

Capital Punishment and American Exceptionalism

by Carol S. Steiker¹

In 1931, the year before his appointment to the U.S. Supreme Court, Benjamin Cardozo predicted that “[p]erhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life.”² The operative word here has turned out to be “perhaps,” given that here we are in the United States almost three-quarters of a century later and still going strong. But, ironically, Cardozo’s prediction proved more or less true for the rest of the Western industrialized world. Soon after World War II and the spate of executions of wartime collaborators that ensued, the use of the death penalty began to decline in Western Europe, and capital punishment for ordinary crimes has at this point been abolished, either de jure or de facto, in every single Western industrialized nation except for the United States.

At the same time, the countries that most vigorously employ the death penalty are generally ones that the United States has the least in common with politically, economically, or socially, and ones that the United States is wont to define itself against, as they are among the least democratic and the worst human rights abusers in the world. In recent years, the top five employers of capital punishment were China, the Democratic Republic of Congo, Iran, Saudi Arabia and the United States.³ Moreover, in the past twelve years, only seven countries in the world are known to have executed prisoners who were under 18 years old at the time of their crimes: the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Yemen and the United States.⁴ Stephen Bright, capital defense lawyer and abolitionist activist, mordantly quips that, “If people were asked thirty years ago which one of the following three countries [Russia, South Africa, and the United States] would be most likely to have the death penalty at the turn of the century, few people would have answered the United States.”⁵ Yet it is true that

¹Professor of Law, Harvard Law School. I am grateful to participants in the University of Oregon’s conference, “The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform?”, to participants in a panel discussions at the University of Texas School of Law and at Suffolk University Law School, to discussants from among the Harvard Neiman Fellows of 2000-2001, and to Jordan Steiker for helpful comments.

²**Benjamin N. Cardozo, *Law and Literature* 93-94 (1931)**

³Amnesty International, *Death Penalty Around the World: Facts and Figures on the Death Penalty* (April 2000, 2001, and 2002), at <http://www.amnesty-usa.org/abolish/world.html>.

⁴Id.

⁵Stephen B. Bright, *Address: Will the Death Penalty Remain Alive in the Twenty-First*

even South Africa and Russia (and many other states of the former Soviet Union) have abandoned the death penalty, while the United States has retained it. And we have not retained it merely formally or even modestly. At the very same time that the pace of abolition quickened in Europe, the pace of executions quickened here in the United States. The rate of executions has risen precipitously since the Supreme Court reinstated the death penalty in 1976, and we have executed more people in *each* of the last five years than in any other year since 1955.⁶

What accounts for this gross discrepancy in the use of capital punishment between the United States and the rest of the countries that we consider to be our "peers" in so many other respects? The answer to this question must be found primarily in the events of the last three decades or so, for it is only during this time period that America's use of capital punishment has diverged widely from that of Western Europe. Indeed, in the 19th century, to the extent that American criminal justice policy diverged from that of Europe, it was in the other direction. In his famous observations on *Democracy in America*, published in 1840, Alexis de Tocqueville commented on the "mildness" of criminal justice administration in America, noting that "[w]hile the English seem disposed carefully to retain the bloody traces of the Middle Ages in their penal legislation, the Americans have almost expunged capital punishment from their codes."⁷ Tocqueville was not alone; historian Stuart Banner writes that mid-nineteenth-century movements to abolish the death penalty in the United States positively "astonished" other European visitors to America.⁸ These abolitionist movements did not turn out to be permanently successful except in a small minority of states, primarily in the Midwest and Northeast. Hence, the United States as a nation did not end up in the abolitionist vanguard, like the Scandinavian countries that led Europe in abolishing capital punishment for ordinary crimes in the first few decades of the 20th century. But neither did the United States diverge in the other direction from the rest of Western Europe until the 1970's. As recently as the mid-1960's, the status of capital punishment in America would not have been a very promising exemplar of "American exceptionalism." At that time, the U.S. looked like most of the rest of Europe (and Canada, and most of Australia) with regard to the use of capital punishment: while most states and the federal government had the death penalty on the books, it was rarely used; during the

Century? International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent, 2001 **Wis. L. Rev.** 1, 2.

⁶See Hugo Adam Bedau, ed., **The Death Penalty in America: Current Controversies** 11, Table 1-3 (1997) (executions from 1950-1995); Amnesty International, *The Death Penalty in the U.S.: U.S. Executions by Year Since 1976* (updated April 1, 2002), at <http://www.amnesty-usa.org/abolish/execsinc76/html>.

⁷Alexis de Tocqueville, **Democracy in America** 2:166 (1840; Vintage Books ed. 1990).

⁸Stuart Banner, **The Death Penalty: An American History** 113 (2002).

1960's, the nation-wide execution rate dropped on average to less than a handful each year.⁹

Yet in the decades that followed the 1960's, all of the other Western democracies abandoned the death penalty for ordinary crimes either de jure or de facto, and many countries that had already abandoned it for ordinary crimes abandoned it for all crimes, including such crimes as terrorism, treason, and military offenses. For example, England abolished the death penalty for murder provisionally in 1965 and then made it permanent in 1969; Canada abolished for murder in 1976; Spain in 1978; Luxembourg in 1979; France in 1981; Australia in 1984; Ireland in 1990; Greece in 1993. In addition, many European countries that had already abolished the death penalty for murder before the 1960's moved to abolish it for all crimes in the 1970's, 80's, and 1990's, such as Sweden and Finland in 1972; Portugal in 1976; Denmark in 1978; Norway in 1979; the Netherlands in 1982; Switzerland in 1992; and Italy in 1994¹⁰.

This pattern of European abolition contrasted with American enthusiasm for the death penalty is widely remarked, especially by abolitionists, both here and abroad, who seek to shame the United States by the dual strategy of highlighting the unsavory character of the rest of the "death penalty club" while at the same time noting that Europe (and Canada, Australia, New Zealand, Mexico, and many other countries) seem to manage well enough without resorting to executions.¹¹ Yet there is surprisingly little sustained commentary, scholarly or popular, about why it is that the U.S. differs so much from its European brethren on the issue of capital punishment.¹² The reason for the relative silence on this topic, it seems, is that people think they

⁹See **Bedau**, *supra* note ---, at 11, Table 1-3.

¹⁰Amnesty International, *The Death Penalty Worldwide: Abolitionist and Retentionist Countries* (November, 2001), at <http://www.amnesty-usa.org/abolish/abret.html>.

¹¹The following quotes from two different French human rights activists are typical of abolitionist sentiment inside as well as outside the United States: "No advanced country does this [uses capital punishment]. America is doing it along with countries like China and Russia and other countries that have terrible human rights records." Suzanne Daley, *Europeans Deplore Executions in the U.S.*, **N.Y. Times**, Feb. 26, 2000, at A8 (quoting Henry Leclerc, the president of the Human Rights League in Paris). "We are in an age of globalization, and sometimes our American friends have a lesson to teach us, and maybe sometime we have a lesson to teach them." *Id.* (quoting Patrick Baudouin, the president of the International League of Human Rights).

¹²Scholarly writing on American exceptionalism with regard to capital punishment is sparse and heavily tilted toward student-written law review notes. See, e.g., Cheryl Aviva Amitay, *Note: Justice or "Just Us" The Anomalous Retention of the Death Penalty in the United States*, 7 **Md. J. Contemp. L. Issues** 543 (1996); Laurence A. Grayer, *Student Comment: A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, 23 **Denv. J. Int'l L. & Pol'y** 555 (1995); Kristi Tumminello Prinzo, *Note: The United States "Capital" of the*

know why, and their (rather diverse) explanatory theories are often mentioned in passing, without support or elaboration, as if they were perfectly obvious. My object here is to take a sustained look at possible explanations for American exceptionalism with regard to capital punishment, with an eye for questioning and complicating what has been presented, when it has been discussed at all, as obvious or simple. It turns out that the number of possible theories is large, and the provenance of such theories is broad: they range from the sociological, to the political, to the historical, to the cultural, to the legal. Of course, none of these categories is wholly separate from any of the others, and both the boundaries between them and the relationship among them is highly contestable. Nonetheless, it is possible to articulate a large number of distinguishable hypotheses, in order to explore their strengths and weaknesses in some depth.

I by no means wish to suggest that I believe that there is a single theory out there which can be proven to be [the] reason for the complex phenomenon at issue. Why the U.S. is different from its European friends and allies in its use of capital punishment at this point in time is no doubt multiply determined in much the same way that the weather is. Meteorologists can identify many of the factors that produce the phenomenon of [weather], like wind speed, barometric pressure, and cloud formation (among many others, no doubt), but they cannot always say what is cause and what is effect, nor can they reliably predict what will happen as the factors change, as we all know! To say that a phenomenon is multiply determined is different from saying that it is over-determined, in the sense of inevitably the product of multiple forces, each of which alone or in smaller combinations would produce the same result. Not only do I wish to resist reductionist simplicity, I also wish to embrace the contingency that attends most complex phenomena.

World: An Analysis of Why the United States Practices Capital Punishment While the International Trend is Towards Its Abolition, 24 *Brooklyn J. Int'l L.* 855 (1999). Scholarly treatment by non-student authors of the reasons for American exceptionalism have tended to be brief and elliptical, if they exist at all, in works otherwise devoted to more empirical, historical, or sociological aspects of capital punishment. *See, e.g.,* **Bedau**, *supra* note --- (collection of essays on controversies regarding capital punishment in America); **Banner**, *supra* note --- (history of capital punishment in America); **Roger Hood**, **The Death Penalty: A World-Wide Perspective** (survey of abolition around the world) (1998); **Raymond Paternoster**, **Capital Punishment in America** (1991) (largely empirical treatment of use of capital punishment in America); **William A. Schabas**, **The Abolition of the Death Penalty in International Law** (1993) (history of development of international human rights norms dealing with capital punishment); **Austin Sarat**, **When the State Kills: Capital Punishment and the American Condition** (2001) (cultural analysis of capital punishment in America); **Franklin E. Zimring & Gordon Hawkins**, **Capital Punishment and the American Agenda** (1986) (comparative assessment of America's movement toward abolition of capital punishment).

What follows is consideration of 10 theories of American exceptionalism. As you will see, many of these theories are interconnected, but the disaggregation is helpful in evaluating the strengths and weakness of each theory.

1. Homicide Rates: The most common theory one encounters in writing and conversation on this issue is the fairly straightforward, sociological observation that the United States has a much higher homicide rate than that of any of our Western European (or other peer) counterparts. Notably, during the 1960's and 1970's — the period when U.S. capital punishment policy first began to diverge from that of Western Europe — the American homicide rate rose dramatically to a level much higher than that of most other Western industrialized nations. Although the rate dropped modestly in the early 1980's, it spiked again later in the decade; as of 1990, the American homicide rate was four and a half times that of Canada, nine times that of France or Germany, and thirteen times that of the United Kingdom.¹³ Although the rate fell substantially in the 1990's, as of 1998, the U.S. homicide rate was still —two to four times higher than those of most Western countries.—¹⁴

Often, though not always, this “homicide rates” theory for American exceptionalism regarding capital punishment is proffered with a defensive spin, the underlying implication being, “If you had our problems, you’d have our solutions, too.” Of course, there is no way to test this counter-factual, short of seeing Western European homicide rates climb to American levels, and maybe not even then. However, recent studies of comparative non-capital penal policies seriously challenge the general claim that crime policy is determined primarily by crime rates. In his introductory essay to a diverse and impressive collection of studies on *Sentencing and Sanctions in Western Countries*,¹⁵ Michael Tonry unequivocally states his conclusion: “The evidence is clear; national differences in imprisonment rates and patterns result not from differences in crime but from differences in policy.”¹⁶ As part of his analysis, Tonry compares violent crime rates from the 1960's to the early 1990's in three countries: the U.S., Germany, and Finland, and finds very similar rates of change in violent crime (all 3 curves go steeply upward) but utterly dissimilar penal policy responses. The U.S. continuously ups the ante, sending more and more offenders to prison; Finland reacts in the opposite manner, imprisoning many fewer people; and Germany reacts inconsistently, first lowering, then raising, and then lowering again its imprisonment rates, even as violent crime continues its steep rise throughout the period in question. Tonry concludes that crime rates cannot be viewed as the primary determinant of

¹³**Banner**, *supra* note ---, at 300-01.

¹⁴**Michael Tonry & Richard S. Frase, eds., *Sentencing and Sanctions in Western Countries* 13 (2001).**

¹⁵Id.

¹⁶Id. at 7.

punitiveness in penal policy (at least as measured by rates of imprisonment); rather, he argues that other factors altogether — such as American moralism, history, and politics — are really at work in the divergence of American penal policy from that of Finland and Germany (and by implication, other Western European nations).¹⁷

Tonry's work has obvious implications for the question of the roots of American exceptionalism regarding capital punishment: it would be odd indeed if there were a substantial correlation between homicide rates and rates of capital punishment when there is so little correlation between violent crime rates and rates of imprisonment. One might argue that homicide, especially murder, is a crime of particular horror and that therefore homicide rates might drive capital punishment policy even if other crimes rates do not drive other penal policy, because high murder rates will generate the political will to add a stronger deterrent or the desire for some appropriate public display of revulsion and repudiation. Or one might argue that, even if capital punishment policy does not rise and fall with any great sensitivity to murder rates, once murder rates reach a certain level, or "tipping point" (such as has been reached in the U.S. but not elsewhere in the industrialized West), the death penalty becomes more thinkable, or desirable, or necessary. In short, one would need some sort of "death is different" argument for why homicide rates drive capital punishment policy in a way that violent crime rates apparently do not drive ordinary, non-capital penal policy. Any such argument, however, loses some plausibility when one considers the politics of penal policy writ large in the United States, for it is easily apparent that the very same political coalitions generally support *either* both capital punishment for murder and severe non-capital punishment for other crimes *or* (in considerably smaller numbers) abolition of capital punishment and less severe non-capital punishment for other crimes. In light of this strong and obvious convergence, it is hard to believe that the well-springs of political attitudes and action regarding capital punishment derive from a different source from the well-springs of political attitudes and action regarding penal policy generally.

In addition, the "homicide rates" hypothesis for American exceptionalism regarding capital punishment is beset by a further difficulty: examined more closely, homicide rates and execution rates dramatically diverge at important points in the past 30 years; indeed, they diverge much more than they converge.¹⁸ From the mid-1960's to the mid-1970's, homicide rates roughly doubled, while execution rates fell to zero for several years preceding the Supreme

¹⁷Id. at 18.

¹⁸*Compare* Federal Bureau of Investigation, *Crime in the United States* years 1960 through 2001 (Washington, D.C., U.S. Government Printing Office) (giving rates for murder and non-negligent homicide from 1960 through 1991), *with* **Bedau**, supra note ---, at 11, Table 1-3, *and* Amnesty International, *U.S. Executions by Year Since 1976*, supra note --- (giving execution rates from 1960 through 2001).

Court's temporary invalidation of the death penalty in *Furman v. Georgia* in 1972¹⁹ (though this might have been due, at least in part, to the "moratorium" strategy of the abolitionist litigators leading up to *Furman*).²⁰ Even more significantly, homicide rates fell precipitously throughout most of the 1990's, while execution rates soared, reaching levels not seen since the 1950's. Moreover, there were some substantial fluctuations in homicide rates even during the 1970's and 1980's, which are not mirrored at all by fluctuations in execution rates. The strongest response to the disjunction between homicide rates and execution rates must be one of significant "lag time" — i.e., that executions took a while to catch up to the rising homicide rates of the 1960's and 1970's and that they have not yet been deflated by the falling homicide rates of the 1990's. As for the discrepancies between homicide rates and execution rates in the late 1970's and early 1980's, Supreme Court litigation working out the details of post-*Furman* constitutional requirements for capital punishment would necessarily have warped execution rates during that period so as to render comparison with homicide rates meaningless. However, these responses to the disjunction between homicide rates and execution rates founder when one considers death sentencing rates during the same thirty-year period, because one would not expect to see the same degree of "lag time" in this measure. Yet one sees a pattern on death row similar to the one in the death chamber: death row grew much more slowly in the late 1960's, when homicide rates were soaring, than it has in the 1990's, when homicide rates were plummeting.²¹ These disjunctions between death sentencing rates and execution rates, on the one hand, and homicide rates on the other, certainly raise some serious problems for the "homicide rates" explanatory thesis.

These problems become only more apparent when one looks at the state and local level. On the state level, the "homicide rates" thesis gets some modest support from the generally higher homicide rates in the Southern and Border states, which also form the "death belt" primarily responsible for the nation's executions.²² But the thesis also suffers some embarrassment as well, in light of the fact that Texas, Virginia, Missouri, Florida, and Oklahoma — the five leading states in executions in the modern era, accounting together for almost two-thirds of the nation's executions since *Furman v. Georgia*²³ — have five of the lowest homicide

¹⁹408 U.S. 238 (1972).

²⁰See **Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment*** 106-125 (1973).

²¹See Death Penalty Information Center, *Size of Death Row by Year*, at <http://www.deathpenaltyinfo.org/DRowInfo.html#year>.

²²See Federal Bureau of Investigation, *Uniform Crime Reports: Murder Rates per 100,000 Population, 1995-1999*, at <http://www.deathpenaltyinfo.org/murderrates.html>.

²³NAACP Legal Defense and Education Fund, Inc., *Death Row U.S.A., Winter 2002*, p. 9, at <http://www.deathpenaltyinfo.org/DeathRowUSA1.html>.

rates in the "death belt."²⁴ Even if homicide rates somehow play a role in the formal retention of the death penalty at the state level,²⁵ something else is accounting for the use of the death penalty, as reflected in execution rates, within states. The role of "something else" becomes even more clear when one examines intra-state variations in death penalty practices. Within individual states, there is staggeringly large variation among individual counties in death sentencing rates that are clearly attributable to something other than homicide rates. For example, in Texas, which leads the country in executions in absolute numerical terms, Dallas County (Dallas) and Harris County (Houston), two counties with strikingly similar demographics and crime rates, have very different death sentencing rates, with Dallas County returning 11 death verdicts per 1000 homicides, while Harris County returns 19 death verdicts per 1000 homicides. One sees a similar disjunction in Pennsylvania between Allegheny County (Pittsburgh) and Philadelphia County (Philadelphia), which have death verdict rates of 12 and 27 per 1000 homicides, respectively. In Georgia, another significant death penalty state, the death sentencing rate ranges from 4 death verdicts per 1000 homicides in Fulton County (Atlanta) to 33 death verdicts per 1000 homicides in rural Muscogee County -- a difference of more than 700 percent! One sees similarly large variations within many other states that are completely uncorrelated with differences in either homicide rates or crime rates more generally.²⁶

²⁴Federal Bureau of Investigation, *Uniform Crime Reports*, *supra* note ---. Of course, proponents of the "homicide rates" thesis and/or the death penalty itself would no doubt argue that the relatively low homicide rates in these five states is the result of their high use of the death penalty. This claim is implausible on many levels, the most obvious being that no state, even the really big users of the death penalty, uses capital punishment with any kind of frequency or reliability at all, so even the staunchest believer in deterrence theory would not expect to see a significant deterrent effect. This common-sense judgment is borne out by recent studies of two of the five leading death penalty states. See John Sorenson, et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 **Crime & Delinquency** 481 (1999) (finding no correlation between execution rates and either murder rates or felony rates in the period studied, 1984-1997); William Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 **Criminology** 711 (1998) (finding no evidence of a deterrent effect on total killings or on any sub-type of killing during the period studied, 1989-1991, but finding evidence of a "brutalization" effect in the rise of certain sub-types of killings after Oklahoma's return to the use of capital punishment after a 25-year hiatus).

²⁵Even this thesis has some trouble accounting for Alaska and Michigan, staunchly abolitionist states, each with a homicide rate higher, by recent count, than that of any of the five leading death penalty states. *Id.*

²⁶See 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* (2002).

Moreover, if one widens the lens to the larger world, one finds further evidence challenging the persuasiveness of the "homicide rates" thesis. It cannot explain why a large number of countries with extremely high serious murder rates — such as South Africa, Mexico, and Brazil — have abolished the death penalty, while Japan, with a comparatively low homicide rate, continues to retain it. Obviously, each country has its own peculiar death penalty "story," as testified to by the unique experience of South Africa.²⁷ But this recognition of the complex singularity of national experiences with capital punishment should only further undermine the simplistic "homicide rates" thesis as fundamentally inadequate or at the very least incomplete.

The foregoing demonstrates, at a minimum, that high homicide rates are neither necessary nor sufficient for the formal retention or vigorous use of capital punishment, and that low homicide rates are neither necessary nor sufficient for its abolition or more modest use. This is not at all to suggest that homicide rates play no role at all in America's anomalous retention and use of the death penalty in the Western industrialized world; rather, it is clear that other forces must be at work as well. Hence, on to other explanatory theories of American exceptionalism.

2. Public Opinion: Related to the "homicide rates" theory is the theory that the United States has capital punishment because of strong public support for it; presumably, public support for the death penalty is bolstered, at least in part, by the fear and disgust generated by high homicide rates. There is no dearth of polling data demonstrating American public opinion in support of capital punishment. Particularly helpful in providing a long view are the Gallup polls that were conducted for much of the twentieth century charting answers to the basic question, "Do you favor the death penalty for those convicted of murder?"²⁸ Like most European nations, the U.S. experienced a decline in popular support for the death penalty during the 1960's. The low point in the U.S. was 1966, when the Gallup poll of that year revealed — for the first and only time in the century — that more respondents opposed rather than supported capital punishment (47% to 42%).²⁹ That trend, however, has dramatically reversed in the past three decades, with American public support for capital punishment rising precipitously, peaking in 1994 at 80% and declining only during the last few years to 65% in May, 2001, and 68% in October, 2001 — substantially lower, but nowhere near the levels of the 1960's.

²⁷See Carol S. Steiker, *Pretoria, Not Peoria: S v. Makwanyane and Another, 1995 (3) SA 391, 74 Tex. L. Rev. 1285* (1996) (describing decision of the South African Constitutional Court abolishing the death penalty in post-apartheid South Africa).

²⁸See Robert M. Bohm, *American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls*, in **The Death Penalty in American: Current Research** 113 (Robert M. Bohm ed., 1991).

²⁹Id. At 116.

One could argue that the "public opinion" thesis buttresses the "homicide rates" thesis in that the fluctuations in public support for capital punishment in the three decades since the 1960's are much more consonant with fluctuations in homicide rates during that period than are fluctuations in either execution rates or death sentencing rates. Public opinion in support of capital punishment grew in the late 1960's and early 1970's along with the homicide rate, whereas the execution rate fell to zero and the growth of the death row population slowed. Moreover, public opinion in support of capital punishment fell, albeit modestly, in the last few years of the 1990's, shortly after the homicide rate dropped substantially, whereas the execution rate has remained extraordinarily high, along with the growth in the size of the death population. The fit is not perfect, primarily because homicide rates rose earlier and faster in the 1960's than did public support for capital punishment, and homicide rates fell earlier and faster in the 1990's than did public support for capital punishment (and there are some other, more modest, divergences along the way), but the case for at least loose correlation has some surface plausibility. Thus, one might reasonably argue that high American homicide rates led to strong public support for capital punishment, which promoted formal retention of the death penalty, even if other forces are at play in producing actual death verdicts and executions within individual states.

The problem with this argument is that there are better explanations for the most significant fluctuations in public attitudes about capital punishment during this time period that have nothing to do with homicide rates. While the Gallup polls reveal a modest increase in support for capital punishment between 1966 and 1972,³⁰ public opinion made a substantial leap immediately after, and apparently in response to, the Supreme Court's decision in *Furman*. Two Gallup polls taken with 1972 — one before and one after *Furman* — reveal a 7% increase in support for the death penalty immediately after *Furman*, as compared with an 8% increase in the 6-year period between 1966 and 1972. Moreover, the same two polls reveal a 9% decrease in opposition to the death penalty immediately after *Furman*, as compared with merely a 6% decrease between 1966 and 1972.³¹ Thus, it seems likely that the Supreme Court's decision in *Furman* itself played a bigger role in bolstering public support for capital punishment, at least as reflected in polling data, than did rising homicide rates. Similarly, while it is true that homicide rates fell substantially in the 1990's, followed by a significant (but not as large) dip in public support for the death penalty, this dip in public support is better accounted for by highly disturbing accounts of innocent people exonerated from death row. From Illinois's moratorium on executions as a result of the exoneration of 13 death row inmates from that state alone,³² to

³⁰In 1966, 42% favored the death penalty; 47% opposed. In 1972, 50% favored the death penalty; 42% opposed. *Id.*

³¹The 1972 polls showed 50% in favor of the death penalty and 41% opposed pre-*Furman*, and 57% in favor and 32% opposed post-*Furman*. *Id.*

³²See Ken Armstrong & Steve Mills, *Ryan: [Until I Can Be Sure]; Illinois Is First State*

the proliferation of DNA exonerations in capital and non-capital cases alike,³³ to studies documenting extremely high reversal rates in capital cases in the post-*Furman* era,³⁴ concerns about the unreliability of the capital process and the possible execution of the innocent are much more likely to be the driving force behind the recent drops in support for capital punishment than is the declining homicide rate. Indeed, respondents overwhelmingly cite this concern when polled about the fairness of the death penalty.³⁵ Thus, the simple story that high homicide rates drive strong public support for capital punishment which in turn drives retention of capital punishment clearly needs some further nuance.

The "public opinion" thesis runs into bigger problems, however, than its failure to buttress the "crime rates" thesis. The most problematic and little-remarked problem for the "public opinion" thesis as an explanation for American exceptionalism with regard to capital punishment is that similar levels of public support for capital punishment existed in Western European countries at the time of abolition. Majorities of roughly two-thirds opposed abolition in Great Britain in the 1960's, Canada in the 1970's, France in the 1980's, and the Federal Republic of Germany in the late 1940's (when capital punishment was abolished in Germany's post-World War II constitution). Indeed, "there are no examples of abolition occurring at a time when public opinion supported the measure."³⁶ It is true that support for capital punishment has tended to fall in Europe over the last three decades — but only *after* abolition had already occurred, and thus more likely as a product of abolition (or the forces that produced abolition) than as cause of it.³⁷ Moreover, in countries where support for capital punishment remains high, like Great Britain, efforts to reinstate the death penalty continue to fail, often by wide margins.³⁸

to Suspend Death Penalty, **Chi. Trib.**, Feb. 1, 2000, at No.

³³See **Barry Scheck, Peter Neufeld, & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right*** (2000).

³⁴See **Liebman**, *supra* note --- (Parts I & II).

³⁵See Ann Coulter, *We're Not Executing the Innocent*, **USA Today**, May 8, 2001, at A13 (citing Washington Post/ABC News poll in which 68% agreed that the death penalty was unfair "because sometimes an innocent person is executed").

³⁶**Zimring & Hawkins**, *supra* note ---, at 21-22.

³⁷*Id.*

³⁸Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 **J. Transnat'l L. & Pol'y** 517, 526 (1997) (noting that "the British Parliament has debated the issue more than a dozen times in recent years, but on the last occasion, the majority against reinstatement [of capital punishment] was the largest ever").

Perhaps the question to be addressed is not, "Why does the U.S. retain the death penalty when Europe has abandoned it?", but rather, "Why did European democracies abandon the death penalty despite substantial popular support for it?" More on the possibility of "European exceptionalism" below.³⁹

To be fair to the "public opinion" thesis, the polling data that shows similar *levels* of support for capital punishment in the United States and most European countries at the time of abolition almost never attempts to measure the comparative *intensity* of respondents' support for capital punishment. Yet, it is plausible, indeed even likely, that Americans care more about capital punishment than their European and other Western counterparts do (or did at the time of abolition), even when raw numbers of those who "support" or "oppose" capital punishment appear similar. There is some modest empirical support for this claim to be found in a consistent pattern of American polling data: a 19?? study found that 79% of respondents reported "a sense of personal outrage when a convicted murderer was sentenced to a penalty less than death;"⁴⁰ a 1986 opinion poll indicated that 65% of American adult respondents identified the death penalty as an issue they "feel very strongly about;"⁴¹ a 1988 presidential election exit poll revealed that more voters identified the death penalty as an issue that was "very important" to them than identified social security, health care, education, or the candidates' political party(!);⁴² and a 1994 New York gubernatorial exit poll found that one in five voters cited capital punishment as the "most important" issue in the race.⁴³ While there is no comparable "intensity" data from Europe, the tepid popular response in Europe to abolition and the failure of movements for reinstatement to garner widespread support suggest that European voters simply do not share Americans' fervor on this issue. Perhaps the strongest support for the "intensity" spin on the "public opinion" thesis comes from the salience of crime generally, and capital punishment

³⁹See discussions below of "Populism" and "European Exceptionalism," *infra* at ---.

⁴⁰Phoebe C. Ellsworth & L. Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 **Crime & Delinquency** 116, ??? (1983).

⁴¹Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 **J. of Soc. Issues** 19, 23 (1994) (citing Associated Press/Media General poll of the nationwide adult population in November, 1986).

⁴²*Id.* (citing ABC News exit poll of 23,000 voters in the 1988 presidential election in which George Bush overwhelmingly defeated Michael Dukakis).

⁴³See Todd S. Purdum, *Voters Cry: Enough, Mr. Cuomo!* **N.Y. Times**, Nov. 9, 1994, at B11 (citing exit polls in the 1994 gubernatorial election in which George Pataki defeated incumbent Mario Cuomo, paving the way for the reinstatement of the death penalty in the state of New York).

particularly, as a political issue in the United States — another obviously intertwined theory of American exceptionalism too which I now turn.

3. Salience of Crime as a Political Issue: The most persuasive reason to believe that Americans care more intensely about capital punishment is the simple fact that crime and punishment have risen to and remained at the indisputable top of the American political agenda at all levels of government. Since 1968, when Richard Nixon ran for president on a largely “law and order” platform, crime policy has been a hugely salient issue in local, state, and national elections, to a degree not rivaled in any of our peer Western nations. It would not be hyperbolic to conclude that crime has been the central theme in the rhetoric of American electoral politics and in the strategies of elected officials in the decades since 1968.⁴⁴

The death penalty has often come to serve as a focal point in electoral politics already organized around law and order. Particularly frightening and repulsive murders grab the public imagination, while the drama of the death penalty provides an easily accessible symbol of righteousness and order to aspiring politicians. One needn’t look far at all to find numerous examples of electoral races at all levels of government that were dominated by the death penalty cast as an issue of crime control, and, indeed, election results that were likely determined by the death penalty positions of the candidates.

Starting at the top, it is more than a little odd that we know so much about the positions of presidential candidates on capital punishment, given that 99% of executions take place at the state level. Not only do we know about presidential positions on the issue, we really seem to care. Who can forget the pivotal moment during the 1988 presidential debates when Michael Dukakis gave an emotionless response to a question about whether his views on the death penalty would change if his wife were raped and murdered?⁴⁵ No doubt learning from Dukakis’ disastrous example, then-Governor Bill Clinton flew back to Arkansas from the campaign trail in 1992 to validate the execution of a severely mentally disabled murderer who had survived a

⁴⁴See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 152-53 (2001) (proposing that “the increased salience of crime” in the decades following the 1960’s was due in large part to the fact that the “social distance between the middle classes and crime was greatly diminished, with consequences for point of view and perspective”); see generally Jonathan Simon, *Megan’s Law: Crime and Democracy in Late Modern America*, 25 *LAW & SOC. INQUIRY* 1111 (2000) (surveying political science, criminology, and sociology literature to support the conclusion that crime was *the* primary motivating political force in the post-1960’s decades).

⁴⁵See Jack Germond & Jules Witcover, *Those Defining Moments*, *DENV. POST*, Jan. 27, 2000, at B-11.

suicide attempt during which he had fired a shotgun into his own head.⁴⁶ The most recent presidential election in 2000 is notable for the fact that every single one of the initial 11 candidates for president, despite other ideological differences, made clear his support for the death penalty.⁴⁷

The centrality of the death penalty as a political issue gets only more dramatic when one looks at state and local elections. In three major gubernatorial races in 1990 alone, the death penalty played a prominent, even central, role. In California, John K. Van de Kamp ran a television advertisement with a gas chamber in the background, highlighting the number of murderers that he put or kept on death row in his roles as District Attorney and Attorney General.⁴⁸ In Texas, Jim Mattox ran against Ann Richards in the Democratic primary with ads taking credit for 32 executions in his role as Attorney General.⁴⁹ In Florida, incumbent Governor Bob Martinez ran ads boasting of the ninety-plus death warrants he had signed while in office.⁵⁰

The governors are not alone in their political resort to the power of the death penalty in electoral politics: the issue has figured prominently in the election and political strategy of legislators, judges, and prosecutors, as well, in situations too numerous to count. Some illustrative examples: In 1993, Senate Republicans pledged opposition to judicial nominees they considered "insufficiently committed to the death penalty."⁵¹ This threat was not merely a reflection of the peaking of national death penalty support in 1994; as recently as 1999, Missouri state judge Ronnie White was denied a federal judgeship by Senate Republicans, led by then-Senator, now-Attorney General, John Ashcroft, who declared Judge White "pro-criminal," in part because he opposed the death penalty.⁵² California Supreme Court Chief Justice Rose Bird

⁴⁶See Marshall Frady, *Death in Arkansas*, **The New Yorker**, Feb. 22 1993, at 105.

⁴⁷See Harold Evans, *Candidates Hide Behind Death Penalty*, **Albany Times Union**, Feb. 22, 2000, at A9.

⁴⁸See John Balzar, *Van de Kamp Ads Focus on Death Row, Will Air Today*, **L.A. Times**, Mar. 21, 1990, at A3.

⁴⁹See Robert Guskind, *Hitting the Hot Button*, **The National Journal**, Aug. 4, 1990, Vol. 22, No. 31, at 1887.

⁵⁰See Richard Cohen, *Playing Politics with the Death Penalty*, **Wash. Post**, Mar. 20, 1990, at A19.

⁵¹See Neal A. Lewis, *GOP to Challenge Judicial Nominees Who Oppose Death Penalty*, **N.Y. Times**, Oct. 15, 1993, at A26.

⁵²See Stuart Taylor, Jr., *The Shame of the Ronnie White Vote*, **The National Journal**,

and two of her colleagues famously lost their seats because of their votes overturning death sentences, and many other elected state judges have been attacked, and frequently defeated, because of their unpopular votes overturning death verdicts.⁵³ Prosecutors, who are overwhelmingly elected officials in the United States, face the same political pressures on the issue of capital punishment.⁵⁴

In the United States, two things are indisputably true, and “exceptional,” at least as a matter of degree, in comparison the rest of the industrialized West. First, crime has a political salience that is extraordinarily high, almost impossible to overstate. As result, themes of “law and order” tend to dominate electoral battles at all levels of government, and the designation “soft on crime” tends to be a political liability of enormous and generally untenable consequence for political actors at all levels of government. Second, the death penalty has become a potent symbol in the politics of “law and order,” despite its relative insignificance as a matter of crime control policy. Political actors clearly believe, apparently correctly, that their support for capital punishment translates directly in voters’ minds as support for “tough” crime control generally. This strong linkage of the death penalty to the politics of law and order renders more plausible the claim that Americans support capital punishment with a greater intensity, if not in greater numbers, than Europeans, now or in the recent past.

4. Populism: Often proffered more as an alternative than as a complement to the “intensity of preference” theory of American exceptionalism is the theory that populism in American politics, as compared to elitism in European politics, best accounts for differences in death penalty policy. As some Americans like to respond to our European detractors, it’s not that Americans have different attitudes about capital punishment, it’s that our political institutions are more responsive to the public will. In this vein, a provocative and much cited article in **The New Republic** sweepingly claimed, “Basically, then, Europe doesn’t have the death penalty because its political systems are less democratic, or at least more insulated from populist impulses.”⁵⁵ This theory conveniently offers an explanation both for why the death penalty continues to flourish in the United States and for how Western European nations

Oct. 16, 1999, Vol. 31, No. 42, at 2949.

⁵³See generally Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Tights and the Next Election in Capital Cases*, 75 **B.U. L. Rev.** 759 (1995)(canvassing the political impact of the death penalty on elected judges).

⁵⁴See generally Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?* 38 **Cal. W. L. Rev.** 283 (2001).

⁵⁵Joshua Micah Marshall, *Death in Venice: Europe’s Death-Penalty Elitism*, **The New Republic**, July 13, 2000, at 14.

managed to achieve universal abolition despite wide-spread popular support for capital punishment.

The "American populism" theory has two dimensions to it, one institutional and one that might better be termed cultural. The institutional dimension emphasizes the populist features of the structures of American political organization, especially as compared to European democracies. Obviously, not all American political structures tend toward the populist, as the presidential election of 2000 amply demonstrated. The electoral college and the bicameral structure of Congress have often been noted as anti-populist, at least in the sense of anti-majoritarian. Nonetheless, there are certain features of American electoral politics that can fairly be described as distinctively populist in comparison to most European parliamentary democracies. The use of the "primary" system to select party candidates in both federal and state elections in the United States is one of the best examples of American political exceptionalism; in other Western democracies, political parties put up candidates for election without throwing the question open to popular intervention — a system much more likely to exclude mavericks and to insulate candidates from hot-button single issues like the death penalty.⁵⁶ Similarly, the widespread availability and (somewhat more modest use) of direct democracy tools, such as referenda and initiatives, is another exceptional feature of American politics, that, like the "primary" system, tends to increase the power of single-issue voters and to promote populist tendencies in political debates and platforms.⁵⁷ In contrast, many European parliamentary systems imitate that of Britain, "in which the ruling political party is tightly disciplined and in firm control of governmental policy and its implementation until the next

⁵⁶Note that many of the political contests in which the death penalty was a particularly hot-button issue were primary races; see *supra* at ---.

⁵⁷Nearly half of the states permit direct democracy tools, although only a handful of states have averaged more than one initiative per election cycle. See generally **Shaun Bowler, et al. (eds.), Citizens as Legislators** (1998); **David Butler & Austin Ranney, eds. Referendums Around the World** (1994); **Philip L. Dubois & Floyd Feeney, Lawmaking by Initiative: Issues, Options and Comparisons** (1998). Successful initiatives on criminal justice issues, not surprisingly, have been almost exclusively of the "tough-on-crime" variety, such as California's famous "three-strikes-you're-out" legislation, mandating life sentences for certain repeat offenders. As one student of initiatives has observed: "Those accused and convicted of crimes, especially violent crimes, are a highly unpopular minority group. In recent decades, large segments of the public have viewed legislatures and courts as being too soft on criminals. Thus, conditions have been ripe for initiatives that restrict the rights of the accused and increase the penalties for those convicted. When "tough-on-crime" measures appear on the ballot, they almost always win, and often by large margins." Kenneth P. Miller, *Courts as Watchdogs of the Washington State Initiative Process*, 24 **Seattle U. L. Rev.** 1053, 1068 (2001).

election,⁵⁸ and thus less susceptible to populist influences.⁵⁸

While these differences in democratic organization certainly do exist, differences in political culture between the United States and the rest of the West appear even more striking. In the United States, politicians are conspicuously anti-elitist in their rhetoric and folksy in their self-presentation. Plainly spoken personal anecdotes tend to displace complex policy analysis, and rolled-up shirt-sleeves and cowboy hats are more the sartorial norm than the exception. Even though successful political candidates are frequently consummate political insiders, [it is almost obligatory for American politicians of both the right and the left to profess mistrust of government.]⁵⁹ Gary Wills, in his recent history of Americans' long-standing distrust of government, argues that Americans have always tended toward a conception of government as appropriately [provincial, amateur, authentic, spontaneous, candid, homogeneous, traditional, popular, organic, rights-oriented, religious, voluntary, participatory, and rotational] as opposed to [cosmopolitan, expert, authoritative, efficient, confidential, articulated in its parts, progressive, elite, mechanical, duties-oriented, secular, regulatory, and delegative].⁶⁰ This political culture creates a strong tendency to defer to clear majority sentiment, not merely as a matter of political expediency, but also as a reflection of the role-conception of elected officials.

If one accepts Wills' two lists of opposing values in government, the second more accurately depicts the political culture of most other Western democracies. Unlike the United States, most European countries have a culture of political elitism and careerism, whereby political leaders are produced in large part through education and graduated ascension through professional bureaucracies. The U.S. simply has no equivalent to France's Ecole Nationale d'Administration (ENA) or Britain's civil service. These institutions both reflect and reinforce a political culture in which political leaders are viewed and view themselves as educated elites who have a duty to make decisions in light of their expertise and thus, more often than in the United States, to lead the public rather than to follow it. In such cultures it is imaginable for a Minister of Justice to respond to polling revealing substantial popular support for the death penalty with the comment, [They don't really want the death penalty; they are objecting to the increasing violence.]⁶¹ This anecdote captures a conception of political responsibility that permits, indeed requires, the mediating of popular desires through expertise to a degree that would result in suspicion if not outrage in the United States.

⁵⁸Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 69 (2001).

⁵⁹Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* 23 (1996).

⁶⁰Gary Wills, *A Necessary Evil: A History of American Distrust of Government* 17-18 (1999).

⁶¹Marshall, *supra* note ---, at 15 (quoting the Swedish Minister of Justice in response to a 1997 poll showing that 49 percent of Swedes wanted the death penalty reinstated).

The foregoing is not meant to celebrate the United States as “authentically” democratic in comparison to European bureaucratic elitism; nor, on the other hand, is it meant to exalt European abolition of capital punishment as progressive and “civilized” in comparison to American retention as crude and atavistic. Wills himself denies that either list of contrasting political values is clearly superior or even that they are mutually exclusive; “Ideally,” he says, “government should combine all these values in a tempered way, since the one set does not necessarily preclude the other.”⁶² Rather, to Wills, the two clusters of values reflect poles on a continuum that have historically been *perceived* to be in tension.⁶³ Although Wills uses these two poles to reflect competing sets of political values within the United States throughout its history, I suggest that his contrasting poles in fact correspond rather well to contrasting current political realities in the United States and the rest of the West, which in turn, make it correspondingly easier or harder for public opinion to translate directly into policy.

While the most common argument from populism is the one I have sketched above — that populist political structures and political culture in the United States allow popular support for capital punishment to translate more directly into public policy than it can in Europe — there is an alternative argument from populism that treats America’s populist political culture more as a *motivation* for retaining capital punishment than as a *mechanism* by which retention occurs. This alternative argument proposes that the inherent fragility and insecurity of the more populist versions of democracy create a demand for compelling symbols of strength and sovereignty, of which the death penalty is a potent example. Austin Sarat has made the best case for this claim:

It may be that our attachment to state killing is paradoxically a result of our deep attachment to popular sovereignty. Where sovereignty is most fragile, as it always is where its locus is in “the People,” dramatic symbols of its presence, like capital punishment, may be most important. The maintenance of capital punishment is, one might argue, essential to the demonstration that sovereignty could reside in the people. If the sovereignty of the people is to be genuine, it has to mimic the sovereign power and prerogatives of the monarchical forms it displaced and about whose sovereignty there could be few doubts.⁶⁴

This argument is modern echo of one of the founding mythologizers of American populist

⁶²Wills, *supra* note ---, at 18.

⁶³*Id.*

⁶⁴Austin Sarat, *The Law and Politics Book Review*, Vol. 8, No. 3 (March, 1998), pp. 114-16 (reviewing James Acker, et al., eds., *America’s Experiment With Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (1998)).

democracy, Thomas Paine, who wrote in 1776 that, "[i]n America the law is king. For as in absolute governments the king is law, so in free countries the law ought to be king [and ceremoniously crowned as such]; . . . but lest any ill should afterwards arise, let the crown at the conclusion of the ceremony be demolished and scattered among the people whose right it is."⁶⁵ There is no more vivid way for the law to be ceremoniously crowned as king than by the use of capital punishment duly authorized and channeled through the legal system.

Unlike the more familiar argument from populism, this latter argument has a harder time establishing that American populist democracy is exceptional, as compared to other Western democracies, in its need for dramatic enactments of popular sovereignty. After all, the entire rest of the Western democratic world also moved, some nations quite dramatically, from monarchical to democratic systems of government. What reasons are there for believing that their democratic structures are any more fragile or insecure than our own? Why would their democracies — all of them newer than our own — not crave the same sort of enactments of popular sovereignty in imitation of former monarchical prerogatives? The basis for American exceptionalism here is harder to clearly identify than it is in the context of political institutions and culture.

5. Criminal Justice Populism: The argument for the "[p]opulism" theory of American exceptionalism with regard to capital punishment gains strength when one recognizes that it is not merely that politics is more populist in the United States, but also that criminal justice is thought to be a particularly appropriate subject for populist influence and control within the political arena. One of the most clearly "[e]xceptional" aspects of the structure of American government is the much greater degree of both lay participation in the criminal justice system and direct political accountability of institutional actors within the criminal justice system. While many other countries use lay fact-finders to a certain extent in criminal trials, no other country authorizes such a large role for criminal trial juries as does the United States.⁶⁶ Moreover, the extensive use of lay grand juries in the charging process in the United States is even more truly anomalous.⁶⁷ Equally anomalous is the fact that the vast majority of American prosecutors are elected rather than appointed.⁶⁸ Judges, too, are directly elected or otherwise politically accountable in a large number of states.⁶⁹ This current state of affairs is the result of a

⁶⁵**Common Sense** (1776).

⁶⁶*See Craig M. Bradley, Criminal Procedure: A Worldwide Study* (1999).

⁶⁷Id.

⁶⁸While federal prosecutors are appointed by the President, over 95% of county and municipal prosecutors are selected by popular election. *See Robert L. Misner, Recasting Prosecutorial Discretion*, 86 **J. Crim. L. & Criminology** 717, 734 (1996).

⁶⁹Twenty-three states have popular elections for nearly all levels of the state judiciary, while an additional ten states combine a system of popular election with executive or legislative appointment of judges. **Council of State Governments, Book of the States 2000/2001** at 137-

uniquely American turn during the 19th century toward increasing and entrenching democratic control over state and local governments through state constitutionalism.⁷⁰

These clearly “exceptional” institutional arrangements, like populism in electoral politics, provide a mechanism through which popular support for the use of capital punishment can influence institutional decision-making. In this context, however, the influence is not on legislative decision-making but rather on prosecutorial charging decisions, judicial conducting of criminal trials, and lay rendering of verdicts and sentences “especially in highly publicized capital, or potentially capital, cases. Elected officials who campaigned on a death penalty platform, or re-elected officials who were vigorous advocates for the use of available capital sanctions while in office, no doubt perceive a mandate to use the death penalty in way that European judges and prosecutors, more isolated products of an elite bureaucracy, could not possibly. There is thus something of a “feed-back” loop between voters and elected officials that tends to reinforce and intensify tendencies toward the use of capital punishment. This loop helps to explain some of the extreme intra-state variation noted above⁷¹ in the use of the death penalty: some of the most “active” counties have been those with a District Attorney highly and vocally committed to the use of capital punishment, such as Johnny Holmes, Jr., in Houston, known as “the Texas Terminator,”⁷² and Lynne Abraham in Philadelphia, dubbed “the deadliest D.A.”⁷³

While the “criminal justice populism” theory offers a plausible account for the role of populism in producing capital charges, verdicts, sentences, and executions, it has less direct relevance to the issue of abolition or retention *per se*. The election of many state court judges does help to explain why judicial abolition, in the rare instances in which it has been attempted, as it was briefly in federal court and with more lasting influence in the state of Massachusetts,

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⁷⁰The rise of Jacksonian democracy in the 1820's provided an impetus toward extending the franchise and providing for the popular election of many state and local officials, including judges, prosecutors, and sheriffs. To a large extent, these movements toward republicanism were accomplished by state constitution drafting or revision. See Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, in **Encyclopedia of Crime and Justice** 1242, 1243 (Joshua Dressler et al., eds., 2nd ed. 2002); G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 **Wis. L. Rev.** 729, 736-37 (1998).

⁷¹See *supra* pp. ---.

⁷²James Langton, *The Texas Terminator Keeps Death Row Busy*, **London Sunday Tel.**, July 18, 1999, at 29.

⁷³Tina Rosenberg, *The Deadliest D.A.*, **N.Y. Times Magazine**, July 16, 1995, at 22.

has occurred in jurisdictions where judges are appointed and thus buffered from political influence.⁷⁴ But the relevance of criminal justice populism to legislative abolition — where almost all the action has been in the rest of the Western world — is less clear. Perhaps one could argue that the greater use of existing capital statutes in states with greater criminal justice populism makes abolition that much more unthinkable; but one could also argue that greater use of capital punishment is more likely to produce either controversial cases, like the recent capital prosecution of Andrea Yates in Texas,⁷⁵ or serious legal error that might undermine confidence in the system of capital justice.⁷⁶ However, if declining use of the death penalty or *de facto* abolition (defined as ten years without an execution) or outright moratorium is a necessary step on the road to abolition, as the experience of many European countries might suggest,⁷⁷ then American criminal justice populism may indeed present a serious impediment to American abolition.

6. Federalism: Another “exceptional” feature of American political organization is American federalism. A number of other Western democracies, such as Germany, Switzerland, and Canada, are structured on a federal model, with discrete governmental units allocated some autonomous spheres of authority within the larger federal nation-state. However, the United States is the only country that gives full criminal law-making power to individual federal units. This grant cannot be superseded by Congress, as the federal constitution is structured to ensure state dominance over criminal law.⁷⁸ As a result, criminal law-making and law enforcement are

⁷⁴See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating the capital statutes of virtually every American jurisdiction under the Eighth Amendment); *Commonwealth v. O’Neal*, 339 N.E.2d 676 (Mass. 1975) (striking down Massachusetts death penalty under the Massachusetts Declaration of Rights); *D.A. for the Suffolk District v. Watson*, 411 N.E.2d 1274 (Mass. 1980) (striking down new penalty legislation under Massachusetts Declaration of Rights); *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984) (striking down new death penalty legislation under the Massachusetts Declaration of Rights, even after the passage of a state constitutional amendment authorizing capital punishment).

⁷⁵See Paul Duggan, *NOW Rallies to Mother’s Defense; Group Says Woman Needs Help, Not Prison, in Drowning of 5 Children*, **The Wash. Post**, Sept. 3, 2001, at A3.

⁷⁶See **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** 164-66 (2002) (greater use of the death penalty is correlated with higher error rates).

⁷⁷See Amnesty International, *The Death Penalty Worldwide: Abolitionist and Retentionist Countries* (November, 2001), *supra* note --- (revealing the existing of a significant time lag between the last recorded execution and the date of *de jure* abolition in the vast majority of abolitionist countries).

⁷⁸See Sara Sun Beale, *Federal Criminal Jurisdiction*, **Encyclopedia of Crime & Justice**

understood and experienced in the United States as primarily a state and local concern, with federal law-making and enforcement as a limited, specialized adjunct.⁷⁹ This arrangement, unique in Western democracies, necessarily permits local or regional enthusiasts to keep the death penalty going within the United States, even when attitudes and trends are moving in the opposite direction in other parts of the country. Nationwide abolition can thus be achieved, as a legislative matter, only by convincing the legislatures of 50 different states and the federal legislature as well.

Coordination is the most obvious challenge for a successful nationwide abolitionist movement in such a system. This coordination problem is exacerbated by the radical decentralization of criminal law enforcement authority with states. Local district attorneys control the use of the death penalty on a county-wide basis; thus, even achieving state-wide abolition is difficult without the cooperation and support of local law enforcement officials whose individual political views and agendas must be accommodated. In addition to the problems of coordination posed by federalism and localism, the continued existence and use of the death penalty in some states (and in some counties within states) makes it more difficult to urge abolition in the larger context and even promotes the attempts of proponents to urge reinstatement in abolitionist jurisdictions. State and local political actors with national political aspirations have reasons to oppose abolition (or even to actively promote capital punishment) in their own bailiwicks if their political fortunes depend on other jurisdictions in which support for the death penalty is strong.

7. Southern Exceptionalism: The natural and intended consequence of American federalism is substantial state and regional variation, which is clearly observable in the context of capital punishment. The vast majority of executions within the United States, at least in the [modern era] of capital punishment since *Furman v. Georgia*, have been carried out by a handful of states located in the American South and Southwest.⁸⁰ Hence one theory of American exceptionalism regarding capital punishment is the thesis that the country as a whole is not exceptional; rather the South (if one expands the concept to include the Southwestern border states) is exceptional within America. This theory, of course, then requires an account of what

694, 694 (Joshua Dressler, et al., eds. 2002) ([General police powers and the bulk of criminal jurisdiction were not granted to the federal government, and accordingly were uniformly recognized to be reserved to the states.]).

⁷⁹See Daniel C. Richman, *Federal Criminal Law Enforcement*, **Encyclopedia of Crime & Justice** 698, 699 (Joshua Dressler, et al., eds. 2002) (noting that [what is most surprising about the federal enforcement apparatus is its small size, at least when compared to the network of state and local enforcement agencies, which have primarily responsibility for patrolling the streets and pursue most of the crimes that happen on or off them.]).

⁸⁰See *supra* at ---.

makes the South exceptional, if it is to provide an explanation for American exceptionalism. Such an account is the subject of Jordan Steiker's contribution to this symposium,⁸¹ but I will provide a brief sketch of mine own of four interrelated theories of American Southern exceptionalism.

First, perhaps the most obvious aspect of Southern exceptionalism is race. The American South has a distinctive legacy of racial inequality stemming from the wide-spread practice of chattel slavery and continues to have disproportionately large (though still minority) black populations. From colonial times, the capital punishment policies of the American South were deeply marked by the institution of slavery. The eighteenth century saw the widespread enactment of capital crimes targeted solely at crimes by slaves.⁸² In first half of the nineteenth century, the abolitionist movement of the Northeast and Midwest had no Southern analog, in part because of its connection to the movement to abolish slavery⁸³ and in part because slaveowners perceived capital punishment to be a necessary deterrent to serious crimes by slaves.⁸⁴ As a result, reports historian Stuart Banner, "By the time of the Civil War . . . [s]lavery had produced a wide cultural gap between the northern and southern states in attitudes toward capital punishment."⁸⁵ This cultural gap did not close with the abolition of slavery after the Civil War; rather, what followed was a long era of lynchings in which mob executions of black men were common⁸⁶ and an even longer era of "legal lynchings" in the South " [e]xecution[s] sanctioned by the forms of judicial process absent the substance of judicial fairness."⁸⁷ This long-standing and close association of capital punishment with the formal and informal social control of blacks in the South may contribute to Southern unwillingness to part with the death penalty, particularly in an era, as noted above, in which the death penalty plays such a strong symbolic role in the

⁸¹See Jordan M. Steiker, *Texas and Southern Exceptionalism*, --- **Or. L. Rev.** --- (2002).

⁸²See **Banner**, *supra* note --- ,at 8 ("Most of these race-dependent capital crimes, unsurprisingly, were created in the Southern colonies. Slaves made up more than half the population of South Carolina by 1720 and nearly half that of Virginia by 1850. To manage these captive workforces the southern colonies turned to ever-increasing lists of capital statutes.")

⁸³*Id.* at 142-43.

⁸⁴*Id.* at 142.

⁸⁵*Id.* At 143.

⁸⁶See **Randall Kennedy, Race, Crime, and the Law** 41-47 (1997) (describing and documenting the lynching of black victims in the post-Civil War era, the vast majority of which occurred in the South).

⁸⁷*Id.* at 88.

politics of crime control.⁸⁸ Indeed, recent empirical studies show that racial prejudice is significantly linked both to support for the death penalty and for tougher crime control policies,⁸⁹ and that such prejudice remains stronger among native white southerners than among whites who were born and live elsewhere.⁹⁰

A different facet of American Southern exceptionalism is the South's distinctive embrace of Protestant fundamentalism. Indeed, the term "the death belt" is a play on "the bible belt," with both terms designating the American South. Numerous sociological studies find a correlation between Southern fundamentalism and support for the death penalty.⁹¹ How exactly the dynamic works connecting Southern fundamentalism and attitudes about capital punishment is an interesting and unsettled question, about which sociologists and theologians will continue

⁸⁸See *supra* at ---.

⁸⁹See Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 **J. of Research in Crime & Delinquency** 202 (1994) (reporting empirical study in which two indexes of racial prejudice were significantly linked to greater support for the death penalty among whites, even after controlling for relevant demographic and attitudinal variables); Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 **Social Psychology Quarterly** 67 (1991) (empirical analysis finding that racial prejudice significantly predicts both support for the death penalty and tougher crime control policies).

⁹⁰See Christopher G. Ellison, *Southern Culture and Firearms Ownership*, 72 **Social Science Quarterly** 267 (1991) (also reporting a significant relationship between racial antipathy and firearms ownership among native Southerners).

⁹¹See, e.g., Marian J. Borg, *The Southern Subculture of Punitiveness? Regional Variation in Support for Capital Punishment*, 34 **Journal of Research in Crime and Delinquency**, 25 (1997) (reporting empirical study showing that fundamentalist church membership is significantly related to southerners' attitudes toward capital punishment); Chester L. Britt, *Race, Religion, and Support for the Death Penalty: A Research Note*, 15 **Justice Quarterly** 175 (1998) (reporting empirical study in which white fundamentalists showed higher levels of support for the death penalty than either black fundamentalists or white and black nonfundamentalists); Harold G. Grasmick & John K. Cochran, *Religion, Punitive Justice, and Support the Death Penalty*, 10 **Justice Quarterly** 289 (1993) (reporting empirical study finding that evangelical/fundamentalist Protestantism was correlated with punitiveness in criminal justice policy, including the death penalty for both adults and juveniles); Harold G. Grasmick, et al., *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, 30 **Criminology** 21 (1992) (reporting empirical study in which individuals affiliated with fundamentalist Protestant denominations were reported to have the highest punitiveness and biblical literalism measures, of which only the latter was correlated with greater death penalty support).

to debate. Nonetheless, whether it is fundamentalist doctrine or leadership or something else that forges the connection, it is hard to gainsay that Southern fundamentalist Protestantism plays some role in generating or reinforcing support for capital punishment in the South.

Third, there is substantial support for the view that the American South has a distinctive sub-culture of violence, whether it is measured in homicide rates,⁹² gun ownership rates,⁹³ or attitudes toward defensive and retaliatory interpersonal violence.⁹⁴ The roots of the greater violence in the South are hypothesized to stem from a Southern "honor culture" in which dueling, among other forms of interpersonal violence, was more of an accepted practice than elsewhere.⁹⁵ The connection between the relatively more violent Southern culture and the use of capital punishment is speculative, but the Southern emphasis on defensive and retaliatory violence on the interpersonal level has some obvious connection to support for capital punishment, and it would not be surprising more generally, if a more violent culture made more violent penalties seem both more necessary and less shocking.

Fourth and finally, the American South is exceptional in the strength and depth of its resistance to the civil rights movement of the 1950's and 1960's, to which the movement for the abolition of capital punishment has had strong connections. In the 1960's death penalty abolition was been promoted by the very same institutional actors who had promoted the end of racial segregation in the South, and through the very same means " federal constitutional imposition through litigation. It was the N.A.A.C.P. Legal Defense and Education Fund that litigated both the major desegregation cases and the death penalty cases. Some part of Southern enthusiasm for capital punishment in the modern, post-*Furman* era may well be a reaction to this connection and to the attempt of the federal government to impose "national" values on Southern culture.

It is a fair question whether any or all of these aspects of Southern exceptionalism fully account for the disproportionate use of the death penalty in the American South. But the biggest qualification of the "Southern exceptionalism" thesis for American exceptionalism with regard to capital punishment comes from the recognition, more fully fleshed out by Jordan Steiker,⁹⁶

⁹²See *supra* at ---.

⁹³See James D. Wright & Linda L. Marston, *The Ownership of the Means of Destruction: Weapons in the United States* 23 **Social Problems** 93 (1976).

⁹⁴See Christopher G. Ellison, *An Eye for an Eye? A Note on the Southern Subculture of Violence Thesis*, 69 **Social Forces** 1223 (1991) (finding that older Southerners express strong normative support for defensive and retaliatory interpersonal violence).

⁹⁵See generally **Richard E. Nisbett & Dov Cohen, Culture of Honor: The Psychology of Violence in the South** (1996).

⁹⁶See Jordan Steiker, *supra* note ---.

that states outside of the South still make significant use of their capital statutes in the production of death sentences, even though their execution rates are far lower than those of the South. While the South may dominate the country in executions, that is not the only measure of "use" of capital punishment. The United States cannot explain away its national exceptionalism as wholly a product of regionalism.

8. European Exceptionalism: This theory turns the tables and asks whether there is something distinctive about European politics, culture, or history that would lead to wholesale abolition of the death penalty in the space of only a few short decades. A version of this theory has already been explored above as a contrast to American political populism: bureaucratic elitism in European politics has allowed European political leaders to abolish the death penalty despite substantial popular support for capital punishment at the time of abolition. But this theory does not explain what has led European political leaders to conclude that the death penalty must be abandoned at this precise point in time.

The answer to this question may lie in Europe's distinctive historical experiences during the 20th century. Europeans and others who have recently and vividly experienced terrible abuses of state power may see more reason to remove the death penalty from the state's arsenal of sanctions. Within the last century, Europe experienced two horrific World Wars fought on its soil and witnessed the bloody rules of Mussolini, Hitler, and Stalin. These experiences may have helped to create a climate in which dramatic demonstrations of state-approved violence are disfavored. Moreover, Europe has suffered numerous violent ethnic conflicts throughout the last century, and it may fear that the use of the death penalty could play a role in exacerbating such conflicts. Thus, it is not surprising that fears of Irishmen being wrongly convicted and executed for terrorism have changed the minds of some British supporters of capital punishment⁹⁷ or that capital punishment is not on the table as an available sanction for the Bosnian War Crimes Tribunal. It is worth noting, too, that while methods of execution have been sanitized in the United States, at the time abolition in Britain and France, the sole mode of execution was the gallows and the guillotine, respectively, each of which carry some significant historical baggage. With associations to the hanging fairs at Tyburn and the bloody Terror during the French Revolution, the gallows and the guillotine themselves embodied reasons for British and French political leaders to distance themselves from capital punishment.

The World Wars and ethnic conflicts in Europe no doubt contributed to Europe's far greater willingness than that of the United States to generate and support international norms, especially those related to human rights. The casting of abolition of the death penalty as an issue

⁹⁷See Hood, *supra* note ---, at 526 (noting that "the revelation of several miscarriages of justice in cases where the persons " mostly Irish convicted of terrorist murder " would have been executed has convinced many former advocates that a return to capital punishment could not be safely administered").

of international human rights (as opposed to a prerogative of purely domestic concern) has been well documented;⁹⁸ the most dramatic and powerful example of this trend is Protocol No. 6 to the European Convention on Human Rights, abolishing the use of the death penalty in peacetime, which was adopted in 1983 — many years ahead of the corresponding provisions adopted by the United Nations or inter-American human rights law.⁹⁹ Membership in the Council of Europe, which is required for admission to the European Union, now requires adherence to Protocol No. 6, a requirement that ensures both that Eastern Europe will follow the abolitionist trend begun in the West and that there will be no backsliding on the issue of capital punishment in already abolitionist states. In contrast, the United States has managed to maintain some version of isolationism throughout much of the same twentieth century, and a version of such “anti-internationalism” still runs fairly deep today, in what one commentator calls “the new sovereigntist” vision, which holds that “the United States can pick and choose the international conventions and laws that serve its purpose and reject those that do not.”¹⁰⁰ One aspect of international law which the United States has steadfastly rejected is the abolition of capital punishment for adults or even for juveniles.

9. American Cultural Exceptionalism: This theory is in some ways the inverse of the “European exceptionalism” thesis and in some ways an extension of the “Southern exceptionalism” thesis. Admittedly more popular in Europe than in the United States, this theory posits that the United States (rather than merely the American South) has “sub-culture of violence” in the larger Western culture. Perhaps because of its relatively recent experience as a “frontier” society, the theory holds, America is simply more violent and crude than the rest of the Western industrialized world. Proponents of this theory note that America is also an outlier on the issue of gun control, regulating firearms to a much lesser degree than our Western counterparts, and that American popular culture glorifies violence, usually by gun-toting macho men. From G.I. Joe, to cop shows on T.V., to the American Western film, American popular culture celebrates violence by soldiers, law enforcers, and righteous men outside the law — promoting exactly the values one might expect to lead to an embrace of capital punishment. Even American intellectual elites occasionally seem to enjoy sending up American society in this way. When French Minister of Justice Robert Badinter visited the United States in 1983, fresh from leading the successful abolitionist charge in France, the *Washington Post* ran an Op-Ed reporting, almost gleefully, Badinter’s comment that on the day the death penalty was abolished in France, he received a telegram from a Texas millionaire who wanted to buy an outlawed guillotine for his game room.¹⁰¹

⁹⁸See **Schabas**, *supra* note ---.

⁹⁹*Id.* At 219-20.

¹⁰⁰Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, **Foreign Affairs** 9 (Nov./Dec. 2000).

¹⁰¹See Colman McCarthy, *Messenger of Life*, **The Wash. Post**, Feb. 12, 1983, at A15.

It is hard to prove or disprove this theory, but there are a number of reasons to be at least somewhat skeptical of it. One reason is that public opinion polls, discussed above,¹⁰² show that Europeans, too, support capital punishment in substantial numbers, despite any [cultural] differences that might exist. Another is that Europeans are huge consumers of exactly the media products that are noted as support for the [American violence] thesis; indeed, as many or more of the top-grossing films in Europe, as compared to the United States, are American films that are R-rated for violence.¹⁰³ A third is that there is surprisingly little empirical support for a strong, generalized connection between media violence and violent attitudes or behavior, despite many attempts to forge such a link. And a fourth is that the higher homicide rates in the United States are partly, though not completely, a result of laxer gun control laws and thus not as strong an independent indicator of violence as the foregoing might suggest. These qualifications are not meant to refute the claim that the United States might have more [violent] a culture than the rest of the West, or that this violence might play a role in the retention of capital punishment in the United States, but rather to suggest that such a claim is a good deal hazier and more conjectural than is often acknowledged.

10. Historical Contingency: This last theory is like the proverbial thirteenth chime of the clock that casts doubt on all that has come before. Perhaps because it fits so poorly with all the other theories, it has been surprisingly neglected. The [historical contingency] thesis holds that the failure of the United States to abolish the death penalty was something of an historical accident [a near miss, if you will]. The U.S. Supreme Court *did*, in fact, abolish capital punishment in 1972 with its decision in *Furman v. Georgia*. Many believed at the time that the abolition was permanent. If it had turned out to be so, there would be question of American exceptionalism with regard to capital punishment today: our abolition would have fit perfectly with that of the rest of the industrialized West. If the Supreme Court had managed to speak more clearly, emphatically, and unanimously on the issue in the original *Furman* decision, or if the Court's membership had changed differently between 1972 and 1976, abolition might well have been permanent. But the Court's legitimacy was weakened by its decisions promoting integration, regulating the police, and legalizing abortion, and by 1976, it was willing to retrench on the issue of capital punishment in response to the outpouring of rage that *Furman* had generated.

Significantly, the Court choose constitutional regulation of capital punishment rather than abolition as its mode of retrenchment. As I have argued at greater length elsewhere, this choice helped to legitimize and stabilize the practice of capital punishment in the United States.¹⁰⁴

¹⁰²See supra at ---.

¹⁰³Get cite from Chris.

¹⁰⁴See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two*

Moreover, the Court's validation of the continuing use of the death penalty as a matter of constitutional law also created an impediment to American acceptance of capital punishment as a violation of international human rights law, so prevalent in Europe and elsewhere. It is hard for American political leaders to articulate or for members of the American public to accept that our much vaunted constitution could validate something that constituted a violation of international human rights.

The "historical contingency" thesis proposes that the U.S. Supreme Court is the institution most similarly situated to the abolitionist legislatures that led the rest of the Western industrialized world to abolition. Only the Court had the power to effect change throughout the United States; only the Court was sufficiently insulated from political will that it could lead rather than follow public opinion. In the aftermath of the Court's failure, the hope for abolition turned to individual state legislatures, with all of the forces noted above arrayed against abolition. In addition, the Court's hope that it could regulate and reform the death penalty through the constitution ironically added to those forces both by promising to ensure the fairness of the capital process (without actually delivering on this promise) and by rendering less powerful international claims that the death penalty violated fundamental and universal norms.

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A quick perusal of this essay, simply by the sheer number of headings and theories, conveys a sense that powerful forces, unique to the United States, have compelled the result that we see today — anomalous American retention of capital punishment in the Western industrialized world. In fact, a careful reading should promote a much more nuanced view. Some of the most popular and easy theories of American exceptionalism with regard to capital punishment have less to recommend them than meets the eye, and a sobering recognition of the many contingencies that have attended America's recent "death penalty story" (and all of history) should temper a bleak acceptance of historical "fate."