Capital Clemency in the Age of Constitutional Regulation: Reversing the Unwarranted Decline

Carol S. Steiker* & Jordan M. Steiker**

For this symposium on "Mercy," some examination of the practice of executive clemency seems essential in light of the historical roots of the contemporary clemency power. The authority of American chief executives to diminish or waive punishment originally derived from the power of English monarchs to do so. The English Crown's power, in turn, arose from the "divine right of kings," an idea with medieval roots that blossomed during the Reformation into an account of the monarchy as "Gods [sic] Lieutenants upon earth," in the words of King James I.[1] The quasi-religious origin of the power of clemency underscores its connection to the concept of mercy, which draws much of its resonance in Western societies from the Judeo-Christian tradition. The Old Testament describes God's command that the lid of the Ark of the Covenant—the "Mercy Seat" where penitential sacrifices were made—be flanked by two cherubim facing each other, which are claimed by some to represent the two faces of God, "Justice" and "Mercy."[2] This historical entwinement of executive clemency with divine mercy explains why the practice of clemency is understood as one of grace rather than right, and why the practice has proven resistant to calls for more procedural regularity and predictability.

But if clemency is the state practice with the closest historical and metaphysical links to the concept of mercy, then it must be said that mercy is in short supply in the United States today. The decline of clemency has been most dramatic and extreme in cases involving the most severe punishment, the death penalty. The modern era of American capital punishment—the period starting in 1976, when the Supreme Court reauthorized the use of the death penalty after invalidating all extant capital

* Henry J. Friendly Professor of Law, Harvard Law School.

** Judge Robert M. Parker Endowed Chair in Law, Co-Director of the Capital Punishment Center, The University of Texas School of Law.

1. Glenn Burgess, *The Divine Right of Kings Reconsidered*, 107 ENG. HIST. REV. 837, 837 (1992) (quoting King James, *A Speach to the Lords and Commons of the Parliament at White-Hall*, *in* THE WORKES OF THE MOST HIGH AND MIGHTIE PRINCE, JAMES . . . KING OF GREAT BRITAINE, FRANCE, AND IRELAND 529, 529 (London, 1616)).

2. Carol S. Steiker, *The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 212, 213 (Michael Klarman, David Skeel & Carol Steiker eds., 2012).

statutes in *Furman v. Georgia*[3] in 1972—saw a stunning drop in the use of capital clemency, which had been a substantial and routine practice prior to the Court's intervention, even in states that used the death penalty the most. We offer an explanation for this tremendous decline in the past half century, arguing that it has been in large part a product of the project of constitutional regulation of capital punishment during that same period. However, we contend that constitutional regulation of capital punishment has not significantly diminished (much less eliminated) the important role of clemency in redressing numerous deficiencies in the American capital system. Moreover, and perhaps more surprisingly, constitutional regulation has generated new grounds for robust reconsideration of capital sentences. We conclude by calling for a reinvigoration of capital clemency as a form of secular mercy.

I. Describing and Explaining the Dramatic Decline in Capital Clemency

It is widely observed that the Supreme Court's revival of the American death penalty in 1976 inaugurated a profound decline in the use of executive clemency in capital cases that has continued to the present day. One scholar describes that decline as "nothing if not spectacular,"[4] while another describes capital clemency in the modern era as so diminished that it "trends toward extinction."[5] No scholar dissents from this strong consensus.

Interestingly, however, scholars have not converged on an authoritative data set of nationwide clemency grants, with significant disparities in modern-era clemency counts among (for example) the NAACP Legal Defense Fund (LDF), the Bureau of Justice Statistics, and Michael Radelet and Barbara Zsembik's independent 1993 study.[6] Radelet and Zsembik observe that "there is no single source which provides statistics regarding the frequency of clemency and the names of prisoners who are awarded clemency in capital cases."[7] They go on to explain that they began their independent accounting of clemency grants by consulting the records of the NAACP LDF, but determined that the LDF's data set was "incomplete and inaccurate" in that it "omitted several cases that we knew (from other sources) were ones in which clemency had been given, and included other cases in which no clemency had be awarded."[8] Although the Death Penalty

3. 408 U.S. 238 (1972).

4. Hugo Adam Bedau, *Background and Developments*, *in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 3, 19 (Hugo Adam Bedau ed., 1997).

5. Michael Heise, *The Death of Death Row Clemency and the Evolving Politics of Unequal Grace*, 66 ALA. L. REV. 949, 950 (2015).

6. Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-*Furman *Capital Cases*, 27 U. RICH. L. REV. 289 (1993).

7. *Id.* at 291.

8. *Id.*

Information Center's clemency count coincides with Radelet and Zsembik's numbers for the years they overlap,[9] the Bureau of Justice Statistics arrives at different yearly counts, illustrated by Hugo Bedau's side-by-side chart of the contrasting numbers found by the Bureau of Justice Statistics (BJS) and by Radelet and Zsembik (R&Z).[10]

The inability to arrive at a consensus about the precise yearly clemency count in the modern era should not affect our confidence in the ultimate conclusion that the modern decline is dramatically steep. Under every count the enormity of the decline is obvious, and it becomes even more obvious when one makes common-sense adjustments to the count—for example, by considering the decline in clemencies not only in raw numbers but in proportion to executions and by excluding one-off mass clemencies and clemencies for judicial expediency (in contrast to individual clemencies for humanitarian reasons).[11] By restricting the count to individual clemencies in the modern era, one compares apples to apples because in the pre-*Furman* era, clemency was an individual practice granted for reasons such as "reform by the criminal while on death row, unresolved doubts about guilt, a split verdict by the appellate courts reviewing the case, [and] inequitable sentencing of codefendants . . . ."[12]

Prior to *Furman* and *Gregg v. Georgia*,[13] individual capital clemency was a robust practice across states that imposed the death penalty—the vast majority of American jurisdictions. In the eighteenth and nineteenth centuries, when mandatory capital statutes were widely in force, executive clemency was thought necessary to set aside capital verdicts in cases of what Alexander Hamilton referred to as "unfortunate guilt" in his ringing defense of a broad pardon power.[14] Well into the twentieth century, capital clemency continued to be generously exercised across the United States, including in

9. *See* List of Clemencies Since 1976, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976 [https://perma.cc/CVN8-YJYH]; Radelet & Zsembik, *supra* note 6, at 297.

10. Bedau, *supra* note 4, at 20.

11. Radelet and Zsembik distinguish between what they term clemencies for "judicial expediency" and those for "humanitarian" reasons. Clemencies for judicial expedience include removal of those from death row "because courts had vacated, or were likely to vacate, the death sentence, and a commutation would save the time and expense of going through a new sentencing proceeding." Radelet & Zsembik, *supra* note 6, at 292. In contrast, clemencies for humanitarian reasons are clemencies granted based on the circumstances of the individual offense or offender and constitute a category "more consistent with the traditional role of clemency as a humanitarian act." *Id.* at 297.

12. Bedau, *supra* note 4, at 19.

13. 428 U.S. 153 (1976).

14. Hamilton urged that "[h]umanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. . . . [W]ithout an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

states that vigorously employed the death penalty. For example, in Texas, ninety-two capital commutations were granted while 361 executions were carried out between 1923 and 1972, for a grant rate of approximately one in five.[15] The rate of commutation was even higher in other major death penalty states: Florida granted clemency in nearly one-quarter of all capital cases between 1924 and 1966, and North Carolina granted clemency in more than one-third of all capital cases between 1909 and 1954.[16]

In the aftermath of the Supreme Court's constitutional reauthorization of the death penalty in *Gregg v. Georgia* and accompanying cases in 1976,[17] the capital commutation rate plummeted and remains at a vastly reduced level to this day. In the nearly fifty years since 1976, Texas has issued only three capital commutations while carrying out 586 executions—a grant rate of approximately one in 200, as compared to one in five during the fifty years prior to 1972.[18] When one considers Texas, Florida, and North Carolina together, those states have collectively granted only fourteen capital commutations since 1976 while carrying out a total of 734 executions—a grant rate of roughly one in fifty.[19] While clemency in non-capital cases has also declined over the past half-century,[20] it never constituted as significant

15. *See* JAMES W. MARQUART, SHELDON EKLAND-OLSON & JONATHAN R. SORENSEN, THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990 20 tbl.2.1 (1994) (listing numbers of capital prisoners executed and commuted from 1923 to 1972).

16. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 291 (2002).

17. *See* Gregg v. Georgia, 428 U.S. 153, 198 (1976) (plurality) (holding that Georgia's capital sentencing procedures, by requiring specific jury findings as to the circumstances of the crime or the character of the defendant, did not violate the Eighth and Fourteenth Amendments); Proffitt v. Florida, 428 U.S. 242, 253 (1976) (plurality) (finding that Florida's capital sentencing procedures, by giving state trial judges specific and detailed guidance in deciding whether to impose a death penalty, did not violate the Eighth and Fourteenth Amendments); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality) (finding that Texas's capital sentencing procedures, by guiding and focusing the jury's objective consideration of the particularized circumstances of the offense through special verdict questions, did not violate the Eighth and Fourteenth Amendments); Woodson v. North Carolina, 428 U.S. 280, 285, 303, 305 (1976) (plurality) (holding that North Carolina's mandatory death sentencing statute for first-degree murder was unconstitutional for failing to permit consideration of offenders' individual character and circumstances); Roberts v. Louisiana, 428 U.S. 325, 331, 333–36 (1976) (plurality) (holding that Louisiana's mandatory death sentencing statute for first-degree murder was unconstitutional for failing to permit consideration of offenders' individual character and circumstances).

18. List of Clemencies Since 1976, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976 [https://perma.cc/CVN8-YJYH]; Executions by State and Region Since 1976, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 [https://perma.cc/V8LN-GP8C].

19. List of Clemencies Since 1976, *supra* note 18; Executions by State and Region Since 1976, *supra* note 18.

20. *See* Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 9 (2015) (chronicling the decline in the use of federal clemency from President Kennedy's term to President Obama's term).

a practice in relation to total sentences as capital clemency did, nor did it decline as quickly and dramatically as capital clemency did.

What accounts for this precipitous decline in capital clemency in the post-*Gregg* era? We argue that the link between increasing constitutional regulation of capital punishment and decreasing capital clemency is not a coincidental connection, but rather a causal one. When the Supreme Court reauthorized capital punishment in 1976, it did not merely press a reset button and return the practice of capital punishment to its pre-*Furman* status as a creature of state legislative prerogative rather than federal constitutional oversight. Rather, the Court has engaged in an ongoing endeavor of top-down constitutional regulation of all aspects of the practice of capital punishment, including the requirements for statutory validity, the eligibility for execution of classes of offenses and offenders, the conduct of capital defense counsel, and the structure of capital trials, post-conviction procedures, end-stage litigation, and the execution process. Of course, the Court does not always rule in favor of capital defendants, but in the modern era, its constitutional rulings have become the final word on virtually every question regarding the American capital punishment system—an enormous change from the almost two centuries that preceded *Furman*, when the Court rarely considered such questions. We believe that the project of constitutional regulation of capital punishment has played a significant role in driving the tremendous decline in the use of capital clemency. Of course, there are other factors that have no doubt also contributed to this decline, most notably the same political forces that drove the punitive practices that led to mass incarceration over the past half-century. But constitutional regulation created some independent dynamics that contributed to the decline in capital clemency and some dynamics that reinforced the more general punitive politics of the post-*Furman* era. In what follows, we describe five overlapping ways in which constitutional regulation has made capital clemency a less attractive practice.

First, as we have argued more extensively elsewhere, the Supreme Court's visible and continuing oversight of the capital process promoted both "entrenchment" and "legitimation" of the practice of capital punishment.[21] By "entrenchment," we mean genuine improvements of the practice that make its outcomes more reliable or just, leading to "at least some satisfaction in the real improvements achieved" and thus making people inside and outside of the capital process "more comfortable than they otherwise would be with the underlying practice."[22] The constitutional invalidation of the

21. *See* Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 421–24 (2002) (defining and describing legitimation and entrenchment).

22. *Id.* at 424.

death penalty for juvenile offenders[23] is an example of an entrenching reform, as it eliminated an outlying and widely criticized application of capital punishment. By "legitimation," we mean the appearance of more robust improvement than is actually the case, thus "inducing a false or exaggerated belief in the fairness of the entire system of capital punishment."[24] The constitutional invalidation of the death penalty for offenders with an intellectual disability[25] is an example of a legitimating reform, as states have created many procedural obstacles to accurately identifying such offenders and permitted their execution despite strong evidence of disability.[26] We believe, and have argued elsewhere,[27] that the project of constitutional regulation has had largely legitimating effects. But regardless of how one characterizes each of the many doctrinal changes introduced over nearly fifty years of constitutional regulation, the comprehensive constitutional regulatory project as a whole would naturally tend to make governors and their proxies less concerned about inaccurate or otherwise unjust capital verdicts and thus less likely to employ capital clemency. Moreover, the general public would be less likely to support capital clemency in light of the perceived improvements wrought by the Court's interventions.

Second, the Court's decision in *Gregg* ruled for the first and only time in American history on the essential constitutional morality of the practice of capital punishment, holding that it did not constitute per se "cruel and unusual punishment."[28] In the decade-long constitutional litigation campaign to abolish capital punishment that culminated in the Court's landmark decision in *Furman*, advocates had vigorously asserted that the death penalty was unjust in essence and not just in practice, and that it constituted "cruel and unusual punishment" in its fundamental barbarity and denial of human dignity.[29] However, the plurality of the justices in *Furman*'s bare majority

23. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that execution of juvenile offenders violates the Eighth Amendment).

24. Steiker & Steiker, *supra* note 21, at 422.

25. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that execution of offenders with an intellectual disability violates the Eighth Amendment).

26. *See* Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia*: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 725–26 (2008) (describing state procedural evasion of *Atkins*' substantive reform).

27. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 430–33 (1995) (describing legitimating effects of constitutional regulation of capital punishment).

28. Gregg v. Georgia, 428 U.S. 153, 168–69 (1976) ("We now hold that the punishment of death does not invariably violate the Constitution.").

29. *See* Mugambi Jouet, *A Lost Chapter in Death Penalty History:* Furman v. Georgia*, Albert Camus, and the Normative Challenge to Capital Punishment*, 49 AM. J. CRIM. L. 119, 127–28, 131 (2022) (describing the capital punishment litigation led by Anthony Amsterdam for the Legal Defense Fund, which argued that the death penalty, no matter the type of administration, is "cruel and unusual punishment").

ruled only on the death penalty's failures in practice,[30] arguing that the lack of standards to guide capital sentencing produced wanton, freakish, and discriminatory verdicts that failed to promote the penological ends of the capital punishment.[31] It was not until its decision in *Gregg* in 1976 that the Court directly and decisively rejected the morality-based constitutional claims against the death penalty, holding that legislatures could reasonably conclude that capital punishment advanced the proper penological goals of retribution and deterrence.

This constitutional decision came at a time when constitutional boosterism was in ascendance. Only a decade after *Gregg*, Americans would be "swept up in a celebratory wave" as they hailed the 1987 bicentennial of the drafting of the Constitution.[32] Sanford Levinson's award-winning book, published shortly after the bicentennial, analogized American belief in constitutionalism to a form of "civil religion" or constitution "worship."[33] The centrality of the Constitution in American public life led many to believe that everything good and necessary must be mandated by the Constitution, and everything problematic or evil forbidden by it. Consequently, the Court's constitutional acceptance of capital punishment in 1976 likely dampened the power of moral claims against the practice. And even those who were not persuaded by the Court's reasoning in *Gregg* would have seen the wisdom of shifting legal and policy discourse around capital punishment from its essential morality to more specific claims about the process by which it was imposed. This shift, whether in actual belief or public discourse, gave governors comfort and cover in declining requests for capital clemency, especially when courts had already ruled against the claimants on procedural matters.

Third, in the first decades of the modern era, the Supreme Court and other state and federal courts reversed an extraordinarily large number of capital cases for legal errors. A study of 4,578 state capital cases in the first twenty-three years after *Furman* revealed that 68% of capital sentences were set aside for prejudicial error.[34] Many of these reversals reflected either the

30. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

31. The individual opinions of Justices Douglas, Stewart, and White in *Furman* all emphasized the problems of standardless sentencing discretion. *Id.* at 256–57 (Douglas, J., concurring); *id*. at 308–10 (Stewart, J., concurring); *id*. at 313 (White, J., concurring). Only Justices Brennan and Marshall advanced arguments based on the moral unacceptability of death as a punishment. *Id.* at 285–86 (Brennan, J., concurring); *id*. at 258–60 (Marshall, J., concurring).

32. AZIZ RANA, THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM, at x (forthcoming 2024).

33. SANFORD LEVINSON, CONSTITUTIONAL FAITH 10–11, 14 (1988).

34. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973–1995*, at i (Colum. L. Sch., Pub. L. & Legal Theory Working Paper, Paper No. 015, 2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=232712 [https://perma.cc/AHA5-55JK].

Supreme Court's shifting course on constitutional essentials or state resistance to the new constitutional norms that were being imposed. But unless one dug into the details of thousands of cases, it was easy to be left with the impression that the new era of constitutional regulation made it extremely difficult for death sentences to withstand scrutiny and for executions to be carried out. The sheer magnitude of reversals supported a perception that capital punishment was a fragile practice under relentless assault from the courts. This perception helped smooth the passage of the federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), expressly designed to limit federal habeas review of state capital convictions.[35] State governors may well have wished to avoid the appearance of "piling on" during this lengthy and controversial period of extensive judicial reversals.

Fourth, *Furman*'s constitutional invalidation of capital punishment engendered a powerful political backlash that did not immediately end with *Gregg*'s reinstatement. In the period between *Furman* and *Gregg*, a tidal wave of jurisdictions—thirty-five states and the federal government—passed new capital sentencing schemes in an effort to reinstate the death penalty following *Furman*'s constitutional invalidation.[36] As homicide and other crime rates continued to rise in the 1970s and 1980s, support grew for harsher criminal punishment across the board, including mandatory minimum sentences, "three strikes" laws, and increased criminal prosecution of juvenile offenders in adult court.[37] The Court's high-profile interventions in *Furman* and *Gregg* thrust capital punishment into the forefront of public consciousness, and in the decades that followed, the death penalty became an easy shorthand for politicians to express their "tough on crime" stances. Local district attorneys, elected state judges, and governors ran for office on their support for capital punishment. In 1990 alone, the death penalty played a prominent, even central, role in three gubernatorial contests:

> 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. In Texas, Jim Mattox ran against Ann Richards in the Democratic primary with ads taking credit for thirty-two executions in his role as Attorney General. In Florida, incumbent

35. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, Title I, 110 Stat. 1214, 1214, 1217–26 (1996) (stating AEDPA's purpose of providing for an "effective" death penalty and outlining legislative changes designed to limit federal review of state capital convictions).

36. *See* Gregg v. Georgia, 428 U.S. 153, 179–80 (1976) (plurality opinion) (describing legislative response to *Furman*).

37. *See* BANNER, *supra* note 16, at 300–01 (noting a climate of fear among the American public following a rise in homicide rates).

> Governor Bob Martinez ran ads boasting of the ninety-plus death warrants he had signed while in office.[38]

In this political milieu, it was impossible for a clemency grant to fly below the political radar, and it thus became much more politically costly for governors to grant capital clemency, even in compelling cases.

Fifth and finally, constitutional regulation of capital punishment drove up the cost of capital verdicts substantially by making capital trials more expensive and by generating a complex body of law that creates many appellate issues. Even when the cost of life imprisonment is taken into account, capital murder prosecutions are now far more expensive than non-capital prosecutions, often by millions of dollars.[39] Much of this cost comes at the trial stage because capital trials in the post-*Furman* era now involve at least two separate phases—one to determine guilt, and one to determine sentence. The sentencing phase can be highly resource-intensive because it involves a specialized mitigation team that must undertake a wide-ranging investigation of the defendant's social history and mental capacity.[40] Moreover, capital verdicts lead to lengthy appeals, which carry their own costs, including long-term incarceration on death row during the post-conviction process. In many of the legislative debates leading to death penalty repeal over the past two decades, the high cost of administering the death penalty was a prominent argument.[41] The enormous costs involved in producing capital verdicts create an additional disincentive for executives to grant clemency. Setting aside a death sentence represents not only a controversial diminution in punishment, but also a waste of a substantial draw on the public fisc.

Constitutional regulation changed perceptions of the appropriateness of capital punishment and of the fairness of its administration, raised the political salience and the political risks of granting clemency, and generally shifted the incentives of governors against the kind of robust clemency that

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38. Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 112 (2002) (footnotes omitted).

39. RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL 16–17 (2013), https://dpic-cdn.org/production/legacy/TwoPercentReport.pdf [https://perma.cc/PE64-6N42] (comparing states' costs for death penalty cases and non-death penalty cases).

40. *See* Am. Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 959–60 (2003) (identifying the necessity of mitigation specialists due to their "clinical and information-gathering skills and training").

41. *See* Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 118 (2010) (noting the role of cost in the legislative repeals in New York, New Jersey, and New Mexico); Dieter, *supra* note 39, at 17 n.45 (noting the role of cost in the legislative repeals in Maryland, Connecticut, Illinois, New Mexico, New Jersey, and New York).

had existed in the pre-*Furman* era. But can this shift be justified as a normative matter? It is to this question that we now turn.

II. Is the Sharp Decline in Executive Clemency Justified?

In this section, we consider the possibility that the profound decline in capital clemency in the modern era is the welcome byproduct of constitutional regulation. Did the new Eighth Amendment doctrines crafted in the wake of *Furman* cure or significantly ameliorate the problems necessitating executive intervention in the pre-*Furman* world? Did these judicial doctrines (and the legislative innovations they inspired) obviate the need for a robust executive role? We argue that many, indeed, most of the pathologies of the pre-*Furman* world continued to plague the administration of the death penalty after the shift to the modern era, including to the present moment, and we illustrate this point by examining some of the grounds most commonly invoked in twentieth century pre-*Furman* commutations of capital sentences. These grounds include: (1) *insufficient aggravation*—that the crime was not among the "worst offenses" and its severity did not warrant death; (2) *disproportionality in light of the reduced culpability of the offender*—that substantial mitigating circumstances reduced the culpability of the offender and called for leniency; (3) *arbitrariness*—that the imposition of the death penalty would be unfair in light of the relatively milder treatment of similar (or more aggravated) offenses; (4) *procedural fairness*—that the investigation or prosecution of the offense suffered from significant irregularities or manifest injustice; (5) *potential wrongful execution*—that doubts remained about the underlying verdict and raised the prospect of a wrongful execution.

Each of these categories continues to present significant numbers of cases worthy of executive intervention. Although constitutional regulation and concomitant changes in state practices have improved the administration of the death penalty in some respects, the prevailing system continues to produce death sentences and executions that are excessive, arbitrary, procedurally flawed, or inaccurate.

In addition, changes in capital practices traceable to constitutional regulation have created new categories of cases worthy of executive intervention. Most notably, constitutional regulation has significantly prolonged the time between sentence and execution, with inmates spending decades rather than a few months or years incarcerated prior to their execution.[42] This extended death-row incarceration warrants at least four new

42. *See Time on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row [https://perma.cc/TT7L-2FVU] (noting that "[w]hen the constitution was written, the time between sentencing and execution could be measured in days or

grounds for executive review: (1) *double punishment*—whether an execution is appropriate given the lengthy imprisonment already endured (often in extreme conditions, such as solitary confinement); (2) *redeeming qualities or contributions*—whether an inmate's conduct during his lengthy death-row confinement reveals new facts about the inmate's character or contributions warranting leniency; (3) *disproven dangerousness*—whether an inmate's conduct undermines the incapacitation rationale for execution, especially in jurisdictions requiring proof of dangerousness as a prerequisite to a death sentence; (4) *changed community standards*—whether an execution is appropriate given that the community no longer condemns offenders to death for the type of offense the inmate had committed.

A. Constitutional Regulation Has Not Cured the Excesses of the Pre-Modern Era

In the pre-modern era, the death penalty was available for a wide range of crimes in capital jurisdictions, including most murders and in some cases non-homicidal offenses such as rape, armed robbery, and kidnapping.[43] In practice, the vast majority of death sentences and executions in the twentieth century prior to *Furman* were imposed for murder or rape.[44] Nonetheless, the breadth of capital statutes meant that the death penalty was available for crimes that, in the scheme of things, were not exceptionally aggravated. In this context, death-sentenced inmates sought and frequently received commutations on the ground that their conduct was insufficiently grave to warrant the death penalty.[45]

The Court's decision to regulate the death penalty beginning in the 1970s was responsive in part to the concern that death eligibility under prevailing state statutes was too broad and those schemes failed to confine the death penalty to the "worst of the worst" offenses. The breadth of death eligibility was particularly problematic because of the declining number of death sentences in the 1950s and 1960s. Given the relative rarity of death sentences and the fact that most murders (and in some states, rapes) rendered a defendant death-eligible, there was a substantial possibility that some

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weeks" but that the Supreme Court's "suspension of the death penalty in 1972 and its declaration in 1976 that meaningful appellate review was a prerequisite to any constitutionally acceptable scheme of capital punishment . . . has resulted in lengthier appeals").

43. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 44 (2016).

44. *See Capital Punishment: Hearing on H.R. 8414, H.R. 8483, H.R. 9486, H.R. 3243, H.R. 193, H.R. 11797, and H.R. 12217 Before Subcomm. No. 3 of the Comm. on the Judiciary*, 92nd Cong. 265 (1972) (reflecting that 3789 of 3859 executions between 1930 and 1971 were for murder or rape).

45. *E.g.*, MARQUART ET AL., *supra* note 15, at 102–03 (noting numerous commutations in Texas in the pre-*Furman* era based on lack of premeditation, provocation, or some other offense-related factor).

defendants would receive the death penalty in circumstances that most prosecutors and juries would not regard as death-worthy (as evidenced by their practices). As the NAACP Legal Defense Fund honed its challenges to death sentences in the 1960s, it insisted that states needed to confine the death penalty to a narrower set of cases so that there was some assurance that those sentenced to death were truly deserving of the penalty under prevailing moral standards.[46] Although the Court famously rejected this claim in *McGautha v. California*,[47] insisting that it was "beyond present human ability" to devise rational standards to limit the death penalty's reach,[48] in *Furman* the decision to invalidate prevailing death sentences rested in part on the Court's perception that death eligibility was too broad given the paucity of death sentences and therefore risked excessive punishment.[49]

Most states responded to *Furman* by creating a new offense of "capital murder," which required proof of an additional "aggravating factor" beyond the offense of murder to trigger death eligibility.[50] The promulgation of aggravating factors sought to confine death eligibility to only the most grave cases and to ensure that the death penalty would not be imposed in ordinary cases in conflict with prevailing moral values.[51] These statutes have proved largely unsuccessful in their effort to confine death eligibility to the "worst of the worst" offenses.[52] Many states, borrowing from the Model Penal Code, included hopelessly open-ended aggravating factors, such as the offense was "especially heinous, atrocious, or cruel" or the defendant displayed "utter disregard for human life."[53] Though the Court recognized the problem with such factors early in the modern era and granted relief in a few cases, states still manage to rest death sentences on these overbroad factors. The Court permits judicial constructions of facially vague factors to save the use of such factors, and the limiting constructions are often no better than the facially vague language acknowledged to be unconstitutionally broad.[54]

In addition, some objective aggravating factors, such as the fact that a murder was committed during the course of some other dangerous felony (such as armed robbery, burglary, or rape), tend to reach a large swath of

46. *See* STEIKER & STEIKER, *supra* note 43, at 44–45 (detailing challenges to pre-*Furman* regime).

47. 402 U.S. 183 (1971).

48. *Id.* at 204.

49. Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring) (describing rarity of death sentences in relation to broad death eligibility).

50. Tyler Ash, *Can All Murders Be "Aggravated?" A Look at Aggravating Factor Capital-Eligibility Schemes*, 63 St. Louis U. L.J. 641, 642, 644–45 (2019).

51. *Id.* at 644–45.

52. *See* Ash, *supra* note 50, at 653–56.

53. Steiker & Steiker, *supra* note 27, at 373–74.

54. *Id.* at 373.

murders, undermining the "narrowing" function of those factors.[55] Lastly and perhaps most significantly, states have enumerated large numbers of aggravating factors, effectively covering the terrain of murder.[56] So even if each individual factor is successful in limiting the reach of the death penalty, the factors *collectively* make virtually all murderers death-eligible. As noted in a recent challenge to the scope of death eligibility under the Arizona capital scheme,[57] one study found that about 98% of first-degree murders committed in Maricopa County over a ten-year period (856 out of 866) satisfied at least one of Arizona's fourteen aggravating factors.[58] In short, death rows are still populated with significant numbers of inmates who committed "ordinary" murders that fall within the current breadth of state schemes.

The other route to ensuring that the death penalty is reserved for the "worst of the worst" is through proportionality exemptions limiting its reach. Here, too, constitutional regulation has not achieved adequate narrowing. In the first three decades post-*Furman*, the Court invalidated the death penalty for the rape of an adult victim,[59] reflecting most states' abandonment of the death penalty for rape in the wake of *Furman.* This was an important development, though it should be noted that offenders convicted of rape were not frequent recipients of commutations in the pre-*Furman* era,[60] reflecting the racial bias in the administration of the death penalty for rape (virtually all executions for rape in the U.S. between 1930–1970 were carried out in states from the former confederacy, with the vast majority involving Black defendants and white victims[61]). But in the 1980s, the Court rejected protections for juveniles[62] and persons with very low intellectual functioning.[63] Additionally, the Court also crafted very limited protections for persons convicted as accomplices for killings by others ("non-triggerpersons").[64] In 2005, the Court revisited its decision regarding juveniles and exempted persons who were under the age of eighteen at the

55. *Id.* at 372, 376–77.

56. *Id.* at 373–74.

57. Order Denying Petition for Writ of Certiorari, 138 S. Ct. 1054 (2018).

58. *Id.* at 1056.

59. Coker v. Georgia, 433 U.S. 584, 592 (1977).

60. *See, e.g.*, MARQUART ET AL., *supra* note 15, at 117 (documenting the relatively low commutation rate in Texas for offenders convicted of rape rather than murder in the pre-*Furman* era).

61. *See Race, Rape, and the Death Penalty*, DEATH PENALTY INFO. CTR (May 16, 2019), https://deathpenaltyinfo.org/policy-issues/race/race-rape-and-the-death-penalty [https://perma.cc/ANM8-S7RC].

62. Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

63. Penry v. Lynaugh, 492 U.S. 302, 340 (1989).

64. Tison v. Arizona, 481 U.S. 137, 149–50, 158 (1987) (removing bright-line protection exempting persons who neither killed, attempted to kill, or intended to kill, established in Enmund v. Florida, 458 U.S. 782 (1982)).

time of the offense,[65] though almost two dozen offenders in this category were executed post-*Furman* before this exemption was embraced.[66] The Court also reversed itself and exempted persons with intellectual disabilities,[67] but many states have failed to protect this class of offenders from death sentences and executions. Georgia, the first state to enact legislation protecting this class, requires that an offender establish his intellectual disability beyond a reasonable doubt, essentially guaranteeing that many persons who satisfy the criteria for intellectual disability will remain subject to execution.[68] Other states, such as Florida and Texas, refused to adhere to clinical definitions and standards in implementing the ban, with the result that many offenders with intellectual disabilities were executed despite the Court's prohibition;[69] the Court has since rejected these contra-clinical approaches,[70] but it remains difficult for the Court to police states' underenforcement of this proportionality limit. Moreover, the statutory and constitutional bars against executing offenders with intellectual disabilities offer no protection to individuals whose intellectual functioning is extremely low but just outside the clinically defined boundary.

In addition, states have declined to protect offenders with serious mental illness from the death penalty. In most states, individuals with serious mental illness will often fail to meet the general test for "insanity" at the time of the offense and will face capital punishment unless spared by prosecutorial or sentencer discretion. Unfortunately, many actors within the criminal system fail to appreciate the *mitigating* significance of serious mental illness and, worse, tend to treat such illness as *aggravating* because of the perceived dangerousness of those offenders. Numerous offenders with serious mental illness (including those burdened by schizophrenia, schizoaffective disorder, bipolar disorder, or delusional disorder) have been executed in the modern

65. Roper v. Simmons, 543 U.S. 551, 578 (2005).

66. *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/executions?juvenile=Yes [https://perma.cc/LU4X-3BMX] (listing the 22 executions of juveniles that occurred between 1985–2003).

67. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

68. *See, e.g.*, *Georgia Death-Row Prisoner Asks Supreme Court to Strike Down Law That Evades Prohibition on Executing the Intellectually Disabled*, DEATH PENALTY INFO. CTR. (Mar. 25, 2020), https://deathpenaltyinfo.org/news/georgia-death-row-prisoner-asks-supreme-court-to-strike-down-law-that-evades-prohibition-on-executing-the-intellectually-disabled [https://perma.cc/4AMS-HUSD] (describing a constitutional challenge to Georgia's definition of intellectual disability after 32 years without a defendant meeting the criteria).

69. *See* Joseph Margulies, John Blume & Sheri Johnson, *Dead Right: A Cautionary Capital Punishment Tale*, 53 COLUM. HUMAN RT. L. J. 59, 68–72 (2021) (detailing executions in defiance of Court's prohibition against executing persons with intellectual disabilities).

70. Hall v. Florida, 572 U.S. 701, 704 (2014) (rejecting Florida's refusal to accept clinical approaches to the standard error of measurement in assessing IQ scores); Moore v. Texas, 137 S. Ct. 1039, 1044 (2017) (rejecting Texas's non-clinical approach to identifying adaptive deficits for the purposes of gauging intellectual disability).

era, and only two states, Ohio and Kentucky, have enacted targeted legislation to limit that possibility.[71]

Overall, then, state schemes continue to allow disproportionate death sentences to be imposed along two dimensions: in cases where the underlying offense has relatively low aggravation and in cases in which the offender has markedly reduced culpability. Constitutional regulation offers only modest safeguards against such practices. Of course, prosecutors and jurors can avoid excessive applications of the death penalty through their exercise of discretion, but that was also true in the pre-*Furman* era. Endemic structural problems heighten the risk of disproportionate death sentences, including the political incentives of prosecutors in some jurisdictions to seek death even in marginal cases (an enormous problem in the early decades of the modern era[72]), the death qualification of jurors who will decide a defendant's fate,[73] and the unevenness of capital trial representation (many lawyers fail to uncover and present facts documenting a defendant's reduced culpability).[74]

A separate but related problem in the modern era is the death penalty's arbitrary and discriminatory administration. Commutations in the pre-*Furman* era often targeted offenders who were equally or less culpable than co-defendants who had been spared death.[75] The risk of such executions remains today, especially given the Court's limited protection of non-triggerpersons who did not intend to kill.[76] More broadly, there is compelling evidence that the death penalty carries forward much of the arbitrary and discriminatory administration that inspired the Court to regulate the death penalty in the first instance. When *Furman* invalidated prevailing state capital statutes in 1972, Justice Douglas lamented the "caste" aspect of the American death penalty and insisted that the broad death eligibility and lack

71. *Under Recent State Legislation Courts in Ohio and Kentucky Rule Four Men Ineligible for Execution Due to Serious Mental Illness*, DEATH PENALTY INFO. CTR. (Nov. 2, 2023), https://deathpenaltyinfo.org/news/under-recent-state-legislation-courts-in-ohio-and-kentucky-rule-three-men-ineligible-for-execution-due-to-serious-mental-illness [https://perma.cc/FC5P-K6F4].

72. *See* Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code; Part II: Report to the ALI Concerning Capital Punishment*, 89 TEXAS L. REV. 353, 390–91 (2010) (discussing politicization of the death penalty and prosecutorial incentives).

73. *See* Wainwright v. Witt, 469 U.S. 412, 424–25 (1985) (allowing states to more easily remove jurors with conscientious reservations about the death penalty).

74. *See* Amanda K. Cox, *Death Penalty and the Poor*, *in* ROUTLEDGE HANDBOOK OF SOCIAL, ECONOMIC, AND CRIMINAL JUSTICE 54 (Cliff Roberson ed., 2018) (explaining why "court-appointed attorneys rarely present sufficient evidence of mitigation during the penalty phase").

75. *See, e.g.*, MARQUART ET AL., *supra* note 15, at 102–03 (noting numerous commutations in Texas in the pre-*Furman* era based on the condemned having been provoked or not being the "trigger man").

76. *See* Tison v. Arizona, 481 U.S. 137, 157 (1987) (finding that the death penalty may constitutionally be applied to persons who did not kill or specifically intend to kill, but who were substantial participants in the offense and acted with reckless indifference to human life).

of guidance within state schemes facilitated unequal treatment of offenders.[77] Despite the Court's intervention, race remains a powerful predictor of death penalty outcomes, particularly the race of victims. Confronted with an empirical study documenting the influence of race in Georgia's early post-*Furman* period, the Court declined to find strong statistical evidence of the role of race in the distribution of death sentences violative of either the Eighth Amendment prohibition of cruel and unusual punishment or the Fourteen Amendment's guarantee of equal protection.[78] The Court assumed for the purposes of its decision that the study was empirically sound; it concluded that the mandated discretion in capital cases makes it impossible to ensure non-discriminatory outcomes for any potential arbitrary factor, including race.[79] Moreover, discretion likely produces arbitrary or discriminatory outcomes in non-capital cases, and a decision invalidating the death penalty based on its discriminatory administration would threaten the whole criminal justice system.[80] Accordingly, the Court concluded that "[t]he Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment."[81] Other post-*Furman* studies have documented the influence of race on capital verdicts, as well as other forms of discrimination, including discrimination on the basis of sex (favoring female offenders), geography (documenting differential treatment of similar offenses among counties within particular states), and resources (offenders with well-resourced representation are less likely to receive death-sentences).[82]

1. Fair Proceedings.—As noted above, the high reversal rates in the first two decades post-*Furman* gave the false impression that the convictions and sentences that survived review were the product of fair proceedings. But the high reversal rates in those first decades were mostly attributable to highly technical aspects of the Court's new capital jurisprudence and did not reflect correction of systemic problems in state capital systems.[83] Much of the litigation focused on the overly-broad aggravating factors states adopted as part of their post-*Furman* schemes, as well as the failure of many states to facilitate consideration of various kinds of mitigating evidence.[84] As the

77. Furman v. Georgia, 408 U.S. 238, 255–56 (1972) (Douglas, J., concurring).

78. McCleskey v. Kemp, 481 U.S. 279, 286, 297 (1987).

79. *Id.* at 315–18; *id.* at 324 (Brennan, J., dissenting).

80. *Id.* at 314–15.

81. *Id.* at 319.

82. *See, e.g.*, Glossip v. Gross, 576 U.S. 863, 918–19 (2015) (Breyer, J., joined by Ginsburg, J., dissenting) (collecting studies documenting various types of discrimination in the administration of the American death penalty).

83. *See* STEIKER & STEIKER, *supra* note 43, at 175–76.

84. *Id.*

courts attempted to sort out these defects in the new statutes, deeper, more fundamental problems remained. Racial bias continued to infect charging decisions, jury selection, and the distribution of capital sentences, but the Court offered little protection against discrimination in these areas.[85] Trial and post-conviction representation remained very poor (especially in the first two decades post-*Furman*), but the Court failed to supervise the quality of capital representation.[86] The Court first devised a test for assessing the constitutional adequacy of punishment-phase investigation and representation in 1984, calling for highly deferential review of trial counsel's representation and making clear that the goal of Sixth Amendment review "is not to improve the quality of representation."[87] The Court also emphasized that the Sixth Amendment approach is similar in capital and non-capital cases.[88] In the early years, post-*Furman*, scores of death-sentenced inmates challenged the adequacy of their trial-level representation in state and federal court detailing extraordinary breakdowns in the adversarial process, including the failure to conduct any punishment-phase investigation at all, the failure to develop any argument supporting a non-death sentence, *defense* counsel use of racial epithets to refer to the client, and cases in which counsel was either asleep or drunk at trial.[89] Nonetheless, the Court did not grant relief on any claim of inadequate punishment-phase investigation or advocacy until more than a quarter-century after *Furman*,[90] resulting in the execution of many inmates who were essentially unrepresented at their capital trials.[91] The Court also declined to police the manner by which claims of inadequate trial counsel are litigated, rejecting the claim that the Sixth Amendment right to counsel extends to state post-conviction proceedings—generally the first opportunity to challenge the constitutional adequacy of trial counsel.[92] As a result, death-sentenced inmates who received inadequate counsel at trial *and* in subsequent post-conviction proceedings were

85. *See* Sheri Lynn Johnson, *Litigating for Racial Fairness after* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178, 179 (2007) (noting that "in twenty years, there has been *one* successful . . . claim that race influenced the defendant's selection for imposition of the death penalty, whether the decision was made by a prosecutor, a judge, or a jury").

86. *See* STEIKER & STEIKER, *supra* note 43, at 170.

87. Strickland v. Washington, 466 U.S. 668, 689 (1984) (holding that ineffective assistance of counsel requires both objectively deficient performance and a reasonable probability that the deficiency prejudiced the defendant).

88. *Id.* at 686.

89. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1843 (1994) (cataloguing cases with patently ineffective representation yet no judicial relief).

90. *See* Joseph Margulies et al., *supra* note 69, at 106.

91. *Id.* at 106–08.

92. Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion).

essentially without recourse.[93] Moreover, in cases in which death-sentenced inmates are adequately represented as they litigate ineffectiveness of trial counsel, state post-conviction courts often deny relief without the benefit of hearings or any adequate process, simply "rubber-stamping" prosecution-crafted orders denying relief; the Court has refused to police such truncated and manifestly unfair adjudications.[94]

Despite the Court's failure to address fundamental unfairness in state capital practices, the perception of meticulous supervision of capital verdicts fueled the congressional decision to limit federal habeas review of state convictions. The Antiterrorism and Effective Death Penalty Act of 1996, or the AEDPA, eliminated de novo review of federal constitutional claims in most habeas cases and crafted other procedural barriers to federal habeas review, including a new statute of limitations, a restriction on evidentiary hearings, and bars to consideration of successive petitions.[95] The more limited scope of federal habeas review and the falling-off of first-generation claims arising from miscommunication about the constitutional prerequisites for post-*Furman* capital statutes have produced an extraordinary decline in reversal rates in capital cases.[96] The low reversal rates of the present moment do not reflect a dramatically improved capital system; instead, they reflect a laissez-faire approach to constitutional norm enforcement. But review of capital convictions and sentences still takes enormous time and resources, despite the low level of constitutional norm enforcement, which, in turn, creates political pressure for executive officials not to interfere with the convictions and sentences that emerge untouched after years of multi-layered judicial review.

2. Accuracy.—Wrongful convictions remain a problem in the present era. In the first two decades post-*Furman*, it was still common for capital trial

93. The Court ameliorated its rejection of a Sixth Amendment right to state post-conviction counsel by holding that ineffective assistance of counsel on state post-conviction respecting a trial ineffectiveness claim can count as "cause" for overlooking procedural default on federal habeas. Martinez v. Ryan, 566 U.S. 1, 9 (2012) (plurality opinion). This holding briefly allowed death-sentenced inmates who had received inadequate representation at trial and on state post-conviction to receive review of their trial ineffectiveness claim in federal court. But the Court subsequently limited severely that potential fix by construing the federal habeas statute to forbid developing new evidence supporting the trial ineffectiveness claim in federal court. Shinn v. Ramirez, 142 S. Ct. 1718, 1734 (2022).

94. *See* Jordan M. Steiker, James W. Marcus & Thea J. Posel, *The Problem of "Rubber-Stamping" in State Capital Habeas Proceedings: A Harris County Case Study*, 55 HOUS. L. REV. 889, 893–94 (2018) (describing the ubiquity of "rubber-stamping" prosecution-drafted orders in state post-conviction, and the unwillingness of federal habeas courts to condemn the practice).

95. *See* STEIKER & STEIKER, *supra* note 43, at 138–39 (explaining that AEDPA created "new deadlines for filing petitions" and a new "deferential standard of review").

96. *See, e.g.*, David R. Dow & Jeffrey R. Newberry, *Reversal Rates in Capital Cases in Texas, 2000-2020*, 68 UCLA L. REV. DISC., Apr. 2020, at 2, 12 (describing federal habeas success rate for Texas death-sentenced prisoners as dropping to below 1% in the two decades studied post-AEDPA).

lawyers to have limited resources for investigation. Eventually, states increased funding both for trial and post-conviction proceedings, though resources still vary widely across and within jurisdictions. But many states denied or limited—and continue to deny or limit—the ability of death-sentenced inmates to litigate claims of newly discovered evidence of innocence.[97] Though presented with the opportunity to do so, the Supreme Court has to date never recognized a constitutional right to a forum for claims of wrongful conviction absent a separate constitutional violation (such as prosecutorial misconduct or ineffective assistance of counsel).[98] As it resisted recognition of that claim, the Court highlighted executive clemency as the traditional "fail safe" against wrongful execution.[99]

Even where states permit post-trial consideration of evidence bearing on the possibility of wrongful conviction, they have been reluctant to overturn verdicts despite substantial claims of faulty science, questionable eyewitness testimony, and problematic confessions. In the modern era, clemency has been denied to many inmates with powerful claims of actual innocence (likely leading to wrongful executions).[100] Here, too, constitutional regulation may have not only failed to solve the problems of wrongful conviction and execution, but also exacerbated them by generating the false impression that the elaborate, complex, and lengthy legal proceedings in capital cases obviate the need for executive review of the accuracy of capital verdicts.

3. New Grounds for Clemency Related to Constitutional Regulation.— Constitutional regulation has significantly increased the time between sentence and execution. This past year saw the longest average time of death row incarceration prior to execution in American history—about 23 years.[101] This unprecedented delay between sentence and execution implicates a host of problems. First, lengthy death row incarceration leads to "double" punishment because death row incarceration in many states is exceptionally

97. States have shown special solicitude for newly discovered evidence of innocence based on DNA evidence, though even in cases involving such evidence, inmates are often denied access to testing. *See* Bailey Martin, *Litigating Innocence: Why Systemic Reforms Are Needed to Exonerate Innocent, Pro Se Individuals*, MINN. J.L. & INEQ., Summer 2023, at 117, 144–47 (discussing obstacles to relief under many state DNA statutes).

98. *See* Herrera v. Collins, 506 U.S. 390, 400–01 (1993) (declining to recognize a constitutional right to federal habeas review of new evidence of innocence when state courts are closed to such evidence).

99. *Id.* at 415.

100. *See* STEIKER & STEIKER, *supra* note 43, at 209 (discussing two cases of likely wrongful executions in Texas).

101. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2023: YEAR END REPORT 20 (2023), https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2023.pdf?dm=1701385056#:~:text=Prisoners%20who%20were%20executed%20spent,1976%20(tied%20with%202021) [https://perma.cc/AH9U-CD38].

harsh (essentially solitary confinement), such that death-sentenced inmates experience decades of severe deprivation in addition to the possibility of actual execution.[102] Extended death row confinement in small cells with limited human contact has generated acute mental health problems for death row inmates and high rates of suicide.[103] Such incarceration by itself raises concerns about cruelty and excessive punishment. The prospect of condemned inmates enduring long-term solitary confinement plus execution increases the risk of unjustified cruelty. Courts outside of the United States have held that prolonged delay between sentence and execution alone violates human rights, apart from the added American problem of solitary-style confinement.[104] American courts, however, have rejected challenges to the double punishment of long-term harsh incarceration followed by an execution.[105] In such circumstances, it is appropriate for executive officials to determine whether an inmate's experience of decades of solitary-style incarceration warrants reconsideration of the decision to execute, especially as the time between sentence and execution has reached its all-time high.Second, lengthy death row incarceration can provide new information about an inmate's character or circumstances that may warrant revisiting the appropriateness of an execution. A condemned prisoner might come to experience remorse for the offense or develop new and different ties with family members, including their children, while on death row, or serve as a mentor or source of support to others (either on death row or beyond the prison walls). This ground for clemency is not exactly new, as reform while on death row was cited by Bedau as a familiar basis for commutations in the pre-*Furman* era.[106] But the transformations possible after decades on death row are far more likely to be profound than the

102. *Id.*

103. *See* Christine Tartaro & David Lester, *Suicide on Death Row*, 61 J. FORENSIC SCIS. 1656, 1656–57 (2016) (gathering data from 1978–2010 and finding a mean suicide rate of 129.7 per 100,000 inmates per year, compared to a suicide rate of 24.62 in the general population of American males over age fifteen during the same time period); ACLU, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 6–7 (2013), https://www.aclu.org/wpcontent /uploads/publications/deathbeforedying-report.pdf [https://perma.cc/EE4D-Y4ZP] (discussing adverse psychological and physiological consequences suffered by people subjected to solitary confinement).

104. *See* Kealeboga N Bojosi, *The Death Row Phenomenon and the Prohibition Against Torture and Cruel, Inhuman or Degrading Treatment*, 4 AFR. HUM. RTS. L.J. 303, 310, 314–15, 317 (2004) (giving examples of various tribunals that have deemed prolonged death row incarceration to be violative of human rights, including decisions from Zimbabwe, India, and the U.K.'s Privy Council).

105. *See* Kara Sharkey, Comment, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 U. PA. L. REV. 861, 863–64 (2013) (discussing the Supreme Court's rejection of "*Lackey* claims" based on length and severity of death row incarceration).

106. Bedau, *supra* note 4, at 19.

changes wrought in a few months or even a few years. The average age of inmates executed in 2023 was 54, the oldest average age in the modern era.[107]

Executing an inmate in his fifties for a crime committed in his twenties raises a serious question of whether the state is executing the "same" person. Many death-sentenced offenders lived relatively short lives as adults before they committed their crimes and came to death row, and often they had significant adverse experiences (such as poverty, neglect, or victimization) that had contributed to their offending.[108] At sentencing, those offenders were entitled to an individualized assessment of their character and background, but often there was little evidence about who they might become as adults—with the limitations of youth and their circumstances behind them. There is currently no judicial mechanism for "correcting" the record when, having been sentenced to death because jurors believed an offender to be remorseless and without redeeming qualities, the offender manages to adapt to the circumstances of death row with maturity and grace.

Relatedly, one of the central justifications for the modern death penalty is incapacitation—preventing dangerous offenders from harming others. Texas, the leading executing state in the modern era by a wide margin, requires a finding of future dangerousness as predicate to a death sentence, and other states treat dangerousness as an aggravating factor triggering death eligibility.[109] Despite their reliance on predictions of future dangerousness in assessing death, these jurisdictions offer no mechanism for reviewing whether, after many decades of incarceration, those predictions turn out to be wrong. Indeed, in one famous case, Wilbert Lee Evans, whose Virginia death sentence rested on a finding of future dangerousness, sought habeas relief on the ground that he had saved prison staff from rape and perhaps murder during a prison riot.[110] A federal district judge stayed his execution and scheduled a hearing to consider whether the changed circumstances undermined the finding of dangerousness, but the Court of Appeals reversed the stay and the Supreme Court denied review, allowing Evans' execution.[111] Other less dramatic developments erode dangerousness over time, including advanced age and physical disability. Given the lengthy (and lengthening)

107. DEATH PENALTY INFO. CTR., *supra* note 101, at 2.

108. *See* Cox, *supra* note 74, at 52–53 (noting that "clemency documents reveal that those sentenced to death, and subsequently executed, lived lives of poverty, abuse, and neglect").

109. *See* Ana M. Otero, *The Death of Fairness: Texas's Future Dangerousness Revisited*, 4 U. DENV. CRIM. L. REV., Summer 2014, at 1, 2 (criticizing Texas's use of future dangerousness in its capital statute); *see Crimes Punishable by Death: Aggravating Factors by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-bydeath/aggravating-factors-by-state [https://perma.cc/R5F9-QSG6] (listing Oklahoma's future dangerousness aggravating factor).

110. Order Denying Writ of Certiorari, 498 U.S. 927, 927–28 (1990) (Marshall, J., dissenting) (describing the litigation in Evans' case).

111. *Id.* at 927, 929.

periods of death row incarceration, the incapacitation rationale for the death penalty is routinely undercut by the passage of time. Clemency review is essential to ensure that executions are consistent with a jurisdiction's avowed purposes for imposing death.

Lastly, the length of death row incarceration poses a separate problem of shifting moral norms about the appropriate reach of the death penalty. Death-sentenced inmates now face execution more than two decades after they were prosecuted and sentenced. In those intervening decades, prosecutors across the country have sought, and juries have returned, far fewer death verdicts, both in absolute numbers and in relation to the numbers of homicides.[112] This decline in death sentencing reflects a narrowed view of when the death penalty should be imposed. In some jurisdictions, the shift is seismic. In Harris County, Texas, for example, District Attorney Johnny Holmes, who served for twenty-one years (1979–2000), famously sought the death penalty in the vast majority of cases in which it could be legally imposed, producing over 200 death sentences (the most in any county in the country during that period),[113] and his successor Chuck Rosenthal, who served about seven years, likewise frequently sought and secured numerous death sentences.[114] Over the past seventeen years, that same office has sought and obtained death verdicts much less frequently, reflecting in large part the declining enthusiasm for the death penalty within the community.[115] As this same story plays out around the country, it seems prudent to revisit whether persons sentenced under outdated standards should have their sentences consummated. A similar impulse has animated the movement for "second-look" resentencing in the non-capital sphere. That movement highlights the costs of continuing to enforce extremely punitive sentences, often imposed on young offenders, that no longer comport with community values.[116] In the death penalty context, as well, we should be reluctant to carry out death

112. *See* Carol S. Steiker & Jordan M. Steiker, *The Court and Capital Punishment on Different Paths: Abolition in Waiting*, 29 WASH. & LEE J. C.R. & SOC. JUST. 1, 3 (2023) (describing extraordinary decline in capital sentencing).

113. Ed Pilkington, *America's Deadliest Prosecutors: Five Lawyers, 440 Death Sentences*, THE GUARDIAN (June 30, 2016, 12:01 AM), https://www.theguardian.com/us-news/2016/jun/29/us-deadliest-prosecutors-death-penalty-five-attorneys-justice-system [https://perma.cc/YFU6-RKBQ].

114. *See Outlier Counties: Former Death Penalty Capital Shows Signs of Change*, DEATH PENALTY INFO. CTR. (Oct. 20, 2016), https://deathpenaltyinfo.org/news/outlier-counties-former-death-penalty-capital-shows-signs-of-change [https://perma.cc/A5P3-UAXA] (noting that Rosenthal oversaw the production of over 40 death sentences).

115. *See id.*

116. *See* Debra Cassens Weiss, *Momentum Builds for 'Second Look' Legislation that Allows Inmates to Get Their Sentences Cut*, ABA J. (May 19, 2021, 2:41 PM), https://www.abajournal.com/news/article/momentum-builds-for-second-look-legislation-that-allows-inmates-to-get-their-sentences-cut [https://perma.cc/JQ9M-WC4R] (noting how 25 states have introduced legislation that "would authorize reevaluation of lengthy prison sentences").

sentences that depart from prevailing practices and that, under current norms, would be deemed unnecessary or unjust from a retributive perspective.

Conclusion

The historical origin of the clemency power in the divine right of kings suggests that it partakes of a conception of mercy different from the one we wish to invoke. Divine mercy, to which monarchs analogized their own merciful power, exists in tension with or even in opposition to justice. Sinners deserve eternal punishment, but divine mercy extends them grace. St. Anselm of Canterbury noted this paradox in the eleventh century, asking how God could be the source of perfect justice and also grant compassion and mercy to the wicked.[117] Christianity offers a resolution of this paradox in the sacrifice of Jesus Christ to expiate the sins of humankind. No analogous reconciliation of the tension between justice and mercy exists for secular, criminal punishment, which has led some moral philosophers to reject mercy as a public virtue in the operation of criminal justice. As Jeffrie Murphy once wrote of judges, prosecutors, and parole boards, "There thus simply is no room for mercy as an autonomous virtue with which their justice should be tempered. Let them keep their sentimentality to themselves for use in their private lives with their families and pets."[118]

In contrast to this skeptical view of the possibility of public mercy, other moral philosophers offer an account of mercy that is not in tension with justice but rather is justice *enhancing*. Martha Nussbaum calls this type of forbearance "mercy as equity," drawing on "both the ancient concept of equity extolled by Aristotle and Seneca among others in the classical world and the more recent Anglo-American legal tradition of equity."[119] Nussbaum sees commitment to mercy as equity as permitting both "the ability to judge in such a way as to respond with sensitivity to all the particulars of a person and situation, *and* 'the inclination of the mind' toward leniency in punishing."[120] Mary Sigler offers a similar account of equity, calling for it to displace mercy, because "unlike mercy, a freestanding virtue, equity is an instrument of justice."[121] In Sigler's view, equity "focuses on the particulars, fine-tuning the law's application to the messy reality of individual cases."[122]

117. *See* Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, *in* FORGIVENESS, MERCY, AND CLEMENCY 16, 20 (Austin Sarat & Nasser Hussain eds. 2007) (considering whether mercy is "a good normative lens" for evaluating the exercise of discretion in the criminal justice system).

118. JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 174 (1988).

119. Steiker, *supra* note 117, at 25–26.

120. Martha C. Nussbuam, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 85–86 (1993) (emphasis added).

121. Mary Sigler, *Equity, Not Mercy*, *in* THE NEW PHILOSOPHY OF CRIMINAL LAW 232 (Chad Flanders & Zachary Hoskins eds. 2016).

122. *Id.*

It is this sort of "fine-tuning" that capital clemency used to perform and that we urge to be revived. The prevailing administration of American capital punishment is filled with error and marked by change. The death penalty reaches too broadly, allowing idiosyncratic imposition of death sentences, in cases lacking sufficient severity to warrant death given prevailing morality and practices. It also reaches defendants who, by virtue of their particular circumstances—such as limited intelligence, mental illness, or other conditions bearing on moral culpability—should not be among the increasingly small number of offenders who receive the ultimate punishment. Our system imperfectly protects against unfair trials, in which race discrimination, inadequate representation, or other impermissible factors taint the resulting death sentence. Wrongful convictions regrettably remain part of our capital landscape, and the length and severity of death row incarceration generates new reasons to question whether executions are excessive or cruel given the purposes of punishment animating state capital schemes and in light of remarkable changes in public opinion about the appropriate reach of the death penalty.

Courts are able to address only some of these problems and are successful in redressing them only some of the time. Constitutional regulation has not displaced the need for actors outside of the judiciary to reinforce the commitments of the Court's death penalty jurisprudence. If anything, constitutional regulation—and the highly visible role of the courts in policing state capital practices—has lulled those actors into an unjustified complacency.

Many have written about how clemency might be revitalized, or its procedures reformed. Consideration of such reforms lies beyond the scope of this piece. But the many deficiencies and changes that we identify in the practice of capital punishment in the modern era call for the revival of some meaningful non-judicial review of capital sentences—not to depart from justice, but rather to fulfill it.