Journal of Public Law and Policy

Volume 37 | Issue 1 Article 2

2017

HATE CRIMES, THE DEATH PENALTY, AND CRIMINAL JUSTICE REFORM

J. Richard Broughton

Mitchell Hamline Law Journal of Public Policy and Practice

Volume 37 | Issue 1 Article 2

2016

Hate Crimes, the Death Penalty, and Criminal Justice Reform

J. Richard Broughton
Associate Professor, University of Detroit Mercy

HATE CRIMES, THE DEATH PENALTY, AND CRIMINAL JUSTICE REFORM

J. Richard Broughton[*]

I. INTRODUCTION

Criminal justice reform is all the rage now. And it knows no party or label. High-profile police-involved deaths, concerns about "mass incarceration," and debates over the scope of substantive criminalization have captured national attention.[1] Congress is considering legislation to reduce the number of crimes eligible for mandatory minimum sentences,[2] the Justice Department has changed the way that federal prosecutors charge drug offenses that trigger mandatory minimums,[3] and the President has broadened the use of his clemency powers to free dozens of drug offenders from federal prison.[4] In the debates over criminal

---

[*] Associate Professor of Law, University of Detroit Mercy. I am grateful to the board and staff of the *Journal* for the invitation to participate in the symposium. I am also grateful to Nadine Hammoud and Patrina Bergamo for their excellent research assistance.

[1] *See* Alex Altman, *Can Congress Pass Criminal Justice Reform ?*, Time.com, http://time.com/3968149/criminal-justice-reform-congress/ (posted July 22, 2015); Jonathan Capehart, *Why criminal justice reform might actually happen*, WashingtonPost.com, http://www.washingtonpost.com/blogs/post-partisan/wp/2015/07/17/why-criminal-justice-reform-might-actually-happen (posted July 17, 2015); Anthony Romero & Mark Holden, *A New Beginning for Criminal Justice Reform*, Politico.com, http://www.politico.com/magazine/story/2015/07/a-new-beginning-for-criminal-justice-reform-119822.html#.VcoLfLUsrkc (posted July 7, 2015). *Cf.* Mark Obbie, *Last Man Standing*, Slate.com, http://www.slate.com/articles/news_and_politics/crime/2015/07/bill_otis_meet_the_last_man_standing_who_thinks_criminal_justice_reform.html (posted July 29, 2015) (highlighting the work of Bill Otis in opposing many criminal justice reform measures).

[2] *See* Safe, Accountable, Fair, and Effective (SAFE) Justice Act, H.R. 2944, 114th Cong. (introduced June 25, 2015).

[3] *See* Memorandum of Attorney General Eric Holder to the United States Attorneys and Assistant Attorney General for the Criminal Division (August 12, 2013) (ordering federal prosecutors not to allege drug quantity that would trigger mandatory minimum sentences in certain federal drug prosecutions, and to seek alternate ways of avoiding mandatory minimums after receiving information that defendant meets criteria for leniency).

[4] *See* Sarah Wheaton, *President Obama commutes sentences of 46 prisoners*, Politico.com, http://www.politico.com/story/2015/07/obama-commutes-46-prisoner-sentences-120034.html?hp=b1_r1 (posted July 13, 2015).

justice and sentencing "reform," capital punishment has figured somewhat prominently. Yet an overwhelming dose of the commentary has focused on the impending demise of capital punishment, its waning popularity and its declining use.

The headlines are ominous. "The Death of the Death Penalty: Why the era of capital punishment is ending," read the title of a piece in *Time* magazine just this May.[5] "Capital Punishment's Slow Death," wrote George Will in the *Washington Post*.[6] Following the decision of the unicameral Nebraska legislature to abandon capital punishment in May, even overriding a gubernatorial veto, an article in the *Washington Post* proclaimed, "The death penalty abolition movement is not limited to Nebraska,"[7] and a piece in *Time* asked, "Which State Will be Next to Abolish the Death Penalty?" (hint: The First State).[8] And even after the Supreme Court in *Glossip v. Gross* recently upheld the use of the sedative midazolam as an execution drug,[9] much of the commentary about the case focused instead upon Justice Breyer's provocative dissent questioning the constitutionality of the death penalty.[10]

---

[5] David von Drehle, *The Death of the Death Penalty*, Time.com, http://time.com/deathpenalty/ (posted May 28, 2015).

[6] George F. Will, *Capital Punishment's Slow Death*, WashingtonPost.com, http://www.washingtonpost.com/opinions/capital-punishments-slow-death/2015/05/20/f3c14d32-fe4f-11e4-8b6c-0dcce21e223d_story.html (posted May 20, 2015).

[7] Jannel Ross, *The death penalty abolition movement is not limited to Nebraska*, WashingtonPost.com, http://www.washingtonpost.com/blogs/the-fix/wp/2015/06/01/the-death-penalty-abolition-movement-is-not-limited-to-nebraska/ (posted June 1, 2015).

[8] Josh Sanburn, *Which State Will Be Next to Abolish the Death Penalty*, Time.com, http://time.com/3900156/nebraska-death-penalty-repeal/ (posted May 28, 2015).

[9] 135 S. Ct. 2726 (2015).

[10] *Id.* at 2755 (Breyer, J., dissenting). For some of the commentary, see, e.g., David Cole, *Justice Breyer v. The Death Penalty*, NewYorker.com, http://www.newyorker.com/news/news-desk/justice-breyer-against-the-death-penalty (posted June 30, 2015); William Baude, *Is the Death Penalty Unconstitutional?*, NYTimes.com, http://www.nytimes.com/2015/07/07/opinion/is-the-death-penalty-unconstitutional.html?_r=0 (posted July 7, 2015).

So, it would seem that the conversation about criminal justice reform and the practice of harsh sentencing does (and probably must) ultimately grapple with sentencing for violent crimes. And it is natural that the death penalty would be part of that conversation. But the death penalty part of it has surely been amplified not just by recent events highlighting its shortcomings or public opposition – like the Nebraska abolition and the Breyer dissent in *Glossip* – but also by recent and highly-publicized instances of extreme violence that have legitimately implicated the option of capital punishment upon conviction. Boston Marathon bomber Dzokhar Tsarnaev was sentenced to death in federal court in May of 2015.[11] James Holmes was convicted in July 2015 for killing twelve people during a mass shooting at an Aurora, Colorado movie theatre, and though his jury found beyond a reasonable doubt that mitigating factors did not outweigh the aggravating factors, it could not agree unanimously on a death sentence, thus resulting in a default sentence of life without parole.[12] Note that rarely does the prevailing anti-death penalty narrative tell us what the just and fitting punishment *should be* for defendants like Tsarnaev or Holmes. And there are plenty of signs that even life in prison without parole has become an object of sentencing scorn.[13]

---

[11] *See* Milton J. Valencia, *Dzhokhar Tsarnaev gets death penalty for placing Marathon bomb*, BostonGlobe.com, https://www.bostonglobe.com/metro/2015/05/15/dzhokhar-tsarnaev-death-penalty-sentencing-jury-boston-marathon-bombing/canMEfLmeQJxQ4rFU0sERJ/story.html (posted May 15, 2015).

[12] *See* Steve Almasy, et al., *James Holmes sentenced to life in prison for Colorado movie theatre murders*, CNN.com, http://www.cnn.com/2015/08/07/us/james-holmes-movie-theater-shooting-jury (posted Aug. 8, 2015). According to media coverage, the result was a product of a single juror who refused to be swayed to impose the death penalty. *See* Elizabeth Murray, *Aurora shooting: Juror opens up about sentencing James Holmes to life in prison*, Today.com, http://www.today.com/news/aurora-shooting-juror-opens-about-sentencing-james-holmes-life-prison-t37596 (posted Aug. 8, 2015).

[13] *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455 (2012) (holding that mandatory life without parole for juvenile homicide offenders violates Eighth Amendment); Stephen Lurie, *The Death Penalty Is Cruel. But So Is Life Without Parole*, NewRepublic.com,

The most recent case of high-profile mass killing, though, adds a new and confounding wrinkle to the narrative. And like the many other cases of extreme mass killing, it further undermines the abolitionist crusade.

On June 17, 2015, Dylann Roof joined the Bible study class at the historic Emanuel AME Church in Charleston, South Carolina.[14] There, using a firearm, he allegedly shot and killed nine people.[15] He fled and was captured in North Carolina.[16] According to media reports, Roof not only confessed to the crime, but indicated that he committed the killing out of racial animus, which is consistent with media reports of statements from survivors who said that Roof shouted racial epithets during the killings.[17] State prosecutors in South Carolina obtained multiple indictments against Roof[18] and are deliberating as to whether to seek the death penalty against him under state law. But then, on July 22, 2015, Attorney General Loretta Lynch announced that the federal government had obtained a 33-count indictment against Roof, charging him with violations of the federal hate crimes statute, the federal religious rights obstruction statute, and federal firearms statutes.[19] Because the federal indictment implicates multiple federal capital

---

http://www.newrepublic.com/article/121943/death-row-crueler-and-more-unusual-penalty-execution (posted June 16, 2015) (discussing conditions of confinement).

[14] *See* John Bacon, *Dylann Roof indicted in deadly Charleston rampage*, USAToday.com, http://www.usatoday.com/story/news/nation/2015/07/07/dylann-roof-indicted--charleston-shootings/29815457/ (posted July 6, 2015).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See* Indictments, State v. Roof, Docket Nos. 2015-GS-10-04123, 2015-GS-10-04115, 2015-GS-10-04116, 2015-GS-10-04117, 2015-GS-10-04118, 2015-GS-10-04119, 2015-GS-10-04120, 2015-GS-10-04121, 2015-GS-10-04122 (Ct. Gen. Sess. July 7, 2015) (all charging defendant with murder under South Carolina law). I note that these are merely indictments and that Roof is presumed innocent at this time.

[19] *See* Indictment, United States v. Roof, No. 2:15cr472 (D.S.C., July 22, 2015). Again, this is merely an indictment, and Roof is presumed innocent at this time.

crimes, the Department of Justice is now weighing whether to seek the death penalty against Roof. Notably, the federal hate crimes prevention statute pursuant to which Roof has been charged does not permit the death penalty.[20] But the federal indictment charges him using not just the hate crimes prevention statute but also the religious obstruction statute, which provides for capital punishment where the relevant conduct causes death,[21] and with the primary gun enhancement statutes – sections 924(c) and (j) – which allow capital punishment where the person uses a firearm during a federal crime of violence, resulting in death.[22]

In terms of electoral influence, the status of the death penalty is ambiguous. It is one thing for journalists, scholars, and commentators to oppose the death penalty; it is quite another for a politician to do so, particularly at the national level. It still is not clear that the death penalty will be a major, or even a minor, issue in the 2016 national elections. It has not figured prominently in recent ones, at least as a national issue. But with so much focus on criminal justice issues, and with these high-profile cases of mass killing and related capital punishment decisions now commanding public attention, it is not unreasonable to think that capital punishment could creep into the national electoral universe in the coming months and years.[23] Historically, few politicians could go wrong supporting the death penalty. Now, one cannot be so sure. Current political sensitivities seem to suggest that opposition to – or at least criticism of – capital

[20] 18 U.S.C. § 249(a)(1)(B)(i).
[21] 18 U.S.C. § 247(d)(1).
[22] 18 U.S.C. §§ 924(c), (j).
[23] For commentary on this, see, e.g., Scott Lemieux, *How a President Hillary Clinton could help end the death penalty*, TheWeek.com, http://theweek.com/articles/565073/how-president-hillary-clinton-could-help-end-death-penalty (posted July 8, 2015) (suggesting that Hillary Clinton could appoint justices to the Supreme Court who would find the death penalty unconstitutional, whereas some Republican candidates could appoint justices who would expand the death penalty).

punishment is in fashion, even among some conservatives[24] (though one would think that doing what is fashionable in politics would be antithetical to conservatism). In a world where harsh criminal sentences are under attack, and in which support for capital punishment is often publicly portrayed as bizarre or ignorant or perverse, how, if at all, is a responsible and prudent political leader supposed to discuss and defend capital punishment? More specifically, in the current political environment, can we now justify seeking the death penalty for brutal mass killings?

This short commentary examines the relationship between the federal hate crimes prevention law and capital punishment. It places that relationship in the context of modern criminal justice reform rhetoric and uses the Roof prosecution as a starting point for evaluating the enforcement of capital punishment with respect to a limited category of highly aggravated hate crimes resulting in death.

II. HATE CRIMES LEGISLATION AND THE DEATH PENALTY "POISON PILL"

Congress passed, and President Obama signed into law, the Hate Crimes Prevention Act in 2009, now codified at section 249 of Title 18.[25] Although

[24] *See, e.g.*, Will, *supra* note 6 (describing the conservative case against the death penalty). There is also a website dedicated to this movement. *See* Conservatives Concerned About the Death Penalty, *available at* http://conservativesconcerned.org/what-conservatives-are-saying/ (listing statements by prominent political figures on the Right questioning the death penalty).

[25] Written both before and after passage of the bill, a substantial body of scholarship and commentary exists on hate crimes laws, much of which debates the wisdom and constitutionality of such legislation. *See, e.g.*, JAMES B. JACOBS & KIMBERLY POTTER: HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS (1998); FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (1999); John S. Baker, United States v. Morrison *and Other Arguments Against "Hate Crimes Legislation*, 80 B.U. L. REV. 1191 (2000); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement*?, 80 B.U. L. REV. 1227 (2000); Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863 (2012); Matthew Trout, *Federalizing Hate: Constitutional and Practical Limitations to the*

versions of it had been pending in the Congress for years, Congress approved the ultimately enacted law as part of the 2010 defense appropriations legislation.[26] The law fills gaps created by an existing federal criminal statute that also punishes bias-motivated conduct, but that is limited to situations where the victims were engaged in certain enumerated federally protected activities.[27] Unlike the federally protected activities statute – section 245 – the hate crimes prevention statute does not limit the class of victims in such a way, and eliminates the double-intent requirement of the federally protected activities law.[28] This new Hate Crimes Prevention Act was named for Matthew Shepard and James Byrd, whose deaths had become iconic symbols of the extreme violence that can sometimes attend personal hatred. Shepard, a student at the University of Wyoming, was beaten, tortured, tied to a fence, and left to die in rural Laramie, Wyoming in 1998.[29] Byrd was abducted in Jasper, Texas by three men who tied him to a pick-up truck and dragged him for nearly three miles, severing multiple body parts, including his head.[30]

The Shepard-Byrd law makes it a distinct federal crime to willfully cause, or attempt to cause, bodily injury through the use of fire, firearm, dangerous

---

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 52 AM. CRIM. L. REV. 131 (2015). While I find this debate fascinating and important, I do not repeat it here. Rather, I take the existing law as I find it (enacted, enforceable, and constitutional), and ask whether and to what extent the federal death penalty should apply for certain violations.

[26] *See* Pub. L. 111-84, Div. E., 123 Stat.2835 (2009), *codified in relevant part at* 18 U.S.C. § 249.

[27] *See* 18 U.S.C. § 245(b)(2).

[28] *Id.* (requiring proof that the actor "willfully" injures, intimidates, or interferes with a protected person "because of" the person's race, color, religion, or national origin, and "because of " the person's participation in the federally protected activity.).

[29] For additional facts and the resolution of the trial, see James Brooke, *Gay Murder Trial Ends With Guilty Plea*, N.Y. TIMES, *available at* http://www.nytimes.com/1999/04/06/us/gay-murder-trial-ends-with-guilty-plea.html (posted April 6, 1999).

[30] *See* State v. King, 29 S.W.3d 556 (Tex. Crim. App. 2000).

weapon, or explosive or incendiary device "because of the actual or perceived race, color, religion, or national origin of any person."[31] The same conduct is unlawful where it is done "because of the actual or perceived "religion, national origin, gender, sexual orientation, gender identity, or disability of any person,"[32] where the conduct bears a statutorily defined connection to interstate commerce.[33] Congress relied upon the Commerce Clause (and Section 5 of the Fourteenth Amendment, where the conduct amounts to state action) for its authority to enact the latter provision, but relied upon Section 2 of the Thirteenth Amendment to enact the former provision,[34] thus dispensing with the need for a connection to interstate commerce. Under either provision, the maximum punishment is ten years in prison,[35] though if death results or the offense includes kidnapping, aggravated sexual abuse, or an attempt to kill, the maximum punishment is life in prison.[36]

The absence of a death penalty provision in the statute was no accident or oversight. The original House version of the bill, which passed in April of 2009, did not contain a death penalty provision.[37] During the Senate's consideration of the bill, Senator Jeff Sessions of Alabama offered an amendment that would have included a death penalty.[38] Senator Sessions remarked at the time that "[i]t would

---

[31] 18 U.S.C. § 249(a)(1).
[32] *Id.* § 249 (a)(2)(A).
[33] *Id.* § 249(a)(2)(B).
[34] *See* United States v. Cannon, 750 F.3d 492, 497-98 (5th Cir. 2014) (explaining constitutional bases for the statute).
[35] 18 U.S.C. §§ 249(a)(1) (A) & (a)(2)(A)(i).
[36] *Id.* § 249(a)(1)(B) & (a)(2)(A)(ii).
[37] *See* H.R. 1913, 111th Cong. (2009).

[38] *See* 155 CONG. REC. S7683 (2009) (considering Amendment No. 1615 as modified). The Amendment provided that the defendant "shall be subject to the penalty of death in accordance with chapter 228 (if death results from the offense), if – (i) death results from the offense, or (ii)

be odd that it would not be possible (to seek the death penalty) and a crime could have resulted – easily in multiple murders – by one of the most vicious criminals one can imagine."[39] The Sessions amendment passed the Senate, along with a series of other amendments, including an amendment offered by Senator Ted Kennedy of Massachusetts that would have established specific standards for seeking the death penalty in a hate crimes case.[40] Although Senator Kennedy opposed the inclusion of a death penalty, he sought to ensure that if the death penalty provision remained, it would have been subjected to exacting scrutiny by the Justice Department and federal courts.[41]

The mere passage of any death penalty provision may seem strange today when we consider that Democrats, a substantial number of whom personally opposed capital punishment, formed an overwhelming majority in the Senate and should have been able to block the amendment. Interest groups who favored the legislation immediately attacked the death penalty provision as a poison pill and urged the Congress to ultimately reject it.[42] One prevalent theory was that the

---

the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill." *Id.*

[39] *Id.* at S7686 (statement of Sen. Sessions).

[40] *See id.* The Kennedy Amendment (Amendment No. 1614) would have required the Attorney General to certify that the defendant was among the "worst of the worst," as Senator Kennedy described it, and would have required federal courts to conduct proportionality review to make sure that the case was like other cases where the federal government had sought and received the death penalty more than half of the time. *Id.*

[41] *See id.* at S7684 (statement of Sen. Kennedy) (stating that "this amendment adds appropriate safeguards in cases where the federal government seeks the ultimate – and irreversible – penalty of death," and that the amendment's "requirements are a significant improvement over existing federal practice in death penalty cases.").

[42] *See* Advocacy Letter to the United States Senate from the Leadership Conference on Civil Rights, et al., Oppose the Sessions Amendments to the Matthew Shepard Hate Crimes Prevention Act, July 20, 2009; Letter to the United States Senate from American Civil Liberties Union, ACLU Urges NO Vote on SA 1615 – Sessions Death Penalty Amendment to Hate Crimes Amendment in Defense Authorization Bill (S. 1390); Sessions Amendment is Unconstitutional, July 20, 2009.

amendment was inserted by opponents of the bill with the full knowledge that supporters of the legislation would not vote in favor of it as long as it provided for the death penalty.[43] Adding capital punishment to the list of permissible sentences would therefore effectively kill the bill. These groups, and other Senators, further attacked the substance of the Sessions amendment, saying that it expanded the federal death penalty and was inconsistent with a commitment to civil rights.[44] It is not unreasonable to think, though, that perhaps Senate Majority Leader Harry Reid of Nevada allowed the various amendments to be included because he wanted to ensure that the legislation would proceed in the defense appropriations bill, knowing that a conference committee ultimately could wipe the final bill clean of any amendments that were too controversial.

Sure enough, when the bill reached the House-Senate conference committee, the death penalty provision was removed and the final version of the bill provided that life in prison would be the most severe punishment available.[45]

On the one hand, the Roof indictment proves why the Shepard-Byrd Act does not require a death penalty provision in order for the federal government to pursue the death penalty in a case involving a hate crime.

Where the defendant commits the bias-motivated murder with a firearm, the underlying bias-motivated violence serves as the predicate for the gun enhancement. The defendant uses the firearm during and in relation to a federal

---

[43] *See* Editorial, *A deadly amendment to the hate-crimes bill*, L.A. TIMES, *available at* http://articles.latimes.com/2009/aug/07/opinion/ed-hate7 (posted Aug. 7, 2009).

[44] *See* 155 CONG. REC. S7695 (2009) (statement of Sen. Leahy); ACLU Letter, *supra* note 42; Press Release, *Senate Adopts Death Penalty Amendment to Hate Crimes Provision: Expansion of Federal Death Penalty Counter to Furthering Civil Rights, Says ACLU*, American Civil Liberties Union, July 21, 2009.

[45] *See* H.R. CONF. REP. 111-288, at 1002 (2009).

"crime of violence,"[46] which is the hate crime. Ironically, then, although opponents of the Sessions Amendment (and the death penalty more generally) opposed using the death penalty for a hate crime, that is the practical effect of seeking the death penalty under the section 924(c) and (j) enhancements where the hate crime serves as the violent crime predicate. Moreover, the conduct that the statute prohibits is sufficiently narrow (requiring "fire, firearm, dangerous weapon, or explosive or incendiary device") that anyone engaged in the kind of conduct that would implicate the hate crimes law would also very often implicate another federal law targeting such conduct that *does* provide for capital punishment – such as section 924(c) or section 844(d) or (i), which permits capital punishment where death results from certain conduct related to fire, explosives and incendiary devices.[47] The federal prosecution of Roof, should it go forward, is therefore an effort to vindicate not just the federal interest in punishing bias-motivated conduct, but also the federal interest in punishing gun violence.

But the Sessions Amendment need not be thought of as a mere poison pill. There was an underlying good faith basis for including a death penalty provision in the Shepard-Byrd bill, one that still exists.

What if the perpetrator of a hate crime, for example, does not use a firearm? What if, instead, the hate crime perpetrator stabs his victims to death, attacks them with a machete, or beats them to death with a baseball bat, out of pure animus? Under those circumstances, the firearm enhancements under sections 924(c) and (j) would not apply. And although the government could,

[46] *See* 18 U.S.C. § 924(c).
[47] *See* 18 U.S.C. §§ 844(d), (i).

under some circumstances, seek the death penalty using the religious obstruction statute (which is alleged in the Roof indictment, because the alleged crime took place in a church Bible study),[48] that statute (unlike section 249(a)), requires proof that the conduct occurred in or affected interstate commerce.[49] It is as yet unclear what the federal government's interstate commerce theory is with respect to Roof, but it is not hard to imagine a case in which the interstate commerce element would be very difficult to prove, even if the animus was comparatively easy to prove. And the Roof case just happens to be a case in which the alleged racial animus and obstruction of religious exercise overlap; that will not always, or even often, be the case. What if the conduct does not occur in a church, but in a private home or on the street? Of course, the Shepard-Byrd law also requires that the weapon be a "dangerous weapon," and perhaps there is some question as to whether a weapon that is not a firearm or explosive would satisfy that element of the statute in the first place. But assuming that it did, and no other federal capital offense applied, the federal government would be without a death penalty option, even if the perpetrator committed a highly aggravated killing that would otherwise implicate the federal death penalty.

Also, contrary to the claims made by groups like the ACLU during consideration of the Sessions Amendment, allowing a capital punishment option is entirely consistent with federal criminal law in the area of civil rights. Almost every one of the major civil rights deprivation statutes in Title 18 that address violent conduct provides for the death penalty. Sections 241 (conspiracy against

[48] *See* Indictment, *supra* note 18, at 6-7.
[49] *See* 18 U.S.C. § 247(d).

rights), 242 (deprivation of rights under color of law), 245 (federally protected activities) and 247 (interference with religious exercise) all provide for the possibility of capital punishment where death results from the underlying conduct.[50] Amending Section 249 to include a death penalty provision would therefore bring it into line with these other civil rights laws. So when civil rights advocacy groups opposed the Sessions amendment in 2009 by saying that it was inconsistent with a commitment to civil rights,[51] that may have been true with respect to the particular viewpoints of those groups, but it was not true with respect to the federal criminal laws protecting civil rights, as those laws overwhelmingly favor the option of a death penalty. And because the hate crimes statute is existing law, amending the legislation now to include a death penalty provision would not serve as a poison pill the way the Sessions Amendment arguably did in 2009.

Consider, moreover, the James Byrd case. Although the State of Texas, and not the federal government, prosecuted the case, it is instructive for purposes of the death penalty debate. Two of Byrd's assailants – Brewer and King – received well-deserved death sentences.[52] Yet the three men who kidnapped Byrd

---

[50] *See* 18 U.S.C. § 241; *Id.* § 242; *Id.* § 245(b); *Id.* § 247(d)(1). Among the statutes in Chapter 13 of Title 18 that deal with violent conduct, only 18 U.S.C. § 248 – which protects freedom of access to reproductive clinics – does not have a death penalty provision (other than section 249). These civil rights statutes also provide for the death penalty in cases kidnapping and aggravated sexual abuse, without a resulting death, but those death penalty provisions would be invalid under *Kennedy v. Louisiana*, 554 U.S. 407 (2008). Notice, *supra* note 42, that the Sessions Amendment would have applied to these situations *only* where death results. And in any event, the Federal Death Penalty Act requires that a death result from the conduct except where the crime is treason or espionage or certain drug kingpin activity. *See* 18 U.S.C. §§ 3591(a) & (b).

[51] *See, e.g.*, ACLU Press Release, *supra* note 44.

[52] Lawrence Russell Brewer was executed in 2011; John William King awaits execution on Texas's death row; Shawn Berry was sentenced to life in prison. *See* Associated Press, *White Supremacist Gang Member Executed for Dragging Texas Man*, FoxNews.com,

and dragged his body to the point of decapitation never used a firearm, nor did they interfere with or obstruct Byrd's free exercise of religion nor did they interfere with or intimidate Byrd with respect to the exercise of any federally protected activity. So while it was obviously unnecessary for the federal government to act in order to obtain a death sentence for Byrd's killers, the same would be true with respect to Roof or any other defendant who commits his offense in a death penalty jurisdiction and is otherwise death-eligible under state law. And yet if the federal government's argument for pursuing Roof is that it must vindicate its interest in punishing violence based on racial animus, the same would have been true with respect to Byrd, as his killers were prosecuted pursuant to Texas capital murder law and not a law directed specifically at punishing racial animus.

Still, even if Congress lacks the will to amend section 249 to include a death penalty provision to cover a limited universe of violent hate-motivated killings that fall outside of the scope of other federal capital offenses, another option exists. Congress could at least amend section 3592(b)'s list of statutory aggravating factors to include killings based on the types of animus described in the hate crimes statute. Other jurisdictions have enacted similar aggravators in their capital murder laws.[53] Even now, the government could theoretically allege racial animus as a non-statutory aggravating factor. But non-statutory aggravators

---

http://www.foxnews.com/us/2011/09/21/white-supremacist-gang-member-executed-for-dragging-texas-man/ (posted Sept. 21, 2011).

[53] *See* CAL. PENAL CODE § 190.2(a)(16); COLO. REV. STAT. § 18-1.3-1201(5)(n); NEV. REV. STAT. § 200.033(11).

are not eligibility factors.[54] Adding a provision for killings that are the product of animus based on race, religion, national origin, gender, disability, or sexual orientation would enable the government to use such animus not just as a ground for aggravating the crime, but also as a ground for making the defendant death-eligible. And by making it a statutory aggravating factor that is different from other aggravators related to the commission of the offense, such a change would further serve to strengthen the government's stated interest in punishing animus-based violence by giving animus its own distinct place among aggravators. Moreover, adding the Shepard-Byrd list of punishable animus would be consistent with the Federal Death Penalty's Act's scheme of aggravation in general, as it includes other statutory aggravators that specifically relate to the motivations of the defendant (such as committing the killing for payment or with the expectation of receiving some other pecuniary gain).[55]

Of course, even having a federal death penalty available – whether as a part of the Shepard-Byrd Act or simply by using other capital offense statutes – does not mean that the federal government must seek the death penalty, even in a highly aggravated case. As the Roof case could demonstrate, the willingness of states to prosecute – and perhaps seek the death penalty – under their own laws functions as a limit on federal power generally, and on its capital prosecution power specifically. The Justice Department's *Petite* Policy requires the federal government to forego prosecution if the parallel state prosecution would leave the

[54] *See* Zant v. Stephens, 462 U.S. 862, 878 (1983). *See also* United States v. Fields, 483 F.3d 313, 325 (5th Cir. 2007) (holding that under federal law, non-statutory aggravators cannot be used to determine eligibility).
[55] *See* 18 U.S.C. §§ 3592(c)(7), (8).

federal interest "demonstrably unvindicated."[56] The Shepard-Byrd Act even codifies to a substantial extent the Department's underlying policy.[57] There is some chance that the federal government will form an agreement with South Carolina that the United States will be first to prosecute the case, thus avoiding serious *Petite* questions (as happened in the Tsarnaev prosecution). But in cases where parallel state and federal prosecutions are contemplated, the federal government should not consider its interests "unvindicated" merely because the state law basis for prosecution is different from the federal law basis. For example, in Roof's case, would the federal interest be left unvindicated merely because South Carolina uses capital murder law rather than a bias-motivated violence prohibition? That, of course, would be the basis for pursuing a federal punishment even if South Carolina prosecutes, convicts, and punishes Roof.[58] But the relevant inquiry should be whether the underlying state prosecution results in just and appropriate punishment for the conduct that is relevant to the federal interest, not whether the State uses a statutory scheme similar to that of the federal government. This also means, however, that in the event that a state prosecution did not result in a death sentence, a federal capital prosecution would still be appropriate because the non-capital sentence would not demonstrably vindicate the federal interest. This is why a federal capital prosecution in the Tsarnaev case would have been appropriate in any event: because Massachusetts could not impose the death penalty upon Tsarnaev. So whether the State proceeds

[56] *See* United States Attorneys Manual 9-2.031.A.
[57] *See* 18 U.S.C. § 249(b)(1).
[58] The aforementioned certification provision of the Shepard-Byrd Act specifically states that the particular interest left "demonstrably unvindicated" is the federal interest in "eradicating bias-motivated violence." *Id.*

under its own laws, and whether it seeks the death penalty, will be additional factors that constrain federal decision-making.

III. DEFENDING A LIMITED AND EFFECTIVE DEATH PENALTY IN A SEASON OF DOUBT

Of course, a more fundamental objection to my modest proposal may be this: why expand the scope of the federal death penalty at a time when the death penalty is, according to many, becoming increasingly unpopular and, if Justice Breyer's *Glossip* dissent is to be believed, is of dubious constitutionality? The answer is that the premises of this objection are highly questionable, if not entirely wrong, and should not deter the enforcement of a constitutionally permissible and limited, yet effective, death penalty. After all, criminal justice reform need not be exclusively about protecting the interests of defendants and prisoners. And my proposal would hardly work a meaningful expansion of the federal death penalty – it could be used only in a limited category of especially aggravated cases where personal animus motivated a killing.

So despite the persistent narrative claiming the death penalty's decline in popularity as well as its questionable wisdom and constitutional validity, let me suggest a contrary narrative. The current naysayers notwithstanding, the prudent politician – not callous or bloodthirsty, but motivated by a sense of justice, proportionality, and equilibrium in the social order – has a sensible defense of capital punishment. In especially serious and aggravated cases, where evidence of guilt is strong and the defendant has acted with no justification or excuse, the death penalty should at least be available as an option for criminal juries. This does not mean mandatory death penalties or even that prosecutors should seek

death for many, or most, murders. It means simply that, on atypical occasions, a set of facts may occur that show a crime so aggravated, so brutal or harmful, with guilt so clear and mitigation so minimal, that a sentence of less than death may not be fitting for the crime and only the death penalty can serve as appropriate moral desert. Under those circumstances, a fair and impartial jury – comprised of citizens who are capable of, but not predisposed to, imposing the death penalty – should at least have the option of doing so.

Moreover, the mere imposition of capital punishment does not offend the Constitution, the text of which explicitly recognizes the existence of capital punishment and sets forth the procedures for inflicting it.[59] Others have adequately answered the constitutional questions that Justice Breyer raises in his *Glossip* dissent.[60] Justices Scalia and Thomas, in particular, separately offered compelling explanations in *Glossip* for why the death penalty remains constitutionally permissible and why, moreover, it is not the Court's place to advocate its abolition.[61] I cannot improve upon these other constitutional defenses of the death penalty. I merely offer the following observations, which amplify certain points raised in the Scalia and Thomas concurrences. First, to establish that the death penalty is *per se* unconstitutional, one must bear the burden of establishing that there are *no* cases – no set of facts, no matter how

[59] *See* U.S. CONST. AMEND V (referring to any "capital or otherwise infamous crime" and to the rule that no person "shall be deprived of life, liberty, or property without due process of law"). I do not suggest that the mere contemplation of the death penalty in the constitutional text is sufficient for upholding its infliction in all cases. Rather, its place in the text is a critical factor is determining whether it is constitutionally appropriate in *any* case.

[60] *See* Baude, *supra* note 10. *See also* Baze v. Rees, 553 U.S. 35, 87 (2008) (Scalia, J., concurring in the judgment) (explaining death penalty's constitutionality, in response to Justice Stevens).

[61] *See Glossip*, 135 S. Ct. at 2746 (Scalia, J., concurring); *id.* at 2750 (Thomas, J., concurring).

brutal, heinous, or aggravated; and no evidence, no matter how overwhelming in demonstrating the defendant's guilt – for which a sentencer should *ever* have *even the option* of considering a death sentence. It is difficult, to the point of nearly impossible, to imagine that the Constitution takes *that* position. And second, if we are to consider whether the Constitution takes *that* position, then we must also consider whether the American people hold such a view. I am confident that they do not, and will not in the foreseeable future.

The second point requires some additional clarification. I have never been particularly fond of using public opinion polling, or other mass summaries of public sentiment, as a sufficient justification for advocating or opposing any specific public policy. Political leaders should seek not to vindicate public sentiment for its own sake, but to refine it, and then perhaps vindicate it or reject it, through sound reasoning and good judgment.[62] Sometimes public opinion polling will be a useful guide on a particular issue. But sometimes polling cannot reasonably be expected to capture the nuance and complexity of a given matter, even where respondents are sincere in their belief that they are offering appropriate guidance through their answers. And sometimes the poll itself is simply useless. Nonetheless, in a world in which the death penalty is routinely described as anathema to contemporary values, and where Eighth Amendment jurisprudence by its own terms seeks to discern those values in determining the

[62] Recall Madison's observation in *Federalist No. 10* that representatives in a republic should "refine and enlarge the public view." *See* THE FEDERALIST NO. 10, at 50 (Clinton Rossiter, ed. 1964) (James Madison).

validity of a particular sentencing practice,[63] I reluctantly confess that public opinion polling on the death penalty has its (limited) place. This is especially so if we are to question whether it remains consistent with contemporary standards of morality, which is the relevant question for purposes of determining its constitutionality *per se*. And a quick, admittedly unscientific, review of recent polling suggests that the death penalty remains popular nationwide,[64] even if unpopular in certain locales.

Moreover, the public opinion polling may actually *understate* popular support for the death penalty in a given case. The Gallup and Pew polls are good examples of why this may be so. The question is whether the respondent was in favor of or opposed to the death penalty "for a person convicted of murder."[65] But, of course, that question does not reflect the reality of capital punishment law – no jurisdiction imposes the death penalty for all murder *simpliciter*, nor should it – nor does it give the respondent any facts upon which to make a moral judgment about the propriety of the death penalty for the particular offense and offender, as opposed to another punishment, such as life without parole. Even so, less than half of respondents in the Gallup Poll chose life without parole when

---

[63] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion) ("we look to objective indicia that reflect the public attitude toward a given sanction.").

[64] According to Gallup, 60% of respondents in May 2015 said that the death penalty was morally acceptable, and in October 2014, 63% said they favored the death penalty "for a person convicted of murder." Gallup Poll on the Death Penalty, *available at* http://www.gallup.com/poll/1606/death-penalty.aspx. The Pew Research Center's national polling from April 2015 shows support for the death penalty at 56%, compared to 38% opposed. *See Less Support for Death Penalty, Especially Among Democrats*, Pew Research Center, *available at* http://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/ (posted April 16, 2015). Again, the question was whether the respondent favored or opposed the death penalty "for persons convicted of murder." *Id.*

[65] *Id.*; Pew Poll April 2016, *supra* note 64.

given the choice, while half chose the death penalty.[66] Imagine, though, the outcome of the polling if it presented the question the way that capital decision-makers must face it. Polls about specific cases (like Tsarnaev or Holmes) get us closer to this kind of more meaningful inquiry. Consider also, for example, what the response might be if respondents were told that, regardless of the facts, regardless of the brutality of the crime or the number of victims, and regardless of the strength of the evidence against the defendant that proves his or her guilt beyond a reasonable doubt, under no circumstances should a person ever receive the death penalty for aggravated murder. I doubt that the responses to such a variation would decrease the death penalty's favorability. Whatever legitimate reservations the public may have about innocence, mistake, or even the sometimes ugly business of executions, the public also likely understands that so long as there are people who are willing to intentionally set off bombs at major sporting events, kill mass numbers of children in schools or movie-goers in a theatre, kill police officers in the line of duty, or kill while serving in prison (including while serving life sentences)[67] or kill entire groups of people out of sheer racial hatred – capital punishment should remain at least available as a sentencing option in these narrow circumstances, despite the risks it may present. Perhaps what the polling should seek to establish, then, is whether Americans

[66] *See* Gallup Poll, *supra* note 64.

[67] It is said that this is rare. *See* Equal Justice USA, Fact Sheet, Executions and Prison Safety?, *available at* http://ejusa.org/learn/prison%20killings (last visited July 15, 2015) (stating that "prison murder overall is extremely rare"). Perhaps so. But the question, as with other questions of just punishment, is not whether the act is rare or frequent. Nor is the question whether the death penalty is a deterrent to prison killings, or whether inmates serving life have incentives to behave well in prison. The question is how, when the act occurs, the actor should be punished. Without a death penalty, a prisoner serving life without parole cannot, as a practical matter, receive an effective punishment if he or she kills in prison.

favor a limited and effective death penalty, one in which prosecutors and jurors reserve death penalty decisions only for a small category of highly aggravated cases and where there is a reasonable degree of certainty that the sentence will be finalized if it is imposed.[68]

One might, however, note that the trends are what matters, and support for capital punishment is trending downward.[69] But even if we assumed that the death penalty was decreasingly popular, the trends in public sentiment do not spell its doom. After all, according to Gallup, even though the death penalty's popularity was at its height during the 1990s, it had climbed there – to 80% in September 1994 – from numbers below 50% in the 1960s and 1970s.[70] So even if one accepts the debatable narrative that the polling demonstrates that the death penalty is declining in popularity, so much so that the American people are turning their backs on it, one must remember that the death penalty has been far less popular than it is now, only to substantially increase in popularity again over time.

Of course, trends remain important in any conversation about the stability of public sentiment. And trending now is a conservative movement to question the death penalty. No offense to my friends on the political Left, but more Liberal

---

[68] Of course, enforcing a truly limited death penalty means entrusting capital prosecutors with discretion in doing so. Justice Breyer rightly notes that prosecutorial discretion can sometimes create risks that the death penalty will be sought in cases for which it is arguably not appropriate, or, conversely, that it may not be sought by some prosecutors when prosecutors in another jurisdiction would seek it. *See Glossip*, 135 S. Ct. at 2763-64 (Breyer, J., dissenting). That is a matter for another essay, perhaps, but it is sufficient here to note that, despite concerns about the scope of prosecutorial discretion in our system, there are ways to impose rational constraints on prosecutors in potential capital cases. And in any event, such discretion among prosecutors is hardly adequate for announcing a blanket rule that *no* prosecutor may *ever* seek the death penalty.

[69] *See* Gallup Poll, *supra* note 64.

[70] *Id.*

angst about capital punishment is unlikely to move the needle. The biggest political threat to the death penalty, rather, comes from the Right. Increasingly, conservatives – a once reliable group in favor of capital punishment – are rethinking their support.[71] But the "conservative" case against the death penalty is no stronger than the traditional "Liberal" one. Indeed, it is much the same, though it is cloaked in the rhetoric of limited (or a kind of libertarian skepticism of) government.

The "conservative case" has perhaps its strongest and most credible voice in George Will. In recent commentary, Will posits that the "conservative case" against capital punishment has three main components.[72] First, "the power to inflict death cloaks the government with a majesty and pretense of infallibility discordant with conservatism."[73] Second, he argues, "when capital punishment is inflicted, it cannot later be corrected because of new evidence, so a capital punishment regime must be administered with extraordinary competence."[74] But, Will says, capital punishment is yet another government program, and the practice of imposing capital punishment has been demonstrably incompetent because more than 140 people since 1973 have been released from death row.[75] And third, "administration of death sentences is so sporadic and protracted that their power to deter is attenuated."[76] To exacerbate this problem, Will notes, judicial

---

[71] *See* Leon Neyfakh, *The conservative case against the death penalty*, BOSTON GLOBE, *available at* https://www.bostonglobe.com/ideas/2014/05/24/the-conservative-case-against-death-penalty/6NsOMqKbpJeIVMlynelCIM/story.html (posted May 25, 2014).
[72] *See* Will, *supra* note 6.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

regulation of the death penalty is "here to stay."[77] Will's eloquence is always appealing, and few would question his conservative *bone fides*. Will, then, is a force with which to be reckoned on this matter. But Bill Otis has properly reckoned with Will's commentary.[78] I will not repeat all of Otis's excellent rejoinder, except to recommend it. Rather, I offer a few additional observations (many of which may fall under the general heading of "what's so great about life without parole?").

First, the power to inflict death does not "cloak the government with a majesty and pretense of infallibility" any more than does the power to inflict life sentences without parole, or life sentences with parole, or, indeed, the power to prosecute in the first place. Will does not explain why seeking and imposing death sentences suddenly turns the government into something that it is not when it engages in any other prosecutorial or sentencing practice. Second, there is no question that the potential risk of executing an innocent person weighs heavily against the infliction of the death penalty in the first instance. In this sense, Will therefore conveys a meaningful concern, and one that capital punishment supporters ought to take seriously, though one that hardly belongs exclusively to conservatism. Rather, Will makes the concern about innocence the province of conservatism by tying it to broader concerns about the competence of government.[79] Yet Will offers no insight as to the proper punishment for a person

---

[77] *Id.*

[78] *See* Bill Otis, *George Will's Limp Case Against the Death Penalty*, Crime & Consequences Blog, *available at* http://www.crimeandconsequences.com/crimblog/2015/05/george-wills-limp-case-against.html (posted May 21, 2015).

[79] *Cf.* Kansas v. Marsh, 548 U.S. 163, 186 (2006) (Scalia, J., concurring) (responding to claims about innocence and the death penalty).

– like, for example, Tsarnaev or Holmes or Timothy McVeigh – whose guilt is not in question. Nor does he make clear why the highest level of government competence would not also be desirable in other areas where agents of the state are permitted to kill (in war, or where a law enforcement agent kills in self-defense), or even when inflicting life without parole or some other severe sentence in the absence of a capital punishment regime.[80] Finally, Will's third point relies entirely upon deterrence as *the* penological justification for capital punishment. It is unclear what is distinctly conservative about preferring deterrence theory, as opposed to theories of retribution or incapacitation. But even if it could be demonstrated beyond rational argument that the death penalty does not deter (and that has not yet happened, as Otis's response makes clear),[81] the penological goals of retribution and incapacitation could justify the continued use of capital punishment.[82]

---

[80] Will seems to be saying that the risk of an innocent person dying at the hands of the state requires a kind of competence that a government program like capital punishment cannot offer. But again, why is capital punishment unique in this sense? Fallibility exists throughout the system – including among those who operate prisons – and as cases like that of Timothy Cole case show, the risks to *innocent* life are not necessarily unique to capital sentencing. *See Texan who died in prison cleared of rape conviction*, CNN.com, http://www.cnn.com/2009/CRIME/02/06/texas.exoneration/ (posted Feb. 6, 2009). Cole was sentenced to twenty-five years in prison for a 1985 rape in Lubbock, Texas. He died in prison in 1999, of heart complications caused by asthma. In 2009, his conviction was formally reversed when it was learned that DNA evidence established his innocence and another man, Jerry Johnson, confessed to the rape for which Cole was convicted. Even if Cole was not formally executed, he nonetheless died at the hands of the state, in a prison where the state wrongfully placed him upon conviction. Cole later received a posthumous pardon by Texas Governor Rick Perry.

[81] *See* Otis, *supra* note 78.

[82] *See Gregg*, 428 U.S. at 183. For a conservative's affirmation of this conclusion, see Baze v. Rees, 553 U.S. 35, 90 (2008) (Scalia, J., concurring in the judgment). Even if we assume *arguendo* that Will would favor a regime of life or life without parole, what would he say about the power of *those* sentences to deter? If Tsarnaev's horrific crime was "especially difficult to deter," as Will says, then surely that would be true even if he faced only life without parole and not the death penalty (indeed, that is precisely what he will face under state law if Massachusetts prosecutors make good on their promise to prosecute him).

I suppose conservative abolitionists may be successful in selling some of their arguments – including the arguments about budgets and costs, which Will does not make, though other conservatives have).[83] And yet none of them appear to examine the costs of alternatives like life without parole, or even life with parole, in a system without capital punishment – after all, once cost is framed as a reason for abolition, the question is not how much the death penalty costs compared to life in prison; the question is how much life in prison costs compared to the other, less severe alternatives. But now that a greater light appears to be shining upon life without parole sentences – which used to be distinguished solely on the ground that "death is different," a notion that is disintegrating[84] – conservatives who want to sell opposition to the death penalty must be prepared to play by the same rules in selling the alternative of life without parole.

Of course, to the extent that Will questions the effectiveness of the death penalty because its administration is "sporadic and protracted,"[85] Will is correct. But this is not an argument against capital punishment; it is an argument against having a death penalty without any intention of actually bringing it to finality.

The abolitionist effort to kill capital punishment through discrete litigation victories has, of course, failed to achieve actual abolition, but has worked to

---

[83] *See, e.g.*, S.E. Cupp, *The conservative case against the death penalty*, N.Y. DAILY NEWS, *available at* http://www.nydailynews.com/opinion/conservative-case-death-penalty-article-1.1781639 (posted May 6, 2014) (stating that the death penalty is not cost-effective); Mary Kate Cary, *The Conservative Case Against the Death Penalty*, USNews.com, http://www.usnews.com/opinion/articles/2011/03/30/the-conservative-case-against-the-death-penalty (posted March 30, 2011) (listing various death penalty costs and asking whether the money could be better spent).

[84] *See* Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012). Both of these decisions began incorporating into non-capital cases involving life without parole an Eighth Amendment methodology previously reserved only for death penalty cases. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009).

[85] *See* Will, *supra* note 6.

substantially limit the government's ability to use capital punishment by imposing greater constitutional restrictions upon it.[86] With respect to executions (as opposed to substantive death penalty law and capital trial procedures), the litigation strategy has failed rather spectacularly, including most recently in *Glossip*, which expressly declined to question the validity of the Court's prior decisions on execution methods.[87] As the *Glossip* Court noted, the state must have a constitutionally acceptable way of carrying out a lawfully imposed criminal sentence,[88] whether that is the death penalty or something else. And as several states have shown, the effort to kill the death penalty through drug unavailability will likely backfire, for where there is a political will to impose the death penalty, the state will find a way to carry out the sentence.[89] So it is not constitutional litigation that poses the most serious contemporary threat to a state's chosen method of execution. Rather, it is will, or the absence thereof. Death penalty jurisdictions cannot simultaneously champion the constitutional

---

[86] *See* J. Richard Broughton, *The Second Death of Capital Punishment*, 58 FLA. L. REV. 639, 642-43 (2006).

[87] *See Glossip*, 135 S. Ct. at 2732-33. *See also* Wilkerson v. Utah, 99 U.S. 130 (1879) (upholding firing squad); In re Kemmler, 136 U.S. 436 (1890) (upholding electrocution); Baze v. Rees, 553 U.S. 35 (2008) (upholding three-drug lethal injection protocol).

[88] *Glossip*, 135 S. Ct. at 2732-33 (quoting *Baze*, 553 U.S. at 47).

[89] Oklahoma (its use of midazolam was at issue in *Glossip*), for example, has already moved to implement the use of nitrogen gas as an alternative method of execution. *See* Josh Sanburn, *The Dawn of a New Form of Capital Punishment*, Time.com, http://time.com/3749879/nitrogen-gas-execution-oklahoma-lethal-injection/ (updated posting April 17, 2015). And though not universally popular even among death penalty supporters, other states have given serious consideration to the firing squad as an alternative method (Utah approved it as an alternate method earlier in 2015) *See* Mark Berman, *Utah governor signs bill making firing squads the state's backup execution option*, WashingtonPost.com, http://www.washingtonpost.com/news/post-nation/wp/2015/03/23/utah-governor-signs-bill-making-firing-squads-the-states-backup-execution-option/ (posted March 23, 2015); Mark Berman & Robert Barnes, *Everything you need to know about executions in the United States*, WashingtonPost.com, http://www.washingtonpost.com/news/post-nation/wp/2014/05/01/everything-you-need-to-know-about-executions-in-the-united-states/ (posted May 1, 2014).

validity of modern execution methods while also permitting, actively or passively, interminable delays in carrying out death sentences.

This, and the defeat of the theory advanced by the challengers in *Glossip*, should be a lesson for states that have repeatedly refused to bring death sentences to finality. The federal court ruling in *Jones v. Chappell* – that California's death penalty was unconstitutional because of inordinate delays in carrying out executions[90] – was badly flawed, both on the merits and on other procedural grounds, and its prompt reversal would be welcome news.[91] But *Jones* at least had the virtue of functionally offering the following practical advice to California and other states: if you do not want to carry out the death penalty, abolish it. Having a death penalty means accepting a regime of extraordinary process for establishing the accuracy of guilt and the legality of one's conviction and sentence, but it also requires a willingness to bring death sentences to finality, tragic as that decision and that moment may be. Neither the Eighth Amendment, nor any other provision of the Constitution, insulates us from all of the tragedies of political life.[92] And controlling the people through the criminal law often requires difficult choices, some of which will involve life and death. The outcome in *Glossip*, while certainly significant in the world of capital punishment supporters,[93] means very little in places where the state lacks the political will to

---

[90] 31 F. Supp.3d 1050 (C.D. Cal. 2014).
[91] *See* J. Richard Broughton, Jones, Lackey, *and* Teague, __ JOHN MARSHALL. L. REV. ___ (forthcoming 2015).
[92] *Cf.* Roger M. Barrus, et al., THE DECONSTITUTIONALIZATION OF AMERICA 122 (2004) (discussing consequences of judicial review).
[93] *See* Kent Scheidegger, *Symposium: A major setback for the antidemocratic war of attrition against the death penalty*, SCOTUSBlog, http://www.scotusblog.com/2015/06/symposium-a-major-setback-for-the-antidemocratic-war-of-attrition-against-the-death-penalty/ (posted June 30, 2015).

carry the sentence to finality. So although neither the federal government nor any other state must have a death penalty, where it has one, the punishment must be more than just symbolic.

One may object that even an effective sentence of life without parole is not symbolic. It is real punishment that the prisoner must endure, even if the state never executes him. Of course that is true, as far as it goes. But the same would be true if we effectively sentenced the defendant to fifty years rather than life; or twenty years; or a week. Each of those would constitute real punishments in some sense of the term. But they would not be the punishment that the political community, acting through the capital sentencing jury, has determined to be just, appropriate, and fitted to the defendant's crime. In that sense, anything other than an effective (that is, actually imposed) death penalty makes the imposition of the death sentence merely symbolic, for it does not achieve the purposes for which it was sought and upon which it was deliberated and decided. A merely symbolic death penalty is the same as no death penalty at all.

IV. CONCLUSION

Some criminal justice reforms have their merit. And even the death penalty's supporters must admit that capital punishment is no less deserving of reform than many other aspects of the criminal justice system. But criminal justice reform need not always be about *reducing* criminal sentences – sometimes it can also be about protecting the government's ability to impose especially severe sentences in the limited universe of cases where they are justified. Prudent prosecutors and political leaders can still sensibly maintain that the death penalty

is not only constitutional but desirable in a narrow class of highly aggravated cases where evidence of guilt is overwhelming and the government possesses the will to carry out the punishment. It is reasonable, then, to include a death penalty provision in the Shepard-Byrd law, or at least to add hate-crime-type animus to the list of statutory aggravating factors in the Federal Death Penalty Act. Federal legislation already recognizes the heightened moral culpability of one who commits violence based on animus. It is not much of a stretch to say that a death penalty should at least be an option for killers who engage in extreme violence that is aggravated by that same animus. Consequently, prosecutors and political leaders should not fear supporting a death penalty, even in light of the current narrative that tries to establish the death penalty's unpopularity and illegitimacy. A sensible case still exists for a just, limited, and effective regime of capital punishment. Prosecutors and political leaders should continue to find a way to make that case as part of a more comprehensive criminal justice reform narrative.