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## PROPORTIONALITY SKEPTICISM IN A RED STATE

Lauren Sudeall Lucas\*

As someone who lives in a red state and has practiced capital defense in Georgia and Alabama, my view for some time has been that the death penalty is not going anywhere any time soon. And while the dominant message from legal experts and commentators in recent years has been that the death penalty is on the decline,<sup>1</sup> the results of this past election might suggest otherwise. The three referenda regarding capital punishment on the 2016 ballot — in California, Nebraska, and Oklahoma — were all resolved in favor of the death penalty.<sup>2</sup> These votes could be taken to signal a resurgence of public support for — or at the very least, a reluctance to completely abandon — the most severe punishment available under the law.

Indeed, for those representing capital defendants in Georgia, last year only confirmed the death penalty's brutal persistence. While the

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<sup>1</sup> See, e.g., DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2016: YEAR END REPORT 2 (2016), <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf> [<https://perma.cc/KJA6-NFTB>] (noting that the number of new death sentences and executions decreased significantly and that public support for the death penalty was at a four-decade low); Richard C. Dieter, *The Future of the Death Penalty in the United States*, 49 U. RICH. L. REV. 921, 921 (2015) (suggesting that the death penalty in the United States “may be approaching its final chapter”); Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 212 (2012) (“Today, . . . the potential for abolition looks very different, and the question seems to be more one of when and how — rather than whether — the American death penalty will expire.”); Scott Bland, *Is the Death Penalty Dying?*, NAT’L J. (Feb. 13, 2014, 12:00 AM), <https://www.nationaljournal.com/s/62088> [<https://perma.cc/L449-RFZA>] (discussing the decrease in public support for the death penalty); Erik Eckhold, *In Death Penalty’s Steady Decline, Some Experts See a Societal Shift*, N.Y. TIMES (Dec. 14, 2013), <http://www.nytimes.com/2013/12/19/us/in-death-penaltys-steady-decline-some-experts-see-a-societal-shift.html> [<https://perma.cc/74YM-S9S3>] (detailing the decline and predictions of a societal shift regarding capital punishment); Ashby Jones, *Death-Penalty Use Continues to Decline in U.S.*, WALL STREET J. (Dec. 16, 2015, 12:01 AM), <http://www.wsj.com/articles/death-penalty-use-continues-to-decline-in-u-s-1450242063> [<https://perma.cc/E83V-NZQW>]; David G. Savage, *Capital Punishment in the U.S. Continues Its Decline*, L.A. TIMES (Dec. 17, 2014, 9:00 PM), <http://www.latimes.com/nation/la-na-death-penalty-2014-12-18-story.html> [<https://perma.cc/E86Y-L73W>] (reporting that “[t]he death penalty continued its slow and steady two-decade decline” in 2014, with “fewer convicted murderers . . . sentenced to die and most executions . . . limited to just three states”).

<sup>2</sup> Aliyah Frumin, *Election 2016: Nebraska, Oklahoma Vote in Favor of Death Penalty*, NBC NEWS (Nov. 9, 2016, 12:45 PM), <http://www.nbcnews.com/storyline/2016-election-day/election-2016-nebraska-oklahoma-vote-favor-death-penalty-n681301> [<https://perma.cc/XHX5-9LNY>] (reporting that in Nebraska, 61.2% voted to repeal an earlier decision to abolish the death penalty; in Oklahoma, 66.4% voted to constitutionally protect capital punishment; and in California, 54% of voters rejected a measure to repeal the death penalty while 51% voted to speed up the time between convictions and executions).

imposition of new death sentences in Georgia has declined,<sup>3</sup> the number of executions reached an all-time high in 2016; in fact, Georgia led the nation in total number of executions, with nine (Texas was second, with seven).<sup>4</sup> Thus, while prosecutors and jurors have exhibited an increasing reluctance to seek and impose death, voters and legislators throughout the country have chosen to leave their capital punishment schemes intact. The machinery of death continues to grind away at a brisk pace.<sup>5</sup>

How can we reconcile these seemingly contradictory phenomena, and what effect does or should the obstinacy of the death penalty in certain states, like Georgia, have on its constitutionality? Taken together, they might suggest that the path to abolition is not as clear or as sure as many commentators think.<sup>6</sup> They may also complicate the applicability of proportionality doctrine, which, in exploring whether death is an appropriate sentence for certain offenses or offenders, relies on an assessment of society's contemporary values with respect to the question at hand. In this Commentary, I suggest that difficulties in accurately assessing public sentiment with respect to the death penalty's general appropriateness, weaknesses in the empirical case for a national consensus regarding abolition, and the Court's institutional limitations may all prompt justifiable skepticism of judicial abolition grounded in proportionality analysis.

In *Courting Death: The Supreme Court and Capital Punishment*, Carol Steiker and Jordan Steiker provide an incredibly thorough and insightful overview of the American death penalty and its legal history. Toward the end of the book, they suggest that the death penalty in the United States will come to an end through judicial abolition and that the most promising vehicle for that holding is proportionality analysis.<sup>7</sup> At the most general level, proportionality inquires whether the penalty

<sup>3</sup> *The Dwindling Pipeline on Death Row*, FULTON COUNTY DAILY REP. (Dec. 16, 2015), <http://www.dailyreportonline.com/id=1202744492187/The-Dwindling-Pipeline-on-Death-Row-CHART> [https://perma.cc/Y4WD-XXNQ].

<sup>4</sup> DEATH PENALTY INFO. CTR., *supra* note 1, at 2.

<sup>5</sup> Bill Rankin, *Death Sentences Now a Rarity in Georgia*, ATLANTA J.-CONST. (Jan. 2, 2017), <http://www.myajc.com/news/local/death-sentences-now-rarity-georgia/WdQLa49GwzpRLG9XrBiMIM/> [https://perma.cc/G68S-WMK8].

<sup>6</sup> See Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1929–31 (2006) (recommending caution in predicting the chances of abolition from a decrease in new death sentences, opinion polls, and the action of some state legislatures); *id.* at 1956 (exploring the possibility that certain factors “have gradually trimmed away those cases where the death penalty was most vulnerable and left us with a core of cases that may stubbornly resist further trimming”).

<sup>7</sup> CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH* 282 (2016) [hereinafter *COURTING DEATH*] (“The Court’s long and expansive development of its Eighth Amendment proportionality doctrine provides a detailed blueprint for a potential categorical constitutional challenge to the death penalty.”).

of death is an excessive punishment for the crime or whether the defendant possesses the requisite level of culpability to justify the imposition of a death sentence.<sup>8</sup> In determining which punishments are so disproportionate as to fall within the Eighth Amendment's prohibition on cruel and unusual punishment, the Court has traditionally asked whether such punishments offend "the evolving standards of decency that mark the progress of a maturing society."<sup>9</sup> Under this framework, the Court has held that capital punishment is a disproportionate penalty for certain groups, such as minors<sup>10</sup> and persons with intellectual disabilities;<sup>11</sup> certain offenses, such as the crime of rape;<sup>12</sup> and for defendants whose role in the crime was minor and who did not possess a culpable mental state.<sup>13</sup>

As a practical matter, proportionality analysis under the Eighth Amendment has two components: objective indicia of contemporary values and application of the Court's independent judgment.<sup>14</sup> Objective evidence under the first part of the analysis typically consists of legislative activity (how many states authorize death for this crime, or this category of offender), sentencing juries' behavior (how often juries vote to impose death for this crime, or this category of offender), and the actual number of executions conducted for members of a particular group (for example, minors) or for a particular offense (for example, child rape).<sup>15</sup> The Court uses these metrics as a proxy for society's

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<sup>8</sup> This is distinct from comparative proportionality review, which the Court held was not constitutionally required in *Pulley v. Harris*, 465 U.S. 37, 50–51 (1984) (concluding that the Eighth Amendment does not require appellate courts to compare an individual defendant's sentence with sentences imposed in similar capital cases); rather, "proportionality analysis," as discussed herein, refers to the type of review conducted by the Court in cases like *Atkins v. Virginia*, *Roper v. Simmons*, *Coker v. Georgia*, and *Kennedy v. Louisiana*, described in notes 10–12 below.

<sup>9</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

<sup>10</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the Eighth and Fourteenth Amendments prohibit the execution of individuals who were under the age of eighteen at the time of the crime).

<sup>11</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of individuals with intellectual disability constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment).

<sup>12</sup> *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (holding that imposition of the death penalty for the crime of adult rape is disproportionate and excessive and thus forbidden by the Eighth Amendment); see also *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding that the Eighth Amendment prohibits the death penalty for the crime of child rape, where death of the victim does not result).

<sup>13</sup> See *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the Eighth Amendment prohibits the death penalty for a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed"); cf. *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that the death penalty is not disproportionate where the defendant's participation in felony resulting in murder is major and the defendant's mental state is one of reckless indifference).

<sup>14</sup> See *COURTING DEATH*, *supra* note 7, at 276.

<sup>15</sup> *Id.* at 282.

underlying views on the matter.<sup>16</sup> For example, in *Atkins v. Virginia*,<sup>17</sup> the Court explained:

[T]he large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon.<sup>18</sup>

Where legislative trends have changed over time, the Court has taken into account the speed of such change and the consistency of its direction.<sup>19</sup> The authors of *Courting Death* argue that other evidence of “broader societal and professional consensus,” including the professional opinion of expert legal organizations like the American Bar Association and the American Law Institute, or international norms, could also fit comfortably within the “objective evidence” prong of the Court’s proportionality doctrine.<sup>20</sup> In contrast to the evidence-based first prong, the Court’s “own judgment” often involves consideration of whether the imposition of a death sentence will further the penological goals of retribution and deterrence.<sup>21</sup> Under this second part of the proportionality framework, the Court has also considered or could consider, as the authors point out, factors such as arbitrariness, discrimination, and the risk of wrongful conviction.<sup>22</sup>

To the extent proportionality analysis aims to ferret out public sentiment,<sup>23</sup> there is a question whether the metrics used by the Court would provide an accurate proxy for the public’s views on the death penalty’s general appropriateness. As social scientists have demonstrated, single-question measures of public opinion — one could conceive of state referenda similarly, given their positioning vis-à-vis the broader public — do not always accurately capture the complexity of

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<sup>16</sup> See *Atkins*, 536 U.S. at 312 (“We have pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’”).

<sup>17</sup> 536 U.S. 304.

<sup>18</sup> *Id.* at 315–16.

<sup>19</sup> *COURTING DEATH*, *supra* note 7, at 282.

<sup>20</sup> *Id.* at 282–83.

<sup>21</sup> *Id.* at 276 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

<sup>22</sup> *Id.* at 284.

<sup>23</sup> See, e.g., *Coker*, 433 U.S. at 593 (relying on trends in state legislation as “objective evidence of the country’s present judgment concerning the acceptability of death as a penalty for rape of an adult woman”); see also *Atkins*, 536 U.S. at 316 & n.21 (relying on evidence of opinion polls, in conjunction with legislative evidence, to demonstrate that a “national consensus,” *id.* at 316, has developed against execution of people with intellectual disability).

attitudes regarding the death penalty.<sup>24</sup> Moreover, people may answer questions about their views on the death penalty differently depending on whether they are asked as a juror or as a voter.<sup>25</sup> There is some evidence that removing the question from the abstract and placing it in a specific context may affect the way individuals respond. For example, one study has shown that people are less likely to be punitive when faced with the details of a specific case than when asked about a certain type of crime in the abstract.<sup>26</sup> This research may help to reconcile voters' unwillingness to let go of the death penalty as an abstract matter<sup>27</sup> with juries' decreased willingness to impose the death penalty in individual cases.<sup>28</sup> Such apparent contradiction might also be accounted for by individuals who, while opposed to the death penalty in most cases, may be hesitant to remove it as an option in more extreme cases or in specific situations.<sup>29</sup>

<sup>24</sup> See Gregg R. Murray, *Raising Considerations: Public Opinion and the Fair Application of the Death Penalty*, 84 SOC. SCI. Q. 753, 753 (2003); Stephen F. Smith, *Has the "Machinery of Death" Become a Clunker?*, 49 U. RICH. L. REV. 845, 870 (2015) ("[P]olls seeking respondents' views in the abstract about the death penalty have proven to be more than a little fickle over the decades.").

<sup>25</sup> See Charles Lane, Opinion, *Most Americans Don't Like the Death Penalty, Right? Wrong.*, WASH. POST (Oct. 26, 2016), [https://www.washingtonpost.com/opinions/most-americans-dont-like-the-death-penalty-right-wrong/2016/10/26/afd7e6c8-9b9a-1e6-aeed-ab0774c7eaa5\\_story.html](https://www.washingtonpost.com/opinions/most-americans-dont-like-the-death-penalty-right-wrong/2016/10/26/afd7e6c8-9b9a-1e6-aeed-ab0774c7eaa5_story.html) [<https://perma.cc/5Y7A-JUXF>] (critiquing the methodology of certain poll reports and suggesting both that a person's view on the death penalty depends on whether they are asked "in the abstract, as a juror or as a voter," and that public opinion is "much more nuanced than media coverage generally reflects").

<sup>26</sup> See Murray, *supra* note 24, at 756.

<sup>27</sup> See, e.g., Frumin, *supra* note 2 (describing 2016 referenda in California, Nebraska, and Oklahoma).

One theory, posited by Justice Marshall in *Furman v. Georgia*, 408 U.S. 238 (1972), is that if members of the public were more informed about the death penalty — particularly its disproportionate application to minorities and the poor, and the fact that innocent people have been executed — they would no longer support it. *Id.* at 363–69 (Marshall, J., concurring) (contending that if the American people were informed about the discrimination and risk of error inherent in capital punishment, they would "condemn death as a sanction," *id.* at 364). This has come to be known as "the Marshall hypothesis." See COURTING DEATH, *supra* note 7, at 260. But the results of social science studies attempting to test the Marshall hypothesis have been mixed, with some suggesting that additional information may lead to increased opposition to the death penalty, and others suggesting that the information has little effect, intensifies respondents' existing views, or results only in short-term changes in belief. See *id.* But see Murray, *supra* note 24, at 756 (finding that studies "generally support" Marshall's argument, though not all individuals are as susceptible to influence or are influenced for equally long).

<sup>28</sup> COURTING DEATH, *supra* note 7, at 213 (noting decrease in death sentences in recent years); see also Bill Rankin, *Georgia Executions Rise, While Death Sentences Plummet*, ATLANTA J.-CONST. (June 18, 2016), <http://www.myajc.com/news/local/georgia-executions-rise-while-death-sentences-plummet/atGjGmB9aNVsRIBnavjSYO/> [<https://perma.cc/2GX7-DHnk>] (noting Georgia juries' growing reluctance to impose the death penalty, with no jury having done so since March 2014).

<sup>29</sup> See, e.g., Sundby, *supra* note 6, at 1971–72 ("[A]lthough death sentences have steadily fallen over the past decade, the decline does not appear to indicate any broad turning against the death penalty . . . . In fact, general support for the death penalty remains relatively high and is likely to

Setting aside the question of what can actually be gleaned about contemporary values from opinion polls, jury verdicts, or legislation, the authors emphasize recent trends in legislative abolition and legal experts' increasing consensus that the death penalty cannot be administered in a fair or impartial manner.<sup>30</sup> In the authors' view, one of the strengths of proportionality analysis is that it provides a vehicle for translating these developments into a constitutional prohibition. From outside the "bubble,"<sup>31</sup> however, the authors' application of proportionality would likely receive harsh criticism. One point the Court has made clear throughout its proportionality opinions is that "national consensus" is key to its findings regarding the constitutionality of a given practice.<sup>32</sup> Given that objective evidence must demonstrate national consensus, one might argue in this case (as have dissenters in other cases<sup>33</sup>) that any evidence of consensus around the general appropriateness of the death penalty is far from "national." As the authors point out, the number of states that have abolished the death penalty is not "particularly impressive," coming in at nineteen.<sup>34</sup> Even considering the four additional states that have gubernatorial moratoria in place, one would have to acknowledge that the nature of the moratorium may not suggest anything about individual voters' views of the death penalty (or those of the voting majority). And, by no fault of the authors, given the book's publication prior to the results of the 2016 election, the direction of the change is no longer consistent.<sup>35</sup> As for the decreased number of executions in recent years, that could be

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stay there because of an abiding belief that certain crimes, like those committed by Timothy McVeigh, deserve only the death penalty.").

<sup>30</sup> COURTING DEATH, *supra* note 7, at 282–84.

<sup>31</sup> J.D. Vance, Opinion, *Life Outside the Liberal Bubble*, N.Y. TIMES (Nov. 9, 2016, 9:49 AM), <http://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/life-outside-the-liberal-bubble> [<https://perma.cc/SP73-Z9Q5>] (contrasting the experience of "coastal elites" with those in other parts of the country, including Trump voters).

<sup>32</sup> See *Atkins v. Virginia*, 536 U.S. 304, 316 (2001) ("The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."); *id.* at 321 (Rehnquist, C.J., dissenting) ("The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants like petitioner . . ."); see also *Roper v. Simmons*, 543 U.S. 551, 564 (2005) ("The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded.").

<sup>33</sup> See, e.g., *Atkins*, 536 U.S. at 342 (Scalia, J., dissenting) ("That bare number of States alone — 18 — should be enough to convince any reasonable person that no 'national consensus' exists. How is it possible that agreement among 47% of the death penalty jurisdictions amounts to 'consensus'?").

<sup>34</sup> COURTING DEATH, *supra* note 7, at 282. The authors acknowledge early in their discussion that "[a]most by definition, proportionality limits apply to the most marginal capital practices," *id.* at 164, perhaps requiring a leap to apply that same analysis here.

<sup>35</sup> See Frumin, *supra* note 2 (describing referenda results in California, Nebraska, and Oklahoma, all favoring preservation of the states' capital punishment schemes).



attributed to other external factors, including problems with obtaining the drugs used in lethal injection and related litigation.<sup>36</sup> In states like Georgia, where such challenges have been made more difficult by the fact that details regarding the sources of drugs and the identities of those involved in the execution are state secrets,<sup>37</sup> the rate of executions is higher than ever.<sup>38</sup>

Instead of national consensus, the evidence demonstrates that trends toward abolition have failed to permeate the “death belt” — those states in the deep South (and, as a broader matter, the swath of the country bordered by Texas and Oklahoma on the west, and Nebraska, Missouri, Kentucky, and Virginia on the north) that have typically embraced the death penalty.<sup>39</sup> Many of these states have not only maintained the death penalty as a possible punishment, but have also actively resisted attempts to curtail its reach. Consider, for example, recent attempts in Alabama<sup>40</sup> and Mississippi<sup>41</sup> to reintroduce the firing squad as an available method of execution, in light of increased challenges to lethal injection procedures. Another example is Texas’s insistent use of its “special issue” jury instructions to deny capital defendants their right to meaningful consideration of constitutionally relevant mitigating evidence — and the Texas courts’ repeated approval of such use — even though the Supreme Court has deemed their application unconstitutional on multiple occasions.<sup>42</sup>

<sup>36</sup> COURTING DEATH, *supra* note 7, at 141–43. Relatedly, Professor Scott Sundby notes that the decline in new death sentences “cannot be attributed to any single factor, but is likely the result of the convergence of a number of influences.” Sundby, *supra* note 6, at 1935.

<sup>37</sup> GA. CODE ANN. § 42-5-36 (2014) (codifying Georgia’s Lethal Injection Secrecy Act, which protects the identity of the people prescribing the drugs used in lethal injections, the identity of the companies that produce and supply such drugs, and the identity of prison staff who carry out executions).

<sup>38</sup> See DEATH PENALTY INFO. CTR., *supra* note 1, at 2; Rankin, *supra* note 28.

<sup>39</sup> See *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [https://perma.cc/29DL-YBFR].

<sup>40</sup> Bryan Lyman, *Bill Would Bring Firing Squad Executions to Alabama*, MONTGOMERY ADVERTISER (Nov. 7, 2016, 5:41 PM), <http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2016/11/07/bill-would-bring-firing-squad-executions-alabama/93427800/> [https://perma.cc/4H2D-74J7].

<sup>41</sup> Emily Wagster Pettus, *Mississippi Considers Firing Squad as Method of Execution*, ASSOCIATED PRESS: THE BIG STORY (Feb. 8, 2017, 4:26 PM), <http://bigstory.ap.org/article/7055b192b55c4020803ca61fdf7886e1/mississippi-considers-firing-squad-method-execution> [https://perma.cc/D3FQ-BGXD].

<sup>42</sup> See *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 237–38 (2007) (holding Texas’s special issue jury instructions did not allow jurors to give “meaningful consideration to constitutionally relevant mitigating evidence”); *Smith v. Texas* (*Smith II*), 550 U.S. 297, 300, 316 (2007) (correcting Texas state court’s misunderstanding of earlier case law regarding Texas special issue jury instruction and its subsequent failures to apply harmless-error standard and grant relief); *Smith v. Texas* (*Smith I*), 543 U.S. 37, 38 (2004) (per curiam) (holding that supplemental “nullification instruction” given to jury failed to correct unconstitutional deficiency in Texas special issue jury instructions); *Penry v. Johnson* (*Penry II*), 532 U.S. 782, 797–800 (2001) (correcting Texas court’s interpretation

Although the Court's regulation of the death penalty has limited its imposition, it has also left many openings for active death penalty states to ensure its continued application. In other words, states desiring to push forward with the death penalty can often find a way to do so. Death penalty jurisprudence is replete with such examples including, most prominently, many states' hasty enactment or re-enactment of their capital punishment schemes in the wake of *Furman*.<sup>43</sup> On a more granular level, consider the practical impact of Georgia's requirement that capital defendants seeking exemption from the death penalty prove their intellectual disability beyond a reasonable doubt.<sup>44</sup> While this standard does not directly contravene the Court's holding in *Atkins* — to the contrary, it exploits an explicit loophole<sup>45</sup> — in practice it has made it nearly impossible for capital defendants to prove intellectual disability.<sup>46</sup>

Moreover, many states are not as ready as the Court (or at least some of its members) to accept the views of expert legal organizations. One example of this is apparent in Alabama state courts' understanding of "prevailing professional norms" in assessing claims of ineffective assistance of counsel under *Strickland v. Washington*.<sup>47</sup> In a study I conducted several years ago of the Alabama courts' interpretation of this standard, in only twelve of eighty-six cases citing such language

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of *Penry I* and holding that supplemental instruction failed to cure the unconstitutionality of the Texas special issue jury instructions); *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 328 (1989) (holding that Texas special issue jury instructions were applied to unconstitutionally deprive the jury of a vehicle to fully consider evidence of petitioner's intellectual disability).

<sup>43</sup> COURTING DEATH, *supra* note 7, at 60–61.

<sup>44</sup> GA. CODE ANN. § 17-7-131(c)(3) (2013) ("The defendant may be found 'guilty but mentally retarded' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded."); *see also* COURTING DEATH, *supra* note 7, at 228.

<sup>45</sup> *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) ("As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" (internal citations omitted) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986))).

<sup>46</sup> *See* Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 GA. ST. U. L. REV. (forthcoming 2017).

<sup>47</sup> 466 U.S. 688 (1984). *See* Lauren Sudeall Lucas, *Lawyering to the Lowest Common Denominator: Strickland's Potential for Incorporating Underfunded Norms into Legal Doctrine*, 5 FAULKNER L. REV. 199 (2014) (solicited as part of the Fred Gray Civil Rights Symposium) (revealing that Alabama state courts assessing claims of ineffective assistance of counsel under *Strickland* have been reluctant to afford external sources, such as the ABA Guidelines, any significant weight); *see also* *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (per curiam) (emphasizing that the ABA Guidelines are "'only guides' to what reasonableness means, not its definition" (quoting *Strickland*, 466 U.S. at 688)); *id.* at 13–14 (Alito, J., concurring) (contesting the notion that the Guidelines "have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment").

from *Strickland* did the court cite to the ABA Guidelines.<sup>48</sup> “In only four of these cases . . . did the court rely on the Guidelines as a benchmark for reasonable performance. In the other eight cases, the court cited the Guidelines only to reject their applicability, echoing *Strickland*’s caveat that such sources are merely guides.”<sup>49</sup> Instead, Alabama courts were much more likely to rely on precedent, their own judgment, or local practice norms.<sup>50</sup> While this is only one example and does not bear directly on the question at hand, it certainly suggests that some courts would not agree that the ABA’s views should overshadow their own judgment. Similarly, they may be less likely to find international norms persuasive.

But, the argument goes, states like Alabama and Georgia are anomalies. Current empirical evidence demonstrates that actual use of the death penalty has become a localized phenomenon, concentrated in a few states and arguably even a handful of counties.<sup>51</sup> Thus, it is a prime candidate for constitutional extinction. There have certainly been other areas of Court-driven constitutional change in which prior to a holding of unconstitutionality, the South had become an outlier, or was more extreme in its treatment of the issue — for example, same-sex marriage and racial segregation. And in those cases, objectors were quick to accuse the Court of imposing its own policy judgment on the states, as they surely would if the Court were to declare the death penalty unconstitutional as a matter of proportionality. The Court is in many ways a countermajoritarian institution,<sup>52</sup> and scholars have long struggled with how to reconcile its institutional nature with our democratic structure.<sup>53</sup> This problem is exacerbated, howev-

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<sup>48</sup> Lucas, *supra* note 47, at 210.

<sup>49</sup> *Id.* (footnotes omitted).

<sup>50</sup> *Id.* at 203, 215–16.

<sup>51</sup> COURTING DEATH, *supra* note 7, at 283; James S. Liebman & Peter Clarke, *Minority Practice, Majority’s Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 263 (noting that “county-level analysis reveals . . . the modern American death penalty is a distinctly minority practice across the United States”); see also FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX: PART I, AN IN-DEPTH LOOK AT AMERICA’S OUTLIER DEATH PENALTY COUNTIES 2 (2016), <http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf> [<https://perma.cc/Q3XJ-T72F>] (“[O]nly 16 counties imposed five or more death sentences between 2010 and 2015.”); Liebman & Clarke, *supra*, at 262–63.

<sup>52</sup> Personally, I believe there are good reasons for the Court to serve this role, such as to ensure access to the political process. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (explaining that the Court’s proper role is process-oriented).

<sup>53</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 495 (1994) (noting that “the last generation of constitutional scholars” has been “[p]reoccupied with the ‘countermajoritarian

er, when the Court bases its analytical framework on its own assessment of the public's values and then translates that assessment into a constitutional prohibition on the states. In contexts like same-sex marriage and school desegregation, the Court relied on its understanding of what equal protection and due process require to invalidate the laws at issue; while trends in popular sentiment may have been atmospherically relevant, they did not provide a basis for the Court's holding.<sup>54</sup> Proportionality, in contrast, relies directly on a determination of contemporary values, or "evolving standards of decency." While both frameworks inevitably involve some amount of subjective judgment, only proportionality purports to rely on an objective assessment of whether the American people perceive something as acceptable. In the proportionality context, therefore, it may be difficult for the Court to maintain a veneer of impartiality in the face of a weak evidentiary case.

In writing this, I do not intend to defend the death penalty as it is currently administered. But it may be worth devoting more time to considering the relative legitimacy of the various avenues proposed for judicial abolition. The authors of *Courting Death* argue that proportionality analysis is best suited for the task, in contrast to an approach based solely on arbitrariness or discrimination, in part because arguments based on the latter would depend heavily on empirical evidence.<sup>55</sup> The authors explain that producing empirical evidence is both expensive and time-consuming, and that such evidence is often limited in terms of temporal and geographic scope.<sup>56</sup> Yet the authors may also underestimate proportionality's flaws, including its own reliance on informal, and perhaps imprecise, empirical analysis of statutes, executions, and the direction and consistency of change.<sup>57</sup> There is al-

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difficulty"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998).

<sup>54</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 962 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("The rule of *Brown v. Board of Education* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation . . .").

<sup>55</sup> *COURTING DEATH*, *supra* note 7, at 274; see also *Glossip v. Gross*, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., dissenting) (relying on numerous empirical studies to provide a basis for finding the death penalty unconstitutional under the Eighth Amendment).

<sup>56</sup> *COURTING DEATH*, *supra* note 7, at 274.

<sup>57</sup> The counting conducted in these cases is often challenged and subject to interpretation, as demonstrated by the jousting between the majority and dissenting opinions in cases like *Atkins v. Virginia*, *Roper v. Simmons*, and *Kennedy v. Louisiana*. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 460–61 (2008) (Alito, J., dissenting) ("In light of the points discussed above, I believe that the 'objective indicia' of our society's 'evolving standards of decency' can be fairly summarized as follows. Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the 'national consensus' that the Court perceives. State legislatures, for more than 30 years, have operated under the ominous shadow of the *Coker* dicta and thus have not been free to express their own understanding of our society's standards of decency. And in the months follow-

so the question of institutional legitimacy, and whether the Court has any advantage over the legislative branch in determining what the public feels is an appropriate punishment. While both require some level of interpretation, approaches relying on fundamental fairness arguably fall more comfortably within the judicial role than those that compel the Court to constitutionalize its perception of dominant trends in the application of the death penalty. Thus, arguments based on fairness and the elimination of arbitrariness may warrant more thorough consideration.

Ultimately, the question of whether someone's life should be taken as punishment for a crime is a deeply personal and moral decision. But the question of whether the death penalty is administered fairly and impartially is one squarely within the Court's domain. The difficulty with proportionality analysis is that it falls somewhere in the gray area between those two realms — particularly as applied to the death penalty's very existence. It channels the Court's legal understanding of what it means to be cruel and unusual while simultaneously asking whether most people would conclude that someone truly deserves to die as punishment for the acts they have committed. Some may view proportionality analysis as an effective tool to force states that are out of step or too stubborn to recognize what is right, to align with the will of a bare and righteous majority. But when the will of that majority is not clearly discernable, and a significant number of voters and states continue to express support for the death penalty, a decision based explicitly on an assessment of contemporary values may place a strain on the Court's institutional legitimacy.

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ing our grant of certiorari in this case, state legislatures have had an additional reason to pause. Yet despite the inhibiting legal atmosphere that has prevailed since 1977, six States have recently enacted new, targeted child-rape laws.”); *Roper v. Simmons*, 543 U.S. 551, 611 (2005) (Scalia, J., dissenting) (criticizing the majority's choice to include in its count those states that had abolished the death penalty, arguing “[t]hat 12 States favor *no* executions says something about consensus against the death penalty, but nothing — absolutely nothing — about consensus that offenders under 18 deserve special immunity from such a penalty.”); *id.* at 614 (“It is, furthermore, unclear that executions of the relevant age group have decreased since we decided *Stanford v. Kentucky*.”); *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) (“The Court’s uncritical acceptance of the opinion poll data brought to our attention, moreover, warrants additional comment, because we lack sufficient information to conclude that the surveys were conducted in accordance with generally accepted scientific principles or are capable of supporting valid empirical inferences about the issue before us.”).