

## CRAFTING THE CASE AGAINST THE AMERICAN DEATH PENALTY

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Just a decade ago, crafting the case against the American death penalty might have seemed a quixotic exercise. Nationwide, there were more executions carried out and more death sentences rendered in the late 1990s than in any other period since the reinstatement of capital punishment in 1976.<sup>1</sup> Thirty-eight states had active death penalty statutes at the turn of the century, another high-water mark in the modern death penalty era.<sup>2</sup> In the political arena, a Texas governor renowned for signing death warrants without blinking was an early favorite to win the 2000 presidential election.<sup>3</sup> In short, the “machinery of death,” to quote the late Supreme Court Justice Harry Blackmun, was churning in full force.<sup>4</sup>

Fortunately for those skeptical of the machinery’s merit, times have changed. Though the death penalty remains both popular and functioning in many states, particularly in the South, the golden age of the late 1990s has given way to a new wave of reflection, criticism and opposition. For the first time in a generation, the ultimate question of capital punishment—whether governments should kill people for killing other people because killing people is wrong—has entered an unpredictable stage in the United States.

Despite the entreaty reproduced above, which exposes the pitfalls of capital sentencing, the Court of Appeals of New York declined to address the ultimate question in *People v. Taylor*.<sup>5</sup> Instead, the court affirmed and

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<sup>1</sup> See Death Penalty Information Center, *Executions by Year*, <http://www.deathpenaltyinfo.org/> (last visited Feb. 26, 2008).

<sup>2</sup> The thirty-eight death penalty states in 1998 were the following: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming.

<sup>3</sup> See, e.g., Richard Benedetto, *Poll gives Bush edge over Gore for 2000*, USA TODAY, May 12, 1998.

<sup>4</sup> *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

<sup>5</sup> 9 N.Y.3d 129 (N.Y. 2007).

applied *People v. LaValle*,<sup>6</sup> in which it found a procedural flaw in New York's 1995 death penalty statute.<sup>7</sup> Lawmakers in Albany have yet to respond to *LaValle* by passing a new and improved statute, so with the *Taylor* decision emptying New York's death row, capital punishment is now officially off the books in the Empire State. Though major news outlets often present that development in its provincial context, the reality is that New York and other states abandoning capital punishment are intricately connected to the national debate.

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment,<sup>8</sup> and for the past fifty years the Supreme Court has interpreted that prohibition in light of the nation's "evolving standards of decency."<sup>9</sup> The Eighth Amendment therefore bans not only those sanctions outlawed at the time of the Constitution's framing, but also all sanctions that offend contemporary conceptions of appropriate punishment. In assessing contemporary conceptions, the Court has relied principally on the objective evidence of state legislation;<sup>10</sup> simply put, if the state legislatures

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<sup>6</sup> 3 N.Y.3d 88 (N.Y. 2004).

<sup>7</sup> *Taylor*, 9 N.Y.3d at 138.

<sup>8</sup> U.S. CONST. amend. VIII.

<sup>9</sup> *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion) (Warren, C.J.). See also, e.g., *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (holding that the execution of the insane constitutes cruel and unusual punishment); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (holding that the execution of mentally retarded offenders constitutes cruel and unusual punishment); *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (holding that the execution of juvenile offenders constitutes cruel and unusual punishment).

<sup>10</sup> The heavy reliance on state legislation appears in the context of both opinions of the Court and plurality opinions. See *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (Stewart, J., Powell, J., and Stevens, J.) ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman* [*v. Georgia*, 408 U.S. 438 (1972)]. The legislatures of at least 35 states have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person."); *Coker v. Georgia*, 433 U.S. 584, 593-94 (1977) (plurality opinion) (White, J.) ("In reviving death penalty laws to satisfy *Furman*'s mandate, none of the States that had not previously authorized death for rape chose to include rape among capital felonies. Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statutes—Georgia, North Carolina and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by *Woodson* and *Roberts*. When Louisiana and North Carolina, responding to those decisions, again revised their capital punishment laws, they re-enacted the death penalty for murder but not rape....Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult

across the nation overwhelmingly reject a practice, then the Court considers that practice cruel and unusual punishment. And though the Court has entertained considerations such as international opinion as well,<sup>11</sup> it has

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woman..."); *Enmund v. Florida*, 458 U.S. 782, 789-791 (1982) (Thirty-six state and federal jurisdictions presently authorize the death penalty. Of these, only eight jurisdictions authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life.); *Ford*, 477 U.S. at 408 ("Today, no State in the Union permits the execution of the insane."); *Tison v. Arizona*, 481 U.S. 137, 152-154 (1987) ("Four states authorize the death penalty in felony-murder cases upon a showing of a culpable mental state such as recklessness or extreme indifference to human life. Two jurisdictions require that the defendant's participation be substantial and the statutes of at least six more...take minor participation in the felony expressly into account in mitigation of the murder...[i]t can be said that all these jurisdictions, as well as the six States which *Enmund* classified...as permitting capital punishment for felony murder *simpliciter*, and the three States which simply require some additional aggravation before imposing the death penalty upon a felony murderer, specifically authorize the death penalty in a [case such as this]...On the other hand...only 11 States authorizing capital punishment forbid imposition of the death penalty even though the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness."); *Thompson v. Oklahoma*, 487 U.S. 815, 826-829 (1988) (plurality opinion) (Stevens, J.) ("In 14 States, capital punishment is not authorized at all, and in 19 others capital punishment is authorized but no minimum age is expressly stated in the death penalty statute...When we confine our attention to the 18 States that have expressly established a minimum age in their death penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense."); *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) ("Only one state...currently bans execution of mentally retarded persons who have been found guilty of a capital offense. Maryland has enacted a similar statute which will take effect on July 1, 1989." (internal citations omitted)); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) ("Of the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders."); *Atkins*, 536 U.S. at 314-315 ("In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998....[I]n 2000 and 2001 six more States—South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina—joined the procession. The Texas Legislature unanimously adopted a similar bill..."); *Simmons*, 543 U.S. at 564 ("...30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.").

<sup>11</sup> See *Atkins*, 536 U.S. at 316-317, n. 21 ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); *Simmons*, 543 U.S. at 575-577 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world

made clear that state legislation is the dominant factor.<sup>12</sup>

In the past decade, the Court has applied this states-based formula twice: first to abolish the death penalty for mentally retarded offenders,<sup>13</sup> and then again to abolish the death penalty for juvenile offenders.<sup>14</sup> On both issues, thirty states banned the practice in question when the Court intervened,<sup>15</sup> and on both issues, the Court held that the thirty states' prohibitions demonstrated that the practice in question, then continuing in the remaining twenty states, violated the Eighth Amendment. Now, even if a state such as Alabama wishes to execute a mentally retarded offender or a juvenile offender, the Constitution prohibits it, largely on account of the positions of thirty states as distant as Alaska and Hawaii. Given that framework, thirty has emerged as something of a magic number in the national movement for total abolition.

So where do the state legislatures stand on the ultimate question of capital punishment? With the *Taylor* decision in October 2007, New York became the nation's thirteenth abolitionist state.<sup>16</sup> New Jersey then repealed its death penalty through legislation in December 2007,<sup>17</sup> emerging as the fourteenth abolitionist state. Maryland nearly joined the 2007 trend, with abolition legislation dying in committee in the state senate despite strong support from both the governor and the legislature's lower chamber.<sup>18</sup> Out west, New Mexico's house and Montana's senate passed abolition measures in 2007, as did legislative committees in Colorado and

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that continues to give official sanction to the juvenile death penalty....[O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of the Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice.”)

<sup>12</sup> See, e.g., *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>13</sup> *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

<sup>14</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>15</sup> *Atkins*, 536 U.S. at 314-15; *Simmons*, 543 U.S. at 564.

<sup>16</sup> The number had been set at twelve since New York reinstated the death penalty in 1995.

<sup>17</sup> Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007.

<sup>18</sup> Maryland Daily Record Staff, *Mixed results mark Maryland session’s end*, MARYLAND DAILY RECORD, Apr. 13, 2007.

Nebraska.<sup>19</sup> Though those state legislatures began their death penalty assessments by grappling with everything from execution methods to budget concerns, all eventually came to contemplate the more fundamental question at stake.

The flurry of activity in state legislatures across the nation, which has continued in early 2008, suggests that even if the magic number of thirty remains a long way off, the debate over the American death penalty is back—and in all its complex dimensions. As such, the editors of the *Journal of Law and Social Change* regard this piece, originally a bold argument in New York's highest court, as a valuable contribution to the continuing national exchange on capital punishment.

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<sup>19</sup> See Steve Terrell, *Death penalty repeal passes state House*, NEW MEXICAN, Feb. 12, 2007; Alan Suderman, *Mont. Senate votes to abolish death penalty*, BISMARCK TRIBUNE, February 24, 2007; Alan Gathright, *House panel votes to abolish death penalty*, ROCKY MOUNTAIN NEWS, Feb. 8, 2007; Legislative Activity—Nebraska, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?did=2206> (last visited Feb. 26, 2008).