

2013

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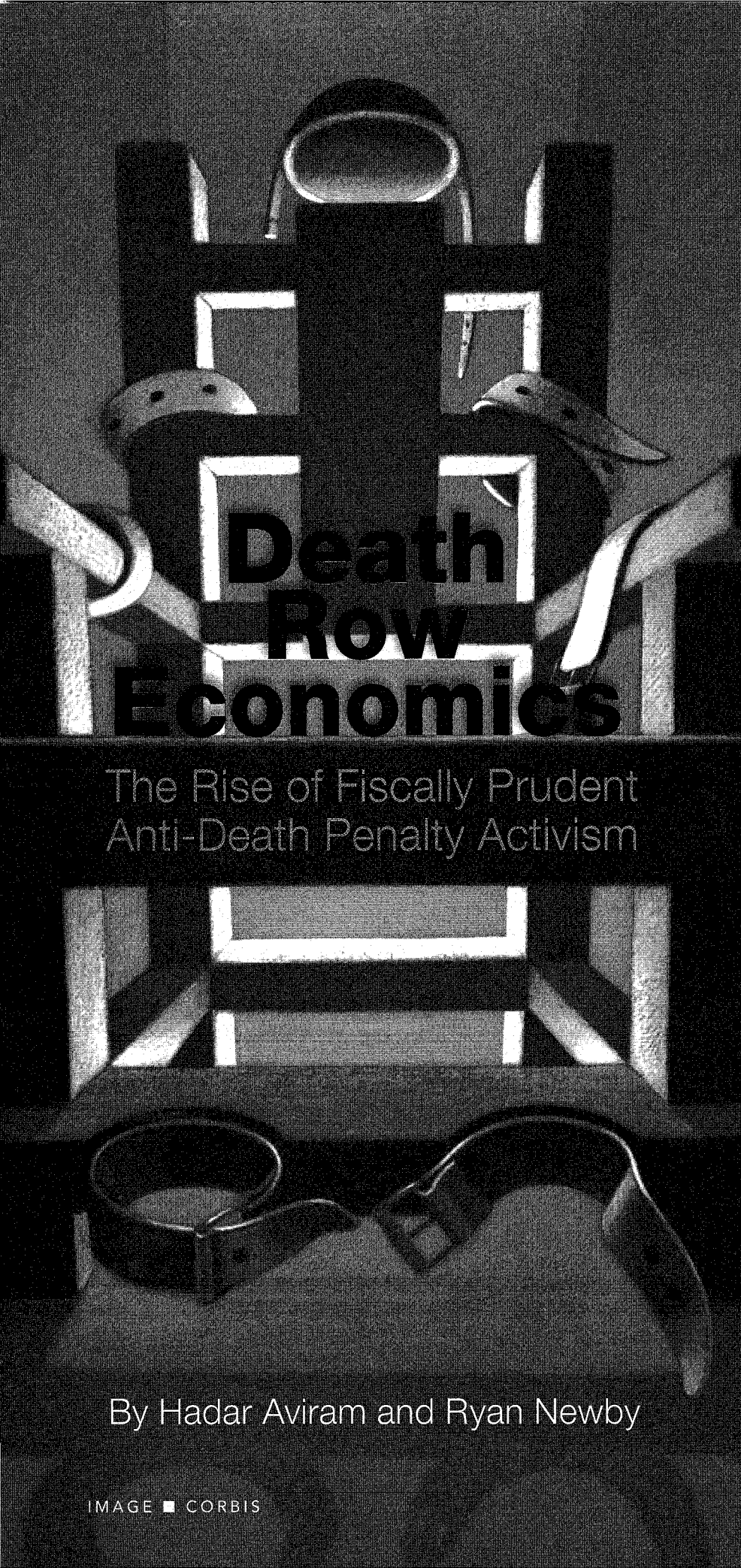
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Recommended Citation

Hadar Aviram and Ryan Newby, *Death Row Economics The Rise of Fiscally Prudent Anti Death Penalty Activism*, 28 *Criminal Justice* 33 (2013).

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Death Row Economics

The Rise of Fiscally Prudent
Anti-Death Penalty Activism

By Hadar Aviram and Ryan Newby

In a recent review of David Garland's book *Peculiar Institution*, retired Justice John Paul Stevens reiterates his objection to the death penalty as per se unconstitutional in that it is disproportionate to any crime. Citing his 1977 opinion in *Gardner v. Florida*, he expresses his view that the death penalty differs from other punishments

in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice and emotion.

(John Paul Stevens, *On the Death Sentence*, N.Y. REV. BOOKS, Dec. 23, 2010 (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010)).)

The death penalty is generally considered a stark example of American exceptionalism in matters of punishment and corrections. Long after most European countries had abolished capital punishment, death sentences and capital postconviction litigation are still features of the American legal system.

But recent developments in this field suggest that we may be approaching a turning point. A recent wave of state abolitions and moratoria, as well as legislation and public initiatives, demonstrate a policy trend favoring life without parole rather than the death penalty as the appropriate sentence for the most heinous crimes.

This article explains the recent successes of anti-death penalty legislative efforts and moratoria as a function of the rise of a new penological discourse, which is characterized by a focus on cost effectiveness and savings. This discourse, which Aviram has referred to elsewhere as “humonetarianism,” transcends the issue of the death penalty and applies to a variety of penological and correctional issues. (Hadar Aviram, *Humoneterianism: The New Correctional Discourse of Scarcity*, 7 HASTINGS RACE & POVERTY L.J. 1 (2010).) Following the 2008 financial crisis, lawmakers, politicians, judges, and activists across the political spectrum are willing to propose abolition of capital punishment as a form of fiscal savings or revenue enhancements. Positions that would have been perceived as “soft on crime” prior to the crisis, such as legalization of marijuana and prison population reduction, are now considered permissible and politically viable when presented through a prism of fiscal prudence rather than humanitarian concern or a belief in the rehabilitative ideal. We argue in this article that attitudes toward the death penalty have not been exempt from this trend.

We begin by tracing the genealogy of abolitionist arguments in the United States, from the early days of the death penalty’s existence to the financial crisis. As we demonstrate, the early ideological influence of Enlightenment-era emphasis on rationality and limits on state power gradually gave way to econometric arguments about the deterrent effects of the death penalty. Later years, particularly in the aftermath of the Supreme Court’s decision in *Gregg v. Georgia*, initially saw the rise of arguments of racial discrimination in the application of the death penalty. (428 U.S. 153 (1976).) Later, the introduction of DNA testing techniques and the emergence of innocence projects prompted focus on wrongful convictions and factual innocence. A final recent line of litigation strategies are confined to what could be referred to, with apologies to Justice Blackmun, as “tinkering with the machinery of death”—debates over the relative humanness and constitutionality of specific execution techniques.

As we demonstrate, since the 2008 financial crisis these arguments have been bolstered by a new, “humonetarian” argument highlighting the costs and inefficiency involved in administering the modern death penalty. This new line of arguments is largely responsible for the revival of the abolitionist project and for several abolitions, moratoria, and initiatives that are marking a visible and encouraging trend. Austin Sarat has described a “new abolitionism,” in which pragmatic concerns allow mainstream politicians to oppose

the death penalty without taking controversial moral stances. (Austin Sarat, *The “New Abolitionism” and the Possibilities of Legislative Action: The New Hampshire Experience*, 63 OHIO ST. L.J. 343, 364 (2002).) We argue that this abolitionism may be currently understood in the context of the financial crisis; politicians and stakeholders can now safely argue for abolition as financially unsustainable, regardless of whether they are personally opposed to capital punishment.

We conclude by offering some thoughts about the viability of the “new abolitionism” in the face of an improving economy, as well as about the price paid in the quality of public discourse.

Human Rights Discourse

The intellectual herald for the European anti-death penalty discourse was Cesare Beccaria’s seminal work *On Crimes and Punishments*. This 1764 book advocated a rational criminal justice system that eschewed torture, and in which punishments were proportional to the offenses committed. Beccaria rejected the notion that capital punishment was consistent with the idea of the social contract, in which citizens sacrifice some freedoms in exchange for the protection and benefits of living in society. He argued that no potential citizen would agree to such a serious and permanent deprivation of rights.

The European abolitionist project was, for the most part, the result of a top-down intellectual debate heavily influenced by Montesquieu and Beccaria. These notions were not confined to the Old World; American colonial leaders such as Thomas Jefferson expressed opposition to the broad application of the death penalty even before the American Revolution. Colonial and Revolutionary opponents to capital punishment also argued for the need to distinguish the new republic’s penal regime from the punitive one of the British, which at the time featured multiple offenses meriting capital punishment specified in the “Bloody Code.” This rationale was advanced by patriots such as Benjamin Rush. According to Rush, “[e]very execution undermined the vitality and security of America by drawing the Republic back toward monarchical institutions and away from republican virtue.” (LOUIS P. MASUR, *RITEs OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865*, at 64 (1989).) Rush further argued that not only did capital punishment fail to deter crime, but that deterrence itself was an illegitimate goal of punishment, and that the proper aim was rehabilitation.

As most European states (and a few American states) abolished the death penalty in the nineteenth century, the United States was left as the only retentionist nation in the West. (GARLAND, *supra*, at 99.) The United States focused its humanitarian energy instead on developing more humane methods of execution. These efforts led to the invention of the first electric chair in 1889, followed by the gas chamber in the 1920s, and lethal injection in the 1980s. These technologies, and the litigation that surrounded them, will be described in greater detail below.

In addition, a new substantive family of arguments emerged during the twentieth century: concerns about

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due process in applying the death penalty. In the first half of the twentieth century, the use of the death penalty varied widely across states. In many Southern states, for example, capital offenses included not only homicide, but attempted homicide, robbery, and rape, though in practice nonhomicide offenses were capital only for African-American defendants. Juries were often given total leeway to apply punishments that ranged from a few years in prison (or no prison time at all) to death. Jurors received no guidance for making their determination, and were not required to explain their decisions. It was in this context that the Supreme Court decided *Furman v. Georgia* in 1972. (408 U.S. 238 (1972).) The three petitioners, including Furman, had been convicted and sentenced to die under wholly discretionary schemes. The Court found the schemes unconstitutional by virtue of their vulnerability to arbitrary application. This decision invalidated every death penalty statute in the United States except in Rhode Island. That statute provided an automatic death penalty, and was invalidated by *Gregg v. Georgia*.

The abolitionist victory was short lived; in 1976, the Supreme Court approved of Georgia's new capital punishment statute, which bifurcated guilt and punishment proceedings, limited application of the death penalty, and offered guidance in the form of "aggravating" and "mitigating" factors. In *Gregg v. Georgia* (428 U.S. 153 (1976)) the Court found that the death penalty was not cruel and unusual where the statute provided safeguards for basic principles of proportionality, fairness, and procedural reliability. The Court's approval of Georgia's statute in *Gregg* provided the template for all death penalty statutes in the United States post-1976.

Deterrence

Some commentators attribute the Supreme Court's decision to approve of the death penalty in *Gregg* in part to the 1975 publication of Isaac Ehrlich's article *The Deterrent Effect of Capital Punishment: A Question of Life and Death*. (65 AM. ECON. REV. 397 (1975).) The article provided an econometric analysis of capital punishment using the FBI's Uniform Crime Reporting data as the basis for regression. Ehrlich concluded that every execution deterred eight homicides. The article was highly controversial, and was soon followed by several pieces discrediting its analysis. Several death penalty scholars have since concluded that the death penalty has, in fact, no deterrent effect, and activist pamphlets and policy documents often treat this conclusion as fact. In the last few years, the deterrence debate has been mostly relegated to the realm of econometric methodology debate, with two teams of researchers examining the same data and reaching opposite conclusions. Most recently, a new report by the National Research Council has come to the conclusion that

[r]esearch to date on the effect of capital punishment on homicide rates is not useful in determining

whether the death penalty increases, decreases, or has no effect on these rates. The key question is whether capital punishment is less or more effective as a deterrent than alternative punishments, such as a life sentence without the possibility of parole. Yet none of the research that has been done accounted for the possible effect of noncapital punishments on homicide rates. The report recommends new avenues of research that may provide broader insight into any deterrent effects from both capital and noncapital punishments.

(NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY (Daniel S. Nagin & John V. Pepper eds., 2012).)

While some abolitionists give a nod to arguments about the lack of deterrent effect of the death penalty, it has largely become a side note to the more prominent arguments for abolition, and mostly the territory of a few dedicated methodologists focusing on rigorous econometrics.

Racial Discrimination

In 1980, David C. Baldus and James W.L. Cole published *Statistical Proof of Discrimination*, showing that the likelihood of a convicted murderer being sentenced to death was determined in large part by the race of the defendant and the race of the victim. The Baldus study examined over 2,000 murder cases in Georgia in the 1970s and found that when examining black and white offenders with black and white victims, black killers of white victims were the most likely to receive death sentences. The least likely recipients were black killers of black victims.

The Baldus study gave fuel to arguments that retooled death penalty statutes continued to produce racially discriminatory and arbitrary punishment. The petitioner in *McCleskey v. Kemp* sought to attack Georgia's death penalty based on the disparate allocation of capital and noncapital sentences among black and white defendants. (481 U.S. 279 (1987).) The Supreme Court held that without evidence of specific racial animus directed at the petitioner, the study was insufficient to find a violation of either the petitioner's Fourteenth or Eighth Amendment rights. The Court affirmed the district court's holding, which assumed the validity of the Baldus study but found the statistics insufficient to demonstrate unconstitutional discrimination in the Fourteenth Amendment context or to show irrationality, arbitrariness, and capriciousness under Eighth Amendment analysis. *McCleskey* claimed that the capital sentencing scheme in Georgia violated equal protection, as well as the Eighth Amendment's prohibition on cruel and unusual punishment by virtue of the racially discriminatory application of the law. However, because there was no showing of racist intent on the part of the legislature, and because the death penalty scheme was within the guidelines established by *Furman* for juror discretion, both of these claims were found to be without merit. To prevail on a claim of discrimination, said the Court, the petitioner would have to demonstrate "evidence specific to his [or her] own case that would support an inference that racial considerations played a part in his [or her] sentence." (*Id.* at 292-93.) Simply put, the "discriminatory

purpose” requirement for showing racial discrimination in an equal protection claim shields a system in which the outcomes are racially skewed, but the actors all disavow any overt racial considerations. While racial discrimination has proven to be a fruitless litigation strategy post-*Gregg*, it is sometimes brought up in the context of activist efforts on behalf of particular defendants, such as in the concentrated effort to prevent the execution last year of Troy Davis.

The Rise of Innocence

The concerns about the irreversibility of the death penalty and the potential for mistake, while theoretically acknowledged for many decades, became more pronounced with the establishment of innocence projects in law schools in the 1990s, followed by the emergence and rapid improvement of DNA technology for use in evaluating old evidence.

In 2003, then-Illinois governor George Ryan performed a mass commutation of inmates on the state’s death row shortly before leaving office. Declaring that he was not an abolitionist, he gave as his reason the unacceptable level of risk of executing an innocent person due to flaws in the Illinois criminal justice system. This act was arguably the most visible outcome of the “Innocence Revolution” in American capital punishment—a time when DNA exonerations and the failure of eyewitness identifications in rape and homicide cases undermined the widely held belief that the American criminal justice system was fair and generally “got it right.” Suddenly, false convictions weren’t merely a bogeyman of the Old South and legal lynchings. (Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004).) They were instead what happened to some 17 men later freed from Illinois’s death row in 2003 thanks to the work of the Innocence Project and students in Northwestern University’s journalism program. Illinois’s subsequent abolition of the death penalty in 2011 can be attributed not only to the innocence argument, but also, as described below, to the rise of humanitarian arguments.

Tinkering with the Machinery of Death

In 1994, Justice Blackmun proclaimed his distaste for litigation regarding technical safeguards in the death penalty context:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored . . . to develop . . . rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved . . . I feel . . . obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. . . . Perhaps one day this Court will develop procedural rules or verbal formulas that actually will

provide consistency, fairness, and reliability in a capital sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness “in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.” I may not live to see that day, but I have faith that eventually it will arrive. The path the Court has chosen lessens us all.

(*Callins v. Collins*, 510 U.S. 1141, 1145, 1159 (1994) (Blackmun, J., dissenting) (alteration in original) (footnote omitted) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980)).)

“Tinkering with the machinery of death” has, since then, become a major capital punishment litigation avenue in the most technical of ways: assessing the relative humaneness of different execution methods. These litigation techniques stem from the immense difficulty of succeeding with general arguments about the constitutionality of the death penalty, and follow the path forged by the nineteenth-century inventors of the electric chair.

In recent years, debating the minute details of execution methods has become the bread and butter of appellate litigation over the death penalty. The most current iteration of these strategies focuses on the constitutionality of lethal injection practices. In *Baze v. Rees*, the Supreme Court determined that the petitioners, death row inmates in Kentucky, had failed to show sufficient evidence that the method Kentucky used violated their Eighth Amendment right to be free of cruel and unusual punishment. (553 U.S. 35, 35 (2008).) The petitioners came to the Supreme Court challenging the three-drug cocktail method used by Kentucky as too prone to risk of improper administration. If the sedative is not effective, the paralytic administered second will prevent the executed from moving, but will not prevent him or her from feeling the crushing pain of dying by simultaneous suffocation and cardiac arrest caused by the potassium chloride. The Court found that the standard urged by the petitioners, in which the state should be required to adopt alternative procedures that could prevent such blunders, was too lax and would invite litigation. The Court held that “[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.” (*Id.* at 50.)

In 2010, the Court heard a challenge, brought by way of a section 1983 suit to the planned Arizona execution of Jeffrey Landrigan by means of non-FDA-approved drugs. (*Brewer v. Landrigan*, 131 S. Ct. 445 (2010).) The district court first invited, then ordered, the Arizona Department of Corrections (ADOC) to provide “the source of the drug, the drug’s expiration date, the efficacy of the drug for its intended purpose . . . and all available documentation concerning the manufacturer and its process for producing sodium thiopental.” (*Landrigan v. Brewer*, No. CV-10-02246-PHX-ROS, slip op. at 2 (D. Ariz. Oct. 25, 2010).)

The defendants refused, first on grounds that Arizona law prohibited disclosure of the identity of executioners, and then on grounds that the court's order improperly required the state to use only FDA-approved drugs. Three petitioners had previously challenged the three-drug cocktail used in Arizona, and their claim was denied at the federal district court based on a finding that the method was "substantially similar" to the one used by Kentucky in *Baze v. Rees*. (553 U.S. 35 (2008).) Landrigan was pursuing his suit on state law grounds; his claim was denied based in large part on the Supreme Court's decision in *Dickens*, which found Arizona's protocol sufficient under *Baze*. (*Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).) Upon denial of Landrigan's claim, Arizona moved for a warrant of execution, which Landrigan opposed, raising for the first time the issue of the nationwide shortage of sodium thiopental, and requesting the Arizona Supreme Court to stay its decision "until the State had demonstrated that it possessed or could legally obtain the drugs necessary to carry out his execution in a manner consistent with Arizona's protocol." (*Landrigan*, No. CV-10-02246-PHX-ROS, slip op. at 5.)

Landrigan filed a motion to disclose a number of matters, including the source of the drug, the lot number, and the chain of custody of the specific drugs to be used in his execution. At oral argument,

counsel for the State declined to reveal where ADOC obtained the sodium thiopental for Plaintiff's execution but acknowledged that it was not obtained from or manufactured by Hospira, Inc., which Plaintiff alleges is the only manufacturer of sodium thiopental approved by the Food and Drug Administration (FDA). The State further reiterated that the drug was "lawfully" obtained and was not expired.

(*Id.* at 6.)

In his motion for an injunction, Landrigan argued that "because ADOC's supply of sodium thiopental lacks the appropriate safeguards, it could be 'contaminated with toxins that cause pain, as opposed to unconsciousness' or could fail to properly anesthetize him, thus resulting in excruciating pain when the second and third drugs are administered." (*Id.* at 8–9.) The state, in response, contended that the protocol provided sufficient safeguards to ensure that the inmate is unconscious before the second and third drugs are administered, which eliminated any genuine risk that Landrigan might suffer pain during the course of his execution.

The Court noted that Arizona behaved unusually in this case, refusing to give any evidence to undercut Landrigan's claim or support its position. Based in significant part on the use of non-FDA-approved drugs, the Court determined that it was unable to evaluate the risk to Landrigan, and that the state's failure to give any evidence on the matter forced the Court to accept Landrigan's "factual showing that such drugs are more likely to contain harmful contaminants." (*Id.* at 14.) The Court concluded:

[T]he issue is whether there is a sufficient level of confidence that the sodium thiopental Defendants plan on using to sedate Plaintiff does not create a substantial risk of harm. FDA-approval is relevant in that drugs manufactured under FDA-guidelines are likely to perform as expected; drugs manufactured by non-FDA approved sources might not benefit from such a presumption. Without the assurance of FDA-approval, the Court is left to speculate whether the non-FDA approved drug will perform in the exact same manner as an FDA-approved drug and whether the non-FDA approved drug will cause pain and suffering. This is not a factual issue the Court can resolve by adopting Defendants' assurances that sodium thiopental "is simply a chemical compound" and the source of that compound is irrelevant.

(*Id.* at 15.)

Despite this record, the Supreme Court, in a 5–4 vote, issued a one-paragraph decision granting the state's application to vacate the district court's restraining order.

The application to vacate the order by the district court granting a temporary restraining order, presented to Justice Kennedy and by him referred to the Court, is granted. There is no evidence in the record to suggest that the drug obtained from a foreign source is unsafe. The district court granted the restraining order because it was left to speculate as to the risk of harm. But speculation cannot substitute for evidence that the use of the drug is "sure or very likely to cause serious illness and needless suffering." There was no showing that the drug was unlawfully obtained, nor was there an offer of proof to that effect. The motion to file documents under seal is denied as moot.

(*Brewer v. Landrigan*, 131 S. Ct. 445, 445 (2010).)

Because Landrigan did not present evidence of the harmfulness of the drugs the state was planning to use—evidence that was only within the state's power to produce, and which it had been ordered to produce—his case was short-circuited. The restraining order was lifted on direct petition by the state, while the Ninth Circuit had affirmed the lower court's decision and denied rehearing. Landrigan was executed as scheduled on October 26, 2010, just hours after the Supreme Court's ruling.

As illustrated by *Landrigan*, the controversy over lethal injection is not just about the order of operations in administering it, but additionally, the ability of states to acquire the drugs involved in the first place. In fact, there are a number of things that are logistically challenging about lethal injection that may also add to the risk of botched or excruciating executions. In 2009, Ohio death chamber technicians were unable to inject Romell Broom properly, and after sticking him over 18 times with a needle, put off the execution because they couldn't find a vein. In 2009, Hospira,

the sole United States producer of sodium thiopental, ceased production of the drug. In 2011, that company announced that they would not be resuming production of the drug at their plant in Italy, out of concern that doing so would subject the company to liability under Italian law if the drug was used in lethal injections. The drug was never approved by the FDA for executions, but had been used for that purpose as an “off-label” use—a common practice in medicine. However, it is a practice that should raise some interesting questions in the arena of capital punishment. The American Medical Association (AMA) and state medical boards have taken the position that it is an ethical violation of a physician’s professional duties to participate in an execution.

A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution. Physician participation in execution is defined generally as actions which would fall into one or more of the following categories: (1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.

(AMA CODE OF MEDICAL ETHICS, OPINION 2.06: CAPITAL PUNISHMENT.)

Among the actions deemed to constitute “participation” is prescribing agents or medications as part of an execution. While a physician may certify that a condemned person has died, the physician may only do so after a non-physician has declared death. In 2007, the North Carolina Medical Board (NCMB) issued a position statement that forbade any physician licensed in North Carolina from participation in an execution that extended beyond mere presence or certification of death. Following this statement, physicians refused to participate in North Carolina executions at all, halting executions. The state’s corrections agency sought, and obtained from the state supreme court, an injunction against the NCMB prohibiting it from disciplining any doctor who participated in an execution based on the position statement’s incompatibility with state law, which requires a physician to be present at all executions. (N.C. Dep’t of Corr. v. N.C. Med. Bd., 675 S.E.2d 641, 643 (N.C. 2009).)

The Rise of Humoneterianism

For a long time, American national politicians could not afford to voice opposition to or ambivalence about the death penalty and still expect success at the polls. In the 1992 Democratic primaries, candidate and former Massachusetts governor Michael Dukakis famously flubbed his response to a reporter’s question about what he would want if his own wife were raped and murdered. In stark

contrast to the conventional political wisdom at the turn of the twenty-first century, states have begun to take on abolition as a serious matter. As previously mentioned, New Hampshire’s legislature voted to end the death penalty in that state in 2000; the bill was then vetoed by Governor Jeanne Shaheen. In that same year, Governor Ryan of Illinois declared a moratorium on executions, and in 2003, commuted the sentences of all Illinois death row inmates. In 2005, New York’s legislature declined to reinstate capital punishment when the appellate court struck down the existing statute. In 2007, New Jersey abolished its death penalty, and in 2008, New Mexico followed suit. In 2011, Illinois and Connecticut repealed their death penalty statutes, and legislatures in Florida, Indiana, Kansas, Maryland, Ohio, Pennsylvania, and Texas all considered bills to abolish the death penalty in those states. Other states have considered, and implemented, moratoria on their death penalty practices, often citing costs.

In 2011, the Illinois legislature voted to abolish the state death penalty, and Governor Patrick Quinn signed the measure into law. Like Governor Ryan eight years before, lawmakers cited numerous reasons for their votes. The possibility, even likelihood, of executing an innocent person was among the top reasons. However, the fiscal impact of the death penalty on state budgets appears to have been the thing that tipped the scales in favor of legislative abolition. In California, the ACLU of Northern California has been waging a campaign to abolish the state’s death penalty scheme for years, giving the cost to the financially strapped state as the primary hook for the organization’s myriad reasons for opposing the practice. Recent studies have purported to show that just trial costs alone for capital crimes far outstrip the costs of convicting and incarcerating other perpetrators of serious crimes.

Austin Sarat, the noted abolitionist scholar and activist, argues that we are experiencing an age of “New Abolitionism,” in which pragmatic “universal” concerns like actual innocence provide cover for mainstream political actors who may or may not also hold moral views opposing or supporting the death penalty. For example, Sarat argues that Ryan’s actions and the grounds he gave in 2003 provided cover for the New Hampshire legislature’s later attempt to ban the death penalty in that state. While that measure was vetoed by the governor, the fact that it was passed by both houses of the state legislature may have demonstrated a shift in popular attitude toward abolition.

In 2004, New Jersey became the first state to abolish the death penalty since 1976. Activists first achieved a moratorium in 2004, and convinced a legislature comprised of an unusually high proportion of officials not seeking reelection to vote out the practice. Apparently key in both New Jersey’s and New Hampshire’s votes was the fact that neither state had executed an inmate since the nationwide moratorium ended following *Gregg*. In contrast, Illinois had an active execution chamber until Ryan’s moratorium in 2000. However, the trauma of seeing convicted men released as innocent, and the posthumous exonerations of several executed men likely had a lasting effect on at least some lawmakers in that state.

Opponents of capital punishment do not rest their arguments on one lone issue at a time. Instead, advocacy groups like the ACLU list on their websites and in their literature myriad reasons for abolition. Among them are that the death penalty is racist, that it is arbitrarily used, and that the geographic and class disparities in its use amount to a failure of due process. Supreme Court justices such as Justice Blackmun and Justice Stevens have, as stated above, expressed their objection to the practice. Moreover, Justice Potter Stewart, hardly a liberal in his day and an opponent of abolition, famously wrote in *Furman* that the chance of a defendant being sentenced to die was less than the likelihood of being struck by lightning. Governor Ryan's 2003 speech announcing his mass clemency act, "I Must Act," lists a panoply of reasons which, taken together, compelled him to halt executions in his state. Among other reasons, he noted that out of 1,000 homicides committed in 2002, only 2 percent of the cases—or 20 murderers—were given a capital sentence. Moreover, downstate defendants were

executed. San Quentin's death row has been the subject of numerous legislative and litigated battles, pertaining not only to the constitutionality of death row practices but also to the immense expense involved in renovating and maintaining death row at a constitutionally acceptable standard. In addition, California's role as an early adopter of punitive reforms, such as mandatory sentencing and the three strikes law, made its current death penalty debate particularly interesting.

The initiative was titled "SAFE California"—"SAFE" standing for "Saving, Accountability, and Full Enforcement." This choice of words was not coincidental. The Proposition 34 campaign deliberately shied away from arguments of human rights and deterrence and focused on two factors: the cost inefficiency of the death penalty as it is practiced in California and the risk of executing innocent people. To dispel any concerns that the initiative might be "soft on crime," it explicitly created a fund that, had the proposition passed, would shift \$30 million of the projected

If California had chosen to abolish the death penalty, savings would have exceeded \$100 million annually.

much more likely to wind up in a death chamber than were defendants in Chicago. In California, the death penalty is likewise an unlikely outcome of a homicide trial, and the vast majority of such sentences come from three counties in Southern California. San Francisco County has had a string of district attorneys opposed in general or in all cases to capital punishment. The newest, George Gascón, committed to never seek the death penalty in San Francisco, after initially drawing fire for saying he would keep the option open for the most heinous cases, such as the murder of a police officer. Gascón has by turns both expressed a philosophical opposition to the death penalty, as well as opined that life without parole would be more economically viable for California.

Prop 34: Model of a New Abolitionist Campaign

One of the most interesting developments in this vein has been California's Proposition 34, which purported not to "abolish" the death penalty, but rather to "replace" it with life without parole. Earlier in 2012, an effort was made to introduce a death penalty abolition bill by the legislature, but the bill failed to garner sufficient support to pass. Then, a voter initiative along the same lines managed to gather the required 750,000 signatures to be placed on the California ballot.

This initiative was of particular interest for several reasons. First, California is home to the nation's largest death row in San Quentin prison, housing more than 700 inmates. Since 1976, only 13 of the prison's death row inhabitants have been executed; during the same period of time, 84 died of natural causes before they could be

executed. The fact sheet distributed at events and available on the website focused exclusively on the cost issue, providing a pie chart that illustrated the causes for high costs: trials and investigations, special housing (alone instead of two to a cell, with a heightened security level), and state and federal appeals.

The reliance of Proposition 34 supporters on the fiscal argument was understandable given the nonpartisan analysis of costs. At the time of distributing voter pamphlets, the Legislative Analyst's Office estimated that, if California would choose to abolish the death penalty, the savings would exceed \$100 million annually.

Activists organizing events for SAFE California received an instruction sheet that explicitly requested them to avoid using the words "abolition" or "barbaric," and in fact discouraged any human rights-oriented discussion of the death penalty. Instead, activists were prompted to discuss the fiscal viability of the death penalty as it is practiced in California. In public appearances, politicians and activists endorsing the proposition often spoke about the harshness of life without parole as an alternative to the death penalty, and about the fact that the small number of people who have been executed in the state since *Gregg* rendered the death penalty an expensive, inefficient method of punishment. The resulting message was one of fiscal responsibility, not of abolition.

The focus on costs was related to another important feature of the initiative: its endorsement by several unlikely supporters. Among the bill's endorsers were the lead proponent of California's 1978 death penalty initiative, the

lawyer who had written California's death penalty law, 400 murder victim family members, and numerous law enforcement officials. The organization was spearheaded by Jeanne Woodford, the former warden of San Quentin, who during her tenure presided over four executions. It is rather unlikely that these parties would have joined such a narrow coalition were it presented as a human rights-focused initiative. Instead, some of the people featured in Proposition 34 ads were family members of victims of unsolved crimes, calling for better funding of police investigations.

A story published in the *San Francisco Chronicle* days before the election revealed an interesting wrinkle pertaining to the initiative: according to an informal poll soliciting reactions to the initiative, most inmates on San Quentin's death row were opposed to Proposition 34. The reasons for this opposition were nuanced and telling. Due to the scarcity of executions, inmates are willing to risk the chance of an execution in return for free litigation services for appeals and habeas corpus petitions. Such resources are not available to the prison's general population. If the initiative had passed, it would raise serious questions regarding the quality of litigation services available to the general prison population, beyond the special treatment we now award those awaiting capital punishment.

Proposition 34 was defeated in the polls by a narrow margin of 47.3 to 52.7. This was a bitter disappointment to supporters, whose spirits rallied by polls in the final weeks of the campaign showing the proposition leading. Nonetheless, several important factors are worth mentioning. The vote against the proposition is the lowest support for the death penalty ever registered in the state. Moreover, the very achievement of placing the proposition on the ballot with resident signatures is an important precedent. The de facto moratorium on executions in California continues, as the state is still negotiating its lethal injection protocol and has low stocks of execution drugs.

Conclusion

The voting result on Proposition 34, while disappointing to anti-death penalty activists, is far from discouraging. It is best regarded as one more data point in a growing trend of cost-focused support for abolition. As this article

demonstrates, the recent abolitionist trend can be attributed largely to the emergence of humanitarian discourse.

The calls to end the death penalty on the basis of expense seem to focus on the mundane and even petty aspects of capital punishment, in contrast to the lofty ideals professed by opponents such as Rush. But looking at these arguments through the lens provided by Sarat, perhaps they are pragmatic responses to the political tenor of the day. It can easily be argued that true believers in abolitionism may choose to highlight humanitarian arguments for strategic reasons.

However, strategic behavior cannot explain the conversion of traditionally conservative lawmakers and policymakers to the cause of death penalty abolition. Rather than perceiving this line of argument as shallow, we believe that it could be read as a statement of a change in priorities. Expressing the opinion that the death penalty, as it is practiced in the United States in the early twenty-first century, is no longer financially sustainable, is also expressing the opinion that the resources devoted to perpetuating the institution are better spent on other public goods, such as education, health care, or policing.

This begs the question of the viability of these abolitionist efforts for the long run. Will these pragmatic rationales for abolition hold up when the American economy improves? Death penalty scholarship, such as David T. Johnson and Franklin E. Zimring's *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia*, often points out that, once a country abolishes the death penalty, reinstating it is no longer on the table and the entire debate becomes a nonissue. While the return of the death penalty in *Gregg* after its halting in *Furman* may suggest that American exceptionalism may operate differently here, the context of these two cases suggests that a wholesale abolition scheme may, indeed, be permanent, as in the rest of the Western world. The growing abolitionist trend suggests that wholesale abolition of the death penalty in the United States is only a matter of time. It may be, therefore, that cost considerations could be the catalyst that loftier considerations could not be, and that this serious financial crisis, to paraphrase Rahm Emanuel, will not have gone to waste. ■

CRIMINAL JUSTICE EDITORIAL POLICY STATEMENT

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