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Slouching Toward Abolition: The American Capital Punishment Debate and the Economic Crisis

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Introduction

For historians of American capital punishment^{1,2} the present era begins in 1972 with the Supreme Court's decision in *Furman v. Georgia*³ striking down all then existing capital punishment laws and suggesting that complete abolition might be near at hand. The case led to a remarkable backlash in which the death penalty after a long period of decline was revitalized as outraged voters and legislators clamored for new capital statutes. Four years later in *Gregg v. Georgia* (1976),⁴ the Supreme Court retreated, upholding several new capital statutes.

Only a few years before *Furman*, public opinion had been moving away from support of capital punishment, reaching a small majority in favor of abolition for the first time ever in the late 1960s. Actual executions ceased after 1967 and fewer and fewer death penalties were sought by prosecutors and handed down by juries.

The controversy helped reinforce an already growing political transformation around fear of violent crime,^{5 6 7} encouraging political leaders to demonize prisoners and courts while competing to offer stronger versions of punitive justice. Meanwhile prosecutors began to seek death against many more defendants than they had a decade earlier and juries began handing down significant numbers of new death sentences. Perhaps most importantly, American political leaders began a period of intense competition over who could be most loyal to the death penalty (and thus to crime victims and other citizens who shared their priorities), a competition that helped transform a whole host of political positions

¹ Stuart Banner, *The Death Penalty: An American History* (Harvard University Press 2002).

² Franklin E. Zimring, *The Contradictions of American Capital Punishment* (Oxford University Press 2003).

³ 408 U.S. 238 (1972).

⁴ 428 U.S. 153 (1976).

⁵ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001).

⁶ Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge University Press 2006).

⁷ Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2007).

quite vital to the administration of the modern state, including governors, attorney generals, mayors, and, most famously, presidents.

By the 1990s the death penalty had moved full circle from being something like segregation, i.e., a state practice drenched in moral and legal problems and with vultures circling in 1972, to a bedrock national consensus.⁸ The epoch that began with *Furman* and *Gregg* may have reached its peak as widely publicized crimes (like the kidnapping and murder of 12 year old Polly Klass in California) and fears of a coming wave of juvenile “super predators”⁹ led to a wave of harsh new laws (including many new federal capital crimes), increases in death sentences handed down by courts, and increases in actual executions. Capital punishment appeared to have secured a permanent place as an anchor of the distinctively harsh character of American criminal justice.¹⁰ Even though the actual numbers executed remained modest by historic standards, never breaking 100, state execution had clearly reestablished itself as a routine if minor part of a greatly expanded correctional system.

As we approach the fortieth anniversary of *Furman v. Georgia*, there are intriguing signs of weakness in the system of capital punishment in the United States, and surprisingly, some signs that the permanence of capital punishment as a feature of American penalty cannot be presumed. The list of capital punishment’s discontents is already long and well known.¹¹ Recent Supreme Court decisions have moved whole (if minor) categories of death penalty eligible defendants out from eligibility, namely the retarded and those who were juveniles at the time of their crimes. Another battle over whether lethal injection procedures were constitutional resulted in a strong affirmation from the Supreme Court but caused a year long moratorium in executions, the first in decades.

Interestingly, signs of decline are present not just in the appellate courts (which in recent history have functioned as the primary check on the exercise of capital punishment), but also in public sentiment reflected in polls and jury rooms. For reasons much debated among criminologists and lawyers, both death sentences handed down, and actual executions are declining. While during the high tide of political enthusiasm for capital punishment in the middle of the 1990s, traditionally abolitionist states like Michigan, New York, and Massachusetts faced growing pressure to embrace capital punishment (only New York actually did), the abolitionist block has held (New York ultimately had its capital statute struck down and the legislature declined to enact a revision), and even more remarkably several marginal capital states have moved toward abolishing capital punishment by

⁸ Zimring, supra note 2.

⁹ [William J. Bennett](#), John J. DiIulio, and [John P. Walters](#), *Body Count: Moral Poverty...How To Win America’s War Against Crime and Drugs* (Simon and Schuster 1996).

¹⁰ Gottschalk, supra note 4.

¹¹ Zimring, supra note 2.

legislation (New Jersey), a route presumed to be impossible by most observers because of the power of populist sentiments in legislatures.

While a judicial knock out blow against capital punishment in the United States continues to seem unlikely, it seems possible that *dejure* abolition may slowly unfold while most the country slips toward a *defacto* abolition in which the death penalty remains a lawful sanction but few death sentences are handed down and even fewer carried out.

What has taken place to so transform the political fortunes of the American death penalty? The major arguments in the death penalty debate have remained stable for more than a century,¹² and have largely cancelled each other out. Humanistic empathy with the condemned is matched with humanistic empathy toward the victims and their families. The debate about whether capital punishment deters continues with a new wave of empirical claims in favor of deterrence emerging in this decade, only to be rather stalemated by critical econometric responses.

The general explanation offered has much plausibility, but if true bodes ill for any long term trend away from the death penalty. The dramatic declines in crime, and particularly homicides in the 1990s have leveled off in this decade but not generally been reversed. The public, which appeared to take a long time to respond to the crime decline in opinion surveys, now seems to have absorbed it, a sentiment reflected in prosecutors and juries. Likewise the recent economic crisis has highlighted the very costly nature of the modern death penalty. The lasting result of the *Furman* era attack on the death penalty has been the requirement that states pay for considerably more lawyers and other courtroom experts on behalf of capital defendants than they do for non-capital ones. This legacy may turn out to be crucial to the eventual demise of the practice.

Both of these trends are important and I will return to them as part of a more cultural explanation for the decline of contemporary capital punishment in the US shortly. However note well that if they explain in any large measure the apparent loss of enthusiasm for capital punishment among the American people, the endurance of that trend is inherently questionable. The homicide rate might go back up, and even if the trends are not statistically alarming, a highly primed media crime complex in the US stands ever ready to point to the contemporary signs that the American cities are rotten with violent criminality (remember the *faux* homicides and rapes reported in the press during the aftermath of Katrina¹³).

¹² McGowen, Randall. "What Does History Offer to the Death Penalty Debate?" *Paper presented at the annual meeting of the The Law and Society, J.W. Marriott Resort, Las Vegas, NV* (2009).

¹³ See Simon, *supra* note 5.

Another trend often noted is the emergence of new techniques based on DNA and its chemical analysis that have created a formidable new capacity to test biological evidence linking individuals to crime scenes and bodies. Famously, DNA testing has now produced well over 100 confirmations of wrongful convictions, including a number of capital cases. These confirmations have given death penalty opponents a potent way of reasserting a classic argument against capital punishment from the problem of fallibility and irreversibility. At the same time the popularization of DNA technology through the media has created in the eyes of some prosecutors an unrealistic expectation on the part of citizens and thus jurors that the state can show the defendant's guilt with a scientific kind of certainty.

In this chapter I want to locate these social and technological trends against a historically changing cultural landscape in which capital punishment is situated. Specifically I want to compare and contrast three micro-periods of recent history to suggest that the landscape has helped displace capital punishment from the center of the US political imagination.

In Part I, we will revisit the period between *Furman* and *Gregg*, 1972-1976, during which capital punishment was transformed, and seemingly helped transform the American polity. Here we will note the peaking of the great crime wave of the late 1960s and early 1970s, the ongoing echoes of assassination and riot, the nation's continuing struggle over civil rights, and the peak of a long period of growth in American affluence, one that comes just before the real tumble of the late 1970s and early 1980s.

In Part II, we will revisit the period between the Bush – Dukakis election of 1988, during which the problem of unexecuted murderers became central to the continuation of the nation's political rightward course and 1994, during which Democrat Bill Clinton, partnered with soon to be in power House Republicans and savvy Senators like Joe Biden, to produce a crime law bristling with a full fledged federal death penalty and bristling with new capital offenses. The law is credited with helping Clinton reframe himself following the defeat of his health reform effort. In this period we again find homicide and other violent crimes rising, now associated in the public mind with "gangs" of young minority males living in areas of concentrated poverty and segregation. Civil rights in this era was already in retrenchment (school desegregation having ground to a halt) but remained under attack around issues like affirmative action. At the same time the national political consensus against racially motivated discrimination obtained the status of a national civic ideal, in the form of the Martin Luther King national holiday, signed into law by President Ronald Reagan in 1983. Just as important was the uneven continuation of the great boom in Wall-Street profits (and corporate profits generally) that began after the '83 recession. During this phase, the boom was financing and profiting from an American lifestyle of consumption anchored on home building and purchasing at the peripheries of America's great cities, a dynamic that reached its peak in 2006 and has now become the epicenter of the economic Depression in the United States (as of mid 2009).

In Part III, we will finally consider our present conjuncture in a bit more detail. Homicide and violent crime remain low relative to the highs of the 1970s and 1980s. The status of civil rights is very much in debate in the aftermath of Barack Obama's historic election as President in November 2008. But if the extent of remaining racism is being debated, Obama's election has already been taken as an enormous confidence builder among minorities of all types in the United States. Most importantly, the combination of global warming and the economic crisis has temporarily collapsed the real estate based finance bubble and suggested that it cannot be sustained in its recent form.

Part I. Crime Wave

That crime went up dramatically in the 1960s is now part of the received narrative of American history, and forms the starting point for most efforts to explain the turn toward punitive crime policies as a central axis of politics.¹⁴ Crime did go up in the 60s, but like much else that was said to have been characteristic of that transformative period, the crime wave really came into sharp focus in the early 1970s when homicide rates approached 200 percent of the 1960 level and robberies 300 percent.

To social reformers of the 1960s, the mounting evidence that crime rates were rising in the nation's northern industrialized cities was a cause for the deepest foreboding. The problem was not their inability to adequately theorize crime, indeed since the 1940s, race liberals had been highlighting crime among northern urban African Americans as a central argument for intensifying federal efforts at civil rights and anti-poverty.¹⁵ Cities like Detroit, Cleveland, Newark, and to a lesser extent Chicago and LA, were already going through a cataclysmic process of deindustrialization that was driving up unemployment among the least educated or skilled.¹⁶ Instead, crime stepped up the anxiety of the white urban workforce about personal danger, and danger to their middle class standing as homeowners, through the rapid devaluing of neighborhood real estate.

The crime wave also seemed to undercut the moral force of the civil rights movement in its crucial hour of pivoting from the battle against Jim Crow segregation to the problem of urban marginality and poverty. The black farmers and craftsmen subjected to the arbitrary cruelty of segregation were subjects of great sympathy, but the black residents of the urban ghettos of the north

¹⁴ Garland *supra*, note 3.

¹⁵ Murakawa, Naomi. "Making the National Crime Problem: Law, Order, and Black Civil Rights" *Paper presented at the annual meeting of the The Midwest Political Science Association, Palmer House Hilton, Chicago, Illinois* (2009).

¹⁶ Thomas Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* (Princeton University Press 1996).

marginalized by widespread private sector discrimination followed by rapid deindustrialization were subjects of fear as well as sympathy. The crime story emerging with the rising homicide rate threatened to recast the increasingly impoverished and hyper segregated urban centers as victims of an “underclass” who at best lacked attachment to prevailing social norms, and at worst had become amoral predators.^{17 18}

Historians¹⁹ and political scientists²⁰ have persuasively argued that the legal case against capital punishment brought this emerging crime, race, and urban social policy to a head in a way that crystallized a new populist punitiveness as a central mentality of government, one symbolically represented by the power to execute, but far more systematically developed as mass imprisonment.

The legal battle for abolition in the 1960s was a direct outgrowth of the civil rights movement and its legal strategies, although it represented a profound shift in the choices that had guided the legal edge of that movement on the march to *Brown v. Board of Education*.²¹ Having long fought capital punishment in individual cases associated with Jim Crow institutions of justice, in the 1950s and 1960s, the NAACP Legal Defense Fund largely stayed away from criminal appeals, choosing to concentrate on attacking segregation, and also choosing to separate the plight of the Negro student and family from the Negro criminal defendant or prisoner.²² However in the fateful year of 1967 the LDF as it was already called changed course and brought the full weight of its socio-legal expertise in a litigation strategy challenging the constitutionality of the death penalty.

After a defeat in the 1969 case of *McGautha v. California*,²³ the anti-death penalty lawyers achieved a partial success in the 1972 case of *Furman v. Georgia* in which a Court divided into at least three factions (there were nine opinions, the longest reported case in US Supreme Court history) held existing capital laws and death sentences unconstitutional. The opinion produced perhaps the most pyrrhic victory in legal history, every death sentence in America, several hundred, was set aside and every capital punishment system declared unlawful, but the door was left open for a new capital punishment regime and the focus of future review was on public opinion, deterrence, and victims of murder.

¹⁷ Loic Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Polity Press 2008).

¹⁸ Indeed to many in the civil rights movement then and now the effort to build violent crime into a national political problem was primarily a backlash strategy aimed at discrediting and obstructing the implementation of civil rights.

¹⁹ Banner *supra*, note 1.

²⁰ Gottschalk *supra*, note 4.

²¹ 347 U.S. 483 (1954).

²² Gottschalk *supra*, note 4. At 207.

²³ 402 U.S. 183 (1971).

This legal path against capital punishment helped construct the narrative, which the carceral state would use to rebuild itself around the death penalty. In this narrative, courts are presented as myopic defenders of criminals against the security concerns of the general public represented by the political branches. The legal strategy against the death penalty helped direct debate away from legislatures and governors at a time, 1955 to 1965, when the meaning of capital punishment was still up for grabs and in which a serious effort to mobilize the public opinion that was slowly moving against capital punishment might have been successful.

To make matters worse, the specific legal arguments chosen placed considerable focus on two issues that would boomerang on abolitionists in the 1970s and help anchor a renewed carceral state in the death penalty. First, the cruel and unusual punishment argument emphasized that American sentiments and values had evolved and turned against capital punishment. Second, whether the death penalty deterred murder and other violent crimes. To make matters worse, the battle between empathy for the victim and empathy for the condemned that the legal challenge to capital punishment invoked, was cast into the structure of the death penalty by the guided discretion system that the Court approved in *Gregg* and especially the wide latitude the Court insisted on extending to defense evidence in mitigation of death. As Gottschalk herself suggests, historical circumstances conspired to make these arguments even more problematic. The doubling of the homicide rate between 1964 and 1974 coincided with the falling off in number of executions, providing seemingly dramatic evidence that capital punishment might be a necessary ingredient in crime control.

Thus capital punishment became the fulcrum within which the broader structure of governing through crime and the far larger system of mass incarceration was revitalized and given its characteristic dynamics.

Nowhere did this take a clearer direction than California where the state's capital punishment law was struck down by the state high court just months ahead of the US Supreme Court decision in *Furman*.²⁴ Ironically the California statute had been affirmed only a few years earlier by the US Supreme Court in *California v. McGautha* and Governor Ronald Reagan, although a vocal defender of capital punishment, had publically stated his comfort in allowing the US Supreme Court to resolve the issue nationally in *Furman*. When the California Supreme Court handed down its 6-1 decision, written by the Chief Justice who was a Reagan appointee, the political response was fast and furious.

Reagan described Californians as menaced by a rising tide of violence that only capital punishment could adequately respond to.

²⁴ Gottschalk supra, note 4 at 219.

Instead of using the death penalty to attack Democrats, as he had Pat Brown in '66, Reagan turned the California Supreme Court into the problem, accusing them of usurping the place of California's elected leaders and endangering the public.²⁵

While the state's liberal leaning Senate refused to support a legislatively initiated constitutional amendment to restore the death penalty, the governor and the state's law enforcement organizations mobilized behind a voter initiative. The resulting movement, led by a Republican Senator, George Deukmejian was an astounding success, gathering hundreds of thousands of signatures more than was needed and winning approval from the voters by better than 2 to 1 (Ibid). Even more importantly, that initiative constituted a new coalition of organized law enforcement, Republican politicians, and crime victims which in many respects has dominated the state's politics ever since.

If the response to judicial abolition had many of the marks of anti-civil rights backlash, it clearly reached well beyond that constituency. Most importantly, what gave the pro-capital punishment movement legs in 1972 was the not inaccurate perception that homicides were surging at least compared to the relative pacified post war decades, and that they constituted a real threat to ordinary Californians.

This important sense of threat from homicide in the early 1970s was anchored in two cultural features that have not been adequately considered in the historical and sociological analysis of American capital punishment, the politicization of murder associated with the high level assassinations and riots of the late 1960s and the powerful interaction effect between homicide as a specific fear and the sensibilities emerging in the new kind of single family free standing household that was becoming the American residential ideal (and the standard in the high growth sunbelt states).

First was the emergence of homicide as a political problem of the first order spurred by the assassination and riots that marked the 1960s beginning with the assassination of President Kennedy in 1963, and intensifying five years later with the back to back assassinations of Civil Rights leader Martin Luther King and Senator Robert Kennedy. To many Americans, these assassinations were political murders in the sense that they may have been motivated by political objectives and carried out with the complicity of some in government or the political establishment. But to an even greater portion of Americans these assassinations were powerful lessons in the vulnerability of all Americans to violent crime, especially in the public spaces of large cities (all three killings took place in downtown settings, in public or semi-public places). If the President, a Senator, and

²⁵ Theodore Hamm, *Rebel and a Cause: Caryl Chessman and the Politics of the Death Penalty in Postwar California, 1948-1974* (University of California Press 2001).

a celebrated clergyman leading an internationally renowned movement could not be protected as they navigated urban public spaces, who could consider themselves safe in those spaces? If men of this magnitude and importance could be killed, apparently by lone individuals, how could citizens expect protection from over-worked police?

The rioting in major cities that began with Los Angeles in 1965, and included Newark, Detroit, and Washington DC may have interacted with the assassinations to launch a common politicization of violence in general and murder in particular. Scores of victims were killed in the riots, many by police, but others in beatings and shootings by rioters against other citizens. Like the assassinations, the riots posed urban central city neighborhoods as particularly associated with violence and the possibility of being killed. They also highlighted the limits of law enforcement capacity to protect people from violence. In each instance, regular police were unable to contain outbreaks of lawlessness and ultimately fell back, leaving it to military units of the national guard being brought in to suppress looting and sniper fire.

We know these images from the late 1960s weighed heavily on the minds of the Supreme Court Justices as they turned to consider the constitutionality of capital punishment in the *Furman* case. In his dissent to the Supreme Court's opinion in *Furman v. Georgia* (1972), Justice (and Virginian) Lewis Powell pointed to this history of murder in the 1960s as forming a powerful influence on public attitudes:

...brutish and revolting murders continue to occur with disquieting frequency. Indeed, murders are so commonplace in our society that only the most sensational receive significant and sustained publicity. It could hardly be suggested that in any of these highly publicized murder cases—the several senseless assassinations or the too numerous shocking multiple murders that have stained this country's recent history --- the public has exhibited any signs of "revulsion" at the thought of executing the convicted murderers. The public outcry, as we all know, has been quite to the contrary.²⁶

In his concurrence in *Furman*, Justice Marshall who would have preferred to find capital punishment unconstitutional under any circumstances, pointedly referenced the climate of violence (note his direct reference to the urban context as well):

At a time in our history when the streets of the nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But, the measure of a

²⁶ Quoted in Simon, *supra* note 3 at 119.

country's greatness is its ability to retain compassion in time of crisis.²⁷

The influence of this background on the course of public support for capital punishment has been duly noted in the scholarship. A secondary factor has been less noted; the rapid suburbanization of the nation and with it, the spread of a whole economic and social logic built around single family homes set a distance from urban neighborhoods and their presumed violence. This was clearly more powerful in some states than others. California would be the prime example (but Florida and Arizona would be others). This new housing pattern which had begun in the post-war period but which began to accelerate in the 1960s, primed the public imagination for murder in several intersecting ways.

Home ownership in any economy ties the owner to a particular location in a manner that is non-trivial. As we are painfully reminded today, housing markets are not always highly liquid and once a measure of concern about security is raised about a neighborhood, real estate in that neighborhood is likely to get substantially less liquid. It is important, in this respect, that violent crime has for decades been associated with neighborhood specific risks (rather than being a free floating risk that could occur anywhere with equal probability). Sometimes this is largely a function of stereotype and prejudice, in other instances, it can be shockingly accurate.²⁸ While a renter may rather easily change their mind and move their family to a different neighborhood in response to real or perceived risk, the homeowner has a greater exposure in both a personal and a financial sense. Homeowners may be more fearful of homicides and burglaries than of crimes like robbery, which is associated more with streets and public encounters. It is the violence that enters the home, or threatens to, that is particularly threatening.²⁹

Following the sociology and criminology of risk (Beck 1991; Ewald 2002; Sparks, Loader, Girle, ; O'Malley 2006) I want to argue that there is a risk mentality specific to the intersection of homeownership and homicide, one that may exist in any time, but which became disproportionately important in the period 1972-1976, and remained so for the next three decades. The risk of being killed, or having a loved one killed, by a stranger who either invades our home or lurks nearby to attack during the inevitable passage to and from home, stands out in this regard as

²⁷ Quoted in Gottschalk, *supra* note 4 at 216.

²⁸ A number of serial killers have operated in very specific geographic locations. In one notorious Florida case Eddie Lee Mosely, who terrorized the African American section of Ft. Lauderdale, Florida in the 1970s, was identified when investigators realized the location of the victims bodies were closely situated in a portion of the neighborhood. The killer turned out to actually live with his parents in a house pretty close to the center of the small zone in which he killed (see Simon 2008).

²⁹ Of course the repressed element for a long time was the domestic violence within the house.

one singularly hard to prevent by either public law enforcement or private choices to discipline behavior for crime safety (to say avoid the streets, bars, downtown shopping streets, or other public places).³⁰

While this mentality may be a broad feature of human experience that incorporates a wide range of residential patterns, I would argue that there are a number of features of the post-war suburbanization and the housing boom that began to unfold in that period which exacerbated it. It was in this period that home ownership, as opposed to renting, began to be valorized as a norm for American middle class families, and associated with all manner of private and public virtues. The federal government subsidized this new norm beginning in the New Deal by allowing tax payers to deduct their mortgage interest from their income in determining their tax liability. While the tenancy of ownership can apply to all kinds of residential structures (including apartments through the vehicle of condominiums), the post-war suburban boom involved the marketing of single family homes physically separated from each other by expanses of yard and often fences, in a setting ideally removed from traffic, commercial life, and workplaces. While there were many virtues associated with this pattern of development, none had higher priority than the idea of security. This kind of household was held out explicitly as the best way to keep families secure from crime. In short, the new housing pattern was offering not simply shelter but a lifestyle based on security through physical separation from the public space, and especially urban public space.

This new pattern of housing became increasingly ubiquitous in the decades following 1960, but it was concentrated in the boom sun-belt states that began to experience major population growth at the expense of the Midwest and Northeastern states. From Georgia and the Carolinas to California, a boom focused on a warmer climate and affordable suburban housing began that has continued until the present economic crisis.

Historians and political scientists have begun to explore the relationship between this new suburban residential pattern and the conservative politics that began to mobilize in the 1960s. Lisa McGirr's study of California's Orange County suggests that the very style of residential development encouraged conservative values.

The result of development along these lines, ... was spatial isolation and an absence of community, which, in a complicated way, helped to

³⁰ The one great and highly controversial exception being through private gun ownership. It is the belief that a hand gun stored in a bedside table or on the person might protect the homeowner from being killed in a home invasion burglary or while coming and going from the home that fuels populist support for gun ownership and the individual rights vision of the Second Amendment of the US Constitution.

reinforce a conservative ethos. One Santa Ana resident, for example, who in 1961 criticized the lack of neighborliness in housing developments and called for more community recreational activity ... where people can get to know one another, linked the depletion of community to government centralization.³¹

But the very same ethos that supported conservative ideology also cultivated a model of home security based on physical separation from public space and the creation of a larger space of recreation and intimacy within the security of home. As home purchasers were encouraged to invest not simply in shelter but in security, Americans found themselves in something like a security paradox. Under these conditions the expansive promise of the home as security zone grew in tandem with a sense of exposure to stranger danger. The very suburban development pattern that offered more distance from the menace of the city, also created more isolation. City life meant proximity to potential criminals but also proximity to neighbors and police. Suburban life had soft white underbelly. If a malevolent stranger were to penetrate the geographic divide, the individual homeowner would be largely on his or her own. This was the nightmare captured in real crimes like the Manson family murders, and countless fictionalized ones. Any fan of American films can identify many examples of movies that celebrate exactly this paradox.³²

As David Garland argues, the suburbs came to seem even more vulnerable to their security seeking residents as women began to enter the workforce in droves.³³ A residential pattern that had relied on full time homemakers to create community out of the islands of back yards and cul de sacs came to seem haunted as new economic conditions forced middle class families to rely on two jobs.

From this perspective it is worth noting a number of features of the crime wave of the 1960s and 1970s. These especially alarming kinds of murder involving strangers assaulting the victim in or near their home may not have become actuarially more common (as opposed to spousal killings, or barroom brawls), but they became culturally more salient. Popular culture played a role. For example,

³¹ Lisa Mcgirr, *Suburban Warriors: The Origins of the New American Right* (Princeton University Press 2001) at 42.

³² The theme appears as early as *The Desperate Hours* (1955) "Dan Hilliard is a comfortable upper-middle-class executive with a wife and two children and a pleasant suburban home. His world seems quite in order, quite predictable. But then convicted murderer Glenn Griffin escapes from prison with his younger brother Hal and a ruthless thug named Kobish. The three escapees take over the Hilliard home, using it as an unsuspected resting place while a police manhunt scours the city for them. Glenn Griffin finds Dan Hilliard to be no pushover, but rather a determined fighter out to protect his home and family from this criminal invasion. But is a middle-aged businessman a match for three wily killers?"

³³ Garland, *supra* note 3.

Truman Capote's book, *In Cold Blood*, told the "true" story of two young ex-prisoners who invade a Kansas farm house and kill the entire family in 1959. While the crime itself took place before the crime wave of the 1960s can be said to have begun, the book was published (and became a huge best-seller) in 1966, and a very popular movie appeared in 1967, right as consciousness about homicide as a social problem was rising (and in the midst of the assassinations and riots). There was also no lack of horrifying contemporary crimes to focus on in this period. Two that loom especially large in the headlines of that era were the 1968 mass killing of eight young nurses in their Chicago apartments by Richard Speck, and the 1969 "Tate Labianca murders" that were ultimately linked to Charles Manson and his cult followers. Both crimes became the focus of innumerable news reports, true crime books, and movies.

These crimes which received mass exposure and cultural processing in the period leading up to 1972 epitomize the kind of residential homicide risk mentality that I argue helped harden the nation's support for capital punishment. They all involve horrifying attacks into the homes of the victim by strangers bent on doing them harm, with no warning or opportunity for personal choice (say by not going out to a bar, or dating a particular person). All of them involved white perpetrators. That African Americans were linked to violent crime fears in the 1960s by historic slanders and by high violence rates is undeniable, but these most alarming images of homicide in the home were not drawing on such racialized fears (indeed Manson was a racist who hoped to spark a race war by linking the grisly home killings to African Americans).

California in this period was ground zero for this combination of a new risk mentality based on the suburban housing boom and horrifying crimes amplified by the media that seemed to suggest that ordinary citizens were far from safe in their homes. From the Watts riot in 1966, to the assassination of Robert Kennedy in 1968, to the Tate-Labianca murders in 1969, to the never solved "Zodiac" murders in the same years, California experienced the whole range of murder risk triggers that we have reviewed here at some length and right in the middle of their internationally prominent media markets. At the same time it offered the most compelling promises of personal fulfillment and family security in ever better housing options farther out from the cities. The state experienced a boom in housing prices that began in the 1970s and carried forward with periodic cyclical downturns (early 1980s, early 1990s). As California lost more of its industrial base in the same periods, an economy based on real estate, finance, and the construction and retail jobs produced by the housing boom became more and more central to its economy.

So now consider the conjuncture opened in 1972 by the Supreme Court's *Furman* decision (once again amplified in California by the fact that it's own state court did the same thing a few months ahead of the US Supreme Court decision). In the backlash that followed, California emerged as one of the first states to begin the restoration process and the only non-Southern one to have really led the national

reaction in the form of its populist governor Ronald Reagan. The dramatic legislative show down and then popular initiative process that followed made support for the death penalty a major vehicle for shaping a whole new political order based on real estate and crime fear. Something like the California pattern may explain the pattern of death penalty restoration that took place in other beacon sun-belt, housing boom states like Florida, Georgia, Texas and Arizona

I have suggested here that in some important states (especially California) support for a revitalization of capital punishment emerged not from an anti-civil rights backlash, but from the growth of a new political sensibility about violence and homicide in particular rooted in the experience of suburbanization and the style and conditions of homeownership at the heart of that experience. The politics of support for capital punishment was premised on addressing this kind of insecurity. One might imagine it as a kind of homeowners insurance, whose promise of deterrence, or the permanent incapacitation of actual killers, however uncertain, added an additional layer of protection to the homes in which Californians and other Americans were investing their families, their savings, and increasingly, their economy.

Moreover, since capital punishment in the new forms permitted by the Supreme Court in *Gregg v. Georgia* and subsequent case law could at best be applied to a limited set of killers, it has also supported a vast hardening of prison sentences for violent crime (especially murder). While the homicide rate dipped in California after 1980 (only to go up again in the latter part of the 1980s) the relatively high levels, magnified by media attention to a very particular subset of homicides, combined with continuing rapid growth of homeownership (again with periods of slower growth), laid the conditions for capital punishment to become a consensus in American politics in the 1990s.

Part II: 1988-1994 --- Securitizing the Housing Boom

For a decade after *Gregg*, the fate of capital punishment remained in a kind of judicial purgatory. A few executions took place, most “volunteers” who gave up their appeals, but it seemed possible that the legal strategy against capital punishment would slowly close the loop created by *Gregg* and its companion cases. In that fateful set of cases, a new majority emerged supporting capital punishment but only in so far as it could be reformed along two dimensions that turned out to be in tension. Death decisions had to be made less arbitrary through extensive legislative guidance (delivered in most states through “aggravating factors” in the capital homicide code) but they also had to permit individualized judgment by the jury (or judge) in which virtually any mitigating evidence about the defendant’s background and motivations was permitted. Although politically popular, it seemed possible that the death penalty might still be abolished by an aggregation of judicial decisions pressing states to further reform along one line or the other.

This period of uncertainty seemed to close in the late 1980s. A signal point was the Supreme Court's decision in *McCleskey v. Georgia* in which a majority rejected an empirical case that the Georgia death penalty arbitrarily targeted killers of white victims.³⁴ The case represented the end of the civil rights based attack on capital punishment that began with *Furman v. Georgia*, finally raising the equal protection challenge directly. It also represented the last broad based challenge that might have delivered a knock out blow to the death penalty as a routine part of state criminal procedure.

This normalization of capital punishment is played out in the numbers of those executed. Despite the defeat of broad based legal challenges in the 1970s, actual executions remained in single digits until 1984 when the norm became a number in the teens or twenties until 1994 when it leaped up into the fifties, sixties and seventies, peaking at 98 in 1999 before the number gradually fell back, dropping below fifty per year in 2004.

The twenty years between 1984 and 2004 may, in time, come to be seen as the high water mark of contemporary capital punishment. During this time capital punishment moved from being a subject of cultural struggle to one of seeming consensus. Support for the death penalty in opinion polls also peaked in these years, with large majorities in virtually every demographic group supporting capital punishment as an appropriate punishment for murder. Political competition around the death penalty also became stalemated as virtually all candidates for significant national or state public office came to be vetted based on their support for the death penalty.

Within this peak period, the years 1988 through 1994 seem particularly powerful. In 1988 early polls suggesting a likely win for the Democratic Party in the election following eight years of Republican rule under Ronald Reagan were reversed by a campaign that focused relentlessly on the Democratic standard bearer, Massachusetts' governor Michael Dukakis, for opposing capital punishment and for operating a prison furlough program under which a convicted murderer named Willie Horton was permitted to leave prison on a temporary furlough during which he engaged in a crime spree including the kidnapping of a young couple and a rape of the wife. After Dukakis' defeat, support for capital punishment became a central policy position for candidates in both major parties for President and for statewide offices. Bill Clinton famously recharged his flagging 1992 primary campaign after flying back to Arkansas to oversee the execution of brain damaged killer Ricky Rector.

This mean season may have reached its height in 1994 when following the defeat of President Clinton's health insurance initiative, Congress enacted a major crime bill ahead of the 1994 fall elections in which the Federal death penalty was fully institutionalized and expanded to reach dozens of new crimes.

³⁴ 449 U.S. 891 (1980).

Let us revisit the three themes in play in '72-76. In terms of homicide rates, the 1988-1994 period sees a revival of the homicide rise of the 1970s, fueled by the violent crack cocaine trade. After falling to a post-60s low of 7.9 homicide deaths per 100 thousand population, the homicide rate begins to go up again, reaching a peak of 9.8 in 1991, just shy of the post-World War II peak of 10.2 in 1980. In the early 1990s criminologists prominently anticipated a further escalation of violence. While this heightened crime wave did not materialize its highly public discussion fueled support for the tough new federal laws.

The 1988 presidential campaign, and especially the aggressive effort to tie Dukakis to African American killer Willie Horton is suggestive of the civil rights backlash theme. The Willie Horton ads suggested that Governor Dukakis was not tough enough on criminals to protect white Americans from Black crime, epitomized by his opposition to capital punishment for murder. The use of the Horton ad by unofficial arms of the successful Bush campaign ultimately tainted his Presidency as observers came to agree on the racialized message of the ads. However, this period also offers evidence that the politics of capital punishment based on fear of violent crime and murder was increasingly operating independently of the civil rights backlash. For one thing, unlike in the mid-1970s when the civil rights movement was still quite powerful nationally, the racial backlash did not need to cloak itself behind a cover issue like crime. Instead, Republican candidates like Bush openly touted their opposition to affirmative action, a direct way to appeal to white voters concerned about a changing racial hierarchy.

The housing boom that began in the 1970s but stalled during the high interest rates of the late 1970s and the early 1980s recession came roaring back in the mid to late 1980s, a trend that continued with a brief slowdown in the early 1990s recession. In this era the securitization of housing became even more explicit with gated communities becoming the modal new housing form in the suburbs. Highly publicized crimes like the kidnapping murders of Polly Klass in California in 1993 and Megan Kanka in New Jersey in 1994, seemed to underscore the kind of homicidal assault in or near the securitized suburban home that we hypothesize forms the core risk against which capital punishment functions as a kind of insurance policy.

Part III: Death and the Bust

Since 2004 executions and death sentences have both declined significantly. Public support for capital punishment, which peaked in 1994, has drifted down from the 80 percent range to the 60 percent range (within striking distance of an abolition majority). Perhaps most importantly several states have taken the remarkable step of legislatively abolishing the death penalty (New Jersey and New Mexico) and it has come close in other states (Nebraska, Colorado).

At the start of this essay we reviewed the most noted causes: the significant decline in violent crime during the 1990s has brought homicide rates down well below their peak rates in the 1980s or 1990s (and back to pre 1960 levels for New York City). A technological revolution in DNA testing has allowed lawyers to document a number of wrongful convictions for violent crimes, including death row inmates. Most recently, an epic economic crisis has strained state budgets more than anytime since the 1930s. Money becomes a direct trade off not only with education but with law enforcement and other aspects of the penal system. In states like California, which rarely execute anyone and yet spend more than 130 million a year on operating the system of capital punishment (mostly legal appeals), that makes capital punishment vulnerable.

The account I developed in Part I of a distinctive American risk consciousness associated with the long housing boom (60s through 00s), which reached its peak as the housing boom turned toward being a bubble, allows us to note some interesting features of all three of these developments.

First the housing-murder link that we have drawn suggests that fear of homicide, framed by the promise of domestic security embedded in our real estate based life-style, suggests that the strength of popular support for capital punishment is determined in part by the sense of homicide threat to households. Of course that does not mean that short term changes in homicide will always reduce or increase support for capital punishment. Once homicide got placed on the national agenda in the 1970s, in part by the Supreme Court's *Furman v. Georgia* decision, framed by the alarming political context of the 1960s (assassinations and riots) and by the new housing context toward which Americans were moving, actual changes in homicide rates may not matter very much. The ability of the media to sustain the sense of impending threat in the cities (see any Batman or Spiderman movie not to mention CSI, Law & Order, etc) means that it does not take many real murders to lend credibility to that fear. Still, the crime decline of the 1990s was sustained and deep enough that it may indeed be having an effect on popular risk consciousness, which in turn is making it harder for prosecutors to win death sentences and easier for legislators to contemplate voting to limit or even eliminate capital punishment.

The DNA technology, of course, is a double-edged sword, helping defense lawyers win exoneration but also helping law enforcement solve cold cases. But interestingly both edges seem to be cutting against capital punishment. The impact of exoneration is well recognized as revitalizing the classic concern that capital punishment is an irreversible penalty for a fallible justice system. But cold case solving opens up an opportunity for capital punishment opponents to seize upon the crime prevention issue which they have rarely been able to champion (accept with the claim that life prison sentences are a greater deterrent than death). If the threat of execution, however unlikely, may offer some hope of deterring killings, the threat that easily shed biological evidence will greatly increase your chance of being caught and convicted should deter even more. In some states, Colorado recently, capital

punishment opponents have directly pit capital punishment against murder investigations, promising to reallocate resources currently devoted to the death penalty to investigating unsolved murders. But even where this trade off is avoided, solving cold cases does not build alarm about murder, it reduces it. As DNA databases grow, or imaginably become universal, murder might become among the most easily solved of crimes. The deterrence, or at least the perception of deterrence, that such a system would produce could significantly reduce the fear-based support for capital punishment.

The present economic crisis presents the strongest opportunity since the 1970s to challenge the fiscal burdens of capital punishment. Here we can stop to appreciate the enduring value for abolition of the legal strategy launched in the late 1960s. While many of the legal demands that *Gregg v. Georgia* placed on capital punishment have been blunted to judicial retrenchment over the years, the lengthy appellate process that the *Gregg* regime continues to require, along with the requirement that states pay for representation during direct appeal, means that capital punishment is an extraordinarily expensive form of punishment. Since even for its supporters capital punishment is recognized to be a legal luxury item that society could survive without (compare to the prison), this cost factor remains a huge vulnerability and could ultimately bring down capital punishment.

But the cultural analysis offered in this essay suggests that the real promise of the present economic crisis is that it may help uproot the residential housing pattern, one based on marketing security through physical separation, that has predominated since the 1970s and the distinctive kind of risk consciousness it has produced. The fact that this security/housing pattern became central to the American economy in recent years through mortgage backed investment instruments means that the present economic crisis is profoundly a crisis of housing that will not resolve itself quickly.

Coming as it does, at a time when climate change and related energy supply concerns are also making this security/housing pattern unsustainable, there is a chance that this economic crisis will expedite a shift toward a very different model of secure residential life in American cities and suburbs. This new model will make issues like water, energy, and access to education, work, and health care bigger than crime. A new set of housing patterns will emerge designed to respond to a different kind of risk profile, one skewed toward infrastructure risks rather than “stranger danger.” It is likely that the new pattern of housing will look more like urban America before the housing boom, an America of renters, of public transportation and dense multi-use urban neighborhoods. Over time, those neighborhoods will produce a risk consciousness and a politics far less friendly to capital punishment.

Some kind of change in this direction seems inevitable, how fast and how far reaching it will go depends a lot on how the trends we have been discussing play out. For example, if the economic crisis should prove shallower than feared at present, the enormous pressure necessary to change whole industries and

consumption habits associated with the security/housing model will not be forthcoming quickly. If the major crime declines of the 1990s are not quickly reversed that could help speed up the shift of middle class families from gated communities back toward cities and inner ring suburbs. These families are likely to be very sensitive to violent crime, but also pragmatic about solutions (this is the public the arguments about resource trade-offs between law enforcement and capital punishment are aimed at).

Conclusion: Slouching Toward Abolition

A decade ago capital punishment seemed like a permanent feature of American legal and political culture. Like the jury trial, it seemed destined to survive as a small but distinctive institution within a vast system of administrative justice and mass incarceration. Today, American society is slouching toward abolition. It is likely to begin regionally with some of the states that readopted capital punishment in the 1970s but rarely used it, becoming *de facto* and then *de jure* abolition states through unwillingness to commit the kind of resources to it that even a potential capital option requires. If and when it becomes a regionally limited penalty, concentrated solely in the states of South (those who joined in the secessionist movement known as the Confederate States of America from 1861 to 1865) it will become possible for a US Supreme Court to strike down capital punishment under the 8th Amendment (as they have the juvenile death penalty and the execution of the retarded).

The cultural context that I have discussed in this essay, the housing pattern I describe as security/housing and the form of risk consciousness that it twins can play an important but subtle effect. I do not mean to suggest that the growth of the security/housing pattern somehow determined that the US would retain capital punishment in a period when many of its peer nations in Europe and Latin America abandoned it. Had the Supreme Court simply declared capital punishment a violation of the Constitution in 1972, it is doubtful that the legal system would have been overturned (any more than *Brown v. Board of Education*,³⁵ *Roe v. Wade*,³⁶ or *Bush v. Gore*³⁷ led to revolutions). The growing public support for capital punishment might have channeled itself into more punitive prison sentences (which we ended up with anyway). But the expansion of a lifestyle in which family security inside the home was increasingly positioned in contrast and tension with stranger danger emanating from American cities was one likely to help sustain support for capital punishment.

If the security/housing paradigm and its risk consciousness decline, the intensity of support for capital punishment is likely to continue to decline. That means that a majority of Americans may continue to support capital punishment,

³⁵ 347 U.S. 483 (1954).

³⁶ 410 U.S. 113 (1973).

³⁷ 531 [U.S. 98](#) (2000).

but not care that much about it. It is under these conditions that sustained fiscal pressure, declines in homicide, and evidence of miscarriages of justice can all do their work in chipping away at the number of states that retain capital punishment.

How fast this transition takes place will depend a lot on the destiny of those western and non-Confederate Sun Belt states where the security/housing took off early and have played a major role in the economy (California, Arizona, New Mexico, Nevada, Colorado).³⁸ These are states in which any serious effort to reduce climate change will have to achieve major revisions in the housing pattern away from security/housing. They are also states in which traditional civil rights backlash motivations for capital punishment have been less determinative than the risk consciousness associated with security/housing.

³⁸ Indeed, southern Sun Belt states like Florida, Georgia and Texas may now share this same risk consciousness and likewise share the potential to change as security/housing paradigm that has helped give rise to it.