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RESPONSE

WHAT'S WRONG WITH DEMOCRACY?
A CRITIQUE OF "THE SUPREME COURT AND THE
POLITICS OF DEATH"

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THE primary thesis of Professor Stephen Smith's provocative article *The Supreme Court and the Politics of Death* appears to be that the death penalty is a political tool used by ambitious prosecutors and that—despite wide public support for capital punishment—it is apparently the task of an enlightened judiciary to move towards its restriction or even its functional abolition. In this brief response, we beg to differ. Capital punishment is a proper punishment in the American criminal justice system, whose popular support should not mark it for judicial undermining, but rather judicial support. Professor Smith should be more trusting in the outcome of democratic processes.

Professor Smith begins his interesting article with what he identifies as a conundrum. Why is it, he asks that the "rest of the Western world" has abolished capital punishment "as an ordinary criminal sanction" while America continues to preserve it?¹ The

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¹ Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 Va. L. Rev. 283, 284 (2008).

answer is simple: America responds to the will of the people more than other countries do. In short, America is more of a democracy.

After the execution of Oklahoma bombing mass murderer Timothy McVeigh, one leader of Germany's chapter of Amnesty International remarked that the difference between Europe and America was that "in Europe the leaders are ahead of the people, while in America it is the other way around."² He could not have been more correct. In the more republican European parliaments, the leaders make decisions that in America are left to its citizens. While some elites in America (e.g., legal academics) have traditionally opposed the death penalty, they have never been in a position to impose their own views on the rest of the country.

As Professor Smith concedes, popular support for capital punishment in America has been strong since *Furman*. What is almost unknown (and not discussed by Professor Smith) is that the populations of many western European nations share similar sentiments. Antony Blinken, senior adviser to President Clinton for European affairs, has noted that "[a]cross the Atlantic, it turns out that Europeans support capital punishment in numbers similar to Americans . . . [but t]heir voice will be ignored because the European Union requires aspiring members to prohibit capital punishment."³ The abolition trend among European nations is not a result of popular opinion, but of this requirement. This is not because these nations are more evolved; rather, as Joshua Marshall observed in *The New Republic*, "[t]here is barely a country in Europe where the death penalty was abolished in response to public opinion rather than in spite of it. . . . In other words, if these countries' political cultures are morally superior to America's, it's because they're less democratic."⁴

² C-SPAN, "Deutsche Welle," May 2001 (on file with author). This paragraph and the next are adapted from Joshua K. Marquis, Truth and Consequences: The Penalty of Death, in *Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case* 117, 124–25 (Hugo Adam Bedau & Paul G. Cassell eds., 2004).

³ Antony J. Blinken, Listen to the People, *Time Europe*, May 21, 2001, <http://web.archive.org/web/20011031033451/http://www.time.com/time/europe/eu/magazine/0,9868,109556,00.html>.

⁴ Joshua Micah Marshall, Europe's Death Penalty Elitism: Death in Venice, *New Republic*, July 31, 2000, at 12.

Professor Smith also notes that China and other repressive regimes support the death penalty. But then, so do Japan, India, and a number of Asian democracies. Professor Smith needs to give a more complete accounting of which nations “count” and which do not in developing some sort of an international moral consensus.

Regardless of the views of other countries, however, Professor Smith seems to regard it as the proper role of elites in this country—and particularly the legal elite embodied in the U.S. Supreme Court—to check majoritarian impulses. His arguments are sophisticated, and we do not mean to caricature them in our brief response. But if we understand him correctly, our disagreement with this position is basic and fundamental: there is nothing wrong with a majority of Americans supporting the death penalty and, at least in thirty seven states, authorizing their representatives (prosecutors) to pursue death sentences in for the most serious crimes.

Professor Smith seems to suggest that Americans who support the death penalty will invariably support a politician who shares their views on this single subject. He reports that

[w]ith strong public support for capital punishment and an expectation, especially in key “death” states like Texas and Virginia, that the death penalty will be imposed and carried out with some regularity, the institutional repeat players in the capital punishment “game”—legislators, prosecutors, governors, and judges—have strong incentives to grease the skids of death.⁵

But given this provocative assertion, it is a bit disconcerting to discover that the article does not mention Virginia’s most recent statewide political campaign—one in which capital punishment was very much at issue.

In the 2005 political campaign for the Virginia governorship, the citizens of Virginia (a state with one of the most active death rows in the country) heard a pro-death penalty campaign from the Republican Attorney General who ran against an outspoken opponent of capital punishment, then-Lieutenant Governor Tim Kaine. In the election to replace outgoing Governor Mark Warner,

⁵ Smith, *supra* note 1, at 294.

Attorney General Jerry Gilgore attempted to use Kaine's personal opposition to capital punishment as a political club. The attempt backfired badly.⁶ Voters who are considered overwhelmingly in favor of the death penalty had no problem electing a Governor whose personal convictions ran counter to the majority of the electorate. Presumably it was because these voters do not want someone who would, as Professor Smith colorfully but ultimately inaccurately puts it, "grease the skids of death." Instead, Virginians (no less than other Americans) want elected officials to do the right thing—through the criminal justice system, no less than other governmental processes.

There are a number of legal urban legends repeated in the article. Primary among them is the claim that prosecutors use the death penalty to leverage their careers to higher political office. Thus, the claim is advanced that elected prosecutors have an interest "in signaling their 'toughness' to voters in the area of crime and punishment, and the death penalty is uniquely powerful as a signal of that vital characteristic."⁷ In a footnote supporting this argument, Professor Smith quotes at length from an article offering a "particularly gruesome" example:

[In 1990], the Attorney General of California, who was also the former District Attorney of Los Angeles County, ran for the Democratic nomination for Governor. He broadcast a commercial depicting the metal door to a gas chamber swinging open. A voiceover proclaimed, "As District Attorney and Attorney General, he's put or kept 277 murderers on death row." The opening door revealed the execution chair, its straps loose. Below the chair, a caption stated that the candidate had "Put or Kept 277 on Death Row."⁸

Without context, such an ad appears to reflect a district attorney selling his ardor for capital punishment for higher office. The

⁶ See, e.g., Editorial, *Death Penalty Demagoguery*, *Roanoke Times*, Oct. 13, 2005, at B8, <http://www.roanoke.com/editorials/wb/wb/xp-36011>.

⁷ Smith, *supra* note 1, at 308.

⁸ *Id.* at 308 n.96 (alteration in original) (citing Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 *Geo. J. Legal Ethics* 941, 945 (1994)).

article does not identify the candidate, but he is easily recognized as former Los Angeles District Attorney and California Attorney General John Van de Kamp. Indeed, one of us (Marquis) worked for him as his sole speechwriter for two years in the mid-1980s. What was missing here is valuable context. Van de Kamp was, and remains, an outspoken *foe* of capital punishment. Yet he did not sacrifice those beliefs in his primary race for Governor against then-Mayor (now United States Senator) Dianne Feinstein, a death penalty supporter. The ad was intended to deflect criticism that Van de Kamp's closely-held personal and religious beliefs would prevent him from carrying out California law as Governor. For whatever reasons, Van de Kamp ultimately lost the primary, as did Dianne Feinstein, who later went on to election to the Senate.

These examples, which could be easily multiplied, demonstrate that Americans' attitudes towards capital punishment are far more nuanced than the conventional wisdom recounted in Professor Smith's article would have us believe. Here the experience of Oregon may serve as an illustration. A populist state that helped introduce the referendum to American politics, Oregon was one of the first states to abolish capital punishment in the early part of the twentieth century. Oregon then reinstated the death penalty in the same manner a decade later. In 1964, Oregonians overwhelmingly voted to abolish capital punishment again. But yet again a decade later, it voted by similar margins to reinstate it.

Oregon, of course, is no pure "red" state. It is the same state that introduced the decriminalization of marijuana and physician-assisted suicide—generally considered liberal or "progressive" political concepts—yet it has continued to support the concept of capital punishment. In 2002 a conference at the University of Oregon entitled *The Death Penalty: Reform, Moratorium, or Abolition?* featured a bevy of abolitionists and a tiny number of proponents (including one of us, Marquis). The conference had been planned to be used as the kick-off for another referendum, entitled "Life for Life," seeking to once again ban the death penalty in Oregon. On February 28, 2002 the sponsors announced they were abandoning their initiative drive. The reason? Private polling that predicted their abolition measure would fail by at least a three to one margin. Yet that same staunch support for the death penalty has not prevented voters from electing both a Governor

and Attorney General who are clear in their personal opposition to the death penalty.

Because of his flawed understanding of the sophistication of voters in Oregon and elsewhere, Professor Smith is also wide of the mark in asserting that elected representatives “facilitate the death penalty” by “allocat[ing] funding strategically in ways that systematically favor prosecutors over indigent defendants.”⁹ Indeed, Professor Smith rather starkly argues that legislatures “tilt the scales in favor of death.”¹⁰ Yet the evidence for this broad assertion turns out to be fairly limited. First, the article recounts problems in his home state of Virginia—which may or may not be typical of other parts of the country. Most of the evidence he recounts regards the general indigent defense system—which may or may not apply to capital cases. Turning to Virginia capital defense in particular, he reports that the hourly rate paid to capital defense attorneys is low. Yet the source for this assertion turns out to be more than fifteen years old.¹¹

The level of expertise in capital defense has changed greatly over the last two decades and the caricature of the threadbare but plucky public defender overwhelmed by the well-heeled prosecutor is more likely to be seen on movie and television screens than in the courtrooms of America. To be clear, we do not support inadequate funding of defense counsel in capital cases. But the description of defense funding that Professor Smith provides certainly strikes us as one that bear little resemblance to the criminal justice systems we are familiar with. In the federal system, for instance, \$13.8 million was provided to pay for McVeigh’s attorneys and cover other costs of McVeigh’s defense until his execution.¹² Even in more straightforward capital cases, payments well in excess of \$100,000 are common.

In state criminal justice systems, our home states of Oregon and Utah often provide payments for defense that easily exceed those provided to the prosecution. While these expenses require judicial approval, trial judges are loathe to deny a capital defendant the

⁹ Smith, *supra* note 1, at 302.

¹⁰ *Id.* at 303.

¹¹ *Id.* at 306 n.92 (citing Richard Klein & Robert Spangenberg, *The Indigent Defense Crisis*, 1993 A.B.A. Sec. Crim. Just. 7).

¹² *Defending McVeigh*, *J. Rec. (Oklahoma City, OK)*, July 2, 2001.

ability to produce a theory of defense or, more commonly, evidence during the second sentence phase of the bifurcated capital case. Our states do not stand alone in attempting to ensure that capital defendants receive adequate representation. In 2001, for example, as part of the continuing effort to monitor defense counsel in capital cases, Texas established a Task Force on Indigent Defense to develop standards and policies for the appointment of defense counsel. Similarly, in 2001, the Illinois Supreme Court established a Capital Litigation Trial Bar, which set demanding standards for attorneys representing capital defendants. In 2003, the Judicial Counsel of California promulgated standards for the appointment of trial counsel in capital cases, with particular emphasis on tenure and related experience. It is also common for California trial judges to exercise discretion to appoint two attorneys in capital cases that go to trial.

In short, Professor Smith says that it “strains credulity to think that overworked capital defenders embroiled in complex litigation at severe resource disadvantages will subject the prosecution’s case to meaningful adversarial testing at either the guilt or penalty phase.”¹³ What really strains credulity is to believe that in America in 2008, capital defendants are being regularly hustled off to death row without serious legal representation. If this is really the current state of affairs in America, Professor Smith should at least shoulder the burden of providing more than the isolated anecdotal information that he has offered.

Professor Smith concludes by arguing that the Supreme Court’s recent proportionality decisions and ineffective assistance of counsel standards will be useful tools “in the ongoing effort by the Supreme Court to bring rationality and fairness to the death penalty.”¹⁴ But reading between the lines in his article, it seems that Professor Smith equates “rationality and fairness” with abolishing the death penalty.

At times, the article reads as though there is something wrong with death penalty—that the American people should simply wake up and abolish it, and if they fail to do the right thing, then the Supreme Court should do it for them. Professor Smith does not

¹³ Smith, *supra* note 1, at 334.

¹⁴ *Id.* at 383.

appear to hide his disappointment when he tells us that “the Court gave the nation a stern lecture in *Furman v. Georgia*,” yet within “a few short years, the nation’s death chambers were back in business, with the Court’s blessing, and busier than they had been in decades.”¹⁵ The problem, as he sees it, is “[s]imply put”—“a dominantly procedural approach to death penalty reform was too easy for the political branches to *subvert*”¹⁶—that is, it was “too easy” for the legislatures to come up with constitutional death penalty procedures.

At another point in the article, Professor Smith contends that “defense attorneys face an uphill battle at the penalty phase of a capital case” and “[u]nless they offer the sentencer compelling reasons to show leniency in spite of the brutality of the crime, the penalty phase is *all too likely* to end in a verdict of death.”¹⁷ Of course, a judgment about whether something is “too likely” to end in a verdict of death requires a comparison to something else. Yet the article never articulates what the relevant comparison is, leaving the reader to think that the appropriate and desirable baseline is zero executions.

A morally evolved society does not mean that we punish no one. Instead, it requires that punishment be proportional and extreme punishment be limited to extreme crimes. Whatever else can be said about the Supreme Court’s capital jurisprudence, it has limited capital punishment in this country to only the most serious crimes and required rigorous proportionality analysis in every case. Indeed, to the extent that the pattern of death sentences in America today lacks “fairness and rationality” (a point that Professor Smith never attempts to prove with other-than-anecdotal evidence), it is because of the Court’s hyper-regulation of the process. Justice Scalia powerfully made this point nearly two decades ago. While the *Furman* line of case interpreted the Constitution as demanding a *narrowing* of the persons to whom the death penalty could be applied, a later line of case originating in *Lockett v. Ohio* held that the Constitution simultaneously

¹⁵ Id. at 381.

¹⁶ Id. (emphasis added).

¹⁷ Id. at 347 (emphasis added).

demanded that defendants be given essentially unlimited latitude to introduce “mitigating” evidence in capital cases.¹⁸

[The line of cases stemming from *Lockett*] and the line stemming from *Furman* . . . cannot be reconciled. Pursuant to *Furman*, and in order “to achieve a more rational and equitable administration of the death penalty,” we require that States “channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance.’” In the next breath, however, we say that “the State *cannot* channel the sentencer’s discretion . . . to consider any relevant [mitigating] information offered by the defendant,” and that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not “deserve to be sentenced to death.” The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve.¹⁹

American legislatures could bring greater rationality to the death penalty—if the Supreme Court would let them. For example, a system that executed every first degree murderer would be quite rational. But it would produce more executions, something that appears to be an unacceptable outcome for abolitionist academics (with whom Professor Smith seems to sympathize). Thus, these academics will continue to egg on the Court to continue to “reform” the death penalty process by reading into the Constitution more and more restrictions on the circumstances in which the legislature may prescribe or a jury may impose a capital penalty. Reasonable arguments can, of course, be made for abolishing capital punishment. But then again, there are plenty of reasonable arguments on the other side. The death penalty may well deter murder, meaning that innocent lives are saved through capital punishment.²⁰ And the death penalty has venerable support

¹⁸ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

¹⁹ *Walton v. Arizona*, 497 U.S. 639, 664–65 (1990) (Scalia, J., concurring in the judgment) (citations omitted) (second and third alterations in original).

²⁰ See Paul G. Cassell, In Defense of the Death Penalty, *in* *Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case* 183, 189–97 (Hugo Adam Bedau and Paul G. Cassell eds., 2004).

as an appropriate retributive measure for the most serious crimes—the deliberate taking of innocent human life.

In a democracy, the way in which such contentious issues are resolved is through the legislative process. Congress and thirty-seven state legislatures have spoken in favor of capital punishment, after careful consideration of the arguments on both sides. Thus, in a very real sense, the “Politics of Death” is no more unusual than the “Politics of Farm Subsidies” or the “Politics of Taxation.” We admire Professor Smith’s efforts to bring a broader, political perspective to the death penalty debate. But in the end, there will be winners and losers in every political debate. Professor Smith should be more trusting of the democratic process, even when it produces results he finds disagreeable.