Introduction

Starting to Think about Finality in Capital Cases

Austin Sarat

"We now recognize the important interest in finality served by state procedural rules and the significant harm to the States that results from the failure of federal courts to respect them."

Justice Sandra Day O'Connor, *Coleman v. Thompson*

"The continued pursuit of that punishment could bring years of appeals and prolong reliving the most painful day of our lives. . . We believe that now is the time to turn the page, end the anguish, and look toward a better future – for us, for Boston, and for the country.

Bill and Denise Richard, "To End the Anguish, Drop the Death Penalty."

Today America is in a period of national reconsideration of capital punishment.[1] Signs of change are all around us. Public support for the death penalty is at a 40-year low.[2] A Pew Research Center survey released recently found only 56 percent of the American public saying that they favor capital punishment. Pew noted that, since 2011, support for capital punishment has declined from 62 percent to its current level. In addition, over the last two decades, the number of people being sentenced to death in the United States declined by more than two-thirds.[3] In 1996, 315 people were given death sentences across all death penalty jurisdictions. In 2014, there were

[1] Charles Ogletree and Austin Sarat, eds., *The Road to Abolition? The Future of Capital Punishment* (New York: NYU Press, 2009).

[2] "Support for the death penalty in the United States dropped by two percentage points over the last year and opposition rose to its highest levels since before the Supreme Court declared existing death penalty statutes unconstitutional in 1972, according to the 2015 annual Gallup Poll on the death penalty. Gallup reports that 61% of Americans say they favor the death penalty, down from 63% last year and near the 40-year low of 60% support recorded in 2013." Death Penalty Information Center, www.deathpenaltyinfo.org/node/6275. Accessed June 1, 2106. See also Andrew Dugan, "Solid Majority Continue to Support Death Penalty," www.gallup.com/poll/186218/solid-majority-continue-support-death-penalty.aspx, Accessed June 1, 2016.

[3] "Less Support for Death Penalty, Especially among Democrats," Pew Research Center, www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/, Accessed June 1, 2016.

just 73 new death sentences.[4] This is the lowest number since the death penalty was reinstated by the United States Supreme Court in 1976.

America also is following through on fewer executions. In 1999, 98 people were executed in the United States. In 2014, that number was 35.[5] And, of the 19 states that do not have capital punishment on the books, six abolished it since 2007. Another 13 states that still retain capital punishment have either formal or de facto moratoria.

What explains these changes? Declines in violent crime and the widespread embrace of life imprisonment without parole surely have played a part. So, too, have growing concerns about the economic cost of the death penalty system, with its lengthy and very expensive legal process.[6]

However, among the most important factors explaining this change are growing concerns about the prospect of error in capital cases and the risk of executing the innocent. More and more, Americans believe that the administration of the death penalty is deeply flawed and broken in important respects. Many of those who fervently support capital punishment nonetheless worry about the risk of executing the innocent. The Pew survey found that 71 percent of the public think there is some risk of an innocent person being executed, while only 26 percent say that there are adequate safeguards in place to prevent that from happening.[7]

It is perhaps too obvious to say that the concerns about making an irreversible error in death cases are largely a function of one of the most genuinely distinctive features of the death penalty as a punishment, namely its finality. Indeed since the last part of the twentieth century the jurisprudence of capital punishment has been built around the idea that, because of its finality, "death is different." As former Supreme Court Justice Potter Stewart put it, "The penalty of death differs from all other forms of capital punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."[8] As a result, those who are accused of capital crimes are entitled to enhanced legal and procedural protections.

In addition to its jurisprudential significance, debates about the significance of finality have animated death penalty politics for several decades. Abolitionists have put it at the center on a new abolitionist politics that shifts attention from the abstract morality associated with arguments against the death penalty. Opponents of capital

4 Death Penalty Information Center, www.deathpenaltyinfo.org/death-penalty-sentencing-information, Accessed June 1, 2016.
5 Death Penalty Information Center, www.deathpenaltyinfo.org/executions-united-states, Accessed June 1, 2016.
6 See Ogletree and Sarat, *The Road to Abolition*.
7 "Less Support for Death Penalty, Especially among Democrats," Pew Research Center.
8 *Furman* v. *Georgia*, 408 U.S. 238 (1972) (Stewart, J., concurring), https://en.wikisource.org/wiki/Furman_v._Georgia/Concurrence_Stewart, Accessed June 1, 2016.

punishment take finality to be a reason in itself to oppose its use.[9] They cite the risk of executing the innocent as an especially telling reason to end the death penalty. They point to the fact that since 1976, 1,406 executions have been carried out in America and that in that same time period, 152 people who received death sentences were exonerated and freed from death row.[10] For every nine people we execute, one person is falsely convicted and sentenced to death.[11] For abolitionists this is an unacceptable error rate.

Death penalty supporters also focus on finality, taking it to be a kind of broken promise associated with capital punishment. As evidence they cite the fact that inmates in the United States typically spend over a decade awaiting execution and that. Some prisoners have been on death row for well over 20 years.[12] As Jamie Orenstein, a former Justice Department official, put it, "Society has a real and legitimate need for finality in answering the question of whether someone is guilty of a crime."[13] This sentiment was reflected in the Supreme Court's 1993 decision in *Herrera* v. *Collins*, which held that the threshold of proof in claims of actual innocence made in late stage habeas would "necessarily be extraordinarily high because of the very disruptive effect that entertaining such claims would have on the need for finality in capital cases."[14]

In the mid-1990s concerns about the absence of finality led to the enactment of the Anti-Terrorism and Effective Death Penalty Act, which sought to limit the reach of federal habeas corpus protections for those on death row, and the de-funding of Post-Conviction Defender Organizations, which provided legal representation for many of those contesting their death sentences. But neither of these actions have substantially sped up the path from death sentences to executions or resolved the dispute about finality.[15]

[9] See Michael Admirand and G. Ben Cohen, "The Fallibility of Finality," *Harvard Law and Policy Review* (February 5, 2016), http://harvardlpr.com/wp-content/uploads/2013/11/10.2_Admirand-and-Cohen_Glossip.pdf, Accessed June 1, 2016.

[10] See Amnesty International, "Death Penalty and Innocence," www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-innocence, Accessed June 1, 2016.

[11] Samuel Gross, Barbara O'Brien, and Edward Kennedy, "Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death," *Proceedings of the National Academy of Sciences of the United States of America*, www.pnas.org/content/111/20/7230.full.pdf, Accessed June 1, 2016.

[12] See "Death Row Inmates, 1953–2013," http://deathpenalty.procon.org/view.resource.php?resourceID=004433, Accessed June 1, 2016.

[13] Adam Liptak, "Prosecutors See Limits to Doubt in Capital Cases," *The New York Times* (February 24, 2003), www.nytimes.com/2003/02/24/us/prosecutors-see-limits-to-doubt-in-capital-cases.html?pagewanted=all.

[14] *Herrera* v. *Collins*, 506 U.S 390 (1993), www.law.cornell.edu/supct/html/91-7328.ZO.html, Accessed June 1, 2016.

[15] See Lincoln Caplan, "The Destruction of Defendants' Rights," *The New Yorker*, June 21, 2015, www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights, Accessed June 1, 2016.

As a subject of scholarship, there has been some empirical work on the length of time from death sentence to execution[16] and some normative scholarship weighing the competing values of finality and fairness.[17] But, other than Jennifer Culbert's 2007 book, *Dead Certainty: The Death Penalty and the Problem of Judgment*,[18] there is not a lot of scholarship on the significance and meaning of finality as a factor in the legal, political, or social world of the death penalty.

Final Judgments: The Death Penalty in American Law and Culture offers a book-length treatment of the significance and meaning of finality in capital cases. Questions addressed in this book will include: How are concerns about finality reflected in the motivations and behavior of participants in the death penalty system? How does an awareness of finality shape the experience of the death penalty for those condemned to die as well as for capital punishment's public audience? What is the meaning of time in capital cases? What are the relative weights accorded to finality versus the need for error correction in legal and political debates? And how does the meaning of finality differ in capital and non-capital (LWOP) cases? Each chapter takes up the challenge of understanding finality as a legal, political, and cultural fact. They deploy various theories and perspectives to explore the death penalty's finality.

This book's first chapter takes up the meaning of finality by comparing death sentences and non-capital sentences. It questions the well-known idea that "death is different" and asks whether the way we think about finality in non-capital cases has anything to teach us about finality where death is a punishment. This chapter then is a kind of argument with those who, like Justice Brennan in his *Furman* v. *Georgia* concurrence, claim that unlike a defendant who has been wrongfully convicted and sentenced to prison, the wrongfully convicted capital defendant cannot be released or compensated after his sentence has been carried out. "[T]he finality of death precludes relief."

Since the mid-1970s, Cynthia Hessick reminds us, the Supreme Court has embraced the idea that "death is different" and, as a result, placed many distinctive procedural and substantive limits on capital punishment. Because of the finality that seems to separate capital punishment from mere incarceration, the Court has required capital procedures to be more rigorous than others. As a result, what Hessick calls "judgment-based finality," the point at which the verdict and sentence are final and cannot be changed, often comes later in capital cases. Capital

[16] "Why So Many Death Row Inmates Will Die of Old Age," *The Economist*, February 3, 2014, www.economist.com/blogs/economist-explains/2014/02/economist-explains-0, Accessed June 1, 2016.

[17] Ron Tabak, "Finality without Fairness: Why We Are Moving toward Moratoria on Executions and the Potential Abolition of Capital Punishment," 33 *Connecticut Law Review* (2001), 733, http://heinonline.org/HOL/Page?handle=hein.journals/conlr33&div=27&g_sent=1&collection=journals#, Accessed June 1, 2016.

[18] Jennifer Culbert, *Dead Certainty: The Death Penalty and the Problem of Judgment* (Palo Alto, CA: Stanford University Press, 1998).

defendants have access to many more resources than do other defendants to have their verdicts reversed or sentences vacated. Of course, the most obvious difference in finality is, as Brennan noted, the inability for courts to revisit past cases once the condemned is executed. This is what Hessick labels "outcome-based finality."

Hessick calls our attention to a rare exception to death is different jurisprudence, namely the Supreme Court's decision in *Graham* v. *Florida*. In *Graham*, the Court held that a state could not impose life without parole (LWOP) on juveniles for non-homicide offences. *Graham* rejected LWOP for juveniles because of its "irrevocability," which Hessick takes as a synonym for outcome-based finality. As with death sentences, children given LWOP are permanently denied an opportunity to rejoin society, based on a determination that they are completely incorrigible. The Court found that determination to be unreasonable.

Instead, states were required to offer juveniles post-sentencing assessments to determine whether or not they could be rehabilitated. This is a special case in which a distinctive procedural protection is made available outside the realm of capital punishment. Hessick's chapter questions whether "outcome-based finality" makes capital punishment really different from other forms of punishment. As she notes, a person released after being wrongfully convicted cannot have back the years spent in prison. She concludes by focusing on how non-capital finality concerns – specifically, the perceived need for post-sentencing assessment – could inform the ongoing debate over the death penalty in the United States.

In Chapter 2, Corinna Barrett Lain returns to the distinctive death is different jurisprudence that Hessick describes. Lain suggests that this jurisprudence has produced a series of "cascading effects," the most important of which has been the extraordinary length of time it takes to carry out death sentences. In her view, awareness of the irrevocability of an execution has had the effect of making the death penalty less final.

The commitment to super due process opened up the death penalty to lots of appellate and post-conviction litigation, much of which was initially handled by incompetent attorneys. This led to a 68 percent reversal rate for death sentences. Congress, unhappy with the high reversal rates, passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which restricted federal habeas review. Yet, because the AEDPA was poorly drafted, it spawned new avenues of litigation. In addition, Congress attempted to defund death penalty resource centers, but the lawyers that worked there still found ways to involve themselves in litigation. All of this created a fleet of capital defense lawyers who were able to slow the death penalty process considerably.

Once the death penalty process was slowed down, exonerations of those on death row became more common. The increase in time to make the case for actual innocence, advances in DNA technology, and the newly specialized capital defense bar all helped make these exonerations much more common. Lain suggests that the modern death penalty has run into trouble because of both the risk of executing the

innocent and the failure to execute the guilty. The increasing duration between crime and punishment diminishes the retributive satisfaction that the death penalty can offer. In the end, the finality of capital punishment is what makes it so rarely final, and so cumbersome, costly, and slow that it no longer makes sense. Following finality reveals the cumulative nature of its heavy burden and helps explain why capital punishment is collapsing under its own weight.

The observation that law is constrained, if not compromised, by its relation to a time-table, Jennifer Culbert contends in Chapter 3, is commonplace. But this limitation is never more salient than in discussions of criminal law and, in particular, the death penalty. Like Lain, Culbert notes that defendants sentenced to death, however, face more than just the possibility of execution. A long delay has been implicitly built into the sentence. Culbert argues that the time it now takes to die unsettles both the capital punishment and criminal justice systems, while scuttling the understanding of the "life" that is alternative to death.

In the mid-1970s the death penalty was reinstated on the grounds that it was accepted by the Framers and that it served the social principles of deterrence and retribution. The Framers, however, could not imagine waiting more than a decade to execute a criminal. Judge Cormac Carney has called the death sentence "life. . .with the remote possibility of death." Moreover, agreeing with Lain, Culbert suggests that delay complicates the effort to achieve retribution. Deterrence is minimized by the disconnection between crime and punishment. Moreover, life "in the shadow of death" cruelly gives defendants a substantial period of time to anticipate it.

Culbert goes on to question, given the time involved, how death is different at all. Recalling Hessick's discussion in Chapter 1, Culbert contends that it is only our "culture of death" that makes capital punishment seem so special. This obsession has led the Supreme Court to institute expensive protections to solve procedural problems that are no more present in the death penalty than anywhere else in criminal justice. The death penalty, which rarely brings about death, distracts the Court from addressing serious problems in other areas. Nor from the prisoner's perspective is death all that different. Extended time on death row renders the prisoner "socially dead," long before he is executed.

Culbert finishes by exploring the meaning of death in relation to our conception of time. Viewing time as "duration," an amorphous sliding entity rather than a series of moments, death, although still a final barrier, can be viewed as a change rather than an endpoint. Interacting with finitude gives people a chance to be transformed. This interaction that occurs in confronting an end happens slowly with death row prisoners, calling into question the concept of death as a definite, final moment.

Chapter 4 moves from examining the structural features of finality discussed in the first three chapters to examine the significance of finality in the work of one group of participants in the death penalty system, assistant prosecutors assigned to handle the post-conviction phase of capital cases. Daniel Medwed seeks to

understand the zealous efforts of prosecutors assigned to post-conviction proceedings and why they often refuse to join defense requests for evidentiary hearings or new trials, even when they have misgivings about the conditions of the original conviction.

Medwed begins by exploring why prosecutors seek the death penalty in the first place. Although the Supreme Court has required legislatures to delineate which crimes are "death eligible," the criteria for eligibility are often amorphous, giving prosecutors considerable latitude. Their charging decisions are largely unregulated as is their decision making in appellate and post-conviction proceedings.

Despite frequent and well-documented problems in the capital trial process, prosecutors, Medwed argues, fight to uphold even the most problematic death sentences. He suggests that this behavior is inconsistent with the prosecutor's obligation to act as a "minister of justice." Professionally, many prosecutors assigned to argue cases fear the consequences of not doing so in a zealous way. Additionally, because conviction rates are used as measures of job performance, there is a false duality, where convictions are wins and reversals are losses. Funding and pay is often tied to conviction rates, creating pecuniary incentives to preserve the trial result. Political variables also come into play, especially with elected prosecutors.

Prosecutors are also driven to seek finality by psychological factors. These include confirmation bias and belief perseverance, status quo bias, top-down processing, self-righteous conformity effects, deference to those with more information, diffusion of responsibility, groupthink, cognitive dissonance, the determination to avoid sunk costs, and implicit racial bias.

Some see the search for finality as a necessary part of the criminal justice system, seemingly offering cost savings and factual accuracy. Trials are costly, evidence goes stale, and final verdicts reinforce procedural legitimacy. Yet, in Medwed's view, there is no value to finality in itself. As he sees it, justice would be served by reducing prosecutors' desire for finality.

Chapter 5, by Daniel LaChance, broadens the focus of inquiry to consider the way the finality of death itself gives capital punishment its cultural meaning. To do so he locates the contemporary situation of capital punishment within a broad cultural frame. Executions long have served as opportunities for ordinary Americans to contemplate what a good death – a different kind of "finality" – entails and what role pain and fortitude play in achieving it. Yet executions today have been transformed from expiating and cleansing acts of torture to empathy-inviting events. LaChance shows how portrayals of executions have reflected this pivot, with a greater focus on the inner world of the condemned and his approach to death.

Before the Enlightenment, execution was a means of restoring the legal, moral, and divine order. Executions gave evidence of the brutal force that "underlay divinely-given law." Since the enlightenment, observers of executions no longer have seen the condemned "solely as an expiator of sin or the vindication of the divine order, but as a discrete individual with an identity that could be valued and

understood outside of a reference to God." The body, too, was considered more self-possessed, and could not be seen simply through the lens of sacrifice.

The growing recognition of the condemned person's inner world has given onlookers the chance to grapple with the finality of death and their own mortality. Diminishing the pain involved in execution allows for greater access to the consciousness of the person facing death. Since, according to Elaine Scarry, a torturous execution robs the victim of language, it denies observers the chance to "contemplate what a good death entailed and what role pain and fortitude played in achieving it." The empathetic selfhood described by LaChance is what Michelle Brown calls "dark empathy." The empathy-inviting narratives of execution are arenas of voyeurism, allowing the public to get closer to seeing the other side of the life's ultimate mystery.

Empathetic selfhood, LaChance claims, propelled the search for more humane methods of execution, which have in turn made the retributive quality of capital punishment much murkier. As the execution process has become more medical, moving from hanging (while standing) to electrocution (while sitting) to lethal injection (while lying down), the condemned has come to be seen as a patient or a specimen, not a moral agent facing the consequences of actions. Lethal injection amplifies the presence of the condemned person in his final moments. The condemned's last acts are volitional attempts to leave an impression on the world, preserving the image of dignity that allows for the expression of the meaning found in death. Yet the growing uncertainty of death sentences and the illegibility of executions in the contemporary period have made it increasingly difficult for Americans to imagine the moment of execution as "an opportunity for a final *self*-judgment: a moment of apprehending, evaluating, and making sense of one's life that makes the leaving of it bearable."

Taken together the work collected in this book shows the complexity of finality as it plays out in capital cases. The awareness of the finality of execution has helped make death sentences less final. This has consequences for our understanding of, and attachment to, capital punishment. Yet for those responsible for administering death as well as for those who seek to find meaning when death is imposed as a punishment, finality is both necessary to, and an unnerving part of, the capital punishment process.

1

Finality and the Capital/Non-Capital Punishment Divide

Carissa Byrne Hessick

The death penalty occupies a unique space in American criminal law. Because "death is different" from other modern punishments, death penalty sentences are subject to limitations that are not imposed on sentences that consist only of incarceration.[1] Those limitations are both substantive and procedural. Substantive limits on the death penalty include limitations on groups of offenders who can be subject to the penalty and limitations on crimes that may trigger the punishment. Procedural limits include requirements about how death penalty statutes may be written, how the capital punishment decision is made, and who makes the decision.

One reason the Justices have offered for their different treatment of capital and non-capital punishment is the finality that accompanies the death penalty. As Justice Brennan stated in his *Furman* v. *Georgia* concurrence: "Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity."[2] Unlike a defendant who has been wrongfully convicted and sentenced to prison, the wrongfully convicted capital defendant cannot be released or compensated after his sentence has been carried out. "[T]he finality of death precludes relief."[3] This "qualitative difference" between death and other punishments "requires a correspondingly greater degree of scrutiny of the capital sentencing determination," the Supreme Court tells us.[4]

Nevertheless, in a series of recent cases, the Supreme Court has begun to import some of its unique capital punishment jurisprudence into non-capital cases.

[1] *See generally* Note, "The Rhetoric of Difference and the Legitimacy of Capital Punishment," *Harvard Law Review* 114 (2001): 1559. The substantive and procedural protections for death penalty cases are so different than for non-death penalty cases, that one prominent scholar characterized the relevant doctrines as having originated with two different Courts – a Court of Life and a Court of Death. Rachel Barkow, "The Court of Life and Death," *Michigan Law Review* 107 (2009): 1145.

[2] *Furman* v. *Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring).

[3] *Id.* at 290.

[4] *California* v. *Ramos*, 463 U.S. 992, 998–99 (1983).

Specifically, in cases involving life-without-parole sentences for juveniles, the Supreme Court has imposed limitations on non-capital sentences using a doctrinal approach that it had previously reserved for cases involving the death penalty. A major justification that the Court offered for extending its death penalty jurisprudence is the finality of life-without-parole sentences. The Court expressed concern that the life-without-parole regime offers juvenile offenders no chance to demonstrate rehabilitation. Because juveniles have not yet completed their cognitive and emotional development, a juvenile who engages in illegal behavior may be more likely to mature and avoid such behavior in the future than a non-juvenile who engages in similar behavior. Consequently, the Court decided that states must give juvenile defendants who committed a non-homicide crime "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[5] Interestingly, the decision to forbid life-without-parole sentences for juveniles was not a decision that defendants must be released from prison. But rather, it was a decision that the states must give defendants the opportunity, after the imposition of the original sentence, to demonstrate that they should not remain in prison for the full duration of the sentence. In other words, in the non-capital context, the Supreme Court has held that the finality of a sentence may require a post-sentencing assessment – that is, the original sentence must be revisited at a later date.

Although defendants ordinarily receive more procedural protections in death penalty cases, the Supreme Court has not extended its post-sentencing assessment requirement to capital cases. The Supreme Court does not currently require states to revisit death sentences in a manner that allows for post-sentencing assessments of a defendant's conduct and character. Unless a capital defendant's conviction or sentence is reversed on appeal, she does not have an opportunity to argue that she should receive a different sentence after the initial sentence has been announced.

This chapter examines the role that concerns about finality have played in both capital cases and juvenile life-without-parole sentencing cases. It will describe how finality has shaped the Supreme Court's death penalty cases, as well as the role it has played in recent juvenile life-without-parole cases. It will then offer some tentative thoughts on whether the non-capital finality concerns – specifically, the perceived need for post-sentencing assessments – should be extended to capital defendants and how post-sentencing assessments might inform the ongoing debate over the death penalty abolition in the United States.

FINALITY AND THE DEATH PENALTY

When we speak about finality and the death penalty, the term finality may refer to two related but distinct concepts. Some discussions of finality revolve around how often a defendant ought to be permitted to challenge a judgment before it becomes

[5] Ibid.