Article

Texas Ain't Tuscany: How a Truism Might Further Invigorate Contemporary “Cost Arguments” for Death-Penalty Abolition

Gretchen Sween*

In all negotiations of difficulty, a man may not look to sow and reap at once, but must prepare business, and so ripen it by degrees.1

I. Introduction.................................................................151
II. Eighteenth-Century Tuscany: Where Rational Arguments for Abolition First Bore Fruit........................................153
III. Twenty-First Century United States: Where a New Cost Argument has Been Grafted onto Beccarian Root Stock ......159
IV. Texas: Where Rational Arguments Against the Death Penalty Are Non-Adaptive......................................................162
V. The Supreme Court: Where Texas-Style Arguments for the Death Penalty Go to Die.................................................172
VI. Conclusion .......................................................................186

I. Introduction

Tuscany and Texas both start with the letter “T.” And Tuscany shares some topographical features with the Texas Hill Country, such that

* Gretchen Sween is an adjunct professor at The University of Texas School of Law, a member of the Board of the Texas Defender Service, and an attorney in private practice. She thanks the participants in the symposium for their inspiration and the members of the journal’s editorial staff for their hard work and support.
1. Francis Bacon, On Negotiation, in BACON’S ESSAYS 413 (Richard Whately ed., 1856). This same quotation was an epigram to the third edition of Cesare Beccaria’s influential 18th century treatise ON CRIMES AND PUNISHMENT.
vineyards and olive trees grow in both places, although they flourish more readily in the former. There the similarities seem to end. For this article, the key difference between these two places is their relationship to the death penalty. Tuscany abolished the death penalty at an early date; Texas, on the other hand, continues to earn international notoriety as the biggest killing state in the United States—and thus in the Western world. By drilling down into the differences between these two venues, I propose that instead of waiting around for the “standards of decency” in Texas to evolve (i.e., until the cows come home), Texas’s contemporary posture with respect to the death penalty may prove a positive stimulus for the only actors in a position to effect wholesale abolition in this country.

My argument assumes the following premises:

- Changing most people’s minds about the death penalty’s moral efficacy is virtually impossible because humankind’s primal desire for revenge, which is always in tension with its (only slightly) more evolved desire for community, is essentially hard-wired, emotional, and reactionary.

- Reason-based arguments about the death penalty should be pursued in hopes of persuading those (1) who are persuadable and (2) who occupy positions of power sufficient to effect real change—i.e., elite policy-makers.2

- “Elites” are those who have the luxury, in terms of time and training, to make momentous policy decisions—about the legitimate means at the State’s disposal for punishing crime—in a contemplative manner consciously detached from the instinctive, vengeful emotions that virtually all human beings feel when presented with the details of, and fallout from, heinous crimes.

- Decisions about whether to have a death penalty and, if so, how to implement it are reason-based arguments that presuppose the rule of law and thus are decisions made by elites (even in a democracy).

- Elites are more likely to make momentous policy decisions at odds with popular consensus (and human instinct) if these elites believe that doing so will accrue to the benefit of the institution with which they feel most closely aligned.

These general premises are borne out by the circumstances that led to the death penalty’s abolition in eighteenth-century Tuscany. Therefore, this article begins there. The reason-based argument for abolition that resonated in Tuscany can be summarized as follows: the death penalty costs too much and yields meager dividends.3 The reason-based rationale for

---

2. This premise is derived from Andrew Hammel’s thesis that elites are the ones who can and have historically taken the lead in abolishing the death penalty. See Andrew Hammel, Ending the Death Penalty: The European Experience in Global Perspective 7 (2010) (describing the forces that led modern Europe to abolish the death penalty).

3. Paul Friedland, Seeing Justice Done: The Age of Spectacular Capital Punishment in
abolition resonating today in the United States makes the same basic points and is reinforced by a literal cost argument. The cost arguments persuading state legislators across the United States have, however, fallen flat in Texas, the execution capital of Western civilization. Because Texas leads the way in executions, abolition is not possible unless Texas is made to stand down. But elites with power in Texas resist abolishing the death penalty because it provides elites with a powerful political tool from which they can reap tremendous benefits despite the considerable costs to the state. Texas, therefore, can only be made to stand down by elites operating outside of the state. Yet the very prospect that outside elites may try to dictate to Texas any kind of policy—and certainly criminal justice policy—is a fear stoked by a contingent of elites within Texas as a means to maintain their power.

In short, the challenge is great. Even so, there are reasons to believe that Texas’s affinity for the death penalty can be harnessed to help convince the Supreme Court of the United States to act towards wholesale abolition. I contend that the Supreme Court, the only elites in our federalist system in a position to eliminate the death penalty completely, are more likely to take on Texas if they see Texas as a threat to their own institutional integrity.

Carol and Jordan Steiker, leading scholars of the American death penalty, have aptly described the Supreme Court’s incremental, but notable, movement toward abolition during the past decade. This article suggests a way to capitalize on this momentum by honing in on Texas’s remarkable losing streak in recent death-penalty cases before the Supreme Court and by identifying rhetorical strategies that, while powerful, have failed to resonate with the particular elites to whom they have been addressed, thereby making Texas an unlikely ally in death penalty abolition.

II. Eighteenth-Century Tuscany: Where Rational Arguments for Abolition First Bore Fruit

The death penalty was abolished in Tuscany in 1786, and the region never looked back. Except that, in 2000, the region looked back to
celebrate, proudly launching La Festa della Toscana to promote the concepts of "international peace, justice and liberty." The date chosen for the festival, November 30, was the same as the day in 1786 when a law promulgated by an elite—the Grand Duke Peter Leopold di Lorena—abolished Tuscany’s death penalty with a mere stroke of his autocratic pen. The law also banned torture and mutilation, which Leopold saw as being of a piece with the death penalty, all instruments of barbarism. Peter Leopold’s legislative decree made Tuscany the first state in the world to take this bold step—for good.

The Grand Duke, a member of the Hapsburg dynasty who reigned over the duchy after the last Medicis, was inspired to take this unilateral action after reading a treatise by Cesare Beccaria, a relatively obscure Enlightenment thinker from Tuscany. Beccaria’s On Crimes and Punishments was first published anonymously in 1764, when Beccaria was in his twenties. After hammering out his ideas with a group of friends who, like him, were highly educated nobles, Beccaria applied the humanistic, Enlightenment values promulgated by Locke and Rousseau to the criminal justice system, concluding that a rational approach to crime and punishment could not include the death penalty.

While Beccaria proposes reforming the entirety of the criminal law, abolishing capital punishment plays a central role in his theory that the State’s integrity depends on criminal punishments being rational. Beccaria argues that the State is not endowed with the power to dole out any more punishment than necessary to try to prevent a particular crime. Ultimately, he concludes that the death penalty has no utility and, in fact, only imposes costs on the State due to the punishment’s excessiveness and vengeful character. The chapter “On the Death Penalty” provides a lucid roadmap for most contemporary arguments for abolishing the penalty:

- The State killing as a means to send a message that killing is execrable is self-contradictory. The “calm rule of law,” which is the basis for state-sanctioned punishment in the name of deterrence, is at odds with the bestial impulse to kill, “an example of cruelty.”

---

7. HAMMEL, supra note 2, at 165.
8. See Helen Borowitz & Albert Borowitz, Pictures and Punishment: Art and Criminal Prosecution During the Florentine Renaissance, 45 MD. L. REV. 1066, 1070 (1986) (book review) (discussing how the duke’s reading of Beccaria played a role in his decision to ban torture).
11. BECCARIA, supra note 9, at 52.
12. Id. at 55.
that can have only a demoralizing effect on the State. On one hand, executions harm public morality in that they are “spectacles” that appeal to the prurient interests of some; on the other hand, the spectacle sparks in others “compassion” for the condemned “mixed with indignation” for the authorities responsible for the criminal’s ultimate suffering. But neither result ennobles the State.

- Executions fail to instill respect for the State; instead, this harsh, irrevocable penalty suggests tyranny. The poor recognize that much crime arises from more fundamental injustices such as hunger. From the perspective of the poor, state-sponsored killing does nothing to remedy the root causes of crime and so does not endear the poor to the State.

- Executions do not deter the commission of crime—otherwise crime would already have vanished from the earth (for instance, execution in Beccaria’s day had long been the default punishment human societies had chosen for many crimes). Deterrence is not accomplished through a punishment’s severity but through its length. Hard labor, therefore, is a far better solution and less likely to attract those who out of “fanaticism” or “vanity” might pursue public martyrdom at the hands of the State. Some who are inclined

---

13. *Id.* at 50 (stating “it seems to me absurd that the laws, which are an expression of the public will, which detest and punish homicide, should themselves commit it, and that to deter citizens from murder they order a public one”). Likewise, Beccaria wonders how the State can reasonably assume the authority to take individual lives when the State forbids suicide. *Id.*

14. *Id.* at 53. This complicated argument arose from the public nature of executions at that time. See RICHARD C. TREXLER, PUBLIC LIFE IN RENAISSANCE FLORENCE 488 (1991) (describing the practice of public executions). On one hand, the spectacle exposed a vulgar attraction to the horror that did not help the cause of those contending that the death penalty is a dignified enterprise that can edify the public by scaring them straight. On the other hand, Beccaria was aware that executions were just as likely to engender compassion for the condemned among the spectators, and compassion is not only an emotional reaction at odds with the concept of the death penalty as a sober tool of the State to right wrongs and deter future wrongs, but also one that disinclines individuals to feel allegiance with the State. Contemporary historians of the death penalty have explained how mob riots in the wake of grisly executions often “threatened rather than reinforced state power” and thus aided abolitionists’ efforts in the nineteenth and early-twentieth century. LARRY W. KOCH ET AL., THE DEATH OF THE AMERICAN DEATH PENALTY: STATES STILL LEADING THE WAY 166 (2012).

15. Beccaria makes this point by putting himself in the mind of a typical thief who posits: “Who made these laws? Rich and powerful men who have never deigned to visit the squalid hovels of the poor, who have never broken mouldy bread amid the innocent cries of hungry children and a wife’s tears. Let me break these ties, which are harmful to the majority and useful only to a few and to indolent tyrants; let us attack injustice at its source.” *BECCARIA, supra* note 9, at 55.

16. For example, the Babylonian Code of Hammurabi, the oldest extant legal code, prescribed the death penalty for twenty-five different offenses, none of which were murder. CODE OF HAMMURABI (ca. 1772 BCE), reprinted in 1 SOURCES OF ANCIENT AND PRIMITIVE LAW 387-442 (Albert Kocourek & John H. Wigmore eds., 1915). Similarly, the English “Bloody Code,” enacted three millennia later, required the death penalty for over two hundred offenses by the end of the eighteenth century. Steven A. Hatfield, Criminal Punishment in America: From the Colonial to the Modern Era, 1 U.S.A.F. ACAD. J. LEGAL STUD. 139, 140 (1990).

17. BECCARIA, *supra* note 9, at 50.
to kill are motivated by fanaticism or vengeance; thus, they may well relish the idea of a public death for themselves. In other words, those most likely to commit a heinous act like murder are not going to be deterred by the prospect of their own death at the hands of the State.

- Victims are not made whole by state-sponsored killing. A better way to compensate the victims of homicide than another death is to give them something tangible, like money.
- The death penalty cannot be justified simply because every human society has had a death penalty. Human history contains “a vast sea of errors, in which a few widely scattered truths are floating” about with large and distant gaps between them. In short, the argument that “it has always been” is unsound. Principle should trump “blind habit,” which is why the decision-makers must be “benevolent monarchs” who “love peaceful virtue, the sciences and the arts” and who steel themselves against the “cries” of the masses.

Most of Beccaria’s points should sound familiar to anyone conversant with contemporary death-penalty polemics. Notably, though, he does not make a classic “dignity of man” argument. His position is grounded entirely in rationalism, not emotional appeals regarding moral imperatives.

18. This component of Beccaria’s argument seems to presage a contemporary awareness that most who commit senseless, heinous crimes do not do so as a result of some reasoned decision-making process that involved weighing the costs and benefits of their actions in terms that would resonate with some general consensus about reasonable risks and rewards. Instead, most heinous crimes are committed by persons afflicted with severe mental illnesses, mental impairments, and/or horrendous backgrounds so that their impulsive actions are not likely to be curbed by the remote possibility that a violent act may result in a state-mandated execution years later. See Michael L. Perlin, Mental Disability and the Death Penalty: The Shame of the States (2013); John Westin Parry, Mental Disability, Violence, and Future Dangerousness: Myths Behind the Presumption of Guilt (2013).


20. Id. at 52–53.

21. The quintessential “modern” abolitionist, among the first to treat the death-penalty issue “as a stand-alone topic,” was Victor Hugo. Hammel, supra note 2, at 128. Hugo believed that “legalistic eloquence”—meaning, refinements obtained through more nuanced legal rule-making—effectively masks the fact that state-sanctioned killing is an instance of “man’s inhumanity to man.” Kathryn M. Grossman, The Early Novels of Victor Hugo 123 (1986). For Hugo, civilization itself—our capacity to evolve—depended in part on abolishing the death penalty. Id. at 122. Hugo also identified the fear and anguish associated with waiting to be executed as the worst part of the punishment from the condemned’s perspective. See id. at 137. Litigants and Supreme Court jurists alike have similarly suggested that languishing on death row amounts to cruel and unusual punishment. Hammel, supra note 2, at 128–29. See also Valle v. Florida, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting) (“I have little doubt about . . . the commonsense conclusion that 33 years in prison under threat of execution is cruel.”); In re Medley, 134 U.S. 160, 172 (1890) (“[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting . . . execution . . . one of the most horrible feelings to which he can be subjected . . . is the uncertainty during the whole of it. . . .”) Hugo’s other primary contribution to penological discourse is the understanding of the role narrative can and must play in changing sensibilities by inducing empathy. In seemingly contradictory terms, he believed that the choice to
Beccaria’s reason-based analysis was calibrated to appeal to his audience. He was not writing for most of his compatriots. He was writing for European nobles, consisting of “benevolent monarchs” who, like would-be philosopher-kings, felt compelled to make a reasoned choice to do the right thing despite tradition and public preference. Indeed, the ruling elites competed to provide patronage to the likes of Beccaria. Those rulers were persuadable because they cared about being seen as aligned with Enlightenment values, and they were in a position to effect real change because they were not burdened with institutions like representative democracy and a federalist system of bifurcated government.

His book’s success demonstrates that Beccaria’s arguments resonated with the elites of his day. It was an immediate publishing sensation. The arguments inspired Enlightenment thinkers like Thomas Jefferson and Voltaire, as well as contemporary criminal justice abolish the death penalty could not be left to the will of the people. See VICTOR HUGO, THE LAST DAY OF A CONDEMNED MAN (1829). This seeming contradiction can be resolved, however, if one considers how narrative arguments work. They involve providing the reader or listener with a specific point of view and triggering an empathetic response as a result. See generally ANNETTE SIMMONS, THE STORY FACTOR: SECRETS OF INFLUENCE FROM THE ART OF STORYTELLING (2001). Narratives work best when they are highly particularized, not general bromides. Stories about specific people who were horribly abused throughout their life that culminated in a particular crime, about people who became mentally unhinged, about people who were wrongly accused and railroaded by a prosecutor blinded by prejudice or hubris, about people who have had demonstrable transformations during their years in prison such that they can hardly be viewed as the same person who was initially sentenced to death, about a person who received such abysmal representation during a cursory judicial proceeding that it offends our sense of fair play—these stories can resonate and create a public outcry. See, e.g., SISTER HELEN PREJEAN, DEAD MAN WALKING: THE EYEWITNESS ACCOUNT OF THE DEATH PENALTY THAT SPARKED A NATIONAL DEBATE (1994). But this emotional capacity is the same reservoir that can be (and is) tapped in the wake of peculiarly dramatic and horrific crimes that prompt people to cry for vengeance. See, e.g., Trip Gabriel & Steven Yaccino, Officials, Citing Miscarriages, Weigh Death Penalty in Ohio Case, N.Y. TIMES, May 9, 2013, at A21 (describing the possibility of capital punishment in the infamous Ariel Castro case).

22. No evidence suggests that Beccaria had any influence on the great mass of largely illiterate members of his own community, let alone *hoi polloi* elsewhere in the Western world, where public executions were common, popular events. See STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 25 (2002) (recounting the popularity of public executions in colonial America); LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865 94–95 (1989) (noting that the first private execution in the United States only took place in 1834).

23. Hammel describes Beccaria as belonging to a “privileged class of Enlightenment thinkers and reformers who traveled from court to court advising rulers who were eager to rule according to the principles of benevolent despotism.” HAMMEL, supra note 2, at 58.

24. For instance, Empress Catherine of Russia and the Hapsburgs vied for Beccaria’s advisory services. Id. at 58–59.

25. As Carol and Jordan Steiker explain, the U.S.’s “commitment to federalism, especially in the area of criminal justice—[is what] . . . most precludes the European path of legislative abolition.” The Beginning of the End, supra note 5, at 100.

26. Beccaria’s work inspired Jefferson to limit the death penalty’s role in a 1778 draft of “Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital.” By 1821, Jefferson wrote that Beccaria had “satisfied the reasonable world of the unrightfulness and inefficiency of the punishment of crimes by death.” MASUR, supra note 22, at 53–54.

27. Inspired by Beccaria, Voltaire took up the idea that murderers should have to pay the victim’s
reformers worldwide. Despite the apparent gulf between the United States and all other Western democracies today, during the Enlightenment, Beccaria's treatise was quickly translated into English, widely read in both northern and southern American cities, and was hugely influential on several of the United States' founding fathers.

The book also sparked controversy. The Venetian Inquisition banned it, perhaps as a result of one monk's emotional counter-attack in which he reputedly described Beccaria's polemic as "socialist." The book was placed on the Roman Inquisition's 1766 Index of Prohibited Books. The objections from these quarters can perhaps be attributed to the fact that Beccaria's thesis hinged on the concept of natural limits on sovereign power, a concept at odds with traditional notions of "might makes right" and the divine right of kings (and popes). That is, not all elites took kindly to a concept that threatened some of the elites' own power. But eighteenth-century European culture was such that many elites were inclined to perspectives that may have seemed counter to their short-term self-interest because they genuinely believed it was rational to serve the interests of humanity at-large.

Admittedly, Beccaria's great influence on Enlightenment rulers and thinkers did not spur immediate abolition of the death penalty anywhere except his native Tuscany. Instead, his treatise inspired incremental reforms that continue into the present—such as transforming the death penalty from a public spectacle to a private, controlled event, and curtailing the availability of the death penalty—until European elites succeeded in abolishing the death penalty entirely. Beccaria's name receded into survivors and perhaps work off the crime as a slave in lieu of death. HAMMEL, supra note 2, at 19–20 (citing VOLTAIRE, PRIX DE LA JUSTICE ET LA HUMANITE 6–8 (1779)).


29. As Masur reports, the first English-language edition of On Crimes and Punishments was published in London in 1767, just three years after it was first printed in Italian. MASUR, supra note 22. Editions were advertised in New York by 1773, published in Charleston in 1777, and published in Philadelphia in 1778. The treatise was serialized in many papers and listed in most American catalogues of books for sale by the 1780s, suggesting widespread interest among the literati. Id.


32. BECCARIA, supra note 9, at xxiii.

33. HAMMEL, supra note 2, at 55. Germany did not abolish the death penalty until 1949, followed by Great Britain in 1969 and France in 1981. Id. However, Beccaria's writings helped spark the abolitionist movements in these countries, which worked to effect gradual bans on torture and increasingly narrow applications of the death penalty. Id. at 55–60.

34. See People v. Brady, 236 P.3d 312, 345 (Cal. 2010) (noting the universal abolition of the death penalty in Western Europe).
relative obscurity, but his argument—that the death penalty was not worth its costs—has been embraced by elites, including those who took immediate action in Beccaria’s homeland of Tuscany. That development was, and remains, a symbol of the region’s enlightened sensibilities.

III. Twenty-First Century United States: Where a New Cost Argument has Been Grafted onto Beccarian Root Stock

Lately, Beccaria has resurfaced, garnering considerable attention from contemporary death penalty scholars who recognize that Beccaria provided “the first coherent, comprehensive and sustained argument against the state’s right to kill.” Today, variants of Beccaria’s reason-based cost argument have emerged and are shaping the debate about the death penalty’s ultimate demise in the United States. One variation focuses on the moral costs, where the risk that the State will execute innocent people remains despite all of the checks supposedly provided by the constitutionalization of the penalty during the decades since Furman v. Georgia. The “risk of executing the innocent” argument has gained considerable traction due to the remarkable work of organizations like the Innocence Project, whose efforts exposing wrongful convictions relying heavily on DNA evidence routinely receive significant press coverage. Another variation on the cost argument focuses on the expense of capital trials and the ensuing appeals, as well as the cost of confining death-row


36. See, e.g., Bessler, supra note 30; see also Timothy V. Kaufman-Osborn, Regulating Death: Capital Punishment and the Late Liberal State, 111 YALE L.J. 681, 685 (2001) (observing that “the last new argument against the death penalty may have been made by Cesare di Beccaria, in 1764”).

37. HAMMEL, supra note 2, at 7.

38. Furman v. Georgia, 408 U.S. 238 (1972). Furman, a profoundly fractured decision, resulted in a temporary moratorium on executions in this country when actual executions were already on the decline. Backlash following Furman prompted many states to revisit the death penalty. See generally Carol S. Steiker & Jordan M. Steiker, Cost and Capital Punishment: A New Consideration Transforms an Old Debate, 2010 U. CHI. L. REV. 117 (2010) [hereinafter Cost and Capital Punishment] (describing Supreme Court capital punishment jurisprudence). Post-Furman statutes have been the subject of decades of litigation, consuming a significant portion of the Supreme Court’s docket. Id. The Court has produced decisions cabining off when and how states may seek the death penalty and crafting numerous procedural safeguards purportedly ensuring that only “the worst of the worst” receive this most severe penalty—and only after being afforded due process and individualized sentencing that weighs aggravating against mitigating factors. Id.

39. The Innocence Project has been particularly successful in shaping public opinion of the death penalty’s flaws. See The Beginning of the End, supra note 5, at 115–16, 138 n.124 (discussing how the Innocence Project’s handling of the Anthony Porter case drew national attention to capital punishment reform). In Illinois alone, thirteen wrongful convictions were exposed, leading Republican governor George Ryan to impose a moratorium in 2000. Editorial, The Demon of Error, IRISH TIMES, Jan. 15, 2003, at 15. This development was not lost on members of the Supreme Court. See, e.g., Kansas v. Marsh, 548 U.S. 163, 208–10 (2006) (Souter, J., dissenting) (recounting the pervasive errors uncovered such that multiple people on death row in Illinois and elsewhere had been exonerated).
inmates in high-security penitentiaries. Even law enforcement personnel have begun to cite these literal costs as the central reason to abandon the death penalty. For instance, in a 2012 referendum effort in California where voters were asked to repeal the death penalty, many individuals on the prosecutorial side joined abolitionists in noting just how many millions of dollars California stood to save if the death penalty were repealed. Although the measure failed, those same arguments have been resonating elsewhere as a number of states have recently passed repeal statutes or are debating such measures.

Even a new conservative group, “Conservatives Concerned About the Death Penalty,” has emerged to emphasize economic costs as a reason to reject the death penalty. The group’s leaders note that the death penalty costs more than a life sentence, and yet does not seem to deter crime. Texas native Richard A. Viguerie, whom some describe as the “Funding Father” of the conservative movement, supports the new group and has framed the argument in terms that might prove palatable to many on both ends of the current American political spectrum. That argument is that the death penalty is just another government program, and since the government cannot be trusted to do anything well, a “system marked by inefficiency, inequity, and inaccuracy” should be abandoned.

The ascendency of the “economic-costs” argument may seem surprising since the American criminal justice system rests on two diametrically different premises, both of which implicitly eschew cost concerns. First, there is the conservative notion that certain ills are so

40. See generally Cost and Capital Punishment, supra note 38, at 117 (discussing the expense of these measures). See also KOCH ET AL., supra note 14, at 156 (same).


42. See, e.g., Ian Urbina, In Push to End Death Penalty, Some States Cite Cost-Cutting, N.Y. TIMES, Feb. 25, 2009, at A1 (reporting on the recent repeal of death penalty statutes in Maryland and New Mexico).


44. The group has also noted evidence demonstrating the unfair application of the death penalty. Id.

45. On the website, Richard Viguerie is quoted as saying:

Conservatives have every reason to believe the death penalty system is no different from any politicized, costly, inefficient, bureaucratic, government-run operation, which we conservatives know are rife with injustice. But here the end result is the end of someone’s life. In other words, it's a government system that kills people.


heinous that a secure society requires that those who perpetrate them must be punished with a loss of liberty; therefore, the State should shoulder whatever costs are necessary to ensure that a sufficient deprivation of liberty occurs.47 Second, there is the countervailing liberal notion that depriving someone of liberty is the most extreme thing a State can do; therefore, harsh criminal sanctions should not be permitted unless the person has been found guilty beyond a reasonable doubt through a public process reflecting due process and equal protection under the law; therefore, the State should shoulder whatever costs are necessary to ensure sufficient and equal process.

The ascendancy of the economic-costs argument may be understandable since the United States is among the most unapologetically capitalist societies in the world. Money—making and spending it—matters a great deal to Americans generally. And virtually every American understands on some level that the way money is spent is a vote about what matters in our culture. Most citizens understand that budgets—particularly in times of economic instability, strained finances, and ballooning public debt—are a zero-sum game: money spent on the military, for instance, is money not spent on health care. Particularly astute citizens have recognized that, because budgets reflect what we value, budgets are a kind of “moral document.”48

All the resources that state and federal governments spend litigating capital cases and incarcerating death-sentenced inmates in extreme isolation are resources not spent on other things. And some Americans—who are essentially pragmatists—are starting to balk when confronted with the death penalty’s precise costs.49 Perhaps this recent development belatedly validates Thurgood Marshall’s hypothesis, which posits that a properly “informed citizenry” could not support the death penalty.50 But even

47. Proponents of capital punishment have argued that the death penalty is worth its costs because it deters crime. Yet this argument is stymied by a lack of supporting empirical evidence. See, e.g., Michael L. Radelet & Tracu L. Lacock, Do Executions Lower Homicide Rate?: The Views of Leading Criminologists, 99 J. CRIM. L. & CRIMINOLOGY 489 (1990) (criticizing the empirical foundations of the deterrence argument). Moreover, murder rates remain highest in the states that have retained the death penalty. KOCH ET AL., supra note 14, at 156.

48. “A nation that continues year after year to spend more money on military defense than on programs of social uplift is approaching spiritual death.” Sister Helen Prejean, Address at the University of Texas School of Law (October 11, 2012) (citing Dr. Martin Luther King, Jr., “Beyond Vietnam: A Time to Break Silence” Address at Riverside Church in New York City (April 4, 1967)).


50. See Furman v. Georgia, 408 U.S. 238, 362 (1972) (Marshall, J., dissenting) (“[T]he question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, oppose that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available. This is not to suggest that with respect to this test of unconstitutionality people are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens.”).
accepting the conservative premise that the only truly just punishment for the worst crimes is death, for many that ideal loses some luster when the economics of the death penalty are viewed through a purely rational lens.\textsuperscript{51} Certainly, for the first time in decades, numbers of conservatives now seem willing to concede that economic concerns should trump their idealism about the death penalty’s legitimacy.

But wait!

Texas is a conservative bastion by most objective measures. Yet the state continues to spend enormous sums executing what may be a large number of people relative to other states but is still a handful compared to its general population.\textsuperscript{52} Since at least 1997, the public has had constructive notice that each execution costs Texas taxpayers about three times as much as incarcerating someone for life.\textsuperscript{53} Yet Texas has been willing to spend those sums even as many of its citizens’ basic needs—healthcare, education, better job opportunities—go unmet. Why is Texas peculiarly resistant to the latest variation on Beccaria’s cost argument for abolition such that, most agree, it will likely be the last execution-state standing?\textsuperscript{54}

IV. Texas: Where Rational Arguments Against the Death Penalty Are Non-Adaptive

The let-the-marketplace-decide model is quite popular in Texas, and leading politicians like to argue that the low-tax, low-regulation, part-time government model explains Texas’s robust economy.\textsuperscript{55} Because of Texas’s pronounced commitment to a relatively unbridled marketplace, one might think it would find pragmatic economic arguments for death-penalty abolition appealing. Yet Texas is a death-penalty state where the economic-

---

\textsuperscript{51} As the conservative hero William F. Buckley, Jr. once quipped in a different context, “Idealism is fine, but as it approaches reality, the costs become prohibitive.” JONATHON GREEN, THE CYNIC’S LEXICON: A DICTIONARY OF AMORAL ADVICE 34 (1984).

\textsuperscript{52} Texas not only leads the country in executions, but also has the largest prison system in the world—yet Texas is only fifteenth in spending on indigent defense. ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE 4 (2010).

\textsuperscript{53} See Richard C. Dieter, Millions Misspent: What Politicians Don’t Say about the High Costs of the Death Penalty, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 402 (Hugo Adam Bedau ed., 1997) (discussing how the heightened costs of capital punishment have been extensively documented in numerous studies); see also DEATH PENALTY INFORMATION CENTER, supra note 49.


\textsuperscript{55} See, e.g., Ross Ramsey, For Low Taxes, It All Depends on the Business, N.Y. TIMES, Oct. 5, 2013, at A25A (quoting Texas Governor Rick Perry’s corporate recruiting campaign as touting, “When you grow tired of Maryland taxes squeezing every dime out of your business, think Texas, where we’ve created more jobs than all the other states combined. Where you’ll find limited government, low taxes and a fair legal system.”). That model does not address the costs associated with Texas having among the highest number of uninsured citizens, the highest proportion of low wage jobs, the highest violent crime rates, and one of the most poorly educated populations in the country. But assessing the soundest of competing economic ideologies is beyond this paper’s scope.
costs argument is not gaining much traction whatsoever—at least not among elites in a position to effect real change. These elites are more inclined to capitalize on the political electorate’s sense of Texas as "special," using a hardline stance with respect to the death penalty as an efficient and powerful means to pander to that electorate.

Why is Texas so special?
In part, Texas is special because of its size and geographic diversity.

Moreover, Texas has a uniquely colorful history. Ever since Davy Crockett reacted to losing reelection to the U.S. House of Representatives in Tennessee by declaring, “You may all go to hell, and I will go to Texas,” Texas has been seen as a place that welcomes those willing to reject the status quo and go their own way. Texas is the only U.S. state that was wrested from both native peoples and colonizers, and then stood for a time as a Republic in its own right before joining the Union. As a result, the state has long been infused with a siege mentality, which in turn contributes to high gun ownership and a concern about fighting off both real and perceived intruders—whether “savages” fighting to maintain their territory in the face of settlement during the frontier days or far-away Iraqis whom a president from Texas purported were a threat to our “freedom.”

Texas is not, of course, the only state that felt insufficient loyalty to the Union such that it seceded not long after Abraham Lincoln’s election.

57. The idea that “everything is bigger in Texas” permeates popular culture, even though Texas is neither the most populous state nor the geographically largest. See, e.g., T. Marzetti Co. v. Roskam Baking Co., 2010 WL 793050, at *7 (S.D. Ohio Mar. 3, 2010) (“it is commonly understood in our lexicon that ‘everything is bigger in Texas.’”).
58. One of the most apt descriptions of Texas’s regional diversity appears in the 2011 film Bernie by Texas native Rick Linklater. In the film, which features many real East Texas residents, one such character tries to explain that Texas really consists of five different states (and then proceeds to describe about seven). The film is based on a magazine article chronicling the relationship between 81-year-old millionaire Marjorie Nugent and her much-younger companion, funeral director Bernie Tiede, who eventually murdered Nugent and stuffed her body in a meat freezer. Skip Hollandsworth, Midnight in the Garden of East Texas, TEXAS MONTHLY, Jan. 1998, available at http://www.texasmonthly.com/story/midnight-garden-east-texas. Carthage residents were so fond of Tiede that, despite his having confessed to the murder, the District Attorney requested and received highly unusual relief: a change of venue based on the argument that the prosecution would be unable to secure a fair trial in Carthage. Id.
60. See JAMES MCENTEER, DEEP IN THE HEART: THE TEXAS TENDENCY IN AMERICAN POLITICS 32 (2004) (“The constitution Texas adopted [in 1836] later reflected a siege mentality that would characterize the republic and later the state of Texas.”).
61. Preserving the institution of slavery played an important role in Texas’s secession from the Union. Walter L. Buenger, Texas and the Riddle of Secession, 87 SW. HIST. Q. 151, 152 (1983). The “Declaration of Causes” adopted at the secession convention expressed the conviction that “African slavery” was a natural right and that notions of racial equality violated “the plainest revelations of
But Texas voted by referendum to secede, not just from the Union, but so it
could resume its status as a sovereign state. Then the state quickly
demonstrated its frustration with process, as the secession convention went
beyond its mandate and moved to join the Confederacy despite the protests
of the sitting governor—war hero Sam Houston—who was summarily
forced out of office and, essentially, out of town, as the Confederate flag
was hoisted over the Capitol. Texas is certainly the only state where a
contemporary sitting governor has felt comfortable, nearly 150 years after
secession, invoking that act in a political campaign presaging a run for
national office. That same governor has, more recently, been using that
Texas legacy—of seeing itself as a country unto itself, a sovereign who can
take or leave the allegedly supreme federal government—to resist federal
legislation that would dare, for instance, to thrust massive funds for
Medicaid expansion upon its citizens.

While that governor, Rick Perry, may have proved a disastrous
presidential contender in 2012, his political instincts about what plays

Divine law” and “holding, maintaining, and protecting the institution known as negro slavery” should be
permitted “to exist in all future time.” TEXAS SECESSION CONV., JOURNAL OF THE SECESSION
CONVENTION OF TEXAS 61-66 (E.W. Winkler ed., 1914). One Texas historian reports how a slave
owner, absent any irony, stood up in a meeting to urge secession by declaring “the people who will not
rise in defense of their rights and their honor, will soon be fit for servitude and for chains.” RANDOLPH
B. CAMPBELL, GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE 241 (2003). This evidence
certainly supports the notion that early Texans, like many of their white brethren in the Deep South, had
a special capacity for cognitive dissonance—believing that, were the federal government to deprive
the state of its right to permit one set of human beings to enslave another, that it would be tantamount to
slavery itself.

62. CAMPBELL, supra note 61, at 242.
63. Id. at 242-44.
64. In the run up to the 2012 presidential election, Rick Perry was taken to task about comments
he had made endorsing a modern secession movement. His spokesmen later characterized such
comments as “a joke.” The Texas Tribune and others, however, unearthed a history of such comments.
Maggie Haberman, Rick Perry Critics Unearth Another Secession Comment, POLITICO (Aug. 10, 2011),
65. Recently, Rick Perry grabbed headlines by declaring his intention to refuse to allow Texas to
participate in the Medicaid expansion program, a key component of the Affordable Care Act (also
referred to as “Obamacare”). See, e.g., Manny Fernandez, Texans Rebut Governor on Expansion of
Medicaid, N.Y. TIMES, Mar. 4, 2013, at A13 (discussing the controversy sparked by Perry’s decision).
That expansion—for which the federal government would pay 100% of the costs for the first three years
and then 90% thereafter—would mean covering more than one million new people in a state that boasts
the highest rate of uninsured residents in the nation. See, e.g., Marty Schladen, Gov. Rick Perry, Other
take; Corrie MacLaggan, Texas Governor Reiterates Medicaid Expansion Opposition, REUTERS (Apr. 1,
2013), http://www.reuters.com/article/2013/04/01/us-usa-texas-medicaid-idUSBRE9300FN20130401; Alison Sullivan, Perry Speech Interrupted by Hecklers, but He Insists He Won’t Expand Medicaid,
66. Katherine Fung, Conservative Pundits Skewer Rick Perry’s Debate Performance,
rick-perry-debate-performance_n_978250.html. Despite uniformly bad reviews, many journalists posit
that Perry is likely to run for the Republican nomination again in 2016. See, e.g., Jay Root, Perry Keeps
Many Texans value their image as out-of-step with elites in Washington and on the coasts. Likewise, these same folks welcome being at odds with international opinion and tend to disdain humanistic, Hugo-esque notions of “evolving standards of decency.” Many Texans, who see colloquial grammar and a homespun drawl as proxies for authenticity, are highly suspicious of intellectual rationalism, due process, and even the rule of law itself—all of which elites who favor death-penalty repeal tend to value. Action-oriented “frontier values” are perceived as preferable. Indeed, sufficient numbers of non-Texans must find the concepts of “swift justice” and “Texas tough” appealing such that they have, in recent decades, rewarded Texans with an extraordinarily large number of seats at the table where national policy is made—which has, in turn, enabled Texas to export criminal justice policy to the rest of the nation.


68. The allusion is to a judicial concept, first articulated in Trop v. Dulles, that the Eighth Amendment to the U.S. Constitution, which prohibits “cruel and unusual punishment,” has to be interpreted in terms of a particular cultural milieu. 356 U.S. 86 (1958). In that case, the Court ruled, 5-4, that revoking U.S. citizenship as a punishment was unconstitutional because it offended “evolving standards of decency.” Id. at 101. Despite persistent efforts by several members of the current Court to revisit the “evolving standards” aspect of Eighth Amendment jurisprudence, one would be hard-pressed to counter the historical evidence that Western attitudes regarding acceptable punishments and human suffering have changed over time—and the vector has evolved, not in purely linear fashion, but consistently in one direction: towards seeing violence and cruelty as uncivilized. See generally, STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED (2011) (charting the decline of violence throughout human history); DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION (2010) (stating the same).


70. Until 1973, Texas had a law on the books that granted a husband (and husbands only) “free shooting rights” with regard to any man he caught having sex with his wife. BILL NEAL, GETTING AWAY WITH MURDER ON THE TEXAS FRONTIER 17 (2006).

71. As governor of Texas, George W. Bush played a leading role in the incarceration explosion that now characterizes the entire nation’s approach to criminal justice. See PERKINSON, supra note 52, at 327–28. Bush made no secret of his attitude; before he was elected Governor in 1994, he described his view of crime policy as follows: “The consequences will be tough and certain.” Id. (citing Clay Robinson, Campaign ’94: On the Issues—Crime, Education in Texas, HOUSTON CHRONICLE, Oct. 30, 1994, at A1). Bush’s role in a record number of executions in Texas was also highly publicized during his first run for president. See, e.g., Frank Bruni & Richard Oppel, Jr., Bush Delays an Execution For the 1st Time in 5 Years, N. Y. TIMES, June 2, 2000, at A18 (discussing Bush’s capital punishment policies in the context of his presidential campaign).

72. Texas has produced four modern-era presidents (Dwight D. Eisenhower, Lyndon B. Johnson, George H. W. Bush, George W. Bush), three vice-presidents (Johnson, Bush, Cheney), yet another vice-presidential candidate (Lloyd Bentsen), and a third-party presidential candidate (Ross Perot) who probably cost another Texan (George H. W. Bush) his reelection. Texans have also held leadership
Nothing symbolizes the deeply-rooted Texas-tough stereotype like Texas’s approach to the death penalty. These roots, like those of the scruffy mesquite trees that flourish in some of the state’s most inhospitable climes, are hard to dislodge and easy to revive. A contemporary pro-death-penalty stance stimulates root values, serving as a shorthand to many Texans as well as non-Texans attracted to the oversized Texas mystique. Talking tough about the death penalty says: “I am pro community writ small. I understand that this community is surrounded on all sides by threats—particularly from people of color (whose land Texans once seiged, whose ancestors were formerly held in bondage, or who try to cross the border today). Other threats come from foreign governments who want to disarm you and leave you exposed. Y’all can go about your business—but remain armed and vigilant. I’ll make sure the Government stays off your

positions recently in both Houses of Congress. Texas political historian Michael Lind argues that the “Texanization” of the American right reached its apex during the George W. Bush presidency, which meant the ascendancy of an ideology that emphasizes minimal government, a bellicose foreign policy, and religious fundamentalism. Michael Lind, MADE IN TEXAS x–xi (2003). In seeking to explain the incarceration explosion in the U.S. in recent decades such that we now spend well over $200 billion per year on prisons, Robert Perkinson concluded that, “in the realm of punishment, all roads lead to Texas”—which incarcerates more people than Germany, France, Belgium, and The Netherlands combined. Perkinson, supra note 52, at 4, 16.

73. Texas’s death row is not only noteworthy for its size (California’s is actually much bigger because it does not carry out many executions); it is also noteworthy for its grim excess. See DEATH PENALTY INFORMATION CENTER, Death Row Inmates by State, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year (both Florida and California have more death row inmates than Texas). Inmates spend most of their time in six-by-nine cells from which they cannot even see another person; they are allowed only one hour a day outside of their cells for “rec,” which takes place alone in a slightly larger cage that is still inside the prison block; for visits with lawyers and family, death-row inmates are chained to a small plexiglass booth where they speak to visitors through a phone. Perkinson, supra note 52, at 37–39. I can confirm the accuracy of Perkinson’s description because the mind-numbing experience of visiting the Polunkys Unit in Livingston, Texas, which houses Texas’s vast death row, haunts me still.

74. Michel Foucault, discussing the challenges involved in abolishing the death penalty, noted “the way in which the death penalty is done away with is at least as important as the doing away. The roots are deep. And many things will depend on how they are cleared out.” Michel Foucault, Against Replacement Penalties, in POWER: ESSENTIAL WORKS OF FOUCALUT, 1954–1984 459 (James D. Faubian ed., 2000).

75. Interestingly, Marie Gottschalk contends that, before Furman, the death penalty “was not a signature issue for law-and-order conservatives”—at least not nationwide. Marie Gottschalk, The Long Shadow of the Death Penalty: Mass Incarceration, Capital Punishment, and Penal Policy in the United States, in IS THE DEATH PENALTY DYING? EUROPEAN AND AMERICAN PERSPECTIVE 302 (Austin Sarat & Jurgen Martschinkof eds., 2011). After Furman, however, the death penalty became the centerpiece of debates about crime and punishment. “Select politicians and public officials began in earnest to exploit [the] issue for electoral or ideological reasons.” Id. As Jonathan Simon adds, only when executions resumed after Gregg v. Georgia did the death penalty become, for the first time in U.S. history, “the ultimate form of public victim recognition.” Jonathan Simon, Violence, Vengeance and Risk: Capital Punishment in the Near-Liberal State (1997) (unpublished manuscript) (on file with the University of Miami). But while the modern death penalty may have become a national tough-on-crime symbol only in the late seventies, Texas—as a Republic and as a state—has always had a death penalty and, throughout its history has largely been committed to using that penalty, not just to wielding it as a symbol. Michael Ariens, LONE STAR LAW: A LEGAL HISTORY OF TEXAS 227 (2011). Nonetheless, even Texas allowed it to lie dormant for a time before Furman.
back. But if a threat ripens, you can be sure the State will step in and exact swift and certain retribution.” This implicit message simultaneously plays to mob sensibilities while promising a ballast against complete mob rule. The message is neither rational nor pragmatic; it is instinctual and darkly palliative.76

Certainly, for the last two decades,77 a major proxy for “Texas values” has been the state’s willingness not only to sentence people to death, but also to carry out those sentences.78 Two of the state’s most successful politicians—measured, respectively, in terms of attaining the nation’s highest office and retaining control over the state’s highest executive office—are George W. Bush and Rick Perry. These men have aggressively defined themselves as Texans, as leaders, and as defenders of a robust death penalty, almost as if the three were synonyms. For instance, even after the American Bar Association published findings supporting the conclusion that Texas fell far below any measure in terms of adequate indigent defense, Governor Bush signed a bill into law limiting the rights of death-sentenced inmates to pursue appeals in state court79 while publicly expressing absolute confidence “that every person that has been put to death in Texas, under [his] watch, had been guilty of the crime charged, and has had full access to the courts.”80 Bush signed death warrants for 152 executions—including forty lethal injections in 2000 alone.81 Bush's

76. Whatever the contemporary death penalty is intended to address, it is not deterrence. While some death-penalty advocates continue to gesture toward a deterrence argument, no legitimate empirical research has ever demonstrated that the death penalty deters crime. See generally Radelet & Lacoek, supra note 47. Indeed, the ABA, criminologists, sociologists, and prominent religious groups agree that the death penalty serves no significant penological purpose. The Beginning of the End, supra note 5, at 121. Nor are these messages akin to the rational pro-death-penalty arguments proffered by Immanuel Kant, who defended the death penalty on the basis of “first principles,” rejecting both emotional notions of retribution and humanitarian “sentimentality.” Evans, supra note 28, at 197.

77. The post-1960s Republican “Southern strategy,” which has involved highlighting values associated with the South and harnessing the energy of “values voters” in and beyond that region, is characterized by hostility toward civil rights, abortion, gay rights, and gun control and a countervailing emphasis on Christian fundamentalism, crime control, militarism, and the death penalty. See Garland, supra note 68, at 253. Texas politicians seem to have recognized that the death penalty itself is the best proxy—not only for those values—but for the fight against foreign elites, defined as both northern liberals and “European socialists,” who aim to take away “states’ rights” to shape their own culture.

78. See A Tale of Two Nations, supra note 69, at 1911–27 (describing the execution gap between symbolic death penalty states, like California, and actual killing states, like Texas).

79. Perkinson, supra note 52, at 341.

80. Sara Rimer & Raymond Bonner, Bush Candidacy Puts Focus on Executions, N.Y. Times, May 14, 2000, at A1; Dick Burk et al., A State in Denial: Texas Justice and the Death Penalty ch. 6 (2000). The Texas Public Defender Service has identified at least six people whom Texas has executed since 1976 whose guilt is questionable, and at least twelve other individuals sentenced to death since 1973 have been exonerated. The latter evidence tends to be spun two different ways depending on which side of the debate one sits: either exonerations are proof that the system is broken and that the risk of executing the innocent remains high; or exonerations are proof that the system of post-conviction review cures all ills.

81. Executed Offenders, Texas Dep’t of Criminal Justice (October 10, 2013), http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html. Governor Bush commuted only a
historic record was broken only by his successor, Rick Perry. Perry also vetoed bills that would have prevented execution of juvenile offenders and of persons with mental retardation and took the unprecedented action of blocking a 2009 probe into the possible wrongful conviction (and subsequent 2004 execution) of Cameron Todd Willingham after investigative reporting suggested he probably should have been acquitted.

These men did not make the culture but they, like other elite Texas conservatives, have been willing to exploit what is lurking deep in the soil. Because these Texas leaders understand their base, they are (not surprisingly) disinclined to embrace the cost argument that attorneys general are embracing in other jurisdictions.

— single death sentence during his tenure as Texas’s governor. Austin Sarat, Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State, 42 LAW & SOC’Y REV. 183, 188 (2008) (describing how Bush’s standard for clemency was such that it “all but ensured that few if any death sentences would be seriously examined”).

82. PERKINSON, supra note 52, at 346.


84. Texas’s first codified law defined eight crimes as death-penalty offenses, four of which were non-homicides perpetrated against “free white” people. ARIENS, supra note 75, at 30. And ever since Furman v. Georgia, the Texas Attorney General’s office has played a leading role in fighting to keep the death penalty and in resisting judicial attempts to curb its application or to micromanage the processes whereby it is pursued. In Furman itself, Texas was at the forefront of the minority supporting retention of the death penalty when the NAACP’s Legal Defense Fund and the ACLU were asking the Supreme Court to strike it down. Most of the amicus curiae briefs filed in Furman supported abolition, but Texas raised its voice to assert its right to keep the death penalty.

85. On a national level, a judge on Texas’s highest criminal court was criticized for refusing to keep the court open after 5:00 pm for a man sentenced to death to seek an emergency stay, but Texas itself dismissed the pursuit of a public reprimand for this conduct. Texas: Reprimand Is Dismissed Against Judge Who Closed Court, N.Y. TIMES, Oct. 12, 2010, at A16; see also KOCH ET AL., supra note 14, at 154. And even when a state trial judge called a hearing to investigate the constitutionality of the process whereby death sentences are meted out in Texas, prosecutors felt confident about openly displaying their disdain. Juan A. Lozano, Death Penalty Prosecutors in Texas to ‘Stand Mute’ during Hearing, WASHINGTON POST (Dec. 6, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/06/AR2010120607582.html (reporting that, after a Houston trial judge aborted a capital trial and declared her intention to hold hearings on the constitutionality of Texas’s use of the death penalty, prosecutors refused to participate).

86. There are legitimate reasons to believe that, were the economic-costs argument to gather momentum in Texas, members of the Texas political elite might respond by stoking voters to adopt “speed-up” measures similar to those recently signed into law in Florida. See generally, e.g., FLA. STAT. § 922.052 (2013) (a Florida statute designed to accelerate the capital punishment process). Legislation of this sort is intended to truncate the appeals process and dramatically shorten the time between conviction and execution, thereby reducing economic costs without abandoning the death penalty. Bill Cotterell, Florida legislators approve measure to speed up executions, CHI. TRIB. (Apr. 29, 2013), http://articles.chicagotribune.com/2013-04-29/news/sns-rt-us-usa-florida-deathpenaltybrea93sout-20130429_1_death-appeals-capital-punishment-condemned-killers. After all, the backlash created by Furman is now quite familiar. After a brief moratorium imposed by that decision—just as public opinion seemed to be moving away from majority support for the death penalty for the first time—the Court commenced a long engagement with micromanaging when and how the punishment can be imposed without offending the Constitution. And this development, along with rising crime rates in the 1970s, “galvanized such a powerful political backlash,” that support for the death penalty in America garnered new life just as it was being abolished in Canada and Western Europe. Gottschalk, supra note
Rhetorically, both supporters and opponents of the death penalty agree that "[i]f the death penalty exists, it should be fair." But supporters—particularly those actively involved in litigating death sentences in Texas—say that sufficient safeguards of fairness are already built into the system. By contrast, opponents—particularly those actively involved in defending against death sentences in Texas—say that beneath the surface of most death sentences lies a dearth of due process, prosecutorial misconduct, woefully inadequate counsel, and overwhelming evidence of racial and economic bias. Opponents of the death penalty also point to horror stories of childhood abuse and deprivation that trial counsel did not bother to investigate, let alone present as evidence militating against a sentence as harsh as death.

The fact remains that at least a dozen people on Texas’s death row have been exonerated since executions resumed after Gregg. Despite this, death-penalty proponents in Texas who are in a position to make policy remain remarkably resistant to efforts to reform the procedural processes that govern capital defense, to fund indigent capital defense, and to impose categorical bans on death-penalty eligibility—thereby ensuring that Texas continues to obtain death sentences and conduct executions in high numbers. The infamous “sleeping lawyer case,” for instance, exposed Texas’s paltry expectations regarding the level of competence expected of those defending persons accused of capital crimes. Despite years of extensive bad publicity, Texas continues to resist modest efforts to ensure that those condemned to death have access to procedures that would enable them to challenge the ineffectiveness of their (generally court-appointed) lawyers.

75, at 306.

87. KOCH ET AL., supra note 14, at 168.


89. Calvin Burdine was sentenced to death in 1983 during a trial in which his defense counsel fell asleep several times—in a manner noticeable enough to be indicated on the record. On direct appeal and in post-conviction review, state attorneys resisted the claim that Burdine had received constitutionally inadequate counsel. The Texas Court of Criminal Appeals and a panel of judges on the Fifth Circuit Court of Appeals affirmed the sentence upon concluding that Burdine had failed to show that his lawyer had slept during “important” portions of the trial. See Burdine v. Johnson, 231 F.3d 950, 964 (5th Cir. 2000). The case stayed in the news for several years, as Burdine’s post-conviction counsel was eventually able to help him negotiate a plea deal such that he received multiple life sentences in exchange for a guilty plea. None of that publicity did anything to burnish Texas’s image as a jurisdiction committed to safeguarding the rights of the poor facing death as a possible criminal sanction. See, e.g., Linda Greenhouse, Inmate Whose Lawyer Slept Gets New Trial, N.Y. TIMES, June 4, 2002, http://www.nytimes.com/2002/06/04/us/inmate-whose-lawyer-slept-gets-new-trial.html.

90. Trevino v. Thaler, 133 S. Ct. 1911, 1913 (2013) (“The structure and design of the Texas system in actual operation, however, make it ‘virtually impossible’ for an ineffective assistance claim to be presented on direct review.”).
Similarly, Texas policy-makers resisted legislation that would have permitted jurors to choose life without the possibility of parole (LWOP) instead of death, arguing that this alternative to death would “confuse juries.”\(^9\) In fact, polling data had long demonstrated that, when given the LWOP option, public support for the death penalty dropped considerably. Therefore, it is not a stretch to suggest that Texas conservative political actors recognized that an LWOP sentencing option would likely curtail the number of death sentences that prosecutors in Texas could secure, and they did not see this prospect as a good thing.\(^9\) Texas only enacted an LWOP option after the Supreme Court decided \textit{Roper v. Simmons}, which deprived the state of the right to execute juvenile offenders.\(^9\) (Texas was only one of three states in the ten years before that decision that had actually executed such offenders.)\(^9\) In response to \textit{Roper}, the state finally passed legislation recognizing this reform in 2009, but it did so by requiring an extremely punitive minimum 40-year prison sentence for juvenile murderers since execution was no longer an option.\(^9\) Then, in 2013, Texas pursued and enacted a mandatory life sentence (with the possibility of parole) for capital juvenile offenders, which is, potentially even more punitive than a 40-year mandatory minimum.\(^9\)

Likewise, Texas continues to resist a ban on executing people with demonstrable mental retardation as a matter of law and fact. First, Governor Perry vetoed a bill that would have abolished the practice, a fact the Supreme Court noted in \textit{Atkins v. Virginia}—the decision that categorically banned such executions despite Texas’s resistance.\(^9\) But over a decade after \textit{Atkins} was decided, Texas continues to execute persons with mental retardation,\(^9\) because the Texas Court of Criminal Appeals (the “CCA”) has expressly rejected a “bright-line rule” with respect to death sentences for persons with mental retardation, whereas a categorical ban is precisely what the Supreme Court mandated in \textit{Atkins}.\(^9\) The CCA, in rejecting the categorical ban, reasoned that, while “[m]ost Texas citizens might agree that Steinbeck’s Lennie should, by virtue of his lack of

---

\(^{91}\) KOCH ET AL., \textit{supra} note 14, at 170.

\(^{92}\) \textit{Id.} at 153 (explaining that, without a life-without-parole option, Texas prosecutors were able to argue that jurors could not feel confident that heinous murderers would be permanently restricted, thus making the death penalty seem like the only viable means to prevent future violence).

\(^{93}\) \textit{Roper v. Simmons}, 543 U.S. 551 (2005) (imposing a categorical ban on the execution of juvenile offenders as unconstitutional under the Eighth Amendment).


\(^{95}\) TEX. PEN. CODE ANN. § 12.31 (West 2009).

\(^{96}\) TEX. PEN. CODE ANN. § 12.31(b)(1) (West 2009).


\(^{98}\) \textit{See Petition for Writ of Certiorari, Chester v. Thaler}, 552 U.S. 947 (2007) (No. 06-1616), (the U.S. Supreme Court denied certiorari, explaining that the State of Texas itself had previously classified Chester as mentally retarded). He was executed in June 2013 despite IQ scores consistently below 70.

\(^{99}\) \textit{See Ex parte Briseno}, 135 S.W.3d 1, 6–7 (Tex. Crim. App. 2004); \textit{Atkins}, 536 U.S. at 321.
reasoning ability and adaptive skills, be exempt” from execution, the CCA was not sure that others with less severe mental retardation should be exempt as well.\footnote{100. See Briseno, 135 S.W.3d at 6 (Tex. Crim. App. 2004) (citing \textsc{John Steinbeck, Of Mice And Men} (1937)).} Therefore, the CCA rejected the standard for diagnosing intellectual and developmental disabilities recognized universally among clinicians and has instead articulated a set of “factors” (at odds with clinical best-practices) that courts are encouraged to “weigh” in assessing mental retardation in the capital punishment context.\footnote{101. See \textit{Briseno}, 135 S.W.3d at 8–9. The clinical standard is promulgated by the American Association on Intellectual and Developmental Disabilities (“AAIDD”), formerly the American Association on Mental Retardation (“AAMR”). The AAIDD has appeared as \textit{amicus curiae} in numerous cases involving the meaning of mental retardation, mental retardation diagnoses in the criminal justice system, and the legal rights of those with intellectual disabilities. The AAIDD/AAMR appeared as \textit{amicus curiae}, for instance, in \textit{Atkins}, 536 U.S. 304. Moreover, even before \textit{Atkins}, the Supreme Court had employed the AAIDD’s definition of mental retardation in adjudicating legal issues affecting persons with mental retardation. \textit{See Penry v. Lynaugh}, 492 U.S. 302, 308 n.1 (1989); \textit{Cleburne v. Cleburne Living Ctr., Inc.}, 473 U.S. 432, 442 n.9 (1985).} Most of these factors focus the fact-finder’s attention on the grisly details of the underlying crime, suggesting that anyone capable of committing a capital crime cannot be mentally retarded—though, were this true, that would render \textit{Atkins} a nullity, which may be the objective.\footnote{102. See \textit{Briseno}, 135 S.W.3d at 8–9. With the announcement of \textit{Hall v. Florida}, No. 12-10882, 2014 BL 145335 (U.S. May 27, 2014), the \textit{Briseno} approach to assessment intellectual disability has been implicitly rejected.}

Texas has been able to resist reform and project an image of impenetrable consensus with regard to the death penalty because of political contingencies unique to Texas—what the Texas Coalition to Abolish the Death Penalty has called the “Iron Triangle.” The trio of conservative forces heavily invested in preserving an active death penalty in Texas is comprised of right-wing politicians, district attorneys, and victims’ rights groups such as “Justice for All,” an organization that is actively promoted on the Texas Attorney General’s official website.\footnote{103. \textit{See Justice for Victims, Justice for All}, THE ATTORNEY GENERAL OF TEXAS, https://www.oag.state.tx.us/alerts/alerts_view.php?id=184&type=3.} Importantly, the elite right-wing politicians who shape the Texas public-policy agenda include state and federal judges.\footnote{104. \textit{See Anthony Champagne, Judicial Reform in Texas: A Look Back after Two Decades}, 43 \textsc{Court Review} 68, 68 (2006) (Texas has “expensive, highly partisan judicial elections.”).}

In other states, where judges are not selected through partisan elections, the judicial branch of government is better positioned to represent the rational vision associated with post-Enlightenment elites by serving as neutral arbiters of justice.\footnote{105. \textit{See Andrew Cohen, 'A Broken System': Texas’s Former Chief Justice Condemns Judicial Elections}, THE ATLANTIC, Oct. 18, 2013, http://www.theatlantic.com/national/archive/2013/10/a-broken-system-texass-former-chief-justice-condemns-judicial-elections/280654/ (recounting conversation with former Chief Justice of the Supreme Court of Texas, Wallace Jefferson, regarding the fundamental failings caused by Texas’s system of electing judges).} But where judges are selected in partisan
elections, as they are in Texas, judges must cater to popular sentiment. Additionally, those seeking state-wide office—such as positions on the CCA, Texas’s highest criminal court—must cater to the Texas Republican Party, which for nearly two decades has controlled all state-wide offices: Governor, Lieutenant Governor, Attorney General, U.S. Senate, as well as the justices sitting on Texas’s two highest courts. Further, U.S. Senators from a particular state are charged with vetting nominees to fill seats on the federal bench in their jurisdiction; therefore, Texas’s conservative senators have the ability to look for nominees who, if appointed, might be more inclined by ideology to review death sentences in post-conviction proceedings, not just by accepting that it is a state’s prerogative to impose such punishments, but also by being pointedly skeptical of process-based reviews of death sentences. In sum, the pronounced homogeneity among the political elites who hold sway in Texas increases the ability of those committed to a particularly severe and expensive penal policy to maintain a unified front and decreases the need for, or interest in, moderation as a matter of economic costs.  

Because of this uniformity among the political leadership that shapes criminal justice policy in Texas today, Texas has been “holding strong” even as skepticism about the death penalty’s efficacy as a penological tool has increased in most other death-penalty jurisdictions.

V. The Supreme Court: Where Texas-Style Arguments for the Death Penalty Go to Die

As long as Texas continues to embrace the death penalty as a means to demonstrate that “Texas tough” is not just tough talk, there will be no

106. Some have argued that the absence of a true two-party system in Texas make corruption more feasible and, at the very least, ethical reform more difficult.

107. Of course, Texas is not as monolithic as it may seem to those on the outside. Its citizens are not, and have never been, of one mind about the death penalty’s efficacy. Texan Lyndon B. Johnson appointed a Texas Attorney General, Ramsey Clark, who dedicated much of his life to liberal causes, including death-penalty abolition. And empirical data shows that most Texas death sentences are produced by only a few counties—with Houston’s Harris County far out in front, a phenomenon that can only be partially explained by Houston’s size. Part of the story is that a particular political actor, Harris County’s District Attorney John Holmes, was actively committed to pursuing the death penalty, which earned him both political capital and notoriety. Audrey Duff, The Deadly DA, TEXAS MONTHLY, February 1, 1994, available at http://business.highbeam.com/410545/article-1G1-14790976/deadly-da. But historians like David Garland have articulated a convincing connection between retention of the death penalty and gun ownership, vigilantism, and other “frontier” values—all characteristics that are particularly pronounced in Texas. See GARLAND, supra note 68, at 44; see also PERKINSON, supra note 52, at 1 (describing Texas’s “uniquely calloused, racialized, and profit-driven style of punishment” as having developed on “slavery’s frontier.”).

108. See Liptak, supra note 54 (noting that Texas is among the few death-penalty states where, after a death sentence has been obtained, “prosecutors, state and federal courts, the pardon board and the governor are united in moving the process along”).

109. In 2007, in discussing the decision to pursue legislation to make a crime other than murder punishable by death, Texas’s Lieutenant Governor David Dewhurst bragged, “There is tough. And then
comprehensive abolition in this country.\textsuperscript{110} And as explained above, Texas political elites are, at present, willing to commit significant tax-payer resources not only to maintain the death penalty, but also to resist attempts to chip away at the death penalty through litigation. Therefore, abolition in the United States will not happen without top-down intervention. The only entity in our federalist system in a position to effect such a ban is the Supreme Court of the United States.

Contending that Texas seems the least likely state poised to abolish the death penalty on its own is hardly novel.\textsuperscript{111} And many scholars of the death penalty believe that complete abolition will only happen if the Supreme Court intervenes, most likely by applying the "evolving standards of decency" methodology that has shown new vitality in the last decade.\textsuperscript{112} Carol and Jordan Steiker, for instance, have articulated compelling reasons to feel sanguine about the possibility that the Supreme Court will be convinced one day by an "evolving standards" argument that relies on recent legislative-repeal efforts\textsuperscript{113} in tandem with those states that long ago abandoned the penalty.\textsuperscript{114}

The Steikers have also described obstacles and historical contingencies that suggest why the Supreme Court is unlikely to find the death penalty categorically unconstitutional any time soon.\textsuperscript{115} The biggest obstacle is the principle of \textit{stare decisis}. To find the death penalty \textit{per se} unconstitutional, the Court will not only have to reverse itself but reverse relatively recent precedent.\textsuperscript{116} That is, the Court has not yet reached a
moment with respect to its death-penalty jurisprudence analogous to the moment when it was able to reverse Plessy v. Ferguson in Brown v. Board of Education.\textsuperscript{117} Before Brown, the Court had been gradually, but steadily, chipping away at the legal foundations that had held state-mandated racial segregation compatible with the U.S. Constitution.\textsuperscript{118} Then, in Brown, the Court spoke with one voice. By contrast, with the notably divided nature of the current Court, unanimity with respect to any decision inhibiting the states’ ability to execute people seems highly improbable, and an opinion announcing a categorical ban would, at best, muster a bare majority. In short, a decision to strike down the death penalty entirely would, at present, cost the Court more institutional capital than making such a move did when Brown was decided. Moreover, top-down abolition by a handful of the most elite players in our federal system would likely stoke the paranoid fantasies of the far right and the most vociferous death-penalty proponents in places like Texas, thereby spawning another backlash as seen in the wake of Furman, hurting the Court’s elite standing and even setting the cause of abolition back.

What the Court needs—or at least what five members of the Court need—is sufficient confidence that flouting \textit{stare decisis} is worth it because failing to do so might cost the Court even more. This is where Texas recalcitrance might prove useful. Texas’s appetite for the death penalty, evidenced by its status as the leading killing state year after year and by its 
commitment of more resources to resisting constitutional litigation challenging death sentences than to indigent defense, is, in one sense, a threat to the Court’s relevance. If Texas, with its halls of power packed with those committed to keeping the machinery of death well oiled, can continue to thumb its nose at the Court’s death-penalty related mandates, how viable is the Court? How viable is federalism and the U.S. Constitution’s Supremacy Clause and the U.S. Constitution itself?

Perhaps exasperation with Texas may be the secret to bolstering enough members of the Court to risk short-term popular backlash in the name of salvaging the Court’s long-term integrity. The first step in testing this hypothesis is to anatomize Texas’s current approach to death-penalty litigation—an approach that stopped working some time ago.

A person who played a salient role in shaping Texas’s contemporary death penalty legal strategy is Ted Cruz, Texas’s former

\begin{itemize}
\item\textsuperscript{118} The Beginning of the End, supra note 5, at 107.
\end{itemize}
Solicitor General and now its junior U.S. Senator. A death case about which Cruz is particularly proud is *Medellin v. Texas*, wherein he defended "U.S. sovereignty against the UN and the World Court." More accurately, he defended Texas sovereignty, as the case concerned Texas's ability to defy the Vienna Convention and the International Court of Justice despite directives from the U.S. federal government. Ironically, in the build-up to *Medellin*, Texas's former governor, then-President George W. Bush, had responded to significant international pressure by issuing a Memorandum to the United States Attorney General, ordering states like Texas to review the convictions and sentences of foreign nationals who had not been advised of their rights under the Vienna Convention before being sentenced. (In some cases, such as Medellin's, the sentences were ones that these foreign governments, our allies, had expressly rejected as human rights violations.) In this particular case, the U.S. government was on the side of Mexican national José Ernesto Medellin as he sought federal habeas relief from a death sentence imposed by Texas. But the Supreme Court sided with Texas, holding in a 5-4 decision that neither international treaties to which the U.S. is a signatory nor decisions of the International Court of Justice are necessarily binding domestic law, thereby enabling Texas to execute Medellin despite multi-national objections that doing so violated international law.

The *Medellin* decision—which gave the victory to Texas against its own former Governor-turned-President and against most of the civilized world—must have suggested to Cruz and other like-minded Texas elites that Texas was unstoppable. They had succeeded in using state

---

119. Senator Cruz has already had a remarkably successful career. He was appointed Texas's Solicitor General at age 32, serving under the state's elected Attorney General, Greg Abbott. Then, bucking the very Republican establishment that had elevated him so quickly, he ran against establishment candidate Lieutenant Governor David Dewhurst for the U.S. Senate seat vacated by Kay Bailey Hutchison, handily winning the election after defeating Dewhurst in a run-off in 2012. He, along with fellow Texan Rick Perry, is considered a contender for the Republican presidential nomination in 2016. See, e.g., Monica Langley and Janet Hook, *Cruz Adds to Speculation of Presidential Ambitions With Iowa Speech*, WALL ST. J. (Mar. 18, 2014), http://online.wsj.com/news/articles/SB10001424052702303287804579447671593210220.

120. 552 U.S. 491 (2008) (holding that international treaties to which the U.S. is a signatory are not necessarily binding domestic law and holding that decisions of the International Court of Justice are not binding domestic law).

121. See TED CRUZ, UNITED STATES SENATOR FOR TEXAS, http://www.cruz.senate.gov/about.cfm; see also ABOUT Ted, http://www.tedcruzfor senate.org/about-ted/.


124. *See Medellin*, 552 U.S. at 501. Medellin had been sentenced to death in Texas in 1997 at age eighteen for a rape and murder to which he had confessed. *Id.* Medellin had been arrested, convicted, and sentenced without having been apprised of rights under the Vienna Convention to assistance from his home country's consulate. *Id.*

125. *Id.* at 506.

126. Shortly after the Supreme Court issued its decision, Medellin was executed on August 5,
sovereignty as a theme to corral a bare majority of Justices on the Court to deny relief to a death-sentenced offender, thereby shoring up support for Texas’s robust use of the death penalty in terms that suggested disdain for the very phenomenon—international opinion—that had bolstered the rationale for categorical bans on death-eligibility announced in recent cases like Roper and Atkins.127

But since then—beginning that same term, in June 2008—the relationship between Texas and the Court (or at least between Texas and the pivotal swing voter, Justice Kennedy) underwent a sea of change. Starting with Kennedy v. Louisiana, 554 U.S. 407 (2008), another case in which Ted Cruz played a prominent role, Texas commenced a remarkable losing streak in death penalty cases before the Supreme Court that has, as of this writing, spanned at least six years.128

Although Texas is the nation’s number one killing state, and death penalty cases continue to consume a great deal of the Court’s docket, in the six years since Medellin Texas has been a party to only two of seventeen death penalty cases that the Supreme Court has agreed to hear and that were fully briefed and given oral argument.129 Texas played a leading role as an amicus in two other death penalty cases, drafting an amicus brief on behalf of a compendium of states in support of another state’s position.130 Most recently, in Hall v. Florida, Texas attorneys wrote the amicus brief that nine other states signed.131 That is, Texas has played a meaningful role in only

---

127. A few years before Medellin, the Supreme Court had been exhibiting pronounced exasperation with respect to Texas death penalty cases. See, e.g., Adam Liptak & Ralph Blumenthal, Death Sentences in Texas Cases Try Supreme Court’s Patience, N.Y. TIMES (Dec. 5, 2004), http://www.nytimes.com/2004/12/05/national/05texas.html?pagewanted=2&_r=0.

128. The other five death cases in which Texas played a leading role that have been decided on the merits by the Supreme Court since Kennedy v. Louisiana, 554 U.S. 407 (2008), are: Holland v. Florida, 130 S. Ct. 2549 (2010), a Florida case for which Texas wrote an amicus brief supporting the state’s position, which twenty-one other states signed; Skinner v. Switzer, 131 S. Ct. 1289 (2011), a Texas case; Maples v. Thomas, 132 S. Ct. 912 (2012), an Alabama case for which Texas wrote an amicus brief supporting the state’s position, which nineteen other states signed; Trevino v. Thaler, 133 S. Ct. 1911 (2013), a Texas case; and Hall v. Florida, No. 12-10882, 2014 BL 145335 (U.S. May 27, 2014), a Florida case for which Arizona is identified as the lead amicus in an amicus brief supporting the state’s position but which was authored by Texas attorneys in a private law firm in Austin, Texas, most of whom were formerly affiliated with the Texas Office of the Solicitor General, 129. See supra text accompanying note 128. This fact alone suggests, at least superficially, that the Court is somewhat reluctant to take death penalty cases arising out of Texas since Texas, because it is among the most active death penalty states, produces a great deal of death penalty litigation and thus should, more often than not, be a party in death penalty cases that make it to the nation’s highest court. 130. See supra text accompanying note 128.

131. Interesting, “Counsel of Record” for the nine states weighing in as amici in support of Florida in Hall is a Texas attorney: Sean Jordan. Mr. Jordan was the principal deputy solicitor general in Texas’s Office of the Solicitor General, initially serving under Ted Cruz and then continuing in that role under Cruz’s successors until Mr. Jordan returned to private practice in 2012. At least two other attorneys whose names appear on the cover of the states’
five of seventeen—about one-fourth—of the Court’s death penalty cases in the six years since Medellin; and in each of those five cases, Texas has been on the losing side. Moreover, of the eight other death penalty cases in the sample—cases in which Texas played no part or merely signed on to an amicus brief spearheaded by another state’s attorney general—the state has won seven of the eight cases. While this sample is not statistically significant, the pattern is interesting in that it suggests, without proving, that where Texas is the face of pro-death-penalty advocacy, the odds that traditionally favor death penalty states are eviscerated.

That Texas’s losing streak began in earnest just after one of Texas’s most audacious wins (in Medellin) beckons us to scrutinize the brief that Texas submitted in Kennedy v. Louisiana.

In Kennedy, Ted Cruz was Counsel of Record for the State of Texas in an amicus brief supporting Louisiana. The Texas Brief, whose drafting Cruz supervised, was signed by eight other attorneys general from death-penalty states. The case involved a death sentence imposed by Louisiana on a man named Patrick Kennedy for the horrific rape of his eight-year-old step-daughter. The issue in the case was whether death as a punishment for a crime other than murder was constitutional or if it offended evolving standards of decency, thereby violating the...
Constitution’s Eighth Amendment. The Louisiana Supreme Court had concluded that the punishment was constitutional, distinguishing the plurality decision in the Supreme Court’s 1977 *Coker v. Georgia* decision, which had held that death is an unconstitutional punishment for the rape of an adult woman. The Louisiana Court had cited the heightened need for deterrence of and retribution for crimes against children. The Louisiana Court then took a novel tact, explaining that in the Supreme Court’s more recent decisions involving categorical bans—*Atkins v. Virginia* and *Roper v. Simmons*—the Court had looked for a national consensus before finding a particular punishment excessive. Based on the trends discussed in *Atkins* and *Roper*, the Louisiana Court decided there existed a national consensus concerning the appropriateness of capital punishment for child rapists because five other states had recently enacted laws similar to those of Louisiana. But in this context, the Louisiana Court saw a consensus trending toward expanding the death penalty’s reach, not curtailing its availability.

The Court granted Patrick Kennedy’s petition for writ of certiorari on direct appeal, not waiting for habeas review. That Texas—and, specifically, its Solicitor General at that time, Ted Cruz—wanted to be heard in this case is not surprising. For a group of states to team up and file an *amicus* brief in a death penalty case pending before the Supreme Court is hardly unusual these days. Of the seventeen death penalty cases that the Court agreed to hear and that were fully briefed in the six-year period from *Kennedy* (2008) to *Hall* (2014), some group of states filed an *amicus* brief to support a fellow state in thirteen of seventeen cases. But it was unusual for the representative of the *amici* states to file a motion asking to share time during oral argument with counsel for the Respondent, Louisiana’s Attorney General. Yet that is what Ted Cruz did. Even more unusual was the Supreme Court’s decision to grant Cruz’s request. And more unusual still was the fact that Cruz was making this unusual request for the second time in a single Supreme Court term—and his effort to secure time during oral argument as an *amicus* succeeded in both instances.

139. *Id.* at 413.
141. *Id.* at 789.
142. *Id.* at 782–83.
143. *Id.* at 784–88.
144. *Kennedy*, 554 U.S. at 419.
145. Of the thirteen death penalty cases in which *amicus* briefs were filed, Texas (or Texas counsel) submitted briefs in five cases. *See supra* text accompanying note 128. Texas did not file an independent *amicus* brief in the remaining eight cases. *See supra* text accompanying note 132.
147. The other occasion was in District of Columbia v. Heller, 554 U.S. 570 (2008), in which Texas, under Cruz’s direction, drafted an *amicus* brief for numerous states supporting Heller’s
It seemed that a sufficient number of the Court’s justices really wanted to hear what Texas-qua-Cruz had to say.

Then, despite these unusual developments, despite what some described as Cruz’s skillful performance during oral argument, and despite the profoundly disturbing and highly publicized details of the underlying crime, the state of Louisiana lost.148 Having Texas on its side had not proven helpful to Louisiana and others seeking to expand the death penalty because Texas had failed to persuade those (1) who were amenable to persuasion and (2) who occupied an elite position that would have enabled them to effect change.

How did Texas, et al. endeavor to persuade the Court in this case? What precise aspects of their brief were wanting? And how might this failure prove useful to those developing contemporary arguments for death-penalty abolition?

A close look at the Texas Brief reveals a series of rhetorical strategies that a skilled and highly educated lawyer like Ted Cruz should have known were likely to rub elites, committed to reason-based argumentation, the wrong way.

First, the Texas Brief in Kennedy was signed by nine states—only six of which had laws on the books like the one at issue in the case (permitting death as a punishment for a non-homicide crime, rape of a minor). The mismatch between the number of signatories and the number of states that truly had a vested interest in the type of law at issue in the case suggests disrespect for a basic precept of federal court jurisdiction: standing. Further, the Texas Brief repeatedly characterized the laws of these six states as “many statutes” that reflected a “national consensus,”149 a point that is facially hyperbolic when one considers that most people would not consider six of fifty, or 8%, equivalent to “many.”

Second, at the time of the brief’s submission, Texas had only recently enacted its death-penalty-for-child-rape law,150 and the way in which the brief describes that development is not so much a legal argument as an overt appeal to emotion. Several pages are devoted to heralding the law’s passage by explaining how it was named after a Florida girl who had been killed (not just raped) by a serial sex offender in a highly publicized case in that state.151 The Texas Brief cites a Fox News story about the Florida crime as support for how the Texas legislature chose the name for interpretation of the Second Amendment as granting individuals a broad right to possess firearms for self-defense. Cruz also participated in the Medellin oral argument that term, but this involvement was not idiosyncratic since he was Texas’s Solicitor General at the time and Texas was a party in that high-profile appeal.

150. See Perkinson, supra note 52, at 459 n.72 (describing Governor Perry’s public statements with respect to the law).
The Fox News story is not, however, about the legislative process in Texas. It is about the gruesome crime and the jury's ultimate recommendation that the Florida killer be sentenced to death. The article does mention that the "killing prompted Florida and a number of other states to pass new laws cracking down on sex offenders and to improve tracking of them through databases and satellite positioning devices." But the article predates the state's legislative efforts to add to the categories of crimes that are punishable by death. The Texas Brief then cites statements from the Texas legislative record indicating various legislators' sense that death is the appropriate punishment for repeat perpetrators of violent sex crimes against children, as if expressions of (understandable) outrage about a horrible homicide that occurred in another state is sufficient proof that sentencing someone to death as a punitive measure for a non-homicide passes constitutional muster.

Texas's central argument is the same seemingly clever, paradoxical argument that had been adopted by Louisiana's highest court in the decision under review. That argument had turned the U.S. Supreme Court's "evolving standards of decency" jurisprudence on its head. The Texas Brief argues that these standards should be assessed by reviewing "objective indicia of national consensus," such as current legislative trends. Thus the Texas Brief implies that what matters are not raw numbers but recent momentum. Texas contends that "evolution" does not imply a particular direction over an extended period of time, but a recent spurt in any direction. The Texas Brief does not acknowledge that the source of this argument is the Louisiana Supreme Court. Instead, the Texas Brief cites a law student "Note" published in the South Carolina Law

---

152. Id. at 9.
154. Id.
155. Id.
156. Texas Brief, supra note 135, at 9.
157. The Texas Brief also argues that several other non-homicide crimes, particularly treason, are punishable by death. Id. at 11–13. This argument has some historical force, but has not been a significant factor in post-Furman death-penalty jurisprudence.
158. The first problem with this argument is that it amounts to a "me too" argument, a regurgitation of a position already in the record, for it was the rationale adopted by the court in the decision under review and was an argument promoted by an actual party to the appeal—the state of Louisiana—in its merits brief. Although empirical studies regarding effective amicus briefing are sparse, it is fairly clear that friend-of-the-court briefs that merely repeat arguments already in the record are not perceived as helpful to the courts to whom they are addressed and may even hurt the cause for which the amicus is advocating.
159. See Texas Brief, supra note 135, at 14–16 (citing Atkins v. Virginia, 536 U.S. 304 (2002), Roper v. Simmons, 543 U.S. 551 (2005), and other recent proportionality decisions wherein the Court utilized the evolving standards of decency rationale to decide the case).
This student Note is remarkable for its patently provocative tone. It begins by asking the reader to imagine a man who comes home from work one day in a bad mood and commences serially raping his five-year-old daughter and her two prepubescent friends. The writer suggests that he does so “over and over” again until he is finally reported; then, years later, all three victims learn that they are infected with HIV. The Note’s author then concludes that South Carolina’s (then recent) Sex Offender Accountability and Protection of Minors Act of 2006, which would permit sentencing a person who had committed such crimes to death, should be found constitutional pursuant to her novel conception of “evolving standards of decency.”

The Texas Brief, in building upon the Note’s thesis, argues that, when the Court decided Roper, which banned the death penalty for juvenile offenders, “just five States” had recently moved to abolish the juvenile death penalty. Further, the Texas Brief reminds the Court of its precept that “[t]he clearest and most reliable objective evidence of contemporary [societal] values” is “legislation.” Aside from ignoring the number of states that had long before abandoned the practice of executing juvenile offenders or that had rejected the death penalty altogether, the argument is undercut by a rather striking non sequitur: “And, at least in the instant case, a jury of his peers unanimously agreed that Patrick Kennedy’s crime merited the death penalty.” The Texas Brief does not explain how twelve citizens serving on a jury in one profoundly disturbing case is analogous to a trend of legislative enactments such that one jury—or any number of juries—are an appropriate barometer of “evolving standards of decency.” Instead, the Texas Brief presumes that a jury’s expression of outrage in one case is a sufficient basis to sustain its proffered interpretation of constitutional text.

Then, while ostensibly applying the Court’s Eighth-Amendment jurisprudence, the Texas Brief mocks that precedent. Through a pastiche that mixes and matches holdings and rationales from several inapposite Eighth Amendment cases, the Texas Brief forges a new legal proposition:

160. See id. at 8 (citing Ashley M. Kearns, South Carolina’s Evolving Standards of Decency: Capital Child Rape Statute Provides a Reminder That Societal Progress Continues Through Action, Not Idleness, 58 S.C. L. REV. 509 (2007)). The citation in the Texas Brief does not indicate that the source is a student note and not an article, as The Bluebook directs. The BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 16.7(b), at 153 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010). The Louisiana Supreme Court also cites this student note in its first Kennedy decision. State v. Kennedy, 957 So. 2d 757, 785-86 (La. 2007).
162. Id. at 510.
163. Id. at 510–11.
164. Texas Brief, supra note 135, at 18. This argument does not, however, account for the fact that, by that time, many states banned the death penalty altogether.
165. Id.
166. Id. at 19.
that "child rapists" may "reliably be classified among the worst offenders."\textsuperscript{167} The Texas Brief asserts, for instance, that this proposition is not really new because the Court had already established that the "'critical facet' of the culpability determination" is the degree of criminal intent and "reckless indifference to the value of human life."\textsuperscript{168} The new legal principle, which the Texas Brief treats as an existing legal principle, is radical because it suggests that any crime that is subjectively perceived as "heinous" and indicative of "moral depravity" reflecting a "reckless indifference" toward its victim is a crime that "warrants the death penalty."\textsuperscript{169} But this is not something the Supreme Court has ever said. Moreover, \textit{Roper}—the principal case upon which the Texas Brief relies—is about abolishing death as a penalty for juvenile offenders in part because, as cognitive psychiatry has demonstrated, impulse control and other psychological factors related to judgment are less developed in young people.\textsuperscript{170} Similarly, \textit{Tison} is about the felony-murder rule and what degree of participation is necessary for an individual's death sentence to be proportionate to the crime.\textsuperscript{171} In other words, neither of these cases is about non-homicide rape or crimes against children (although both cases involved offenders who were under twenty-one). The reasoning of the Texas Brief, though, is that any crime that is horrible—and all violent crimes, especially those perpetrated against children, are horrible—should be death-eligible if at least a handful of states had recently been moved to find such crimes death-eligible.

Finally, the Texas Brief devotes several pages to a graphic description of Kennedy's crime, concluding that, because "in the judgment of his peers," he is a scumbag, he deserves the death penalty.\textsuperscript{172} But if viewed seriously through the lens of logic, this argument exposes the whole problem with a sentencing process that amounts to inciting feelings of moral outrage such that a jury will be inclined to punish in a pique of vengeance.

After providing the Court with graphic details of Kennedy's truly repulsive crime, the Texas Brief then provides information about the long-term, devastating effects of child abuse—on the child, extended family, and society.\textsuperscript{173} This argument is problematic for two distinct reasons. First, this information is not the sort that states, as \textit{amici}, are particularly well-suited to share with the Court since the states lack any special expertise in the subject matter. Perhaps this lack of expertise is why the Texas Brief

\textsuperscript{167.} \textit{Id.} at 20 (citing \textit{Roper v. Simmons}, 543 U.S. 551 (2005)).
\textsuperscript{168.} \textit{Id.} (citing \textit{Tison v. Arizona}, 481 U.S. 137 (1987)).
\textsuperscript{169.} \textit{Id.}
\textsuperscript{170.} \textit{Roper}, 543 U.S. at 578–79.
\textsuperscript{171.} \textit{Tison}, 481 U.S. at 138.
\textsuperscript{172.} Texas Brief, \textit{supra} note 135, at 23.
\textsuperscript{173.} \textit{Id.} at 23–26.
indulges in a serious *ipse dixit*. The Texas Brief cites a Heritage Foundation report regarding the massive costs associated with child abuse, admitting that “evidence further suggests that child abuse is a frequent precursor to adult criminality.”174 Second, putting aside any reasonable doubts one might have about the efficacy of a report derived from an unknown research methodology on behalf of a conservative interest group, the proposition that the report is intended to support actually undercuts the fundamental theme in the Texas Brief.175 If research shows that an abused child is more likely to become an adult sex offender, then the penological justification for executing child abusers is undercut because killing such abusers does nothing to deter future crime. Once they have been victimized as a child, the abused child is poised to pass on the heinous legacy through “sexual revictimization.”176 Thus the study actually exposes the futility of executing such child abusers because it does nothing to break the cycle that produces people who are damaged to the point that they are predisposed to commit such crimes. The more cogent argument arising from the study is that society’s limited resources should be used to try to break the cycle of child abuse by addressing the root causes of such abuse and to lift children out of demonstrably abusive circumstances.

In short, the Texas Brief, while well-written in terms of style and sentence-level flair, is riddled with classic fallacies unlikely to persuade the audience to whom the brief is directed. The Texas Brief:

- Overstates the degree to which the signatories represent a consensus and leans too heavily on the notion of an emerging popular consensus (*argumentum ad populum*);
- Engages in arguments by distraction designed to inflame the emotions instead of appealing to reason;
- Seeks recourse to suspect authorities (such as *Fox News*, the Heritage Foundation, and a law student’s Note);
- Implicitly impugns the motive of the Court itself by mocking its modern Eighth Amendment jurisprudence;
- Cherry picks quotes from the Court’s precedent instead of respecting the context from which holdings were derived;
- Begs the question whether death as a punishment for child rape furthers any valid penological objective; and
- Assumes a false causation (*post hoc ergo propter hoc*) in maintaining that executing child abusers will protect society from the harms of child abuse, while adding that being a victim of child abuse itself likely engenders the impulse in (some) adults to abuse


175. *Id.*

176. *Id.*
children.

Because these fallacies are so rampant, they are not difficult to spot. Certainly, they were not lost on Justice Kennedy who authored the majority opinion in this case.\footnote{177 Kennedy v. Louisiana, 554 U.S. 407, 412–13 (2008).}

The opinion roundly rejects the notion that death is a constitutional punishment for raping a minor simply because a handful of states had recently passed statutes permitting such a punishment.\footnote{178 Id. at 421, 423.} The Court begins the opinion with a reminder of how the rule of law is supposed to operate in our federalist system: “The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection.”\footnote{179 Id. at 412.} Then, after acknowledging the horrific nature of the crime at issue, the opinion confronts virtually all of the logical fallacies on display in the Texas Brief and mounts a pointed defense of the Court’s Eighth Amendment, “evolving standards of decency” jurisprudence that the Texas Brief had sought to upend.\footnote{180 Id. at 412–47.}

Ultimately, one must conclude that the Texas Brief, which failed so miserably, was written for an audience other than the Court itself. Considering the errors recounted above, the highly intelligent, skilled lawyers involved in the brief’s preparation back in Texas could not have believed the brief would convince Justice Kennedy to join the more predictable contingent of Justices Alito, Scalia, Thomas, and Chief Justice Roberts, who ultimately comprised the dissenting block. Therefore, the Texas Brief, as legal advocacy, was a failure.

Why spend considerable time and tax-payer money on such a brief, on preparing for and participating in oral argument as an amicus, and on defending a brand-new law if the goal was not to secure a win? Perhaps the answer is that the real audience for the brief was not the Court at all, but the folks back home.

The Texas Brief’s principal architect was, at the time, an unelected state official. But shortly after appearing in the Kennedy oral argument for Texas, et al. and before a decision in that case was announced, Cruz left Texas’s Solicitor General’s Office and entered private practice.\footnote{181 Ross Ramsey, How It All Came Out, TEX. WEEKLY (April 14, 2008), http://www.texastribune.org/2008/04/14/how-it-all-came-out/.} Thereafter, Cruz announced his intention to run for the seat Senator Kay Bailey Hutchison was vacating.\footnote{182 Brandi Grissom, Former Solicitor General Ted Cruz Joins Senate Race, THE TEX. TRIBUNE (Jan. 19, 2011), http://www.texastribune.org/2011/01/19/former-solicitor-general-ted-cruz-joins-senate-race/.} His bid for the open seat was successful,
primarily because he defeated the state’s long-standing Lieutenant Governor, the Republican establishment candidate, in a primary runoff by a 14-point margin.\textsuperscript{183} Since taking office, the junior senator from Texas has exhibited a noteworthy ability to play to a base of “Values Voters,” which tend to include folks committed to retaining a robust death penalty.

Of course, after Cruz’s exit from the Solicitor General’s Office, Texas actors did not cease spending public time and money fighting against further incursions upon the death penalty—nor did Texas cease losing those fights at the Supreme Court level.\textsuperscript{184}

But by inviting the Supreme Court Justices to side with Texas in terms that seem to mock concepts that are fundamental to the Court’s stability and legitimacy, Texas, \textit{et al.} were not likely to carry the day. They were not speaking in terms calibrated to persuade the particular elites in a position to effect the kind of change Texas seemed to be after. By contrast, Tuscany’s Beccaria spoke to the elites of his day about the death penalty’s costs in terms that resonated with those elites’ fundamental values. This portrait of contrasts suggests that if Texas just keeps on being Texas, it will be easier for the persuadable members of the Court to conclude that Texas cannot be trusted with the death penalty. Texas’s willingness to defy Supreme Court mandates, not to mention international standards, to preserve an unbridled death penalty threatens the stability of the Court and the federal republic itself.


\textsuperscript{184} Even several years before \textit{Kennedy}, Texas had been more likely to lose than win death cases before the Supreme Court. The trend, however, seemed to change with \textit{Medellin}, which augured that at least a majority of the Court seemed willing to give Texas considerable latitude in the death-penalty context in the name of state sovereignty. In \textit{Kennedy}, though, any change seemingly presaged by \textit{Medellin} was abruptly cut short. Ultimately, Justice Scalia is the only current member of the Court who actively embraces the kind of partisan rhetoric that Cruz utilized as the Texas Solicitor General. A telling example of how comfortable Justice Scalia is with a rhetorical style that pushes the envelope of judicial-decorum is found in his \textit{Atkins} dissent. \textit{Atkins v. Virginia}, 536 U.S. 304, 337–52 (2002) (Scalia, J., dissenting). Scalia’s tone is replete with sarcasm as he chides the majority for “its embarrassingly feeble evidence of ‘consensus,’” even giving a “Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’” in “the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls.” \textit{Id.} at 344, 347. No one could ever accuse Justice Scalia of being bland, but a stylistic voice that so palpably resonates with precepts passionately espoused by members of The Federalist Society ultimately grates the ear because it stands in opposition to the basic understanding of judicial restraint. The value of such sober and restrained judicial decision-making is foundational to the rule of law. Because of Justice Scalia’s well-known propensities, endeavoring to win his vote in support of the State in a death penalty case is not where the heavy lifting lies.
VI. Conclusion

The point of an argument, particularly any legal or public policy argument, is to persuade. For decades after *Furman v. Georgia*, when the Supreme Court imposed what proved to be a short-term moratorium on the death penalty, proponents of abolition have been marshalling all manner of arguments in an effort to persuade the Supreme Court, legislators, and the general public that the death penalty should be abolished. At bottom, most of these arguments have been premised on a moral imperative: the death penalty is wrong. The problem with arguments that hinge on moral imperatives is that they do not tend to persuade unless the audience already shares the advocate’s normative presuppositions. Rational arguments that support a particular moral position do not change minds so much as fortify people who already possess a particular normative view, inspiring them to recommit to values they have instinctively embraced and are, in a sense, part of their very identities.185

Endeavoring to persuade those who strongly believe that the death penalty is just that the death penalty is morally repugnant has been a quixotic enterprise.186 Perhaps that is why the arguments that are gaining the most traction today are reason-based arguments for death-penalty “repeal” that shift the conversation further away from the (utterly false) choice between the human dignity of crime victims and the human dignity of the criminally-accused, focusing the audience instead on values that resonate with contemporary American, cost-conscious culture. The contemporary American version of Beccaria’s cost-argument for abolition focuses on the ineluctably error-ridden system that, quite literally, costs too much to maintain and monitor. Even assuming the morality of the death penalty, the question many conservatives are now asking is: Can this ideal notion of Justice—that society can only be made whole after the commission of the most heinous offenses through the death of the perpetrator—ever be implemented in a way that is not arbitrary, capricious, inefficient, or unfair when the Government is in charge of the penal system? Elites in charge in Texas, however, have too much to lose to join in this collective soul-searching.

In this article, I have tried to use the Texas phenomenon to tease out additional nuances involved in making a cost argument for our times. I submit that before Texas can look more like Tuscany, the benefits certain key actors garner from maintaining the death penalty must be included in the calculus. Despite hopeful signs, like the emergence of a conservative entity whose objective is to cast doubt on the death penalty’s efficacy, the

185. *See generally* JOSEPH RAZ, FROM NORMATIVITY TO RESPONSIBILITY (2011).
186. Perhaps the problem is expressed best by a quip attributed to Jonathan Swift: “It is useless to attempt to reason a man out of a thing he was never reasoned into.” JOHNATHAN SWIFT, in CIVILIZATION’S QUOTATIONS: LIFE’S IDEAL 105, 105 (2002).
enormous political benefits some can reap from retaining the death penalty mean that Texas will not likely be jumping on the repeal-bandwagon any time soon. Therefore, the Supreme Court of the United States—the only contemporary entity that is, like Peter Leopold of 18th century Tuscany, capable of abolishing the death penalty with the stroke of (five) pens—must be convinced that doing so would be worth the costs. The argument that might do the trick must target those on the Court who can be persuaded—either because they have deep-seated, if unstated, moral convictions that the death penalty is wrong, or because they care more about the Court's integrity than about Republican hegemony in Texas. For those members of the Court, successful arguments are ones that resonate with the precise culture of the Court itself—an elite institution committed in principle to argumentation that transcends ideology and regional self-interests. To prevail with these jurists, who owe their ultimate allegiance to the idea of a federal republic, arguments must affirm the Court's place in overseeing the ultimate contours of criminal punishment within that republic.

187. I can certainly be faulted for undue optimism about the prospect of quickening the Supreme Court's willingness to announce a constitutionally-based categorical ban based on *Kennedy v. Louisiana*, a case that expressly reaffirms the proposition that the death penalty is not, in all instances, unconstitutional. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). After all, prominent abolitionist Hugo Adam Bedau wrote in 1974 that "we will not see another execution in the nation this century." Henry Adam Bedau, *Challenging the Death Penalty*, 9 HARV. C.R.-C.L. L. REV. 643 (May 1974). And death-penalty scholars Frank Zimring and Gordon Hawkins predicted in a book first published in 1986, shortly after the post-*Furman* revival of executions "that the last execution in the United States is more likely to take place in fifteen years than in fifty years; and it is not beyond the possibility that executions will cease in the near future." **FRANK ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA** 157 (1986). Nearly thirty years later, states, especially Texas, are still executing numerous people each year. Arguably, these predictions may have been so far off because these prominent scholars could not have foreseen the oversized role Texas would play in both exporting an ideological view that privileges the death penalty and committing to such a robust regime of executions.