

The History and Future of Capital Punishment in the United States

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It is a great pleasure to be with you today to deliver the 2016 Nathaniel Nathanson Lecture. I am delighted to join the many distinguished jurists and scholars that have delivered this Lecture in prior years. Early in his career, Professor Nathanson clerked for Justice Louis Brandeis and served the Securities and Exchange Commission in its formative days.¹ Professor Nathanson is deservedly viewed as one of the architects of modern administrative law.² His work, *Administrative Discretion in the Interpretation of Statutes*, was monumental in the field of administrative law.³ Professor Nathanson was the first scholar to identify a “principle of limited judicial review” when reviewing agency interpretations of statutes.⁴ One year after his death, the Supreme Court impliedly adopted Professor Nathanson’s

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1. See Carl McGowan, *In Memoriam: National L. Nathanson*, 78 NW. U. L. REV. 913, 914 (1983).

2. See *32nd Nathaniel L. Nathanson Memorial Lecture*, UNIV. OF SAN DIEGO, http://www.sandiego.edu/law/school/events/detail.php?_focus=51509 [https://perma.cc/HT3A-BQTY] (last visited Feb. 16, 2017).

3. See Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470 (1950).

4. John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1108 (2004).

formulation in *Chevron v. Natural Resources Defense Council, Inc.*⁵ Today, *Chevron* is one of the most cited and studied Supreme Court cases in history.⁶ Professor John H. Reese notes how “strikingly similar” the Nathanson model is to the language of *Chevron*.⁷ Perhaps it is not much of a leap to suggest that Justice John Paul Stevens, a student of Professor Nathanson and author of the Court’s *Chevron* opinion, drew inspiration from his distinguished professor.⁸

I learned a great deal about Professor Nathanson from our mutual friend, Professor Carl Auerbach, my dear colleague at the University of Minnesota Law School for many years before he taught at the University of San Diego Law School. Carl Auerbach and Nathaniel Nathanson together represent two giants of modern administrative law.

On October 20, 2015, I had the pleasure of hosting the late Justice Antonin Scalia at the University of Minnesota for the annual Stein Lecture series.⁹ Four months earlier, the Court in *Glossip v. Gross* upheld the use of lethal injection under the Eighth Amendment.¹⁰ During our Conversation I asked Justice Scalia about Justice Breyer’s dissent in *Glossip*, in which Justice Breyer argued that capital punishment is unconstitutional under the Eighth and Fourteenth Amendments.¹¹ Justice Scalia lamented that the Court’s jurisprudence made it “practically impossible to impose” the death penalty.¹² Justice Scalia criticized Justice Breyer’s call for the abolition of capital punishment due to its already-numerous exceptions, retorting, “[y]ou did it, Steve!”¹³ Justice Scalia concluded by stating that he “wouldn’t

5. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 866 (1984).

6. See Melina Forte, *May Legislative History Be Considered at Chevron Step One? The Third Circuit Dances the Chevron Two-Step in United States v. Geiser*, 54 VILL. L. REV. 727, 727 n.2 (2009).

7. Reese, *supra* note 4, at 1110.

8. Cf. Justice John Paul Stevens, Supreme Court of the United States, Byron White: Hero and Scholar 1 (Sept. 22, 2011), <https://www.supremecourt.gov/publicinfo/speeches/JPS%20University%20of%20Colorado%20Speech%2009.22.11.pdf> [<https://perma.cc/VC3E-MN2U>] (“Nathaniel Nathanson, my constitutional law professor [] taught me to be aware of ‘glittering generalities.’”).

9. See *The 2015 Stein Lecture: U.S. Supreme Court Justice Antonin Scalia*, UNIV. MINN. L. SCH., <https://www.law.umn.edu/events/2015-stein-lecture-us-supreme-court-justice-antonin-scalia> [<https://perma.cc/7VG7-7GK7>] (last visited Feb. 16, 2017).

10. See *Glossip v. Gross*, 135 S. Ct. 2726, 2729 (2015).

11. Cf. *id.* at 2755 (Breyer, J., dissenting) (stating he “would ask for full briefing on a more basic question: whether the death penalty violates the Constitution”).

12. Justice Antonin Scalia, *The 2015 Stein Lecture at the University of Minnesota* (Oct. 20, 2016) [hereinafter *The 2015 Stein Lecture*]; see also *Herrera v. Collins*, 506 U.S. 390, 428 (1993) (Scalia, J., concurring) (“If the system that has been in place for 200 years (and remains widely approved) ‘shock[s]’ the dissenters’ consciences . . . perhaps they should doubt the calibration of their consciences, or better still, the usefulness of ‘conscience shocking’ as a legal test.”).

13. *The 2015 Stein Lecture, supra* note 12.

be surprised” if the Court found the death penalty unconstitutional in the near future.¹⁴ Justice Scalia’s statement drew national attention.¹⁵ Today’s Lecture expands upon Justice Scalia’s remarks by reviewing the history of capital punishment cases in the Supreme Court. I hope that by presenting this history, I can shed some light on the future of capital punishment in America.

As an originalist, Justice Scalia held the beliefs of the Founding Fathers in high esteem when interpreting the Constitution.¹⁶ Justice Scalia noted that the death penalty has been a part of the U.S. justice system since its earliest days.¹⁷ Death penalty laws date as far back as the Code of Hammurabi—written in the eighteenth century B.C.¹⁸ The first recorded death sentence in the American Colonies occurred in 1608.¹⁹ Captain George Kendall was executed by firing squad after accusations emerged that he was a Spanish spy.²⁰ Four years later, the Governor of Virginia enacted the Divine, Moral, and Martial Laws, which provided the death penalty for the

14. *Id.*

15. *See, e.g.*, Christian Farias, *Justice Scalia Says He’ll Retire Once He ‘Can’t Do the Job As Well,’* HUFFINGTON POST (Oct. 21, 2015, 4:50 PM), http://www.huffingtonpost.com/entry/justice-scalia-retirement_us_5627ba31e4b08589ef4a1366 [https://perma.cc/ECE6-4KJR] (“Scalia reprised comments from September, when he said it ‘wouldn’t surprise me’ if the current court struck down the death penalty as unconstitutional.”); *Justice Scalia: “Wouldn’t Surprise Me” If Death Penalty Struck Down*, CBS NEWS (Oct. 20, 2015, 9:31 PM), <http://www.cbsnews.com/news/justice-scalia-wouldnt-surprise-me-if-death-penalty-struck-down> [https://perma.cc/3QVU-CKWL] (“Scalia said death penalty decisions from the court have made it ‘practically impossible to impose it but we have not formally held it to be unconstitutional.’ Earlier in his remarks, Scalia said ‘it wouldn’t surprise me if it did’ fall, a comment that drew scattered applause in the mostly full, 2,700-seat auditorium.”).

16. *See* R.B. Bernstein, *The Constitution as an Exploding Cigar and Other “Historian’s Heresies” About a Constitutional Orthodoxy*, 55 N.Y.L. SCH. L. REV. 1073, 1078 (2011) (“Justice Antonin Scalia, often cited as a leading originalist . . . call[ed] himself a ‘plain-meaning’ interpreter of the Constitution, focus[ed] on the plain meaning of the document as of the time of its framing and ratification.”).

17. *See Herrera*, 506 U.S. at 429.

18. *See The Code of Hammurabi*, THE AVALON PROJECT (L.W. King trans.), <http://avalon.law.yale.edu/ancient/hamframe.asp> [https://perma.cc/GBB7-YN9A] (last visited Feb. 16, 2017) (“If any one break a hole into a house (break in to steal), he shall be put to death before that hole and be buried.”).

19. *See* Philip L. Barbour, *Captain George Kendall: Mutineer or Intelligencer*, 70 VA. MAG. HIST. & BIOGRAPHY 297, 301 (1962).

20. *See Introduction to the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/part-i-history-death-penalty> [https://perma.cc/L2RK-VHBU] (last visited Feb. 16, 2017).

most minor offenses, such as killing chickens and trading with Indians.²¹ Colonial governments viewed public hangings as a good moral lesson for the colonists—a reminder of social obedience and order.²²

Penal laws varied from colony to colony.²³ The Capital Laws of New England permitted the death penalty for crimes such as murder, sodomy, witchcraft, idolatry, blasphemy, rebellion, manslaughter, and poisoning.²⁴ New York enacted the Duke’s Laws of 1665, which commanded capital punishment for denial of the true God, pre-meditated murder, sodomy, buggery, kidnapping, and other felonious offenses.²⁵ On the other hand, South Jersey had no mandated capital punishment and only permitted the death penalty for murder and treason.²⁶ By the time of Independence, all of the colonies had similar death statutes covering arson, piracy, treason, murder, sodomy, burglary, robbery, rape, horse-stealing, slave rebellion, and counterfeiting.²⁷

When the First Congress met in 1790, it enacted criminal statutes permitting capital punishment for murder, forgery, robbery, and rape.²⁸ Leading that Congress were men who had drafted the Constitution and the Bill of Rights. The Eighth Amendment to the Constitution, approved by that Congress and ratified by the States in 1791, provided that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²⁹ To an originalist like Justice Scalia, the Eighth Amendment’s prohibition against “cruel and unusual punishment” could not have been intended to include the death penalty.³⁰ The death penalty was so thoroughly

21. See David Konig, *Dale’s Laws and the Non-Common Law Origins of Criminal Justice in Virginia*, 26 AM. J. LEGAL HIST. 354, 354 (1982).

22. See JACK SHULER, *THE THIRTEENTH TURN: A HISTORY OF THE NOOSE* 60 (2014) (“Colonists took executions seriously and believed there must be a pedagogical intent to them.”).

23. See *The Early Years of American Law - Colonial Freedom, Britain’s Push For Greater Control, A New Start, A New Criminal Court System*, JRANK, <http://law.jrank.org/pages/11900/Early-Years-American-Law.html> [https://perma.cc/4FXF-PSK5] (last visited Feb. 16, 2017).

24. See JOHN COTTON, *AN ABSTRACT OF THE LAWS OF NEW ENGLAND* 12–14 (1641).

25. JAMES, DUKE OF YORK, *DUKE’S LAWS* (1665), <http://www.worldcat.org/title/dukes-laws-manuscript-1665/oclc/58771757> [https://perma.cc/DQP9-N834].

26. See Michael H. Reggio, *History of the Death Penalty*, in *SOCIETY’S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY* 1 (Laura E. Randa ed., 1997).

27. See Philip English Mackey, *Introduction to VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787–1976*, at xvii (Philip English Mackey ed., 1976).

28. See Crimes Act, ch. 9, 1 Stat. 112 (1790); VALERIE HEITSHUSEN, *CONG. RESEARCH SERV.*, RL30567, *PARTY LEADERS IN THE UNITED STATES CONGRESS, 1789–2015*, at 4, 16 (2015).

29. U.S. CONST. amend. VIII.

30. E.g., John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 539–40 (2014).

integrated with the penal system that had the Founders intended to include the death penalty within the definition of “cruel and unusual punishment,” he believed they would have done so explicitly.³¹ Even the Fifth Amendment to the Constitution, also approved by the States in 1791, acknowledged the right to indictment by Grand Jury in capital cases—reaffirming its constitutionality through textual inclusion.³²

That is not to suggest there was no abolitionist movement in the eighteenth century. Cesare Beccaria’s 1764 essay, *On Crimes and Punishment*, argued that a government could never justify taking a life.³³ Beccaria’s arguments led to the abolition of the death penalty in Austria and Tuscany and influenced some of our Founding Fathers.³⁴ Benjamin Rush, a signer of the Declaration of Independence, challenged notions of the death penalty as a deterrent for the commission of crimes.³⁵ Thomas Jefferson attempted to reform Virginia’s death penalty laws and proposed limiting its application to murder and treason; however, Jefferson’s revisions to the penal code were defeated by only one vote.³⁶ In 1794, Pennsylvania repealed the death penalty except in cases of first-degree murder.³⁷

Though the Founders may not have intended to ban capital punishment, they armed future jurists and litigants with tools to argue for and against it. The Eighth Amendment prohibited sentencing defendants to cruel and unusual punishments.³⁸ The Fifth Amendment provided that “[n]o person . . . shall be deprived of life, liberty or property, without due process of law.”³⁹

31. *See id.* at 541.

32. U.S. CONST. amend. V (“[No person shall] be deprived of life . . . without due process of law . . .”).

33. HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1994* at 7 (1996) (“[Abolitionists] drew their rhetorical ammunition from European reformers like Cesare Beccaria, whose *Essay on Crime and Punishments* was published in the United States in the 1770s and was frequently cited by prison reformers and abolitionists”); *see also* CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (1764), http://www.constitution.org/cb/crim_pun28.txt [<https://perma.cc/LJ35-W3QM>].

34. John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 *NW. J.L. & SOC. POL’Y* 195, 200–01 (2009).

35. *See* BENJAMIN RUSH, *ON PUNISHING MURDER BY DEATH 1* (1793) (“The punishment of murder by death, is contrary to reason, and to the order and happiness of society.”).

36. 2 THOMAS JEFFERSON, *A Bill for Proportioning Crimes and Punishment*, in *THE PAPERS OF THOMAS JEFFERSON* 492, 494–95, 497 (Julian P. Boyd et al. eds., 1950); *Early Questions About the Death Penalty in Colonial America*, *THE DEATH PENALTY*, <http://deathpenaltycurriculum.org/node/24> [<https://perma.cc/B564-65JR>] (last visited Feb. 17, 2016).

37. Mackey, *supra* note 27, at xvi.

38. U.S. CONST. amend. VIII.

39. U.S. CONST. amend. V.

Enacted in 1868, the Fourteenth Amendment parroted the language of the Fifth and made the Eighth Amendment applicable to the States.⁴⁰ The drafters of these amendments did not view the amendments' language to prohibit the death penalty.⁴¹ Yet jurists, such as Justice Breyer, later used the language to challenge the constitutional foundations of the death penalty.⁴²

Throughout the nineteenth and early twentieth centuries, opponents of capital punishment achieved victories in some states.⁴³ In 1847, Michigan became the first state to abolish the death penalty for all crimes, except treason.⁴⁴ Similarly, Rhode Island, Maine, and Wisconsin later enacted statutes prohibiting the death penalty in all cases, even in cases of treason.⁴⁵ The rise of the Progressive Movement triggered another push to abolish capital punishment—leading six states to outlaw the death penalty altogether, and another three to limit it to cases of treason and first-degree murder.⁴⁶ The death penalty resurged in the 1920s to the 1940s, however, with the 1930s averaging 167 executions per year—the most executions of any period in American history.⁴⁷

Across the Atlantic, abolitionists had greater success. After the atrocities of the Second World War, protection of human rights became a priority. In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights.⁴⁸ Article 3 proclaimed the “right to life,” noting no exceptions. Adopted in 1950, Article 2 of the European Convention for the Protection of Human Rights guarantees: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”⁴⁹ A de facto prohibition on

40. U.S. CONST. amend XIV.

41. See Stinneford, *supra* note 30.

42. See *Glossip v. Gross*, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting).

43. See Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 249 (2015).

44. Michigan, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/michigan-0> [<https://perma.cc/JP4C-QFFL>] (last visited Feb. 16, 2017) (“Michigan became the first English-speaking territory in the world to abolish capital punishment in 1847.”).

45. RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 9 (1991).

46. Part I: *History of the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/part-i-history-death-penalty> [<https://perma.cc/GDY2-QWW5>] (last visited Feb. 16, 2017).

47. *Id.*

48. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948).

49. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into protocol Mar. 20, 1950).

the death penalty became the norm in Europe.⁵⁰ Today, capital punishment has been abolished in every European country except Belarus.⁵¹

It took until the 1960s for death penalty abolitionists in the United States to again garner meaningful support. In 1958, Chief Justice Earl Warren wrote in a plurality decision in *Trop v. Dulles* that the Eighth Amendment must draw its meaning from “the evolving standards of decency that mark the progress of a maturing society.”⁵² If Europe was any indicator, whether capital punishment met these standards was beginning to be questioned.

In 1963, advocates of abolition found an ally on the Supreme Court. Justice Arthur Goldberg, appointed by President John F. Kennedy in 1962, became the fifth vote in the Warren Court’s liberal majority.⁵³ In 1963, Justice Goldberg directed his law clerk to draft a memo with the most compelling constitutional arguments against the death penalty.⁵⁴ Justice Goldberg circulated the memo to his fellow Justices condemning the death penalty as a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment in light of evolving international standards.⁵⁵

Later that year, the Supreme Court was presented with an opportunity to review the constitutionality of the death penalty in *Rudolph v. Alabama*.⁵⁶ The Court, however, denied certiorari.⁵⁷ Writing a dissent from the denial of cert, Justice Goldberg declared, “I would grant certiorari to consider whether the Eighth and Fourteenth Amendments permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.”⁵⁸ Justices William O. Douglas and William Brennan joined Justice Goldberg’s dissent.⁵⁹

50. See *Abolition of the Death Penalty*, COUNCIL OF EUR., http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others_issues/Death_Penalty/default_en.asp [https://perma.cc/JEX6-MXVY] (last visited Feb. 16, 2017).

51. See *id.*

52. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

53. *Arthur J. Goldberg, 1962-1965*, THE SUPREME COURT HISTORICAL SOC’Y, http://supremecourthistory.org/timeline_goldberg.html [https://perma.cc/ED3B-9QRZ] (last visited Feb. 16, 2017).

54. Jesse Wegman, Editorial, *The Death Memo*, N.Y. TIMES (Aug. 24, 2013), <http://www.nytimes.com/2013/08/25/opinion/sunday/the-death-memo.html> [https://perma.cc/B93X-GV82].

55. EVAN J. MANDERY, A WILD JUSTICE 24 (2013).

56. *Rudolph v. State*, 152 So. 2d 662, 662 (Ala. 1963), *cert. denied*, *Rudolph v. Alabama*, 375 U.S. 889, 889 (1963).

57. *Id.*

58. *Rudolph*, 375 U.S. at 889 (Goldberg, J., dissenting).

59. *Id.*

Rudolph v. Alabama was a clear signal to criminal defense attorneys that the Eighth Amendment must be asserted as a defense in capital cases. Defense attorneys flooded appellate courts with petitions asking for constitutional review of death penalty convictions of defendants on death row.⁶⁰ Administrative backlog virtually stopped executions in the United States in the 1960s and early 1970s.⁶¹ Viewing its abolition as inevitable, Vermont, Iowa, and West Virginia abolished the death penalty in those states.⁶² Justice Goldberg's dissent reignited the war against America's severest sentence.

A chance to review the constitutionality of the death penalty reached the Supreme Court in *Furman v. Georgia*.⁶³ William Henry Furman, a twenty-six-year-old African-American man, broke into a home in Georgia intending to commit robbery. The home owner startled Furman. Furman testified at trial that he dropped the gun while fleeing the scene of the crime, the gun discharged, and killed the home owner. Contrary to Furman's testimony, the police report stated that Furman fired blindly in the direction of the home owner while making his escape. Furman was convicted of murder, and the jury sentenced him to death.⁶⁴ Furman appealed to the Supreme Court of Georgia, which affirmed Furman's conviction and the capital sentence.⁶⁵

The Supreme Court granted certiorari, and consolidated it with two other cases on appeal in *Furman v. Georgia*.⁶⁶ In *Jackson v. Georgia*, an African-American man was convicted of rape in the process of committing armed robbery.⁶⁷ And *Branch v. Texas*, like *Jackson v. Georgia*, concerned an African-American man's conviction of rape.⁶⁸ All three juries imposed the death penalty without specific instructions or guidelines.

Furman v. Georgia presented the United States Supreme Court with the issue of whether the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In a five-to-four

60. Arthur J. Goldberg, *Death and the Supreme Court*, 15 HASTINGS CONST. L.Q. 1, 2 (1987) (“[A]n important consequence [to Justice Goldberg’s dissent in *Rudolph v. Alabama*] was to alert the Bar to challenge the constitutionality of capital sentencing laws . . .”).

61. *Id.* (“Thereafter, beginning in 1965, the constitutionality of the death penalty was raised by counsel in a wide variety of cases. . . . This being the case, the Court, to consider these challenges imposed a de facto moratorium on executions . . .”).

62. LARRY W. KOCH ET AL., *THE DEATH OF THE AMERICAN DEATH PENALTY: STATES STILL LEADING THE WAY* 13–14, 16 (2012).

63. *Furman v. Georgia*, 408 U.S. 238, 238–40 (1972).

64. *See id.* at 252; *Furman v. State*, 167 S.E.2d, 628, 628–29 (Ga. 1969).

65. *Furman*, 167 S.E.2d at 628–629.

66. *Furman v. Georgia*, 403 U.S. 952 (1971).

67. *See id.*; *Jackson v. State*, 171 S.E.2d 501, 503 (Ga. 1969).

68. *See Branch v. State*, 447 S.W.2d 932, 932–33 (Tex. 1969).

decision, the Supreme Court reversed the death sentences in all three cases.⁶⁹ All nine Justices wrote separate opinions. Justices William O. Douglas, Byron White, Potter Stewart, William Brennan, and Thurgood Marshall each voted in favor of overturning the sentences. In a per curiam decision—no Justice authored a majority opinion in the case—the Court held the “imposition and carrying out of the death penalty *in these cases* constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.”⁷⁰ The majority, however, could not agree on the rationale for its rather short holding.⁷¹

Three concurring Justices cited the arbitrariness of the capital punishment in the statutes as the reason for their unconstitutionality. Justice William O. Douglas argued that states disproportionately imposed the death penalty on the poor and socially disadvantaged.⁷² Justice Douglas highlighted that all three defendants in *Furman* were black and that the state statutes left the decision to impose the death penalty to the jury with no guiding principles.⁷³ Black defendants in predominantly white states would be disadvantaged due to cultural prejudices that persisted.⁷⁴ According to Justice Douglas, discretionary statutes that allow for the imposition of the death penalty in a discriminatory manner cannot be compatible with due process guarantees.⁷⁵

Justice White began his concurrence by hedging, “I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment.”⁷⁶ Justice White doubted the death penalty acted as an effective deterrent given its infrequent imposition.⁷⁷ In many other cases with similar or worse facts than the defendants’ cases, juries imposed life imprisonment or shorter

69. *Furman*, 408 U.S. at 239–40.

70. *Id.* at 238–40 (emphasis added).

71. *See id.*

72. *See id.* at 242 (Douglas, J., concurring) (“It would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.”).

73. *Id.* at 240, 252–53.

74. *Id.* at 252–53.

75. *See id.* at 257.

76. *Id.* at 310–11 (White, J., concurring).

77. *See id.*

prison terms upon finding that these punishments were sufficient.⁷⁸ Under the current statutory regimes in the cases before the Court, without more frequent imposition and stricter guidelines, juries lacked meaningful bases for distinguishing between cases that warranted the death penalty and those that did not.⁷⁹ Justice White concluded that the jury's ability to reject the death penalty, no matter the facts and circumstances, rendered an arbitrary form of punishment.⁸⁰

Justice Stewart also refused to reach the constitutionality of the death penalty as a whole. Justice Stewart echoed Justice White's concerns, calling the Georgia and Texas death penalty statutes "unusual in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare."⁸¹ He concluded that "these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual," and that the Eighth and Fourteenth Amendments "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."⁸²

Justices White and Stewart agreed that the death penalty, as applied in these cases, violated the Eighth and Fourteenth Amendments but each believed that a statutory regime with clear guidelines would make capital punishment constitutional.⁸³ Justices Brennan and Marshall reached the ultimate question, each concluding that the death penalty *per se* violated the Eighth Amendment.⁸⁴

Justice Brennan, citing *Trop*, repudiated the idea that the Framers' intent could control in a case implicating the cruel and unusual punishments clause.⁸⁵ According to Justice Brennan, the Eighth Amendment prohibits: (1) the infliction of uncivilized and inhuman punishments that degrade the dignity of human beings, (2) the arbitrary infliction of severe punishment, (3) punishment unacceptable to contemporary society, and (4) excessive punishment when a less severe punishment is adequate.⁸⁶ Justice Brennan proceeded to analyze the death penalty under these four principles.⁸⁷

First, the death penalty degrades human dignity in an ultimate way—by denying the executed person's right to life and humanity. This alone, Justice

78. *See id.*

79. *Id.* at 310–11.

80. *Id.* at 313–14.

81. *Id.* at 309 (Stewart, J., concurring).

82. *Id.* at 309–10.

83. *Id.* at 306–10 (Stewart, J., concurring); *id.* at 310–14 (White, J., concurring).

84. *See id.* at 305–06 (Brennan, J., concurring); *id.* at 358–59 (Marshall, J., concurring).

85. *Id.* at 258 (Brennan, J., concurring) (citing *Trop v. Dulles*, 356 U.S. 86, 89 (1958)).

86. *Id.* at 270–71, 274, 277, 279.

87. *Id.* at 270.

Brennan suggested, would be enough to hold the death penalty unconstitutional under the Eighth Amendment. Second, the death penalty is infrequently imposed despite thousands of crimes each year eligible for capital sentencing. Nothing distinguished the crimes of Furman from other murders; if his crime was “extreme,” then nearly all murderers and their murders are also “extreme.”⁸⁸ The “procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.”⁸⁹ Third, the death penalty has historically stirred public controversy and over time the public has sought to comport punishments with human dignity. The history of the death penalty has been one of successive restriction. According to Justice Brennan, “when an unusually severe punishment is authorized for wide-scale application but not, because of society’s refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it.”⁹⁰ Finally, in order for the death penalty to be necessary for deterrence purposes there must exist a potential, rational criminal “who will commit a capital crime knowing that the punishment is long-term imprisonment . . . but will not commit the crime knowing that the punishment is death.”⁹¹ The risk of imposition of the death penalty, however, is too remote and improbable to act as an effective deterrent. Life imprisonment equally deters and protects society from dangerous criminals.

Justice Marshall’s concurrence raised many of the same concerns about human decency as Justice Brennan. Justice Marshall focused on the “evolving standards of decency that mark the progress of a maturing society.”⁹² Concluding his concurrence, Marshall stated:

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve ‘a major milestone in the long road up from barbarism’ and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.⁹³

88. *Id.* at 293–94.

89. *Id.* at 295.

90. *Id.* at 300.

91. *Id.* at 301.

92. *Id.* at 329 (Marshall, J., concurring) (quoting *Trops v. Dulles*, 356 U.S. 86, 101 (1958)).

93. *Id.* at 371 (quoting RAMSEY CLARK, *CRIME IN AMERICA* 336 (1970)).

Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell, and William Rehnquist dissented.⁹⁴ Though each wrote separately, the dissenters each raised similar concerns. Until *Furman*, capital punishment was presumed constitutional in light of its prevalence and history.⁹⁵ In deciding *Furman*, the majority ignored years of Supreme Court precedent.⁹⁶ In addition, the dissent expressed concerns that the Supreme Court should not challenge state legislative judgments about the death penalty's desirability or effectiveness.⁹⁷ The legislature—not the Court—represents the will of the people and responds best to the will and moral values of the people.⁹⁸ Furthermore, the death penalty enjoys popular support in the United States among much of the population.⁹⁹

Among the dissents, Justice Blackmun's deserves further comment. Justice Blackmun expressed that if he were a legislator he would vote against the death penalty for policy reasons.¹⁰⁰ While Justice Blackmun admitted his own internal conflict over the death penalty, he was disturbed by the "suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago."¹⁰¹ He concluded, "Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped."¹⁰² Thus, his dissent acknowledged the moral conundrum raised by the death penalty. However, in the eyes of the dissenting Justices, its permissibility was a policy decision best left to state legislators.

Furman was a shock to the capital punishment system in the United States, invalidating death penalty statutes in approximately forty states and overturning 600 death penalty sentences.¹⁰³ The Court's decision forced state legislatures to consider whether the death penalty still served a role in the penal system. Instead of abandoning capital punishment, thirty-four states enacted new death penalty statutes to comport with the Court's holdings.¹⁰⁴ Some states enacted statutes bifurcating trials and providing juries with guidelines for imposing the death penalties.¹⁰⁵ Other states

94. *See id.* at 375–470 (dissenting opinions).

95. *Id.* at 451 (Blackmun, J., dissenting).

96. *See id.*

97. *Id.* at 405 (Burger, C.J., dissenting).

98. *Id.*

99. *See id.* at 443 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

100. *Id.* at 406 (Blackmun, J., dissenting).

101. *See id.* at 410.

102. *Id.* at 414.

103. *See* MARK COSTANZO, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 19 (1997); *Part I: History of the Death Penalty*, *supra* note 46.

104. *Part I: History of the Death Penalty*, *supra* note 46.

105. *Id.*

mandated the death penalty upon conviction for certain crimes.¹⁰⁶ A referendum in California overturned the California Supreme Court's decision in *California v. Anderson*, which held the death penalty violated the California constitution.¹⁰⁷

If popular opinion dictated the evolving standards of decency in society, the majority of the U.S. population reaffirmed capital punishment as an appropriate sentence in some cases. The voters in California had another opportunity to vote for or against the death penalty on two referenda in November 2016, and they reached the same result as they did over forty years ago.¹⁰⁸ Proposition 62, which was defeated, would have repealed capital punishment and made life without parole the maximum punishment for murder in California.¹⁰⁹ Proposition 66, which was approved, retains the death penalty and speeds up the appellate process prior to executions.¹¹⁰ In December 2016, the California Supreme Court stayed the implementation of Proposition 66 to consider a lawsuit challenging the constitutionality of the measure.¹¹¹

The Supreme Court's de facto moratorium on the death penalty in the United States came to an end in 1976 with the Court's decision in *Gregg v. Georgia*.¹¹² On November 21, 1973, Troy Gregg robbed and murdered Fred Simmons and Bob Moore after they picked him up while he was hitchhiking.¹¹³ At trial, the judge recommended either the death sentence or life imprisonment.¹¹⁴ Georgia's revised death penalty statute used a

106. *Id.*

107. CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 157 (G. Alan Tarr ed., Greenwood Press 1996).

108. *Despite Californians' Overall Move to the Left, Death Penalty Remained a Holdout*, S. CAL. PUB. RADIO (Nov. 10, 2016), <http://www.scpr.org/programs/airtalk/2016/11/10/53016/ca-voters-on-the-death-penalty> [<https://perma.cc/V32F-9HDF>].

109. *California Proposition 62, Repeal of the Death Penalty (2016)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_62_Repeal_of_the_Death_Penalty_\(2016\)](https://ballotpedia.org/California_Proposition_62_Repeal_of_the_Death_Penalty_(2016)) [<https://perma.cc/HS5K-4ZCV>] (last visited Feb. 16, 2017).

110. *California Proposition 66, Death Penalty Procedures (2016)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_66_Death_Penalty_Procedures_\(2016\)](https://ballotpedia.org/California_Proposition_66_Death_Penalty_Procedures_(2016)) [<https://perma.cc/458R-DAPC>] (last visited Feb. 16, 2017); SEC'Y OF STATE OF THE STATE OF CAL., OFFICIAL VOTER INFORMATION GUIDE 78–81, 104–107 (2016) (explaining the views of the advocates and opponents of California's Proposition 62 and Proposition 66).

111. *California Supreme Court Halts Death Penalty Measure Prop 66*, S. CAL. PUB. RADIO (Dec. 20, 2016), <http://www.scpr.org/news/2016/12/20/67381/california-supreme-court-halts-death-penalty-measu> [<https://perma.cc/5MZ7-5ERS>].

112. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

113. *Id.* at 158–59.

114. *Id.* at 160.

bifurcated procedure.¹¹⁵ In instructing the jury on the death penalty hearing, the trial court judge required the jury to find beyond a reasonable doubt that (1) the offense of murder was committed while the offender was engaged in the commission of two other capital felonies; (2) the offender committed the offense of murder for purpose of receiving money and the automobile described in the incident; and (3) the offense of murder was outrageously and wantonly vile, horrible, and inhuman, in that it involved the depravity of the mind of the defendant.¹¹⁶ Finding these three requirements met, the jury imposed the death sentence for Gregg on the murder charge and on the armed robbery conviction.¹¹⁷ The Georgia Supreme Court affirmed the capital punishment sentence for the murder conviction, but vacated the capital punishment sentence for the armed robbery conviction.¹¹⁸ On appeal to the U.S. Supreme Court, *Gregg* was combined with four other similar cases involving sentences of capital punishment from Florida, Texas, North Carolina, and Louisiana.¹¹⁹ *Gregg* afforded the Court the opportunity to review the revised statutes drafted post-*Furman*.

With one exception, the same Justices that decided *Furman* also decided *Gregg*. In 1974, Justice Douglas suffered a debilitating stroke that left him partially paralyzed.¹²⁰ Despite his insistence that he continue to serve on the Court, the other Justices convinced Douglas to retire.¹²¹ In his place, President Ford appointed Justice John Paul Stevens.¹²² Justice Douglas—discontent with his retirement—insisted that he had only taken senior status on the Court.¹²³ When he tried to hear arguments in *Gregg*, the other nine Justices delivered Douglas a formal letter informing him that his retirement had ended his duties on the Court.¹²⁴

In *Gregg*, the Supreme Court held, by a plurality of 7–2, that the Georgia statute did not violate the Constitution because it provides objective criteria directing and limiting discretion and permits the sentencing authority to consider the defendant’s character.¹²⁵ The Court also held the Florida and

115. *See id.* at 158.

116. *Id.* at 161.

117. *See id.* at 161.

118. *Gregg v. State*, 210 S.E.2d 659, 667 (Ga. 1974).

119. *Gregg v. Georgia*, 423 U.S. 1082, 1082–83 (1976).

120. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 272 (Kermit L. Hall ed., 2d ed., 2005).

121. ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 191 (2003).

122. *Id.*

123. *See id.*

124. *Id.*

125. *Gregg*, 428 U.S. at 206–07.

Texas statutes constitutional but ruled the North Carolina and Louisiana statutes unconstitutional.¹²⁶

In a plurality decision by Justice Stewart joined by Justices Powell and Stevens, the Court held that the death penalty is not per se cruel and unusual punishment.¹²⁷ Rather, the death penalty may be constitutionally imposed when it is proportional to the severity of the crime, not arbitrarily imposed, and does not result in a wanton infliction of pain.¹²⁸ *Gregg* clarified the holding of *Furman* to effectuate *Furman*'s demand that the sentencing authority have discretion in deciding whether or not to impose the death penalty.¹²⁹ The Court created a two-part standard for legislatures in enacting constitutional capital punishment schemes.¹³⁰ First, the statute must provide objective criteria to limit discretion.¹³¹ Second, the sentencer must be allowed to take into account the character and past conduct of the defendant.¹³² Applying this standard, the Court found the bifurcated trial under the Georgia statute prevented arbitrary and disproportionate death sentences.¹³³ While the plurality did not hold as such, it strongly implied that mandatory death penalty statutes would violate the Eighth Amendment.¹³⁴

Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurred.¹³⁵ Justice White dwelled on the death penalty's history and presence in the U.S. Constitution, concluding it could never be per se unconstitutional.¹³⁶ Moreover, the majority of states enacted new death penalty statutes after *Furman*, reaffirming its popular support within the United States.¹³⁷ Justice White reaffirmed that prosecutorial discretion in charging does not make capital punishment unconstitutionally arbitrary.¹³⁸

126. *Id.*; Part I: History of the Death Penalty, *supra* note 46.

127. *Gregg*, 428 U.S. at 206.

128. *See id.* at 203–04.

129. *See id.* at 206–07.

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *Id.* at 207 (White, J., concurring).

136. *See id.* at 226.

137. Part I: History of the Death Penalty, *supra* note 46.

138. *See Gregg*, 428 U.S. at 225 (White, J., concurring).

The prosecutor decides whether to seek the death penalty on the likelihood of success.¹³⁹

Again, Justices Brennan and Marshall dissented. Both argued that the death penalty was unconstitutional under the Eighth Amendment.¹⁴⁰ Justice Brennan reaffirmed that “[t]he Cruel and Unusual Punishments Clause ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’”¹⁴¹ Justice Marshall again criticized the death penalty as “morally unacceptable.”¹⁴²

Gregg revived the death penalty and ended *Furman*’s de facto moratorium. In 1977, Utah became the first state to resume executions.¹⁴³ The reinstatement of the death penalty renewed public outcry against capital punishment. Many institutions and scholars published reports condemning the Court’s decision. In 1980, the Judicial Affairs Committee of the American Medical Association passed a resolution stating that physicians should not participate in executions.¹⁴⁴ A 1987 study by Hugo Bedau and Michael Radelet in the *Stanford Law Review* prompted further outrage by documenting 350 cases of wrongly convicted defendants in capital punishment cases from 1900 to 1985.¹⁴⁵

Bedau and Radelet’s study started a movement for increased use of DNA evidence in capital punishment cases. In 1993, Kirk Bloodsworth became the first inmate on death row to be exonerated with DNA testing.¹⁴⁶ In 1997, the American Bar Association adopted a resolution calling for a moratorium on capital punishment to (1) ensure that death penalty cases are administered fairly and impartially and (2) minimize the risk that innocent persons may be executed.¹⁴⁷ Throughout the last three decades, states such

139. *See id.* (“Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.”).

140. *Id.* at 227 (Brennan, J., dissenting); *id.* at 232 (Marshall, J., dissenting).

141. *Id.* at 227 (Brennan, J., dissenting).

142. *Id.* at 232 (Marshall, J., dissenting).

143. COSTANZO, *supra* note 103, at 22.

144. PROCEEDINGS OF THE HOUSE OF DELEGATES, ANNUAL CONVENTION, AM. MED. ASS’N 85–86 (1980), http://ama.nmtvault.com/jsp/viewer.jsp?doc_id=ama_arch%2FHOD00001%2F00000110&query1=&recoffset=0&collection_filter=Transactions&collection_name=1ee24daa-2768-4bff-b792-e4859988fe94&sort_col=&CurSearchNum=-1 [https://perma.cc/WCQ7-XLWT].

145. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justices in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23–24 (1987).

146. Margot Alder, *Once on Death Row, He Now Fights to Defeat the Death Penalty*, NAT’L PUB. RADIO (Mar. 10, 2013, 4:07 PM), <http://www.npr.org/2013/03/10/173852138/once-on-death-row-he-now-fights-to-defeat-the-death-penalty> [https://perma.cc/E89R-2EHH].

147. *See Death Penalty Moratorium Resolution (1997)*, AM. BAR ASS’N, http://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/moratorium-1997.html [https://perma.cc/N5CZ-5DJK] (last visited Feb. 16, 2017).

as New York, New Mexico, Pennsylvania, Nebraska, Connecticut, and Illinois have either eliminated the death penalty or instituted a moratorium on executions.¹⁴⁸

Since *Gregg*, the Court requires heightened statutory procedures for states wishing to impose the death penalty. In 1978, in *Lockett v. Ohio*, the Court expanded *Gregg*'s holding requiring the sentencer to consider all possible mitigating factors.¹⁴⁹ The Court in *Lockett* held that the legislature cannot restrict which mitigating factors the sentencer considers.¹⁵⁰ Rather, the sentencer must be allowed to consider every possible mitigating factor presented by the defendant.¹⁵¹ Two years later, in *Beck v. Alabama*, the Court held that juries must be allowed to consider lesser offenses, not just the capital offense or acquittal.¹⁵²

Yet in other cases, the Court allowed more liberal application of capital punishment. In 1984, in *Spaziano v. Florida*, the Court held that a judge may constitutionally override a jury's recommendation of life imprisonment and impose the death penalty.¹⁵³ In 2002, however, the Court essentially overruled *Spaziano* in *Ring v. Arizona*.¹⁵⁴ In 2016, in *Hurst v. Florida*, the Court held that the jury, not the judge, must make the findings necessary to impose the death penalty, removing the capital punishment sentencing decision from judges' hands.¹⁵⁵

In addition to these procedural restrictions, the Court has found the death penalty excessive when applied in a number of particular cases. One year after *Gregg*, the Court held in *Coker v. Georgia* that the death penalty is unconstitutional when imposed for rape of an adult woman when the victim is not killed.¹⁵⁶ Justice White, writing for the plurality, held that death is excessive punishment for "the rapist who, as such, does not take human life."¹⁵⁷ The Court has since limited capital punishment's application to specific crimes.

148. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [<https://perma.cc/MY7T-R9X2>] (last visited Feb. 16, 2017).

149. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

150. *See id.* at 605–08.

151. *See id.* at 605.

152. *See Beck v. Alabama*, 447 U.S. 625, 642–43 (1980).

153. *See Spaziano v. Florida*, 468 U.S. 447, 462–63 (1984).

154. *See generally Ring v. Arizona*, 536 U.S. 584 (2002).

155. *See Hurst v. Florida*, 136 S. Ct. 616, 625 (2016).

156. *See Coker v. Georgia*, 433 U.S. 584, 599 (1977).

157. *Id.* at 598.

In other cases, the Court has prohibited the imposition of capital punishment for certain defendants. In *Ford v. Wainwright*, the Court held that the Eighth Amendment prohibited the execution of insane persons, because executing the insane did not serve any penological goals.¹⁵⁸ Similarly, in *Atkins v. Virginia*, the Court held that executing individuals with intellectual disabilities violates the Eighth Amendment.¹⁵⁹ As mentally disabled individuals cannot communicate with the same sophistication as the average offender, there is a greater likelihood that their deficiency in communication would be interpreted by juries as a lack of remorse for their crimes.¹⁶⁰ In *Roper v. Simmons*, the Court held that it was unconstitutional to impose the death penalty for crimes committed while the defendant was under the age of eighteen.¹⁶¹ According to Justice Kennedy’s majority opinion, only three states had executed prisoners under the age of eighteen since 1995.¹⁶² Kennedy also cited international standards, finding that only seven other countries execute juvenile offenders.¹⁶³

As the Supreme Court has continued to further restrict the death penalty, more Justices have joined Justices Brennan and Marshall in finding that the Eighth Amendment prohibits capital punishment. Dissenting in *Callins v. Collins* in 1994, his last year on the Court, Justice Blackmun famously wrote, “[F]rom this day forward, I shall no longer tinker with the machinery of death.”¹⁶⁴ In his recent book, *Six Amendments: How and Why We Should Change the Constitution*, Justice Stevens said, “For me, the question that cannot be avoided is whether the execution of only an ‘insignificant minimum’ of innocent citizens is tolerable in a civilized society When it comes to state-mandated killings of innocent civilians, there can be no ‘insignificant minimum.’”¹⁶⁵

Last year, in a concurring opinion in *Glossip v. Gross*, Justice Breyer, joined by Justice Ginsburg, wrote:

Nearly 40 years ago [referring to *Gregg*], this Court upheld the death penalty under statutes that, in the Court’s view, contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily. The circumstances and the evidence of the death penalty’s application have changed radically since then. Those changes, taken together with my own 20 years of experience on this

158. See *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

159. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

160. *Id.* at 320–21.

161. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

162. *Id.* at 564–65.

163. *Id.* at 577.

164. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

165. JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 122 (2014).

Court, lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishment.’¹⁶⁶

Over the last fifty years, we have seen a movement toward restricting capital punishment in the United States. Today, nineteen states and the District of Columbia have abolished the death penalty.¹⁶⁷ The Supreme Court and its Justices have continued to profess wariness about its constitutionality under the Eighth Amendment.¹⁶⁸ Justice Scalia’s prophecy that the Court may hold capital punishment to be unconstitutional in the near future seems very likely. Two Justices—Justice Steven Breyer and Justice Ruth Bader Ginsburg—have signaled their support for reconsideration of the constitutionality of capital punishment.¹⁶⁹ No other current Justice has endorsed that view.¹⁷⁰ Two other current Justices in the liberal wing of the Court—Justice Sonia Sotomayor and Justice Elena Kagan—have not indicated a position on the issue, but might be supportive.¹⁷¹ Justice Anthony Kennedy has written opinions narrowing the cases in which the death penalty can be applied.¹⁷² Although a majority of the current Court might hold the death penalty unconstitutional, the presidential election in 2016 may have changed the timetable for such a decision. President Donald Trump’s election and his appointment of Justice Neil Gorsuch increases the number of conservative Justices on the Court.

It is possible, but not likely, that the Court may consider the constitutionality of the death penalty in two cases on the docket in the current term of the Court.¹⁷³ Both cases are on appeal from defendants on death row in

166. See *Glossip v. Gross*, 135 S. Ct. 2726, 2755–56 (2015) (Brennan, J., concurring).

167. *Facts About the Death Penalty*, DEATH PENALTY INFO CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/3YSW-THSD>] (last visited Feb. 16, 2017). The nineteen states that have abolished the death penalty are: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.*

168. See *Statements on the Death Penalty by Supreme Court Justices*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/statements-death-penalty-supreme-court-justices> [<https://perma.cc/B33E-D48L>] (last visited Feb. 16, 2017).

169. See *id.*

170. See *id.*

171. See *id.*

172. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005).

173. See Adam Liptak, *Supreme Court to Hear Death Penalty Cases*, N.Y. TIMES (June 6, 2016), http://www.nytimes.com/2016/06/07/us/politics/supreme-court-to-hear-two-major-death-penalty-cases.html?_r=0.

Texas.¹⁷⁴ In these cases, the Court will consider the role of race and intellectual disability in capital prosecutions. In one case, the Court will consider the effect of a psychologist's testimony as a witness for a black defendant that black defendants are more dangerous to society than white defendants.¹⁷⁵ The other case involves the appropriate standard for determining whether a defendant has a mental disability that would preclude execution for his crime.¹⁷⁶ Initially, when the Court announced that it would hear the second case, the Order said the Justices would also consider a second question—whether executing a convicted defendant more than thirty-five years after he was sentenced to death violates the Eighth Amendment.¹⁷⁷ Two hours after that announcement, the Court issued a revised Order limiting the case to the intellectual disability issue.¹⁷⁸ Apparently, the Court wanted to ensure that a full complement of nine Justices hear a case in which it considers whether capital punishment violates the Eighth Amendment.

It appears the issue of the constitutionality of the death penalty will await another case, and the wait may be a little longer than expected only a year ago. In view of the trend of Supreme Court cases in recent years, however, I expect that Justice Scalia's prediction will come true, and it will happen during the terms of some of the Justices currently on the Court.

174. *Id.*

175. *Buck v. Stephens*, 623 Fed. App'x. 668 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 2409 (2016) (No. 15-8049); Brief of Petitioner at i, *Buck v. Stephens*, No. 15-8049 (U.S. July 28, 2016).

176. *Ex parte Moore*, 470 S.W.3d 481 (Tex. Crim. App. 2015), *cert. granted sub nom.* *Moore v. Texas*, 136 S. Ct. 2407 (2016) (No. 15-797); Brief of Petitioner at i, *Moore v. Texas*, No. 15-797 (U.S. July 28, 2016).

177. *See* Liptak *supra* note 173.

178. *See id.*