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The Law of Abolition

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THE LAW OF ABOLITION

KEVIN M. BARRY*

Three themes have characterized death penalty abolition throughout the Western world: a sustained period of de facto abolition; an understanding of those in government that the death penalty implicates human rights; and a willingness of those in government to defy popular support for the death penalty. The first two themes are present in the U.S.; what remains is for the U.S. Supreme Court to manifest a willingness to act against the weight of public opinion and to live up to history's demands.

When the Supreme Court abolishes the death penalty, it will be traveling a well-worn road. This Essay gathers, for the first time and all in one place, the opinions of judges who have advocated abolition of the death penalty over the past half-century, and suggests, through this "law of abolition," what a Supreme Court decision invalidating the death penalty might look like. Although no one can know for sure how history will judge the death penalty, odds are good that the death penalty will come to be seen as one of the worst indignities our nation has ever known and that a Supreme Court decision abolishing it will, in time, be widely accepted as right.

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INTRODUCTION

In an influential book written over thirty years ago, Professors Franklin Zimring and Gordon Hawkins identified three common themes that have characterized the abolition of the death penalty throughout the Western world: (1) a sustained period of de facto abolition; (2) a recognition by those in government that the death penalty is a “human rights issue” rather than an individual, criminal justice issue; and (3) a willingness of those in government to defy the weight of public opinion.¹ According to Zimring and Hawkins, these common themes are not part of a single coordinated international strategy or the conscious appropriation of tactics that have proved successful in other countries that have abolished the death penalty.² Instead, the commonality is unconscious; it is “simply . . . how the abolition of capital punishment happens in modern democracies.”³ The question, then, is not *whether* the U.S. will join the ranks of abolitionist nations, but rather when. Applying Zimring and Hawkins’s three themes, the answer hinges on the willingness of the U.S. Supreme Court to act against the weight of public opinion and live up to history’s demands.⁴

¹ FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 21–23 (1986). Zimring and Hawkins also noted a fourth, and somewhat counterintuitive, theme of abolition: popular *support* for the death penalty. *Id.* at 21–22. This theme is discussed below. *See infra* notes 41–42 and accompanying text (discussing public opposition to abolition of death penalty).

² *Id.* at 19.

³ *Id.*; *see also id.* at 23 (“[T]hese elements accompany the end of capital punishment, the normal pattern of abolition that provides a standard of comparison with development in the United States . . .”).

⁴ *See, e.g.,* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 4–5, 289 (2016) (stating that “the death penalty will not last much longer in the United States,” and that judicial abolition “seems likely in the coming decade or two—but only if justices who leave the current Court are replaced with justices who hold similar or more liberal views”); *see also* State v. Webb, 750 A.2d 448, 458 (Conn. 2000) (Norcott, J., dissenting) [hereinafter *Webb II*] (“I am optimistic that very early in the twenty-first century we will all witness the abolition of this practice by Connecticut as a state and the

When the U.S. Supreme Court abolishes the death penalty, it will not be going it alone. Indeed, for over a half-century, at least thirty-five federal and state judges have concluded that the death penalty is unconstitutional *per se*.⁵ And they have done so for remarkably similar reasons—namely, objective criteria detailing the death penalty’s unacceptability to contemporary society, the subjective determination that the death penalty no longer serves any legitimate penological purpose, and a recognition that the death penalty violates human dignity.⁶ Taken together, these decisions form a coherent body of law—the “law of abolition”—on which the Supreme Court should rely.

Part I of this Essay discusses why abolition depends upon the Supreme Court’s willingness to defy public opinion. Part II compiles and analyzes those judicial opinions advocating abolition of the death penalty, and suggests, through this “law of abolition,” what a Supreme Court decision invalidating the death penalty might look like. Part III argues that a Supreme Court decision abolishing the death penalty will, in time, be widely accepted as right. Part IV offers some concluding remarks.

I. THE DEATH PENALTY’S NUMBERED DAYS

In their 1986 book, *Capital Punishment and the American Agenda*, Professors Zimring and Hawkins boldly predicted U.S. abolition of the death penalty in the early part of the twenty-first century:⁷

[Abolition] will not happen as a consequence of a major decline in the rate of violent crime It will not happen because of a dramatic abatement in the ideological conflict between the proponents of hard- and soft-line approaches to crime control policy. Nor will it occur because of research findings that would constitute proof that the death penalty is no more a deterrent to murder than is imprisonment [or] . . . because of a single precipitating event—for example, the execution of an individual subsequently proved innocent.⁸

Instead, Zimring and Hawkins argued, U.S. abolition will come about in much the same way it has come about in the rest of the Western world—

United States as a country.”); Richard C. Dieter, *The Future of the Death Penalty in the United States*, 49 RICH. L. REV. 921, 921 (2015) (“There are . . . concrete reasons to believe that the story of the death penalty in the United States may be approaching its final chapter.”).

⁵ See *infra* Part II.

⁶ *Id.*

⁷ ZIMRING & HAWKINS, *supra* note 1, at 157 (predicting in 1986 that the last execution was “more likely to occur in fifteen years than in fifty years,” and that “the Supreme Court will ultimately preside over the formal disestablishment of the death penalty” at a substantially later date).

⁸ *Id.* at 149.

when three themes are present. First, there will be a sustained period of de facto abolition, represented by a diminution in death sentences and a lack of actual executions in a majority of states.⁹ Second, among at least some of those in government, there will be a recognition of what Zimring and Hawkins call “[t]he human rights linkage”—that is, the understanding that the death penalty is a human rights issue rather than solely a criminal justice issue committed to the sovereignty of individual states.¹⁰ And third, there will be leaders in government willing to defy the weight of public opinion.¹¹ Applying these three themes, abolition hinges on the Supreme Court’s willingness to lead—not follow—public opinion.

A. DE FACTO ABOLITION

Historically speaking, countries seldom give up their death penalties cold turkey.¹² Instead, “a lengthy transition period between the end of executions and the formal repudiation of all capital punishment” is generally required.¹³ This is especially true for countries with federalist governments, where the gap between the first and last abolitionist jurisdiction is often decades-long.¹⁴

This transition appears to be underway in the U.S. Over the past two decades, the death penalty has lost much of the acceptance it once enjoyed. Nineteen states have abolished the death penalty de jure by either legislatively repealing death penalty statutes or judicially abolishing the death penalty.¹⁵ Eleven more states have abolished the death penalty de

⁹ *Id.* at 21 (discussing de facto abolition). Analogizing to the Supreme Court’s legalization of abortion, Zimring and Hawkins suggest that U.S. abolition of the death penalty will not require that *all* states abolish de facto; a majority of American states will do. *See id.* at 154 (stating that the Supreme Court’s decision protecting the right to abortion in *Roe v. Wade* came “after a majority of all American states had liberalized their grounds for legal abortion . . .”).

¹⁰ *Id.* at 23.

¹¹ *Id.* at 154–56.

¹² *See* ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY, A WORLDWIDE PERSPECTIVE* 18 (5th ed. 2015) (discussing long delayed abolition in U.K., Netherlands, Portugal, and Italy). Notably, since 1989, a majority of countries—including Romania, the Czech and Slovak Republics, Cambodia, Latvia, South Africa, and Turkmenistan—have abolished the death penalty within ten or fewer years of their last executions. *Id.*

¹³ ZIMRING & HAWKINS, *supra* note 1, at 156.

¹⁴ *Id.* at 152 (discussing Switzerland and Australia).

¹⁵ *See States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 9, 2016), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [hereinafter DPIC, *States*]. These states are: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Columbia. *Id.*

facto; they have not executed anyone in a decade or more.¹⁶ All told, thirty states—nearly two-thirds of the country—have turned their backs on the death penalty.¹⁷

Although twenty states with the death penalty have imposed the death penalty in the past decade, the number of executions nationwide has steadily declined.¹⁸ In 2016, there were only twenty executions—a twenty-five-year low.¹⁹ With the exception of two executions in Alabama and one each in Florida and Missouri, all of those executions occurred in just two states: Georgia and Texas.²⁰ Prior years have followed a similar pattern. In 2015, there were twenty-eight executions, all but two of which occurred in Florida, Georgia, Missouri, and Texas.²¹ And in 2014, there were thirty-five executions, all but five of which occurred in the same four states.²² The death penalty's symphony of support has been reduced to a lonely quartet.

The death penalty's overwhelming loss of acceptance is confirmed by a nationwide drop in new death sentences—from modern era highs of more than 300 annually in the mid-1990s to modern era lows of eighty-five or fewer since 2011, culminating in a forty-year low of just thirty death sentences in 2016.²³ The 2016 ouster of prosecutors in four of the sixteen

¹⁶ See *Executions by State and Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5741> (last visited Oct. 24, 2016). These states are California, Colorado, Kansas, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oregon, Pennsylvania, and Wyoming. In three of the eleven states—Colorado, Oregon, and Pennsylvania—governors have declared moratoria on executions. *Death Penalty in Flux*, DEATH PENALTY INFO. CTR. (Feb. 6, 2007), <http://www.deathpenaltyinfo.org/death-penalty-flux>. Generally speaking, death sentences in these eleven states are correspondingly rare. Over the past ten years, there have been no death sentences handed down in Montana and Wyoming, one in New Hampshire, two each in Colorado and Nebraska, six in Kansas, ten in Oregon, and fourteen and eighteen in Nevada and North Carolina, respectively. *Death Sentences in the United States From 1977 By State and By Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last visited Oct. 24, 2016).

¹⁷ DPIC, *States*, *supra* note 15.

¹⁸ *Executions by Year*, DEATH PENALTY INFO. CTR. (Aug. 25, 2017), <http://www.deathpenaltyinfo.org/executions-year>.

¹⁹ *Id.*

²⁰ *Execution List 2016*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2016> (last visited Oct. 24, 2016).

²¹ *Execution List 2015*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2015> (last visited Oct. 24, 2016).

²² *Execution List 2014*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2014> (last visited Oct. 24, 2016).

²³ See DEATH PENALTY INFO. CTR., DEATH PENALTY IN 2016: YEAR END REPORT 1, 3, <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf> [hereinafter DPIC REPORT] (last visited Oct. 24, 2016).

counties that impose the most death sentences in the U.S., and the election of prosecutors who oppose the death penalty or have pledged to reform their county's death penalty practices, supports this conclusion.²⁴ So, too, does the reelection of Washington Governor Jay Inslee, who imposed a moratorium on executions in 2014.²⁵

B. HUMAN RIGHTS LINKAGE

As of 2016, 104 countries—over half of the world—have abolished the death penalty for all crimes.²⁶ Seven more countries have abolished the death penalty for all “ordinary crimes” and another thirty have not executed anyone over the past decade, yielding a total of 141 abolitionist countries, or well over two-thirds of the world.²⁷ Only fifty-seven countries retain the death penalty, and only five countries other than the U.S. use it with it any frequency: China, Iran, Iraq, Saudi Arabia, and Pakistan.²⁸

A centerpiece of the worldwide evolution away from the death penalty has been the emergence of international human rights law and its commitment to “the protection of citizens from the power of the state and the tyranny of the opinions of the masses.”²⁹ Over the past twenty-five years, numerous international human rights instruments have transformed the use of the death penalty from an issue of state sovereignty—one “decided solely or mainly as an aspect of national criminal justice policy”—to “a fundamental violation of human rights: not only the right to life but the right to be free of excessive, repressive, and tortuous punishments.”³⁰

²⁴ *Id.* at 9–10; see also Frances Robles & Alan Blinder, *Florida Prosecutor Takes a Bold Stand Against Death Penalty*, N.Y. TIMES, Mar. 16, 2017, at A21 (discussing decision by chief prosecutor in Orlando, Florida to no longer seek death penalty).

²⁵ DPIC REPORT, *supra* note 23, at 9.

²⁶ *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR. (Dec. 31, 2016), <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries>.

²⁷ *Id.*

²⁸ *Id.*; *The Death Penalty: An International Perspective*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-penalty-international-perspective> (last visited Oct. 24, 2016). China, Iran, and Saudi Arabia have regularly executed twenty or more people (and, sometimes, hundreds or even thousands of people) every year for the past decade. *Id.* Iraq and Pakistan have regularly executed large numbers of people over the past decade, although not every year. *Id.* Several other countries, including Yemen, Sudan, and Egypt, have also executed large numbers of people, although with far less frequency than the six countries listed above. *Id.*

²⁹ HOOD & HOYLE, *supra* note 12, at 22.

³⁰ *Id.*; see also *Protocol No. 13 to the Convention for Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty In All Circumstances*, 1 E.T.S. No. 187 (2002) <https://rm.coe.int/CoERMPublicCommon>

This human rights linkage has informed the U.S. Supreme Court's death penalty jurisprudence. Although the Court has eschewed reliance on international human rights norms, it has not ignored them.³¹ In recent death penalty decisions, the Court has found support in the practices of the world community, which, in turn, rely on international human rights law.³² For example, in *Roper v. Simmons*, the Court supported its prohibition of the death penalty for crimes committed by juveniles by stating that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."³³ Similarly, in *Atkins v. Virginia*, the Court prohibited the death penalty for those with intellectual disabilities, noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."³⁴

The Court's reliance on "dignity"—a concept used consistently throughout international human rights law, including in its charter, the 1948 Universal Declaration of Human Rights³⁵—suggests further acknowledgment of the human rights perspective. Over the past forty years, the Court has successively restricted imposition of the death penalty, using dignity as the touchstone for gauging who may receive the death penalty, the procedures under which the death penalty may be imposed, and the means by which the

SearchServices/DisplayDCTMContent?documentId=0900001680081563 (abolishing the death penalty "in all circumstances" on grounds that "[the] right to life is a basic value in a democratic society and . . . the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings"); *Protocol No. 6 to the Convention for Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, 1 E.T.S. No. 114 (1983) http://www.echr.coe.int/Documents/Library_Collection_P6_ETS114E_ENG.pdf (abolishing the death penalty in times of peace); Chapter I, Article 2 of the Charter of Fundamental Rights of the European Union, 2000 OJ (C 364), 9 (Dec. 18, 2000) http://www.europarl.europa.eu/charter/pdf/text_en.pdf (stating that "[e]veryone has the right to life" and "[n]o one shall be condemned to the death penalty, or executed").

³¹ *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.").

³² *Id.* at 578 ("[T]he express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.").

³³ *Id.* at 575.

³⁴ 536 U.S. 304, 316 n.21 (2002); *cf.* *Graham v. Florida*, 560 U.S. 48, 80–82 (2011) (discussing foreign and international law's support for prohibition of life without parole for juvenile non-homicide offenders).

³⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810 at 72 (Dec. 10, 1948) (affirming the "dignity and worth of the human person").

death penalty may be carried out.³⁶ Although the Court has yet to hold that the death penalty per se violates human dignity under the Eighth Amendment, it is inevitable that it one day will.³⁷

The human rights linkage, moreover, is not confined to the Court's death penalty jurisprudence. State legislators have invoked human rights norms in support of repealing the death penalty,³⁸ as have governors when imposing moratoria on executions³⁹ and commuting death sentences.⁴⁰

³⁶ See Barry, *infra* note 61, at 400–11 (discussing role of dignity in Supreme Court's Eighth Amendment death penalty jurisprudence); Bharat Malkani, *Dignity and the Death Penalty in the United States Supreme Court*, 44 HASTINGS CONST. L.Q. 145, 160–61 (2017); accord. Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 461–65 (2017).

³⁷ See, e.g., William J. Brennan, Jr., *The 1986 Oliver Wendell Holmes, Jr. Lecture, Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 331 (1986) (“I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the [condemned] and transgresses the prohibition against cruel and unusual punishment.”).

³⁸ See, e.g., *Senator Raymond Lesniak: The Road to Justice and Peace*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/senator-raymond-lesniak-road-justice-and-peace> (last visited Oct. 24, 2016) (arguing “that the death penalty violates the fundamental human rights of mankind”). Conservative legislators have similarly invoked “the right to life” in support of abolishing the death penalty. Compare, e.g., *Statement from Concerned Conservative Nebraskans: Conservatives and Republicans Call for Repeal of Nebraska's Death Penalty*, NEBRASKANS FOR ALTERNATIVES TO THE DEATH PENALTY (May 1, 2015), <http://nadp.net/statement-from-concerned-conservative-nebraskans/> (discussing Nebraska state legislators' opposition to death penalty on grounds that it violates “the right to life”), and Ben Jones, *The Republican Party, Conservatives, and the Future of Capital Punishment*, J. OF CRIM. L. AND CRIMINOLOGY (forthcoming 2017) (discussing support for death penalty repeal legislation among Republican state legislators based, in part, on pro-life beliefs), with FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 27–28 (2003) (characterizing “the right to life” as “the most fundamental of human rights,” and discussing the international campaign to transform consideration of the death penalty from “an isolated issue of criminal justice” to an “attack[] on fundamental human rights, of which the right to life is but the first”).

³⁹ See STATE OF COLORADO OFFICE OF THE GOVERNOR, EXECUTIVE ORDER: DEATH SENTENCE REPRIEVE 3 (May 22, 2013), <http://www.deathpenaltyinfo.org/documents/COexecutiveorder.pdf> (declaring moratorium on use of death penalty and noting that “two-thirds of countries worldwide have abolished the death penalty in law or in practice . . .”).

⁴⁰ In Ryan's Words: *I Must Act*, DEATH PENALTY INFO. CTR. (Jan. 11, 2003), <http://www.deathpenaltyinfo.org/ryans-words-i-must-act> (commuting death sentences and noting that “the United States is not in league with most of our major allies: Europe, Canada, Mexico, most of South and Central America. These countries rejected the death penalty. We are partners in death with several third world countries. Even Russia has called a moratorium.”).

C. LEADERSHIP FROM THE FRONT

Where abolition has come about in other countries, “it has not been as a result of the majority of the general public *demanding* it.”⁴¹ Indeed, Zimring and Hawkins could not find *any* “examples of abolition occurring at a time when public opinion supported the measure.”⁴² When countries abolish the death penalty, it is instead the result of what Zimring and Hawkins call “leadership from the front”—“responsible agents manifest[ing] a willingness to act against public opinion.”⁴³

One obvious reason for the gap between public opinion and the government is perspective: the public views the death penalty from afar, like an amateur astronomer gazing at the moon.⁴⁴ From a distance, the death penalty appears as “an important legal threat, abstractly desirable as part of society’s permanent bulwark against crime.”⁴⁵ But government actors—particularly judges—do not share this luxury of distance. Those “closer to the nexus between policy and practice, between ‘the death penalty’ as statute, and killing people as punishment” see the death penalty as it truly is, with all of its imperfections laid bare.⁴⁶

The U.S. experience is emblematic of the divide between popular support for the death penalty and political leadership against it. According to an October 2016 Gallup poll, 37% of respondents answered “no” when asked whether they were “in favor of the death penalty for a person convicted of murder.”⁴⁷ Although this is the highest rate of death penalty opposition in

⁴¹ HOOD & HOYLE, *supra* note 12, at 426 (emphasis in original); *see also* ZIMRING AND HAWKINS, *supra* note 1, at 21–22 (“Majorities of two-thirds *opposed* to abolition were associated with abolition in Great Britain in the 1960s, Canada in the 1970s, and the Federal Republic of Germany in the late 1940s.”) (emphasis added) .

⁴² ZIMRING AND HAWKINS, *supra* note 1, at 22. “[P]ublic opinion or perception almost invariably follows tradition, and the death penalty as symbol is certainly traditional.” *Id.* at 13. Once abolition is accomplished, however, “the death penalty . . . ceases to be a pressing public issue” and “support for the death penalty diminishes.” *Id.* For example, in 1948, one year before Germany abolished the death penalty, 74% of German respondents supported retention of the death penalty; 21% supported abolition. In 1980, over thirty years after Germany abolished in 1949, only 26% of German respondents supported retention, and 55% supported abolition.” *Id.*

⁴³ *Id.* at 155–56.

⁴⁴ *Id.* at 22 (“[T]he difference between public attitudes and the government’s or legislators’ view may often be, in part, not so much a difference in opinion as a difference in perspective.”).

⁴⁵ *Id.* at 22 (quoting Hugo Bedau).

⁴⁶ *Id.*

⁴⁷ *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Oct. 24, 2016).

forty-five years, 60% answered yes (down 20% from an all-time high of 80% in 1994).⁴⁸ On November 8, 2016, voters in California rejected a referendum to abolish the death penalty (53% to 46%), 51.1% of voters voted to hasten the execution process in California, 61% of voters in Nebraska reinstated the death penalty that the state legislature repealed in 2015, and two-thirds of Oklahoma voters passed a referendum that amended their constitution to permit the death penalty.⁴⁹

Despite popular (albeit declining) support for the death penalty, various government leaders have taken action to end it. At the state level, legislative leadership has led to repeal of the death penalty in five states over the past decade: New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), and Maryland (2013).⁵⁰ In 2015, the Nebraska legislature repealed the death penalty over a gubernatorial veto; voters reinstated the death penalty by referendum in 2016.⁵¹ Executive leadership at the gubernatorial level has completely halted executions in Colorado, Washington, Oregon, and Pennsylvania, and has resulted in the commutation of death sentences in New Jersey, Maryland, Illinois, and several other states.⁵² Leadership among district attorneys has likewise resulted in fewer death sentences.⁵³ And three

⁴⁸ *Id.*

⁴⁹ DPIC REPORT, *supra* note 23, at 8–9.

⁵⁰ *See* DPIC, *States*, *supra* note 15.

⁵¹ *Nebraska*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/nebraska-1> (last visited Oct. 24, 2016).

⁵² *See Death Penalty in Flux*, DEATH PENALTY INFO. CTR. (Feb. 6, 2007), <http://www.deathpenaltyinfo.org/death-penalty-flux>; *Clemency*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/clemency>.

⁵³ *See, e.g.,* John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1718 & n.72 (2003) (discussing Governor George Pataki’s removal of “Bronx County District Attorney Robert Johnson from a high-profile murder prosecution when he refused to seek the death penalty”); Robles & Blinder, *supra* note 24 (quoting newly elected chief prosecutor of Orlando, Florida, Aramis Ayala, who announced in 2017 that her office would no longer pursue death penalty: “I am prohibited from making the severity of sentences the index of my effectiveness. Punishment is most effective when it happens consistently and swiftly. Neither describe the death penalty in this state.”); *Montana Assistant Attorney General Calls for Death Penalty Repeal*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/new-voices-prosecutors-and-attorneys> (quoting Montana Assistant Attorney General’s 2007 testimony to the Montana House Judiciary Committee in support of death penalty repeal: “It seems to me to be the ultimate incongruity to say we respect life so much that we’re going to dedicate all our money, all our resources, our legal expertise and our entire system to try and take your life. . . . Frankly, I just don’t think I can do it anymore.”); *see also* *Glossip v. Gross*, 135 S. Ct. 2726, 2774 (2015) (Breyer, J., dissenting) (“[T]he number of active death penalty counties is small and getting smaller.”); DPIC REPORT, *supra* note 23, at 9–10 (discussing 2016 defeat of Alabama, Florida, and Texas prosecutors

state supreme courts—California (1972), Massachusetts (1980), and Connecticut (2015)—have struck down the death penalty as unconstitutional *per se*, although voters in California and Massachusetts later abrogated the decisions of their high courts by amending their state constitutions to permit the death penalty.⁵⁴

In our federal system, the actions of state legislatures, governors, and state supreme courts can only do so much; to abolish the death penalty, it will take federal action.⁵⁵ Congress could pass a law prohibiting the death penalty, but it is unlikely to do so on such a divisive issue.⁵⁶ The President could halt federal executions and pardon federal prisoners, but this is similarly unlikely, as is the U.S. Attorney General’s refusal to authorize federal prosecutors to seek the death penalty.⁵⁷ In any event, these executive

“in four of the 16 counties that imposed the most death sentences in the U.S.” by candidates “who expressed personal opposition to the death penalty or pledged to institute reforms in the county’s death penalty practices”).

⁵⁴ DPIC, *States*, *supra* note 15; see *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 117–18, 124 (Mass. 1984) (discussing Massachusetts constitutional amendment abrogating judicial abolition of the death penalty in *Suffolk Dist. v. Watson*, 411 N.E.2d 1274 (Mass. 1980), and holding unconstitutional the death penalty provisions of MASS. GEN. LAWS ch. 265, § 2); *People v. Frierson*, 599 P.2d 587, 605 (Cal. 1979) (discussing California constitutional amendment abrogating judicial abolition of the death penalty in *People v. Anderson*, 493 P.2d 880 (Cal. 1972)). Connecticut has *not* abrogated judicial abolition of the death penalty in *State v. Santiago*, 122 A.3d 1, 10–11 (Conn. 2015) [hereinafter *Santiago II*], although three legislators have introduced legislation that would do so. Dave Collins & Associated Press, *3 Connecticut Lawmakers Call for Restoring the Death Penalty*, NEW HAVEN REGISTER (Feb. 12, 2017), <http://www.nhregister.com/government-and-politics/20170212/3-connecticut-lawmakers-call-for-restoring-the-death-penalty>.

Delaware’s and New York’s high courts have each ruled that their respective death penalty statutes (but not their death penalties *per se*) are unconstitutional, and neither state has enacted new death penalty legislation. *Delaware*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/delaware-1> (last visited Oct. 24, 2016); *New York*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/new-york-1> (last visited Oct. 24, 2016).

⁵⁵ ZIMRING & HAWKINS, *supra* note 1, at 153 (“[E]xecutions represent a manifestation of state autonomy that continues to influence state and local decision makers [U]nless the states’ rights struggle spontaneously ends, nationalization of the death penalty issue appears to be a necessary component in the timely achievement of abolition.”).

⁵⁶ *Id.* (“Congress is characterized by consistent timidity, lacking a tradition of moral leadership . . .”).

⁵⁷ See LINDA E. CARTER et al., UNDERSTANDING CAPITAL PUNISHMENT 311, 422–23 (3d ed. 2012) (discussing president’s authority to grant clemency for people convicted of federal crimes, and U.S. Department of Justice protocol that requires the Attorney General to authorize U.S. Attorneys to pursue death penalty prosecution for federal crimes). Federal grants of clemency applications have declined sharply over the past forty years for a multitude of reasons, including the rise of tough-on-crime politics. Rachel E. Barkow, *The Ascent of the*

actions would apply only to people convicted of federal crimes.⁵⁸

This leaves the U.S. Supreme Court, the branch whose membership is insulated from public opinion⁵⁹ and “whose exercise of moral leadership is supported by a long historical tradition,” as the best bet to abolish the death penalty for good.⁶⁰ In 2015, the Supreme Court seemed poised to do so.⁶¹ That year, in *Glossip v. Gross*, four Supreme Court Justices—Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor—dissented from a decision upholding Oklahoma’s lethal injection protocol, and the former two Justices stated that it was “highly likely that the death penalty

Administrative State and the Demise of Mercy, 121 HARV. L. REV. 1332, 1348–49 (2008). Since the reinstatement of the federal death penalty in 1988, clemency has been granted to only two federal death row inmates—one in 2001, under President Clinton, and the second in 2017, under President Obama. *Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR. (July 25, 2017), <http://www.deathpenaltyinfo.org/federal-death-row-prisoners>. In 2017, President Obama also granted clemency to a military death row prisoner. *President Obama Commutes Two Death Sentences*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6657> (last visited Oct. 24, 2016).

Similarly, no Attorney General formally halted federal death penalty prosecutions during this period. See CARTER et al., *supra* note 57, at 422–23 (discussing Attorneys General Reno and Ashcroft); Matt Apuzzo, *Obama Administration Steps Back From Effort to End Federal Death Penalty*, N.Y. TIMES, Apr. 29, 2015, at A1 (discussing Attorneys General Holder and Lynch). On the contrary, between 1988 and 2010, the Attorneys General approved 466 defendants for federal capital prosecutions, and three defendants were executed. See CARTER et al., *supra* note 57, at 423.

⁵⁸ See CARTER et al., *supra* note 57, at 311, 422–23 (discussing presidential pardon power and DOJ protocol regarding federal death penalty).

⁵⁹ The experience of state judges illustrates the importance of Supreme Court leadership. When state courts have abolished the death penalty outright or reversed death sentences on a case-by-case basis, “[t]he offending judges have sometimes been removed in retention elections, though veiled hints alone have usually sufficed to secure compliance with popular will. Lacking the institutional wherewithal of the federal courts, state judges must either relent or face ouster.” Stephen P. Garvey, *Politicizing Who Dies*, 101 YALE L.J. 187, 207 (1991); see, e.g., Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1395, 1419–20 (2016) (discussing efforts to defeat elected justices); Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 846 (1986) (discussing “effort[s] to defeat sitting justices because of their death sentence votes.”); Christopher Keating, *House, Senate Approve Justice Palmer For Another Term On Supreme Court Bench*, HARTFORD COURANT (Mar. 8, 2017), <http://www.courant.com/politics/hc-justice-palmer-votes-20170308-story.html> (discussing unusually close vote in state senate to confirm the reappointment of Justice Richard N. Palmer, who authored the 2015 decision abolishing Connecticut’s death penalty).

⁶⁰ ZIMRING & HAWKINS, *supra* note 1, at 155.

⁶¹ See, e.g., Kevin M. Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383, 388, 388 n.23 & 418 (2017) (predicting that the Supreme Court will soon declare the death penalty unconstitutional).

violates the Eighth Amendment.”⁶² Approximately three months later, and shortly before his death, Justice Antonin Scalia told an audience of college students that four of his colleagues on the Court believe that the death penalty is unconstitutional, and that he “wouldn’t be surprised” if the Court abolished it.⁶³ The fate of the death penalty, it appeared, lay in the thoughtful hands of Justice Anthony Kennedy, whose soaring opinions supporting LGBT rights and limiting the class of people eligible to receive the death penalty have “push[ed] ‘dignity’ closer to the center of American constitutional law and discourse.”⁶⁴

But predictions about Justice Kennedy’s willingness to join his four colleagues in abolishing the death penalty were premature. It is rumored that Justice Kennedy will soon retire from the bench.⁶⁵ Should he do so within the next three years, the populist and pro-death penalty president, Donald Trump, will almost certainly replace Kennedy with a conservative Justice unlikely to support judicial abolition.⁶⁶

Notwithstanding this setback for abolition, statistics detailing our moribund death penalty and its numerous flaws, coupled with an Eighth Amendment doctrine rooted in human dignity that largely turns on such statistics, are cause for optimism.⁶⁷ While not imminent, judicial abolition is inevitable. In the words of Zimring and Hawkins,

Although both the public mood and the ideology of governments fluctuate dramatically in relatively short periods of time, in the history of the Western world those fluctuations

⁶² 135 S. Ct. 2726, 2776–77 (2015) (Breyer, J., dissenting); *see id.* at 2797 (Sotomayor, J., dissenting).

⁶³ *See* Debra Cassens Weiss, *Scalia Says He “Wouldn’t be Surprised” If SCOTUS Overturns the Death Penalty*, ABA J., (Sept. 24, 2015), http://www.abajournal.com/news/article/scalia_says_he_wouldnt_be_surprised_if_scotus_overturns_the_death_penalty.

⁶⁴ Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 21 (2015); *see also* Barry, *supra* note 61, at 404–11 (discussing line of Supreme Court cases categorically prohibiting the imposition of death penalty because of insanity, intellectual disability, youth, and non-homicide character of crime).

⁶⁵ *See* Cody Derespina, *Chuck Grassley Expects Supreme Court Resignation This Summer*, FOX NEWS (Apr. 20, 2017), <http://www.foxnews.com/politics/2017/04/20/chuck-grassley-expects-supreme-court-resignation-this-summer.html> (discussing rumored retirement).

⁶⁶ *See* Ariane de Vogue & Joan Biskupic, *Conservatives Prepare for Justice Anthony Kennedy’s Retirement*, CNN (May 2, 2017), <http://www.cnn.com/2017/05/01/politics/justice-anthony-kennedy-retirement-rumors/> (discussing list of conservative judges and lawyers to replace Justice Kennedy).

⁶⁷ *See supra* Part I.A–B (discussing death penalty’s loss of acceptance and line of Supreme Court cases holding that application of death penalty violates human dignity under Eighth Amendment).

occur within a larger continuous movement of developing social and political trends [T]he movement for abolition of capital punishment aris[es] from ‘beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century. In this longer-term perspective the transience and marginal significance of current fashion is clear We see the Court changed not by personnel or a single event but by a sense of the necessity of living up to history’s demands.⁶⁸

In short, the Supreme Court’s decision to abolish the death penalty will ultimately derive from its understanding that there *is* a right side of history and from the Court’s commitment to being on that side.

II. THE LAW OF ABOLITION

Having discussed why abolition ultimately depends upon the U.S. Supreme Court’s willingness to act against public opinion, this essay now looks back at the history of judicial abolition of the death penalty. The goals of this part are modest and few: to gather, for the first time and all in one place, the opinions of judges who have advocated abolition of the death penalty for over the past half-century, and to suggest, through these opinions, what a Supreme Court decision invalidating the death penalty might look like.⁶⁹

A. THE REASONS FOR JUDICIAL ABOLITION

When a majority of the Supreme Court abolishes the death penalty, it will not be going it alone. Members of the judiciary, including several current

⁶⁸ ZIMRING & HAWKINS, *supra* note 1, at 158.

⁶⁹ As its title suggests, this essay does not include judges’ extrajudicial statements—of which there are many—opposing the death penalty. *See, e.g.*, *People v. Bull*, 705 N.E.2d 824, 846 (Ill. 1998) (Freeman and McMorro, JJ., concurring) (citing to A. KAUFMAN, CARDOZO 395 (1998) in a discussion of U.S. Supreme Court Justice Benjamin Cardozo’s statements in opposition to death penalty prior to becoming a judge); STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 238–39, 288 (2002) (discussing public and private statements opposing death penalty by U.S. Supreme Court Justices Felix Frankfurter, Tom Clark, Earl Warren, Robert Jackson, and Lewis Powell); *New Voices - Judiciary*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/new-voices-judiciary> (last visited Oct. 24, 2016) (collecting statements of federal and state court judges in opposition to death penalty). Because judges who advocate abolition do not often cite the abolitionist opinions of other judges, the list of opinions contained in this Essay is almost certainly under-inclusive. The author welcomes additions. For other articles compiling judicial opinions that advocate abolition of the death penalty, see, for example, Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges to New York’s Death Penalty*, 4 J.L. & POL’Y 161, 182 & nn.98–99 (1995); Stephen P. Garvey, *Politicizing Who Dies*, 101 YALE L.J. 187, 206 n.116 (1991); and James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1331 n.150 (1989).

and former Supreme Court Justices, have not been silent on this issue. In all, at least thirty-five federal and state judges have concluded that the death penalty is unconstitutional *per se*.⁷⁰ This is “the law of abolition.” Although their opinions span well over a half-century, their reasons for abandoning the death penalty are remarkably similar, and can be summed up as follows:

1. Objective criteria detailing the death penalty’s unacceptability to contemporary society, as gleaned from statutory repeals, the rarity of executions and death sentences, and the worldwide trend toward abolition.
2. A determination that the death penalty no longer serves any legitimate penological purpose, as gleaned from several sub-factors:
 - a. The inherently arbitrary administration of the death penalty;
 - b. The inherently discriminatory administration of the death penalty;
 - c. The inherent unreliability of the death penalty;
 - d. The inherently long delays in imposing the death penalty;
 - e. The illegitimacy of retribution as a goal of punishment; and
 - f. The excessive pain involved in the administration of the death penalty—both physically, in terms of execution, and also mentally, in terms of waiting for execution.
3. And, lastly, the recognition that the death penalty violates human dignity.⁷¹

When the Supreme Court again turns to the constitutionality of the death penalty, one can expect many of these factors to weigh heavily in the Court’s Eighth Amendment analysis.⁷²

B. THE HISTORY OF JUDICIAL ABOLITION

The history of judicial abolition begins in 1963, when newly appointed Supreme Court Justice Arthur Goldberg circulated a memo to his fellow Justices, arguing that the death penalty was *per se* cruel and unusual under the Eighth Amendment.⁷³ In support of his argument, Justice Goldberg

⁷⁰ See *infra* Part II.B (discussing judicial opinions arguing—and, in some cases, holding—that death penalty is unconstitutional *per se*).

⁷¹ See *infra* Part II.B (compiling cases).

⁷² For other helpful analyses of what a Supreme Court decision abolishing the death penalty might look like, see, for example, STEIKER & STEIKER, *supra* note 4, at 271–85 and Barry, *supra* note 61, at 418–28.

⁷³ See STEIKER & STEIKER, *supra* note 4, at 41; BANNER, *supra* note 69, at 248–49.

pointed to the death penalty's unacceptability to contemporary society, as measured by its abolition among a number of states and "[m]any, if not most, of the civilized nations of the western world"; public opinion polls showing only 42% to 51% support for the death penalty; and the risk of executing innocent people.⁷⁴ "[W]hatever may be said of times past," Goldberg wrote, "the evolving standards of decency that mark the progress of [our] maturing society now condemn as barbaric and inhuman the deliberate institutionalized taking of human life by the state."⁷⁵ According to Justice Goldberg, the death penalty also failed to "achieve the permissible ends of punishment."⁷⁶ He found "no persuasive evidence that capital punishment uniquely deters capital crime," and he rejected "vengeance" (i.e., retribution) as an unacceptable goal of punishment.⁷⁷

A majority of the Court did not share Justice Goldberg's opinion, and that is putting it lightly. As legal historian Stuart Banner has written, Chief Justice Earl Warren "was furious," fearing that publication of the memorandum would encourage defiance of desegregation efforts.⁷⁸ Justices Marshall Harlan and Hugo Black were similarly aghast.⁷⁹

In an opinion dissenting from a denial of writ of certiorari in the case of *Rudolph v. Alabama*, Justice Goldberg reframed his original per se attack on the death penalty as a call for consideration of whether the death penalty was unconstitutional as applied to non-homicide crimes.⁸⁰ According to Professor Banner, Justice Goldberg's dissent "rang like an alarm clock in the

⁷⁴ Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment, October Term, 1963*, 27 S. TEX. L. REV. 493, 501 (1986) ("The concept of innocence has, of course, at least two meanings when used by a court. A person is 'innocent' if he is not the one who committed the crime. A person is also innocent, regardless of whether or not he committed the crime, if his conviction was improperly secured. The thought of innocent men—in the first sense—being executed in any substantial number would certainly be enough to condemn the penalty of death in most people's eyes. This Court is equally concerned with the possibility of innocent men—in the second sense—being executed.").

⁷⁵ *Id.* at 499 (internal quotation marks omitted).

⁷⁶ *Id.* at 502.

⁷⁷ *Id.* at 502–03. Justice Goldberg further found that the death penalty obviously did not rehabilitate, nor did it serve the isolation goal of punishment more effectively than imprisonment for life.

⁷⁸ BANNER, *supra* note 69, at 250; see also STEIKER & STEIKER, *supra* note 4, at 41–42.

⁷⁹ BANNER, *supra* note 69, at 250.

⁸⁰ 375 U.S. 889, 890–91 (1963) (Goldberg, J., dissenting) (suggesting that death penalty for non-homicide crimes may be: a violation of "evolving standards of decency . . .," "disproportion[ate] to the offense[] charged," or "unnecessary" to serve a "permissible aim[] of punishment" given less severe penalties).

offices of civil rights lawyers.”⁸¹ Although individual defense lawyers had been raising constitutional challenges to the death penalty in individual cases as early as 1950, by the late 1960’s, a network of highly skilled lawyers at the ACLU and the NAACP Legal Defense Fund were consistently raising these challenges in a large number of cases.⁸²

These arguments were initially met with resistance by courts. For example, in *Sims v. Balkcom*, the Supreme Court of Georgia had this to say about Goldberg’s dissent in *Rudolph*:

[W]ith all due respect to the dissenting Justices [in *Rudolph*], we would question the judicial right of *any American judge* to construe the American Constitution contrary to its *apparent meaning*, the American history of the clause, and its construction by American courts, simply because the numerous nations and States have abandoned capital punishment for rape.⁸³

But several state supreme court judges answered Justice Goldberg’s call.⁸⁴

I. Abolition and Revival: 1971–1976

In 1971, in *Adams v. State*, two Indiana Supreme Court Justices argued in dissenting opinions that the death penalty was cruel and unusual under the state and federal constitutions.⁸⁵ Justice Roger DeBruler provided multiple reasons why the death penalty was unacceptable to contemporary society. Like the Goldberg memorandum, he pointed to the abolition of the death penalty in a number of states (including in Indiana, where a repeal bill was vetoed) and throughout the world, as well as polling data suggesting a lack of support for the death penalty.⁸⁶ He also offered a litany of other reasons for the death penalty’s unacceptability, including the rarity of executions and

⁸¹ BANNER, *supra* note 69, at 250.

⁸² *Id.*; *see also* Dist. Attorney for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1278 (Mass. 1980) (“Following the *Rudolph* dissent, a large number of cases were brought to the Supreme Court squarely presenting the issue of the constitutionality of the death penalty . . .”) (quoting Arthur J. Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 365 (1973)).

⁸³ 136 S.E.2d 766, 769 (Ga. 1964) (emphasis added); *see also* *Ralph v. Peppersack*, 335 F.2d 128, 141 (4th Cir. 1964) (rejecting proposition “recently mentioned and discussed by Justice Goldberg in dissenting from the majority decision denying certiorari in *Rudolph v. Alabama*” that “the imposition of the death penalty on a convicted rapist is ‘uncivilized conduct’ and constitutes cruel and inhuman punishment where he has neither taken nor endangered the life of his victim”).

⁸⁴ *See infra* Part II.B.1.

⁸⁵ *Adams v. State*, 271 N.E.2d 425, 431 (Ind. 1971), *vacated by* 284 N.E.2d 757 (Ind. 1972) (DeBruler, J., concurring and dissenting in part); *id.* at 443 (Prentice, J., dissenting).

⁸⁶ *Id.* at 437–39 (DeBruler, J., dissenting).

high rate of executive commutations nationwide, the reluctance of juries to sentence people to death, and the reluctance of courts to affirm death sentences.⁸⁷ “When the penalty is death, we [state supreme court justices], like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.”⁸⁸ Finally, Justice Debruler relied on his own subjective judgment, noting the “extreme” psychological and physical pain endured by those executed as well as the death penalty’s unreliability and arbitrariness (disproportionately affecting the poor) as grounds for abolishing it.⁸⁹

In a separate dissenting opinion, Justice Dixon Prentice concluded that Indiana had already “abandoned capital punishment”; all that remained was for the court to abolish it.⁹⁰

[I]t is ludicrous and inhumane to any longer suspend those under sentence of death in a state of limbo, pending formal abolition We are the guardians of the rights of the most lowly among us, and for us to require them to await the miracle of legislative action in their behalf is an unwarranted passing of our responsibility to the Governor’s office or to higher judicial authority and is a denial of constitutional rights.⁹¹

Less than one year later, in 1972, in *People v. Anderson*, California became the first state ever to judicially abolish its death penalty.⁹² In a 6–1 decision holding the death penalty unconstitutional under the California Constitution, the Supreme Court of California noted the rarity of executions, the death penalty’s brutalizing psychological effects, and its repudiation by a number of states and many nations.⁹³ The court also noted the death penalty’s

⁸⁷ *Id.*

⁸⁸ *Id.* at 439 (DeBruler, J., dissenting) (quoting *Stein v. New York*, 346 U.S. 156, 195 (1953); see also Garvey, *supra* note 69, at 207 n.11 (“Until very recently, the New Jersey Supreme Court had reversed every death sentence on appeal.”).

⁸⁹ *Adams*, 271 N.E.2d at 441–42 (DeBruler, J., dissenting) (“[T]here are deficiencies in this legal machinery. The most important of these is lack of money There are too few public defenders. There are too few trial courts to handle the increasing caseload. Too little money is being provided the indigent defendant for investigation, witness fees, all of which is necessary to providing a decent defense. It is well documented that even when that machinery has done its job completely, miscarriages of justice occur. The innocent do get convicted The risk of injustice is there, an ineradicable part of the exercise of human judgment.”).

⁹⁰ *Id.* at 444 (Prentice, J., dissenting).

⁹¹ *Id.*; see *id.* at 443 (“[W]e courageously struck down certain outmoded and ill considered doctrines that had theretofore chained us to the past by the shackles of repetition . . .”).

⁹² *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27. Later that year, the People of California amended the state constitution to permit the death penalty, and the legislature subsequently passed legislation reinstating the death penalty. See *People v. Frierson*, 599 P.2d 587, 605 (Cal. 1979).

⁹³ See *Anderson*, 493 P.2d at 894–95, 898–99. The six Justices were: Donald Wright,

failure to deter crime, given lengthy delays between sentencing and execution and the arbitrariness inherent in the selection of those for death.⁹⁴ And like Justice Goldberg, the *Anderson* court rejected “vengeance or retribution” as “incompatible with the dignity of an enlightened society.”⁹⁵ According to the *Anderson* Court, the death penalty “degrades and dehumanizes all who participate in its processes” and is “incompatible with the dignity of man and the judicial process.”⁹⁶

Several months after the *Anderson* decision, in *Furman v. Georgia*, the Supreme Court famously struck down the death penalty as applied, holding that standardless jury sentencing violated the Eighth Amendment.⁹⁷ Significantly, Justices Thurgood Marshall and William Brennan went further. In their concurring opinions, they argued that the death penalty was unconstitutional per se, relying on many of the same arguments raised by the Goldberg memorandum, the Indiana Justices, and the majority in *Anderson*.⁹⁸ Specifically, Justices Marshall and Brennan noted the death penalty’s rejection by contemporary society; the arbitrariness, unreliability, and mental pain inherent in the administration of the death penalty; and the death penalty’s failure to deter or deliver retribution, given the inefficiency and arbitrariness with which it is imposed.⁹⁹ According to Justice Marshall, the death penalty was not only arbitrary but also discriminatory, with “the burden of capital punishment fall[ing] upon the poor, the ignorant, and the under privileged members of society.”¹⁰⁰ And for Justice Brennan, dignity was central: “In comparison to all other punishments today, . . . the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.”¹⁰¹

The abolitionists’ victory was short-lived. Just four years later, in 1976, in *Gregg v. Georgia*, the Supreme Court explicitly rejected Justice Marshall’s and Brennan’s position: the death penalty was not per se unconstitutional

Raymond Peters, Mathew Tobriner, Stanley Mosk, Louis Burke, and Raymond Sullivan.

⁹⁴ *Id.* at 894–97.

⁹⁵ *Id.* at 896.

⁹⁶ *Id.* at 899.

⁹⁷ *See* 408 U.S. 238, 314 (1972) (White, J., concurring).

⁹⁸ *See, e.g., id.* at 305 (Brennan, J., concurring); *id.* at 370 (Marshall, J., concurring).

⁹⁹ *See, e.g., id.* at 288–306 (Brennan, J., concurring) (discussing death penalty’s severity, unreliability, arbitrariness, unacceptability, and lack of valid penological justification); *see also id.* at 342–69 (Marshall, J., concurring) (discussing death penalty’s lack of valid penological justification, unacceptability, discriminatory application, and unreliability).

¹⁰⁰ *Id.* at 365–66 (Marshall, J., concurring).

¹⁰¹ *Id.* at 291 (Brennan, J., concurring); *see also id.* at 371 (Marshall, J., concurring) (“In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute.”).

under the Eighth Amendment.¹⁰² Although the Supreme Court has repeated this refrain since 1976,¹⁰³ a significant number of federal and state court judges have challenged this assumption.¹⁰⁴

2. Abolition Post-Gregg: 1977–1990

In 1977, in *Pierre v. Utah*, Justice Richard Maughan of the Utah Supreme Court argued that the death penalty violates substantive due process under the federal and state constitutions because it deprives the “inherent and fundamental right” to life.¹⁰⁵ According to Justice Maughan, the death penalty did not deter, as confirmed by abolition in a number of states with no associated rise in murders.¹⁰⁶ The only compelling purpose that could possibly justify the death penalty, he concluded, would be restoring life.¹⁰⁷ “Were there some way to restore the bereaved and wounded survivors, and the victims, to what was once theirs[,]” he wrote, “there could then be justification for the capital sanction. Sadly, such is not available to us.”¹⁰⁸

In 1980, in *District Attorney v. Watson*, the Supreme Judicial Court of Massachusetts followed California’s lead in abolishing the death penalty.¹⁰⁹ In a 6–1 decision holding the death penalty unconstitutional under the Massachusetts Constitution, the court relied on the rarity of executions and the risk of error as evidence of the death penalty’s unacceptability, and also

¹⁰² *Gregg v. Georgia*, 428 U.S. 153, 186–87 (1976).

¹⁰³ *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015) (citing cases).

¹⁰⁴ *See infra* Part II.B.2.

¹⁰⁵ 572 P.2d 1338, 1359 (Utah 1977) (Maughan, J., concurring in part and dissenting in part).

¹⁰⁶ *See id.* Justice Maughan rejected “vengeance” as a legitimate purpose, concluding that “[r]evenge is not a function of the law.” *Id.*; *cf. Provenzano v. Moore*, 744 So. 2d 413, 446 n.55 (Fla. 1999) (Anstead, J., dissenting) (“[I]t must never be said that the American justice system has refused to properly confront the issues that it has been given the unique responsibility to decide or, worse yet, that the justice system has allowed itself to become a means for extracting vengeance.”).

¹⁰⁷ *Pierre*, 572 P.2d at 1359 (Maughan, J., concurring in part and dissenting in part).

¹⁰⁸ *Id.* (Maughan, J., concurring and dissenting); *see also Adams v. State*, 271 N.E.2d 425, 445 (Ind. 1971) (Prentice, J., dissenting) (noting the death penalty’s “finality and the fallibility of man,” and stating that “until we are more learned in the principles of resurrection or at least reincarnation, I cannot accept a sentence of death as consistent with principles of reformation”).

¹⁰⁹ 411 N.E.2d 1274, 1286–87 (Mass. 1980). In 1982, the People of Massachusetts amended their state constitution to permit the death penalty, and the state legislature enacted a new death penalty statute. In 1984, the Massachusetts Supreme Judicial Court invalidated the statute—not on per se grounds, but instead because it “impermissibly burden[ed] both the right against self-incrimination and the right to a jury trial guaranteed by [the state constitution].” *See Com. v. Colon-Cruz*, 470 N.E.2d 116, 117–18, 124 (Mass. 1984).

brought its own judgment to bear on the death penalty.¹¹⁰ Chief among the court's reasons for abolishing the death penalty were arbitrariness, and racial bias specifically, in the administration of the death penalty.¹¹¹ According to the court, "experience has shown that the death penalty will fall discriminatorily upon minorities, particularly blacks."¹¹² Human dignity, and the physical and mental pain inflicted on the condemned, also played a role in the court's decision:

There is little doubt that life is a fundamental right explicitly or implicitly guaranteed by the Constitution The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity.¹¹³

In a concurring opinion, Justice Paul Liacos underscored the death penalty's "physical and mental tortures" and its deprivation of human dignity.¹¹⁴ "The purpose of the cruel or unusual punishment prohibition is to guarantee a measure of human dignity even to the wrongdoers of our society," he wrote.¹¹⁵ The death penalty was cruel and unusual because it

deem[ed] the prisoner a nullity, less than human and unworthy to live My views would not change if stays on death row were made more pleasant, killing techniques less painful, or removal from death row more swift. This is a punishment antithetical to the spiritual freedom that underlies the democratic mind. What dignity can remain for the government that countenances its use?¹¹⁶

Over the next decade, four more state high court justices—in Tennessee, Wyoming, Washington, and Montana—similarly argued that the death penalty was per se unconstitutional.¹¹⁷ In 1981, in his concurring opinion in *State v. Dicks*, Chief Justice Ray Brock of the Tennessee Supreme Court argued in dissent that the death penalty violated the Tennessee Constitution.¹¹⁸ Relying heavily on the reasoning of the Supreme Judicial Court of Massachusetts in *Watson* and the Supreme Court of California in *Anderson*, the Chief Justice argued that the death penalty was unacceptable to contemporary society; served no legitimate purpose; and was "barbarous,"

¹¹⁰ See *Watson*, 411 N.E.2d at 1282. The six Justices were: Edward Hennessey, Robert Braucher, Benjamin Kaplan, Herbert Wilkins, Paul Liacos, and Ruth Abrams.

¹¹¹ *Id.* at 1283–86.

¹¹² *Id.* at 1283.

¹¹³ *Id.* at 1282–83 (citation omitted).

¹¹⁴ *Id.* at 1289, 1294 (Liacos, J., concurring).

¹¹⁵ *Id.* at 1294 (Liacos, J., concurring).

¹¹⁶ *Id.* at 1293–94 (Liacos, J., concurring).

¹¹⁷ See *infra* notes 118–130. (discussing state high court decisions).

¹¹⁸ *State v. Dicks*, 615 S.W.2d 126, 142 (Tenn. 1981) (Brock, C.J., concurring in part and dissenting in part).

arbitrary, and unreliable in its administration.¹¹⁹ Significantly, in reaching this conclusion, the Chief Justice acknowledged that he erred in supporting constitutionality of the death penalty in a concurring opinion just two years earlier: “But, I think it better to confess and correct that error than to perpetuate it.”¹²⁰

That same year, in *Hopkinson v. State*, Chief Justice Robert Rose of the Wyoming Supreme Court made nearly identical arguments in an opinion concurring and dissenting in part.¹²¹ The death penalty’s unacceptability to contemporary society, lack of penological purpose (including the illegitimacy of retribution as a goal of punishment), and infliction of physical and mental pain featured prominently in the Chief Justice’s conclusion that the death penalty violated the Wyoming Constitution.¹²² So, too, did the dignity of the condemned:

It frightens me to hear it argued that, since the vilest and most depraved criminal has killed four people, the most civilized and humane response that the state of Wyoming can think of, in discharging its punishment obligations to society, is to kill the killer while pretending that the act of state murder is not offensive to her people’s sense of decency.

I wonder how many capital victims would, if they could, tell us that the murders perpetrated upon them were not cruel—were not unusual—and therefore (within the ambit of these constitutional proscriptions) society could, so far as they were concerned, proceed to murder murderers.¹²³

In 1984, in his concurring opinion in *State v. Rupe*, Justice James Dolliver of the Washington Supreme Court cited *Anderson* in support of his conclusion that the death penalty violated the Washington Constitution.¹²⁴

¹¹⁹ *Id.* at 136–41.

¹²⁰ *Id.* at 133. Chief Justice Brock also invoked dignity in support of his argument that the death penalty was unconstitutional. *See id.* at 141–42 (“[C]apital punishment is . . . incompatible with the dignity of man and the judicial process.”) (quoting *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972)).

¹²¹ *Hopkinson v. State*, 632 P.2d 79, 199 (Wyo. 1981) (Rose, C.J., dissenting in part and concurring in part).

¹²² *See id.* at 207–16.

¹²³ *Id.* at 199; *see also id.* at 215–16 (“I have lived my entire life in Wyoming and I have to believe that were my friends and associates who are citizens of this state able to visit the whole process of the death penalty from indictment to the throwing of the switch—with its dehumanizing effect—that is, its tendency to turn all of us who are charged with the responsibility of committing state murder back into animals—I am positive that the vast majority of the people of Wyoming would say . . . that there must be another way and that this form of punishment—while acceptable in another day—is no longer acceptable to a more advanced morality.”).

¹²⁴ *State v. Rupe*, 683 P.2d 571, 599 (Wash. 1984) (Dolliver, J., concurring).

Responding to the majority's charge of judicial activism,¹²⁵ Justice Dolliver stated that he was not substituting his moral judgments for those of the people of Washington; rather, he was *deferring* to those moral judgments as contained in the state constitution:

If the meaning and application of our Bill of Rights, and the judgments contained therein, were fully revealed, there would be no need for this court to sit on cases involving our Bill of Rights as the popular will would always be manifest. Unfortunately, the constitutional language defies this easy escape for the judiciary. Thus, rather than decline to articulate the meaning of the constitution and its application, it is the duty of this court to express its understanding of the moral judgments rendered by the people in their constitution.¹²⁶

And in 1990, one year before his retirement, Justice John Sheehy of the Montana Supreme Court dissented in *State v. Kills on Top*, arguing that the death penalty was unconstitutional per se under the Montana Constitution.¹²⁷ Relying on Justice Brennan's concurrence in *Furman*, Justice Sheehy supported his argument by pointing to the death penalty's unacceptability to contemporary society—particularly given Montana's lack of executions for over forty years with “no more than slight public reaction”—and the arbitrariness inherent in its administration.¹²⁸ Like Chief Justice Brock of the Tennessee Supreme Court, Justice Sheehy came to the conclusion that the death penalty was unconstitutional after supporting its constitutionality for some time.¹²⁹ Furthermore, like Justice Dolliver of the Washington Supreme Court, Justice Sheehy understood his decision to be motivated not by his personal moral views but rather by his interpretation of the state constitution:

For a long time I have had the moral conviction that exacting the penalty of death in criminal cases was improper. I have come to the *legal conviction* that the death penalty is indeed cruel and unusual punishment and so prohibited by the Eighth Amendment to the United States Constitution.¹³⁰

3. North, South, and the Federal Courts: 1994–2015

The state with the most prolific, and also the most recent, history of

¹²⁵ *Id.*; see also *id.* at 592 (majority opinion) (“[W]e believe that to hold that the death penalty is per se unconstitutional would be to substitute our moral judgment for that of the people of Washington.”).

¹²⁶ *Id.* at 599 (Dolliver, J., concurring in the result).

¹²⁷ *State v. Kills on Top*, 787 P.2d 336, 356 (Mont. 1990) (Sheehy, J., dissenting).

¹²⁸ *Id.* at 356–57.

¹²⁹ *Id.* at 356 (stating that he had “authored two opinions affirming death penalties”).

¹³⁰ *Id.* at 355 (emphasis added); see also *id.* at 356 (stating that it is “the responsibility of judges to uphold the constitution and thus subordinate[] . . . moral feelings . . . and decide this type of case solely on . . . legal grounds”).

judicial opinions declaring the death penalty unconstitutional per se in Connecticut. From 1994 to 2015, a total of seven Connecticut Supreme Court justices concluded that the death penalty violated the Connecticut Constitution.¹³¹

In 1994, in *State v. Ross*, Justice Robert Berdon concluded that the death penalty was unconstitutional under the Connecticut Constitution based on arguments raised in *Anderson* and *Watson*, namely its unacceptability to contemporary society, lack of a legitimate penological purpose, unreliability, arbitrary and racially discriminatory application, and barbarity—particularly given long delays between sentencing and execution.¹³² Citing Justice Brennan’s concurring opinion in *Furman*, Justice Berdon concluded that the death penalty was “a denial of a person’s basic humanity To burn human flesh to death by electrocution, or snuff out life through lethal injection, is not less inhumane because it is done in the name of justice.”¹³³ Justice Berdon reiterated a number of these arguments—particularly his argument that the death penalty was racially discriminatory—in a series of subsequent dissenting opinions.¹³⁴ “When a capital defendant marshals a compelling argument that the death penalty as it is administered in our state is incurably racist,” he wrote in *State v. Cobb*, “we should stop dead in our tracks until we have given the argument our most serious attention.”¹³⁵

In 2000, in her dissenting opinion in *State v. Webb*, Justice Joette Katz similarly concluded that the death penalty violated the Connecticut Constitution.¹³⁶ Like those justices before her, Justice Katz regarded judicial abolition of the death penalty not as an affront to the separation of powers, but rather of a piece with it:

[Judges] have a duty, as the final arbiters of the state constitution, to determine whether the punishment of death meets contemporary and moral standards of decency. If a penalty exceeds those bounds, as I believe the death penalty does, we have a

¹³¹ See *infra* notes 132–139, 153–156, 173–183, and accompanying text (discussing opinions of Justices Berdon, Katz, Harper, Norcott, Palmer, Eveleigh, and McDonald).

¹³² *State v. Ross*, 646 A.2d 1318, 1378–88 (Conn. 1994) (Berdon, J., dissenting).

¹³³ *Id.* at 1380.

¹³⁴ See, e.g., *State v. Cobb*, 743 A.2d 1, 137–42 (Conn. 1999) (Berdon, J., dissenting); *State v. Webb*, 680 A.2d 147, 229–31 (Conn. 1996) (Berdon, J., dissenting) [hereinafter *Webb I*]; *State v. Breton*, 663 A.2d 1026, 1054–55 (Conn. 1995) (Berdon, J., dissenting); see also *State v. Griffin*, 741 A.2d 913, 952 (Conn. 1999) (Berdon, J., dissenting) (“[T]he penalty of death fails to comport with contemporary standards of decency and . . . constitutes cruel and unusual punishment in violation of our state constitution.”).

¹³⁵ *Cobb*, 743 A.2d at 140–41 (Berdon, J., dissenting).

¹³⁶ *State v. Webb*, 750 A.2d 448, 458 (Conn. 2000) (Katz, J., dissenting).

constitutional obligation to declare it unconstitutional, just as we would if the legislature provided for punishment by the rack, the screw or the wheel.

. . . [W]hether carried out by impalement or electrocution, crucifixion or the gas chamber, firing squad or hanging, lethal injection or some other method yet to be designed, the very quintessence of capital punishment is cruelty.¹³⁷

In a subsequent dissent in a different death penalty case, Justice Katz pointed to arbitrariness and racial discrimination as additional reasons for opposing the death penalty per se.¹³⁸ “[E]ven under the most sophisticated death penalty statutes, race continues to play a major role. We have not eliminated the biases and prejudices that infect society generally”¹³⁹

In contrast to the slow but steady drumbeat of state supreme court opinions opposing the death penalty post-*Gregg*, the federal judiciary was largely silent, save for the repeated dissents of Justices Brennan and Marshall.¹⁴⁰ This changed in 1994, when Justice Harry Blackmun, who had voted to uphold the death penalty in *Gregg*, uttered his now famous words in an opinion dissenting from a denial of certiorari in *Callins v. Collins*: “From this day forward, I no longer shall tinker with the machinery of death.”¹⁴¹ Arbitrariness, discrimination, and unreliability, he reasoned, were inescapable parts of that machinery; indeed, twenty years’ worth of effort to remedy them had proven futile.¹⁴² The death penalty—the “killing [of] human beings”—Justice Blackmun concluded, “cannot be administered in accord with our Constitution.”¹⁴³

In 2002, federal district court Judge Jed Rakoff held that, given “the unacceptably high rate at which innocent persons are convicted of capital crimes” and the “prolonged delays before such errors are detected,” the

¹³⁷ *Id.* at 459 (quoting Justice Berdon’s dissenting opinion in *Webb I*). “[S]ociety should not have the authority to sustain an institution the nature of which is to destroy its own members. If our status as moral creatures is to survive, the termination of our ability to accomplish a deliberate institutionalized method of execution heads my list of desiderata for this society.” *Id.* at 459–60.

¹³⁸ *State v. Peeler*, 857 A.2d 808, 888 (Conn. 2004) (Katz, J., dissenting).

¹³⁹ *Id.*

¹⁴⁰ Justices Brennan and Marshall dissented in *Gregg* and in every death penalty case that followed it—more than 2,100 cases, according to one commentator. Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 591, 593 (1995).

¹⁴¹ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

¹⁴² *Id.* at 1143–59. “The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.” *Id.* at 1145–46.

¹⁴³ *Id.* at 1143, 1157.

federal death penalty statute violated due process by depriving innocent people of the right to prove their innocence.¹⁴⁴ Although Judge Rakoff's decision stopped short of holding the death penalty unconstitutional per se, this was the effect of his decision, for no criminal justice scheme is infallible.¹⁴⁵ Not surprisingly, the Second Circuit reversed the decision, holding that "there is no fundamental right to a continued opportunity for exoneration throughout the course of one's natural life."¹⁴⁶

In 2008, Justice John Paul Stevens who, like Justice Blackmun, had voted to uphold the death penalty in *Gregg*, registered his opposition to the death penalty.¹⁴⁷ Relying on over thirty years of "almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty," Justice Stevens concluded that the death penalty was "patently excessive and cruel and unusual punishment violative of the Eighth Amendment."¹⁴⁸ The death penalty served no penological purpose, he argued, and was plagued by arbitrariness and an "unacceptable" risk of racial discrimination and error.¹⁴⁹

On the heels of Justice Stevens's opinion in *Baze v. Rees*, Mississippi Supreme Court Justice Oliver E. Diaz, Jr., joined by Justice James E. Graves, Jr., argued that the death penalty violated the federal and state constitutions.¹⁵⁰ "I am convinced that the progress of our maturing society," Justice Diaz stated, "is pointed toward a day when our nation and state recognize that, even as murderers commit the most cruel and unusual crime, so too do executioners render cruel and unusual punishment I would

¹⁴⁴ *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002); *see also id.* at 264 ("What DNA testing has proved, beyond cavil, is the remarkable degree of fallibility in the basic fact-finding processes on which we rely in criminal cases."); *cf.* *Thompson v. Calderon*, 151 F.3d 918, 937 (9th Cir. 1998), *as amended* (July 13, 1998) (Reinhardt, J., concurring and dissenting in part) (dissenting from majority's refusal to allow defendant to file a petition for writ of habeas corpus raising actual innocence claim, characterizing the denial as a "miscarriage of justice" and "the product of the federal judiciary's elevation of procedure over justice, of speed and efficiency over fairness and due process").

¹⁴⁵ *See United States v. Quinones*, 313 F.3d 49, 65 (2d Cir. 2002) ("[O]ur judicial system—indeed, any judicial system—is fallible"); *cf.* *McCleskey v. Kemp*, 481 U.S. 279, 315 n.37 (1987) ("[T]he dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution.").

¹⁴⁶ *Quinones*, 313 F.3d at 52.

¹⁴⁷ *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment).

¹⁴⁸ *Id.* at 83, 86 (quoting Justice White's concurring opinion in *Furman*).

¹⁴⁹ *Id.* at 78–86.

¹⁵⁰ *Doss v. State*, NO. 2007-CA-00429-SCT, at 28 (Miss. Dec. 11, 2008) (Diaz, J., dissenting), *available at* <https://deathpenaltyinfo.org/files/pdf/DossvMississippi.pdf>.

make today that day.”¹⁵¹

In reaching this conclusion, Justice Diaz traced the death penalty’s familiar litany of failings, namely: “inherent” arbitrariness; “wholly inadequate” indigent defense; “[t]he specter of racially motivated executions,” particularly given that African Americans comprise more than half of Mississippi’s death row but constitute only one-third of Mississippi’s population; unreliability, with exonerations “leav[ing] little room for doubt that innocent men, at unknown and terrible moments in our history, have gone unexonerated and been sent baselessly to their deaths”; objective indicia of unacceptability, both statewide and nationally; and a lack of penological purpose, with deterrence unproven and retribution illegitimate.¹⁵²

In 2012, in *State v. Santiago (Santiago I)*, Connecticut Supreme Court Justice Lubbie Harper, Jr. added his opposition to the death penalty under the Connecticut Constitution, focusing on the themes of unacceptability; a lack of legitimate penological purpose, particularly given “the anguish attendant to capital punishment’s performance of its irrevocable function”; and arbitrariness, racial discrimination, and unreliability inherent in the death penalty’s administration.¹⁵³ Justice Harper’s critique of the death penalty’s “racially skewed imposition” was pointed:

The constitution and the standards of our society cannot possibly countenance ending a human life for racist reasons . . . I take it as a matter too obvious to discuss that our state’s constitution could not, in the twenty-first century, permit a hateful and vengeful system that takes the lives of predominantly black men generally accused of crimes against whites. The parallels to a prior, equally untenable system of “justice” that once prevailed in much of this country are all too clear. While significant social progress has been made since those days, the continued exercise of a racially charged system of extermination, coupled with the disparate treatment even of *victims* based on their race, is yet another reminder that our society’s long path toward equality is far from complete. There is no better next step than the rejection of a system that is, in reality, little more than the heir to lynch mobs.¹⁵⁴

Human dignity was also central to his critique. “[T]he categorical exclusion of any person from humanity cannot be reconciled with a legitimate vision of human dignity,” he wrote.¹⁵⁵ “It is a reality, albeit a difficult one, that even a person who commits the most heinous and

¹⁵¹ *Id.* at 37.

¹⁵² *Id.* at 29–37.

¹⁵³ *State v. Santiago*, 49 A.3d 566, 694–705 (Conn. 2012) (Harper, J., concurring in part and dissenting in part) [hereinafter *Santiago I*], *judgment set aside, opinion not vacated* (Aug. 25, 2015), *opinion supplemented on reconsideration*, 122 A.3d 1 (Conn. 2015).

¹⁵⁴ *Id.* at 702, 705 & n.15.

¹⁵⁵ *Id.* at 697.

unforgivable acts is still one of us—a member of the human community and of our society.”¹⁵⁶

In 2014, after four decades on the bench, Judge Tom Price of the Texas Court of Criminal Appeals, Texas’ highest court for criminal appeals, called for an end to the death penalty in his dissenting opinion in *Ex parte Panetti*.¹⁵⁷ Characterizing judges as “guardians of the process,” he concluded that the death penalty process was inherently flawed and “should be abolished.”¹⁵⁸ According to Judge Price, “societal values” supported abolition, as indicated by a reduction in death penalty prosecutions and death sentences.¹⁵⁹ In addition,

the execution of individuals does not appear to measurably advance the retribution and deterrence purposes served by the death penalty; the life without parole option adequately protects society at large in the same way as the death penalty punishment option; and the risk of executing an innocent person for a capital murder is unreasonably high, particularly in light of procedural-default laws and the prevalence of ineffective trial and initial habeas counsel.¹⁶⁰

In 2015, in *Glossip v. Gross*, Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, argued in dissent that it was “highly likely that the death penalty violates the Eighth Amendment” and invited full briefing on the issue.¹⁶¹ According to Justice Breyer:

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed.¹⁶²

Four considerations led Justice Breyer to question the death penalty’s constitutionality. The first consideration was the death penalty’s lack of reliability, especially given the high number of exonerations in capital cases.¹⁶³ Second was the death penalty’s arbitrariness, with death sentences largely determined by race, gender, local geography, and resources, as opposed to the egregiousness of the crime.¹⁶⁴ Third was the extraordinary

¹⁵⁶ *Id.* at 705.

¹⁵⁷ *Ex parte Panetti*, 450 S.W.3d 144, 145 (Tex. Crim. App. 2014) (Price, J., dissenting).

¹⁵⁸ *Id.* at 147.

¹⁵⁹ *Id.* at 145.

¹⁶⁰ *Id.* at 147.

¹⁶¹ *Glossip v. Gross*, 135 S. Ct. 2726, 2776–77 (2015) (Breyer, J., dissenting).

¹⁶² *Id.* at 2755.

¹⁶³ *Id.* at 2256–59.

¹⁶⁴ *Id.* at 2259–64.

delay between sentence and execution, which aggravates the death penalty's cruelty and diminishes its legitimate penological goals.¹⁶⁵ And the final consideration was the rarity with which the death penalty is carried out.¹⁶⁶

Responding to Justice Breyer's dissent, Justices Clarence Thomas and Antonin Scalia argued that judicial abolition would mark the culmination of the Court's "ceaseless quest to end the death penalty through undemocratic means,"¹⁶⁷ "replac[ing] the judgments of the People with [the Court's] own standards of decency."¹⁶⁸ Justice Breyer acknowledged this "strong counterargument."¹⁶⁹ Over forty years ago, in *Furman*, he explained that the Court *did* look to the People—to Congress and state legislatures—to fix many of the very problems he had identified.¹⁷⁰ And the legislatures responded.¹⁷¹ But, he concluded:

[I]n the last four decades, considerable evidence has accumulated that those responses have not worked. Thus we are left with a *judicial* responsibility. The Eighth Amendment sets forth the relevant law, and we must interpret that law.¹⁷²

Just weeks later, in *State v. Santiago (Santiago II)*, the Connecticut Supreme Court became the third state supreme court in history to abolish the death penalty.¹⁷³ In a 4–3 decision, the court ruled that the death penalty was cruel and unusual in violation of the Connecticut Constitution.¹⁷⁴ One year later, in May 2016, a newly reconstituted court upheld that decision 5–2.¹⁷⁵

The majority's reasons in *Santiago II* for abolishing the death penalty were familiar ones, neatly packaged into two parts.¹⁷⁶ First, the court concluded that the death penalty was unacceptable to contemporary society,

¹⁶⁵ *Id.* at 2264–72.

¹⁶⁶ *Id.* at 2772–76.

¹⁶⁷ *Id.* at 2755 (Thomas, J., concurring).

¹⁶⁸ *Id.* at 2749 (Scalia, J., concurring).

¹⁶⁹ *Id.* at 2776 (Breyer, J., dissenting).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* ("We are a court. Why should we not leave the matter up to the people acting democratically through legislatures?").

¹⁷² *Id.* (emphasis added).

¹⁷³ *State v. Santiago*, 122 A.3d 1, 10 (Conn. 2015) [hereinafter *Santiago II*].

¹⁷⁴ *Id.* The four Justices were: Flemming Norcott, Richard Palmer, Dennis Eveleigh, and Andrew McDonald.

¹⁷⁵ *State v. Peeler*, 140 A.3d 811 (Conn. 2016). Citing respect for "the basic principle of stare decisis," Chief Justice Chase Rogers, who dissented in *Santiago II*, joined Justices Palmer, Eveleigh, and McDonald in upholding abolition of the death penalty in *Peeler*. *Id.* at 813 (Rogers, C.J., concurring). Justice Norcott, who voted with the majority in *Santiago II*, retired from the court and was replaced by Justice Robinson, who provided a fifth vote to uphold the death penalty in *Peeler*. *Id.* at 833 (Robinson, J., concurring).

¹⁷⁶ *Santiago II*, 122 A.3d 31–73.

based on objective criteria that included a rarity of executions and Connecticut's 2012 partial repeal of the death penalty (for future crimes only).¹⁷⁷ Second, the court concluded that the death penalty lacked a legitimate penological purpose, given its inherent inefficiency, unreliability, arbitrariness, and “inescapabl[e] taint[]” of “caprice and bias.”¹⁷⁸ In response to a stinging dissent by Chief Justice Chase Rogers that accused the majority of “relying solely on its own views” and invalidating the death penalty because “it offends the majority’s subjective sense of morality,”¹⁷⁹ the Justices in the majority shot back:

[W]e do not question the sincerity or good faith of Chief Justice Rogers’ views, and we find it unfortunate that she deems it necessary to question ours. Although it should go without saying, we feel compelled to emphasize that we, no less than the dissenting justices, have decided this case on the basis of our understanding of and dedication to the governing legal principles, and our decision should in no way be taken as an indication of our personal views with respect to the morality of capital punishment.¹⁸⁰

Justice Flemming Norcott, a staunch critic of Connecticut’s death penalty for over two decades,¹⁸¹ together with the newly appointed Justice Andrew McDonald, authored a joint concurrence addressing persistent allegations of racial and ethnic discrimination in the administration of the death penalty.¹⁸² “In light of th[e] historical and statistical record,” they wrote, “we would be hard-pressed to dismiss or explain away the abundant evidence that suggests the death penalty in Connecticut, as elsewhere, has been and continues to be imposed disproportionately on racial and ethnic minorities.”¹⁸³

¹⁷⁷ *Id.* at 35–55.

¹⁷⁸ *Id.* at 55–73.

¹⁷⁹ *Id.* at 159–60 n.33, 164 (Rogers, C.J., dissenting).

¹⁸⁰ *Id.* at 55 n.89 (majority opinion).

¹⁸¹ *State v. Cobb*, 743 A.2d 1, 143–48 (Conn. 1999) (Norcott, J., dissenting); *id.* at 146 (“[T]he reality is that a large part of the death row population is made up of people who are distinguished by neither their records, nor the circumstances of their crimes, but by their abject poverty, debilitating mental impairments, minimal intelligence, and the poor legal representation they received.”); *State v. Webb*, 680 A.2d 147, 237 (Conn. 1996) (Norcott, J., dissenting) (“As long as racial prejudice is a factor in our lives, and it is an undeniable factor in every facet of American life, there can be no place for a capital penalty in our society.”).

¹⁸² *Santiago II*, 122 A.3d at 85–100 (Norcott and McDonald, Js., concurring).

¹⁸³ *Id.* at 96. Justice Eveleigh wrote a separate concurring opinion, arguing that not only Connecticut’s death penalty, but also Connecticut’s *partial repeal of the death penalty for future crimes only*, violated the federal and state constitutions. *Id.* at 103 (Eveleigh, J., concurring).

4. Honorable Mention

Several other judges deserve mention. While stopping short of either abolishing the death penalty per se or calling for its abolition, each has expressed grave doubts about whether the death penalty can ever be imposed as a sanction for murder.¹⁸⁴

In 1975, holding that Massachusetts' mandatory death penalty for rape-murder deprived "the fundamental constitutional right to life" in violation of the Massachusetts Constitution, Chief Justice G. Joseph Tauro of the Supreme Judicial Court of Massachusetts implied that a discretionary death penalty would also violate the right to life.¹⁸⁵

Dissenting from a denial of post-conviction relief in a 1981 death penalty case, Justice Daniel Shea of the Montana Supreme Court chided the majority for "clos[ing] its eyes to the issues raised on appeal."¹⁸⁶ According to Justice Shea, the federal and state constitutions required an evidentiary hearing to determine whether Montana's death penalty served any valid state purpose in light of its arbitrary and discriminatory imposition, the rarity of executions, and the undue delay between sentencing and execution.¹⁸⁷ "Never in the annals of criminal law history in this State," he wrote, "has a defendant ever been the victim of such a consistent and wholesale denial of fundamental rights."¹⁸⁸

In a 1987 dissenting opinion concluding that New Jersey's death penalty statute was cruel and unusual as well as a violation of due process and "fundamental fairness" under the state constitution, New Jersey Supreme Court Justice Alan Handler stated that:

[T]ime will settle the question [of whether the death penalty is unconstitutional per se]. All of us will, I am certain, endure the frustrating and frenetic attempts to enforce capital punishment in a fair and sensible way that now plague our sister states. That experience will, I fear, yield grim confirmation of the fact that capital punishment in a civilized constitutional society is virtually impossible to administer in a principled manner. The

¹⁸⁴ See *infra* notes 185–215 and accompanying text.

¹⁸⁵ See *Com. v. O'Neal*, 339 N.E.2d 676, 688 (Mass. 1975); see also *id.* at 683, 688 n.23 (stating that "if [a discretionary death penalty] should be enacted, the burden would be on the Commonwealth to establish that such use of the death penalty is the least restrictive means for furtherance of a compelling State interest," and implying that evidence supporting the deterrent effect of a discretionary death penalty was *weaker* than evidence supporting mandatory death penalty).

¹⁸⁶ *McKenzie v. Osborne*, 640 P.2d 368, 384 (Mont. 1981) (Shea, J., dissenting).

¹⁸⁷ *Id.* at 429–32.

¹⁸⁸ *Id.* at 434 ("[M]y review of this appeal has convinced me beyond any doubt that a defendant sentenced to death in this state has no chance to obtain fair, adequate, and meaningful review.").

per se invalidity of official capital punishment, in other words, may well be self-revealing.¹⁸⁹

Justice Handler chronicled this revelation in a long series of sharply-worded, voluminous dissents that took aim at the death penalty's arbitrariness and "impermissible risk of racial discrimination" that "single[d] out black persons for death."¹⁹⁰

In 1988, Justice Hans Linde of the Oregon Supreme Court suggested that every death penalty scheme raises concerns of arbitrariness—namely, the "prosecution[] of similar offenders committing similar crimes, of whom some are selected for the death penalty and others are not"—in violation of the state constitution.¹⁹¹

In 1989, Justice Robert Glass of the Connecticut Supreme Court expressed "serious doubts as to the viability of [the U.S. Supreme Court's] death penalty standard that only provides that the sentencer's 'discretion must be suitably directed and limited so as to *minimize* the risk of *wholly* arbitrary and capricious action.'"¹⁹² According to Justice Glass, the Connecticut Constitution, by contrast, did not appear to tolerate *any* "capriciousness in the application of the death penalty."¹⁹³

In 1998, in *People v. Bull*, Justice Moses Harrison II wrote a sharply-worded dissent that called for an end to Illinois' death penalty based largely on the exoneration of nine Illinois death row inmates in as many years.¹⁹⁴ Justice Harrison did not mince words: "Innocent persons are going to be

¹⁸⁹ *State v. Ramsey*, 524 A.2d 188, 321 (N.J. 1987) (Handler, J., dissenting); *see also id.* at 365 ("Because of the primacy our society reposes, as against the state, in individual life, . . . no other issue so demands that legal doctrine be coherent and just. . . . As guardians of the Constitution that embodies that value and that commitment [to the sanctity of individual life], . . . the Court must never suffer state actions to replicate even remotely the irrationality of [the defendant]. Were the state to do so through the unreasoned imposition of death it would be traducing individual life, not honoring it.").

¹⁹⁰ *State v. Loftin*, 724 A.2d 129, 191 (N.J. 1999) (Handler, J., dissenting); *see, e.g., State v. Bey*, 645 A.2d 685, 733 (N.J. 1994) (Handler, J., dissenting); *State v. DiFrisco*, 662 A.2d 442, 491 (N.J. 1995) (Handler, J., dissenting); *State v. Marshall*, 613 A.2d 1059, 1143 (N.J. 1992) (Handler, J., dissenting); *State v. Martini*, 651 A.2d 949, 1001 (N.J. 1994) (Handler, J., dissenting);

¹⁹¹ *State v. Wagner*, 752 P.2d 1136, 1196–97, 1197 n.7, 1199 (Or. 1988) (Linde, J., dissenting), *cert. granted, vacated on other grounds*, 492 U.S. 914 (1989).

¹⁹² *State v. Breton*, 562 A.2d 1060, 1071 (Conn. 1989) (Glass, J., dissenting) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980)).

¹⁹³ *Id.*

¹⁹⁴ *People v. Bull*, 705 N.E.2d 824, 847 (Ill. 1998) (Harrison, J., dissenting) (discussing nine exonerations between 1987 and 1996). Justice Harrison also pointed to the weight of international opinion against the death penalty, as well as abolition among twelve U.S. states and the District of Columbia. *Id.* at 846.

sentenced to death” and would “inevitably . . . be executed in Illinois” in violation of the federal and state constitutions.¹⁹⁵

Characterizing this line of argument as an “inexplicable attack” on fundamental principles and a “strident protest . . . against the concept of the Anglo–American criminal trial itself,” the majority’s response was, in effect, to let the defendant eat cake.¹⁹⁶ “Have mistakes been made? Will mistakes be made? Certainly,” said the court.¹⁹⁷ But since the “defendant does not suggest a substitute for this system,” the “inevitable execution of innocent persons” was not the court’s problem.¹⁹⁸ The majority opinion, and a separate concurrence authored by three Justices in the majority, rebuked Justice Harrison for “elevat[ing] personal beliefs above thoughtful constitutional analysis,” abandoning “[j]udicial restraint and deference to legislative judgments,” and “impugn[ing] the integrity of other members of the court.”¹⁹⁹ Undeterred, Justice Harrison reflected:

Just as the execution of an innocent person is inevitable, it is inevitable that one day the majority will no longer be able to deny that the Illinois death penalty scheme, as presently administered, is profoundly unjust. When that day comes, as it must, my colleagues will see what they have allowed to happen, and they will feel ashamed.²⁰⁰

In 2005, in *Moore v. Parker*, Judge Boyce F. Martin, Jr. of the Sixth Circuit enumerated various criticisms of the death penalty, including unreliability, “blatant racial prejudice,” “incomprehensible arbitrariness,” “bad lawyering,” pro-death penalty bias among juries and elected judges, and U.S. exceptionalism among western democracies.²⁰¹ Acknowledging his “oath . . . to apply the law as interpreted by the Supreme Court of the United States,”²⁰² Judge Martin declined to declare the death penalty unconstitutional, but forcefully argued that it was:

arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair. . . . Death has more to do with extra-judicial factors like race and socio-economic status than with whether death is deserved. A system, whose basic justification is the interest in retribution and general deterrence, is not served when guided by such

¹⁹⁵ *Id.* at 847–48.

¹⁹⁶ *Id.* at 841 (majority opinion).

¹⁹⁷ *Id.* at 842.

¹⁹⁸ *Id.* at 840–42.

¹⁹⁹ *Id.* at 844; *id.* at 845 (Miller, J., concurring).

²⁰⁰ *Id.* at 848 (Harrison, J., dissenting).

²⁰¹ *Moore v. Parker*, 425 F.3d 250, 268–69 (6th Cir. 2005) (Martin, J., dissenting).

²⁰² *Id.* at 270 (“I have no delusions of grandeur and I know my place in the judiciary I will continue to do as I am told until the Supreme Court concludes that the death penalty cannot be administered in a constitutional manner or our legislatures abolish the penalty.”).

irrelevant factors. Nor should a system of life and death hinge on the proficiency of counsel.²⁰³

Reflecting on his over twenty-five years on the bench, Judge Martin concluded that “the idea that the death penalty is fairly and rationally imposed in this country is a farce.”²⁰⁴

Less than six months later, Washington Supreme Court Justice Charles W. Johnson, joined by Justices Richard B. Sanders, Susan Owens, and Barbara Madsen, similarly argued in dissent that Washington’s death penalty was “arbitrarily or capriciously” imposed in violation of *Furman*.²⁰⁵ Pointing to life sentences received by three of “the worst mass murderers in Washington’s history,” who were collectively responsible for killing seventy-four people, Justice Johnson concluded that the “death penalty is like lightning No rational explanation exists to explain why some individuals escape the penalty of death and others do not.”²⁰⁶ While stopping short of finding the death penalty unconstitutional *per se*, Justice Johnson’s opinion strongly implied that “the arbitrariness with which the penalty of death is exacted” was incapable of remedy.²⁰⁷

More recently, in 2014, federal district court Judge Cormac Carney held that the extraordinary, decades-long delay that precedes execution in California rendered its death penalty arbitrary and devoid of penological purpose in violation of the Eighth Amendment.²⁰⁸ Although Judge Carney did not reach whether California’s death penalty was *per se* unconstitutional,²⁰⁹ his opinion suggested that California’s death penalty could not be rationally carried out, given the inherent tension between efficiency and accuracy.²¹⁰

In March 2016, in holding that Alabama’s death penalty procedures violated the defendants’ Sixth Amendment right to a jury trial in light of

²⁰³ *Id.* at 268, 270.

²⁰⁴ *Id.*

²⁰⁵ *State v. Cross*, 132 P.3d 80, 114 (Wash. 2006) (Johnson, J., dissenting).

²⁰⁶ *Id.* at 112–15.

²⁰⁷ *Id.* at 109, 115 (discussing “serious flaws” in Washington’s death penalty system).

²⁰⁸ *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1061, 1063 (C.D. Cal. 2014), *rev’d sub nom. on other grounds, Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

²⁰⁹ *Id.* at 1061 (acknowledging that “reasonable people may debate whether the death penalty offends th[e Constitution’s] proscription” of cruel and unusual punishment).

²¹⁰ *Compare id.* at 1062 (“[T]o carry out the sentences of the 748 inmates currently on [California’s] Death Row, the State would have to conduct more than one execution a week for the next 14 years.”), *with id.* at 1067 (“Of course, the Court’s conclusion should not be understood to suggest that the post-conviction review process should be curtailed in favor of speed over accuracy.”).

Hurst v. Florida,²¹¹ state trial court Judge Tracie Todd offered a harsh critique of Alabama's administration of the death penalty more generally.²¹² Pointing to bias in the elected judiciary, unqualified defense counsel, and inadequate funding of the judicial branch, Judge Todd concluded:

There is a time and place for diplomacy and subtlety. That time and place has been expunged by the dire state of the justice system in Alabama. It is clear, from here on the front line, that Alabama's judiciary has unequivocally been hijacked by partisan interests and unlawful legislative neglect As a result, the death penalty in Alabama is being imposed in a "wholly arbitrary and capricious" manner.²¹³

And in December 2016, after conducting a two-week evidentiary hearing on the constitutionality of the Federal Death Penalty Act, federal district court judge Geoffrey Crawford concluded that the Act

falls short of the standard required in *Furman v. Georgia* and in *Gregg* for identifying defendants who meet objective criteria for imposition of the death penalty. Like the state statutes enacted after *Furman*, the [Act] operates in an arbitrary manner in which chance and bias play leading roles.²¹⁴

Conceding that "*Gregg* is still the law of the land," Judge Crawford denied the defendant's motion to dismiss the death penalty, but stated that "[t]he time has surely arrived to recognize that the reforms introduced by *Gregg* and subsequent decisions have largely failed to remedy the problems

²¹¹ *Alabama v. Billups et. al.*, CC-2005-001755.00, Mar. 3, 2016, at 26–27, available at http://media.al.com/news_birmingham_impact/other/Hurst%20-%20FINAL.pdf, vacated by Ex Parte State, No. CR-15-0619, 2016 WL 3364689, at *1 (Ala. Crim. App. June 17, 2016). In *Hurst*, the U.S. Supreme Court held that Florida's death penalty statute violated the defendant's Sixth Amendment right to a jury trial because it required a judge, not a jury, to find facts necessary to warrant a sentence of death. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). According to the trial court in *Billups*, Alabama's death penalty procedures violated *Hurst* by "[a]llowing a judge to consider information not known to the jury and override the jury's determination." *Billups* at 26. On a petition for writ of mandamus, Alabama's Court of Criminal Appeals disagreed, holding that Alabama's death penalty procedures do not violate the holding of *Hurst* and ordering the trial court to set aside its order holding the death penalty unconstitutional. Ex parte State, 2016 WL 3364689, at *11; accord. In re Bohannon v. State, No. 1150640, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016), cert. denied sub nom. Bohannon v. Alabama, 137 S. Ct. 831 (2017).

²¹² *Billups*, supra note 211, at 5–11; see also Ex Parte State, 2016 WL 3364689, at *16 (Burke, J., concurring) (questioning "whether the trial court's ultimate conclusion is based on its analysis of *Hurst* or on the trial judge's personal opinions regarding Alabama's death penalty," and noting that "[t]he majority of the order is devoted to the trial court's opinions regarding partisan politics, the effects of an elected judiciary, court funding, and the propriety of the death penalty in general").

²¹³ *Billups*, supra note 211, at 1, 27.

²¹⁴ *United States v. Fell*, No. 5:01-cr-12-01, 2016 WL 7238930, at *1 (D. Vt. Dec. 13, 2016).

identified in *Furman*.²¹⁵

III. THE RIGHT SIDE OF HISTORY

Is the death penalty acceptable to contemporary society? Is it defensible as a matter of deterrence or retribution? Is the death penalty consistent with human dignity? Eventually, the U.S. Supreme Court will follow the path laid down by federal and state judges for the past half-century and answer each of these questions in the negative.²¹⁶

This, in turn, gives rise to perhaps the most salient question of all: even if the death penalty is unacceptable, devoid of penological purpose, and a violation of dignity, should the *U.S. Supreme Court* be the one to get rid of it? Will doing so be the culmination of the U.S. Supreme Court's dignity jurisprudence—a rejection of American exceptionalism on the world stage and a ringing endorsement of the most universal dignity, the right to life itself?²¹⁷ Or will it instead represent a stunning blow to our democracy—a rejection of judicial self-restraint akin to *Lochner v. New York*.²¹⁸ Will judicial abolition make us “the Nation we aspire to be,”²¹⁹ or a nation that has lost its way?

The right side of history, or the wrong side?

For an answer to that question, one might look to the example of slavery. The U.S. Supreme Court did not abolish slavery or even seriously question its constitutionality.²²⁰ It certainly could have. In 1771, in his charge to a grand jury at a session of the North Carolina Superior Court, colonial judge Martin Howard remarked on the inconsistency between the institution of slavery and the idea that “all men are by nature equal and by nature free.”²²¹

²¹⁵ *Id.* at *28.

²¹⁶ See *supra* Parts I and II.

²¹⁷ See *supra* notes 26–36 and accompanying text (discussing worldwide evolution away from death penalty and also the Supreme Court's reliance on dignity in Eighth Amendment context).

²¹⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (“It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution ‘is made for people of fundamentally differing views.’”) (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

²¹⁹ *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014).

²²⁰ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 708–09 (4th ed. 2011).

²²¹ GENTLEMEN OF THE GRAND JURY: THE SURVIVING GRAND JURY CHARGES FROM COLONIAL, STATE, AND LOWER FEDERAL COURTS BEFORE 1801, 708 (Stanton D. Krauss ed., 2012).

Slavery, he argued,

is an adventitious, not a natural state. The souls and bodies of negroes are of the same quality with ours—they are our fellow creatures, tho' in humbler circumstances, and are capable of the same happiness and misery with us. . . . I am content it should be said, that these observations proceed more from the heart than the understanding, at the same time I shall ever suspect the soundness of that understanding which has no mixture of humanity.²²²

Similarly, in 1783, in his instructions to a jury in a case involving the beating of an enslaved man, Chief Justice William Cushing of the Massachusetts Supreme Judicial Court concluded that slavery was at odds with the Massachusetts Constitution's declaration "that all men are born free and equal."²²³ According to Cushing:

[W]hatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses—features) has inspired all the human race.²²⁴

Instead of following the lead of these judges, the Supreme Court in *Dred Scott v. Sandford* did precisely the opposite, invalidating a federal law that would have restricted the expansion of slavery and thus fortifying slavery's hold on the Nation.²²⁵

History has not been kind to slavery. Between 1865 and 1867, historian, congressman, newspaper editor, and antislavery advocate Horace Greeley published *The American Conflict*, a 1400-page, two-volume treatise on the abolition of slavery.²²⁶ It is a harsh indictment of the institution.²²⁷

²²² *Id.* at 709.

²²³ Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1331 (2015) (discussing Quock Walker cases).

²²⁴ *Id.* (quoting *Document 15: Commonwealth v. Jennison, Charge of Chief Justice Cushing*, in CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY 45–46 (Albert P. Blaustein & Robert L. Zangrando eds., 1968)).

²²⁵ 60 U.S. 393, 452 (1856); see also Kevin Barry & Bharat Malkani, *The Death Penalty's Dark Side: A Response to Phyllis Goldfarb's Matters of Strata, Race, Gender, and Class Structures in Capital Cases*, WM. & MARY L. REV. ONLINE ("In *Dred Scott v. Sandford*, the U.S. Supreme Court explicitly sanctioned slavery, articulating a powerful defense of racial subordination that set the stage for the Civil War.')

²²⁶ HORACE GREELEY, *THE AMERICAN CONFLICT*, vol. I (1865).

²²⁷ See *id.* at 12, 44–45, 47 (discussing "the radical injustice and iniquity of slave-holding" and the "fearfully misguided" men who fought to preserve the institution, and stating that "those provisions favoring or upholding Slavery, which deform our great charter, . . . are unsightly and abnormal additions" demanded by the "slave-hungry States of the extreme

The death penalty—which Greeley and other anti-slavery advocates also opposed²²⁸—is not yet history. But it will be. Although none of us can know for sure how history will judge the death penalty, odds are good that the death penalty will come to be seen as one of the worst indignities our Nation has ever known, and that a Supreme Court decision abolishing it will, in time, be widely accepted as right. Odds are also good that many of us alive today will be there when history is made.

IV. CONCLUSION

Abolition of the death penalty is inevitable. Power, not principle, sustains it,²²⁹ and principle, not power, will eventually end it.²³⁰ Applying three themes that have characterized death penalty abolition in the Western world, this Essay has argued that the end of the death penalty hinges on the Supreme Court’s willingness to defy public opinion and live up to history’s demands.

When the Supreme Court abolishes the death penalty, the Court will not be going it alone. This Essay has gathered the opinions of federal and state judges who have advocated abolition of the death penalty for over the past half-century. These decisions form a coherent body of law—the “law of abolition”—on which the Supreme Court should rely.

South”). President Obama repeated this sentiment in 2016. *See Remarks by the President in Eulogy for the Honorable Reverend Clementa Pinckney*, THE WHITE HOUSE, (June 26, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/26/remarks-president-eulogy-honorable-reverend-clementa-pinckney> (“[T]he cause for which they fought—the cause of slavery—was wrong . . .”).

²²⁸ *See Horace Greeley: Abolitionist with Pen in Hand*, AFRICAN AMERICAN REGISTRY, http://www.aaregistry.org/historic_events/view/horace-greeley-abolitionist-pen-hand (last visited Oct. 24, 2016); *cf.* MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION 3* (2016) (discussing slavery abolitionists’ anticipation of “contemporary scourges, criticizing the criminalization of blackness and the use of capital punishment and force by the state”).

²²⁹ *See* ZIMRING & HAWKINS, *supra* note 1, at 153 (“[E]xecutions represent a manifestation of state autonomy that continues to influence state and local decisionmakers.”). A case in point is Nebraska, whose legislature repealed the death penalty over the governor’s veto, and whose governor responded by funding a public referendum campaign that resulted in the reinstatement of the death penalty. *See* Pema Levy, *A Republican Governor Is Using His Own Money to Reinstate the Death Penalty*, MOTHER JONES (Nov. 1, 2016) (stating that Nebraska governor “[Pete] Ricketts and his billionaire father, Republican megadonor Joe Ricketts, spent \$300,000 on an effort to collect enough signatures to put the death penalty question to voters, in the form of a referendum on November 8. The governor donated another \$100,000 this fall to fund a campaign to sway voters to reinstate the death penalty”); *see also Nebraska*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/nebraska-1> (last visited Oct. 24, 2016) (discussing reinstatement of the death penalty).

²³⁰ *See supra* Part I.B (discussing “human rights linkage”).

The Court's decision to abolish the death penalty will not be easy; one vote will most likely separate abolition from retention. Nor will the decision be popular; indeed, abolition has *never* been the result of popular demand.²³¹ But, as this Essay has argued, it will, in time, almost certainly be regarded as right.

²³¹ See HOOD & HOYLE, *supra* note 12, at 426.