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FOREWORD

CAPITAL PUNISHMENT: ITERATING TOWARD PERFECTION, WHEN PERFECTION IS UNATTAINABLE

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We look back now with haughty disdain and self-righteous indignation at the law of capital punishment as it existed in America just a very short time ago: regularly executing convicts who were mentally ill¹ or retarded,² under the age of eighteen,³ or found guilty of non-homicide offenses.⁴ Not long ago in America, all-White juries and White judges, after hearing racially charged arguments from White prosecutors, took mere minutes to convict minority defendants who had been represented by patently ineffective

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¹ *Ford v. Wainwright*, 477 U.S. 399 (1986).

² *Atkins v. Virginia*, 536 U.S. 304 (2002).

³ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴ *Coker v. Georgia*, 433 U.S. 584 (1977).

counsel.⁵ To many, this sounds horrific, and we may ask ourselves, “How could it have been like that in America?”

That was the reality just a few short years ago. The broken American capital punishment system of several decades ago began to change only after courageous legal researchers and scholars spoke up and confronted the hidden and tragic realities on America’s death rows. In this volume, a new group of young scholars and researchers pick up the mantle from those who came before and stand on their shoulders to confront the injustice and inequality played out still in today’s American capital punishment system. Tomorrow’s scholars will stand on the shoulders of the scholars whose vision and creativity is captured on these pages in the Lincoln Memorial University Law Review.

When a society chooses, through its criminal justice system, to execute certain criminals who have violated the law, that society must ensure that the system by which death is imposed is just, accurate, race-neutral, and defensible. If a society chooses to allow capital punishment to continue, the system must ensure that only the “worst of the worst”⁶ are executed, and that procedures are in place to compel the system’s decision-makers – prosecutors, judges, jurors – to

⁵ E.g., *Missouri v. Kinder*, 942 S.W.2d 313 (Mo. 1996). The White presiding judge in *Kinder*, while campaigning for his seat during pendency of the trial, had issued a press release stating in pertinent part, “The [other] party places far too much emphasis on representing minorities . . . people who dont’ [sic] want to work, and people with a skin that’s any color but white.” *Missouri v. Kinder*, Appellant’s Brief, No. 75082 (Mo. 1996) (excerpted at <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides#7>). See also *Peek v. Florida*, 488 So. 2d 52, 56 (Fla. 1986) (wherein the White presiding judge, as the penalty phase was set to begin, stated in court, “Since the nigger mom and dad are here anyway, why don’t we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state”). See generally David Baldus, et al., *Comparative Review of Death Sentences: An Empirical study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 61 (1983).

⁶ *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).

elevate law and reason over emotion and revenge. Of course, as humans, we are incapable of creating a perfect and error-free capital punishment system. One might then ask, if we cannot create a perfect capital system, then why have one at all? Conversely, since we cannot create a perfect capital punishment system, how much injustice and error should society accept before capital punishment becomes fundamentally unjust? These questions tear at the fabric of the death penalty system in America. They also, however, raise more questions.

Why do we ask such searching questions only of our capital punishment system? When a person is put to death by a constitutionally infirm and discriminatory system, most of us can perceive the need for change, and many of us call for change, but injustice permeates more than just the capital punishment system. Blacks are imprisoned today at twice the rate of Whites in *every* FBI crime category except driving under the influence of alcohol and other alcohol-related offenses.⁷ In a 2007 study, seven states reported an incarceration rate for Blacks that was ten times higher than that for Whites.⁸ Thus, we should be intolerant of discrimination no matter where it arises in the criminal justice system, and not just in capital cases. Arguably, there is only marginally less injustice when an unjustly convicted person is sentenced to life imprisonment instead of death. Perhaps the next steps to be taken by some of the researchers in this volume will be to address unjust convictions with a depth and breadth that spans the entire criminal justice system.

When society became uneasy with public executions, we moved them indoors. When society confronted the fact that execution by hanging, electrocution, or the firing squad

⁷ FBI, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 2012, table 43A (2013).

⁸ Marc Mauer & Ryan S. King, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE & ETHNICITY, table 6 (The Sentencing Project July 2007).

was unnecessarily painful and cruel, we substituted death by lethal injection. When a three-drug protocol occasionally led the condemned to suffer extreme pain and suffering, some states moved to a one-drug protocol. But these purported solutions are proverbial pats on the head, because the flaws and injustices reside at the core of the death penalty system. Thus, we must ask whether our society, like so many across the globe, should abolish the death penalty altogether.

Capital punishment as a research focus is a glum endeavor. Tragedy abounds on all sides of death penalty cases, and many would rather that the practice remain hidden from plain view, “off our radar” in execution chambers, and in the bowels of correctional facilities. This is precisely why the courageous young researchers who penned the student notes in this volume in conjunction with a 2013 Death Penalty Seminar at Lincoln Memorial University’s Duncan School of Law have contributed to the American capital punishment debate in extraordinary ways. Their efforts give life to the late Justice Thurgood Marshall’s concept that since “death is different,”⁹ our procedures and the quantum of due process must be of the highest order. Simply put, the research presented here *is* of the highest order.

Sheena Foster probes the special challenges and evidentiary dilemmas facing capital defendants suffering from Autism and Asperger’s Syndrome and their variants. Foster wisely concludes that evidence and expert testimony regarding a defendant’s disabilities must be admissible because otherwise, capital jurors may misinterpret visible symptoms of these mental illnesses as evidence of disinterest, lack of remorse, lack of empathy for the victim, or worse. Foster calls for broader admissibility to ensure these special defendants can truly have their cases heard by fully informed jurors.

Paige Coleman argues that America is perilously close to losing international credibility because we are so out-of-step

⁹ *Ford*, 477 U.S. at 411.

with the rest of the industrialized world on how we approach capital punishment. Most recently, America was the only remaining death penalty nation, other than Somalia, that continued to allow executions of criminals whose crimes were committed when they were juveniles. As Coleman notes, it is appropriate for us to consider other nations' approaches to the death penalty as we reconsider our own approaches.

Nick Davenport's thought-provoking note illuminates the links between Natural Law, the Declaration of Independence, and the American death penalty system. He posits, as Natural Law adherents explain, that by voluntarily continuing to live in America, we at least impliedly adopt and accept the criminal justice system's strictures, including the principle that the death penalty is an accepted penalty for the "worst of the worst." As Davenport argues, part of the price of living in and benefiting from this ordered society is that each of us tacitly accepts the risk that serious violations of criminal law can yield very serious consequences.

Ivy Gardner's thoughtful note demonstrates that cost-benefit arguments, although they may play a reasonable role in grander discussions of the capital punishment system as a whole, have no rightful place in individual capital cases and therefore should be suppressed. The issues in the penalty phase of a capital case are properly about the nature of the offense and the nature of the offender. There is no room in the sentencing equation for an argument that the decision maker should rule for or against execution because it is cheaper or more expensive than life imprisonment. As Gardner notes, such economic arguments, where a defendant's life is at stake, are at best unseemly, and at worst, unconstitutional.

Kendall English's note focuses on the *Atkins v. Virginia* decision and the constitutionality of executing capital defendants who suffer from developmental disabilities or mental retardation. As English concludes, the *Atkins* case has left the door open for states to set their own standards for determining which defendants are too mentally retarded to be

constitutionally executed, and in so doing, the Court has utterly failed to give the states any guidance on specific standards that might pass constitutional muster.

Randall Noe, a career Tennessee law enforcement officer, who has lost coworkers and friends through violent crimes, presents a moving and insightful history of Tennessee's experience (some may call it Tennessee's experiments) with capital punishment. Noe's insights into and connections with the topic were not merely the product of research at arm's length. Rather, they were earned the old-fashioned way – up close and personal.

The Supreme Court's struggle with capital punishment, at least since 1976, has not been easy or always in the same direction. In one case, all nine Supreme Court justices issued separate written opinions.¹⁰ Nor has the Court's struggle been solely or even predominantly about constitutional jurisprudence. Rather, the Court has engaged in a practice that appears more like an exercise of judicial will than a principled jurisprudential quest. At times, it seems like the Court has arrived at a pre-ordained outcome while struggling to find a constitutional hook to support its decision. Shouldn't it be the other way around? That is certainly not the kind of constitutional analysis the Court should typically perform.

In a very real sense, "death is different." Perhaps it is not enough to be an originalist and adhere only to the text and intent of the Framers. Perhaps it is not enough to be a "living Constitution" devotee and explain with a wave of the hand that the Framers intended these concepts to be malleable and adaptable over time as circumstances change. That makes the Supreme Court—not the people—in charge of telling us what the Constitution means now—and forever—in the death penalty area.

Ultimately, one's take on capital punishment is an individualized and complex equation that incorporates

¹⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

religious, ethical, and moral concepts within a legal context. It is a personal matter, indeed. Perhaps there is no one right answer, and perhaps our approach to terrestrial justice on Earth is doomed, as a product of humans who err, to be imperfect. But that does not moot the quest for perfection. Perhaps the “safest” religious, ethical, moral, and even legal path is to admit perfection is unattainable and simply abolish capital punishment as an option. But once a society has fervently decided to exact the most final retribution on its “worst of the worst” offenders that society must just as firmly bind itself to engage in that quest toward perfection, because “death is different.”