THE DEATH PENALTY, PUBLIC OPINION, AND POLITICS IN THE UNITED STATES

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INTRODUCTION

Let me start a long time ago, in 1972. In June of 1972, the Supreme Court decided the case of *Furman v. Georgia*,[1] a huge decision, in which the Court held that all existing death penalty laws in the United States at that time were unconstitutional, and the Court vacated the death judgments against nearly 700 people on death rows across the country.

At the time, I was a second-year law student at the University of California at Berkeley. My reaction to *Furman* was "Huh? Death penalty? Do we have a death penalty in California? Am I against it? I think I am, but maybe not. I don't know."

I didn't have a position on the death penalty. I do now, and I should say what it is, although I am not here to talk about my views on the death penalty.

I think capital punishment is a terrible idea. It is a policy that has no affirmative value whatsoever in modern states. In particular, it does not deter murder or crime in general. It is also extremely expensive. It inflicts huge costs and pain on many people, including the surviving victims of capital crimes and the family members of those who are killed. The death penalty is arbitrary; we do not kill the worst murderers, but those who are most unlucky. We discriminate by race in imposing the death penalty. We sentence innocent people to death—we know that because many have been exonerated—and there is no doubt that we have executed innocent people and will continue to do so. Finally, the death penalty embodies a type of vengeful punitive nature that infects the

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1. 408 U.S. 238, 239–40 (1972).

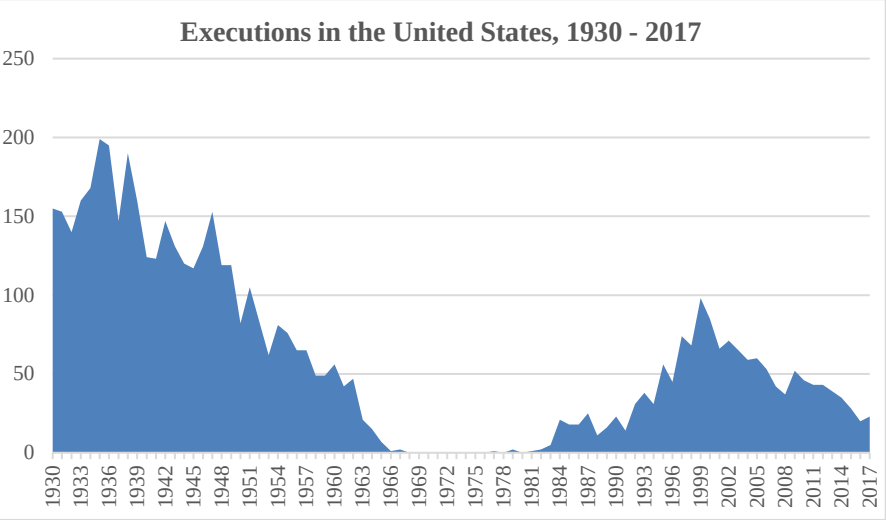
entire criminal justice system and contributes to other terrible problems we live with, in particular mass incarceration.

If you do not agree with all that, I will not try to persuade you. I only mention my views so you'll know that part of the background for what I have to say about the death penalty in recent American history.

I. WHY DO WE STILL HAVE A DEATH PENALTY IN AMERICA?

Back in 1972, forty-five years ago, I had not given the topic much thought—which is not surprising. In Figure 1, you see the number of executions in the United States from 1930 to 2009. In 1972, we were at the bottom. There had not been a single execution in five years.

FIGURE 1



Sources: Tracy L. Snell, U.S. Dep't of Justice Office of Justice Programs Bureau of Justice Statistics, Capital Punishment, 2011 – Statistical Tables (2014) https://www.bjs.gov/content/pub/pdf/cp11st.pdf [https://perma.cc/ZG59-S2M3]; Bureau of Justice Statistics, National Prisoner Statistics Program (2011); Death Penalty Info. Ctr., Facts About the Death Penalty (2018) https://deathpenaltyinfo.org/documents/FactSheet.pdf [https://perma.cc/93PZ-PLYR].

Earlier, before the Second World War, executions in the United States were reasonably common, reaching a level of 150 to 200 a year for several years. After the Second World War, the rate of executions went down and down until it reached zero. It seemed like the United States would follow the pattern in several other western democracies—Germany, Italy, the United Kingdom, Canada, Spain, France—where, after World War II, the use of the death penalty declined, then it fell into disuse, and then was ultimately abolished altogether.

Furman looked like it was a step – a big step – along the path to abolition. But that did not happen. Starting several years later, executions resumed, and eventually got back up to rates we had not seen since the 1950s. Why was the American path so different?

There are two fundamental reasons.

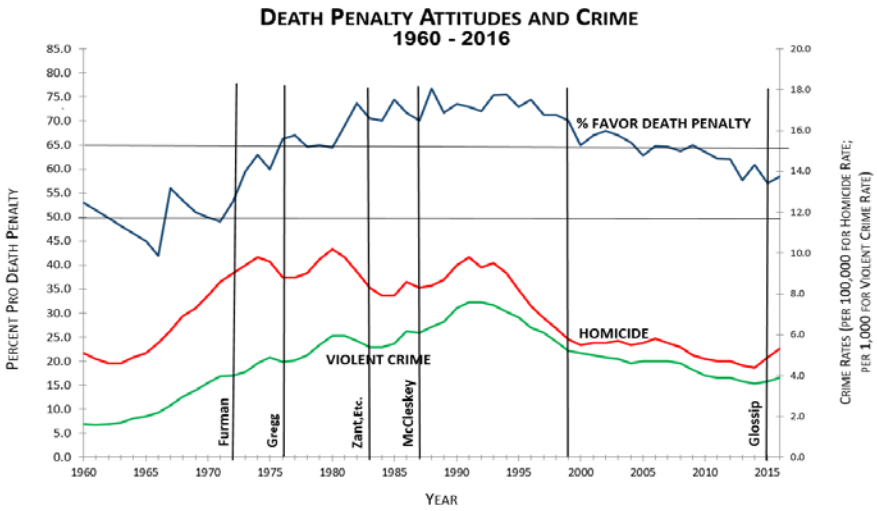
First, in Canada and the European countries I mentioned, the death penalty was abolished by national legislatures that controlled unitary criminal justice systems. In the United States, the criminal justice system is fragmented. On this issue, it's divided into fifty slices (or fifty-one, or fifty-three, depending on whether you count the District of Columbia and the territories). As a practical matter, Congress can't abolish the death penalty.

Second, and probably more important, in Canada and the European countries that abolished the death penalty, crime in general and the death penalty in particular were not significant electoral issues. Not then, and in most of them still not now. In America, crime has been an important electoral issue in local and state elections for a long time, at least 150 years. Crime became a *national* electoral issue in America starting in the late1960s, and before long the death penalty became an essential part of the politics of crime. That is a major focus of my talk today.

A. Crime and Public Opinion

Figure 2 is more complicated than Figure 1. It helps explain why and how public opinion came to influence our policy on capital punishment.

FIGURE 2



Sources: "% FAVOR DEATH PENALTY" is derived from opinion poll data stored in the iPoll Databank of the Roper Center for Public Opinion Research [data on file with the author]; "HOMICIDE" and "VIOLENT CRIME" are derived from data on crime rates reported in the FBI's Uniform Crime Reports. FBI, UNIFORM CRIME REPORTING, https://ucr.fbi.gov/ [https://perma.cc/R48R-3EP4].

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The two lines at the bottom of Figure 2 track the rates of crime in the United States from 1960 through 2016 – violent crime in general, and homicide separately. They show that in the early 1960s the rate of violent crime was very low, near historic lows since these statistics have been available. But the homicide rate began to grow rapidly in the mid-1960s, and then kept going up. It reached a peak in the early 1970s and stayed high, with ups and downs, for twenty-some years. Violent crime in general followed a similar pattern but more slowly. It increased into the early 1990s.

I mentioned that crime became a national political issue in the late 1960s. The turning point was Nixon's campaign for president in 1968, when one of his major planks was a promise to restore "law and order." In Barry Goldwater's unsuccessful campaign for president in 1964, he talked about "crime in the streets"—but it didn't catch on. In 1968 it did, in the context of the rising crime rates that we see in Figure 2.

The type of crime that people were most concerned about in 1968 was politically driven: anti-war demonstrations that led to violence, and riots by African-Americans in major American cities, especially those that took place after the assassination of Martin Luther King in April of 1968. There was an unmistakable racial element to the campaign for law and order in 1968. That was intentional, as John Ehrlichman, one of Nixon's closest advisors at the time, admitted some thirty years later. The focus on law and order was unambiguously a campaign against anti-war demonstrators and African-Americans.

The top line in Figure 2 shows the percentage of people who support the death penalty, over time. In the early 1960s, support for the death penalty was quite low, hovering around fifty percent. That is how it appears on this chart, but we don't know that much about public support for the death penalty back then. The line from 1960 to 1972 is jagged because, at that time, there were very few public opinion polls that asked questions about the death penalty. The few points that you see here are the only polls that we have from that time. In the 1980s and 1990s there were maybe fifteen to twenty such polls each year. In the 1950s and early 1960s there was one poll one year, another poll two or three years later. That, as much as anything, reflects the status of the death penalty. It wasn't a big issue. People didn't think about it or talk about it much.

Support for the death penalty started to go up in the early 1970s and kept going up until it reached a high plateau, in the range from seventy percent to seventy-six percent, from about 1982 to 1999. As you can see, the increase in support for the death penalty followed the rise in the crime rates, but with a time lag. It looks like it took several years for the effect of rising crime to take hold.

B. The Supreme Court

How do these public attitudes translate into law? In the fragmented American criminal justice system, any attempt to modify, limit, or ultimately repeal the death penalty is likely to focus on the one institution that has the power

to write legal rules that apply to murder prosecutions throughout the country—the United States Supreme Court. So, the Supreme Court has been the main focus of most attempts to regulate and possibly repeal the death penalty.

Furman v. Georgia, which I already mentioned, is the pivotal case. It came to the Court as a result of a several-year-long campaign by the NAACP Legal Defense and Educational Fund, which took on the issue because they kept running into racial discrimination in the use of the death penalty in the South. Legal Defense Fund lawyers and other lawyers working with them produced the moratorium on executions that was in place in the United States from 1967 until 1977.

How has the Supreme Court handled this challenge? Let me pause for another disclaimer. Here's a major topic I am not going to talk about, except in the briefest passing: Supreme Court jurisprudence on the death penalty, starting with *Furman*. The death penalty litigators in the room know why not, and are giving me knowing smiles. They know that this body of law is basically indecipherable—which has become increasingly clear over forty-five years of trying to decipher it. In any event, this is not a talk about constitutional law.

"Mr. Dooley" is a fictional bartender. He was created by a satirist named Finley Peter Dunne around the turn of the twentieth century. In 1901, the fictional Mr. Dooley said "th' supreme coort follows th' iliction returns."[2] This is taken as a criticism, because the Supreme Court, we are told, is not supposed to be guided by popular opinion. Remember what Chief Justice Roberts told the Senate at his confirmation hearing: Justices are umpires—they don't make law, they just "call balls and strikes"[3]—and umpires are not supposed to listen to the crowd.

Be that as it may, in *this context* the Supreme Court *is* supposed to pay attention to popular opinion, and ultimately to be governed by it. The main claim against the death penalty is that it violates the Eighth Amendment prohibition of cruel and unusual punishments, and the central issue in deciding whether a punishment violates the Eighth Amendment is its public acceptability.

In 1958, the Supreme Court held that to decide whether a punishment is constitutional under the cruel and unusual punishments clause, the Court must decide whether it comports with "evolving standards of decency that mark the progress of a maturing society."[4] Nobody seriously disputes that rule. Even a committed originalist like the late Justice Scalia never argued that the Court should *not* look to popular opinion and other indications of public acceptability to decide whether a punishment is unconstitutionally cruel and unusual. Why

2. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

3. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of the nominee, John G. Roberts).

4. Trop v. Dulles, 356 U.S. 86, 101 (1958).

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not? Probably because in the late Eighteenth Century, when the Eighth Amendment was enacted, many brutal punishments that are considered intolerable today were widely used, including flogging, branding, and ear cropping.

In any event, the Court has, to a great extent, followed popular opinion in its decisions on the death penalty, as we can see in Figure 2.

When *Furman* was decided in 1972, support for the death penalty was on the way up, but that wasn't yet clear. There were not many polls and support had been low for years. Crime and homicide had increased, but not to the levels that were seen ten years later. The Court, in a 5-4 decision, "kicked the can down the road"—sort of. It did two things.

First, as I mentioned, they said that all existing death sentence laws were unconstitutional and that everybody sentenced under them could not be executed.

Second, the Court implied that it was possible that better written and better implemented death-penalty laws might be constitutional under the Cruel and Unusual Punishments Clause. That, in any event, is what *Furman* has been interpreted as saying. *Furman* is actually nine separate opinions, including five individual opinions by the five justices in the majority. It's absolutely obscure. It's a Rorschach test. It means whatever you think it means. But that's how it has generally been taken.

That's where things stood until the next major case. Four years later, the Court decided *Gregg v. Georgia*[5] – take two of "Is the Death Penalty an Unconstitutional Cruel and Unusual Punishment?"

By then, in 1976, public support for the death penalty had clearly gone up from about 53% to something like 66%. Crime had also increased. The homicide rate was quite high. Violent crime was increasing and continued to increase for fifteen years.

More important, in those four years, thirty-five states had enacted new death penalty laws to replace the ones that had been struck down in *Furman*. And at least 460 defendants had been sentenced to death under those new laws. The Court, correctly, took those facts as strong evidence that the death penalty was acceptable to a contemporary society in 1976. In a 7-2 decision, it held that the death penalty does not in itself violate the Cruel and Unusual Punishment Clause of the Eighth Amendment, and that it might be constitutional if it is appropriately structured and properly implemented. Indeed, the Court upheld the constitutionality of the post-*Furman* death-sentencing schemes in Georgia, Florida, and Texas—and by implication, in several other states as well.

That second holding—that in order to be constitutional, the death penalty must be appropriately structured and implemented—was a huge qualification. It launched a period of constitutional regulation of the death penalty by the

5. 428 U.S. 153 (1976).

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Supreme Court that continues to this day, and—as far as anybody can tell—will go on for years to come. The Supreme Court hears and decides, on average, two or three death penalty cases a year. By now, there have been well over 100 Supreme Court death penalty cases since *Gregg*, most of which were decided under the Eighth Amendment Cruel and Unusual Punishments Clause. Some of them go one way, some the other; some make sense, some make no sense at all. And there's no end in sight.

Initially, the basic message of *Gregg* seemed clear. States could go ahead, use their newly enacted death sentencing laws, and begin to execute people. Except that didn't really happen for some time.

As of June 1983, there had been only seven executions across the country in the seven years since *Gregg*, and four of them were executions of "volunteers," defendants who gave up available appeals. That is to say, four of the seven were executed by their own choice while their cases were still under legal review. In other words, the Court's decision in *Gregg* that the death penalty must be administered under tight controls had stalled the process to the point that there were almost no executions. The Supreme Court knew all of that.

That issue came to a head in a series of decisions in 1983. In *Zant v. Stephens*[6] and three other cases, the Court aggressively deregulated the death penalty. It removed a bunch of procedural protections that most people thought it had imposed in *Gregg*, and said, in effect, "That is not what we meant at all." At the same time, the Court also expedited the process of federal court review of death sentences, federal *habeas corpus* review, in order to speed up executions.

It worked. As we see on Figure 1, the rate of executions started going up in 1983. In the second half of that year, after the decisions in *Zant* and the other cases, there were four more executions. None of them were volunteers. And the rate of executions kept going up until it reached heights we hadn't seen since the 1950s, and peaked at ninety-eight executions in 1999.

6. 462 U.S. 862 (1983).

C. The Death Penalty Triumphant

The period from 1983 through 1999 was the heyday of the death penalty in the United States in the last 50 years.

First, support for the death penalty was at an all-time high, as we see on Figure 1. By then pretty much everybody had a position on the death penalty and most of them were passionate. The death penalty had become a major political issue. There are many examples of this, but probably the best is the 1988 presidential campaign in which George H.W. Bush defeated Michael Dukakis, the governor of Massachusetts.

Crime was the leading issue in that campaign. Bush attacked Dukakis as soft on crime and focused heavily on a man named Willie Horton, as those of you who are old enough will remember well. (Actually, his name is William Horton, but he was called Willie by the Bush campaign and it stuck.) Horton, an African-American who had been convicted of murder, was in prison in Massachusetts. He was released for a few days as part of a prison furlough program, and while on furlough, he robbed, raped, and assaulted white victims. Dukakis had nothing to do with the release, but it happened while Dukakis was governor. That incident became the most conspicuous issue in the campaign: *Dukakis is soft on crime. Look at Willie Horton!* And indeed, pictures of Willie Horton—looking very dark and very scary—were shown on television for months throughout the country. The racial content of the message was unmistakable.

On election day in 1988, ABC News conducted an exit poll of voters. Twenty-seven percent of the respondents agreed that the candidate's position on the death penalty was "very important" to them in choosing the president. To put that in perspective, that means that more voters cared deeply about Bush and Dukakis's positions on the death penalty than about their positions on drugs, education, health care, or social security—or even the candidate's political party. The only issue that ranked ahead of the death penalty was abortion, and only by a few points.

By 1988, attitudes toward the death penalty had become an aspect of most Americans' self-identification. It was a matter of choosing sides. "I'm for the death penalty; so is George Bush. Michael Dukakis is against the death penalty, so I'm against him."

Throughout this period, the Supreme Court continued to decide death penalty cases, and mostly they came out in favor of the prosecution. I mentioned that race was a major issue in attitudes toward the death penalty. It was a major issue in the Supreme Court as well. In 1987, the Court decided the case of *McCleskey v. Kemp*,[7] in which they rejected an exceptionally well documented challenge to the use the death penalty in Georgia on the ground that defendants who were convicted of killing white victims were far more likely to be sentenced

7. 481 U.S. 279 (1987).

to death than those convicted of killing black victims. The Supreme Court's reaction? *That may be true, but as far as the Constitution is concerned, it doesn't matter*. *McCleskey* is one of the most notorious decisions the Supreme Court has reached in the past seventy years.

D. The Death Penalty in Retreat

And then, after 1999, things started to change.

By then, the homicide rate and the violent crime rate in general had been going down for years, since about 1993 or 1994, as we see on Figure 2. Homicides have kept going down. They are now at a level that we haven't seen since the 1960s, and violent crime is down to levels we haven't seen since the early 1970s.

It took several years for that change to have an effect. It takes a while for people to notice and believe that crime isn't as much of a problem as it used to be. But starting around 2000, support for the death penalty started to drop, and has continued to do so. It is now down around 58%, a level we have not seen since *Furman*.

It's not just the overall level of support. There was an even steeper drop in enthusiasm. The death penalty no longer commands the passion it once did.

In 1994, a National Election Survey (an excellent public opinion poll) found that 76% of the respondents favored the death penalty. In 2015, another high quality poll by the Pew Research Center found that support had dropped to 57%, a decrease of 19%. But the 1994 survey also found that at that time 59%—a strong majority of all respondents—"strongly favored" the death penalty. In 2015, strong support for the death penalty was down to 23%, a drop of 36%. In 2015 strong supporters were a minority even among those who favor capital punishment.

The use of the death penalty followed suit. In Figure 1, you see that the number of executions went down from ninety-eight in 1999 to twenty in 2016, an 80% drop. In 2006, twelve states had abolished the death penalty; that number is now up to nineteen states, plus the District of Columbia. Four additional states have moratoria against executions in effect, and in another twelve states where the death penalty is available in theory, nobody has been executed in at least five years. In other words, only fifteen states—fewer than half of those that have the death penalty on the books—have actually used it in the last five years.

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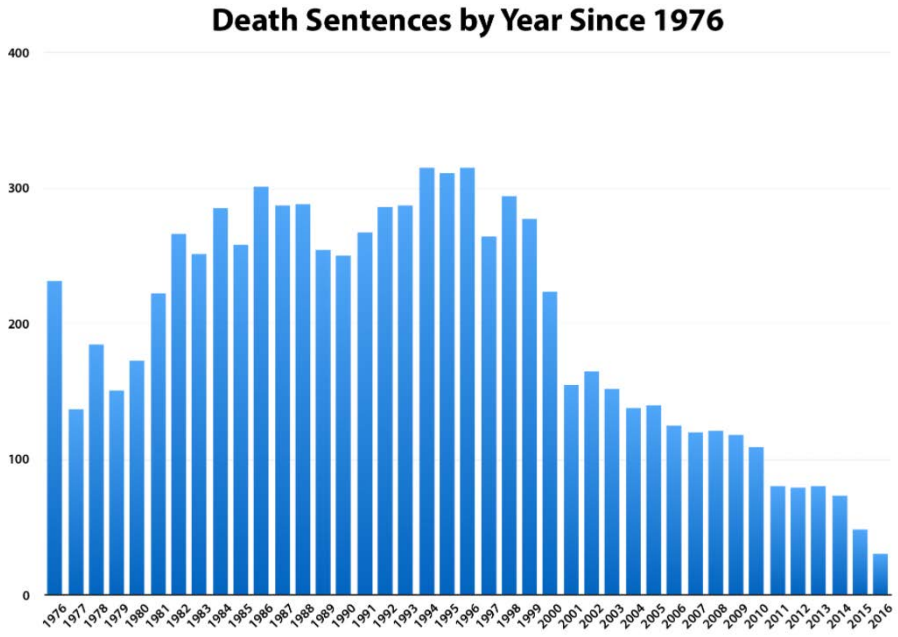
FIGURE 3



Source: Death Sentences By Year, Death Penalty Info. Ctr (2018), https://deathpenaltyinfo.org/death-sentences-year-1977-present [https://perma.cc/G5HN-2AY].

New death sentences have gone down even more quickly. See Figure 3. They just dropped off the table. The number of death sentences imposed decreased by about half from 1998 to 2001, and by 90% from the 1990s—when there were over 300 in some years—to 2016, when there were thirty-one.

Over a relatively short period, the death penalty has moved from center stage to the periphery. It is now far less common in every respect: less widely available, rarely imposed, infrequently carried out, less popular, and less passionately supported. And this has happened across the board, including in those states that executed the most prisoners less than twenty years ago.

In Texas, which has conducted more executions since 1976 than the next six states combined, the number of new death sentences went from forty-eight in 1999 to two in 2015. Two. In Virginia, which has had the second largest number of executions since 1976, there have been no new death sentences in the last five years. Zero.

And here in Missouri, through most of the 1980s and 1990s, you had half a dozen death sentences a year or more. But there have been only four new death sentences in Missouri since 2010, and none at all in the last three years.

II. WHY IS THE DEATH PENALTY IN DECLINE?

Why did all this happen? I don't know for sure, but here are some thoughts.

A. Crime and Politics

First, there's the drop in crime itself, once people noticed it and believed it. That explanation seems obvious, but it requires a bit of discussion. The relationship between crime, and the fear of crime, and support for the death penalty, is not necessarily symmetrical in good times and bad. If crime goes up, if murder is rampant, many people conclude that we need a death penalty to protect ourselves. If crime goes down, however, they might not switch to "We don't need the death penalty," but rather think "It seems to be working. Let's leave it in place."

More important, when crime goes down, many people just stop paying attention to the death penalty, or to crime and punishment generally—and lack of attention doesn't motivate anybody to do anything. If there's no crisis, an existing practice can just stay in place. The fact that crime has gone way down and homicide is much less common may mean that there is no affirmative push to increase the use of the death penalty, but it does not, on its own, create pressure to eliminate capital punishment or even reduce its use. That requires something else in addition.

Second, at least at the national level, crime has largely dropped out of politics since 2000—or had, until 2016. That change, of course, was driven by the steep decrease in crime rates; crime just isn't on people's minds nearly as much as it was twenty-five years ago. Crime was barely an issue in George W. Bush's presidential campaign against Al Gore in 2000. It didn't surface at all when Bush defeated John Kerry in 2004, or in either of Barack Obama's successful campaigns, in the 2008 and 2012 elections. It was basically never mentioned.

Does anybody even remember John Kerry's position on the death penalty? Or for that matter, President Obama's position on the death penalty? He had one—he was "troubled" by its use in America but was not opposed to executions in principle—but hardly anybody knew that. It never came up. And it wasn't just the death penalty. Crime in general just wasn't discussed in those elections. In exit polls, asking those who had just voted what they cared about when choosing the president, crime was never mentioned.

As I said, a major reason for this was the huge drop in crime rates. In addition, we owe a peculiar debt to Bill Clinton, who is hardly my favorite president on criminal justice policy.

Clinton became president when crime was a red-hot issue. He made it a matter of policy not to be outflanked on the right in his support for draconian punishments, and especially his support for the death penalty. He wasn't. In 1991, he interrupted his election campaign to return to Arkansas to preside over

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the execution of a brain damaged defendant. In 1994, he expanded the number of federal capital crimes from one to sixty—most of which are not used for anything but getting elected.

Bill Clinton made sure that nobody mistook him for Michael Dukakis. One effect was to make it impossible to think of support for punitive criminal measures in general, and for the death penalty in particular, as a uniquely Republican position, since the most effective proponent for harsh punishment and the death penalty was the Democratic president. By the end of Clinton's tenure, crime and punishment—and the death penalty in particular—was not an issue that divided Democrats from Republicans the way it once had. As a result, when the effects of the decline in crime began to take hold, some Republicans could come out in favor of more reasonable, less punitive policies in ways that weren't politically possible ten years earlier.

B. DNA and Death-Row Exonerations

Changes in crime rates and politics made it *possible* for use and support for the death penalty to drop, but not inevitable. Actual change required a few additional factors.

First, there was a new reason to oppose executions. There have always been strong reasons to oppose the death penalty. I mentioned some of them before; it's very costly, it's plagued by racial discrimination, it's arbitrary—and it produces no benefits. In particular, there is no indication that executions deter murders. (By the way, these days most Americans who support the death penalty don't think it deters homicide. That used to be the most common reason why people supported the death penalty. It's now a minority position even among those who do support the death penalty.)

All of those reasons, and especially the fact that executions don't deter murder, had been around since well before 1972. It's much easier for people to change their minds about a policy if they have a *new* reason to do so. Something they didn't think about before. Ideally, something that is supported by a new type of evidence, especially new scientific evidence—like DNA.

DNA identification technology was first used to establish the innocence of convicted defendants in the United States in 1989. It can conclusively prove that defendants are innocent years after they were convicted, including in cases where nobody doubted their guilt. We now know of more than 350 DNA exonerations. Between 1973 and 1999, eighty-two people who had been sentenced to death were exonerated and freed—not resentenced to life imprisonment, but cleared of all charges and released from prison.

That bulge in death-row exonerations had a major impact precisely because it was not anticipated. It was new and it was based on science—the sort of thing we should take into account now because we didn't know about it before. There are multiple Supreme Court opinions that say just that.

There's a bit of a problem, however, with that description of the issue. In fact, very few death-row exonerations have anything to do with DNA. DNA exonerations occur mostly in sexual assault cases because rapists usually leave semen at the crime scene and it can be tested for DNA. Most murders don't have that sort of biological evidence. As a result, only 12% of death row exonerations involve DNA evidence.

But exonerations of defendants on death row and DNA exonerations hit televisions screens at about the same time, so people generally thought they were the same thing. Many, probably most, still do.

C. Death Penalty Attitudes Are Largely Symbolic

Second, and at least equally important, attitudes toward the death penalty are symbolic. What do I mean by that?

The death penalty is hardly the only aspect of the vast increase in punitive policies in the 1980s and 1990s. Mass incarceration is the truly massive problem that these policies generated. It affects millions of people. There have been some changes in our policies on imprisonment since the sharp decrease in crime began twenty-some years ago—the "smart on crime movement," drug courts, changes in sentencing rules. And there has been a decrease in the number of people we imprison, but only by a few percent. There has been nothing like the massive change we have seen that use the death penalty, at least not so far.

That is to be expected. Incarceration is a huge industry: more than one-and-a-half million people in prisons and about 750,000 in local jails across the country. That's a lot of people. It affects lots of jobs, and has many other implications. It's a huge ship; it'll take a lot of time to turn it around.

On the other hand, the death penalty could be eliminated overnight and nothing else would change. It's a policy that has concrete implications for almost nobody in the country. Even fifty executions a year—a rate which we have not seen for some time—is less than one execution for every six million people. Virtually nobody has personal contact with any aspect of the death penalty. Murder is a terrible crime, but a very uncommon one. Less than 1% of felony convictions in the United States are murder convictions, and maybe 1/100 of 1% of felony convictions are death sentences. That's a tiny number.

The death penalty may have great importance, but primarily as a symbol. I suspect that at the height of support for the death penalty, even the most committed anti-crime warriors knew that the death penalty was not so much a weapon against crime as a flag to rally behind.

It's much easier to change an occasional and largely symbolic practice than a vast institution like mass incarceration. Under the right circumstances, that sort of change can be rapid.

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D. Criminal Defense and Political Action

I should mention two other factors that influenced the speed as well as the direction of this change.

First, increasingly good, and increasingly well-organized capital defense work has made a big difference by reducing the number of death sentences. It has become more difficult, more expensive, and less likely for prosecutors to get death sentences. Some of the other panelists that we are honored to have here will talk about that later today.

Second, I mentioned that seven states have abolished the death penalty since 2006. That didn't happen by chance. Those decisions were the result of well-organized political campaigns that have increasingly focused on mobilizing conservatives who oppose the death penalty.

E. What's Next?

So, what happens next? As before, the focus is on the Supreme Court.

The Court has kept on deciding cases on the death penalty since its use and support began to decline, starting around 1999. In general, their decisions have been less friendly to the death penalty than before. The last Supreme Court opinion I'll mention is a dissent in June 2015 in the case of *Glossip v. Gross*.[8]

In that dissent, Justice Breyer, writing for himself and Justice Ginsburg, invites a plenary reexamination of the constitutional status of the death penalty. Breyer discusses many of the issues we've covered, focusing especially on the large number of exonerations of defendants sentenced to death and the accumulating evidence that we not only sentence innocent people to death, but also execute some of them. He concludes that it's now time, thirty-nine years after *Gregg*, to reexamine that decision and reconsider the constitutionality of capital punishment.

The *Glossip* dissent was widely interpreted as speaking for justices Sotomayor and Kagan as well as Breyer and Ginsburg. If that's true, and if Justice Anthony Kennedy also went along, that would be five justices—enough to abolish the death penalty—and Justice Kennedy had voted to limit the use of the death penalty in several other cases in recent years.

For more than a year, the *Glossip* dissent generated excitement among many people who oppose the death penalty. Support for the death penalty was way down, its use was dropping like a stone, and now Justice Breyer had said, in effect, "Please—ask us to revisit *Gregg*. It's time for the Court to hear a case that we could use to decide that the death penalty is unconstitutional."

By now, nobody thinks it's going to happen any time soon. That moment has passed. We now have Justice Neil Gorsuch, who is highly unlikely to vote to outlaw the death penalty. More important, we have President Donald Trump.

8. 135 S. Ct. 2726, 2756 (2015).

Trump may have a chance to appoint additional justices in the next few years. But even if the composition of the Court does not change, I don't see any justice voluntarily taking on an issue that would be as politically controversial as the abolition of capital punishment. The justices know that at any time they might face a constitutional crisis in which they have to confront the President over the power to wage war, the suspension of the writ of *habeas corpus*, encroachments on the First Amendment, or who knows what Trump might do in the next three years. If I were in their shoes, I'd keep my powder dry for a potential fight about the very structure of the Republic.

Also, for what it's worth, I never thought the Supreme Court was going to take on the constitutionality of the death penalty any time soon. I didn't think it was going to happen a year ago, when I had little doubt that Trump would never get elected—so obviously I'm not much of a prophet. But the reason wasn't Trump, or the things he was saying. It was terrorism.

Americans support the death penalty for terrorists more than they support the death penalty in principle. We have seen this repeatedly in opinion polls. When asked in 2001 if they support the death penalty, 62% said yes—but 75% said that Timothy McVeigh, the Oklahoma federal building bomber, should be executed. The same thing happened again in 2015, in polls about Dzhokhar Tsarnayev, the Boston Marathon bomber.

There have been several terrorist attacks in the United States in the last few years. They could get worse, as everyone knows. In July 2016, a terrorist in a truck killed eighty-six people and injured more than 450 in Nice, France. The same, or worse, could happen any time in Miami Beach or in Portland. If the Supreme Court chose to abolish the death penalty, it would make that decision in March or April of, say, 2019, and then issue an opinion abolishing the death penalty in late June of that year—knowing all along that in May or in July there might be a terrorist attack of that magnitude somewhere in America. I can't imagine the Court doing that.

III. THE DEATH PENALTY IN THE AGE OF TRUMP

So, what will happen to the death penalty under President Trump?

Opposition to the death penalty seems to thrive when it's not a hot issue. When it's been neglected. When it's almost forgotten. That's where we were in 1972. We were getting back somewhere close to that position a few years ago.

In 2012, there was a referendum in California on repealing the death penalty. It didn't pass, but it came close—it got 48% of the votes. In talking to voters in that campaign, the organizers of the repeal effort discovered that lots of Californians didn't even know that California had the death penalty. Which isn't really surprising. Nobody had been executed in California for 13 years, and there were lots of other pressing issues on people's minds.

Passion seems to favor people who argue *for* the death penalty. Passion for justice and for revenge against vicious criminals, passion to protect innocent

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victims. On the other side, most of the reasons to oppose the death penalty are more bland and abstract: It costs too much. It doesn't work effectively. It discriminates between some killers and other killers based on race.

Punishing the innocent can generate passion. The prospect of executing an innocent person has been the most effective issue in mobilizing opposition to the death penalty. It might have a huge impact if it were ever demonstrated conclusively that a person who was put to death recently was totally innocent. That has not happened.

But it's easy to mobilize passion on the other side simply by telling the horrific stories of many murders. These terrible, heart-wrenching stories are not likely to change the minds of those who oppose the death penalty. But they can mobilize many of those who already support the death penalty but are not particularly concerned about it, and others who had not thought about the issue at all. That's more than enough to keep an existing institution in place.

There was a second anti-death penalty referendum in California, in 2016. It did worse than the one in 2012. It only got 46% of the vote. Why? In 2012 there had been no organized opposition to the anti-death penalty referendum. In 2016 there was another death penalty referendum on the same ballot, sponsored by several district attorneys, a proposal that was designed to speed up the process of carrying out executions.

In other words, in 2016 there was an active electoral campaign for and against the death penalty in California, with spending and media coverage on both sides. Those in favor of the death penalty carried the day. Their own proposal got 51% of the vote, and the campaign they waged also reduced support for the proposal to abolish the death penalty from its 2012 level, despite the fact that in the intervening four years the California electorate had become younger and more heavily Democratic, and included a higher proportion of minorities. These demographic changes should have favored opponents of the death penalty, but with concerted opposition from those who favor the death penalty, it wasn't close anymore.

We know Trump's position on the death penalty. He has not talked about it much recently, but it's no secret. Trump devotes more time to torture and brutality, both of which he advocates. Last July he told police officers, "When you see these towns and when you see these thugs being thrown into the back of a paddy wagon, you just see them thrown in, rough, and I said, 'Please don't be too nice,'" and "Like when you guys put somebody in the car and you're protecting their head, you know, the way you put their hand over [so they] don't hit their head. I said, you can take the hand away, okay?"[9] This is the President of the United States, on national television, advocating extra-legal violence by

9. Maya Rhodan, *President Trump Tells Police Officers Not to Be 'Too Nice' With Suspects*, TIME (July 28, 2017), http://time.com/4878838/president-donald-trump-police-officers/ [https://perma.cc/Y2VQ-X5X4].

police. The same president who, in his inaugural address, railed about "this American carnage" at a time when crime rates are lower than they've been in decades.

As long as Trump is President, abolition of the death penalty is a nonstarter—not because support has increased, but because passions of those who do support it can easily be stirred up by the President, and will be if the issue ever makes it onto Fox News.

This will pass. Maybe in three years, maybe in ten, but it will pass. In the meantime, I believe the death penalty will continue to be used in America, but in the greatly diminished form that we've seen for the last ten years. The work that some of the other panelists are doing, and the trends that they will describe later today, will keep the death penalty in retreat and help maintain opposition in these grim times.

The tide will change within the lifetime of most if not all of us in this room. When that happens, you will finally see this nasty, destructive, and inhumane practice bite the dust.