and 2000, peaking at 98 in 1999; averaged 50.5 in 1995–1996; and averaged 46 in 2009–10).

<sup>375</sup> DEATH ROW USA, *supra* note 40, at 1.

<sup>376</sup> Since 2004, Virginia has executed about twice as many people as it has sentenced to death. See *Death Sentences by State and Year*, *supra* note 12; *Virginia Executions Database, 1982–Present*, WASH. POST, [http://www.washingtonpost.com/wp-srv/metro/data/vaexecutionsdb\\_02142011.html](http://www.washingtonpost.com/wp-srv/metro/data/vaexecutionsdb_02142011.html) (last visited Sept. 21, 2011). Similarly, between 2006 and 2009, Ohio executed fourteen individuals but sentenced only eleven to die. See *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions> (last visited May 15, 2011); *Death Sentences by State and Year*, *supra* note 12.

continue to be more than double the number of executions each year.<sup>377</sup> As a result of declining death sentences and ongoing appellate reversals leading to lesser sentences—but not so much as a result of executions that declined somewhat during the period—the nation’s death row population has modestly fallen. After peaking at 3593 in 2000, and remaining close to 3550 from 1999 to 2002, the death row census fell to a low of 3207 in 2008 and has been close to that figure over the last six years.<sup>378</sup>

#### A. *The Last Decade’s Nationwide Death Sentencing Decline*

Observers have offered a variety of reasons for the decline in death sentencing over the last fifteen years, including falling crime rates, a fear of executing the innocent, broader availability of “life without parole” options and improved capital defense representation.<sup>379</sup> Our analysis suggests a different reason: a rebellion of sorts by the majority of communities and citizens in capital states who rarely or never use the death penalty, but for years have been subsidizing its profligate use by the minority of jurisdictions that often impose it.<sup>380</sup>

To examine this hypothesis, we first must determine how the decline in death

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<sup>377</sup> Compare *Death Sentences by State and Year*, *supra* note 12, with *Executions by Year*, *supra* note 374.

<sup>378</sup> *Size of Death Row by Year, 1968–Present*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited May 14, 2011).

<sup>379</sup> Possible explanations for the decline in death sentencing include: (1) a drop in violent crimes, starting a few years earlier than the drop in death sentences and declining by a comparable amount, see FACTS AT A GLANCE, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/glance/cv2.cfm> (last visited May 14, 2011); (2) concerns, fueled by the *Broken System* studies and the exoneration of more than a dozen inmates on death row in Illinois, about the condemnation and possible execution of the innocent, see Adam Liptak, *Number of Inmates on Death Row Declines as Challenges to Justice System Rise*, N.Y. TIMES (Jan. 11, 2003), <http://www.nytimes.com/2003/01/11/us/number-of-inmates-on-death-row-declines-as-challenges-to-justice-system-rise.html> (“[L]egal experts across the political spectrum agreed that public discomfort with the administration of the system [including DNA exonerations] has played a significant role [in the decline].”); *supra* notes 164, 280–81, 302, and accompanying text; (3) the adoption of life without parole as the only alternative to a death sentence for capital murder, see *supra* notes 326–27 and accompanying text, together with a Supreme Court decision requiring trial judges to inform capital jurors of that alternative if the prosecution contends that execution is required to keep the defendant from offending again, see *Simmons v. South Carolina*, 512 U.S. 154 (1994); and (4) improvements in the quality and sophistication of capital defense lawyers, including as a result of the Supreme Court’s stricter line on ineffective assistance of counsel between 2000 and 2005, see *infra* notes 424–25 and accompanying text. See generally Neil A. Lewis, *Death Sentences Decline, and Experts Offer Reasons*, N.Y. TIMES, Dec. 15, 2006, at 28, available at <http://www.nytimes.com/2006/12/15/us/15execute.html>; Steve Mills, *Death Sentences, Executions Decline*, CHI. TRIB. Dec. 31, 2004, at 1, available at <http://www.prisontalk.com/forums/archive/index.php/t-98166.html> (discussing various theories).

<sup>380</sup> See *supra* notes 264–300 and accompanying text. For something of a manifesto in support of this rebellion, fittingly published in *Forbes*, see Erb., *supra* note 247.

sentencing has been distributed across counties. One possibility is that the nation has reached a new, more sensible capital punishment equilibrium, with fewer, more evenly distributed death verdicts imposed only for "the worst of the worst" crimes.<sup>381</sup> In this scenario, the death sentencing disparity between the minority of death-prone counties and others would decline, as would rates of reversible error associated with high death sentencing rates as well as the majority-to-minority subsidy associated with curing the errors.<sup>382</sup> Another possibility, consistent with the generalized decline in violent crimes nationwide since the 1990s, is that death sentencing has dropped in roughly equal proportion across all counties. In this event, a minority-majority disparity and majority-to-minority subsidy would remain, but would be smaller. A final possibility is that the drop in death sentences has been the result of an abandonment of the field altogether by jurisdictions that previously used the death penalty only sparingly. A result of this quiet series of county-by-county abolitions would be an increase in the concentration of death sentences in a minority of death-prone counties and, ironically, an increase in the extent to which communities that are trying to wean themselves from the penalty end up subsidizing its heavy use by a shrinking minority of death-prone localities. In that event, a smaller tail would be wagging a larger dog.

### B. *An Uneven Decline*

To determine the current distribution of death sentences in the United States, we examined the counties responsible for the 768 new inductees to death row during the years 2004 through 2009.<sup>383</sup> Our results support the last of our hypotheses, that death sentencing is retreating to its bastions, as less frequent users abandon the practice altogether.<sup>384</sup> Between 1973 and 1995, the most death

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<sup>381</sup> A proponent of this view is Oregon prosecutor Joshua Marquis, who has been a leader of the capital litigation committee of the National District Attorney's Association. See Adam Liptak, *Fewer Death Sentences Being Imposed in U.S.*, N.Y. TIMES (Sept. 15, 2004), <http://www.nytimes.com/2004/09.15/national/15death.html> ("Mr. Marquis said there were other reasons for the decline in death sentences. 'Prosecutors in America are far more discriminating in the kinds of cases they submit to juries,' he said. 'There is a recognition that the death penalty should be reserved for the worst of the worst. If you look back 20 years, there clearly were jurisdictions where some prosecutors overused the death penalty.'").

<sup>382</sup> See *supra* notes 57–60, 157–61, 183, 198–208, 268–81, and accompanying text.

<sup>383</sup> Data for death sentences by county for the 2004–2009 period were provided by Robert J. Smith of the Charles Hamilton Houston Institute, Harvard University Law School. See *supra* note 40.

<sup>384</sup> That hypothesis has not been entirely proven, however, because not enough years have elapsed to be certain that the communities in question have stopped using the death penalty altogether, as opposed to keeping it in their "back pocket" for the very worst cases. See *supra* notes 336–47 and accompanying text. For evidence from Texas of a sharp and an uneven decline in death sentencing in recent years, and for support for our thesis that marginal death-sentencing counties are giving up on capital punishment, see David McCord, *What's Messing with Texas Death Sentences*, 43 TEX. TECH L. REV. 601, 607–09 (2010) (discussing less populous Texas counties that are

prolific 1% of Americans accounted for 9% of death sentences; the top eighth (12.5%) were responsible for *half* of all death sentences.<sup>385</sup> In our more recent study, counties representing 1% of Americans had nearly doubled their share to 16% of all new death sentences, and counties containing one-eighth (12.5%) of Americans now originate *two-thirds* of all death sentences (67%).<sup>386</sup> High frequency death sentencing communities are now responsible for an even greater share of the national total of condemned inmates than in the *Broken System* period from the early 1970s to the mid-1990s.

Further corroborating the third hypothesis, many major death sentence generators continue on much as before or are picking up speed. As Table 1 illustrates, between 1973 and 1995, the counties of Los Angeles, Maricopa (Phoenix),<sup>387</sup> and Oklahoma (Oklahoma City) by themselves accounted for 6.5%

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“opt[ing]-out” of the death penalty); *see also id.* at 609–11 (discussing the plunge in death sentencing in Harris County (Houston)). *See also* Roger C. Barnes, *Is the Death Penalty About to Die?*, SAN ANTONIO EXPRESS-NEWS (June 14, 2011), <http://www.mysanantonio.com/opinion/commentary/article/Is-the-death-penalty-about-to-die-1422636.php> (noting recent drop in number of death sentences in Texas and concluding that “Texas is having second thoughts about death sentences, and executions”).

<sup>385</sup> Clarke Spreadsheet, *supra* note 40.

<sup>386</sup> *Id.*

<sup>387</sup> How do cosmopolitan Los Angeles and Maricopa (Phoenix) Counties fit our model of high death sentencing communities with parochial tendencies? The answer in the former case is *gangs* and in the latter is illegal immigration. To begin with, Los Angeles *County* has roughly three times the population of its more cosmopolitan eponymous *City*. *See State & County QuickFacts, 2009 Estimates*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06/06037.html> (last visited May 15, 2011) (showing that LA County has 9.85 million residents while LA city has 3.85 million). Moreover, Los Angeles County has been plagued for decades by ethnic gangs—a classic case of threatening “outsiders.” *See, e.g., Race Distinguishes Gang Violence in Los Angeles*, NAT’L PUB. RADIO (Mar. 11, 2008), <http://www.npr.org/templates/story/story.php?storyId=88098444> (summarizing a report that found 700 active gangs in Los Angeles with a combined membership of more than 40,000, mainly composed of ethnic minorities). Los Angeles County has been by far the largest contributor to California’s massive death row (the largest in the nation, at over 700), *see* Clarke Spreadsheet, *supra* note 40, and California has the highest percentage of gang-related homicides in its pool of capital-eligible cases as a result of a statutory aggravating circumstance that allows a single police officer’s testimony that a defendant fits the profile of a *gang member* (regardless of any actual connection between the defendant or the crime to gang activity or gang violence) to establish death-eligibility. *See, e.g., Alarcón, supra* note 19, at 699 nn.7–8 (identifying the gang-member aggravating circumstance, among others, as contributing to the excessive ease of imposing a death sentence in California and supporting proposals to “decrease the number of crimes punishable by death and the circumstances under which death may be imposed so that we only [capitally] convict . . . [those] ‘we truly have the means and the will to execute’” (citation omitted)). We are indebted to our colleague Jeffrey Fagan for these insights on Los Angeles, based on research he is conducting into the relationship between alleged gang membership and imposition of the death penalty in Los Angeles and California generally. As for Phoenix, consider a recent article comparing Maricopa (Phoenix) and Pima (Tucson) Counties, in the former of which death sentencing is high and increasing and in the latter of which, it is relatively low and decreasing substantially. *Arizona Divided: A Tale of Two Counties*, THE ECONOMIST, March 31, 2011, at 28, available at <http://www.economist.com/node/18486323> (discussing stark differences in the two counties’ reaction to an influx of Hispanic immigrants; Maricopa County, led by Sheriff Joe Arpaio, considers itself to

of the death sentences nationwide.<sup>388</sup> More recently, however, their share has almost doubled.<sup>389</sup> Against the backdrop of a steep (64%) drop in the nation's annual death sentencing rate, these counties' previously high rates remained stable or, in Phoenix's case, increased substantially, accounting for the rise in their share of the national total.<sup>390</sup>

*Table 1*

County	Death Sentences Per Year, 1973–1995	Death Sentences Per Year, 2004–2009
Los Angeles, CA	6.8	5.5
Maricopa, AZ (Phoenix)	5.2	6.2
Oklahoma, OK	3.1	3.0

As Table 2 illustrates, three of Los Angeles County's fellow southern California jurisdictions—Orange, Riverside, and San Diego Counties—also are part of a death-sentencing boom in regions close to the border with Mexico.<sup>391</sup>

be under siege from illegal immigration and has responded harshly; Pima County has taken a more moderate line; also noting how Pima County residents distinguish themselves from what they consider to be their more parochial peers in neighboring Maricopa County); *infra* Table 1, text following note 388, and *infra* Table 4, text accompanying notes 400–01 (documenting Maricopa County's increasing and Pima County's decreasing use of the death penalty). The boom in death-sentencing throughout all of southern California, see *infra* 389 and accompanying text, may well be in reaction to both gangs and illegal immigration.

The comparison drawn above between Tucson and Phoenix, and our generalizations about a county as large and diverse as Los Angeles, prompt two caveats to our overall analysis. First, the parochial and libertarian forces we describe are neither immune to, nor necessarily more powerful than, a variety of contingencies relating to such things as the priorities and political ambitions of a given county's district attorney or the commission there of a particularly wrenching crime. Those contingencies may account for wide discrepancies in death-sentencing practices among counties, and within the same county over time, that cannot be explained by differences in the extent to which the counties are, or over time have become, more or less parochial or libertarian. Without denying the importance of such contingencies, our argument is simply that parochial and libertarian tendencies exert considerable, if not always decisive, influence over death-sentencing practices in the ways we have suggested. Indeed, one such influence may be a county's susceptibility to contingencies that tend to generate death sentences—for example, the election of a prosecutor with an unusually strong disposition to use the death penalty, including as a springboard for higher office. Second, the fact that Los Angeles County encompasses neighborhoods ranging from some of the most, to some of the least, "progressive" or "permissive" in the nation requires caution in generalizing about the effect there and in other populous jurisdictions of any single tendency. Even so, we think it is reasonable to suggest that perceived threats from, for example, gangs and illegal immigration can trigger strong enough reactions in particular segments of the population of a county to influence policies, even if many or most other residents take a more nuanced view of the supposed threat.

<sup>388</sup> Clarke Spreadsheet, *supra* note 40.

<sup>389</sup> The data in Table 1 are from *id.*

<sup>390</sup> Clarke Spreadsheet, *supra* note 40.

<sup>391</sup> The data in Table 2 are from *id.*



Table 2

County	Death Sentences Per Year, 1973–1995	Death Sentences Per Year, 2004–2009
Orange, CA	1.6	2.3
Riverside, CA	1.2	2.5
San Diego, CA	1.0	1.3

While the *status quo ante* continues with little interruption in these major urban capital contributors and many smaller, rural counties,<sup>392</sup> huge swaths of communities either slowed down their death sentencing rates dramatically in 2004–2009 or did not use the death penalty at all.<sup>393</sup> New Jersey and New Mexico abolished the death penalty in 2009, and before doing so, did not register a single capital sentence in the 2004–2009 period.<sup>394</sup> Quietly, neither did New Hampshire and South Dakota, and neither did conservative Montana and Utah.<sup>395</sup> Washington, Wyoming and Maryland each registered only one, and Colorado had only two.<sup>396</sup> Perhaps most surprising is Virginia, which, after Texas, has carried out the second most executions in the United States since Gregg.<sup>397</sup> Since 2005,

<sup>392</sup> Examples of small counties experiencing increases in death sentencing rates between 1973–1995 and 2004–2009 include Caddo Parish, LA (death verdicts increased from 2 in 1973–1995 to 6 in 2004–2009); Cherokee, TX (death verdicts increased from 0 in 1973–1995 to 2 in 2004–2009); Houston, AL (death verdicts increased from 6 in 1973–1995 to 9 in 2004–2009); Madison, NE (death verdicts increased from 1 in 1973–1995 to 3 in 2004–2009); and Seminole, FL (imposed 6 death verdicts in both 1973–1995 and in 2004–2009). See Clarke Spreadsheet, *supra* note 40.

<sup>393</sup> Examples of less populous counties experiencing sharp declines in death sentencing between 1973–1995 and 2004–2009 include Bay, FL (death verdicts dropped from 13 in 1973–1995 to 3 in 2004–2009); Glynn, GA (death verdicts dropped from 8 in 1973–1995 to 2 in 2004–2009); Lexington, SC (small city; death verdicts dropped from 18 in 1973–1995 to 5 in 2004–09)); Montgomery, PA (suburban; death verdicts dropped from 12 in 1973–1995 to 3 in 2004–2009)); Randall, TX (death verdicts dropped from 8 in 1973–1995 to 2 in 2004–2009); and Russell, AL (rural/small city; death verdicts dropped from 6 in 1973–1995 to 3 in 2004–2009). See Clarke Spreadsheet, *supra* note 40.

<sup>394</sup> Clarke Spreadsheet, *supra* note 40.

<sup>395</sup> See *id.*; *infra* note 409 and accompanying text (citing legislative action on abolition in Montana).

<sup>396</sup> See Clarke Spreadsheet, *supra* note 40.

<sup>397</sup> Measured by its high number of executions, Virginia has long been thought of as a death penalty heavyweight. See *supra* note 374. But as *Broken System II* discovered, Virginia acquired that status not by being a heavy death-sentencing state—in fact, it imposed rather few death sentences per capita compared to states like Alabama, Oklahoma, and Texas. Virginia managed a high number of executions, because its low death-sentencing rate translated into a low reversal rate, giving it the nation's highest rate of executions per death sentence. See Liebman et al., *Broken System II*, *supra* note 27, at 389–90. In the recent period, Virginia has moved from being a moderate death-sentencing state to being a marginal death-sentencing state. See *infra* note 396 and accompanying text.

Virginia has imposed only one death sentence a year.<sup>398</sup>

Outside of these states, there were eight counties, collected in Table 3, with over 500,000 people that handed down at least six death sentences in the *Broken System* period, but none between 2004 and 2009.<sup>399</sup> These counties represent a sizable portion of the nation's citizens who in the earlier period were significant death penalty consumers, measured by their localities' death sentencing practices, yet they did not impose any capital sentences in the six-year window of our later study.<sup>400</sup> They again are representative of many smaller counties that likewise have seen death sentences plunge to zero since 2000.<sup>401</sup> These communities are widely dispersed throughout the country, defying any state-centric or region-centric explanation for the decline in death sentencing.

**Table 3**

County	Death Sentences Per Year, 1973–1995	Death Sentences Per Year, 2004–2009
Muscogee, GA (Columbus)	1.1	0
Palm Beach, FL	0.8	0
Marion, IN (Indianapolis)	0.7	0
Santa Clara, CA (San Jose)	0.7	0
Gwinnett, GA (suburban Atlanta)	0.5	0
Davidson, TN (Nashville)	0.4	0
Franklin, OH (Columbus)	0.4	0
San Francisco, CA	0.3	0

<sup>398</sup> See *Death Sentences by State and Year*, *supra* note 12.

<sup>399</sup> The data in Table 3 are from Clarke Spreadsheet, *supra* note 40.

<sup>400</sup> These are large urban areas, generating many homicides each year, so the absence of death sentences in the recent six-year period is more reliably indicative of ongoing trends than it is in counties with fewer people and homicides. Cf. *supra* note 382.

<sup>401</sup> Examples of less populous counties experiencing declines in death sentencing to zero between 1973–1995 and 2004–2009 include Bowie, TX (death verdicts dropped to 0 in 2004–2009 from 8 in 1973–1995); Creek, OK (death verdicts dropped to 0 in 2004–2009 from 7 in 1973–1995); Cole, MO (death verdicts dropped to 0 in 2004–2009 from 12 in 1973–1995); Columbia, FL (death verdicts dropped to 0 in 2004–2009 from 10 in 1973–1995); Meriweather, GA (death verdicts dropped to 0 in 2004–2009 from 8 in 1973–1995); and Rockingham, NC (death verdicts dropped to 0 in 2004–2009 from 8 in 1973–1995). See Clarke Spreadsheet, *supra* note 40.

Finally, part of the drop-off in death sentences occurred in counties—several of the largest in the nation—that used to be but no longer are in the high frequency category, yet still impose some death sentences. Together, the seven counties listed in Table 4 accounted for about a tenth of the nation's death sentences during the 1973–1995 *Broken System II* period. Between 2004 and 2009, their share fell to 3.6%—less than that of either Maricopa or Los Angeles County by itself.

**Table 4**

County	Death Sentences Per Year, 1973–1995	Death Sentences Per Year, 2004–2009
Cook, IL (Chicago) <sup>402</sup>	6.3	1.2
Miami-Dade, FL	4.7	0.7
Hillsborough, FL (Tampa)	3.0	0.5
Pima, AZ (Tucson) <sup>403</sup>	2.9	1.0
Pinellas, FL (St. Petersburg)	2.3	0.5
Cuyahoga, OH (Cleveland)	2.0	0.5
Baltimore County, MD	1.5	0.2

The process evidently continues. In the past year, the legislatures of Connecticut,<sup>404</sup> Kansas,<sup>405</sup> Kentucky,<sup>406</sup> Indiana,<sup>407</sup> Montana,<sup>408</sup> Maryland,<sup>409</sup> Nebraska,<sup>410</sup> Ohio,<sup>411</sup> Pennsylvania,<sup>412</sup> and, of course, Illinois,<sup>413</sup> have given

<sup>402</sup> Illinois abolished capital punishment in March 2011. See *supra* note 18 and accompanying text.

<sup>403</sup> See *supra* note 385 (comparing Pima (Tucson) and Maricopa (Phoenix) Counties).

<sup>404</sup> See *supra* notes 337–46 and accompanying text.

<sup>405</sup> See *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/recent-legislative-activity> (last visited July 15, 2011) [hereinafter *Recent Legislative Activity*] (discussing House Bill 2323, which would abolish the death penalty and replace it with life without parole).

<sup>406</sup> *Id.* (discussing House Bill 292, to abolish the death penalty).

<sup>407</sup> *Id.* (discussing Senate Bill 344, to abolish the death penalty).

<sup>408</sup> *Id.* (discussing Senate Bill 185, to abolish the death penalty, which was defeated in the House Judiciary Committee on March 18, 2011).

<sup>409</sup> *Id.* (discussing House Bill 1075 and Senate Bill 837, to abolish the death penalty).

<sup>410</sup> *Id.* (discussing Legislative Bill 276, to replace the death penalty with life without parole, which passed the Judiciary Committee in March, 2011).

<sup>411</sup> *Id.* (discussing a bill introduced in the Ohio General Assembly in March, 2011, to abolish the death penalty and replace it with life without parole).

<sup>412</sup> *Id.* (discussing Senate Bill 423, to abolish the death penalty introduced on March 24, 2011); see also Governor Rendell Urges General Assembly to Review Effectiveness of Pennsylvania's Death Penalty, PR NEWswire (Jan. 14, 2011), <http://www.prnewswire.com/news-releases/governor-rendell-urges-general-assembly-to-review-effec>

significant attention to abolition proposals.<sup>414</sup>

### C. A Smaller Tail Wagging a Larger Dog

The distribution of recent death sentencing declines in the United States does not reveal a more sensible death penalty equilibrium in which capital sentencing proclivities nationwide have converged around the penalty's use only for the worst crimes, and error rates and the majority-to-minority subsidy have faded. On the contrary, the data demonstrate that the problems we discuss above have sharpened. An increasingly isolated core of counties continues to impose the vast majority of death sentences. And they continue to do so at high, probably error-inducing<sup>415</sup>,

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tiveness-of-pennsylvanias-death-penalty-113610439.html.

<sup>413</sup> See *supra* note 18 and accompanying text.

<sup>414</sup> Evidence from California and Florida reveal how deceiving statewide data can be. Although, as we suggest above, southern California counties (Imperial, Los Angeles, Orange, Riverside, San Bernardino and San Diego) are frequent and increasing users of death sentences (driving state totals up), see *supra* note 389 and accompanying text & Table 2, some northern California counties that previously used the death penalty have more recently stopped doing so (Santa Clara and San Francisco). Similarly, some of the biggest drops in the nation were in western and southern Florida (Dade, Hillsborough, Palm Beach and Pinellas Counties), while some of the most persistent capital-sentencing counties were in the northern and eastern parts of that state (for example Brevard, Broward, Duval and St. Lucie Counties). See Clarke Spreadsheet, *supra* note 40.

<sup>415</sup> Our data do not prove that high capital sentencing rates continue to generate high rates of serious error or high rates of reversal by state or federal courts, and no study comparable to *Broken System* has addressed the question since *Broken System II* was completed in 2002. The fact that only around fifty executions occur each year from among a death row population above 3200, see *supra* notes 372–76 and accompanying text, reveals that capital review procedures are not speeding up, which in turn suggests that state and federal courts continue to find claims of error to be deserving of review. Indeed, the Justice Department's annual capital punishment reports indicate that the time between death sentences and executions has risen steadily over the past decade. Compare CAPITAL PUNISHMENT 2009—STATISTICAL TABLES, BUREAU OF JUSTICE STATISTICS, at 1 (December 2010), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2215> (last visited July 15, 2011) (calculating the average time from death verdict to execution of those executed in 2009 as fourteen years and one month), with CAPITAL PUNISHMENT 2005, BUREAU OF JUSTICE STATISTICS, at 1 (December 2006), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=415> (calculating the average time from death verdict to execution of those executed in 2005 as twelve years and three months), with CAPITAL PUNISHMENT 2001, BUREAU OF JUSTICE STATISTICS, at 1 (December 2002), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=438> (indicating that the average time from death verdict to execution of those executed in 2009 was eleven years and ten months); see also *Valle*, 2011 WL 4475201, at \*1 (Sept. 28, 2011) (mem.) (Breyer, J., dissenting from the denial of a stay) (“The average period of time that an individual sentenced to death spends on death row is almost 15 years.”); see generally King et al., *supra* note 207 (studying a sample of cases showing that adjudication of capital federal habeas corpus petitions was taking twice as long to complete as of 2000–2006 than was true before 1996). Likewise, the fact that the nation's death row population has come down somewhat over the last decade, notwithstanding a decline in executions during the same period, see *supra* notes 372–76 and accompanying text, suggests that reversals leading to non-capital sentences on retrial continue to occur. Given Congress's adoption of legislation in 1996 reducing federal prisoners' access to federal habeas corpus review, it is likely that the reversal rate in federal court has declined recently. That was the finding of a recent study of non-final (i.e. only

rates, making it likely that only a small proportion of the verdicts will ever end in executions.

Instead of a harmonizing of death sentencing rates nationwide, or a smooth decline across still disparate counties, we are witnessing a retreat of the death penalty to a small bastion of counties where its use remains high or is being fortified. In contrast, many jurisdictions that previously used it sparingly are losing their stomach for it entirely. As capital punishment becomes more and more of a minority outcome, and the discrepancy between a small capital-sentencing core of jurisdictions and a majority of less death-prone communities sharpens, so does the system's irrationality from the perspective of the latter. They have to subsidize practices by their parochial and libertarian neighbors in which they are no longer disposed to indulge themselves—and to continue bearing public safety and judicial integrity costs that spill over from their neighbors' risky actions.

The picture gets even more disturbing when we consider what Carol and Jordan Steiker call "symbolic [capital] states."<sup>416</sup> Over 25% of the death sentences handed down today originate in states that are profoundly unwilling or unable to carry out capital sentences absent the consent of the condemned.<sup>417</sup> Faced with the facts set out in Table 5, it is fair to say that a death verdict in California, Connecticut, Kansas, Maryland, Nevada, Pennsylvania, and Tennessee is little more than a cruel joke. It is cruel to the victims' family who anxiously await an event that everyone besides them knows will probably never occur. It is cruel, as well, to the condemned man, who suffers the psychological torture of having to wait many years to see whether his case will be the rare one in which an involuntary execution does, capriciously, occur.<sup>418</sup> It is a joke to the majority of

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district court not court of appeals and Supreme Court) decisions in a non-representative sample of federal habeas corpus cases filed in 2000–2002. See King et al., *supra* note 207, at 2, 3, 10 (finding reversal rate of 13% for sample of cases filed in 2000–2002, which is 35 times higher than the reversal rate in non-capital habeas corpus cases; predicting that the actual capital reversal rate is higher because 25% of the cases in the study were still under review when the study ended and because cases in which reversals occur tend to take longer than affirmances, but predicting that the rate would not reach the 40% level in the *Broken System II* study). Given *Broken System II*'s finding that state courts account for 90% of reversals of capital verdicts, and that state and federal reversal patterns tend to be compensatory—with state rates increasing if federal reversal rates decline, and vice versa, and with state courts focusing more on urban cases and federal courts focusing more on rural ones, see Liebman et al., *Broken System II*, *supra* note 27, at 65, 218–19, it is unlikely that trends in the current federal reversal rate, whatever it currently may be, are indicative of trends in the state courts or the overall reversal rate.

<sup>416</sup> Steiker & Steiker, *Tale*, *supra* note 19, at 1870.

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

<sup>418</sup> See *supra* notes 301–22, 348 and accompanying text; see also Valle, 2011 WL 4475201, at \*1 (Sept. 28, 2011) (mem.) (Breyer, J., dissenting from the denial of a stay) ("I have little doubt about the cruelty of so long a period [33 years] of incarceration under sentence of death.") (citing *In re Medley*, 134 U.S. 160, 172 (1890) (describing as "horrible" the "feelings" that accompany uncertainty about whether, or when, the execution will take place)); *Sollesbee v. Balkcom*, 339 U.S.

citizens who bear most of the cost of maintaining a system that they rarely if ever use and is self-evidently capable of accomplishing almost nothing.

*Table 5*

State	Death Row	Executions Since 1976	Prisoners Volunteered to be Executed	All Executions as % of Death Row	Involuntary Executions as % of Death Row
California	702	13	2	1.9%	1.6%
Connecticut	12	1	1	8.3%	0%
Kansas	9	0	0	0%	0%
Nevada	77	12	11	15.6%	1.2%
Pennsylvania	222	3	3	1.4%	0%
Tennessee	89	6	1	6.7%	5.6%

In this sense, the irrationality of the system is getting worse. California and Pennsylvania—prototypical “symbolic states”—accounted for 15% of death sentences during the 1973–95 period.<sup>419</sup> In our more recent 2005–2009 study period, the two states imposed a *quarter* of all U.S. death sentences.<sup>420</sup> The implication is clear, and from the subsidizing majority’s perspective, troubling. As majority communities and taxpayers take steps to curb the costs of their own, previously modest, use of the death penalty, the subsidy they continue to pay is emboldening the minority of death-prone communities to intensify their profligate ways. Where the Steikers found “no obvious correlation between securing death verdicts and carrying out executions,”<sup>421</sup> there now seems to be a *negative* correlation. The more improbable executions become, the more death sentences capital prone communities impose. The smaller the chance that the system will generate the only outcome—executions—that distinguishes it from a system in which life without parole is the most severe sentence, the greater the subsidy, public safety and judicial integrity burden the majority of death-forbearing communities and taxpayers must shoulder.<sup>422</sup>

Table 6 bears out this concern. It identifies the top six states in the nation

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9, 14 (1950) (Frankfurter, J., dissenting) (“In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon”).

<sup>419</sup> Clarke Spreadsheet, *supra* note 40.

<sup>420</sup> *Id.*

<sup>421</sup> Steiker & Steiker, *Tale*, *supra* note 19, at 1872.

<sup>422</sup> Although the Steikers focus on “symbolic states,” our analysis shows that the source of the problem is a subset of death-prone *communities* in the state. California and Florida, for example, are made up both of counties that are increasing their use of the death penalty and those that are decreasing their use, but not their subsidy, of the punishment. See *supra* notes 278–79, 283–84, 286–90 and accompanying text; *supra* notes 399–401 and accompanying text & Tables 1–4; *supra* text following note 421 & Table 6.

based on the number of death sentences imposed between 2004 and 2009. Then it reports those states' rankings (out of thirty-two total states) based on the historical probability that a death sentence each state imposes will actually result in an execution.<sup>423</sup> Five of the six top death sentencing states in the nation—all but Texas—are ranked in the bottom two-fifths of states when it comes to how likely it is that their death verdicts will be carried out.

*Table 6*

State	Death Sentences 2004–2009	Probability of Execution (Rank out of thirty-two)
California	110	31
Florida	94	25
Texas	79	2
Alabama	63	19
Arizona	45	20
Pennsylvania	35	32

Above, we show how for decades the majority of communities and taxpayers that rarely use the death penalty have borne a huge share of the costs of the ragged largely symbolic death verdicts that a minority of parochial and libertarian communities prefer over systematic law enforcement. We puzzled over the majority's willingness to continue subsidizing the minority's profligacy. In this Part we discovered evidence that the majority has recently tried to fight back by decreasing its own use of the penalty. But far from chastening the minority, the result has been to embolden it. Whether because of increasingly tight budgets in communities that already underfund law enforcement, or to capture space cleared in statewide capital punishment budgets by their neighbors' withdrawal from the field, the minority have expanded their reliance on capital sentences in lieu of effective prevention and adjudication, even as the likelihood has declined that their error-laden death verdicts will ever be executed. On the assumption that the majority, having already given the shirts off their backs, is increasingly unwilling to continue being flayed, the next Part suggests some steps the majority might take.

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<sup>423</sup> The number of death sentences imposed is from *Death Sentences by State and Year*, *supra* note 12. The historical probability of an execution is calculated by dividing each state's cumulative number of executions from 1977 to 2007 by its cumulative number of death sentences in the same period. The data produced by this calculation and the rankings it generates are from, *Executions per Death Sentence*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-death-sentence> (last visited July 15, 2011) (including only states that currently have the death penalty and carried out at least one execution between 1977 and 2007).

## VIII. POLICY OPTIONS

A. *The Insufficiency of Options Previously Proposed*

This Article is the fourth in a series chronicling a “broken” system of capital punishment and proposing solutions.<sup>424</sup> In *Overproduction of Death and Broken System II*, we proposed a set of individual policy options designed to reconfigure incentives, force the cost of effective death sentencing to be borne at trial and increase the extent to which states use appellate review and reversals to improve the reliability of their capital systems.<sup>425</sup>

To some extent, state and federal institutions listened or figured it out for themselves. One proposal was to improve the quality of counsel in capital trials.<sup>426</sup> In three rulings between 2000 and 2005, the Supreme Court required more comprehensive mitigation investigations in the run-up to capital trials.<sup>427</sup> Another proposal was to adopt the alternative of life without parole.<sup>428</sup> All death penalty states have now done so.<sup>429</sup> Together these changes dissuade jurisdictions from pursuing marginal capital prosecutions out of fear of heavy defense costs and given the availability of a stout alternative to death.<sup>430</sup> In the process, the reforms improve the reliability of the capital sentences that are imposed.

Our analysis reveals, however, that the effect of these steps is limited. Although they almost certainly have contributed to declining use of the death penalty in the majority of jurisdictions that already were fairly judicious capital sentencers, we have produced substantial evidence that the minority of jurisdictions that produce the lion’s share of death sentences is not much affected by these reforms. Recent patterns suggest that those communities are not pulling

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<sup>424</sup> See Liebman et al., *Broken System II*, *supra* note 27 (reprinted in Gelman et al., *supra* note 15); Liebman, *supra* note 161; Liebman, *supra* note 19.

<sup>425</sup> See Liebman et al., *Broken System II*, *supra* note 27, at 391–418 (reprinted in Gelman et al., *supra* note 15, at 254–60) (proposing policy options to narrow the death penalty to the most aggravated cases); Liebman, *supra* note 161, at 2129 (suggesting strategies to get trial level officials to internalize the costs of their errors in capital cases).

<sup>426</sup> See Liebman, *supra* note 161, at 2147 (proposing that states adequately compensate defense counsel and support services for indigent capital defendants).

<sup>427</sup> See *Rompilla v. Beard*, 545 U.S. 374, 377 (2005) (holding that “even when a capital defendant’s family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial”); *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (requiring counsel to gather substantial mitigating evidence prior to the sentencing phase); *Williams v. Taylor*, 529 U.S. 362, 392 (2000) (ordering relief where defendant’s attorneys failed to investigate and present substantial mitigating evidence at the sentencing phase of trial that might have influenced the jury’s appraisal of the defendant’s moral culpability).

<sup>428</sup> Liebman et al., *Broken System II*, *supra* note 27, at 404.

<sup>429</sup> See *supra* note 327 and accompanying text.

<sup>430</sup> See *supra* notes 261–67, 424–27 and accompanying text.



back from the death penalty and may even be increasing the number of flawed verdicts they impose.<sup>431</sup> Our analysis also explains why. These communities' parochialism and libertarianism leads them to value death verdicts—particularly for felony murder—for two reasons that in neither case are affected by court reversals or modern carceral options like life without parole. First, they value death verdicts for the clear message sent, then and there, about how the community views and intends to respond to invasive outsider crime.<sup>432</sup> Second, the Capital Felony Murder Doctrine lets them target the few resources they are willing to devote to law enforcement on the stranger crimes they most abhor, preserve a sense of the law being in their own hands and minimize entanglement with the modern administrative state.<sup>433</sup> More generally, these jurisdictions value the verdict more than the execution, so discipline tied to whether or not the verdict will be carried out has little effect on them.<sup>434</sup>

In *Slow Dancing with Death*, we suggested that each state use comparative proportionality review of murder sentences to define a statewide “going rate” for the amount of aggravation (once discounted by the amount of mitigation present in the case) that is needed for a death sentence, and to expunge outliers.<sup>435</sup> This strategy is partially responsive to the analysis here, because it would use the application of the death penalty in the majority of jurisdictions that implement it sparingly to discipline more death-prone communities and orient the death penalty towards only extreme cases.<sup>436</sup> As *Slow Dancing with Death* describes, however, after first seeming to require comparative proportionality review, the Supreme Court pulled back—evidently because of the unwanted substantive responsibility this placed on the Court to develop a national “going rate” by comparing state “going rates.”<sup>437</sup> The only state willing to implement the strategy in earnest was New Jersey, and its failure to carry through with it was part of the justification for the state’s 2009 abolition of capital punishment.<sup>438</sup> We may never know, therefore, whether comparative review would have enabled courts to manage the dialectic between parochial/libertarian communities and other communities within

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<sup>431</sup> See *supra* notes 381–90 and accompanying text & Tables 1–2.

<sup>432</sup> See *supra* text following note 102; *supra* notes 110, 192–96, 226–44, 308, 331, and accompanying text.

<sup>433</sup> See *supra* text following note 156.

<sup>434</sup> See *supra* notes 110, 192–96, 226–44, 308, 331, and accompanying text.

<sup>435</sup> Liebman, *supra* note 19, at 129 (arguing that the Supreme Court could have used returns from juries, courts, and legislatures nationwide to identify a national “going rate” for death sentencing and, on that basis, adopted a more defensible interpretation of the Cruel and Unusual Punishment Clause and applied it to overturn outlying, excessively broad statutes, sentencing patterns, and individual death verdicts).

<sup>436</sup> *Id.* at 129–30.

<sup>437</sup> *Id.*

<sup>438</sup> See NEW JERSEY DEATH PENALTY REPORT, *supra* note 258, at 49–50; *supra* note 18 and accompanying text.

a state—or instead would have skewered them on one of the dialect's horns.<sup>439</sup>

In any event, new mechanisms are required to help the majority rein in the high frequency death imposing minority. Repeal is the most obvious solution, but one that, for reasons set out above and below,<sup>440</sup> many courts and legislatures do not yet seem ready to adopt.<sup>441</sup> Accordingly, we limit ourselves here to strategies in the shadow of the possibility of abolition, rather than abolition itself.

### B. Regulatory Strategies

Death-prone communities' suspicion of outside forces and distaste for government complicate the political economy and the design of steps to regulate local capital decisions. Enforcement is challenging, too, because the usual *appellate* strategy for regulating local court action has little effect on these communities, given the greater importance they assign to the verdict, which they control, over its execution, which appellate courts control.<sup>442</sup> Finally, the courts and the death indifferent majority seem to be wary of crossing death-prone communities, out of respect for their traditions and self-reliance or out of fear of their affinity for self-help.<sup>443</sup>

We take as a given, however, that the majority—which *is* a majority, after all—has resolved to fight back.<sup>444</sup> Moreover, the majority holds the top card; it can repeal the death penalty—as legislatures in red and blue states alike are currently considering.<sup>445</sup> Under these circumstances, the threat of repeal provides a classic “penalty default.” It is an outcome about which both “sides” may have enough *doubts* (as to whether it will be accomplished) and *fears* (that it will be accomplished and engender a frightening response) that they will agree to cooperate and share secret information to stave off the uncertainty and feared

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<sup>439</sup> See Liebman, *supra* note 19, at 106; see also James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1643, 1663–64 (2006) (describing a related dialectic that the Supreme Court indeed never managed to resolve, between Justice Stewart's desire to avoid caprice by narrowing death verdicts to a small set of the worst of the worst cases and Justice White's desire to increase the number of death verdicts to enhance the deterrent and retributive power of the death penalty). Although Justice White was far too rationalistic and scientific in his aim for additional deterrence and retribution to be a perfect proxy for death-prone parochial and libertarian communities, his never resolved battle with Justice Stewart has elements of the dialectic between the minority and majority communities that we discuss in this Article. See *id.* at 1608–48.

<sup>440</sup> See *supra* notes 7–18, 49–156, 327, 340–69, and accompanying text; *infra* notes 442–50 and accompanying text.

<sup>441</sup> See *supra* notes 402–12 and accompanying text (discussing abolition proposals in several states, thus far unsuccessful).

<sup>442</sup> See *supra* notes 110, 192–96, 226–44, 308, 331 and accompanying text.

<sup>443</sup> See *supra* notes 348–63 and accompanying text.

<sup>444</sup> See *supra* notes 367–412 and accompanying text; see also Erb, *supra* note 248 (discussed *supra* note 378).

<sup>445</sup> See *supra* notes 402–12 and accompanying text.

effects.<sup>446</sup> Or course, if the majority is disposed to seek abolition, it should do so and outright end the death penalty's fiscal, public safety and judicial integrity harms. But if the majority is unsure it can achieve abolition or that it *wants* to, it can use the threat that rising costs will drive it to embrace that "nuclear" option to induce the minority's cooperation.

### 1. Less, Not More, Externalization of Costs

As we have noted, the majority's main goal should be to get death-prone communities to internalize more of the costs of their capital proclivities.<sup>447</sup> This principle may seem obvious, but it rules out a number of oft-proposed capital reform strategies that have the counterproductive effect of increasing the state (majority-to-minority) subsidy of local capital sentencing practices. Examples include statewide public defender systems and state prosecutors on loan to localities;<sup>448</sup> state mechanisms for sharing the cost of capital prosecution and representing the defendant;<sup>449</sup> and Professor Gershowitz's recent proposal to require "[a]ll aspects of death penalty cases—charging, trial, appeal, and everything in between—[to] be handled at the state level by an elite group of prosecutors, defense lawyers, and judges."<sup>450</sup> Professor Smith's trenchant response to Gershowitz's proposal applies to the other suggestions as well:

If states take over the enforcement of the death penalty . . . or underwrite

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<sup>446</sup> See, e.g., Bradley C. Karkkainen, *Information-Forcing Regulation and Environmental Governance*, in LAW AND NEW GOVERNANCE IN THE E.U. AND THE U.S. 301–05 (Grainne de Burca & Joanne Scott eds., 2006) (citing authority and extending Ayers & Gertner's analysis to public regulatory regimes); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91–93 (1989) (describing how contract law uses onerous and unpredictable requirements to encourage contracting parties to "bargain around" the rule, thus creating an incentive to redress information asymmetries in order to develop solutions better tailored to the particular conditions than any single solution the law could prescribe)..

<sup>447</sup> See Liebman, *supra* note 161, at 2142 ("To succeed, reform efforts must realign the incentives of all key players . . . to make it costly for police and prosecutors to pursue marginal, and to obtain undeserved, capital judgments"); *supra* notes 422–39 and accompanying text.

<sup>448</sup> See, e.g., Death Penalty Focus, *Inadequate Legal Representation*, <http://www.deathpenalty.org/article.php?id=83> (last visited May 17, 2011) (noting that "[i]n 2009, the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions conducted an official visit to the United States to examine the administration of the death penalty in Alabama and Texas" and "called for the two states 'to establish well-funded, state-wide public defender services'").

<sup>449</sup> Proposals of this sort have recently been made, for example, in California and Washington State. See CALIFORNIA DEATH PENALTY COMM'N, *supra* note 279, at 7–8, 36 (recommending that counties be "fully reimburse[d]" by the state for payments for defense services and that the backlog of appeals be addressed by state funding of an expanded state public defender); WASHINGTON STATE BAR REPORT, *supra* note 249, at 33 (arguing that, in order to keep "financial restraints" from interfering with charging decisions, "the state [should] assume the prosecution and defense costs of all aggravated murder cases").

<sup>450</sup> See Gershowitz, *supra* note 21, at 310.

the cost of local prosecution . . . , prosecutors will have less incentive to show . . . restraint . . . . Given the greater resources that are available to states, [they] are better positioned than localities to bear the financial costs of seeking the death penalty. Consequently, . . . [the] most likely result [is] more death sentences . . . .<sup>451</sup>

To be sure, Professor Gershowitz aims to dampen local excesses by putting the capital charging decision in the hands of elite state officials.<sup>452</sup> But for local communities, this new effusion of state power and withdrawal of the sacred prerogative of local communities to define the “worst of the worst” for themselves would certainly be a bridge too far, tantamount to repealing the death penalty. For Gershowitz’s proposal to go forward, therefore, the decision to proceed capitally almost certainly would end up in the hands of local prosecutors and grand juries, or of state officials whose capital sentencing dispositions mirror those of the death-prone communities. In either event, Professor Smith’s objections are on target.

The more difficult question is whether the majority should remove state subsidies that *already* exist.<sup>453</sup> The problem is that removing existing supports, such as statewide public defenders, could aggravate the problem by generating more error-prone verdicts as a result of under-funded local representation.<sup>454</sup> The test for whether to remove existing subsidies is, therefore, straightforward: if the local action being subsidized helps the locality directly achieve the one thing it wants—death verdicts—removing the subsidy is a *good* idea. An example is state sharing of the cost of the prosecution itself. Otherwise, however, the goal should not be to remove the existing subsidies but to forbear adding new ones.

## 2. The Problems with Performance-Based Approaches

To get localities to stop incurring, or externalizing, capital sentencing costs, states might directly aim (1) to limit death verdicts or (2) to cost them out and impose a corresponding charge on the sentencing community. Professor Gershowitz has proposed a version of each of these strategies.

Most simply, Gershowitz has proposed to cap the number of capital prosecutions a community can bring each year at “two capital prosecutions for every 100 murders” and for smaller jurisdictions with fewer murders, a maximum of “one capital prosecution per year.”<sup>455</sup> This approach directly attacks the problem of overuse of the death penalty. But its rigidity is enough to turn almost

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<sup>451</sup> Smith, *supra* note 21, at 120.

<sup>452</sup> See Gershowitz, *supra* note 21, at 338–39.

<sup>453</sup> See *supra* notes 264–300, 445–49 and accompanying text.

<sup>454</sup> See *supra* notes 89, 191, 419, and accompanying text.

<sup>455</sup> Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 78–79 (2007).

anyone into a regulation-hating libertarian. Prosecutors will complain that no “right” number of death verdicts can apply to all jurisdictions and that “heinousness” is not evenly distributed across murders and years, so prosecutors would be forced to treat like crimes, defendants, and victims differently; that a county with only ninety-nine murders in a year will be senselessly disadvantaged relative to an identical county with 101; that cities with many murders will be disadvantaged in relation to towns with fewer than fifty, which nonetheless get their one capital prosecution; and that counties should be able to trade “death permits,” creating a market in lives.<sup>456</sup> Defendants will complain that creative charging practices will let prosecutors manipulate the number of “murders” in their jurisdiction to increase their cap; that, in order to fill the quota in a “down” year for murders, less egregious cases will be selected; and that the remedy in any event will not deter “quick and dirty” procedures in cases that are chosen to meet the quota.<sup>457</sup>

A different approach analogizes the modern death penalty to a public service that only a minority of people value, justifying a hefty “user fee” each time a county initiates a capital case. Charging the same fee in every case, however, will miss the distinct uses counties make of the death penalty and the different levels of risk their verdicts create. Even worse, whatever good cause is the beneficiary of the funds from the fees will have an incentive to urge expansion of the death penalty to generate more funds—in the same way as public schools in many states now cheer on gamblers and purchasers of regressive lottery tickets. The temptation then would be to set the fee, not to cover the subsidy, but to generate maximum income. This would be an especially dangerous outcome if the court system receives the funds, because it would encourage judges to forbear reversing cases for fear of decreasing revenue. Charging more for post-reversal retrials would create the opposite bias.

Professor Gershowitz tackles these problems in the last of his proposals by analogizing capital cases not to boutique public services but, in effect, to dangerous nuisances.<sup>458</sup> To get counties to use capital punishment sparingly, Gershowitz proposes that state legislatures “requir[e] local county prosecutors to post a cash bond and transmit the money to the state treasury before filing capital charges.”<sup>459</sup> If prosecutors get a death sentence and preserve it on appeal, “the bond would be returned to the county with interest.”<sup>460</sup> But if the case is

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<sup>456</sup> Gershowitz rejects a “cap and trade” strategy that would let prosecutors buy and sell authorizations to proceed capitally. *Id.* at 110 n.112. See generally Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1334–41 (1985) (claiming that tradable permits “at one stroke, cure many of” command and control’s “basic flaws”).

<sup>457</sup> Gershowitz, *supra* note 455, at 110–16.

<sup>458</sup> Gershowitz, *supra* note 21, at 863–64, 873–87.

<sup>459</sup> *Id.* at 863.

<sup>460</sup> *Id.*

reversed, “the county would forfeit the bond to the state.”<sup>461</sup> This approach addresses the right problem (overuse) at the right moment (time of filing capital charges) and avoids inflexibility by letting local prosecutors “determine which capital cases they want to pursue while forcing them to take full responsibility for those decisions” in the event of reversal.<sup>462</sup>

But there is still a problem, which also afflicts a more traditional approach of assessing costs or the other side’s attorney’s fees in the event of an adverse verdict. All these strategies would make state judges hesitant to overturn flawed death sentences. *Broken System II* shows that elected state judges already are more reluctant to overturn otherwise similar death sentences imposed in rural areas, probably due to the stronger adverse reaction there.<sup>463</sup> Fear of provoking that same reaction after *every* reversal could lead judges to rubber-stamp death verdicts, encouraging more corner-cutting in trials and increasing appeal costs by delaying deserved reversals until the case completes both state court levels of review and moves to federal court.

Most of our objections to this point focus on the difficulty of measuring death penalty *costs* and assuring they are borne by the communities that generated them. From those communities’ perspective, however, the bigger problem is the failure to gauge the *benefits* they derive from the death penalty—benefits, they would argue, that are greater in some communities than others due to different value choices. The user “fee” and “cap” approaches directly impinge on communities’ ability to be the arbiter of the benefits they get from death verdicts because those strategies give the same answer for all communities to the questions of “How much a death verdict is worth?” and “How many is enough?” Even worse from this perspective is Gershowitz’s alternative proposal to give the capital charging decision to state officials,<sup>464</sup> because that takes away localities’ longstanding and highly prized ability to make the cost-benefit judgment in response to each crime. The “bond” and “costs” strategies are less pernicious from this perspective, but they have a similar odor insofar as they attach a punitive message to communities’ capital sentencing decisions.

### 3. Local Improvements in Defense Representation

A more promising approach is to require trial procedures that improve the quality of death verdicts and deter communities from seeking them except when they meet statutory and constitutional standards. A good example is the 2000–2005 series of Supreme Court decisions requiring better capital defense representation.<sup>465</sup> In theory, at least, this approach can increase the reliability of

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<sup>461</sup> *Id.* at 863–64.

<sup>462</sup> *Id.* at 865.

<sup>463</sup> See Liebman et al., *Broken System II*, *supra* note 27, at 65, 218–19.

<sup>464</sup> See *supra* notes 448–50 and accompanying text.

<sup>465</sup> See *supra* notes 424–25 and accompanying text.

individual verdicts and decrease appeal costs. It also may discourage future prosecutions in marginal cases out of a concern that when skilled defense lawyers obtain not guilty or life verdicts in high profile cases, the message communicated is the opposite of the fear-allaying and retributive message that parochial and libertarian communities want death verdicts to convey. By diminishing the value of the Capital Felony Murder Doctrine for rationing those communities' response to outside crime, this reform might even trigger more professional and systematic law enforcement techniques to allay community crime fears.

The problem, however, is that the enforcement mechanism for judicially imposed requirements of this sort—appellate reversal of the death verdict and remand for re-trial—works poorly in the current context. To be sure, reversals do chasten communities that rarely use the death penalty. But those communities do not impose the bulk of the error costs. Instead, those costs are imposed by death-prone communities for which the remedial dialectic—that the appellate court will not let an execution go forward until the locality cures the systemic defects that cause the errors—has no clout. Those communities value the initial verdict far more than the execution, and they do so out of a strong desire *not* to engage in the systematic and professional practices needed to cure the error.<sup>466</sup>

An important lesson, therefore, is that interventions will not be effective unless they occur *before* capital prosecutions are brought, not after verdicts are imposed. This constraint rules out exclusive reliance on rights enforced on appeal. It does not, however, make all procedural solutions ineffective. Recall our premise that cooperative steps are possible in the shadow of the penalty default created by the repeal option. Under this impetus, it might be possible to secure legislation making the death penalty a local option, which counties invoke by agreeing to create a mechanism for qualified, well-paid capital defense attorneys.<sup>467</sup>

Legislation to this effect might include standards that county plans for defense representation must meet, a review process for deciding whether the plans satisfy the standards and post-approval monitoring of opt-in counties' track records of reversals and other factors. The law might assign an administrative arm of the state courts or the state attorney general to review and monitor plans or give the task to a panel with judicial, prosecutorial, defense, and taxpayer representatives aligned with the majority interest in professional proceedings that moderate error. The law should require the reviewing agency to benchmark each county's proposed plan against those from similarly situated counties to create a race to the top. Later, the agency should publicize counties' appellate track records and compare counties' records to determine whether each continues to meet the opt-in

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<sup>466</sup> See *supra* notes 102, 110, 192–97, 226–44, 308, 331, and accompanying text.

<sup>467</sup> An example of this type of mechanism—albeit one available to states, not localities, and that few states have thus far opted into—is the option the federal habeas statute gives states to obtain more expedited and favorable habeas proceedings in capital cases if they agree to create systems for providing qualifying state post-conviction representation to condemned prisoners. See 28 U.S.C. §§ 2261, 2265 (2006); HERTZ & LIEBMAN, *supra* note 271, § 3.3.

criteria.<sup>468</sup> In this way, the law would use results from appellate and post-conviction review to discipline use of the death penalty without relying on judges to enforce the discipline through ineffective directives to “get it right or we won’t execute,” and without using fee options or bond forfeitures that create incentives for too many death sentences or too few reversals.

The same outcome might be achieved less formally through negotiations with capital-prone counties that commit, as a way to stave off repeal, to create and fund a qualifying mechanism for improved representation and to monitor and publicize counties’ comparative appellate track records. The goal in either event is to use death-prone counties’ desire to avoid repeal and their freedom to choose how to meet the representation standards and achieve a viable record on appeal to induce cooperation. Of course, by increasing the cost of death verdicts, these approaches would diminish the benefit death-prone communities derive from death verdicts. What distinguishes this strategy from the cap, fee, and bond approaches is that it enables each community to make its own judgments about how best to evaluate the relative benefits and costs and how to maximize the former and minimize the latter across all cases and in each individual case.<sup>469</sup>

#### 4. Managed Prosecution

Along with improved defense representation at capital trials, *Broken System II* proposed making the decision to prosecute capital a more deliberative process.<sup>470</sup> The aim was to improve judgments often made hastily under the influence of emotions generated by the crime and invite defendants to inform prosecutors about competing considerations.<sup>471</sup> The United States Justice Department, for example, requires U.S. Attorneys (some of whom have advisory committees of their own) to secure approval for capital prosecutions from a central Capital Case Review Committee that also hears from defendants.<sup>472</sup> A number of commentators and death penalty commissions have made similar proposals.<sup>473</sup>

This Article explains why prosecutors in death-prone communities resist procedures of this sort. Precisely because they are deliberative and take time, these procedures undermine a central feature of the quick and unvarnished death

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<sup>468</sup> For an analogous regime, see Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 685–86 (describing Wisconsin legislation under which counties must adopt plans to assure the reliability of eyewitness identifications).

<sup>469</sup> See *supra* notes 453–62 and accompanying text.

<sup>470</sup> See Lieberman et al., *Broken System II*, *supra* note 27, at 409–10.

<sup>471</sup> See *id.*

<sup>472</sup> See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role*, 26 FORDHAM URB. L.J. 353, 410–11 (1999); see also Benjamin Weiser, *Pondering Death, by Committee: What Is a Capital Crime?*, N.Y. TIMES, June 26, 1997, at B1, B4.

<sup>473</sup> See Gershowitz, *supra* note 21, at 338–42 n.163.



penalty that parochial and libertarian communities value. They diminish the communities' and prosecutor's ability, as a substitute for systematic crime fighting strategies, to make immediately and emotively plain to fearful citizens, the perpetrator and prospective miscreants how seriously they take the invasion it has suffered and how harshly it is disposed to respond.

Still, in the context of the majority's use of the possibility of repeal to induce cooperation, there may be a place for proposals for more deliberatively managing the decision whether to charge capitally. Facing facts, the majority might want to acknowledge the dialectic between the parochial and libertarian dispositions of the minority of death-prone communities and their own more modern views on penology and government and their frustration at having to subsidize the minority's risky practices. If that dialectic is to be resolved in some fashion, the best time to get agreement to have the conversation is in the shadow of the threat of repeal, and the best time and a very good way to *have* the conversation is on a contextualized, case-by-case basis as each possibly capital case presents itself.

Agreement, then, might be reached to predicate counties' opt-in to the death penalty—or to predicate some other compromise that heads off a cataclysmic vote on repeal—on the minority's agreement to make death-sentencing decisions only after discussion with a committee of sober representatives of the majority. Questions to be addressed would be those at the heart of the dialectic: why is the death penalty appropriate and necessary in the case? What risks do a death prosecution and verdict pose for the community, the victim's family, the rest of the state and its taxpayers and the defendant? And (in order to provoke a pretrial version of the comparative proportionality review the Supreme Court has declined to require after the fact<sup>474</sup>) what does this and other communities' appellate track record in similar cases suggest about the wisdom of going forward capitally?

The forum and format for such a discussion are matters of choice. Certainly the views of the victim's family and defendant should be heard, and representatives of the majority that foots the externalized portion of the capital punishment bill should help do the probing. A local committee might serve, although it might have too little diversity to assure that the leavening questions are sincerely asked and answered. A statewide standing committee would be better, to avoid those risks and gradually reveal—and perhaps impel—a rough, statewide “going rate” that does indeed resolve the dialectic.<sup>475</sup>

## IX. CONCLUSION

*De facto*, the death penalty in the United States today is a minority institution. Even in avidly pro death penalty states, only a small fraction of local jurisdictions with a minority of the population impose the great bulk of death verdicts. The death penalty offers these parochial and libertarian communities a passionately

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<sup>474</sup> See *supra* notes 435-437 and accompanying text.

<sup>475</sup> See *supra* notes 433-437 and accompanying text.

expressive response to the outsider, cross-boundary incursions that most terrify them. At the same time, the penalty allows them to economize drastically on the freedom and fruits of their labors that they have to surrender to the modern administrative state.

As raw and reassuring, as well as inexpensive, as this response may be locally, it is extraordinarily costly to the majority of communities and their residents who do not much use the death penalty. It leaves crime unattended that spills over into neighboring communities. It generates verdicts fraught with costly error that state and federal courts must fix. It misleads the family of murder victims into thinking death verdicts will be executed, not just expressed. It tortures the condemned with a punishment positively Czarist in its cruelty, of life without possibility of parole, but with a chance of execution a dozen or more years later. It heaps scorn on court proceedings that churn but never conclude. It costs \$23 million to \$187.5 million extra for the executions that do materialize—rarely and at random. Although hidden and diffuse, the costs are so great that one has to wonder why the majority continues to tolerate them.

Even as the majority of death indifferent communities and citizens recently have moved towards a quiet repeal of the death penalty in their own locales, their death-prone neighbors have maintained, even intensified, its use. The rising tide of majority reluctance has left a thinning archipelago of death-embracing communities that impose an ever larger proportion of the nation's death verdicts. At the same time, however, death-prone communities have grown increasingly indifferent to executions. A quarter of the country's 3200 condemned sit on a death row where they are more likely to die of illness or old age than by execution.<sup>476</sup> The seemingly senseless costs imposed on the many by the few increase.

There is evidence, however, that the majority is restive. Whether abolition is in the cards is uncertain, both because of the majority's fear of the minority's violent reaction to repeal and the majority's respect for the minority's traditions and self-reliance. But a disposition to make their cost-externalizing neighbors pay their own freight does seem to exist.

We promised at the outset that we would ourselves acknowledge the minority's traditions and self-reliance.<sup>477</sup> And although we have not minced words about the crude advantage the minority takes of the majority, we will perhaps be criticized in the end for respecting the minority and its values too much. Still, short of the majority's most logical response—repeal—there are accommodations to be had to reduce the burden the minority foists on the majority, and we propose two of them.

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<sup>476</sup> George Skelton, *Repeal the Death Penalty*, L.A. TIMES, July 14, 2011, available at <http://articles.latimes.com/2011/jul/14/local/la-me-cap-death-penalty-20110714> ("A condemned man in California is more likely to die of old age than an execution. Although 13 have been executed, 78 have died of natural or other causes.").

<sup>477</sup> See *supra* notes 64–65 and accompanying text; see also *supra* notes 362–63 and accompanying text.