
VIRGINIA LAW REVIEW

IN BRIEF

VOLUME 94

SEPTEMBER 29, 2008

PAGES 57–64

RESPONSE

THE MULTIFARIOUS POLITICS OF CAPITAL PUNISHMENT: A RESPONSE TO SMITH

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STEVE Smith's insightful account of the "politics of death"¹ is organized into three broad points. First, he notes that the Supreme Court, in trying to regulate (and, briefly, to abolish) the death penalty, perversely reignited a pro-capital punishment politics that had been on the wane through the 1960s. Second, he describes how the political process—at least, since the 1970s—has made moderation on the death penalty infeasible, so that capital punishment policy grows ever harsher but rarely more moderate or restricted. Finally, he describes the Court's new approach to capital punishment regulation. Instead of tinkering with mechanisms to guide jury and judge discretion in death sentencing and thereby bring some distributive justice to capital punishment implementation, the Court has turned to a two-pronged approach: restricting death eligibility under the Cruel and Unusual Punishment Clause and revitalizing capital defense representation under the Sixth Amendment counsel doctrine inaugurated in *Strickland v. Washington*.²

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¹ Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 Va. L. Rev. 283 (2008).

² 466 U.S. 668 (1984).

The first point—the Court’s unintended role in revitalizing capital punishment—is especially interesting. This is the first instance I have seen in the death penalty context of a thesis about the sometimes perverse political effects of the Court’s decisions on contentious policy issues. Our colleague Michael Klarman elaborately and trenchantly developed a similar thesis with respect to the unintended effects of *Brown v. Board of Education*³ on school racial integration and civil rights more broadly.⁴ The Court’s integration order had the perverse political effect of energizing a new zealotry in pro-segregation sentiment. In that context, the story ends differently than in Smith’s account of the death penalty. Over time, larger national political sentiment turned against parochial, often vociferous, segregationists, and the political process, rather than the Court’s decisions, deserves most of the credit for gains in integration. In Smith’s account of the death penalty, however, this second stage—political support for moderating or abolishing the death penalty—has yet to occur and doesn’t seem to be on the horizon.

That is certainly right as a broad conclusion. The death penalty exists in thirty-seven states, and actual executions increased in the 1990s to a level unseen in many decades (and unseen in other Western democracies in decades). But I want to suggest that the politics of death are not quite as bleak as Smith believes them to be, and so I will focus on the second part of his thesis and highlight some significant developments in the moderation of capital punishment policy achieved through the democratic process. I will follow that account with a brief response to Smith’s third part, where I have greater pessimism than Smith seems to have about the significance of the Court’s recent forays into capital punishment regulation.

Thirty-seven states currently authorize capital punishment. To those who follow this closely, that’s a new number—it used to be thirty-eight. Last year, New Jersey’s legislature and governor repealed the death penalty in that state, which had sentenced

³ 347 U.S. 483 (1954).

⁴ Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 344–442 (2004).

murderers to death but not actually executed anyone since 1963.⁵ That was the most heartening development for death penalty opponents in recent years, probably in the entire post-*Furman v. Georgia*⁶ era.

Other signs in state politics also suggest that pro-death-penalty politics is not a one-way ratchet of ever-increasing harshness, nor is taking moderate (or even abolitionist) positions political suicide for politicians. Current governors of at least two death penalty states—Virginia and Maryland—oppose the death penalty. Virginia’s governor successfully vetoed an expansion of the penalty in his state, and Maryland’s imposed a moratorium on executions and vocally supported a bill (that failed in the legislature) to repeal the death penalty.⁷ Those may be minor developments given the lack of legislative success for those views, but other developments point in the same direction. Governors in a few states (in addition to councils in 150 cities⁸) have enacted years-long moratoria on executions without political repercussions: Illinois (since 2000, through two governors of both parties), Maryland (2002–03, 2006–present),⁹ and New Jersey (until the legislature abolished the death penalty last year).¹⁰ New York’s death penalty was declared unconstitutional in 2004, and the legislature has defeated repeated efforts to reinstate it.

⁵ See Death Penalty Information Center, Legislative Activity—New Jersey, <http://www.deathpenaltyinfo.org/article.php?did=2208> (last visited Apr. 4, 2008).

⁶ 408 U.S. 238 (1972).

⁷ See Death Penalty Information Center, Recent Legislative Activity, <http://www.deathpenaltyinfo.org/article.php?did=236&scid=40> (last visited Apr. 4, 2008); Death Penalty Information Center, Legislative Activity—Maryland, <http://www.deathpenaltyinfo.org/article.php?did=2209> (last visited Apr. 4, 2008).

⁸ See Equal Justice USA, A Project of the Quixote Center, <http://www.ejusa.org/> (last visited Apr. 4, 2008).

⁹ Francis X. Clines, Death Penalty is Suspended in Maryland, N.Y. Times, May 10, 2002, at A20; John Wagner & Eric Rich, Md. Death Penalty May Come to Fore, Wash. Post, Dec. 24, 2006, at C1. The 2002 ban by Democratic Gov. Glendening was overturned in Jan. 2003 when Republican Governor Ehrlich took office; Ehrlich was defeated for re-election by Democrat O’Malley, who opposes the death penalty and supports abolition, in 2006, though capital punishment was not a major issue in the campaign. *Id.* at C4.

¹⁰ Though to be sure, moratoria bills have consistently failed in legislatures. See Am. Bar Ass’n, *supra* note 13, at app. G.

In addition, as the Court noted in *Roper v. Simmons*¹¹ and *Atkins v. Virginia*,¹² a number of death penalty states enacted legislation removing teens and mentally retarded individuals from capital-punishment eligibility.¹³ Those actions are debatable as evidence of the consensus against executing such offenders, which the Court was looking for in *Roper* and *Atkins*. But they strongly indicate that in a number of death penalty states, legislative votes to contract the death penalty are far from politically impossible.

There are some examples as well of legislative support for policies that could be politically characterized as frustrating capital punishment. While, as Smith notes, some states, such as Virginia, dramatically under-fund criminal defense, other states do much better, sometimes by binding themselves with legislation that ties public defenders' salaries to prosecutors'—requiring raises for the former whenever salaries increase for the latter.¹⁴ California, for instance, is notable for its commitment to adequately funding appellate litigation in capital cases. And North Carolina's legislature, in addition to creating an Actual Innocence Commission with power to investigate claims wrongful conviction and effectively provide an additional mechanism for collateral review largely outside the judiciary¹⁵ (perhaps with minimal political risk given the focus on innocence), also enacted a broad discovery statute requiring nearly open-file disclosure by the prosecution.¹⁶

¹¹ 543 U.S. 551, 565 (2005).

¹² 536 U.S. 304, 314–16 (2002).

¹³ For a summary of this legislative action, see Am. Bar Ass'n, Building Momentum: The American Bar Association Call for a Moratorium on Executions Takes Hold apps. D–F (2003), available at <http://www.abanet.org/moratorium/reportsandlaw.html>.

¹⁴ See, e.g., Ariz. Rev. Stat. Ann. § 11-582(B) (2001) (defender salary must be at least 70 percent of prosecutor salary); Tenn. Code Ann. § 16-2-518 (1994) (public defense office funding increases must be at least 75 percent of any funding increase for prosecutor offices).

¹⁵ For a description, see Brandon L. Garrett, Aggregation in Criminal Law, 95 Cal. L. Rev. 383, 436–37 (2007).

¹⁶ N.C. Gen. Stat. Ann. § 15A-903 (West 2007) (“Upon motion of the defendant, the court must order the State to . . . Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.”) (enacted 2004, replacing a restrictive discovery statute similar to S.C. R. Crim. Pro. 5(a)).

Also notable, though of uncertain political significance, is the steady decline in actual executions since the high-water mark in 1999. The same is true of death sentences imposed by trial courts: since peaking in 1996, death sentences have been in steady decline, and the 125 capital sentences in 2004 and 2005 marked the lowest number since *Furman* in 1973.¹⁷

All of that hardly means that capital punishment is steadily withering away or that state legislatures will soon achieve the abolition trend that the Court thought it spotted in 1972 and then inadvertently undermined. But it does suggest that the politics of death is not inexorable. Rather, American death-penalty politics (and American criminal justice politics generally) contains a great deal of variation not only across time but also across jurisdictions. Smith notes some key moments in temporal variation—a decline in death penalty support, usage, and authorization during roughly the decade of the 1960s, and increased support, authorization, and usage after *Furman*.

But the spatial variation is even more notable. It is well known that death penalty states have very different rates of execution. But it is less noted that this variation arises largely from legislative policy choices—choices that legislatures implicitly or explicitly reaffirm over time. Carol and Jordan Steiker describe this variation as a split between “symbolic states” and “executing states.”¹⁸ States such as California, Ohio, and Pennsylvania *sentence* offenders to death at rates comparable to states such as Texas, Virginia, Missouri, and Oklahoma. But the former states *carry out* those sentences so rarely that their capital punishment regimes might be viewed as mostly symbolic, while the latter states lead the country actual executions.¹⁹ The reasons for those distinctions are not entirely clear, but some key distinctions tell us something about variations in the politics of death. As the Steikers recount in detail, California’s legislature has a strong and longstanding commitment

¹⁷ Scott E. Sundby, *The Death Penalty’s Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 *Tex. L. Rev.* 1929, 1929–30 (2006).

¹⁸ Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 *Tex. L. Rev.* 1869 (2006).

¹⁹ *Id.* at 1871–72.

to well-funded appellate and collateral counsel for capital defendants; the state allocates at least \$25,000 for investigation during state habeas litigation, an amount that far exceeds funds for the average Texas case, where courts and under-funded lawyers perpetuate a custom of little factual investigation for collateral appeals.²⁰ With the vagaries of state budgets, the legislature cannot always adequately fund those attorneys. But in the budget squeeze, it is the expeditiousness of the process that gives way in California, not the quality of representation. That is, if the state cannot provide well-funded counsel for the appellate process, cases do not proceed, and defendants wait indefinitely on death row. Contrast that with Texas, where cases move more quickly through the appellate and collateral processes despite much less funding of defense counsel from the state and sometimes no counsel at all in the collateral appeal process, giving rise to a culture of poor quality of defense representation that state courts regularly accept.²¹

The points to note are the substantial variation in the politics of death across states and the demonstrated feasibility in American jurisdictions for significant legislative support for policies that benefit capital defendants and slow death penalty implementation. The politics of death is neither monolithic nor inexorable. Death penalty and criminal justice politics more generally seems roughly as amenable to the effects of social movements, legislative lobbying and craftsmanship, and broad shifts in public opinion and events—such as declining crime rates and publicity for exonerations of wrongly convicted individuals—as other important policy debates.

That malleability of capital punishment politics is a modest cause for optimism, at least in contrast to the view that criminal law politics is intrinsically pathological. But that malleability is also cause for skepticism about the efficacy of the Court's recent attempts to insist on better quality defense counsel for capital defendants—an effort, it seems, to move states like Virginia and Texas closer to the process in states like California. Smith seems fairly optimistic that the Court's decisions in *Williams v. Taylor*,²² *Wiggins v. Smith*,²³ and *Rompilla v. Beard*²⁴ inaugurate a new era of

²⁰ Id. at 1878–80, 1886–89.

²¹ Id. at 1880–83.

²² 529 U.S. 362 (2000).

²³ 539 U.S. 510 (2003).

Supreme Court supervision of capital defense representation that will be implemented (as it must be to have any real effect) by lower state and federal courts and, ultimately, state legislatures.²⁵

I agree with the first half of that thesis—that trio of cases constitutes a clear statement by the Court barring the death penalty when defense counsel is notably deficient, even in ways that lower courts for years have approved. But I am less confident that lower courts, and especially state legislatures, will consistently support that commitment. Despite the political successes noted above, the record of politicians allocating money for politically unpopular causes when ordered to do so by courts is not an encouraging one. That was true with the legislative implementation of the *Brown* decision on school desegregation, and—closer to the point here—it has been true when courts have implicitly ordered legislatures to improve criminal defense funding. When the Louisiana Supreme Court effectively barred criminal cases from proceeding until the legislature adequately funded public defense, the legislature initially responded with increased funding but quickly cut back that budget.²⁶ When Oklahoma’s Supreme Court ordered that appointed counsel be paid at the same rates as prosecutors until the legislature devised an adequate system for defense funding, legislators responded by implementing a low-bid contract system for defenders, an arrangement that creates incentives for poor representation.²⁷

A pending prosecution in Georgia is in an example of the cost of implementing *Wiggins/Rompilla* and of legislative resistance to that cost. Brian Nichols’s defense attorneys (and their experts and investigators) have already cost the state \$1.2 million before trial, due largely to an unusual trial judge who will not let the case proceed without adequate defense funding. Those fees exhausted the state’s capital defense budget for the year, and the legislature is refusing to allocate more money. In fact, the Georgia legislature

²⁴ 545 U.S. 374 (2005).

²⁵ It is interesting to note that the Court’s decisions during this same period in *Strickler v. Greene*, 527 U.S. 263 (1999) and *Banks v. Dretke*, 540 U.S. 668 (2004) moderately improve the standards for prosecution disclosure of exculpatory and impeachment evidence in capital cases.

²⁶ Marc L. Miller & Ronald F. Wright, *Criminal Procedures: Prosecution and Adjudication* 79 (3d ed. 2007) (citing *State v. Peart*, 621 So. 2d 780 (La. 1993)).

²⁷ *Id.* at 78 (citing *State v. Lynch*, 796 P.2d 1150 (Okla. 1990)).

has cut defense funding each year since 2005, when it implemented a new statewide defender system with a dedicated funding source from court fees, even though revenues from those fees increased each year.²⁸

So, while there is some cause for modest optimism on American political systems' ability to ratchet down capital punishment, the politics of death that Smith describes is still very much a driving force in many settings, especially where money is involved. And judicial mandates seem a tenuous way prompt political change—at least, *intentional* change. While not every Court decision favoring capital defendants and limiting legislative policy options has perverse effects—the response to *Roper* and *Simmons* limiting death eligibility has been negligible—on Smith's persuasive account, the Court seems more effective at unintentionally prompting political backlash. The politics of death, then, seems to be a mutable and inconstant politics, but nonetheless one the Court has only intermittent and unpredictable success at manipulating. Smith does us a great service in telling a cautionary tale of the Court's failed interjection into death penalty regulation and politics, and in identifying the Court's new approach to finding a productive role for constitutional regulation in capital punishment. It remains to be seen whether the Court will be any more effective on this new path than it was on its old one, in large part due to the political dynamics that Smith describes.

²⁸ Jeffrey Toobin, *Death in Georgia; The High Price of Trying to Save an Infamous Killer's Life*, *New Yorker*, Feb. 4, 2008, at 32.