

Capital Punishment at a Constitutional Crossroads

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INTRODUCTION

In 2003, we published an article in a symposium on the death penalty in the first issue of this journal.¹ We attempted to predict the state of the American death penalty on the fiftieth anniversary of *Furman v. Georgia*² in 2022, which is now three years ago but was then almost twenty years in the future. Our piece consisted of a hypothetical majority opinion and dissent from the U.S. Supreme Court considering a panoply of constitutional challenges to the death penalty—a “*Furman II*,” if you will. Our mock opinions considered four distinct challenges to the constitutionality of the American death penalty, based on (1) its arbitrary and discriminatory application, (2) the prevalence of wrongful capital convictions, (3) the cruelty of increasingly lengthy confinement on death row, and (4) the emergence of a national consensus regarding the excessiveness of the death penalty as a criminal punishment. Our majority opinion rejected the first three challenges but partially accepted the fourth one, invalidating the American death penalty with respect to “ordinary” (i.e., non-terrorism related) crimes as inconsistent with “evolving standards of decency” under the Eighth Amendment based on a wide-ranging evaluation of indicia of societal consensus.³

Our piece got a fair amount right about the (then) future, now recent past, of the American death penalty—and also a fair amount wrong. As Yogi Berra famously quipped, “It’s tough to make predictions, especially about the future.”⁴ When the editors of this journal invited us to revisit our earlier piece for this current symposium, we first thought about penning another hypothetical Supreme Court opinion a few decades hence. But we immediately realized that such a project would be ill-advised—not so much because of our mixed track record the first time around, but rather because this moment is so different from the early aughts, when

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¹ Carol S. Steiker & Jordan M. Steiker, *Abolition in Our Time*, 1 OHIO STATE J. CRIM. L. 323 (2003).

² See generally *Furman v. Georgia*, 408 U.S. 238 (1972).

³ See Steiker & Steiker, *supra* note 1, at 333 (“[E]volving standards of decency are measured . . . by a more global examination of social practices and commitments.”).

⁴ Alex R. Piquero, *The Perils (and Necessity) of Forecasting How Many People Will Be in Jail*, VITAL CITY (Mar. 12, 2024), <https://www.vitalcitynyc.org/articles/the-perils-and-necessity-of-jail-population-forecasting> [<https://perma.cc/FQA-K8A>].

discernable trend lines were beginning to emerge. At the present moment, in contrast, it would be impossible for anyone to confidently predict the future status of the death penalty a generation hence, because the relevant trend lines are moving in opposite directions.

On the ground, the death penalty is in steep decline, with most indicators pointing to continuing declines. Yes, President Trump is promising to ramp up capital punishment, but the federal government is a bit player in the national death penalty drama, and former President Biden abridged its role even further with capital commutations that have reduced federal death row to less than a handful.⁵ While a few states are also seeking to revive their waning use of the death penalty, it is unlikely that the death penalty's dramatic nationwide decline will be substantially reversed in the foreseeable future.⁶ At the same time, however, the current Supreme Court is looking likely to continue to pull back, perhaps dramatically, on existing constitutional constraints on federal and state death penalty practices. The nature and even existence of constitutional regulation of capital punishment is very much up for debate in this Court. What these opposing trends on the ground and in the Court mean for the constitutional status of capital punishment a generation hence is impossible to say, because we stand at an inflection point where just about every constitutional future of the death penalty is conceivable over the next few decades.

Faced with this radical uncertainty, instead of putting our money on one possible outcome, we instead will try to offer a taxonomy of the various possibilities going forward. We will start by giving a brief account of our prior predictions, as a way of assessing how the law and practice of the death penalty have evolved over the past two decades and how the trend lines on the ground and in the Court have diverged. We will then briefly sketch four different possible constitutional futures for the American death penalty, leaving the difficult task of prediction to our audience.

I. WHAT WE GOT RIGHT—AND WRONG

Our earlier piece made numerous accurate predictions about the future of the law and practice of the death penalty, both in the short term and in the longer term. We wrote our piece in 2002, and it was published in 2003. We were confident and correct that the Court's 2002 decision in *Atkins v. Virginia*,⁷ which banned the death penalty for offenders with intellectual disability would lead to a similar categorical exemption for juvenile offenders. We predicted that such a decision would come

⁵ Carol Steiker, *Almost Anti-Death Penalty*, INQUEST (Feb. 6, 2025), <https://inquest.org/almost-anti-death-penalty/> [<https://perma.cc/MXN5-ZCDG>] (discussing former President Biden's commutation of the death sentences of thirty-seven individuals on federal death row).

⁶ See Carol S. Steiker & Jordan M. Steiker, *The Court and Capital Punishment on Different Paths: Abolition in Waiting*, 29 WASH. & LEE J.C.R. & SOC. JUST. 1, 55–59 (2023) (explaining why the dramatic nationwide decline in the use of the American death penalty is likely to continue).

⁷ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

seven years later, when in fact the Court exempted juveniles from the death penalty a mere three years later in *Roper v. Simmons*.⁸

We were also correct in our longer-term prediction that the death penalty would decline along every dimension. At the time that we wrote, there had not been any statewide abolitions of the death penalty in nearly two decades,⁹ but we correctly predicted that the coming decades would see legislative and judicial abolitions, gubernatorial moratoria, and fewer death sentences and executions even in states that continued to authorize capital punishment.

We also correctly predicted that politicians would begin to be willing to take public stances against the death penalty, something that Michael Dukakis' failed presidential campaign in 1988 had virtually eliminated.¹⁰ It took some time, but Joe Biden made history in 2020 as the first President to be elected after explicitly expressing opposition to capital punishment,¹¹ accompanied by a party platform that also called for the end of the death penalty.¹²

Finally, we were correct that as between the federal government and the states, the feds would be the ones more committed to ramping up the death penalty—though we were wrong about the reasons for such federal enthusiasm. We were writing during the ramp up of the War on Terror in the wake of 9/11, as prisoners were piling up in Guantanamo and fear of future terrorist attacks loomed large. We imagined that fear of terrorism would displace fear of “ordinary” murder and that enthusiasm for the death penalty for those convicted of terrorism-related offenses would grow, while appetite for the death penalty for those convicted of other crimes would decline. We did not predict that Donald Trump, or some other figure with

⁸ *Roper v. Simmons*, 543 U.S. 551, 578 (2005). We did not predict the further extension of *Atkins* to interpersonal crimes other than murder in *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (invalidating the death penalty for offender guilty of the rape but not the murder of a child), nor its extension to cases involving sentences of life-without-parole for juveniles (JLWOP) in *Graham v. Florida*, 560 U.S. 48, 82 (2010) (invalidating JLWOP sentences for non-homicidal offenses), and *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (invalidating mandatory JLWOP sentences even for homicide offenses).

⁹ The most recent statewide death penalty abolitions prior to 2003 occurred in Massachusetts and Rhode Island, both in 1984. *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [<https://perma.cc/34ME-KER9>] (last visited Mar. 29, 2025).

¹⁰ SaraKay Smullens, *Mr. President, Please: Learn from Dukakis' Worst Political Blunder*, HUFFPOST (May 25, 2011), https://www.huffpost.com/entry/mr-president-please-learn_b_739733 [<https://perma.cc/72M5-XHFJ>].

¹¹ Austin Sarat, *Biden Is the First President to Openly Oppose the Death Penalty*, SLATE (Jan. 21, 2021, at 3:59 PM), <https://slate.com/news-and-politics/2021/01/biden-death-penalty-agenda.html> [<https://perma.cc/5H3Y-ECLR>].

¹² The Democratic Party became the first major U.S. political party to call for an end to capital punishment in its 2016 platform—a call it reiterated during Biden's successful 2020 campaign. That plank was removed from the platform in 2024. Jessica Schulberg, *Democrats Scrub Death Penalty Opposition from Campaign Platform*, HUFFPOST (Aug. 22, 2024, at 9:29 AM EDT), https://www.huffpost.com/entry/democrats-scrub-death-penalty-campaign-platform_n_66c67a0de4b0b9c7b360296b [<https://perma.cc/P9HD-JA6G>].

authoritarian tendencies, would become president and seek to accelerate and expand the federal death penalty for ordinary crimes.

Our predictions were wrong in other ways as well. Most obviously, we were far afield in our prediction that the Supreme Court would be ready to hand down a constitutional abolition of the death penalty for ordinary crimes in 2022; indeed, constitutional abolition looks farther away today than it did twenty or even ten years ago. But while we were wrong about where the Court would be at this moment, we actually underestimated how ripe conditions on the ground would be for a global constitutional challenge to capital punishment. Not only did we vastly overestimate how many federal executions would take place over the past two decades, we substantially underestimated the extent of the decline of the death penalty more broadly. Nationwide executions reached their modern-era high in 1999 at ninety-eight; we predicted that the decade prior to 2022 would yield an average of fifty-four executions per year (an almost 50% decline from that peak), while in fact that decade produced an average of twenty-seven executions per year.¹³ We even more substantially underestimated the decline in new death sentences, which are the best predictor of executions going forward. We predicted that the death sentencing rate would fall “modestly,”¹⁴ but new death sentences fell even more dramatically than executions, declining from 151 in 2003 to 21 in 2022.¹⁵ Finally, we underestimated the number of states that would abolish the death penalty between 2003 and 2022. We predicted that five states would abolish either legislatively or judicially, while in fact eleven states did so—more than twice our estimate.

We did not predict the magnitude of these truly stunning changes because we did not foresee the impact of two of the primary drivers of the death penalty’s dramatic decline. It was not clear to us, writing in 2003, how much mitigation practice would improve and prevent the imposition of the death penalty even in highly aggravated cases, such as those of Zachariah Moussaoui (the so-called 20th hijacker from the 9/11 attacks),¹⁶ James Holmes (the “Batman” movie house shooter in Colorado responsible for the largest mass murder in that state),¹⁷ and Nicholas

¹³ See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2025), <https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf?dm=1741616524> [<https://perma.cc/NU7P-64ML>] [hereinafter DPIC Fact Sheet]. Even after the COVID-19 pandemic, executions remained relatively stable, with twenty-five carried out in 2024, though there has been a substantial uptick in 2025. *Id.*

¹⁴ See Steiker & Steiker, *supra* note 1, at 332.

¹⁵ See DPIC Fact Sheet, *supra* note 13, at 3. Once again, even after the COVID-19 pandemic, new death sentences remained relatively stable, with twenty-six imposed in 2024.

¹⁶ Neil A. Lewis, *Moussaoui Given Life Term by Jury over Link to 9/11*, N.Y. TIMES (May 4, 2006), <https://www.nytimes.com/2006/05/04/us/04moussaoui.html> [<https://perma.cc/UMY5-JWUP>].

¹⁷ Elisha Fieldstadt & Jacob Rascon, *Aurora Movie Theater Shooter James Holmes to Be Sentenced to Life in Prison*, NBC NEWS (Aug. 8, 2015, at 12:03 AM EDT), <https://www.nbcnews.com/news/us-news/aurora-movie-theater-shooter-james-holmes-be-sentenced-life-prison-n406276> [<https://perma.cc/8HYD-8R2K>].

Cruz (the Marjory Stoneman Douglas high school shooter in Parkland, Florida).¹⁸ It was also not apparent to us how much legal challenges to lethal injection practices, despite their ultimate lack of success in the U.S. Supreme Court, would gum up the execution works, as Corinna Lain’s contribution to this symposium elaborates.¹⁹ In addition to their direct effects, both the improvements in mitigation practice and the increasing difficulties states faced in securing drugs for lethal injection significantly raised the cost of capital punishment, which has contributed to reducing its use.²⁰

We were perhaps most wrong about how the Supreme Court would be thinking about the Eighth Amendment and capital punishment. We imagined a majority willing to embrace a constitutional abolition of capital punishment through the application of the methodology that the Court had just elaborated in *Atkins v. Virginia* in 2002. That was not so far-fetched, as such a majority might well have come into being if Hillary Clinton had been elected president in the close election of 2016.

But we also imagined that the conservative wing of the Court, whom we cast as dissenters to our hypothetical decision, would dissent on largely the same grounds as Justices Scalia and Rehnquist did in *Atkins*—critiquing the expansive approach the majority took to divining “evolving standards of decency,” the long-standing test for interpreting the Eighth Amendment. Justices Scalia and Rehnquist objected to the *Atkins* Court going beyond “objective” evidence of societal standards and endeavoring to “fabricate” an emerging “national consensus” against executing people with intellectual disability even though a majority of death penalty states permitted the practice.²¹ We did not imagine an emboldened conservative supermajority on the Court seemingly ready to jettison the “evolving standards” test altogether for a more originalist approach.

This possibility of a seismic shift in Eighth Amendment jurisprudence informs our sense that we stand at a crossroads for the constitutional future of capital punishment. In what follows, we map some of the possible paths that the Court might take with regard to the death penalty over the next few decades. We sketch two possible futures in which the balance of power shifts toward a more liberal or

¹⁸ Gareth Evans, *Parkland School Shooting: Why the Gunman Was Spared the Death Penalty*, BBC (Oct. 13, 2022), <https://www.bbc.com/news/world-us-canada-63237156> [<https://perma.cc/T2F6-NCS5>].

¹⁹ Corinna Barrett Lain, *Lethal Injection Then and Now: A Topsy-Turvy Moment for the Abolition Movement*, 23.1 OHIO STATE J. CRIM. L. 37, 39 (2026).

²⁰ See Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 141, 150 (2010) (describing the role of rising costs as a new constraint on the retention and use of the death penalty).

²¹ *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) (“[T]he Court’s assessment of the current legislative judgment . . . resembles a *post hoc* rationalization for the majority’s subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency.”); *id.* at 347 (Scalia, J., dissenting) (“But the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls.”).

progressive majority on the Court, which might yet embrace constitutional abolition of the death penalty. We then sketch two possible futures in which the Court addresses capital punishment using a more originalist methodology, with a variety of outcomes. We leave it to our readers to decide which, if any, of these futures seems most likely to occur.

II. CONSTITUTIONAL ABOLITION BASED ON HUMAN DIGNITY

One possibility for an eventual constitutional abolition by the Court is a ruling that embraces the primary argument advanced against the death penalty in the original *Furman* litigation. The lead case in the *Furman* litigation was *Aikens v. California*, which was mooted out of the joint litigation after oral argument before the U.S. Supreme Court when the California Supreme Court invalidated the state's death penalty under the state constitution.²² The *Aikens* brief had relied heavily on a single source for its main claim. That source was Albert Camus' mid-century essay, *Reflections on the Guillotine*, which argued that capital punishment was a barbaric practice incompatible with respect for human dignity.²³ The *Aikens* brief asserted that capital punishment "has been progressively rejected in the course of an ideological and moral debate resonant with concerns that are intimately connected with the 'principle of civilized treatment' and 'the dignity of man.'"²⁴ This dignity-based argument under the Eighth Amendment was consistent with the tenor of much of the advocacy against the death penalty in the 1960s and early 1970s.²⁵

The main thrust of the Court's decision in *Furman*, however, focused on the administration of the penalty of death in the United States rather than on its *per se* incompatibility with civilized respect for human dignity. It is a bit challenging to identify the "main thrust" of *Furman*, given that there were five solo opinions written by the five justices in the bare majority. However, most knowledgeable observers identify the opinions of Justices Potter Stewart and Byron White as the core of the *Furman* decision on the ground that these justices changed their votes from a decision only the previous year that had rejected a similar challenge to the

²² *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (declaring the California death penalty unconstitutional under the California state constitution).

²³ ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH 131, 151–52 (Justin O'Brien trans., Modern Library ed. 1963) (Capital punishment is "the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared[.] For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.").

²⁴ Brief for Petitioner at 31, *Aikens v. California*, 406 U.S. 813 (1972) (No. 68-5027) (quoting *Trop v. Dulles*, 356 U.S. 86, 99, 100 (1958)).

²⁵ See CAROL S. STEIKER & JORDAN M. STEIKER, *The Foreignness of Furman*, in DEATH PENALTY IN DECLINE?: THE FIGHT AGAINST CAPITAL PUNISHMENT IN THE DECADES SINCE *FURMAN V. GEORGIA* 92, 95–96 (Austin Sarat ed., 2024) (describing the humanistic tenor of the dominant critique of capital punishment at the time of *Furman*).

death penalty under the Due Process clause.²⁶ Justices Stewart and White did not invoke human dignity in their *Furman* opinions; rather, they pointed to the rare and random distribution of capital sentences that seemed unlikely to achieve any permissible purposes of criminal punishment²⁷ and that, in Justice Stewart's memorable and oft-quoted words, were "cruel and unusual in the same way that being struck by lightning is cruel and unusual."²⁸ Four years later, in *Gregg v. Georgia*,²⁹ the Court reauthorized the use of capital punishment, approving new capital statutes that attempted to guide the discretion of capital sentences and explicitly rejecting the claim that "the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution."³⁰ This focus on the death penalty's application rather than its essence continued in the legal challenges to capital punishment over the decades to follow, spilling over into much of public discourse as well—in part due to path dependence on the early, though temporary, success of procedural arguments and the failure of dignitary arguments in *Furman* and *Gregg*.³¹

Despite the Supreme Court's rejection of wholesale constitutional challenges to capital punishment based on dignity and the turn away from such arguments in the public sphere in the United States in the decades that followed, arguments against the death penalty based on human dignity won big in the rest of the world over the course of the same time period. The trickle of countries that abolished capital punishment in the first few decades after World War II turned into a flood in the 1980s and 1990s. Scholars of the death penalty in international and historical perspective identified a "new dynamic" that characterized this period, during which numerous countries abolished the death penalty for all crimes within only a few years after their last execution, rather than first experiencing a long period of desuetude punctuated by increasing restrictions on the use of the death penalty, which had been the more common dynamic in earlier abolitions.³² Within a few decades, all Western developed democracies other than the United States—that is to say, all of the United States' closest peers—had abolished capital punishment. This remarkable, and remarkably speedy, phenomenon was driven by a consensus that

²⁶ See *McGautha v. California*, 402 U.S. 183, 221–22 (1971).

²⁷ See *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) ("I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.").

²⁸ *Id.* at 309 (Stewart, J., concurring).

²⁹ *Gregg v. Georgia*, 428 U.S. 153, 195–99 (1976).

³⁰ *Id.* at 168–69 (plurality opinion).

³¹ See Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 129 (2002) ("It is hard for American political leaders to articulate, or for members of the American public to accept, that our much vaunted constitution could validate something that constituted a violation of [fundamental] human rights.").

³² See ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 18 (5th ed. 2015).

the death penalty constitutes a denial of fundamental and universal human rights. The Council of Europe, first in 1983 and then even more emphatically in 2002, issued protocols abolishing the death penalty as a matter of the protection of “human rights and fundamental freedoms.”³³ The preamble of the 2002 protocol explicitly notes the need for abolition of capital punishment in order to protect “the right to life” and “the fundamental dignity of all human beings.”³⁴ In Europe, all nations seeking admission to the European Economic Union must agree to abolish the death penalty.³⁵ As scholar Mugambi Jouet has observed, the primary rationale for European abolition of the death penalty in modern times has been the “humanistic” protection of dignity: “[A]s abolitionism triumphed in Europe categorical humanistic objections came to trump practical ones. . . . [H]uman rights norms . . . became the official basis for abolition.”³⁶

Given the remarkable convergence of our international peers on the dignitary basis for rejecting capital punishment, it is not inconceivable that a future, more progressive Supreme Court might author a constitutional abolition on similar grounds. After all, the Court has frequently invoked the ringing quote from *Trop v. Dulles*, a foundational Eighth Amendment precedent, that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”³⁷ And it is not hard to imagine what such an Eighth Amendment opinion would look like. Justice Brennan’s solo opinion in *Furman* itself explicitly and at length developed an argument that the death penalty constitutes a *per se* violation of the Eighth Amendment because it fails to “comport with human dignity.”³⁸ Brennan’s analysis started with the “dignity of man” quote from *Trop v. Dulles* and elaborated four “principles . . . sufficient to permit a judicial determination whether a challenged punishment comports with human dignity.”³⁹ He argued that a punishment violates the Eighth Amendment’s dignitary guarantee if it is degrading, arbitrarily inflicted, unacceptable to contemporary society, and excessive in relation to its purposes.⁴⁰ After a lengthy exegesis, Brennan found that the four principles individually and in

³³ See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, C.E.T.S. No. 114; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, C.E.T.S. No. 183 [hereinafter Protocol No. 13].

³⁴ Protocol No. 13, *supra* note 33.

³⁵ See EUR. UNION, EU GUIDELINES ON THE DEATH PENALTY 4 (2008), https://www.ecas.europa.eu/sites/default/files/08_hr_guidelines_death_penalty_en.pdf [<https://perma.cc/MP4M-ZA7J>] (“Abolition is . . . a precondition for candidate countries seeking accession to the EU.”).

³⁶ Mugambi Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, 71 AM. J. COMPAR. L. 46, 91–92 (2023) (italics omitted).

³⁷ *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

³⁸ *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

³⁹ *Id.* at 258, 270.

⁴⁰ See *id.* at 271–79.

tandem established an Eighth Amendment violation and concluded that “death stands condemned as fatally offensive to human dignity.”⁴¹

Justice Marshall’s solo *Furman* opinion did not explicitly refer to the concept of human dignity, but it used language invoking “the humanity of our fellow beings” and the need to eschew “barbarism” that dovetailed with Brennan’s analysis and that similarly called for a *per se* rejection of the death penalty under the Eighth Amendment.⁴² Marshall’s opinion was more practically focused in its attempt to demonstrate that “fully informed” citizens would reject the death penalty as “barbarously cruel” based on the punishment’s failure to promote any permissible penal purposes.⁴³ After considering one by one the purported purposes of capital punishment, Marshall concluded that if informed of “all the facts presently available regarding capital punishment, the average citizen would . . . find it shocking to his conscience and sense of justice.”⁴⁴ Marshall’s ringing concluding paragraph closed with language that sounded in the register of human dignity without using that term: “In recognizing the humanity of our fellow beings, we . . . achieve ‘a major milestone in the long road up from barbarism.’”⁴⁵

A constitutional elaboration of the meaning of human dignity would not necessarily have to adopt Brennan’s four principles or Marshall’s invocation of a hypothetical “fully informed citizen.” Many scholars have attempted to flesh out the meaning of human dignity and its relationship to the death penalty, offering numerous permutations that a court could adopt or elaborate. Some scholars have focused on the death penalty’s relationship to torture, which the Supreme Court has explicitly rejected as cruel and unusual punishment under the Eighth Amendment since the nineteenth century.⁴⁶ For example, moral philosopher Jeffrey Reiman has argued that the death penalty is akin to torture in its “intense pain and the spectacle of one human being completely subject to the power of another.”⁴⁷ Professors Charles Fried and Gregory Fried, a father-and-son professorial duo in law and philosophy respectively, co-authored a book devoted to explaining the moral impermissibility of torture but ultimately concluded that the death penalty is also impermissible on the same grounds—that the practice “grossly offends the bedrock premise that every human being is a locus of inestimable value.”⁴⁸ Law professor

⁴¹ *Id.* at 305.

⁴² *Id.* at 371 (Marshall, J., concurring).

⁴³ *Id.* at 361–62.

⁴⁴ *Id.* at 369.

⁴⁵ *Id.* at 371 (footnote omitted).

⁴⁶ See *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment] to the Constitution.”).

⁴⁷ Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFFS. 115, 139–40 (1985).

⁴⁸ CHARLES FRIED & GREGORY FRIED, *BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR* 55, 76–80 (2010).

John Bessler has argued that “[i]f lynchings, death threats and mock executions are, quite appropriately, considered to be acts of torture [under international law], then death sentences and actual executions should qualify as well,” because they partake of many of the same features.⁴⁹ Bessler goes on to argue that the torture inherent in death sentences and executions should require that international law recognize a *jus cogens* norm—a mandatory and inviolable norm—against the use of capital punishment.⁵⁰ Other scholars have also elaborated on the ways in which human dignity has been invoked around the globe to challenge the death penalty, either as a matter of domestic policy or international law.⁵¹

While the torture analogy tends to emphasize the suffering of the victim of torture, other scholars have argued that the concept of dignity should sweep more broadly. Professor Bharat Malkani has argued that the death penalty implicates not only the dignity of the people involved in the crime, but also “the dignity of the wider community in whose name the death penalty is being imposed” and “the dignity of the legal institution that administers capital punishment.”⁵² One of us (Carol Steiker) has elaborated on the “collective” aspect of human dignity, exploring “the role that the concept or value of dignity might play in protecting something in our collective, communal life—our dignity, if you will—in addition to and apart from the individual suffering of those who are harmed by our failures to respect *their* dignity.”⁵³ This concept of collective dignity offers a different way to challenge the permissibility of the death penalty, by excavating the ways in which the practice of capital punishment may threaten to undermine the collective moral agency upon which our punishment practices are premised.⁵⁴

Yet other scholars have attempted to build on the U.S. Supreme Court’s recognition of dignity in contexts outside of criminal punishment in order to support a challenge to capital punishment. Professor Kevin Barry has mounted a dignitary

⁴⁹ JOHN D. BESSLER, *THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION* xxii (2017) (alteration in original) (footnote omitted).

⁵⁰ See *id.* at xxiv; see generally JOHN D. BESSLER, *THE DEATH PENALTY’S DENIAL OF FUNDAMENTAL HUMAN RIGHTS: INTERNATIONAL LAW, STATE PRACTICE, AND THE EMERGING ABOLITIONIST NORM* (2023) (detailing how capital punishment violates universal human rights to life, to be free from torture and other cruel, inhuman, and degrading treatment or punishment, to be treated in a non-arbitrary and non-discriminatory manner; and to be treated with dignity).

⁵¹ See, e.g., ERIN DALY & JAMES R. MAY, *DIGNITY LAW: GLOBAL RECOGNITION, CASES, AND PERSPECTIVES* (2020) (providing kaleidoscopic approach to the recognition of human dignity across legal domains around the globe); Paolo G. Carozza, “*My Friend is a Stranger*”: *The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031, 1043–77 (2003) (surveying constitutional court opinions on dignity and the death penalty around the globe).

⁵² Bharat Malkani, *Dignity and the Death Penalty in the United States Supreme Court*, 44 HASTINGS CONST. L.Q. 145, 147 (2017).

⁵³ Carol S. Steiker, “*To See a World in a Grain of Sand*”: *Dignity and Indignity in American Criminal Justice*, in *THE PUNITIVE IMAGINATION: LAW, JUSTICE, AND RESPONSIBILITY* 19, 21 (Austin Sarat ed., 2014).

⁵⁴ See Carol Steiker, *The Death Penalty and Deontology*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* 441, 459–61 (John Deigh & David Dolinko eds. 2011).

assault on the death penalty by referencing the Supreme Court's invocation of dignity in its cases protecting LGBT rights, such as *United States v. Windsor*⁵⁵ and *Obergefell v. Hodges*.⁵⁶ Barry argues that because life is "the most basic aspect of dignity," the Court's precedents protecting dignity in the LGBT context "must also demand an end to the death penalty."⁵⁷

The foregoing is just a sampling of the variety of approaches to dignity that might inform a constitutional abolition premised on that fundamental moral and constitutional value. This grounding for constitutional abolition may seem far-fetched, given the resolutely practical, procedural cast of anti-death penalty legal and policy advocacy in the U.S. over the half century since *Furman*, and given the current conservative super-majority on the Supreme Court. But we are looking a generation ahead, when things remain unknowable and may yet change again. The dignitary approach has the distinction of being the most common pathway to death penalty abolition around the world, especially in the countries that are our closest social, political, and economic peers. In an increasingly globalized world, it would be shortsighted not to include this pathway to constitutional abolition on a list of possibilities.

III. CONSTITUTIONAL ABOLITION BASED ON EMERGING SOCIETAL CONSENSUS

In our 2003 piece in this journal, we predicted a constitutional abolition on *Furman*'s 50th anniversary based on the Supreme Court's Eighth Amendment proportionality methodology that had just been elaborated in the Court's 2002 decision in *Atkins v. Virginia*.⁵⁸ More than a decade later, in our 2016 book on the constitutional regulation of capital punishment, we further developed this possibility into what we described as a "Blueprint for Constitutional Abolition."⁵⁹ Although the membership and political orientation of the Court has changed since we published our book (the book's publication date was one day prior to the 2016 presidential election), the legal "blueprint" for a future constitutional abolition remains inscribed in Supreme Court precedent, at least for the moment, and conditions on the ground have continued to develop in a direction that offers even more powerful support for such a decision.

As we explained in our earlier article and our book, the *Atkins* decision substantially expanded the Court's Eighth Amendment proportionality jurisprudence, which the Court had previously invoked in the capital context to

⁵⁵ *U.S. v. Windsor*, 570 U.S. 744, 775 (2013) (striking down the federal law that denied recognition of same-sex marriages).

⁵⁶ *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (holding that the fundamental right to marry is equally guaranteed to same-sex couples).

⁵⁷ Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383, 390 (2017).

⁵⁸ *Atkins v. Virginia*, 536 U.S. 304, 311–13 (2002).

⁵⁹ CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 271–85 (2016).

preclude the death penalty for the crime of the rape of an adult woman and to limit the use of capital punishment for those convicted of felony murder who did not themselves kill.⁶⁰ These earlier precedents established that to decide whether a challenged use of the death penalty violated the Eighth Amendment's proportionality guarantee, the Court should first consider objective evidence of a consensus against the practice and then apply its own judgment with regard to whether the punishment adequately promoted permissible aims of punishment.⁶¹

Prior to *Atkins*, the objective evidence that the Court invoked was limited to the decisions of legislatures, juries, and prosecutors—e.g., how many jurisdictions permitted the challenged practice, how often sentencing juries imposed the death penalty in the challenged circumstances, and how often prosecutors sought the death penalty in the challenged circumstances.⁶² In *Atkins*, the Court substantially expanded the evidence it considered in determining the existence of a societal consensus. The Court may have felt a need to bolster its finding of consensus because only eighteen of the thirty-eight states that (then) retained capital punishment formally prohibited the practice of executing offenders with intellectual disability. Thus, the Court emphasized the remarkable speed of the change that had occurred since 1989, when the Court had rejected a similar challenge.⁶³ In 1989, only two states had prohibited executing offenders with intellectual disability, but in the intervening thirteen years, sixteen more states had passed legislation rejecting the practice. In addition, the Court emphasized the consistency of the direction of this legislative change, with no jurisdictions limiting or repealing their new categorical bars.⁶⁴ In its most expansive move, the *Atkins* majority dropped a footnote explaining that its finding of an objective consensus against the challenged practice was supported by the views of expert organizations, religious leaders, the world community, and respondents to public opinion polls.⁶⁵

⁶⁰ See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the Eighth Amendment precludes the death penalty for the rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the Eighth Amendment precludes the death penalty for offenders convicted of felony murder who did not themselves kill, attempt to kill, or intend to kill); *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987) (holding that the death penalty may be imposed only on those offenders who played a major role in the underlying felony and acted with reckless indifference to human life, thereby narrowing *Enmund*).

⁶¹ See *Enmund*, 458 U.S. at 788 (invoking the need to consider “objective factors” in Eighth Amendment proportionality review, quoting *Coker*); *id.* at 797 (explaining that “it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as *Enmund*,” reaffirming its approach in *Coker*).

⁶² See *id.* at 788–96.

⁶³ *Atkins*, 536 U.S. at 314–15 (observing that “[m]uch has changed” since the Court’s rejection of a similar claim in *Penry v. Lynaugh*, 492 U.S. 302 (1989) and detailing subsequent new legislative enactments on a year-by-year basis).

⁶⁴ *Id.* at 315.

⁶⁵ *Id.* at 316 n.21 (observing that analysis of the listed factors “lends further support to our conclusion that there is a consensus among those who have addressed the issue”).

With respect to the second part of its proportionality analysis, the bringing of “its own judgment” to bear, the *Atkins* Court similarly expanded the realm of relevant considerations.⁶⁶ Previously, the Court had addressed only the consistency of the challenged practice with the two penological goals of capital punishment, retribution and deterrence.⁶⁷ The Court in *Atkins* added another consideration to the application of its own judgment, to which it appeared to give equal weight—the concern that offenders with intellectual disability might “face a special risk of wrongful execution.”⁶⁸ The Court worried that such offenders might be impaired in their ability to mount persuasive showings of mitigation at sentencing, because they “may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse.”⁶⁹ The Court also noted that the mitigating effect of evidence of intellectual disability might be undercut by the possibility that a sentencing jury would treat it as evidence of the defendant’s future dangerousness.⁷⁰ But the Court’s concerns extended beyond unjustified death sentences; the Court also emphasized the fact that offenders with intellectual disability are at heightened risk for giving false confessions, which can lead to erroneous *convictions*, not just sentences.⁷¹

The foregoing illustrates why *Atkins* seemed to us such a promising legal framework for a wholesale constitutional challenge writing in 2003. But that legal framework has only been strengthened since then. Three years later, when the Court applied its *Atkins* methodology to invalidate the death penalty for juvenile offenders in *Roper v. Simmons*,⁷² the majority opinion doubled down on the relevance of international opinion that had previously been relegated to a footnote in *Atkins*, explaining in the text that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁷³ The *Simmons* Court ringingly proclaimed: “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of

⁶⁶ *Id.* at 312 (noting that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of acceptability of the death penalty under the Eighth Amendment”) (quoting *Coker*, 433 U.S. at 597).

⁶⁷ See, e.g., *Enmund v. Florida*, 458 U.S. 782, 797–801 (1982) (finding that capital punishment is disproportionate where neither deterrence nor retribution justifies its use against offenders convicted of felony murder who did not kill, attempt to kill, or intend to kill).

⁶⁸ *Atkins*, 536 U.S. at 321.

⁶⁹ *Id.* at 320–21.

⁷⁰ *Id.* at 321.

⁷¹ *Id.* at 320 (recognizing “the possibility of false confessions”). Presumably, the reduced ability to give meaningful assistance to counsel and to serve as an effective witness, which the Court discussed in the mitigation context, would likewise contribute to a heightened risk of wrong conviction, not merely unjustified capital sentencing.

⁷² *Roper v. Simmons*, 543 U.S. 551, 564–67, 578 (2005).

⁷³ *Id.* at 578.

freedom.”⁷⁴ A few years later, the Court also underscored the relevance of the risk of wrongful convictions to the application of its own judgment in rejecting the death penalty for the crime of the rape of a child in *Kennedy v. Louisiana*.⁷⁵ The Court identified “serious systemic concerns in prosecuting the crime of child rape,” including “unreliable, induced, and even imagined child testimony.”⁷⁶ The Court supported this assertion by citing a variety of empirical studies that identified the potential contributors to wrongful convictions in prosecutions for child rape.⁷⁷ The Court explicitly invoked the language from *Atkins* about the importance of a “special risk of wrongful execution” to the application of its own judgment, because such a risk “undermines . . . the meaningful contribution of the death penalty to legitimate goals of punishment.”⁷⁸ The Court also expanded its proportionality analysis when it applied it to cases involving juvenile life-without-parole (JLWOP) sentences. In doing so, the Court had to deal with a much larger number of JLWOP sentences (124) than the number of executed offenders with intellectual disability (5) or juvenile offenders (6) that it had dealt with in its capital proportionality cases.⁷⁹ In addressing this apparent disparity, the Court emphasized how lumpy the distribution of JLWOP sentences was, concentrated in only a few jurisdictions,⁸⁰ and also how infrequently JLWOP sentences were imposed in proportion to cases in which they might be sought.⁸¹ These expansions have obvious import for a global challenge to the death penalty, as we explain further below.

Writing in 2003, we imagined changes over the following twenty years that would support a global challenge under the *Atkins* methodology (even before it was bolstered by later cases). But our imaginings fell far short of the reality of changes on the ground. The past two decades have seen much greater rejection, questioning, and diminishment of the practice of capital punishment across the country than we had predicted, yielding an even stronger claim under *Atkins* and the Court’s later decisions in *Simmons* and *Kennedy*.

As we recounted above, our predictions⁸² of legislative and judicial state abolitions, declines in execution rates, and declines in death sentencing rates were correct—but way too conservative. We predicted five legislative and judicial abolitions when in fact there were eleven—more than double our prediction. We

⁷⁴ *Id.*

⁷⁵ *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008).

⁷⁶ *Id.* at 443.

⁷⁷ *Id.* at 443–45.

⁷⁸ *Id.* at 443.

⁷⁹ *See Graham v. Florida*, 560 U.S. 48, 64–65 (2010).

⁸⁰ *See id.* (noting that although thirty-five states and the District of Columbia permitted JLWOP sentences in some instances, actual JLWOP sentences were concentrated in only eleven states).

⁸¹ *Id.* at 66 (arguing that “in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual”).

⁸² *See Steiker & Steiker, supra* note 1, at 324–40.

predicted an average execution rate of fifty-four executions a year when in fact there were twenty-seven—half of our prediction. And we were farthest off on the most important metric—the rate of death sentencing—which is obviously the best predictor of future capital practices. We predicted that death sentencing would fall “modestly” when in fact it fell from 151 in 2003 to 21 in 2022, a fall of more than 86%. This is a stunning rate of change in an extraordinarily short period of time—the biggest decline overall in capital practices in American history.

But the grounding for a global constitutional challenge appears even stronger when one considers the doctrinal expansions announced in *Atkins* and later cases. Addressing the factors that *Atkins* itself added, the views of legal experts challenging the death penalty received a significant boost in 2009 when the American Law Institute (ALI)—the nation’s preeminent legal think tank—withdrawed its support for the model death penalty provisions promulgated in the Model Penal Code in 1962.⁸³ The ALI explained that this withdrawal was a response to “current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”⁸⁴ The world community’s rejection of the death penalty has only grown in the past two decades,⁸⁵ and its views were given special pride of place in *Roper v. Simmons* a few years after *Atkins*.⁸⁶ The leaders of many religious organizations continue to oppose capital punishment.⁸⁷ And public opinion polling has shown support for the death penalty dropping to historic lows,⁸⁸ especially when poll respondents are given life without possibility of parole as an

⁸³ See Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 358–60 (2010) (describing the ALI’s decision-making process leading to the withdrawal of its model death penalty provisions).

⁸⁴ *Id.* at 360 (quoting Letter from Lance Liebman, Dir., A.L.I. (Oct. 23, 2009), <https://www.ali.org/news/10232009.htm>).

⁸⁵ See Richard C. Dieter, *Introduction: International Perspectives on the Death Penalty*, in *COMPARATIVE CAPITAL PUNISHMENT 2*, 2 (Carol S. Steiker & Jordan M. Steiker eds. 2019) (describing how “capital punishment is now being rejected in law and in practice at an accelerated pace”).

⁸⁶ See Steiker & Steiker, *supra* note 6, at 35–37.

⁸⁷ For example, in the final months of 2024, a diverse coalition of religious leaders urged then-President Biden to grant mass commutations to the prisoners on federal death row. See Bob Smietana & Jack Jenkins, *Faith Leaders, Activists, the Pope Urge Biden to Empty Federal Death Row Before Trump Term*, RELIGION NEWS SERV. (Dec. 11, 2024), <https://religionnews.com/2024/12/11/faith-leaders-activists-call-on-biden-to-empty-federal-death-row-before-trump-takes-office/> [<https://perma.cc/GK2F-BREZ>].

⁸⁸ See Hayley Bedard, *NEW POLL: Overall Support for the Death Penalty Remains at Five-Decade Low as Opposition to the Death Penalty Grows Among Younger Generations*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), <https://deathpenaltyinfo.org/new-poll-overall-support-for-the-death-penalty-remains-at-five-decade-low-as-opposition-to-the-death-penalty-grows-among-younger-generations> [<https://perma.cc/6VEN-7Q4B>].

alternative (a sentence authorized in all of the states that currently retain the death penalty).⁸⁹

Moreover, the concerns about wrongful convictions and wrongful death sentencing that the Court raised in *Atkins* and later in *Kennedy* have continued to grow in the capital context. The most careful and widely cited count of wrongful capital convictions since 1973 has just reached 200.⁹⁰ Researchers have presented a “conservative” calculation that 4.1% of capital verdicts between 1973 and 2004 were erroneous⁹¹ and have concluded that there is a higher likelihood of wrongful conviction in capital cases than in noncapital cases, notwithstanding the more elaborate procedures required in capital cases, because of special circumstances that affect the investigation and prosecution of capital murder.⁹² These circumstances include pressure on the police to clear homicides, the absence of live witnesses in homicide cases, greater incentives for the real killers and others to offer perjured testimony, greater use of coercive or manipulative interrogation techniques, greater publicity and public outrage around capital trials, the “death qualification” of capital juries which makes such juries more likely to convict, greater willingness by defense counsel to compromise the guilt phase to avoid death during the sentencing phase, and the lessening of the perceived burden of proof because of the heinousness of the offense. The studies support a conclusion that capital defendants face “a special risk of wrongful conviction” that should inform the Court’s application of its own judgment within its current proportionality framework.

Finally, just as the Court noted in the JLWOP context, the distribution of capital sentences, and especially executions, is exceedingly lumpy, highly concentrated in only a few states, and often in only a few counties within those states. For example, in 2024, “[j]ust four states were responsible for three-quarters of the executions that

⁸⁹ The Gallup polling group reported in 2019 that 60% of poll respondents thought that life imprisonment was a better punishment than the death penalty, up from 45% in 2014. See Jeffrey M. Jones, *Americans Now Support Life in Prison over Death Penalty*, GALLUP NEWS (Nov. 25, 2019), <https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx> [<https://perma.cc/SS8V-N7J8>].

⁹⁰ See *Innocence*, DEATH PENALTY INFO CTR., <https://deathpenaltyinfo.org/policy-issues/policy/innocence> [<https://perma.cc/C8UP-S6TF>] (last visited Apr. 16, 2025). For inclusion on this list of capital exonerees, a defendant must have been convicted and sentenced to death, and subsequently either (a) had their conviction overturned followed by (i) an acquittal at retrial or (ii) the dismissal of all charges; or (b) received an absolute pardon from the governor based on new evidence of innocence. See *Criteria for Inclusion on DPIC’s Innocence List*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/criteria-for-inclusion-on-dpics-innocence-list> [<https://perma.cc/CN7F-ZXM5>] (last visited Apr. 16, 2025).

⁹¹ Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT’L ACAD. SCI. U.S. 7230, 7234 (2014).

⁹² See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 475–500 (1996).

took place in the U.S.”⁹³ Another widely cited report revealed that a tiny minority of local jurisdictions—2% of the nation’s counties—was responsible for more than half of all executions in the U.S. since 1976.⁹⁴ Similarly, just as the Court noted in the JLWOP context, the few dozen death sentences that are imposed yearly represent a tiny fraction of the thousands of cases of intentional murder that could plausibly be charged capitally.⁹⁵

The Court’s proportionality doctrine offers a plausible path for an eventual global abolition both because the doctrine has deep roots in the Court’s Eighth Amendment doctrine (extending back to the Court’s decision in *Coker* in 1977) and because the doctrine has become so expansive, extending well beyond numerical headcounts to include more qualitative evidence of “evolving standards of decency.” While it is possible that other grounds for abolition of the death penalty might be advanced, such as challenges based on its arbitrary and/or discriminatory application, the prevalence of wrongful capital convictions, and the cruelty of lengthy confinement on death row, we stand by our analysis of the difficulties that each of these individual challenges presents, which we elaborated in our earlier article in this journal.⁹⁶ And we would add that the arbitrariness challenge—the claim that (briefly) succeeded in *Furman* itself—faces the additional difficulty of being an entirely procedural rather than a substantive challenge, and thus one subject to overruling upon the advent of new and improved procedures (as happened with *Furman* four years later).

The reason to focus our attention here on proportionality is that each of these narrower grounds can be given some weight within the currently extremely capacious proportionality rubric. The arbitrary and discriminatory application of the death penalty undermines its claims to promote either retribution (because the penalty is imposed not upon those most deserving) or deterrence (because many of the worst offenders may not believe that they will be capitally charged and thus are unlikely to be deterred by the penalty). Similarly, lengthy confinement on death row also undermines the likelihood that the death penalty will promote either retribution (because lengthy stays on death row allow for redemptive change that demonstrates

⁹³ Kate Scanlon, *2024 Death Penalty Report: Most U.S. Executions Due to 4 States*, OSV NEWS (Dec. 19, 2024), <https://www.osvnews.com/2024-death-penalty-report-most-us-executions-due-to-4-states/> [<https://perma.cc/TSJ2-YLEX>].

⁹⁴ See RICHARD C. DIETER, DEATH PENALTY INFO CTR., *THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL* 6, 27 (2013), <https://files.deathpenaltyinfo.org/documents/pdf/TwoPercentReport.f1564408816.pdf?dm=1683576587> [<https://perma.cc/QQ6Z-CBUV>].

⁹⁵ While no comprehensive database of capital eligible cases exists, the murder rate in death penalty states provides some sense of the likely magnitude of such cases. See *Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states> [<https://perma.cc/JJ7F-YXLU>] (last visited Apr. 16, 2025) (reporting murder rates per 100,000 in death penalty states from 1990–2020).

⁹⁶ See Steiker & Steiker, *supra* note 1, at 326–31.

the fallibility of initial assessments of offenders' depravity or dangerousness) or deterrence (because the speed and certainty of sanctions play such important roles in creating deterrent effects). And the Court has already given pride of place to the risk of wrongful conviction within its proportionality framework.

Of course, it is possible to imagine a global constitutional abolition based on some combination of all of these possible challenges, proportionality included. Indeed, one does not need to imagine what such a decision might look like, because between the time we wrote our earlier piece for this journal and now, two justices penned opinions challenging the constitutionality of capital punishment based on some combination of these and other concerns. In 2008, Justice Stevens wrote a concurrence in *Baze v. Rees*,⁹⁷ a case challenging lethal injection procedures, explaining that he had come to believe that the death penalty was unconstitutional based on the inadequacy of procedural protections in capital cases, the discriminatory application of the death penalty, and the risk of wrongful convictions.⁹⁸ But Stevens concurred in upholding the death sentence in that case rather than dissented because of his adherence to *stare decisis*.⁹⁹ In 2015, Justice Breyer dissented in *Glossip v. Gross*,¹⁰⁰ another lethal injection case, joined by Justice Ginsburg, suggesting that the death penalty was unconstitutional because of the risk of wrongful convictions, its arbitrary and discriminatory imposition, excessive delays that inflict cruel suffering and undermine the death penalty's penological rationale, and the tremendous decline in the use of capital punishment (the central inquiry in a proportionality analysis).¹⁰¹ We thus do not discount the possibility that an eventual global constitutional challenge may take a "throw everything at the wall" approach, especially given that such a tack may be thought likely to attract the most votes on the Court. Nonetheless, we have (yet again) chosen to underscore the proportionality approach, because it is the most capacious approach that has a deep precedential pedigree, and thus may be most likely to pull in justices who wish to be seen as applying existing law rather than enacting their own political preferences, as the justices in the *Furman* majority were accused of doing at the time of their temporary abolition.¹⁰²

⁹⁷ *Baze v. Rees*, 553 U.S. 35, 71–87 (2008) (Stevens, J., concurring).

⁹⁸ *Id.* at 84–86 (noting procedural concerns including the death-qualification of capital juries, the permissibility of statutes authorizing capital verdicts when aggravating and mitigating facts are in equipoise, and the admissibility of victim impact evidence in capital cases—in addition to broader concerns about racial discrimination and the risk of wrongful convictions).

⁹⁹ *Id.* at 87.

¹⁰⁰ See generally *Glossip v. Gross*, 576 U.S. 863 (2015) (Breyer, J., dissenting).

¹⁰¹ *Id.*

¹⁰² See *Furman v. Georgia*, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting) ("Yet it is essential to our role as a court that we not seize upon the enigmatic character of the guarantee [against cruel and unusual punishment] as an invitation to enact our personal predilections into law.").

IV. CONSTITUTIONAL RETENTION BASED ON REJECTION OF “EVOLVING STANDARDS OF DECENCY” FRAMEWORK

Perhaps the easiest path forward to imagine is for the Court to reject a constitutional challenge to the death penalty by abandoning the “evolving standards of decency” framework. Though this approach is deeply rooted in precedent and provides the foundation for modern capital punishment law, several members of the Court have implicitly and explicitly questioned its continued application, which in turn has led opponents of the framework to call for its reconsideration and rejection.

The “evolving standards of decency” approach was embraced almost seventy years ago in *Trop v. Dulles*,¹⁰³ which offered an extended discussion of the contours of the Eighth Amendment. In *Trop*, the Court invalidated denaturalization as punishment for desertion during wartime. The plurality opinion, relying on an early 20th century decision invalidating a punishment imposed in the Philippines (then a U.S. Territory), insisted that the Eighth Amendment is “not static” and “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁰⁴ This approach rejects the notion that the Eighth Amendment prohibits only those punishments deemed excessive at the time of the founding and suggests, in Durkheimian fashion, that societies become less punitive as they “mature.”

In dissent, Justice Frankfurter, joined by three justices, found the result puzzling based on his greater-includes-the-lesser view: if desertion could be met by death—a constitutional punishment, how could the lesser punishment of denaturalization be deemed unconstitutional?¹⁰⁵ More importantly, Justice Frankfurter’s view of the constitutionality of the death penalty seemed to be rooted at least partly in an historical point about the death penalty’s availability at the founding: “It seems scarcely arguable that loss of citizenship is within the Eighth Amendment’s prohibition because disproportionate to an offense that is capital and has been so from the first year of Independence.”¹⁰⁶ In response, the plurality conceded the constitutionality of the death penalty, but only for that present moment, remarking that “in a day when it is still widely accepted, [the death penalty] cannot be said to violate the constitutional concept of cruelty.”¹⁰⁷

A few years after *Trop*, the Court for the first time applied the Eighth Amendment against the states, rejecting as cruel and unusual the imposition of punishment for the “status” of being an addict.¹⁰⁸ A year later, Justice Goldberg, dissenting from denial of certiorari, called for the Court to consider whether the death penalty is constitutionally excessive when imposed for the crime of rape where

¹⁰³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁰⁴ *Id.* (citing *Weems v. United States*, 217 U.S. 349 (1910)).

¹⁰⁵ *Id.* at 124–26 (Frankfurter, J., joined by Burton, Clark, & Harlan, JJ., dissenting).

¹⁰⁶ *Id.* at 125.

¹⁰⁷ *Id.* at 99 (plurality opinion).

¹⁰⁸ *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

no life is taken.¹⁰⁹ Justice Goldberg's dissent explicitly embraced *Trop's* "evolving standards of decency" framework, suggesting that the issue was ripe "[i]n light of the trend both in this country and throughout the world against punishing rape by death."¹¹⁰ Justice Goldberg's opinion inspired the NAACP Legal Defense Fund ("LDF") to embark on an unprecedented effort to abolish the death penalty nationwide by highlighting its diminished use, inefficacy, arbitrariness, and discriminatory imposition.¹¹¹

Trop's invocation of "evolving standards of decency" made constitutional abolition of the death penalty thinkable. It encouraged the LDF to gather evidence suggesting that the widespread availability of the death penalty as a matter of law masked growing distaste for the practice on the ground, with dwindling death sentences and executions. The LDF's effort was spectacularly successful. Its moratorium strategy brought executions to a halt by 1967,¹¹² and in the landmark *Furman v. Georgia*¹¹³ decision in 1972, the Court invalidated all prevailing capital statutes under the Eighth Amendment. *Furman* famously did not produce a majority opinion, as all five justices supporting the result wrote separately without joining each other. The common thread linking those opinions was the arbitrary administration of the death penalty, with only two Justices (Brennan and Marshall) concluding that the death penalty was no longer a permissible punishment under the Eighth Amendment. Notably, though, the "evolving standards" framework was endorsed explicitly not only by three of the five justices supporting the judgment (Douglas, Brennan, and Marshall), but also by Chief Justice Burger's dissent (which reflected the views of all four of the dissenting justices).¹¹⁴ Indeed, Chief Justice Burger's ultimate support for the constitutionality of the death penalty turned on the inadequacy of evidence that prevailing moral sentiment found the punishment repulsive: "There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned."¹¹⁵ The Chief Justice, tracking the approach in *Trop*, left open the possibility that the death penalty could be deemed unconstitutionally cruel if it no longer commanded the support of the American people.

States responded to *Furman* by enacting new capital statutes designed to minimize its arbitrary distribution. When the Court addressed those statutes in 1976,

¹⁰⁹ *Rudolph v. Alabama*, 375 U.S. 889, 889 (1963) (Goldberg, J., joined by Douglas & Brennan, JJ., dissenting from denial of certiorari).

¹¹⁰ *Id.*

¹¹¹ STEIKER & STEIKER, *supra* note 59, at 40–51.

¹¹² *Id.* at 46.

¹¹³ *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

¹¹⁴ *Id.* at 242 (Douglas, J., concurring); *id.* at 269–70 (Brennan, J., concurring); *id.* at 327 (Marshall, J., concurring); *id.* at 383, 390 (Burger, C.J., joined by Blackmun, Powell, & Rehnquist, JJ., dissenting).

¹¹⁵ *Id.* at 385 (Burger, C.J., joined by Blackmun, Powell, & Rehnquist, JJ., dissenting).

it upheld three of the five new capital statutes it reviewed.¹¹⁶ As a preliminary matter, the Court addressed the global question it avoided in *Furman*: whether the death penalty remained a permissible punishment under the Eighth Amendment—the first and only time that the Court has answered the question in a sustained and explicit manner. In so doing, all nine justices applied the evolving standards framework. The central plurality opinion in the Georgia case, invoking *Trop*, asserted that an “assessment of contemporary values concerning the infliction of a challenged sanction”¹¹⁷ is the crux of the Eighth Amendment inquiry. The plurality emphasized the need for “objective” indicia of prevailing values, reflected in legislative enactments and sentencing practices. The plurality also insisted that the Court must bring its own judgment to bear on whether a challenged punishment serves important penological purposes. Applying these criteria, the plurality found that American society had not turned its back on the death penalty and that the punishment plausibly served deterrence and retributive goals.¹¹⁸ Four other justices who would have sustained all five of the challenged statutes likewise concluded that capital punishment remained “acceptable to the contemporary community as just punishment for at least some intentional killings.”¹¹⁹ Although these justices noted the textual support for capital punishment in the Constitution and the use of the death penalty at the founding and throughout American history, they too ultimately focused on whether the punishment “has been rejected by or is offensive to the prevailing attitudes and moral presuppositions in the United States.”¹²⁰ And, of course, Justices Brennan and Marshall, who voted to strike down all five of the new capital statutes, relied on the evolving standards framework in concluding that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth Amendment, a position they maintained until their respective retirements from the Court.

Over the next several decades, the Court adhered to its evolving standards of decency approach as it addressed numerous proportionality challenges to capital and non-capital sentences. As discussed above, in the early 2000s the Court reversed prior decisions rejecting proportionality challenges to the death penalty as applied to juveniles and persons with intellectual disability.¹²¹ As it crafted those exemptions, the Court broadened the criteria for discerning prevailing social norms, finding confirmatory support in expert, world, and religious opinion, as well as polling data.¹²² This expansive approach enhanced the case not only for the particular exemptions the Court newly recognized, but also for constitutional

¹¹⁶ STEIKER & STEIKER, *supra* note 59, at 65–71.

¹¹⁷ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

¹¹⁸ *Id.* at 183–87.

¹¹⁹ *Roberts v. Louisiana*, 428 U.S. 325, 353 (1976) (White, J., joined by Burger, C.J., Blackmun, & Rehnquist, JJ., dissenting).

¹²⁰ *Id.*

¹²¹ *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹²² *Atkins*, 536 U.S. at 316 n.21.

abolition writ large, as all of these criteria increasingly aligned against capital punishment as a practice.

The move to revisit “evolving standards” as the touchstone for Eighth Amendment analysis emerged in the lengthy and contentious debate surrounding lethal injection. The Court first confronted the claim that prevailing lethal injection protocols risked inflicting unnecessary pain in *Baze v. Rees*.¹²³ The Court began with the premise that because the death penalty is constitutional, “[i]t necessarily follows that there must be a means of carrying it out.”¹²⁴ Perhaps that formulation of the inquiry prompted Justice Stevens, who had been part of the *Gregg* plurality sustaining the death penalty over thirty years before, to use *Baze* as an occasion to call for revisiting the constitutionality of capital punishment. His concurring opinion catalogued many defects in the prevailing administration of the death penalty, and he insisted that the death penalty was not insulated from constitutional scrutiny based on language in the Constitution recognizing its availability (e.g., the Fifth Amendment’s Due Process Clause prohibiting deprivations of *life*, liberty, or property without due process of law) or based on the fact of its widespread embrace at the time of the founding.¹²⁵ In support of that point, he observed that “[n]ot a single Justice in *Furman*” indicated that an Eighth Amendment challenge was foreclosed by text or history as “even the four dissenters, who explicitly acknowledged that the death penalty was not considered impermissibly cruel at the time of the framing, proceeded to evaluate whether anything had changed in the intervening 181 years that nevertheless rendered capital punishment unconstitutional.”¹²⁶ On this point, Chief Justice Roberts’s plurality opinion did not disagree; it cited *Gregg* for the proposition that the death penalty is constitutional and did not suggest that the death penalty was impervious to constitutional attack.¹²⁷ But Justices Scalia and Thomas, concurring in the judgment, emphasized that text and history preclude any judicial effort to reject the death penalty under the Eighth Amendment.¹²⁸ Though they did not call out and reject by name *Trop* or the evolving standards of decency framework, they implicitly questioned the Court’s ability to remove the death penalty as an available legislative choice given that “it is explicitly permitted by the Constitution.”¹²⁹

Seven years later, as it again confronted a challenge to a lethal injection protocol in *Glossip v. Gross*,¹³⁰ the Court repeated its view that the constitutionality

¹²³ *Baze v. Rees*, 553 U.S. 35, 40, 46 (2008).

¹²⁴ *Id.* at 47.

¹²⁵ *Id.* at 82–86 (Stevens, J., concurring).

¹²⁶ *Id.* at 86 n.19.

¹²⁷ *Id.* at 47, 52 (plurality opinion).

¹²⁸ *Id.* at 87–88 (Scalia, J., joined by Thomas, J., concurring).

¹²⁹ *Id.* at 93.

¹³⁰ *Glossip v. Gross*, 576 U.S. 863, 867 (2015).

of the death penalty “is settled,”¹³¹ and that there must therefore be a constitutional means of carrying it out. And again, this structure elicited a call, this time by Justice Breyer (joined by Justice Ginsburg), to revisit the constitutionality of the death penalty. Like Justice Stevens, Justice Breyer emphasized that the constitutionality of the death penalty should not be judged by mores at the time of the Constitution’s adoption, “but rather by those that currently prevail.”¹³² Justice Breyer then offered an elaborate and detailed argument, described in the previous section, for rejecting the death penalty as excessive, arbitrary, and inconsistent with contemporary norms given its declining and marginal use.

In response, Justice Scalia, joined by Justice Thomas, took direct aim at *Trop*. He viewed the effort to discern evolving standards as “a task for which we are eminently ill suited” and defended an “historical understanding” of the Eighth Amendment tied to whether challenged punishments were embraced or rejected at the time of the founding.¹³³ Astonishingly, Justice Scalia insisted that *Trop* was not simply wrong, but perhaps the most dangerous decision in the American constitutional canon, insisting that it “has caused more mischief to our jurisprudence, to our federal system, and to our society than any other decision that comes to mind.”¹³⁴ That assessment seems odd given the paucity of cases invoking “evolving standards of decency” as a basis for constraining states’ criminal justice policies. In the capital sphere, *Trop*’s framework has yielded only a few categorical exemptions discussed above, shielding from execution juveniles, persons with intellectual disability,¹³⁵ certain accomplices convicted of murder based on the actions of others,¹³⁶ and persons convicted of child rape and other ordinary non-homicidal crimes.¹³⁷ Its impact on the non-capital sphere has been even more modest, prohibiting life-without-possibility-of-parole (LWOP) sentences for juveniles convicted of non-homicidal offenses¹³⁸ and the *mandatory* imposition of LWOP against juveniles who commit murder.¹³⁹

Perhaps Justice Scalia’s antipathy toward the *Trop* framework is the fact that it renders the death penalty forever vulnerable to constitutional abolition in light of new circumstances.¹⁴⁰ Indeed, his opinion begins with the line, “Welcome to

¹³¹ *Id.* at 869.

¹³² *Id.* at 908 (Breyer, J., joined by Ginsburg, J., dissenting).

¹³³ *Id.* at 898–99 (Scalia, J., joined by Thomas, J., concurring).

¹³⁴ *Id.* at 899.

¹³⁵ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹³⁶ *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (restricting death penalty for non-triggerpersons who neither attempt nor intend to kill); *see also Tison v. Arizona*, 481 U.S. 137, 158 (1987) (allowing death penalty to be imposed for non-triggerpersons who are major participants and who act with reckless indifference to life).

¹³⁷ *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008).

¹³⁸ *Graham v. Florida*, 560 U.S. 48, 74 (2010).

¹³⁹ *Miller v. Alabama*, 567 U.S. 460, 470 (2012).

¹⁴⁰ *Steiker & Steiker, supra* note 6, at 43–44.

Groundhog Day,”¹⁴¹ referring to the film in which the same day is endlessly repeated, and he compares that dynamic to the repeated efforts of death penalty abolitionists to revisit the constitutionality of capital punishment. Justice Scalia makes clear that he would rather treat the matter as settled by history and text, and suggests if abolitionists insist on revisiting the death penalty’s constitutionality, he would want to put *Trop* on the table for reconsideration as well: “If we were to travel down the path that Justice Breyer sets out for us and once again consider the constitutionality of the death penalty, I would ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled.”¹⁴²

In the third major lethal injection case to come to the Court, *Bucklew v. Precythe*,¹⁴³ Justice Gorsuch, writing for a majority, again began the analysis by noting that the death penalty is constitutional.¹⁴⁴ But this time the Court relied not on *Gregg* or an assessment of evolving standards of decency; instead, Justice Gorsuch insisted that the death penalty is constitutional based on history and text. Capital punishment was “‘the standard penalty for all serious crimes’ at the time of the founding,”¹⁴⁵ was explicitly referenced in the Bill of the Rights, and the First Congress, which proposed the Eighth Amendment, authorized numerous capital crimes.¹⁴⁶ Making clear that the constitutionality of the death penalty does not turn on prevailing moral values, Justice Gorsuch baldly asserted that the “Constitution . . . permits States to authorize capital punishment” and “the judiciary bears no license to end a debate reserved for the people and their representatives.”¹⁴⁷

Of course, *Bucklew* did not involve a global challenge to capital punishment as a practice, and no one argued to the Court that the death penalty was unconstitutional. Hence, the portion of the opinion explaining *why* capital punishment is a valid punishment is dicta and does not technically bind future courts. But Justice Gorsuch’s effort to embrace Justice Scalia’s position from *Glossip* was not inadvertent. He wanted to signal the Court’s impatience with *Glossip*-styled assaults on capital punishment and to lay the foundation for a permanent embrace of the death penalty under the Eighth Amendment.

What does this mean for the future of the American death penalty? The *Bucklew* dicta could ripen into a holding if the Court were to revisit and reject *Trop*. Two scenarios seem plausible. One possibility is that the death penalty continues to decline along many of the dimensions witnessed over the past quarter century, with fewer executions and death sentences and an increase in the number of abolitionist

¹⁴¹ *Glossip v. Gross*, 576 U.S. 863, 893 (2015) (Scalia, J., joined by Thomas, J., concurring).

¹⁴² *Id.* at 899.

¹⁴³ *Bucklew v. Precythe*, 587 U.S. 119, 126–27 (2019).

¹⁴⁴ *Id.* at 129.

¹⁴⁵ *Id.* (quoting STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 23 (2002)).

¹⁴⁶ *Id.* at 129.

¹⁴⁷ *Id.* at 130.

jurisdictions as well as popular opposition to the death penalty. These dynamics seem not only plausible but likely at the present moment. The size of death row has dropped to its lowest point since 1987, declining every year since 2001.¹⁴⁸ This decline of more than 40% since the turn of the century (3,593 death-sentenced inmates nationwide in 2000, compared to 2,092 in January, 2025)¹⁴⁹ predicts fewer executions going forward (notwithstanding the significant uptick this year), especially given that one-third of current death-sentenced inmates are housed in jurisdictions with moratoria in place¹⁵⁰ (and possible abolition on the horizon). Death sentencing remains at all-time lows,¹⁵¹ and many of the factors contributing to the decline, including cost, improved capital trial advocacy, and the changing politics of high death-sentencing counties, appear to be durable developments.¹⁵² Several states are entertaining bills that would abolish the death penalty, and few abolitionist jurisdictions seem eager to reinstate. Polling data has shown a strong trend away from the death penalty, especially when respondents are offered the choice of LWOP sentences.¹⁵³ If these trends hold, it seems reasonable to suppose that litigants would again advance the argument that the death penalty has run its course and no longer comports with prevailing moral commitments.

If that argument were to land before the Court as presently constituted, it seems likely that it would be met with the same skepticism voiced in *Bucklew*. Indeed, with Justice Barrett replacing Justice Ginsburg in 2020, the current Court seems even less hospitable to claims advanced by capital defendants than it was in 2018, when five justices in *Bucklew* categorically rejected the notion that capital punishment could be deemed unconstitutional under the Eighth Amendment. In addition, the current Court seems increasingly committed to a focus on history and text as guideposts to constitutional adjudication outside of the capital context (primarily in adjudicating rights protected via Due Process),¹⁵⁴ making the *Bucklew* approach that much more attractive. In this scenario, jettisoning *Trop* would be a defensive maneuver to shield the death penalty from its diminished and diminishing status on the ground.

¹⁴⁸ *Size of Death Row by Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview/size-of-death-row-by-year> [<https://perma.cc/6JMD-W698>] (last visited Apr. 11, 2025).

¹⁴⁹ *Id.*

¹⁵⁰ California currently has 632 people on death row, while Pennsylvania has 109. *Death Row USA*, DEATH PENALTY INFO. CTR. (July 1, 2024), <https://deathpenaltyinfo.org/death-row/overview/death-row-usa> [<https://perma.cc/537H-U7D5>].

¹⁵¹ Between 2019 and 2024, the number of people sentenced to death in the United States fluctuated annually: thirty-four in 2019, eighteen in both 2020 and 2021, twenty in 2022, twenty-one in 2023, and twenty-six in 2024. *Sentences by Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/data/sentencing-data/death-sentences-by-year/2024-death-sentences-by-name-race-and-county-3> [<https://perma.cc/NH5T-XH8Q>] (last visited Apr. 11, 2025).

¹⁵² Steiker & Steiker, *supra* note 6, at 16–19, 24–26, 29–37.

¹⁵³ Jones, *supra* note 89.

¹⁵⁴ *E.g.*, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19, 24 (2022); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022).

A second possibility is that *Trop* is targeted by actors seeking to unwind constitutional protections in capital cases, perhaps in part to reverse the withering of the practice on the ground. Here, the effort to displace *Trop* would be a matter of offense, not defense—an effort to enhance the death penalty’s status by highlighting “judicial interference” with its administration. Numerous signs point toward this possibility. Prosecutors and their allies have urged the Court to revisit some of its leading cases protecting capital defendants, including the 1976 decision invalidating the mandatory death penalty.¹⁵⁵ More dramatically, in a recent case in which a federal appeals court granted relief on an *Atkins* claim, nineteen states joined an amici brief seeking reversal of *Atkins* relief by abandoning *Trop*.¹⁵⁶ The brief insists that “the Court should never have told judges to chase after the country’s ‘evolving standards of decency’” and that the framework “was invented out of whole cloth [and] has no support in the text or history of the Eighth Amendment.”¹⁵⁷ Legislators, too, have sought to revive practices the Court has explicitly prohibited, such as imposing the death penalty for the offense of child rape.¹⁵⁸ Florida recently enacted a mandatory statute targeting murders committed by “unauthorized aliens,” despite the Court’s blanket rejection of mandatory capital provisions.¹⁵⁹ Relatedly, some lower federal court judges have urged curtailing the availability of federal habeas beyond its already quite limited scope; building on dicta in a Supreme Court decision;¹⁶⁰ for example, one circuit court panel suggested that habeas petitioners should not receive relief notwithstanding a constitutional violation in their case if a judicial assessment of the “equities” favors ignoring the violation.¹⁶¹ That decision, like *Bucklew*, rests on arguments from history and text despite more than a half century of contrary practice.¹⁶²

Perhaps the best illustration of the effort to undo constitutional protections in the capital sphere is President Trump’s recent executive order directing the Attorney General to “take all appropriate action to seek the overruling of Supreme Court precedents that limit the authority of State and Federal governments to impose

¹⁵⁵ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

¹⁵⁶ Brief for Idaho et al. as Amici Curiae in Support of Petitioner at 1–2, 4, *Hamm v. Smith*, No. 24-872 (U.S. Mar. 17, 2025).

¹⁵⁷ *Id.* at 4.

¹⁵⁸ FLA. STAT. § 794.011 (2023); see also TENN. CODE ANN. § 39-13-204 (West 2024).

¹⁵⁹ *Florida Legislature Passes Unconstitutional Bill That Mandates the Death Penalty for “Unauthorized Aliens”*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), <https://deathpenaltyinfo.org/florida-legislature-passes-unconstitutional-bill-that-mandates-the-death-penalty-for-unauthorized-aliens> [<https://perma.cc/M8Y5-5P68>].

¹⁶⁰ *Brown v. Davenport*, 596 U.S. 118, 134–36 (2022).

¹⁶¹ *Crawford v. Cain*, 68 F.4th 273, 287 (5th Cir. 2023); see also Lee Kovarsky, *The New Negative Habeas Equity*, 137 HARV. L. REV. 2222, 2260–62 (2024) (criticizing effort to empower lower federal courts to reject habeas relief notwithstanding established constitutional violations based on discretionary judicial perception of “equities”).

¹⁶² *Crawford*, 68 F.4th at 286–88; Kovarsky, *supra* note 161, at 2262–68.

capital punishment.”¹⁶³ This order constitutes an unprecedented broadside attack on an entire body of jurisprudence, literally calling for chief law enforcement officials of the United States to ask the Supreme Court to jettison any constitutional protections afforded capital defendants. In some respects, this order builds on President Trump’s successful effort at the end of his first term to consummate numerous executions despite complicated, unresolved statutory and constitutional issues in a number of the cases in which the executions were sought.¹⁶⁴ His administration encouraged the Supreme Court to sweep aside those potential obstacles and the Court obliged, often using its “shadow docket”¹⁶⁵ to accelerate review and lift lower court stays (without explanation) so that the executions could go forward before the transition to the Biden administration.¹⁶⁶

The avowed goal in the title of President Trump’s order, to “[r]estor[e] the Death Penalty,” reflects a recognition of the death penalty’s diminished status. President Biden’s decision to commute the capital sentences of virtually all federal death-row prisoners (thirty-seven of forty)¹⁶⁷ left President Trump with limited opportunities to invigorate the practice. His call for increased use of the death penalty in aggravated federal cases (another part of the executive order)¹⁶⁸ can accomplish only so much given the amount of time it takes to charge and try a capital case (and the limited number of death-eligible offenses committed in the federal system in any given year). Presidential fiat is unlike to produce many new capital sentences in the short term.

It certainly seems plausible that the Court would embrace these efforts to unravel protections in the capital sphere, especially if President Trump were to replace any of three justices in the minority who support many of the protections afforded in capital cases. The Court could jettison *Trop* as it reviews a lower court decision granting proportionality relief (as in the case involving the amici effort by nineteen states described above) or in reviewing a challenge to a new capital status permitting the death penalty in a context not now permitted (such as child rape). In either case, explicitly rejecting *Trop* and adopting an originalist account of the Eighth Amendment would seemingly foreclose the human dignity and proportionality paths to global constitutional abolition of the death penalty described above.

¹⁶³ Exec. Order No. 14,164, 90 Fed. Reg. 8463, 8464 (Jan. 20, 2025).

¹⁶⁴ Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 639–58 (2022).

¹⁶⁵ STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* 29–33 (2023).

¹⁶⁶ Kovarsky, *The Trump Executions*, *supra* note 164, at 658–67.

¹⁶⁷ Will Weissert & Darlene Superville, *Biden Gives Life in Prison to 37 of 40 Federal Death Row Inmates Before Trump Can Resume Executions*, A.P. NEWS (Dec. 23, 2024, at 6:11 PM EST), <https://apnews.com/article/biden-death-row-commutations-trump-executions-f67b5e04453cd1aa6383c516bc14f300> [<https://perma.cc/2SNF-VYFG>].

¹⁶⁸ Exec. Order No. 14,164, *supra* note 163, at 8463–64.

But it is not clear that the Court's intervention would ultimately "restore" the death penalty. The most pressing current obstacle to the death penalty's restoration is not constitutional doctrine limiting its reach so much as the absence of political will on the ground to seek or secure the death penalty in large numbers of cases in which it is presently available. In fact, stripping away protections in the capital sphere is most likely to accelerate *executions*, which would paradoxically expose the weakness of the American death penalty by noticeably shrinking the footprint of the Nation's death row. Constitutional deregulation of the American death penalty, without a corresponding political commitment to new death sentences, would reveal how far this country has traveled in eschewing the death penalty as the ordinary response to even aggravated murders.

V. CONSTITUTIONAL ABOLITION IN AN ORIGINALIST WORLD

One additional possibility remains. If the Court continues its trajectory toward an originalist account of the Eighth Amendment and a disavowal of "evolving standards of decency," opponents of the death penalty could still mount an originalist case against the current instantiation of capital punishment. It is of course true that the death penalty was a universally available punishment at the state and federal level at the time of the adoption of the Eighth Amendment. But as Justice Breyer argued in *Glossip*—as well as in several opinions respecting denial of certiorari in the years before *Glossip*¹⁶⁹—the practice of capital punishment today is quite different along two important dimensions. First, the time separating sentence and execution now stretches into decades, compared to an interval of weeks or months in the 18th and 19th centuries and a period of months, or at most a few years, in the 20th century before the inauguration of the modern era of capital punishment in the 1970s. In addition, the conditions of confinement on death row in many jurisdictions are exceptionally harsh—amounting to solitary confinement. Thus, the prevailing "punishment" of a death sentence has become two punishments: decades of solitary confinement followed by execution. Worse still, during that lengthy period of solitary confinement, inmates often face execution dates, with the threat of execution sometimes withdrawn at the very last moment.

Justice Breyer offered this critique of the death penalty to illustrate its cruelty (based on the suffering of the condemned and the mental health effects of prolonged isolation) and its inefficacy (arguing that the length of time between sentence and execution undermined the deterrence and retributive value of the punishment).¹⁷⁰ These arguments found a home in the human dignity and proportionality

¹⁶⁹ See *Johnson v. Bredesen*, 558 U.S. 1067, 1069 (2009) (Stevens, J., joined by Breyer, J., statement respecting denial of certiorari); *Gomez v. Fierro*, 519 U.S. 918, 918 (1996) (Stevens, J., joined by Breyer, J., dissenting); *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari); *Thompson v. McNeil*, 556 U.S. 1114, 1118–19 (2009) (Breyer, J., dissenting from denial of certiorari).

¹⁷⁰ *Glossip v. Gross*, 576 U.S. 863, 925–38 (2015) (Breyer, J., joined by Ginsburg, J., dissenting).

frameworks described above. But more importantly for these purposes, Justice Breyer's critique of the current death-row phenomenon—extended incarceration in exceptionally harsh conditions under a long-term threat of execution—is also an argument that states are now practicing a *different* type of capital punishment than what was known and available in the late 18th century. This point becomes clearer by imagining how a court might address, from an originalist perspective, whether four decades of solitary confinement was an available punishment in the late 18th century. A court would be compelled to answer “no,” because lengthy confinement of this sort was not available until the introduction of penitentiaries in the 19th century. And although solitary confinement was a feature of some Quaker penitentiaries in the 19th century, it lost favor by the 20th century and was later used by American prisons as an administrative tool for controlling inmate behavior (rather than as a part of an inmate's *punishment*). It is fair to say that multiple decades of solitary punishment was not contemplated as an accepted practice at the time of the founding, was used only episodically in the 19th century, was rejected by the early 20th century, and did not become routine until the current incarnation of the death penalty: in the present day, only death-sentenced inmates face solitary confinement as an unalterable feature of their imprisonment (until execution).

An originalist defender of the death penalty might respond, as Justice Scalia did in *Glossip*, that both the length of time between sentence and execution and the conditions of confinement on death row are not *necessary* features of today's death penalty.¹⁷¹ The first could be solved by shortening the time between sentence and execution (limiting appeals or processing them more expeditiously), and the second could be resolved by modifying death-row confinement.¹⁷² But the possibility that these features of contemporary capital punishment could be changed, and that capital punishment could again resemble the practice at the founding, does not diminish the point that a large portion of the present inhabitants of death row now experience a novel and especially painful punishment that has no pedigree. Moreover, as Justice Breyer argued in *Glossip*, there is little reason to believe that the delays between sentence and execution are amenable to solutions given the varied entrenched institutional arrangements producing such delays (e.g., lack of postconviction counsel, complexity of litigation, limits on court capacity); and any effort to bludgeon through these obstacles would risk underenforcement of constitutional norms or possibly wrongful execution.¹⁷³

Hence, even in a world where originalism controls the interpretation of the Eighth Amendment, the Supreme Court could reasonably conclude that American capital practices constitute a new punishment which imposes greater physical and

¹⁷¹ *Id.* at 896–99 (Scalia, J., joined by Thomas, J., concurring).

¹⁷² *See id.*

¹⁷³ *Id.* at 938 (Breyer, J., joined by Ginsburg, J., dissenting) (“In this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both.”).

psychological suffering than what was known and authorized at the time of the Eighth Amendment's ratification. This argument could well be strengthened by future developments, as the length of death-row confinement has steadily increased over the past two decades and shows little sign of reversing course (reaching an all-time high in 2022, averaging 288 months of incarceration prior to execution).¹⁷⁴ Moreover, in some jurisdictions, such as those currently with a moratorium on executions in place, there is no realistic prospect of execution at all; for inmates in these jurisdictions, the punishment of the death penalty is to live permanently in the shadow of the state's right to execute. This, too, could fairly be regarded as a unique and untested punishment, certainly without parallel in the founding era.

CONCLUSION

The American death penalty appears to be at a crossroads. The practice is in steep decline and yet the Supreme Court—the most promising forum for abolition—is increasingly disposed to abandon the field. We have considered several possibilities given this odd moment in which the punishment is losing currency in the public arena but the judiciary is wary of curtailing its use. But the future of the American death penalty is not simply a story about capital punishment. Something deeper and more existential is afoot. American democracy is also at a crossroads, and ordinary presumptions about the role of the Court in protecting and elaborating individual liberty seem increasingly less secure. For the first time in our history, the future of the American death penalty seems inextricably linked to pressing and fundamental questions about the future of American democracy. Will American courts remain independent from the centers of political power? Will those in power remain answerable to the people or slide toward authoritarian rule? Historically, the death penalty has played a central role in authoritarian regimes in solidifying power and terrorizing opponents. We cannot confidently predict the future of the American death penalty at a time when we are unable to gauge how much of our larger political order will change or remain the same.

¹⁷⁴ *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [<https://perma.cc/9799-BB6L>] (last visited Apr. 11, 2025).