

From Wolves, Lambs (Part I): The Eighth Amendment Case for Gradual Abolition of the Death Penalty

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FROM WOLVES, LAMBS (PART I): THE EIGHTH AMENDMENT
CASE FOR GRADUAL ABOLITION OF THE DEATH PENALTY

*Kevin Barry**

Abstract

This spring, the Connecticut Supreme Court will take up a novel question, unprecedented in modern death penalty jurisprudence: Can a state gradually abolish its death penalty? Restated, can it leave the sentences of those currently on death row in place but abolish the death penalty going forward? This Article argues that it can. On simple statutory construction grounds, “prospective-only” repeals of death penalty legislation are not given retroactive effect. Although the constitutional considerations are admittedly less straightforward, prospective-only repeals do not offend the Constitution. The death penalty remains constitutional per se under the Eighth Amendment, and “as-applied” challenges under *Atkins* and *Furman* fare no better.

Apart from the thorny legal question before the Connecticut Supreme Court, prospective-only repeal gives rise to two other difficult questions. The first is a pragmatic one: From the perspective of the abolition movement, is prospective-only abolishment of death-penalty legislation wise? The second is a moral one: Is it right to leave those who committed murder on day one on death row, while eliminating the death penalty for those who commit murder on day two? This Article answers both questions in the affirmative. Prospective-only death penalty repeal offers both retraction of the death penalty and preservation of the status quo. It is therefore a useful tool for winning states with inmates on death row to the cause of abolition. Furthermore, by retaining the death penalty for some so that no others will ever face a similar fate, legislators transform an immoral punishment into an arguably moral sacrifice. This is the uneasy morality of gradual abolition; from wolves, lambs.

* Professor, Quinnipiac University School of Law. This Article is adapted from the written and oral testimony of Quinnipiac University School of Law’s Civil Justice Clinic in support of prospective-only legislation that abolished Connecticut’s death penalty in 2012. *See* Testimony of Quinnipiac University School of Law Civil Justice Clinic in Support of Raised Bill No. 280, Judiciary Comm., 2012 Gen. Assemb. (Conn. March 14, 2012), <http://www.cga.ct.gov/2012/JUDdata/Tmy/2012SB-00280-R000314-Christine%20Gertsch-%20Quinnipiac%20University%20School%20of%20Law-TMY.PDF>; JUD Committee Hearing Transcript for March 14, 2012 Gen. Assemb. (Conn. 2012), <http://www.cga.ct.gov/2012/JUDdata/chr/2012JUD00314-R001100-CHR.htm>. Thanks to the Connecticut Office of the Chief Public Defender and the Connecticut Office of the Chief State’s Attorney for their outstanding advocacy and thoughtful consideration of an earlier draft of this Article. Thanks also to: participants at the Faculty Forum at Quinnipiac University School of Law for helpful conversations; the *Florida Law Review* staff for excellent editorial assistance; and Andrea Dupre, Christine Gertsch, and Trevor Bradley for their research assistance.

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OPENING STATEMENT

This is an important time for death penalty abolition. The past five years have witnessed the dawning of a new trend in the abolition movement, that of *gradual* abolition, by which states eliminate the death penalty for all future crimes while preserving it for crimes already committed. Two factors define the trend: (1) state legislatures' use of "prospective-only" language—language limiting repeal to crimes committed on or after the effective date of the statute; and (2) the executive's refusal or inability to commute existing death sentences after repeal. In spring 2014, the Connecticut Supreme Court will address the legality of this approach, which is a novel question unprecedented in modern death penalty jurisprudence.

Importantly, the novelty of gradual abolition does not lie in the prospective-only nature of the death penalty repeal. Over the years, many states have enacted prospective-only legislation altering death penalty procedures or repealing the death penalty for certain crimes and certain types of offenders. Courts have generally upheld such repeals. Other states have enacted prospective-only legislation—like Connecticut's—abolishing the death penalty for *all* future crimes. Unlike in Connecticut, however, executive branches in these states have commuted the sentences of those on death row immediately prior to or after such repeals, so no one remained on death row to challenge such repeals. As a result, courts have generally not had occasion to address the legality of such repeals.¹

The novelty of the issue before the Connecticut Supreme Court thus arises from the fact that the Connecticut General Assembly abolished the death penalty for all future crimes,² and Connecticut's executive did not commute the sentences of those remaining on death row. New Mexico and

1. In 1908 and 1918, the supreme courts of Kansas and Missouri, respectively, refused to give retroactive effect to prospective-only legislation repealing their death penalties *in toto*. See *State v. Lewis*, 201 S.W. 80, 85–86 (Mo. 1918); *In re Schneck*, 96 P. 43, 44–45 (Kan. 1908). Since that time, no court appears to have addressed this issue. Because many states enacted prospective-only legislation abolishing their death penalties after 1918, the dearth of case law addressing challenges to those repeals suggests that either there was no one on death row at the time of prospective-only repeal or the executive commuted the sentence of anyone on death row at the time of such repeal. For an excellent summary of statutes abolishing the death penalty, see generally Brief of Amici Curiae Legal Historians & Scholars, *State v. Santiago*, 9 A.3d 566 (Conn. 2012) (No. SC17413) [hereinafter *Historians Brief*], available at <http://ctbriefsonline.com/Briefs/SC17413ac5.pdf>; see also Kevin Barry, *From Wolves, Lambs (Part II): The Fourteenth Amendment Case for Gradual Abolition of the Death Penalty*, 35 *CARDOZO L. REV.* (forthcoming 2014) [hereinafter *Barry, From Wolves, Lambs (Part II)*] (discussing the history of prospective-only death penalty repeal).

2. An Act Revising the Penalty for Capital Felonies, Pub. Act No. 12-5, § 1, 2012 Conn. Acts 13, 14 (Reg. Sess.), available at <http://www.cga.ct.gov/2012/ACT/PA/2012PA-00005-R00SB-00280-PA.htm> (“Effective from passage and applicable to crimes committed on or after said date): . . .”).

Maryland appear to be the only other states to have done the same in nearly a century.³ Together, these three states retain eighteen men on death row after prospective-only repeal of the death penalty.⁴

To understand the exceptional events taking place in New Mexico, Connecticut, and Maryland, it helps to understand the context from which they emerged. On November 5, 2005, in Albuquerque, New Mexico,

3. See An Act Concerning Death Penalty Repeal—Substitution of Life Without the Possibility of Parole, ch. 156, § 3, 2013 Md. Laws 5, available at http://mgaleg.maryland.gov/2013RS/chapters_noln/Ch_156_sb0276T.pdf (stating that, after effective date of repeal, governor may “change a sentence of death into a sentence of life without the possibility of parole”); An Act Relating to Capital Felony Sentencing; Abolishing the Death Penalty; Providing for Life Imprisonment Without Possibility of Release or Parole, ch. 11, § 6, 2009 N.M. Laws 133, 141, available at <http://www.nmlegis.gov/Sessions/09%20Regular/final/HB0285.pdf> (“The provisions of this act apply to crimes committed on or after July 1, 2009.”).

On November 1, 2010, a New Mexico trial court denied a “Motion to Dismiss the Death Penalty” in the case of Michael Astorga, who committed his crime before that state’s 2009 prospective-only repeal but was convicted after repeal and was awaiting sentencing. See Response to Petition for Writ of Superintending Control at 2, *Astorga v. Candelaria*, No. 32,744 (N.M. Jan. 26, 2011) [hereinafter NM’s January 2011 Response]; Defendant’s Motion to Dismiss the Death Penalty with Memorandum of Law at 2, *State v. Astorga*, CR-2006-1670 (N.M. Dist. Nov. 1, 2010) [hereinafter Def.’s Motion to Dismiss]. “I don’t find anything about [prospective-only repeal] unconstitutional,” Judge Candelaria stated at the close of arguments. Scott Sandlin, *Astorga Death Penalty Trial Can Proceed*, ALBUQUERQUE J. (Dec. 3, 2010), <http://www.abqjournal.com/news/metro/032332537958newsmetro12-03-10.htm> (internal quotation marks omitted). “It’s the Legislature’s prerogative to make a law prospective or retroactive.” *Id.* (internal quotation marks omitted).

Astorga filed an Emergency Petition for Writ of Superintending Control with the New Mexico Supreme Court, arguing that it was unconstitutional for the state to pursue the death penalty against him given New Mexico’s prospective-only repeal. See NM’s January 2011 Response, *supra*, at 2; Emergency Petition for Writ of Superintending Control at 3–11, *Astorga v. State*, No. 32,744 (N.M. Feb. 4, 2011) (attaching Def.’s Motion to Dismiss, *supra*). The New Mexico Supreme Court granted a stay of proceedings and requested a response from the State. After full briefing on the constitutional issues, the court denied the defendant’s petition and lifted the stay of proceedings. See Order at 1, *Astorga v. Candelaria*, No. 32,744 (N.M. Feb. 4, 2011) [hereinafter Feb. 2011 Order].

Because the court’s order did not expressly reserve judgment on the constitutional arguments raised in the December 2010 Petition, it is unclear whether the court found them to be without merit or merely inappropriate to address in a writ proceeding. Compare Feb. 2011 Order, *supra* (no reasoning), with Order at 3, *Astorga v. State*, No. 33,152 (N.M. Sept. 1, 2011) (finding it “inappropriate” to decide whether *rules of statutory construction* required retroactive application of prospective-only repeal, and “expressly” refusing to do so in writ proceeding). What is clear is that the New Mexico Supreme Court refused to give retroactive effect to New Mexico’s prospective-only repeal in a pending case. Other state supreme courts have done so more explicitly. See, e.g., *State v. Alcorn*, 638 N.E.2d 1242, 1246 (Ind. 1994) (holding that prospective-only statute allowing jury to recommend life imprisonment without possibility of parole rather than death was constitutional under the Eighth Amendment and not retroactive in the pending case); *In re Schneck*, 96 P. at 44–45 (holding that prospective-only death penalty repeal was not retroactive in pending case in which defendant was charged with capital crime three months before repeal).

4. *Death Row Inmates by State*, DEATH PENALTY INFO. CENTER (Apr. 1, 2013), <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>.

Michael Paul Astorga shot Candido Ray Martinez in the head, killing him.⁵ Astorga believed that Martinez had stolen his 1959 El Camino, which had gone missing while Astorga was serving a sentence for various weapons, vandalism, and drug charges.⁶ Police issued an arrest warrant for Astorga but were unable to find him.⁷ Then, on March 22, 2006, New Mexico County Deputy Sheriff James McGrane Jr. pulled Astorga over as part of a routine traffic stop.⁸ Seconds later, McGrane lay dead—shot in the head by Astorga.⁹ Mr. Astorga was eventually located in Mexico where he was arrested.¹⁰ On April 14, 2006, the State of New Mexico charged Astorga with murdering McGrane and filed notice of its intention to seek the death penalty, asserting the murder of a police officer as an aggravating factor.¹¹

On March 13, 2009, well before Astorga's murder trials, New Mexico's legislature passed House Bill 285, which repealed the death penalty for "crimes committed on or after July 1, 2009."¹² The legislature's rationales for repeal ranged from the high costs of administering the death penalty and the prevention of false hope for the families of murder victims, to the results of a 2008 poll that demonstrated that 64% of New Mexico's citizens favored life without parole over the death penalty.¹³ The legislature's reasons for the bill's prospective-only feature, on the other hand, were far different. In a "Motion to Dismiss the Death Penalty," filed with the trial court on the eve of sentencing, Astorga's attorney brought the unseemliness of prospective-only repeal into stark relief:

Legislative debate, according to some involved, on the repeal

5. Maggie Shepard, *Family Feud Had Fugitive on the Run*, ALBUQUERQUE TRIB. (Mar. 21, 2006, 1:14 PM), <http://www.abqtrib.com/news/2006/mar/21/family-feud-had-fugitive-on-the-run>; Olivier Uyttebrouck, *Michael Paul Astorga Could Be Spared from Death Penalty in Case of Slain Deputy*, ALBUQUERQUE J. (Aug. 7, 2007), <http://www.abqjournal.com/news/metro/584352metro08-07-07.htm>. Candido Ray Martinez was also known as Candy Ray Martinez. Shepard, *supra*.

6. Shepard, *supra* note 5.

7. Uyttebrouck, *supra* note 5.

8. Scott Sandlin & Olivier Uyttebrouck, *Astorga Convicted of Killing Sheriff's Deputy*, ALBUQUERQUE J. (June 5, 2010), <http://www.abqjournal.com/news/metro/05235649metro06-05-10.htm>.

9. Michael Navrot, *Astorga's Passenger Held, Let Go*, ALBUQUERQUE J. (Mar. 26, 2006), <http://www.abqjournal.com/news/metro/445213metro03-26-06.htm>.

10. Sandlin & Uyttebrouck, *supra* note 8.

11. NM's January 2011 Response, *supra* note 3, at 1.

12. An Act Relating to Capital Felony Sentencing; Abolishing the Death Penalty; Providing for Life Imprisonment Without Possibility of Release or Parole, ch. 11, 2009 N.M. Laws 133, available at <http://www.nmlegis.gov/Sessions/09%20Regular/final/HB0285.pdf>; 2009 Regular Session; HB 285; Abolish Death Penalty, N.M. LEGISLATURE, <http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=H&LegType=B&LegNo=285&year=09> (last visited Feb. 28, 2014) (noting the date the Senate passed the bill).

13. Press Release, Death Penalty Info. Ctr., New Mexico's Legislature Votes to Abolish Death Penalty—Part of National Trend Away from Capital Punishment (Mar. 13, 2009), <http://www.deathpenaltyinfo.org/documents/NMpressrel.pdf>.

of the death penalty included a compromise, “no repeal for Michael Astorga.” This appears to be the compromise the governor and certain legislators requested/demanded in order to support and/or sign the repeal bill. It appears that politicians want him to die at the hands of the government executioner to satisfy the demands of certain law enforcement and the right-wing pro-death crowd. The last vestige of the abhorrent death penalty, for politicians and revenge-seekers, is Michael Astorga’s dead body.¹⁴

Governor Bill Richardson, who signed the repeal bill into law on Wednesday, March 18, 2009, made public statements regarding the bill that do not contradict this characterization.¹⁵ The day after signing the repeal bill, Richardson told the press he believed Astorga—who had not yet been

14. Def.’s Motion to Dismiss, *supra* note 3, at 3.

15. *Governor Bill Richardson Signs Repeal of the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/governor-bill-richardson-signs-repeal-death-penalty> (last visited Dec. 28, 2013) (quoting in full Governor Richardson’s signing statement). The statements of Representative Gail Chasey, sponsor of New Mexico’s prospective-only death penalty repeal bill, on the other hand, *do* contradict Astorga’s characterization. Interview with Gail Chasey, State Representative, N.M. House of Representatives (July 11, 2013) (notes on file with author) [hereinafter Chasey Interview]. According to Representative Chasey, New Mexico’s death penalty abolition bill had been prospective-only since she first introduced it 1999—well before Astorga’s crimes. *Id.* Although the bill’s prospective-only feature certainly made it easier for lawmakers to support it, Representative Chasey notes, the decision to make the bill prospective-only had nothing to do with lawmakers wanting Astorga to get the death penalty. *Id.* Instead, the decision was based on, among other things, New Mexico’s constitutional savings clause, which prohibits a new law from extinguishing penalties, rights, and liabilities under a prior law. N.M. CONST. art. IV, §§ 33–34; *see also id.* art. II, § 19 (“No . . . law impairing the obligation of contracts shall be enacted by the legislature”). New Mexico lawmakers interpreted New Mexico’s savings clause to prevent passage of a retroactive death penalty repeal bill. Chasey Interview, *supra*; *cf.* Comment, *Today’s Law and Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120, 129 (1972) (“The legislature in [New Mexico] is powerless to lessen penalties for past transgressions; to do so would require constitutional revision.”). While the New Mexico legislature’s interpretation of the savings clause is a reasonable one, it is debatable as a matter of law. For example, the savings clause did not stop the legislature from previously abolishing the death penalty retroactively, “revo[king] death penalties already imposed and substitut[ing] a sentence of life imprisonment.” *State v. Pace*, 456 P.2d 197, 205 (N.M. 1969) (per curiam) (supplemental opinion) (“It is clear from [the 1969 repeal law] that the legislature intended the act to apply retroactively.”). It also did not stop the legislature from enacting legislation in 1997 that explicitly allows the legislature to pass laws that retroactively reduce penalties. *See* N.M. STAT. ANN. § 12-2A-16(c) (West, Westlaw through 1st Reg. Sess. of 2013 Legis. Sess.) (“If a criminal penalty for a violation of a statute or rule is reduced by an amendment, the penalty, if not already imposed, must be imposed under the statute or rule as amended.”); *id.* § 12-2A-8 (“A statute or rule operates prospectively only *unless the statute or rule expressly provides otherwise . . .*” (emphasis added)). Therefore, if New Mexico’s legislature had wanted to abolish the death penalty retroactively for those sentenced to death—at least those whose sentences were not yet final—it likely could have done so by including an express provision saying as much. For further discussion of savings clauses, see *infra* Subsection III.A.1.

convicted of murder, much less sentenced to death—“should go to the death penalty. But I think *for the future*, life in prison without parole is a huge punishment.”¹⁶

Ironically, despite the hue and cry over Astorga, he ultimately was not sentenced to death.¹⁷ Two other men were on New Mexico’s death row when the repeal bill was signed, and they remain there.¹⁸ Although the governor of New Mexico has the authority to commute death sentences, their sentences stand.¹⁹

As in New Mexico, Connecticut’s path to prospective-only repeal took place in the shadow of two highly publicized death penalty trials that arose out of a brutal home invasion and triple murder in the town of Cheshire, Connecticut.²⁰ In the early morning hours of July 23, 2007, Joshua Komisarjevsky and Steven Hayes entered the home of the Petit family.²¹ The men beat and bound Dr. William Petit, then forced his wife, Jennifer Hawke-Petit, to go to the bank and withdraw \$15,000.²² Komisarjevsky tied the two Petit daughters, eleven-year-old Michaela and seventeen-year-old Hayley, to their beds and sexually assaulted Michaela; Hayes raped

16. Crystal Gutierrez, *Gov Subpoenaed in Death-Penalty Case*, KRQE (Nov. 23, 2010, 7:13 PM), <http://www.krqe.com/news/crime/gov-subpoenaed-in-death-penalty-case> (emphasis added). New Mexico’s gubernatorial candidates also weighed in, both agreeing that New Mexico’s prospective-only repeal did not apply to Astorga. *New Mexico: Death Penalty Becomes Issue in Gubernatorial Race*, DEATH PENALTY NEWS (June 9, 2010), <http://deathpenaltynews.blogspot.com/2010/06/new-mexico-death-penalty-becomes-issue.html>.

17. *Convicted NM Deputy Killer Avoids Death Penalty*, ALAMOGORDO DAILY NEWS (May 18, 2012, 12:24 PM) [hereinafter *Deputy Killer*], http://www.alamogordonews.com/ci_20655404/nm-jurors-death-penalty-case-ask-about-safety. On June 4, 2010, Astorga was convicted of first-degree murder of McGrane, among other charges. Sandlin & Uyttebrouck, *supra* note 8. On May 18, 2012, he was sentenced to life in prison plus thirteen years when a jury failed to unanimously agree on imposition of the death penalty. *Deputy Killer*, *supra*. On January 18, 2012, Astorga was convicted of second-degree murder of Candido Martinez, among other charges. *Astorga Convicted in Second Murder Trial*, KOAT (Jan. 18, 2012, 4:48 AM), <http://www.koat.com/Astorga-Convicted-In-Second-Murder-Trial/-/9154444/9708110/-/12hpm9/-/index.html>. On August 3, 2012, he was sentenced to twenty-eight years in prison for that crime. Hailey Heinz, *Astorga Gets 28 More Years*, ALBUQUERQUE J. (Aug. 3 2012, 10:45 AM), <http://www.abqjournal.com/122206/abqnews-seeker/astorga-gets-28-more-years.html>.

18. *New Mexico*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/new-mexico-1> (last visited Feb. 28, 2014).

19. LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 250 n.8 (2d ed. 2008); *New Mexico*, *supra* note 18.

20. William Glaberson, *Reliving Horror in a Test for the Death Penalty*, N.Y. TIMES (Jan. 18, 2010), <http://www.nytimes.com/2010/01/19/nyregion/19cheshire.html> (“‘All of the things that are about to play out in the Cheshire case will have a tremendous effect on the death-penalty debate in this state,’ said State Representative Michael P. Lawlor . . .”).

21. Manny Fernandez & Alison Leigh Cowan, *When Horror Came to a Connecticut Family*, N.Y. TIMES (Aug. 7, 2007), <http://www.nytimes.com/2007/08/07/nyregion/07slay.html?pagewanted=all> (corrected Aug. 10, 2007) (reporting the facts of the invasion and subsequent murders).

22. *Id.*

Jennifer and then strangled her to death.²³ The two men then doused the house in gasoline and ignited it.²⁴ Both Petit girls died from smoke inhalation.²⁵ Dr. Petit, having regained consciousness, survived by escaping through a basement door shortly before the gasoline was lit.²⁶ Police apprehended Komisarjevsky and Hayes as they attempted to flee.²⁷

In 2009, two years after the Cheshire murders, the Connecticut General Assembly passed a prospective-only bill repealing the death penalty.²⁸ The addition of the prospective-only feature of the bill, and specifically its application to Hayes and Komisarjevsky, was the subject of intense debate in the house and senate.²⁹ When Governor Jodi Rell vetoed the bill on June 5, she was acting in part on the testimony of Dr. Petit, who had argued in support of the death penalty.³⁰

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. An Act Concerning the Penalty for a Capital Felony, H.R. 6578, 2009 Gen. Assemb., Jan. Sess. (Conn. 2009), available at <http://www.cga.ct.gov/2009/act/Pa/pdf/2009PA-00107-R00HB-06578-PA.PDF> (vetoed June 5, 2009). H.R. 6578 passed the House by a vote of 90-56 and the Senate by a vote of 19-17. *Death Penalty in Connecticut*, CONN. NETWORK TO ABOLISH DEATH PENALTY, <http://www.cnadp.org/resources/death-penalty-in-connecticut/> (updated Nov. 15, 2010). Two years before the Cheshire murders, in 2005, the Connecticut General Assembly attempted to pass a bill that would have repealed the death penalty both prospectively *and* retroactively. An Act Concerning Murder with Special Circumstances, H.R. 6012, 2005 Gen. Assemb., Jan. Sess. (Conn. 2005), available at <http://www.cga.ct.gov/2005/TOB/h/pdf/2005HB-06012-R02-HB.pdf>; see also *Death Penalty in Connecticut*, *supra*. The backdrop to that legislation, and no small reason for its demise, was the then-pending, widely publicized execution of serial killer Michael Ross (which eventually occurred on May 13, 2005). See LAWRENCE B. GOODHEART, *THE SOLEMN SENTENCE OF DEATH: CAPITAL PUNISHMENT IN CONNECTICUT* 243 (2011). Because “[a] move to strike the death penalty would not only effectively commute the death sentences of six inmates, but also of Ross, to life in prison,” Democrats worried about being the target of “attack campaign[s] . . . with the message: Did your legislator vote to spare Michael Ross?” *Id.*; see also H. Sess. Transcript for Apr. 11, 2012, Gen. Assemb. (Conn. 2012), <http://www.cga.ct.gov/2012/trm/H/2012HTR00411-R00-TRN.htm> (last visited Feb. 28, 2014) [hereinafter 2012 H. Sess. Transcript] (statement of Rep. Larry Cafero, H. Minority Leader) (stating that 2005 debate “was all about Michael Ross, . . . the poster boy for the death penalty . . . who was reviled as one of the most heinous villains of our time in our State’s history”). That was the last time Connecticut’s General Assembly attempted to pass a retroactive repeal.

29. See, e.g., S. Sess. Transcript for May 21, 2009, Gen. Assemb. (Conn. 2009) http://search.cga.state.ct.us/dtsearch_lpa.asp?cmd=getdoc&DocId=33324&Index=I%3A%5Cindex%5C2009 (last visited Feb. 28, 2014) (statement of Sen. McDonald in opposition to an amendment excluding from repeal murder in the course of a home invasion) (“I think it would be a mistake to leave the impression that somehow anything in the underlying bill would affect the prosecution of the two defendants in the Petit case.”); see also Amendment to H.R. 6578: An Act Concerning the Penalty for a Capital Felony, 2009 Gen. Assemb., Jan. Sess. (Conn. 2009), available at <http://www.cga.ct.gov/2009/AMD/H/2009HB-06578-R00SA-AMD.htm> (excluding murder in the course of a home invasion).

30. See Press Release, State of Conn. Exec. Chambers, Governor Rell Vetoes HB 6578, An

When the state assembly next attempted to repeal the death penalty in 2011, it did so in the wake of Stephen Hayes's capital murder trial and sentencing, and on the eve of Joshua Komisarjevsky's trial.³¹ The Cheshire murders weighed so heavily on the minds of some legislators that the murders single-handedly derailed an effort to pass even a prospective-only bill.³² After a personal visit from Dr. Petit, two state senators changed their position "out of sympathy" for him, and the 2011 prospective-only repeal failed.³³ One of those senators, Edith Prague, told the press that "[t]hey should bypass the trial and take that second animal and hang him by his penis from a tree out in the middle of Main Street."³⁴

In 2012, a prospective-only repeal bill was considered for the third time. The Cheshire murders were at the center of debate in the House and

Act Concerning the Penalty for a Capital Felony (June 5, 2009), <http://www.ct.gov/governorrell/cwp/view.asp?A=3675&Q=441204> (reciting Dr. Petit's quotation of Lord Justice Denning, Master of the Rolls of the Court of Appeals in the United Kingdom). The United Kingdom abolished its death penalty for murder in 1965 and did so both prospectively and retroactively. See Murder (Abolition of Death Penalty) Act, 1965, c. 71 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1965/71>.

31. Hayes was convicted of capital murder on October 5, 2010 and sentenced to death on November 8, 2010. William Glaberson, *Death Penalty for a Killer of 3 in Connecticut*, N.Y. TIMES (Nov. 8, 2010), <http://www.nytimes.com/2010/11/09/nyregion/09cheshire.html>. Komisarjevsky was convicted of capital murder on October 13, 2011 and sentenced to death on December 9, 2011. William Glaberson, *Death Penalty for 2nd Man in Connecticut Triple-Murder Case*, N.Y. TIMES (Dec. 9, 2011), <http://www.nytimes.com/2011/12/10/nyregion/joshua-komisarjevsky-gets-death-for-cheshire-killings.html>.

32. See An Act Revising the Penalty for Capital Felonies, S. 1035, 2011 Gen. Assemb., Jan. Sess. (Conn. 2011), available at <http://www.cga.ct.gov/2011/TOB/S/2011SB-01035-R01-SB.htm>.

33. See *State v. Santiago*, 49 A.3d 566, 696 (Conn. 2012) (Harper, J., concurring in part and dissenting in part). Because Josh Komisarjevsky had not yet been convicted of the 2007 crimes, Dr. Petit argued that passage of a prospective-only repeal "could complicate [his] capital trial." Mark Pazniokas, *At Petit's Request, Two Senators Stop Repeal of Death Penalty*, CT MIRROR (May 11, 2011), <http://www.ctmirror.org/story/12559/petits-request-prague-stop-repeal-death-penalty-year>. As Senator Edith Prague later told legislators:

I did have a meeting with Dr. Petit and his sister and their attorney. And the attorney said if you vote for repeal now, it's going to be next to impossible for us to get the death penalty for these two monsters who were involved in the slaughter of the Petit family. And out of respect for Dr. Petit, I said . . . I could not vote for repeal. I couldn't because certainly Dr. Petit had suffered enough and I wasn't about to cause anymore [sic] problems.

S. Sess. Transcript for Apr. 4, 2012, Gen. Assemb. (Conn. 2012), <http://www.cga.ct.gov/2012/trn/S/2012STR00404-R00-TRN.htm> [hereinafter 2012 S. Sess. Transcript] (statement of Sen. Edith Prague); see also Pazniokas, *supra* ("For Dr. Petit, for me to do one more thing to cause him some kind of angst, I can't do it. . . . I'm [refusing to vote for repeal] because that's what they came in for . . .") (internal quotation marks omitted) (quoting Sen. Edith Prague)).

34. *Santiago*, 49 A.3d at 696 (Harper, J., concurring in part and dissenting in part) (quoting Bob Connors, *Prague: "Hang the Animal By His . . ."*, NBC CONN. (May 12, 2011), <http://www.nbcconnecticut.com/news/local/Prague-Hang-the-Animal-by-His-121670559.html>).

the Senate.³⁵ With assurances that the bill was prospective-only,³⁶ the Assembly passed a repeal of the death penalty for “crimes committed on or after” the date of passage, and Governor Dannel Malloy signed the bill into law on April 25, 2012.³⁷ Connecticut’s eleven death row inmates³⁸ remain on death row; only the Board of Pardons and Paroles has the authority to commute their sentences, which it has not done.³⁹

35. Compare 2012 H. Sess. Transcript, *supra* note 28 (statement of Rep. Cafero) (“It is no secret that what is weighing over all of us is the Petit murders. We heard through the summer and spring, the fall of 2010 and 2011 of these horrible, heinous, deplorable crimes. People in the jury box vomited for the pictures they saw and the descriptions they heard. . . . [Those voting for prospective repeal] want to see justice by way of the death penalty happen for those in the Petit case [I]t’s because of [Komisarjevsky and Hayes] that we have the bill that we have before us.”), *id.* (statement of Rep. Hewett) (acknowledging “members who are voting for a prospective bill so they can make sure that Hayes and Komisarjevsky get the death penalty”), and *id.* (statement of Rep. Adinolfi) (“There are many people in this room that have changed in their mind their vote to abolish the death penalty [prospectively] rather than vote against abolishing the death penalty based on these 11 who are on death row being executed, especially, Komisarjevsky and Hayes”), with 2012 S. Sess. Transcript, *supra* note 33 (statement of Sen. Boucher) (“[T]he crimes that affected the Petit family . . . [are] behind the whole rationale for making this prospective.”), and *id.* (statement of Sen. Kissel) (“Mr. Hayes and Mr. Komisarjevsky . . . had multiple capital convictions. And that is why it’s almost impossible to get a bill through this Legislature right now that would repeal the death penalty across the board.”).

36. See, e.g., 2012 S. Sess. Transcript, *supra* note 33 (statement of Sen. Coleman, responding to question from Sen. Prague) (“[T]here will be no retroactive application of this change for anyone who’s currently on death row.”).

37. See *supra* note 2 and accompanying text (citing repeal statute); Daniela Altimari, *Without Fanfare, Malloy Signs Bill Abolishing Death Penalty*, HARTFORD COURANT (Apr. 25, 2012), http://articles.courant.com/2012-04-25/news/hc-death-penalty-signing-0426-20120425_1_death-penalty-gail-canzano-capital-punishment.

38. Shortly after Connecticut’s repeal became law, the Connecticut Supreme Court overturned the death sentence of Eduardo Santiago, one of Connecticut’s eleven death row prisoners, on grounds that the trial court had improperly failed to disclose privileged records regarding abuse and neglect of Mr. Santiago’s siblings. *State v. Santiago*, 49 A.3d at 566, 653–54 (Conn. 2012). The Connecticut Supreme Court remanded the case to the trial court for a new penalty phase hearing, *id.*, but Mr. Santiago argued that Connecticut’s prospective-only repeal prohibited the state from seeking the death penalty against him. Supplemental Brief of Defendant, *State v. Santiago*, S.C. 17413, at 1–3 (Conn. Nov. 13, 2012). Mr. Santiago’s case is once again pending before the Connecticut Supreme Court. Because Mr. Santiago remains subject to the death penalty at the time of this writing (albeit not sentenced to death), this Article includes him within Connecticut’s death row population as a statistical matter. *Connecticut Supreme Court Considers Executions After Death Penalty Repeal*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/connecticut-supreme-court-considers-executions-after-death-penalty-repeal> (last visited Mar. 10, 2014).

39. CARTER ET AL., *supra* note 19, at 250 n.9; *Connecticut*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/connecticut-1> (last visited Feb. 28, 2014). Even if Governor Malloy had the authority to commute the sentences of those on Connecticut’s death row, it is unlikely that he would do so. In a gubernatorial debate in October 2010, Malloy stated that “he would abolish the death penalty *only in future cases*—not in those currently underway,” and singled out the two defendants in the Cheshire murders, stating that “[i]f these two gentlemen are sentenced to death, that sentence will be carried out. Period.” Christopher Keating, *Tom Foley, Dan Malloy*

Like New Mexico and Connecticut, Maryland's decision to repeal the death penalty prospective-only was motivated in part by political concerns. Between 2001 and 2008, Maryland's legislature introduced death penalty repeal bills nearly every year.⁴⁰ All were explicitly retroactive, and none ever made it to a floor vote.⁴¹

In 2008, the legislature passed a law creating the Maryland Commission on Capital Punishment, a 23-person body tasked with studying the administration of the death penalty, holding public hearings, and issuing a report with recommendations to the legislature by the end of the year.⁴² At the Commission's hearings, several family members of murder victims testified in support of the death penalty. One of those family members was Phyllis Bricker, whose elderly parents were "bound, gagged, and repeatedly stabbed to death in their Baltimore home" in 1983 by a neighbor who wanted money for drugs.⁴³ Ms. Bricker testified that she had waited for "equal justice" for over twenty-five years, "attending every trial, appeal, and hearing," including five trips to the U.S. Supreme Court.⁴⁴ In her testimony in support of the death penalty, Sharon Ward Blickenstaff likewise described in intimate detail the fatal stabbing of her blind, elderly father in his home in 2002.⁴⁵ "[T]he murder[er]'s victims are put into a situation where their cries of pain and pleas for mercy fall on uncaring ears," Ms. Blickenstaff wrote.⁴⁶ "Who stands for the true victims? Who gives them a voice? Who cares for the families of survivors?"⁴⁷ And Harold Bernadzikowski, whose sister was murdered in 2000, testified about the "debilitating stress" and depression that survivors experience, and encouraged members of the Commission to "put victim's [sic] rights

Clash On Death Penalty, Jobs, Records In Gubernatorial Debate, HARTFORD COURANT (Oct. 6, 2010), http://articles.courant.com/2010-10-06/news/hc-gubernatorial-debate-1006-20101005_1_death-penalty-foley-malloy-democrat-dannel-malloy (emphasis added).

40. DEP'T OF LEGISLATIVE SERVS. OF MD. GEN. ASSEMBLY, FISCAL AND POLICY NOTE: HB 316, 2009 Sess., at 9, *available at* http://mgaleg.maryland.gov/2009rs/fnotes/bil_0006/hb0316.pdf (discussing legislative history of Maryland death penalty repeal bills from 2001 to 2008). It appears 2002 was the only year in which a death penalty repeal bill was not introduced. *See id.*

41. *Id.*

42. Commission members "included police officers, correctional officers, family members of murder victims, prosecutors and defense attorneys, an innocent Maryland man sentenced to death who was later exonerated, and other members of Maryland's community." *Maryland Commission Recommends Abolition of Death Penalty in Final Report*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/maryland-commission-recommends-abolition-death-penalty-final-report>.

43. Transcript for Aug. 5, 2008, Md. Comm'n. on Capital Punishment, at 7 (Md. 2008), <http://www.goccp.maryland.gov/capital-punishment/documents/transcript-aug-5.doc>.

44. *Id.* at 8, 11.

45. Testimony of Sharon Ward Blickenstaff, Md. Comm'n on Capital Punishment, at 3-4 (Md. Aug. 27 2008), <http://www.goccp.maryland.gov/capital-punishment/documents/blickenstaff-testimony.pdf>.

46. *Id.* at 4.

47. *Id.* at 7.

first.”⁴⁸

On December 12, 2008, the Commission issued a report calling for repeal of the death penalty.⁴⁹ One month later, in January 2009, the Maryland legislature introduced Maryland’s first prospective-only death penalty repeal bill.⁵⁰ That bill deleted the retroactive language found in prior bills, which stated that “an inmate who has been sentenced to death *before* the effective date of this Act and who has not been executed may not be executed and shall be considered as having received a sentence of life.”⁵¹

With the strong support of Governor Martin O’Malley, the bill passed in 2013 and took effect on October 1, 2013.⁵² Officials involved in the effort to abolish Maryland’s death penalty attribute the success of the bill, in part, to its prospective-only feature.⁵³ Maryland’s five death row inmates remain

48. Testimony of Harold Bernadzikowski, Md. Comm’n on Capital Punishment, at 1, 5 (Md. Sept. 22, 2008), <http://www.goccp.maryland.gov/capital-punishment/documents/bernadzikowski-testimony.pdf>. Support for the death penalty was not shared among all family members of murder victims. “Bonitta Spikes, whose husband was murdered, Lisa Delity, whose brother was murdered, Ginger Beale, whose son was murdered, Art Laffin, whose brother was murdered, Kim Armstrong, whose son was murdered and Erricka Bridgeford, whose brother was murdered, favor repeal of the death penalty.” Final Report to the Gen. Assemb., Md. Comm’n on Capital Punishment, at 55 (Md. Dec. 12, 2008) [hereinafter Final Report], <http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf>.

49. Final Report, *supra* note 48.

50. See An Act Concerning Criminal Law – Death Penalty – Repeal, HB 316, 2009 Reg. Sess. (Md. 2009) (deleting retroactivity provision); An Act Concerning Criminal Law – Death Penalty – Evidence, S.B. 279, ch. 186, 2009 Reg. Sess. (Md. 2009).

51. Compare An Act Concerning Criminal Law – Death Penalty – Repeal, HB 1328, 2008 Reg. Sess. (Md. 2008) (“BE IT FURTHER ENACTED, [t]hat an inmate who has been sentenced to death before the effective date of this Act and who has not been executed may not be executed and shall be considered as having received a sentence of life . . .”), with An Act Concerning Criminal Law – Death Penalty – Repeal, H.B. 316, 2009 Reg. Sess. (Md. 2009) (deleting retroactivity provision), and An Act Concerning Criminal Law – Death Penalty – Repeal, S.B. 279, 2009 Reg. Sess. (Md. 2009) (same).

52. S.B. 276, Reg. Sess. (Md. 2013); see also *What Made Maryland Different?*, NAT’L COALITION TO ABOLISH THE DEATH PENALTY, <http://www.ncadp.org/blog/entry/what-made-maryland-different>.

53. Telephone Interview (Aug. 9, 2013) (source confidential at request of interviewee; notes on file with author). Like New Mexico, Maryland’s legislature also appears to have been motivated by a legal determination that reducing the sentences of those currently on death row would create a “constitutional separation of powers problem.” Email from Jane Henderson, Exec. Dir., Md. Citizens Against State Executions (July 16, 2013) (on file with author). Lawmakers apparently believed that they did “not have the power to sentence any individual to anything,” so, in 2009, they removed the bill’s explicitly retroactive language. *Id.* Although the Maryland legislature’s interpretation of the law is reasonable, it is debatable as a matter of law. For example, Maryland’s general savings statute explicitly allows the legislature to pass laws that retroactively reduce penalties. See MD. CODE ANN., art. 1, § 3 (West, Westlaw through 2013 Reg. Sess.) (preserving penalties under repealed statutes “unless the repealing . . . act shall expressly so provide”). Furthermore, Maryland’s constitutional prohibition on “retrospective Laws, punishing acts committed before the existence of such Laws,” and “retrospective oath[s] or restriction[s],” by its terms, prohibits retroactive legislation that *burdens*, not benefits. MD. CONST. of 1867, Declaration

on death row; Governor O'Malley has stated that he "would consider commuting the five inmates' sentences to life in prison on a case-by-case basis once a request is made."⁵⁴

New Mexico's, Connecticut's, and Maryland's experience with prospective-only repeal gives rise to three important questions. The first is a pragmatic question: Is prospective-only repeal helpful to the cause of abolition? The second is a moral question: Is prospective-only repeal morally right? And the third question is a legal one: Is prospective-only repeal permissible under the law? This Article answers all three questions in the affirmative.

Part I of this Article addresses the pragmatic question. It concludes that prospective-only repeal, with its promise of gradual abolition, is useful to the cause of abolition. States have long used prospective-only repeal to abolish the death penalty. In the past five years, all that has changed is that three states have not commuted the sentences of those on death row following prospective-only repeal. Connecticut, New Mexico, and Maryland have left their death rows intact after abolishing the death penalty for everyone else.⁵⁵ While abolition's principles may be at odds with prospective-only repeal, abolition's progress may not be. The states next in line for abolition have inmates on death row, which makes prospective-only repeal an enticing option for some lawmakers. If states' high courts or lower federal courts strike down prospective-only repeals, abolition may lose a trusty and useful tool.

While this Article cannot do justice to the weighty moral questions raised by prospective-only repeal, Part II offers some introductory thoughts on how prospective-only repeal, when viewed through the lens of sacrifice, may actually be moral. While it may be immoral to punish a person with death, it is not necessarily immoral to sacrifice them for the higher good of eliminating the death penalty forever. Many of Connecticut's, New Mexico's, and Maryland's lawmakers voted for prospective-only repeal because they knew that a retroactive bill would not be passed. Rather than maintain the death penalty for all, these lawmakers voted for a bill that would maintain it for only some, thus transforming an immoral punishment into an arguably moral sacrifice. In dying, these convicted men destroy the death penalty.

Part III, the heart of this Article, analyzes the legality of prospective-only repeal, both as a matter of statutory construction and as a constitutional question under the Eighth Amendment. Because this issue is

of Rights, art. 17. Therefore, if Maryland's legislature had wanted to abolish the death penalty retroactively for those sentenced to death, it likely could have done so by including an express provision saying as much. For further discussion of savings clauses, see *infra* Subsection III.A.1.

54. Brian White, *Maryland Governor Slow to Commute Death Sentences*, ASSOCIATED PRESS (Sept. 13, 2013, 11:54 AM), <http://bigstory.ap.org/article/md-governor-slow-commute-death-sentences>.

55. See *Death Row Inmates by State*, *supra* note 4.

currently before the Connecticut Supreme Court and will undoubtedly come before other state supreme and federal courts, this Article discusses the issue in depth. A companion article, *From Wolves, Lambs (Part II): The Fourteenth Amendment Case for Gradual Abolition of the Death Penalty*, addresses the legality of prospective-only repeal under the Fourteenth Amendment's Equal Protection and Due Process Clauses.⁵⁶

This Article first argues that, as a matter of statutory construction, clearly prospective-only repeals of death penalty legislation are not given retroactive effect. When such repeals are silent or ambiguous as to whether they are prospective-only, most courts still construe them as being prospective-only by resorting to general savings statutes, which prohibit retroactive application of laws in the absence of contrary legislative intent.

Next, this Article argues that prospective-only repeal is constitutional under the Eighth Amendment. Because the death penalty remains constitutional *per se*, the Eighth Amendment permits states to abolish the death penalty without clearing their death rows. Prospective-only repeal is also constitutional under the Eighth Amendment as applied. Under *Atkins v. Virginia*⁵⁷ and its progeny, there is no national consensus against prospective-only repeal. The vast majority of legislatures have abolished prospective-only. Although some executives have commuted the sentences of those remaining on death row post-repeal, others have not. There simply is no national consensus against prospective-only repeal. Furthermore, those remaining on death row post-repeal share no unifying characteristic that diminishes their culpability or susceptibility to deterrence. Lastly, under *Furman*, the death sentences at issue are not “pregnant with discrimination”; they were imposed under a constitutional scheme and remain constitutional post-repeal.

Prospective-only repeal is also consistent with policy considerations underlying the Eighth Amendment. A majority of the U.S. Supreme Court has expressed reluctance to expand the death penalty. On the other hand, the Court's dissenters have argued that the Court's Eighth Amendment inquiry into evolving standards of decency is not a “ratchet” that forbids states from evolving in other directions—“giving effect to altered beliefs and responding to changed social conditions.”⁵⁸ Prospective-only repeal does not upset either concern: it does not loosen the screw one iota, rather it allows states to turn the screw at their own pace. The effect of a ruling that prospective-only repeals are unconstitutional would be to require that states not only use a ratchet—in the sense that the screw must turn *toward* abolition, not away, but also ratchet with a zeal that outpaces the

56. See Barry, *From Wolves, Lambs (Part II)*, *supra* note 1.

57. 536 U.S. 304, 349 (2002).

58. *Kennedy v. Louisiana*, 554 U.S. 407, 466 (2008) (Alito, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (Scalia, J.)) (internal quotation marks omitted); see also *Atkins*, 536 U.S. at 349 (2002) (Scalia, J., dissenting) (same).

ratchet— in the sense that the screw must turn toward prospective *and* retroactive abolition. If prospective-only repeal is ruled prospective in name only, some states may decide not to abolish the death penalty at all, thereby fossilizing their standard of decency rather than allowing it to evolve.

I. THE UTILITY OF PROSPECTIVE-ONLY REPEAL

A. *Prospective-Only Repeal's Long History*

Prospective-only death penalty repeal is helpful to the cause of abolition. To understand why this is so, one need only look at the sixteen states that have abolished their death penalties by statute.⁵⁹ With just three exceptions, every one of those states did so prospective-only, albeit not as explicitly as New Mexico, Connecticut, or Maryland.⁶⁰ Prospective-only repeal is therefore not novel; it has been an effective tool of the abolition movement for over a hundred years.⁶¹ What *is* novel, however—at least in modern death penalty jurisprudence—is the refusal of governors and administrative boards to commute sentences in anticipation of, or immediately following, prospective-only repeal.⁶²

In the past five years, for example, four states have repealed their death penalties and all have done so through prospective-only legislation. In 2011, the governor of Illinois commuted the sentences of those on death row immediately after repeal so the death penalty was effectively abolished completely.⁶³ By contrast, in Maryland, where the death penalty was

59. Eighteen states plus the District of Columbia have abolished the death penalty. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Feb. 28, 2014). Of those, Massachusetts, New York, and the District of Columbia have abolished their death penalties by court decision and legislative inaction. See *Massachusetts*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/massachusetts-0> (last visited Feb. 28, 2014); *New York*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/new-york-1> (last visited Feb. 28, 2014); *District of Columbia*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/district-columbia> (last visited Feb. 28, 2014).

60. See *supra* notes 2–3 (discussing New Mexico, Connecticut, and Maryland); *infra* Subsection III.B.2.a.i (discussing three explicitly retroactive state statutes and three explicitly prospective-only state statutes, and arguing that the other ten state statutes are prospective-only); cf. *Atkins*, 536 U.S. at 342 n.1, 342–43 (Scalia, J., dissenting) (citing prospective-only statutes prohibiting execution of people with intellectual disabilities).

61. See *In re Schneck*, 96 P. 43, 44–45 (Kan. 1908) (holding that prospective-only death penalty repeal was not retroactive); accord *State v. Lewis*, 201 S.W. 80, 85–86 (Mo. 1918); Historians Brief, *supra* note 1, at 4 n.11 (noting that in Minnesota, which repealed its death penalty in 1911, Board of Pardons commuted death sentences of remaining death-row inmates, which would only have been necessary if the repeal was prospective-only).

62. See *supra* note 1 and accompanying text.

63. An Act Concerning Criminal Law, Pub. Act 96-1543, 2010 Ill. Laws 7778 (2011), available at <http://www.ilga.gov/legislation/publicacts/96/PDF/096-1543.pdf>; *Illinois*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/illinois-1> (last visited Feb. 28, 2014).

abolished with a prospective-only act in 2013, five men remain on death row because the governor is unwilling to commute their sentences.⁶⁴ Likewise, the governor of New Mexico has been unwilling to commute the sentences of two inmates on death row after that state's legislature abolished the death penalty by a prospective-only act in 2009.⁶⁵ In Connecticut, where the death penalty was abolished with a prospective-only act in 2012, eleven men remain on death row because the administrative board with the authority to commute their sentences has not done so.⁶⁶ Kansas and Delaware are poised to become the nineteenth and twentieth states to abolish the death penalty. They will likely do so with prospective-only legislation; prospective-only death penalty repeal bills are pending in both states' legislatures.⁶⁷ If the Kansas legislature passes a prospective-only repeal, it will be up to the governor to decide whether to commute the sentences of Kansas' ten death row prisoners or add those prisoners to the roll of inmates who remain on death row post-repeal.⁶⁸ If the Delaware legislature passes a prospective-only repeal, an administrative board will decide whether to recommend commutation to the governor of the sentences of that state's eighteen death row inmates; the governor is bound by that recommendation.⁶⁹

It is clear from these examples that prospective-only death penalty

64. See *supra* note 3 and accompanying text. Compare Press Release, The Office of Governor Martin O'Malley, Statement from Governor Martin O'Malley on Passage of Death Penalty Repeal in Maryland (Mar. 15, 2013), available at <http://www.governor.maryland.gov/blog/?p=8492> (noting that the governor will make case-by-case determinations for the five inmates on death row), with *Death Row Inmates by State*, *supra* note 4 (noting that there remain five inmates on death row).

65. See text accompanying notes 18–19.

66. See *supra* notes 2, 37–39 and accompanying text.

67. E.g., S. 239, 2013 Leg., 2013 Sess. (Kan. 2013), http://kslegislature.org/li/b2013_14/measures/documents/sb126_00_0000.pdf (“(a) No person shall be sentenced to death for a crime committed on or after July 1, 2013. (b) Any person who is sentenced to death for a crime committed prior to July 1, 2013, may be put to death pursuant to the provisions of article 40 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto.”); An Act to Amend Title 11 of the Delaware Code Relating to the Death Penalty, S. 19, 147th Gen. Assemb. (Del. 2013), <http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/SB+19?Opendocument>. Senate Amendment No. 1 modified the bill as originally proposed, removing the retroactive provision, making the bill prospective-only. S. Amendment 1 to S. 19, 147th Gen. Assemb. (Del. 2013), <http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/SA+1+to+SB+19?opendocument>; *Senate Amendment No. 1 to Senate Bill No. 19*, DELAWARE.GOV, <http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/SA+1+to+SB+19?opendocument> (last visited Feb. 28, 2014) (noting passage of the amendment).

68. See CARTER ET AL., *supra* note 19, at 250 n.8 (stating that, in Kansas, “the governor has sole authority to grant clemency”); *Death Row Inmates by State*, *supra* note 4 (noting ten death row inmates in Kansas).

69. See CARTER ET AL., *supra* note 19, at 251 n.11 (stating that, in Delaware, “the governor may grant clemency only after a recommendation by an administrative board”); *Death Row Inmates by State*, *supra* note 4 (noting eighteen death row inmates in Delaware).

repeal has momentum in states whose legislatures would rather leave the difficult decision of what to do about current death row inmates to the governor or pardon board. It also has momentum in states where the governor will not sign a repeal bill into law unless it is prospective-only. Given its enduring success, especially in recent years, prospective-only repeal is likely to be an attractive option for future states considering abolition, including: Colorado (with four inmates on death row); Kentucky (thirty-four on death row); Montana (two on death row); Nebraska (eleven on death row); New Hampshire (one on death row); Pennsylvania (a staggering 198 on death row); and South Dakota (three on death row).⁷⁰ In Nebraska and Pennsylvania, the governor does not have the unilateral authority to commute death sentences after prospective-only repeal.⁷¹ In the remaining states from the list above—where the governor retains the authority to commute death sentences⁷²—political pressure or other considerations may prevent the governor from doing so, as happened in New Mexico and Maryland. The past seven years have brought six states to the abolitionist camp.⁷³ Odds are good that the next seven years will bring more, and that some will choose to keep their death rows intact.

B. *Prospective-Only Repeal's Uncertain Future*

In 2014, in *State v. Santiago*, the Connecticut Supreme Court will decide the issue of whether a state can completely abolish its death penalty going forward while maintaining its death row intact.⁷⁴ If the court

70. *Death Row Inmates by State*, *supra* note 4. Significantly, California's 2012 ballot proposition abolishing the death penalty was both prospective *and* retroactive. SAFE California Act, § 10, 2012 Cal. Leg. Serv. Proposition 34, at 95, 100, *available at* <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop34> ("In order to best achieve the purpose of this act as stated in Section 3 and to achieve fairness, equality and uniformity in sentencing, this act shall be applied retroactively."). Proposition 34 narrowly missed passing by a vote of 48.0% to 52.0%. *Directory of California State Propositions*, SMART VOTER (Dec. 17, 2012, 13:48), <http://www.smartvoter.org/2012/11/06/ca/state/prop>. Had it passed, Proposition 34 would have reduced the sentences of California's then-725 death row prisoners to life imprisonment without the possibility of parole. *Prop 34. Death Penalty. Initiative Statute.*, CAL. SEC'Y OF STATE: OFFICIAL VOTER INFO. GUIDE, <http://voterguide.sos.ca.gov/propositions/34/analysis.htm> (last visited Feb. 28, 2014).

71. *Clemency Process by State*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/clemency#process> (last visited Feb. 28, 2014).

72. *Id.* In some states, the governor may receive a nonbinding recommendation from a board or advisory group. *Id.*

73. These states are New York (2007), New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), and Maryland (2013). *States With and Without the Death Penalty*, *supra* note 59.

74. See Brief Amicus Curiae for Criminal Justice Legal Foundation in Support of Conn. at i., *State v. Santiago*, 49 A.3d 566 (Conn. Feb. 11, 2013) (No. SC17413), *available at* <http://www.cjlf.org/briefs/SantiagoE.pdf> (question presented); see also *supra* note 3 (discussing the New Mexico Supreme Court's experience with prospective-only death penalty repeal in *State v. Astorga*).

challenge is successful, it will be a coup for the defendant in that case and possibly for Connecticut's ten other death row inmates, whose sentences might therefore be reduced to life imprisonment without the possibility of parole. It would also create strong persuasive precedent for the seven men who remain on death row in Maryland and New Mexico to use in similar appeals.

While abolitionists would no doubt warmly receive these ripple effects, there could be other less desirable effects. Reverberations from the court's ruling would be felt, not only on death row but also in the legislature, particularly among abolition's foes. If these opponents challenged abolitionists on the legal merits of prospective-only repeal, as they did in Connecticut,⁷⁵ abolitionists may have little to say beyond, "Connecticut's court got it wrong." Legislatures might therefore be less willing to pass prospective-only repeals, and governors might be less likely to sign them, if these repeals become "prospective" in name only.⁷⁶ A federal court decision striking down prospective-only repeal would have a similar impact, in effect requiring that states repeal retroactively or not at all.⁷⁷ In short, while the invalidation of prospective-only death penalty repeal would be good for at least some of the eighteen inmates currently on death row post-repeal, it may be bad for the abolition movement.⁷⁸ It may

75. See 2012 H. Sess. Transcript, *supra* note 28 (statement of Rep. Labriola) ("To the notion that somehow this bill will be prospective in nature, I do believe that that is a complete and utter falsehood. . . . [B]y operation of law the people who are now sentenced to death on our death row in Connecticut, their death penalties will be commuted to life in prison without parole, without question. It's—it's a certainty."); *id.* (statement of Rep. Hewett) ("[F]or the members who are voting for a prospective bill so they can make sure that Hayes and Komisarjevsky get the death penalty, it's not going to happen."); 2012 S. Sess. Transcript, *supra* note 33 (statement of Sen. Kissel) ("[I]f matters of life and death come before a Supreme Court and a prospective repeal of the death penalty is the law of the land in our state, I really can't imagine for a second that they would allow the execution of the 11 folks on death row while acknowledging that under any legal analysis, this law is the best and most recent indication of evolving standards in our society of human decency.").

76. Cf. Millard H. Ruud, *The Savings Clause: Some Problems in Construction and Drafting*, 33 TEX. L. REV. 285, 286, 310 (1955) (stating that statutory language that leaves in place existing penalties "make[s] the transition from one set of laws to another less painful and disrupting" and "may be used to create a favorable climate for a bill by assuring legislators that the change proposed will take effect with the minimum disruption of existing expectations and liabilities").

77. Cf. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) (stating that, in the context of state parole legislation, "[o]ur system of federalism encourages . . . state experimentation. If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole.").

78. Courts' rejection of prospective-only repeal might be bad for the abolition movement for another reason. If a court were to declare prospective-only language unconstitutional, the court may decide that such language is not severable from the remainder of the repeal statute. In that case, "the only remedy available to th[e] Court is to strike down the entire statute, which would have the effect of reinstating the [death penalty]." NM's January 2011 Response, *supra* note 3, at 32; see also Supplemental Brief of the State of Conn.—Appellee at 41, *State v. Santiago*, 49 A.3d 566 (Conn.

undermine a strategy that has worked well in recent years—that of gradual abolition.

Some abolitionists might say good riddance to the strategy of gradual abolition, pointing to its cost in human lives. It is not enough that no more should die; *none* should die. But this purist position assumes that those on death row will be executed. The reality is, in many cases, those on death row will not be executed. They will challenge their sentences, and continue challenging them, until either they die of old age, or the Supreme Court declares the death penalty unconstitutional *per se*. In sum, gradual abolition may be a win-win: lawmakers retain their death rows and (many of) those on death row retain their lives.

Others might argue that prospective-only repeal will ultimately backfire. When it comes time for the U.S. Supreme Court to revisit the question of whether there is a national consensus against the death penalty, the argument goes, it will discount those states that have abolished the death penalty prospective-only. In other words, states like New Mexico, Connecticut, and Maryland will not be counted as having abolished the death penalty. The response to this concern is straightforward: the Court's precedent suggests otherwise.⁷⁹ Although the Court's dissenters care whether the death penalty repeal is prospective-only or complete, the majority does not.

In *Atkins*, for example, the Court determined that a consensus of states objected to the execution of people with intellectual disabilities, notwithstanding the fact that eleven of the states that abolished the death penalty for people with intellectual disabilities did so prospective-only.⁸⁰ Although Justice Scalia believed that prospective-only repeal was far different than complete repeal because it prohibited some but not *all* executions, the majority did not share his concerns.⁸¹ As *Atkins* makes clear, consensus has to do with *whether* a state abolishes, not *how*. States

Jan. 11, 2013) (No. SC17413) [hereinafter CT's January 2013 Response] (“[I]f this Court strikes [the death penalty repeal statute] in its entirety, [the prior statute] would be revived, thereby restoring capital punishment as it existed before the passage of the [repeal statute].”).

79. See *Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002).

80. See *id.* at 315–16 (discussing the “large number of States prohibiting the execution of mentally retarded persons”).

81. Compare *id.* at 342 (Scalia, J., dissenting) (“Eleven of those [states] that the Court counts enacted statutes prohibiting execution of mentally retarded defendants *convicted after, or convicted of crimes committed after, the effective date* of the legislation; those already on death row, or consigned there before the statute’s effective date, or even (in those States using the date of the crime as the criterion of retroactivity) tried in the future for murders committed many years ago, could be put to death. That is not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches.” (footnote omitted)), with *id.* at 315 (majority opinion) (compiling state statutes prohibiting death penalty for “mentally retarded”), and *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005) (“When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach.”).

that have repealed prospective-only are not at odds with those that have repealed prospectively and retroactively; they are two sides of the same coin, sharing an underlying opposition to the death penalty. States with prospective-only repeal statutes *are* evolving, one might say. For a variety of moral and pragmatic reasons, however, they are just evolving more slowly. So far as the Court is concerned, though, prospective-only repeal is still repeal; it is part of the evolution away from the death penalty.⁸²

II. THE MORALITY OF PROSPECTIVE-ONLY REPEAL

Even assuming that prospective-only repeal is helpful to abolition's cause, one might reasonably ask how it is moral. How is it right for New Mexico's, Connecticut's, and Maryland's legislatures to leave eighteen men convicted of murder on day one on death row, while eliminating the death penalty for those who commit murder on day two?⁸³ While it is not the purpose of this Article to plumb the depths of this difficult issue, some introductory thoughts are instructive.

The moral debate over the death penalty is straightforward. Death penalty abolitionists believe that the death penalty is an immoral form of punishment, while those in favor of retaining the death penalty take the opposite position.⁸⁴ When debate focuses on prospective-only repeal of the death penalty, however, the debate gets trickier. Dr. Martin Luther King Jr.'s words, which he wrote from a jail cell in Birmingham, are illustrative of this debate: "[T]he means we use must be as pure as the ends we seek [I]t is wrong to use immoral means to attain moral ends."⁸⁵ Abolitionists grudgingly accept maintaining the death penalty for those on death row as a necessary evil, a side effect of achieving the greater good—abolition going forward.⁸⁶ Prospective-only repeal is undesirable, these

82. *See id.* at 315 (majority opinion). As Justice Scalia wrote of the Court's death penalty jurisprudence, "It is just a game, after all." *Id.* at 348 (Scalia, J., dissenting). He may be right. But it is a game with the highest stakes, one abolitionists must play—and win. Prospective-only repeal helps.

83. *See, e.g.*, 2012 H. Sess. Transcript, *supra* note 28 (statement of Rep. Cafero) ("How could we say it is no longer the policy of the State of Connecticut to take a life, yet, we are allowing a life to be taken? So it's in conflict.").

84. *See generally* CARTER ET AL., *supra* note 19, at 8–13 (discussing debate over deterrence and retribution in the context of the death penalty).

85. Martin Luther King Jr., Letter from Birmingham Jail (Apr. 16, 1963), *available at* http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

86. 2012 H. Sess. Transcript, *supra* note 28 (statement of Rep. Holder-Winfield) ("[T]here is nothing wrong with being opposed to the State executing people and saying if I can't get the State to stop executing people that are already on death row, at least, that I can stop the State from executing people that maybe [sic] on death row in the future. There's nothing wrong with that. It makes perfect sense. It's logical. What is illogical is to say to a person who is opposed to the death penalty, you have the chance to stop the State from moving forward, but because you can't stop the State from dealing with those who it has already put through its system, you do nothing."); *see also* Alison McIntyre, *Doctrine of Double Effect*, STAN. ENCYCLOPEDIA PHIL. (last updated Sept. 7,

abolitionists say, but not immoral. For retentionists, this position is disingenuous. Reserving the death penalty for those currently on death row, retentionists say, is not a mere side effect; it is an immoral means of achieving (what abolitionists believe to be) a moral end.⁸⁷ According to retentionists, if the death penalty is immoral, then retaining it through prospective-only repeal is also immoral.

As Dr. King's words suggest, the moral debate over prospective-only repeal sets undesirable side effects against immoral means. But peace can be made between these two sides. Prospective-only repeal *is* a means, and it is also a moral one.

The death penalty is, as its name suggests, a form of punishment. It is a means by which the State condemns the acts of the offender—retribution—and discourages others from committing similar acts in the future—deterrence. Through punishment, the State restores balance to the community by making up for what the offender has taken away.⁸⁸ In the context of prospective-only repeal, however, the death penalty is not only a means of punishment; it is also a means of *ending* a punishment. It is not just a means of restoring what the community has lost. Rather, it also becomes a means of making the community better than it was before. In Connecticut, for example, many legislators wanted to repeal the death penalty completely, but they knew that this was not politically feasible.

2011), <http://plato.stanford.edu/entries/double-effect> (“The doctrine (or principle) of double effect is often invoked to explain the permissibility of an action that causes a serious harm, such as the death of a human being, as a side effect of promoting some good end. It is claimed that sometimes it is permissible to cause such a harm as a side effect (or ‘double effect’) of bringing about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end. This reasoning is summarized with the claim that sometimes it is permissible to bring about as a merely foreseen side effect a harmful event that it would be impermissible to bring about intentionally.”); cf. *Evangelium Vitae* from Pope John Paul II para. 73 (Mar. 25, 1995), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html (“[W]hen it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at *limiting* the harm done by such a law and at *lessening* its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but rather a *legitimate and proper attempt to limit its evil aspects.*” (emphasis added)).

87. *E.g.*, 2012 S. Sess. Transcript, *supra* note 33 (statement of Sen. Suzio) (“If you’re going to say that taking human life in the form of a legal execution is wrong going forward, then it’s wrong going backwards. . . . If you can support the execution of the Petit family killers for what they did five years ago, why couldn’t you support it if it should occur two years from now or three years from now or 20 years from now? It strikes me as an ungravely inconsistent moral position to take. . . . No matter what good you want to do in life, you can’t achieve that good using morally illicit means. I bring that up because I suspect that one reason why there’s this big gaping . . . moral hole in this law is because of the political consequences of making it an absolute both prospectively, as well as retrospectively.”).

88. *See Roper v. Simmons*, 543 U.S. 551, 571 (2005) (stating that retribution is, among other things, “an attempt to right the balance for the wrong to the victim”).

Because many of their colleagues believed that the death penalty was an appropriate punishment, at least with respect to the eleven men currently on death row, a retroactive repeal bill simply did not have sufficient support.⁸⁹ Rather than allow death penalty repeal to fail, many legislators who supported retroactive repeal settled for prospective-only repeal instead. These legislators did *not* support prospective-only repeal for the purpose of retribution or deterrence; rather, they did so for the purpose of eliminating the death penalty in Connecticut. This is a significant distinction.

When legislators change the purpose for which the death penalty exists (in this case from punishing offenders to abolishing the death penalty), they may also change the morality of the means.⁹⁰ Imposing death on some so that no others will ever be put to death is not punishment—it is sacrifice. It does not restore community by redressing an offender’s wrong; it improves community by eliminating an unjust punishment for future offenders. In this view, the eleven men on Connecticut’s death row are not being punished; they are being sacrificed.

Of course, sacrifice, like punishment, is not always moral. As I previously observed:

[w]hen we talk about sacrifice, we often think of those who willingly offer themselves up for a higher good like God or country. This is the stuff of heroes and martyrs and, for many, it is to be celebrated.

Being sacrificed, on the other hand, has a very different connotation. It’s not about those who choose their fate, but those whose fate is chosen for them. They are lambs, plucked from the field and thrown onto the altar for some higher good. This bothers us—and it should. Who among us has the right to decide the fate of innocent others for some purported good?

89. See also CT’s January 2013 Response, *supra* note 78, at 19 & n.14 (“[N]ot everyone [in the Connecticut legislature] who voted for prospective repeal is morally opposed to capital punishment.” (citing legislative history)). Compare 2012 H. Sess. Transcript, *supra* note 28 (statement of Rep. Holder-Winfield) (“[I]n 2009 when I attempted to completely abolish the death penalty, I came to the realization that the only way to move forward was with the bill that was prospective.”), with 2012 S. Sess. Transcript, *supra* note 33 (statement of Sen. Kissel) (“You guys . . . support the death penalty prospectively only, because the votes aren’t there to do it across the board . . .”).

90. *But cf.* Brief of Amicus Curiae ACLU Foundation of Conn. in Support of the Supplemental Brief of the Defendant with Attached Appendix at 8, *State v. Santiago*, 49 A.3d 566 (Conn. Dec. 3, 2012) (No. SC17413) [hereinafter ACLU-CT Brief], available at <http://ctbriefsonline.com/Briefs/SC17413ac3.pdf> (“By repealing the death penalty prospectively, the General Assembly has, in effect, sacrificed Santiago to end the death penalty for everyone. As Justice Marshall stated in *Furman*, the Constitution does not permit legislatures to make ‘sacrificial lambs’ of its citizenry. Fundamental fairness prohibits it.” (emphasis added)).

This is the stuff of genocide and is to be avoided at all costs.⁹¹

While it is exceedingly difficult to imagine circumstances in which sacrificing others is morally defensible, prospective-only repeal may present such a circumstance. “The [eleven] men on [Connecticut’s] death row are no martyrs, nor are they innocents plucked from the field.”⁹² And because they are already sentenced to death, the legislature’s failure to intervene leaves them no worse off than before. “In these [eleven] men, Connecticut’s legislature saw an opportunity to do something” for the higher good.⁹³

The legislature has, in effect, taken these 11 men from the death chamber and walked them to the altar. It has transformed their punishment into an act of sacrifice. From wolves, lambs. Yes, these 11 men remain on death row, but now they die for something; they die so that others will not be put to death.

This is the uneasy morality of gradual abolition. Dying, these men destroy our death penalty.⁹⁴

Punishing a person for committing murder on day one but not on day two may well be morally incoherent. But gradual abolition is not only about punishment; it is also about sacrifice. While it may be immoral to punish eleven men with death post-repeal, it may not necessarily be immoral to sacrifice them for the sake of ending the death penalty.⁹⁵ Prospective-only repeal may transform an immoral punishment into a moral sacrifice.⁹⁶

91. Kevin Barry, *Are Death Row Inmates Sacrificial Lambs?*, HARTFORD COURANT (Nov. 9, 2012), http://articles.courant.com/2012-11-09/news/hc-op-barry-are-death-row-inmates-sacrificial-lambs-20121109_1_death-row-death-penalty-abolition; see also C.D. BROAD, BROAD’S CRITICAL ESSAYS IN MORAL PHILOSOPHY 278 (1971) (“[C]ommon-sense holds that it may be right and praiseworthy for a person voluntarily to make sacrifices which it would be wrong for anyone else to impose on him.”).

92. Barry, *supra* note 91.

93. *Id.*

94. *Id.*

95. BROAD, *supra* note 91, at 275, 277 (discussing “the sacrifices which a person may legitimately impose on others,” and stating that “it does not follow that, when one *has* taken account of the features which distinguish a person from a brute or an inanimate thing, and *has* endeavored to give weight to them, it is never right to treat him in certain respects as if he were one or the other. It is not clear, e.g., that it is never right to compel a person to do what he believes to be wrong . . . For, although he is a person, he is not the only one . . .”). As distasteful as this line of moral reasoning may be, it may serve the cause of abolition in the end by revealing what Professor Austin Sarat has called the “sadism that is at the heart of the state’s tenacious attachment to capital punishment” and by “invit[ing] the ‘bad taste’” of the public. AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 208 (2001).

96. One might reasonably argue that Connecticut’s prospective-only repeal did not sacrifice eleven men to end the death penalty—it sacrificed nine men out of a desire for retribution against Joshua Komisarjevsky and Steven Hayes. Likewise, the argument goes, New Mexico’s prospective-

III. THE LEGALITY OF PROSPECTIVE-ONLY REPEAL

Having briefly touched on the utility and morality of prospective-only death penalty repeal, Part III turns in depth to the legality of prospective-only death penalty repeal. Section A analyzes prospective-only death penalty repeal in the context of statutory construction, and Section B turns to the Eighth Amendment question raised by prospective-only repeal.⁹⁷

A. *Clearly Prospective-Only Death Penalty Repeals Are Not Given Retroactive Effect*

1. Retroactivity Basics

Rules of statutory construction require that courts give effect to the

only repeal did not sacrifice two men to end the death penalty—it sacrificed them out of a desire for retribution against Michael Astorga. But for Komisarjevsky, Hayes, and Astorga, one might argue, Connecticut and New Mexico might have repealed their death penalties retroactively. These arguments have merit. To the extent that some legislators were motivated by these retributive purposes, their sacrifice was not a moral one.

97. Before analyzing the legality of prospective-only repeal, an important distinction should be made between the retroactivity of statutes (statutory retroactivity), which is squarely at issue in the context of prospective-only repeal, and the retroactivity of judicial decisions interpreting the constitutionality of those statutes (judicial retroactivity), which is not. The retroactivity of a new capital sentencing statute is controlled by rules of statutory construction and by courts' interpretation of the Eighth and Fourteenth Amendments. It is therefore different from the retroactivity of a new constitutional ruling by a court, which is controlled by judicial precedent, namely, *Teague v. Lane*, 489 U.S. 288 (1989). In 1989, in *Teague*, the Supreme Court held that "new constitutional rules of criminal procedure" declared by the court, while applicable to cases pending on direct review, "will not be applicable to those cases which have become final before the new rules are announced," unless one of two exceptions applies. *Id.* at 310. According to the Court, a new rule should be applied retroactively "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" or "if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* at 307 (alteration in original) (quoting *Mackey v. United States*, 401 U.S. 667, 692–93 (1971)) (internal quotation marks omitted). Just four months later, in *Penry v. Lynaugh*, the Court confirmed that *Teague's* non-retroactivity analysis applies to capital sentencing proceedings, but held that court decisions prohibiting the execution of certain classes of prisoners (such as those with intellectual disabilities) would nevertheless be retroactive because they fell within the first *Teague* exception. See 492 U.S. 302, 329–30 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

In sum, *Teague* has to do with *judicial* retroactivity, which means that *if* a court were to find a prospective-only death penalty repeal statute unconstitutional, "evenhanded justice" would require "that it be applied retroactively to all who are similarly situated." *Teague*, 489 U.S. at 300. The fact that such a ruling would be retroactive under *Teague*, however, has nothing to do with whether a statute will be given retroactive effect. That is an issue of *statutory* retroactivity which, as set forth in this Part, implicates rules of statutory construction and courts' interpretation of the Eighth and Fourteenth Amendments. *Teague* is simply not relevant to this determination. For a helpful discussion of *Teague's* non-retroactivity analysis, see generally Lyn S. Entzeroth, *Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161 (2005).

plain language of a statute, provided that it does not lead to absurd results.⁹⁸ Therefore, as a matter of statutory construction, courts are duty-bound to prohibit retroactive application of laws that are unambiguously prospective-only, and to give retroactive effect to laws that are unambiguously retroactive.⁹⁹ Accordingly, many statutes contain a so-called savings clause that explicitly provides that the statute applies only to conduct committed, or to convictions or sentences that occur, on or after a date certain.¹⁰⁰ Other statutes explicitly state the opposite—that the statute applies “irrespective of whether the crime was committed, the conviction had, or the sentence imposed, before or after” a date certain.¹⁰¹

Importantly, courts’ obligation to give retroactive effect to unambiguously retroactive laws is subject to an important caveat: retroactive legislation typically does not apply to final judgments.¹⁰² According to the Supreme Court, “Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.”¹⁰³ Once “all appeals have been forgone or completed,” however, “[i]t is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress’s latest

98. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241–42 (1989) (“[W]here . . . the statute’s language is plain, the sole function of the courts is to enforce it according to its terms. . . . except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls.” (alteration in original) (citation omitted) (quoting *Caminetti v. United States*, 242 U.S. 470, 487 (1917); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (internal quotation marks omitted)).

99. *See id.*; *e.g.*, *Meade v. Comm’r of Corr.*, 920 A.2d 301, 304 (Conn. 2007) (“When considering the retroactivity of a penal statute, ‘[i]t is axiomatic that, [w]hether to apply a statute retroactively or prospectively depends upon the intent of the legislature.’” (alterations in original) (quoting *State v. Skakel*, 888 A.2d 985, 1020 (Conn. 2006))). The retroactivity of a penal statute is, of course, subject to the Constitution’s Ex Post Facto Clause. *See infra* note 219.

100. *See, e.g., supra* notes 2–3 (discussing Connecticut and New Mexico death penalty repeal statutes); *supra* note 67 and accompanying text (discussing a Kansas death penalty repeal bill).

101. Act of Mar. 12, 1965, ch. 40, 1965 W. Va. Acts 202, 207; *see infra* note 270 and accompanying text (discussing West Virginia and North Dakota death penalty repeal statutes); *cf.* OHIO REV. CODE ANN. § 2929.06(E) (West, Westlaw through 2013 File 47 of the 130th Gen. Assemb.) (“This section [making capital offenders eligible for a death sentence on resentencing] . . . shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.”); *State v. White*, 972 N.E.2d 534, 543 (2012) (concluding that “[b]y enacting [§ 2929.06(E)], the General Assembly has clearly expressed its intent that [the statute making capital offenders eligible for a death sentence on resentencing] apply retroactively”).

102. *See infra* note 106 and accompanying text.

103. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995).

enactment . . . Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.”¹⁰⁴ Doing so, the Court held, violates “[t]he Constitution’s separation of legislative and judicial powers.”¹⁰⁵

In the criminal context, this means that ameliorative legislation—that is, legislation that is less onerous than prior law—is typically not held to apply retroactively to final sentences.¹⁰⁶ Debate over the retroactivity of criminal

104. *Id.* at 226–27.

105. *Id.* at 240 (“We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution’s separation of legislative and judicial powers denies it the authority to do so.”).

106. See Harold J. Krent, *Retroactivity and Crack Sentencing Reform*, 47 U. MICH. J.L. REFORM 53, 74 (2013) (discussing federal and state courts’ reluctance to apply legislation retroactively to final sentences, noting separation of powers concerns under both Article III (usurping judicial authority) and Article II (usurping executive’s pardon authority)); *id.* at 74 & n.148 (discussing federal and state legislature’s reluctance to pass legislation altering final sentences); S. David Mitchell, *In with the New, Out with the Old: Explaining the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 28–29 (2009) (stating that courts’ and legislatures’ “current practice of retroactive amelioration is inadequate because an entire class of defendants, namely post-final judgment defendants, is barred from benefiting from the ameliorative sentencing changes”); Comment, *supra* note 15, at 145 (“[A]meliorative legislation has never been held to apply to finalized convictions. It is well-settled that a legislative change will not arrest or interfere with execution of sentence.”), *cited in* *Warden v. Marrero*, 417 U.S. 653, 660 (1974); *id.* (noting finality and separation-of-powers concerns); see also *Dorsey v. United States*, 132 S. Ct. 2321, 2330 (2012) (holding that the Fair Sentencing Act of 2010 reduced sentences of crack offenders whose sentences became final after—but not before—enactment of FSA); *Loving v. United States*, 517 U.S. 748, 757 (1996) (“Congress may not revise judicial determinations by retroactive legislation reopening judgments.” (citing *Plaut*, 514 U.S. at 225–26)); *United States v. Blewett*, Nos. 12-5226, 12-5582, 2013 WL 6231727, at *1 (6th Cir. Dec. 3, 2013) (“Consistent with a 142-year-old congressional presumption against applying reductions in criminal penalties to those already sentenced, consistent with the views of all nine Justices and all of the litigants in *Dorsey v. United States*, consistent with the decisions of every other court of appeals in the country, and consistent with dozens of our own decisions, we hold that the [Fair Sentencing] Act does not retroactively undo final sentences.” (citations omitted)).

Despite the weight of authority against ameliorative legislation’s application to final judgments, significant questions remain regarding whether such legislation violates separation-of-powers principles. Although an in-depth discussion is beyond the scope of this Article, some introductory thoughts are instructive. First, the *Plaut* majority’s central premise—that Congress has no authority to reopen final judgments—was highly contested. Three justices, one concurring and two dissenting, argued that Congress does have that authority. Compare *Plaut*, 514 U.S. at 240 (stating that “Constitution’s separation of legislative and judicial powers denies it the authority” to “enact[] retroactive legislation requiring an Article III court to set aside a final judgment”), with *id.* 241–42 (Breyer, J., concurring) (“[A]t least *sometimes* Congress lacks the power under Article I to reopen an otherwise closed court judgment.”), and *id.* at 247 (Stevens and Ginsburg, JJ., dissenting) (“Throughout our history, Congress has passed laws that allow courts to reopen final judgments.”). Indeed, in *Dorsey*, the Supreme Court implied this authority in dictum, stating that “disparities . . . will exist whenever Congress enacts a new law changing sentences (*unless*

statutes instead tends to focus on cases involving those who committed criminal acts before the effective date of the ameliorative legislation but were not convicted or sentenced, or did not exhaust their direct appeals, until after the effective date of the legislation.¹⁰⁷

This issue of finality aside, some further complexity arises when the statute is silent or otherwise ambiguous as to whether it is retroactive or prospective-only. Where an ambiguous statute is more onerous than existing law, “impos[ing] new burdens on persons after the fact,” there is a

Congress intends re-opening sentencing proceedings concluded prior to a new law's effective date).” 132 S. Ct. at 2335. Likewise, in *Blewett*, the Sixth Circuit joined “[e]very other federal court of appeals” in holding that the Fair Sentencing Act “does not apply to individuals sentenced before its effective date,” but strongly implied that Congress could have made the Act retroactive to offenders already sentenced if it had wanted to. *Compare Blewett*, 2013 WL at *1 (holding that the Fair Sentencing Act “does not retroactively undo final sentences”), *with id.* at *2 (stating that “[t]he Fair Sentencing Act nowhere provides that it covers offenders sentenced before it became effective. Nor do the Act's clear implications show a desire to apply the new law to offenders already sentenced”), *and id.* at *13 (“Congress should think seriously about making the new minimums retroactive. . . . Any request for a sentence reduction must be addressed to a higher tribunal (the Supreme Court) or to a different forum altogether (the Congress and the President).”). *Blewett's* dissenting opinions also assume Congress's authority to apply the Fair Sentencing Act retroactively to final sentences. *See, e.g., id.* at *41 (White, J., dissenting) (“[T]he scheme set up by Congress contemplates not only that finality is not sacrosanct, but that consideration whether a change should be available for application to offenders already under sentence should be a part of the very process of making changes, and the determination left to the Commission's sound discretion.”); *see also* Krent, *supra*, at 73–77 (distinguishing *Plaut* and arguing that separation-of-powers principles do not prevent Congress from applying ameliorative legislation to final sentences).

Second, *Plaut's* holding was narrow. *Plaut* involved “retroactive legislation requiring an Article III court to set aside a final judgment”; if the retroactive legislation had required the court to review the judgment but had given the court discretion to set it aside, *Plaut* might have gone the other way. *Id.* at 240 (emphasis added); *see id.* at 231–32 (stating that a retroactive legislative change “subject to the control of the courts themselves would obviously raise no issue of separation of powers”). The Smarter Sentencing Act now pending in Congress is a case in point. That legislation would allow certain inmates sentenced before the effective date of the Fair Sentencing Act to petition for sentence reductions consistent with the Fair Sentencing Act, and would give courts the discretion to impose a reduced sentence. *See* Smarter Sentencing Act of 2013, S. 1410, 113th Cong. § 3(b), *available at* <https://www.govtrack.us/congress/bills/113/s1410/text> (“A court that imposed a sentence for a covered offense, *may*, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.” (emphasis added) (citation omitted)); *see also* *Durbin and Lee Introduce Smarter Sentencing Act*, U.S. SENATE (Aug. 1, 2013), <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736>.

Finally, and of particular importance to this Article, separation-of-powers principles have not stopped several state legislatures from passing legislation that retroactively repealed the death penalty in *all* cases—final and not final. *See infra* note 270 (discussing North Dakota, West Virginia, and New Jersey repeals); *cf.* Krent, *supra*, at 74–77 (arguing that Congress has passed noncapital legislation that retroactively altered final judgments).

107. *See infra* Subsection III.A.2 (discussing retroactivity in non-final cases).

“presumption against statutory retroactivity.”¹⁰⁸ The statute will be given only prospective effect because imposing new burdens after the fact is “unfair[.]”¹⁰⁹ Indeed, in the criminal context, “[i]f the new legislation increase[s] the punishment for the same crime, or ma[kes] previously lawful activity unlawful, the ex post facto clause preclude[s] prosecution under the new statute of offenses committed before the statute’s effective date.”¹¹⁰

Where the ambiguous statute is more lenient than existing law, *removing* a burden “by repealing a penal provision (whether criminal or civil),” the common law deemed such a repeal to be retroactive as to judgments that were not yet final.¹¹¹ In 1871, Congress abolished this presumption through passage of a general savings statute, which provides that “a new criminal statute that ‘repeal[s]’ an older criminal statute shall not change the penalties ‘incurred’ under that older statute ‘unless the repealing Act shall so expressly provide.’ . . . Penalties are ‘incurred’ under the older statute when an offender becomes subject to them, *i.e.*, commits the underlying conduct that makes the offender liable.”¹¹² In other words, under the federal general savings statute, ameliorative federal legislation is not considered to be retroactive absent explicit language to the contrary or some other “indicia of congressional intent.”¹¹³ In the absence of such

108. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

109. *Id.*

110. *Holiday v. United States*, 683 A.2d 61, 66 (D.C. Cir. 1996); *see also Dobbert v. Florida*, 432 U.S. 282, 294 (1977) (“It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law.”). For further discussion of the Ex Post Facto Clause, *see infra* note 219.

111. *Landgraf*, 511 U.S. at 270–71. This is known as the doctrine of abatement. As the U.S. Supreme Court stated in *Bradley v. United States*, “At common law, the repeal of a criminal statute abated all prosecutions which had not reached final disposition”—*i.e.*, the imposition of a sentence—“in the highest court authorized to review them.” 410 U.S. 605, 607 (1973). To avoid such results, legislatures frequently indicated an intention not to abate pending prosecutions by including in the repealing statute a specific clause stating that prosecutions of offenses under the repealed statute were not to be abated.” *Id.* at 609–10; *see also Bell v. Maryland*, 378 U.S. 226, 230, 232 (1964) (reciting the “universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State’s condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it. . . . In the present case the judgment is not yet final, for it is on direct review in this Court.”); *Holiday*, 683 A.2d at 66 (“At common law, [repeals of criminal statutes] applied retroactively, abating every prosecution which had not yet resulted in final conviction (including appeal to the highest reviewing court)—unless a special provision had been enacted to save prosecutions under the repealed statute.”).

112. *See Dorsey v. United States*, 132 S. Ct. 2321, 2330 (2012) (alteration in original) (quoting 1 U.S.C. § 109).

113. *Id.* at 2332. “[B]ecause statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified,” the Supreme Court has long held that the general savings statute “creates what is in effect a less demanding interpretive

language or intent, ameliorative federal legislation does not apply to those who commit their crimes prior to the effective date of the statute—even if they are not convicted or sentenced, or if the sentence does not become final, until after the effective date of the statute.¹¹⁴ Most states have passed similar general savings statutes.¹¹⁵

Although federal courts have overwhelmingly applied the federal general savings statute to prohibit retroactive application of ameliorative legislation, a minority of state supreme courts have disregarded their own savings statutes and given such ameliorative legislation retroactive effect.¹¹⁶ Other state supreme courts have given retroactive effect to ameliorative legislation pursuant to ameliorative amendments to their savings statutes, which permit individuals to benefit from subsequent ameliorative changes to the law.¹¹⁷ Importantly, as noted above, even when state supreme courts have given retroactive effect to ameliorative legislation—whether by disregarding their state savings statutes or by

requirement.” *Id.* at 2331. The result is a general savings statute with moderate bite: it “set[s] forth an important background principle of interpretation,” but Congress remains free to disregard it “either expressly or by implication as it chooses.” *Id.* at 2331–32; *see id.* at 2340 (Scalia, J., dissenting) (stating that where repeal is not explicit, “the implication from the subsequently enacted statute must be clear enough to overcome our strong presumption against implied repeals”).

114. *United States v. Blewett*, Nos. 12-5226, 12-5582, 2013 WL 6231727, at *8 (6th Cir. Dec. 3, 2013) (stating that, “by default under the [federal] savings statute,” ameliorative statutory change “would not have applied to people who offended before the statute’s effective date, even those sentenced after the effective date”) (emphasis added); *see also Holiday*, 683 A.2d at 72–74 (rejecting argument that federal general savings statute “is limited to preserving sentences already imposed”). *But cf. Dorsey*, 132 S. Ct. at 2335 (stating that, in *non-capital* cases involving application of federal sentencing guidelines, “the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced”).

115. *Mitchell*, *supra* note 106, at 8 n.48, 20, 47–51 (compiling state savings statutes); *id.* at 47–51 (listing four state constitutions that contain savings provisions). The *Holiday* court explained,

As a way of preventing abatements of criminal prosecutions and other liabilities when legislatures failed to provide special savings clauses in the repealing legislation, state legislatures began in the last century to adopt general savings statutes applicable thereafter to all repeals, amendments, and reenactments of criminal and civil liabilities. For criminal prosecutions, therefore, these statutes shifted the legislative presumption from one of abatement unless otherwise specified to one of non-abatement in the absence of contrary legislative direction.

683 A.2d at 66 (footnote omitted) (internal quotation marks omitted).

116. *Mitchell*, *supra* note 106, at 29. State courts have justified their disregard of general savings statutes for a number of reasons, including that the general savings statute is itself ambiguous; that following the general savings statute would be inconsistent with legislative intent; and that general savings statutes prohibit the retroactive application of more onerous laws but not ameliorative ones. *Id.* at 29–32.

117. *Id.* (compiling state savings statutes, ten of which contain exceptions allowing retroactive application of ameliorative legislation in cases that are not final); *see also* Comment, *supra* note 15, at 129 & nn.66–69 (1972) (compiling ameliorative amendments).

following ameliorative amendments to those statutes—they have stopped short of disturbing final sentences.¹¹⁸ These courts appear willing to give retroactive effect to ameliorative legislation *only* in cases that have not resulted in a final judgment.¹¹⁹

The upshot is that, generally speaking, “legislation, especially of the criminal sort, is *not* to be applied retroactively.”¹²⁰ Federal courts and a majority of state courts hold that, absent some express intent of the legislature to the contrary, “ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense” are not given retroactive effect.¹²¹ This is consistent with the

118. Compare Comment, *supra* note 15, at 133 (discussing court’s disregard of savings statute where “amendatory statute lessening punishment becomes effective prior to the date of appellate finalization”), with Mitchell, *supra* note 106, at 20 (noting that ameliorative amendment exceptions to general saving statutes are “restricted . . . to pre-final judgment defendants, resulting in a limited number of defendants being eligible to receive the benefits of an ameliorative sentencing change”).

119. See *supra* note 106 and accompanying text.

120. Johnson v. United States, 529 U.S. 694, 701 (2000) (emphasis added). One well-recognized exception is for procedural legislation, which generally *is* applied retroactively notwithstanding a general savings statute. Warden v. Marrero, 417 U.S. 653, 660–61 (1974) (stating that the federal general savings statute “does not ordinarily preserve discarded remedies or procedures”), superseded by statute on other grounds, Act of Oct. 26, 1974, Pub. L. No. 93-481, 88 Stat. 1455, 1455; see also Landgraf v. USI Film Prods., 511 U.S. 244, 275 (1994) (noting “the diminished reliance interests in matters of procedure” and stating that “[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity”); 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 23:38, at 566–67 (7th ed. 2009) (“[R]ights which are not substantive and private in nature . . . are beyond the scope of general saving statutes, and are eliminated by repeal of their derivative source.”). Although the line between substantive and procedural legislation is not always clear, the U.S. Supreme Court has concluded that legislation affecting “all forms of punishment for crime” is not procedural; it affects substantive rights and is therefore subject to the federal general savings statute. Marrero, 417 U.S. at 661. Compare *id.* (citing Jones v. United States, 327 F.2d 867 (D.C. Cir. 1963)) (holding that ineligibility for parole was “punishment” and was therefore preserved by 1 U.S.C. § 109), and Jones, 327 F.2d at 871 (concluding that the death sentence was preserved by 1 U.S.C. § 109), with United States v. Obermeier, 186 F.2d 243, 254–55 (2d Cir. 1950) (holding that “a statute of limitations is considered no part of a ‘right’ or ‘liability,’ but as affecting the ‘remedy’ only,” and was therefore not preserved by 1 U.S.C. § 109).

121. Marrero, 417 U.S. at 661; see, e.g., INS v. St. Cyr, 533 U.S. 289, 315–16 (2001) (“[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.” (second alteration in original) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)) (internal quotation marks omitted)), superseded by statute on other grounds, REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 302, 310; *id.* at 316–17 (“A statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result. . . . The standard for finding such unambiguous direction is a demanding one. [C]ases where this Court has found truly retroactive effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation.” (alteration in original) (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)) (internal quotation marks omitted)); Landgraf, 511 U.S. at 280 (“When a case implicates a federal statute enacted after the events in suit, the court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach. If Congress has done so, of course, there is no need

principle articulated in *Landgraf v. USI Film Products*, a case in which the Supreme Court addressed the retroactivity of statutory provisions creating a right to recover compensatory and punitive damages for certain violations of Title VII, providing for a jury trial if such damages were claimed. In *Landgraf*, the Court stated:

It will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity. Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal. A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute. Indeed, there is reason to believe that the omission of [a prior bill's] express retroactivity provisions was a factor in the passage of the [bill that became law]. Section 102 [of the law] is plainly not the sort of provision that *must* be understood to operate retroactively because a contrary reading would render it ineffective.¹²²

Importantly, this determination does not change when the prospective-only repeal applies to the death penalty, as multiple federal and state courts have made clear.¹²³ In nearly all cases, death row inmates remain eligible for death notwithstanding the subsequent repeal of the death penalty or the procedures used to implement it.¹²⁴

to resort to judicial default rules.”); *id.* at 273, 278–79 (harmonizing the “presumption against statutory retroactivity” and “explicitly retroactive statutes”); *State v. Reis*, 165 P.3d 980, 996 (Haw. 2007) (“[T]he inclusion of a specific savings clause within an amendment—the polar opposite of an express retroactivity provision—must operate as clear evidence of the legislature’s intention that the act in question should apply prospectively only. Indeed, where a specific savings clause has been included in amendatory legislation, the general trend among the states nationally is, in fact, *not* to apply the amendments retroactively, *even when they are ameliorative.*”); *Holiday v. United States*, 683 A.2d 61, 79 (D.C. Cir. 1996) (“[A]bsent an express provision specifying the class or classes to which the new sentencing scheme applies, we cannot conclude that, ‘obviously’ and inevitably, the legislature must have intended a retroactive, rather than a prospective, approach.”); *id.* at 80 (“[I]f the Council had intended for the repeal of mandatory-minimum sentences to apply retroactively—to pending prosecutions, either pre-sentence or pre-final judgment—express language to that effect could have been included.”). *See generally* Mitchell, *supra* note 106, at 29–37 (discussing judicial retroactive amelioration).

122. *Landgraf*, 511 U.S. at 285–86 (footnote omitted).

123. *See, e.g., Jones*, 327 F.2d at 869–71 (applying both the federal general savings statute, 1 U.S.C. § 109, and repeal statute’s savings clause in refusing to give retroactive effect to an ameliorative statute eliminating mandatory death penalty).

124. *See, e.g., id.*

2. Retroactivity and the Death Penalty

This subsection addresses the issue of retroactivity and the death penalty. It first reviews several cases in federal and state jurisprudence where the courts refused to give retroactive effect to prospective-only repeal. It then turns to consideration of circumstances under which the courts took the opposite approach.

a. Cases Refusing to Give Retroactive Effect to Prospective-Only Repeal

In *Jones v. United States*, the D.C. Circuit held that the defendant, who was found guilty of first degree murder and sentenced to death under a mandatory death penalty, could not benefit from a subsequent law repealing the mandatory death penalty and allowing a jury (or, in the case of pending cases, a judge) to decide between execution or life imprisonment.¹²⁵ The court noted that the repeal was “obviously prospective in operation” because it “contained no language applying its ameliorating provisions to previously committed offenses” and instead included a specific savings clause preserving the defendant’s sentence under the prior statute.¹²⁶ “Quite apart from the [statute’s savings clause],” the court added, the federal general savings statute, 1 U.S.C. § 109, conclusively established “that the death sentence not only was mandatory, final and unreviewable, but that sentence had not been vacated by the [repeal].”¹²⁷

Jones’s reasoning finds explicit support in the U.S. Supreme Court’s decision in the non-capital case of *Warden v. Marrero*.¹²⁸ In that case, the Court refused to give retroactive effect to a prospective-only federal statute, the Comprehensive Drug Abuse Prevention and Control Act of 1970, which removed ineligibility for parole for certain drug crimes.¹²⁹ According to the Court, the Act’s savings clause required this result by explicitly prohibiting application of the Act to “[p]rosecutions for any violation of law occurring prior to the effective date of [the Act].”¹³⁰ The Court also premised its decision on the federal general savings statute, 1

125. *Id.*

126. *Id.* at 871. At the time, the repeal statute’s savings clause read, “Cases tried prior to the effective date of this Act and which are before the court for the purpose of sentence or resentence shall be governed by the provisions of law in effect prior to the effective date of this Act.” Act of Mar. 22, 1962, Pub. L. No. 87-423, 76 Stat. 46 (codified as amended at D.C. CODE § 22-2104 (West, Westlaw through 2013)).

127. *Jones*, 327 F.2d at 870–71.

128. 417 U.S. 653, 660–61 (1974), *superseded by statute on other grounds*, Act of Oct. 26, 1974, Pub. L. No. 93-481, 88 Stat. 1455, 1455.

129. *Id.* at 657–59; *accord* *Bradley v. United States*, 410 U.S. 605, 609–10 (1973).

130. *Marrero*, 417 U.S. at 655–56 & n.4 (second alteration in original) (quoting Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1103(a), 84 Stat. 1236, 1294) (internal quotation marks omitted).

U.S.C. § 109, citing *Jones* for the proposition that § 109 “bar[s] application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense.”¹³¹

Significantly, the prisoner in *Marrero* argued that, by removing ineligibility for parole,

Congress completely changed its approach to regulation of narcotics offenses in the 1970 Act, jettisoning the retributive approach of the [prior] law in favor of emphasis in the 1970 Act upon rehabilitation of the narcotics offender. . . . [I]n light of this basic change, little purpose is served by denying respondent eligibility for parole, indeed that such denial frustrates the current congressional goal of rehabilitating narcotics offenders.¹³²

While acknowledging the “undeniable” force of this argument, the Court rejected it, stating that it was “addressed to the wrong governmental branch.¹³³ Punishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds.”¹³⁴ The statute’s own savings clause, together with the federal savings statute, “saved from repeal the bar of parole eligibility under [the prior statute], and, however severe the consequences for respondent, Congress trespassed no constitutional limits.”¹³⁵

Support for prospective-only repeal of death penalty legislation can arguably be found in one of the Supreme Court’s most infamous death penalty cases, *Rosenberg v. United States*.¹³⁶ On April 5, 1951, Julius and

131. *Id.* at 661 (citing *Jones*, 327 F.2d 867; *United States v. Kirby*, 176 F.2d 101 (2d Cir. 1949); *Lovely v. United States*, 175 F.2d 312 (4th Cir. 1949)).

132. *Id.* at 664.

133. *Id.*

134. *Id.*

135. *Id.* Many lower federal courts and state supreme courts have similarly rejected retroactive application of clearly prospective-only sentencing statutes in the noncapital context. *See, e.g.*, *United States v. Ross*, 464 F.2d 376, 378–79 (2d Cir. 1972) (refusing to give retroactive effect to a portion of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which liberalized sentences for drug crimes); *id.* at 380 (distinguishing two Supreme Court cases in which laws were applied retroactively on grounds that those cases involved decriminalization of conduct, namely, consumption of alcohol and equal access to public accommodations); *State v. Reis*, 165 P.3d 980, 981–82, 991 n.19 (Haw. 2007) (refusing to give retroactive effect to a prospective-only statute allowing probation for first-time nonviolent drug offenders because the “plain language [of the savings clause] bar[red] retroactive application”).

136. 346 U.S. 273 (1953). *Rosenberg* was decided in a very short per curiam order on June 19, 1953. *Id.* at 288 (per curiam). Two concurring opinions were delivered that same day, with the same six Justices joining the two concurrences. *See id.* at 289 (Jackson, J., concurring); *id.* at 293 (Clark, J., concurring). A few weeks later, Chief Justice Fred Vinson filed the opinion of the Court, which was joined by the same Justices who had joined the earlier concurrences. *Id.* at 277 (majority opinion). Accordingly, the same six-Justice majority backed three separate opinions. For simplicity,

Ethel Rosenberg were sentenced to death for conspiracy to commit espionage during a time of war, in violation of the Espionage Act of 1917.¹³⁷ On June 17, 1953, just two days before their execution,¹³⁸ Justice William Douglas granted a stay of execution to address whether the Rosenbergs' death sentences, which were imposed without recommendation of a jury and without a finding that the offense was committed with the intent to injure the United States, violated the Atomic Energy Act of 1946, which authorized capital punishment only upon jury recommendation and a finding of such intent.¹³⁹ "[T]he sole ground of this stay," the Court stated, "is that the Atomic Energy Act may have retrospective application to conspiracies in which the only overt acts were committed before that statute was enacted."¹⁴⁰ The Court rejected this claim.¹⁴¹

According to the Court, assuming that the Atomic Energy Act in fact repealed the Espionage Act,¹⁴² "the Government could not have invoked the Atomic Energy Act against [the] defendants."¹⁴³ Because "[t]he crux of the charge alleged overt acts committed in 1944 and 1945, years before [the Atomic Energy] Act went into effect," that Act was inapplicable.¹⁴⁴

this Article considers all three opinions to speak for the Court.

137. *Id.* at 277.

138. *See infra* text accompanying note 147.

139. *Rosenberg*, 346 U.S. at 283 (describing Justice Douglas's actions); *id.* at 294 (Clark, J., concurring) (stating that the Atomic Energy Act of 1946's elements "are not prerequisite to a sentence of death" under the Espionage Act of 1917); *id.* at 317 (App'x to Op. of Douglas, J., dissenting) (noting neither element was satisfied).

140. *Id.* at 290 (Jackson, J., concurring).

141. *Id.* at 289.

142. The Court held that the Atomic Energy Act merely supplemented, rather than *repealed*, the Espionage Act and therefore did not apply to the Rosenbergs, who were convicted under the Espionage Act. *Id.* at 289 (per curiam) ("The Atomic Energy Act did not repeal or limit the provisions of the Espionage Act."); *see id.* at 290 (Jackson, J., concurring) ("[T]he Atomic Energy Act does not, by text or intention, supersede the earlier Espionage Act. It does not purport to repeal the earlier Act, nor afford any grounds for spelling out a repeal by implication. Each Act is complete in itself and each has its own reason for existence and field of operation."); *see also id.* at 295 (Clark, J., concurring) ("[I]nstead of repealing the penalty provisions of the Espionage Act, [the Atomic Energy Act] in fact preserves them in undiminished force. Thus there is no warrant for superimposing the penalty provisions of the later Act upon the earlier law."). Significantly, the Court did not stop there, and held that even if the Atomic Energy Act *did* repeal the Espionage Act, it did not apply retroactively to the Rosenberg's offenses. *Id.* at 295–96.

143. *Id.* at 295–96 (Clark, J., concurring).

144. *Id.* at 295; *see also id.* at 290 (Jackson, J., concurring) ("The crime here involved was commenced June 6, 1944. This was more than two years before the Atomic Energy Act was passed. All overt acts relating to atomic energy on which the Government relies took place as early as January 1945."); *id.* at 311 (Douglas, J., dissenting) ("[O]bviously no criminal statute can have retroactive application."). Although the majority reasoned that retroactive application of the Atomic Energy Act would impose *harsher* penalties than the Espionage Act in violation of the Ex Post Facto Clause, *see id.* at 290 (Jackson, J., concurring); *id.* at 295–96 (Clark, J., concurring), its determination that the former Act "authorize[d] capital punishment *only* upon recommendation of a

Significantly, Justices Frankfurter and Douglas, writing separately in dissent, did not dispute that the Atomic Energy Act applied only prospectively;¹⁴⁵ instead, they argued that part of the Rosenbergs' crime took place after the Act's effective date.¹⁴⁶ On June 19, 1953, the Court issued a per curiam opinion vacating the stay, and the Rosenbergs were executed later that evening.¹⁴⁷

While acknowledging the troubling stakes, the majority concluded that the law was clear; the petition raised a pure "question of statutory construction" and the majority had "no doubts" as to its answer.¹⁴⁸ "Vacating this stay," Justice Jackson stated in a separate opinion, "is not to be construed as indorsing the wisdom or appropriateness to this case of a death sentence. That sentence, however, is permitted by law and, as was previously pointed out, is therefore not within this Court's power of revision."¹⁴⁹ Justice Clark was less contrite: "Though the penalty is great and our responsibility heavy, our duty is clear."¹⁵⁰

jury and a finding that the offense was committed with intent to injure the United States" belies this reasoning and suggests that the Atomic Energy Act was ameliorative. *Id.* at 294 (emphasis added); *see id.* at 305–06 (Frankfurter, J., dissenting) ("The decisive thing in this case is that under the Espionage Act the power to impose a sentence of death was left exclusively to the discretion of the court, while under the Atomic Energy Act a sentence of death can be imposed only upon recommendation of the jury.").

145. *Id.* at 311 (Douglas, J., dissenting) ("The Solicitor General says . . . that the Government would have been laughed out of court if . . . this case had been laid under the Atomic Energy Act of 1946. I agree. For a part of the crime alleged and proved antedated that Act. And obviously no criminal statute can have retroactive application."); *see id.* at 304–05 (Frankfurter, J., dissenting) (implying that the Atomic Energy Act was prospective-only).

146. *See id.* at 311 (Douglas, J., dissenting) ("[T]hat conspiracy, as defined in the indictment itself, endured almost four years after the Atomic Energy Act became effective."); *see also id.* at 305 (Frankfurter, J., dissenting) (arguing that "the terminal date of the Rosenberg Conspiracy [did not] precede[] the effective date of the Atomic Energy Act").

147. The Rosenbergs were executed on June 19, 1953, several hours after the Supreme Court vacated the stay. Brad Snyder, *Taking Great Cases: Lessons from the Rosenberg Case*, 63 VAND. L. REV. 885, 932 (2010).

148. *Rosenberg*, 346 U.S. at 287–88; *see id.* at 288 (stating that "[m]ore complete statements of the reasons for our decision are set forth in the opinions of Mr. Justice Jackson and Mr. Justice Clark").

149. *Id.* at 292–93 (Jackson, J., concurring).

150. *Id.* at 296 (Clark, J., concurring); *cf.* *Bradley v. United States*, 410 U.S. 605, 612 (1973) (Douglas, J., dissenting) (noting that the Court in *Rosenberg* "resolved an ambiguity in a statutory scheme against life, not in its favor"). Lower federal court decisions interpreting the federal death penalty lend further support to the permissibility of prospective-only repeal as a matter of statutory construction. In 2008, for example, the Fourth Circuit refused to give retroactive effect to the Federal Death Penalty Act, which repealed various provisions of an earlier federal death penalty statute under which the defendant was sentenced. "[U]nder the [Federal] Savings Statute," the court concluded, "a liability that arises under a later-repealed statute is preserved despite repeal and may be enforced by a post-repeal action." *United States v. Stitt*, 552 F.3d 345, 353 (4th Cir. 2008) (quoting *Korshin v. Comm'r*, 91 F.3d 670, 673 (4th Cir. 1996)). Accordingly, the Fourth Circuit reversed "the district court's decision to sentence [the defendant] to life imprisonment plus 780

Numerous other state supreme courts have refused to give retroactive effect to a variety of prospective-only repeals of death penalty statutes as a matter of statutory construction. Some of these cases involved prospective-only repeal of the death penalty for certain offenders and certain crimes. The Indiana Supreme Court, for example, refused to give retroactive effect to a prospective-only repeal of the death penalty for people with intellectual disabilities.¹⁵¹ The Supreme Court of Georgia refused to give retroactive effect to a prospective-only repeal of the death penalty for people who were less than seventeen years of age at the time of their offense.¹⁵² And the Supreme Court of North Carolina refused to give retroactive effect to a statute that removed the death penalty for second-degree rape.¹⁵³ “[I]n a capital case, just as in any other case,” North Carolina’s high court stated, “we are not at liberty to disregard established principles of law in arriving at the intent of the Legislature in enacting a statute, nor, having determined that intent, may we properly refuse to give it effect.”¹⁵⁴

Many more cases, such as *Jones v. United States*, involve prospective-

months” and ordered the court to conduct a new capital sentencing hearing. *Id.* at 356.

151. *Rondon v. State*, 711 N.E.2d 506, 512 (Ind. 1999) (“[A]bsent a constitutional mandate for the rule exempting mentally retarded individuals, this Court is neither expected nor required to engage in retroactivity analysis. Rather, the extent of our writ is to enforce the law as it was at the time [he] committed his crimes.” (second alteration in original) (quoting *Allen v. State*, 686 N.E.2d 760, 786 (Ind. 1997))). The Tennessee Supreme Court similarly refused to give retroactive effect, as a matter of statutory construction, to a prospective-only repeal of the death penalty for people with intellectual disabilities. *See Van Tran v. State*, 66 S.W.3d 790, 798 (Tenn. 2001). According to the court:

[T]he absence of express language providing for retroactive application supports the conclusion that the legislature did not expressly intend [a retroactive] application. As the State contends, other Public Acts demonstrate that when retroactive application is intended, the General Assembly includes specific, clear language expressing its intent. Such clear language is absent from [the repeal statute]. In short, notwithstanding the presence of some ambiguous language in the statute and in the legislative history, there is no evidence of a clear legislative intent to apply the statute retroactively as required by the general rule.

Id. *But see infra* notes 318–21 and accompanying text (discussing *Van Tran*’s holding that the death sentence nevertheless violated the state and federal constitutions).

152. *Cobb v. State*, 152 S.E.2d 403, 406 (Ga. 1966) (“The trial judge here properly ruled that [a statute providing that any minor less than seventeen years of age at the time of an alleged offense could not be given the death penalty] could not be given retroactive effect so as to apply to the appellant.”), *rev’d per curiam*, *Cobb v. Georgia*, 389 U.S. 12 (1967).

153. *State v. Williams*, 212 S.E.2d 113, 119–20 (N.C. 1975) (“We construe the provision in the 1974 Act, ‘This act shall become . . . applicable to all offenses hereafter committed’ as a saving clause, showing the intent of the Legislature to leave the preexisting statute in effect as to the elements of and punishment for the crime of rape committed prior to 8 April 1974. Otherwise, that provision of the Act would be a mere meaningless redundancy.” (alteration in original)).

154. *Id.* at 119.

only repeal of various death penalty procedures. For example, the supreme courts of Connecticut,¹⁵⁵ Florida,¹⁵⁶ Indiana,¹⁵⁷ Maryland,¹⁵⁸ Tennessee,¹⁵⁹ and Utah¹⁶⁰ all refused to give retroactive effect to prospective-only statutes that required the jury to consider life imprisonment without the possibility of parole as a sentencing option. The Indiana Supreme Court refused to give retroactive effect to a prospective-only statute requiring courts to instruct the jury on the potential for consecutive or concurrent sentencing.¹⁶¹ The Supreme Court of Nebraska refused to give retroactive

155. *Dortch v. State*, 110 A.2d 471, 476 (Conn. 1954) (“The murder for which the plaintiff stands convicted was committed on September 3, 1949. Judgment was rendered upon the verdict on February 23, 1950. . . . [The repeal statute] did not become effective until October 1, 1951. . . . The legislature expressed no intent that [the repeal statute] should operate retrospectively, and it has no retrospective effect.”); *id.* at 472 (“[The repeal statute] gives to the jury before whom any prosecution for a murder is tried the power to recommend imprisonment for life . . .”).

156. *Bates v. State*, 750 So. 2d 6, 10 (Fla. 1999) (“In 1994, the Legislature enacted [a statute which] ma[de] life without the possibility of parole the alternative punishment to a death sentence for the crime of first-degree murder. . . . [T]he amended sentencing statute applies to all crimes committed after May 25, 1994. We find no unequivocal language that the Legislature intended this amendment to apply retroactively[.]”); *accord* *Orme v. State*, 25 So. 3d 536, 547 (Fla. 2009).

157. *State v. Alcorn*, 638 N.E.2d 1242, 1246 (Ind. 1994) (“[A]ppellee’s trial is governed by the death penalty statute that was in effect at the time of the offense. The jury has no authority to apply the amended statute in this case since the saving clause makes the statute inapplicable to murders that were committed before June 30, 1993.”); *id.* at 1244 (“As amended, [the death penalty statute] allows a trial court to impose a sentence of life imprisonment without parole as an alternative sentence to death.”); *accord* *State v. Azania*, 875 N.E.2d 701, 704 (Ind. 2007).

158. *Collins v. State*, 568 A.2d 1, 15 (Md. 1990) (“We rule the life without parole sentencing option is only available for offenses occurring after the effective date of the provision, July 1, 1987. The instant offense occurred prior to the effective date.” (citation omitted)); *accord* *Booth v. State*, 608 A.2d 162, 174 (Md. 1992).

159. *State v. Keen*, 31 S.W.3d 196, 213–14 (Tenn. 2000) (“[T]he plain language of the statute [permitting the jury to consider life without parole] applies only to cases in which the *offense* was committed after July 1, 1993”); *accord* *State v. Cauthern*, 967 S.W.2d 726, 735 (Tenn. 1998).

160. *State v. Andrews*, 843 P.2d 1027, 1029 (Utah 1992) (holding that the trial court “did not err in concluding that the new sentencing option [of life without parole] has no retroactive application to defendant, whose date of sentence occurred on November 27, 1974”); *accord* *Andrews v. Carver*, 798 F. Supp. 659, 662 (D. Utah 1992) (refusing, on habeas review, to give retroactive effect to a prospective-only statute adding option of life without possibility of parole, but suggesting that the result might be different if the prospective-only statute were passed before defendant’s conviction became final); *id.* (“There is no obligation that a state accord retroactive effect to new substantive statutes to allow a convicted person the benefit of a new statute where the conviction is final. The state’s interest in maintaining the finality of convictions and sentences justifies a prospective legislative limitation.”).

161. *See Williams v. State*, 706 N.E.2d 149, 160 n.7 (Ind. 1999) (“Under our current death penalty sentencing statute, courts should instruct the jury on the potential for consecutive or concurrent sentencing, and the court’s failure to provide the jury with a verdict form which included the possibility of sentencing a defendant to life imprisonment without parole would have been error. Because [the defendant] committed his crime on August 12, 1986, however, the law which was in force on that date applies to him. It is a well established rule of our criminal jurisprudence that the law which applies is that law in effect at the time the crime is committed.” (citation omitted)).

effect to a prospective-only statute that required the court to determine the propriety of a death sentence in light of previous cases involving the same or similar circumstances.¹⁶² The Supreme Court of California refused to give retroactive effect to a prospective-only statute that limited the evidence relevant to the prosecution's case for aggravation.¹⁶³ And both the Supreme Court of California and the Tennessee Supreme Court refused to give retroactive effect to prospective-only statutes that required courts to instruct juries with respect to the balancing of aggravating and mitigating factors.¹⁶⁴ According to the Supreme Court of California, "[t]he presumption that a criminal defendant is entitled to an ameliorative change in the law is just that—a presumption—which plainly does not apply where, as here, the new law provides otherwise."¹⁶⁵

Further examples include courts' refusal to give retroactive effect to prospective-only statutes changing the method of execution;¹⁶⁶ amending the aggravating factors required to sentence a person to death;¹⁶⁷ giving the district attorney discretion to seek the death penalty against defendants tried and convicted of first-degree murder;¹⁶⁸ authorizing bifurcated trials in capital cases and permitting defendants to offer certain evidence in mitigation of punishment;¹⁶⁹ and replacing an existing death penalty statute with a new death penalty statute.¹⁷⁰

162. *State v. Rust*, 303 N.W.2d 490, 493 (Neb. 1981) (stating that the repeal statute "was not enacted until after the sentence in this case had been imposed and became final. Having become a final judgment prior to the effective date of [the repeal statute], it is not affected by the adoption of [the statute]." (quoting *State v. Holtan*, 287 N.W.2d 671, 673 (Neb. 1980) (per curiam))).

163. *People v. Robertson*, 767 P.2d 1109, 1127 (Cal. 1989) ("Because defendant committed the offenses when the [prior] law was in effect, that statute's provisions governed the penalty retrial. . . . A capital trial must be held under the death penalty law in effect at the time the capital offenses were committed; application of any other law is error."). *But see id.* (suggesting that the result may be different if the subsequent law affected the "criminality of defendant's conduct or the severity of punishment" (emphasis added)).

164. *State v. Cazes*, 875 S.W.2d 253, 267 (Tenn. 1994) ("[W]here an offense is committed before the effective date of the [statute requiring the jury to find that aggravating circumstances outweigh mitigating circumstances "beyond a reasonable doubt" before imposing a death sentence], but the trial and sentencing occur after that effective date, a trial court does not err by instructing the jury under the statute as it existed at the time the offense was committed."); *People v. Stankewitz*, 793 P.2d 23, 47 (Cal. 1990) (stating that a statute requiring a jury to find that aggravating circumstances outweigh mitigating circumstances before imposing a death sentence "was intended to be purely prospective in effect" (citation omitted)).

165. *Stankewitz*, 793 P.2d at 47.

166. *Simborski v. Wheeler*, 183 A. 688, 689–90 (Conn. 1936).

167. *State v. Blanton*, 975 S.W.2d 269, 280 (Tenn. 1998).

168. *State v. Ward*, 555 S.E.2d 251, 260 (N.C. 2001).

169. *Pittman v. State*, 434 S.W.2d 352, 359 (Tex. 1968).

170. *Watkins v. State*, 409 So. 2d 901, 902–03 (Ala. Crim. App. 1981) ("It is clear that the legislature intended to apply [the] pre-existing [death penalty statute] to conduct occurring prior to 12:01 a.m. on July 1, 1981, and to apply [the new death penalty statute] to all conduct occurring on and after that time and date."); *accord Ex parte Cochran*, 500 So. 2d 1179, 1181 n.1 (Ala. 1985).

Courts' overwhelming refusal to give retroactive effect to prospective-only repeals of death penalty statutes is not a recent phenomenon; this has been their consistent approach for over 100 years. In 1889, in the case of *People v. Nolan*,¹⁷¹ the Court of Appeals of New York refused to give retroactive effect to a prospective-only statute that replaced hanging with electrocution.¹⁷² Rejecting the defendant's argument that neither the old nor the new statute applied to him, the court stated:

By reason of [the savings clause of the act,] the sections of the Code as they existed prior to the passage of the act remain, for all purposes therein stated, in full force and effect, exactly the same as if no act of amendment, alteration, or repeal had ever been passed; and on that account, and for that reason, the law in force in this state, so far as the defendant is concerned, remains as it was before [the date on which the act took effect], and all its provisions relating to the infliction of the death penalty by hanging are saved and continued. No amount of reasoning or argument can make this plainer than it is made by the statute itself, and further amplification would only tend to confuse what is now clear and unambiguous.¹⁷³

In 1908, in *In re Schneck*,¹⁷⁴ the Kansas Supreme Court held that a statute (like Connecticut's) that *completely* repealed the death penalty prospective-only did not apply retroactively to a defendant who committed his offense three months before repeal but who would not be tried until after repeal.¹⁷⁵ According to the court,

[h]ad the Legislature in the enactment of the amendment [repealing the death penalty] provided to what cases the amendment should be applicable with reference to the time of its passage, the special provision would control. In the absence, however, of any such provision, the general [savings statute] applies. . . .

. . . [S]ince the crime is charged to have been committed before the repeal of the statute prescribing the penalty of death, . . . the repeal and amendment does not affect the penalty of the crime charged¹⁷⁶

In 1918, in *State v. Lewis*,¹⁷⁷ the Supreme Court of Missouri held that,

171. 21 N.E. 1060 (N.Y. 1889).

172. *Id.* at 1062.

173. *Id.*

174. 96 P. 43 (Kan. 1908).

175. *Id.* at 44–45.

176. *Id.*

177. 201 S.W. 80 (Mo. 1918).

pursuant to the state's general savings statute, a 1917 statute *completely* repealing the death penalty prospective-only (like Connecticut's) did not apply retroactively to a defendant who was sentenced to death three months before passage of the repeal.¹⁷⁸ "Undoubtedly the Legislature in 1917 had the power to abolish capital punishment as to all offenses, whether committed before or after the enactment of the new law," the court stated, "but it did not do so."¹⁷⁹ And in 1927, in *Ex parte Faltin*,¹⁸⁰ the Supreme Court of Arizona refused to apply a 1916 prospective-only repeal of the death penalty for the crime of murder in the first degree to a defendant sentenced to death in 1913.¹⁸¹ "The old law is abrogated, repealed and modified for future offenses," the court concluded, "but preserved by the [general] saving clause . . . in so far as the penalties to be inflicted for offenses committed under it"¹⁸²

As these cases demonstrate, courts that treat clearly prospective-only death penalty repeals as such are not forging a new path. Instead, they are standing on a long and well-worn road.

b. Cases Giving Retroactive Effect to Prospective-Only Repeal Pursuant to Rules of Statutory Construction

While the overwhelming weight of authority rejects retroactive application of death penalty repeals, some courts have applied such repeals retroactively on the basis of statutory construction. They have done so in two circumstances: (1) when the death penalty repeal was clearly retroactive, thereby making resort to the general savings statute unnecessary, or (2) when the death penalty repeal was silent or ambiguous as to retroactivity and legislative history or fundamental fairness concerns favored retroactive application over application of the general savings statute.¹⁸³ In both circumstances, courts have stopped short of disturbing final judgments; as discussed above, these courts have interpreted death

178. *Id.* at 85–86; *accord* *State v. Hill*, 201 S.W. 58, 61 (Mo. 1918) (holding that the statute abolishing death penalty, which became operative on June 18, 1917, did not apply where "trial and conviction was had in May, 1917").

179. *Lewis*, 201 S.W. at 85. Because Missouri's general savings statute contained an exception for ameliorative legislation enacted prior to "the penalty or punishment for any offense," the *Lewis* court suggested that the result might be different if the judgment and sentence had not been entered before enactment of the repeal. *Id.* (quoting the ameliorative statute) (internal quotation marks omitted); *see id.* at 85–86 ("[A]s the sentence and judgment in this case were prior to the going into effect of the new statute, they were correct and in no way erroneous at the time of their entry, and the new law . . . does not affect them in any way.").

180. 254 P. 477 (Ariz. 1927).

181. *Id.* at 479–80.

182. *Id.* at 479.

183. A review of death penalty case law did not reveal a third circumstance in which courts might otherwise apply repeals retroactively: application of an ameliorative amendment exception. *See supra* text accompanying note 117 (discussing ameliorative amendment exception).

penalty repeals to apply retroactively only to capital offenders who have not exhausted their direct appeals.¹⁸⁴

When the death penalty repeal is clearly retroactive as to crimes committed before its effective date, thereby making the general savings statute inapplicable, lower courts consistently give the statute retroactive effect as a matter of statutory construction. For example, in *Watts v. State*,¹⁸⁵ the Supreme Court of Mississippi gave retroactive effect to a statute requiring the jury to consider life imprisonment without the possibility of parole as a sentencing option in “any case in which pre-trial, trial or resentencing proceedings take place after July 1, 1994.”¹⁸⁶ The fact that the defendant’s crime occurred several months before the effective date of the statute was “immaterial”; what mattered was that the defendant was tried in 1996, “more than two years after the effective date of the statute.”¹⁸⁷

Similarly, in *State v. Payne*,¹⁸⁸ the Idaho Supreme Court gave retroactive effect to a statute that required new procedures for,

any capital sentencing proceeding occurring after the effective date of this act, including those cases where the murder for which sentence is to be imposed occurred before the effective date of this act and including those cases where a first-degree murder conviction or death sentence occurring before the effective date of this act has been set aside and the case is

184. See *supra* note 106 and accompanying text (discussing finality and statutory retroactivity). Capital offenders who have not exhausted their direct appeals consist of those who have not had their conviction and sentence reviewed by the state court of last resort (and by the U.S. Supreme Court, assuming one of the parties petitions for a writ of certiorari and the Court grants the petition). BARRY LATZER & JAMES N.G. CAUTHEN, JUSTICE DELAYED? TIME CONSUMPTION IN CAPITAL APPEALS: A MULTISTATE STUDY 10–11 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf>. Although the time it takes for a case to complete direct appeal differs significantly from state to state, commentators report a median of 966 days from the date of sentencing, or about 2.5 years, plus another 188–250 days for U.S. Supreme Court review of a petition for a writ of certiorari. *Id.* at 3.

Following direct appeal, capital offenders can file a motion in the state trial court for state post-conviction review of claims not raised on direct appeal. *Id.* at 11. They can also file a petition for the writ of habeas corpus in federal district court. *Id.* at 11–12. Both routes allow for the appeal of adverse decisions and can take, roughly speaking, an additional ten years to resolve. *Id.* at 3, 9 (stating that it takes approximately three years from the date of sentencing to complete the direct appeal process, and that it takes approximately twelve years from the date of sentencing to carry out an execution). If a conviction or sentence is overturned in either post-conviction or habeas proceedings, and the person is resentenced to death, the direct appeal process restarts. See *id.* at 9 n.1.

185. 733 So. 2d 214 (Miss. 1999).

186. *Id.* at 237 (quoting Act of Apr. 7, 1994, ch. 566, § 5, 1994 Miss. Laws. 847, 851) (internal quotation marks omitted).

187. *Id.*

188. 199 P.3d 123 (Idaho 2008).

before the court for retrial or resentencing[]¹⁸⁹

And in *State v. Pace*,¹⁹⁰ the New Mexico Supreme Court gave retroactive effect to a statute abolishing (with some exceptions for special circumstances) the death penalty for murder and “provid[ing] for revocation of death penalties already imposed and substitution of a sentence of life imprisonment.”¹⁹¹ Because it was “clear from [the repeal statute] that the legislature intended the act to apply retroactively,” the court “perceive[d] no reason under the constitution why it could not make the law applicable in situations where, as here, the case was pending on appeal.”¹⁹²

Rather than apply their general savings statute, some courts give retroactive effect to ameliorative death penalty statutes that are ambiguous or merely silent as to retroactivity. Legislative intent and fundamental fairness figure prominently in these cases. For example, in 2004, in *State v. Fortin*,¹⁹³ the Supreme Court of New Jersey gave retroactive effect to a 2000 law that allowed a jury to consider life without parole as a sentencing option in certain capital cases.¹⁹⁴ “If the statute was not intended to apply to capital murders that occurred before the enactment,” the court acknowledged, “then the inquiry ends.”¹⁹⁵ But the court found no such intent. “[T]he language of the statute does not provide an answer [to the question of whether the statute is retroactive] because the legislative direction that the ‘act shall take effect immediately’ is insolubly ambiguous.”¹⁹⁶ Finding scant legislative history addressing the ambiguity, the court concluded that “policy objectives of the legislation”—such as eliminating recidivism and proportionality among defendants awaiting sentencing—“clearly support the most far-reaching application of the statute.”¹⁹⁷

189. *Id.* at 154 (emphasis omitted) (quoting Act of Feb. 13, 2003, ch. 19, § 6, 2003 Idaho Sess. Laws 71, 75).

190. 456 P.2d 197 (N.M. 1969).

191. *Id.* at 205 (per curiam) (supplemental opinion); see also Lyn Suzanne Entzeroth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 OR. L. REV. 797, 821 (2012) (“Punishment by death for any crime is abolished except for the crime of killing a police officer or prison or jail guard while in the performance of his duties and except if the jury recommends the death penalty when the defendant commits a second capital felony after the time for due deliberation following the commission of a capital felony.” (quoting N.M. STAT. ANN. § 40A-29-2.1 (1963) (repealed 1973)) (internal quotation marks omitted)).

192. *Pace*, 456 P.2d at 205. The court declined to consider whether the repeal also applied retroactively to *final* death sentences. *Id.*

193. 843 A.2d 974 (N.J. 2004).

194. *Id.* at 1010, 1012.

195. *Id.* at 1012.

196. *Id.*

197. *Id.* at 1012–13. After the reversal of his capital murder conviction and death sentence in

In 1988, in *State v. Bey*,¹⁹⁸ the Supreme Court of New Jersey gave retroactive effect to a statute repealing the death penalty for crimes committed by minors.¹⁹⁹ In that case, New Jersey's 1982 death penalty statute was silent as to whether it applied to juveniles.²⁰⁰ When the legislature amended the statute four years later to clarify that juveniles were not included, it did not specify whether the amendment was retroactive.²⁰¹ The court relied on legislative history and other public statements of legislators regarding the amendment's intended retroactivity to conclude that it was "clear . . . that the Legislature never had intended to subject juvenile offenders to capital punishment [under the 1982 law], and did intend that its ameliorative amendment [in 1986] would apply retroactively to defendant's case."²⁰² "[T]he presumption against retroactive application," the court added, "is no more than a rule of statutory interpretation, and can be overcome by an indication of contrary legislative intent, either expressed in the language of the statute itself, or implied in its purpose."²⁰³ In addition to legislative intent, the court stated that "notions of fundamental fairness . . . likewise demand[ed] retroactive application of the juvenile-offender exemption in this case."²⁰⁴

2004, the defendant in *Fortin* was again convicted of capital murder. *State v. Fortin*, 969 A.2d 1133, 1134 (N.J. 2009). In 2007, prior to sentencing, the New Jersey legislature abolished the death penalty and replaced it with life imprisonment without parole. *Id.* Because the state did "not dispute that the Legislature clearly intended to retroactively apply the amended sentencing statute to defendants who committed crimes prior to 2007," *id.* at 1138, and instead moved to have the defendant sentenced to life imprisonment without parole, *id.* at 1136, the court never had to decide whether New Jersey's 2007 death penalty repeal was retroactive. *See id.* at 1138. Nor is it likely that the court will do so since all of New Jersey's remaining death row inmates had their sentences commuted to life without parole. *New Jersey*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/new-jersey-1> (last visited Feb. 28, 2014); *see also infra* note 270 (discussing New Jersey's repeal statute).

198. 548 A.2d 846 (N.J. 1988).

199. *Id.* at 873, 877.

200. *Id.* at 872 (noting silence); *id.* at 873 (noting date of statute); *id.* at 872 n.29 ("Any person convicted under subsection a. (1) or (2) who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment, of anything of pecuniary value shall be sentenced as provided hereafter . . .") (alteration in original) (emphasis added); *see id.* at 874 ("[W]e cannot lightly presume that the 'any person' language was intended to sweep within its purview juveniles tried as adults.").

201. *Id.* at 873 ("A juvenile who has been tried as an adult and convicted of murder shall not be sentenced [to death].") (quoting Act of Jan. 17, 1986, ch. 478, § 1(g), 1985 N.J. Laws 1935, 1940)).

202. *Id.* at 873 & n.32 (noting that, at the time the statements were made, defendant "was the only juvenile offender in New Jersey who had been convicted and sentenced to death").

203. *Id.* at 876 (citation omitted) (quoting *Rothman v. Rothman*, 320 A.2d 496, 499 (1974)) (internal quotation marks omitted).

204. *Id.* at 877 (noting that "the Attorney General . . . concedes that 'sound public policy and fundamental fairness dictate that defendant not be singled out to be the *only* juvenile ever executed or even eligible for execution under our current death penalty law.'" (emphasis added) (internal quotation marks omitted)); *see also State v. Biegenwald*, 524 A.2d 130, 157–58 (N.J. 1987) (giving

In *Cheatham v. State*,²⁰⁵ the Oklahoma Court of Criminal Appeals gave retroactive effect to a statute that required juries to consider the sentencing option of life imprisonment without parole.²⁰⁶ The statute “bec[a]me effective November 1, 1987,”²⁰⁷ but did not explicitly state that it was retroactive. The court cited “the extreme nature of the penalty involved in capital murder cases . . . [and] the need for extremely careful scrutiny of the imposition of the death sentence,” and held that the statute applied in that narrow band of cases in which the statute took effect while the offender awaited trial.²⁰⁸ According to the court:

[S]entences of death must be absolutely, unquestionably fair.

Given the gravity of the death penalty, we find that principals of fundamental fairness compel us to reverse this case for a new second stage trial. . . . Quite simply, we cannot justify a decision which would act as a total bar to consideration of a punishment alternative to death merely because the crime giving rise to the trial occurred a short time before the effective date of . . . [the ameliorative] legislation.

. . . In the interests of fundamental fairness, we find that justice demands the action taken by this Court under these distinctively compelling facts.²⁰⁹

Similarly, in *People v. Oliver*,²¹⁰ the Court of Appeals of New York gave retroactive effect to a statute that, among other things, prohibited any child

retroactive effect to an ambiguous statutory amendment requiring the state to prove beyond reasonable doubt that aggravating factors outweighed mitigating factors, based on legislative history and fundamental fairness, reasoning that “we would regard it as impermissibly harsh to apply to one defendant, on this critical question of life and death, a standard significantly less favorable than that to be applied to another defendant, merely because of the relatively short time differential between the commission of their crimes. Much more is at stake than doing justice to [the defendant]. What is at stake is the fundamental fairness of a system that generates life and death decisions”).

205. 900 P.2d 414 (Okla. Crim. App. 1995).

206. *Id.* at 429.

207. Act of May 18, 1987, ch. 96, § 7, 1987 Okla. Sess. Laws 95, 96.

208. *Cheatham*, 900 P.2d at 429.

209. *Id.*; accord *Salazar v. State*, 852 P.2d 729, 739–41 (Okla. Crim. App. 1993). The majority’s reliance upon fundamental fairness in *Cheatham* and three factually analogous cases prompted vigorous dissents by Judge Lumpkin. See *Cheatham*, 900 P.2d at 430 (Lumpkin, J., concurring in part, dissenting in part); *Humphrey v. State*, 864 P.2d 343, 345 (Okla. Crim. App. 1993) (Lumpkin, J., concurring in part, dissenting in part); *Hain v. State*, 852 P.2d 744, 753–56 (Okla. Crim. App. 1993) (Lumpkin, J., concurring in part, dissenting in part); *id.* at 755 (“Principles of fundamental fairness’ is an easy solution to the problem this Court has created by ignoring its own caselaw in determining ‘death is different.’ And as with many easy solutions, it is neat, plausible—and wrong.”); *Salazar v. State*, 852 P.2d 729, 741–43 (Okla. Crim. App. 1993) (Lumpkin, J., concurring in part, dissenting in part); *id.* at 743 (“Death is different; but law is law. This Court in its ruling today stresses the former and ignores the latter. Nearly nine decades of Oklahoma jurisprudence should have taught us better.”).

210. 134 N.E.2d 197 (N.Y. 1956).

under fifteen from being charged with or prosecuted for a crime punishable by death or life imprisonment.²¹¹ According to the court:

A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance.²¹²

Therefore, the court concluded, “nothing but the very clearest legislative direction should lead us to conclude that [the legislature] intended the prior law to apply in any subsequent trial.”²¹³ Because the statute contained “no express instructions” as to its retroactivity, the court held that it applied retroactively to those who, as in *Cheatham*, were “not tried and sentenced by the time it became law.”²¹⁴

Lastly, in *People v. Kellick*,²¹⁵ the Illinois Supreme Court gave retroactive effect to a statute that removed the aggravating factor under which the defendant was charged with death.²¹⁶ Although the statute was ambiguous as to whether it was retroactive (its effective date preceded the date it was signed into law), the court found “the legislative history . . . replete with evidence that the General Assembly intended the [amendment] to operate retrospectively.”²¹⁷

211. *Id.* at 199, 202–04.

212. *Id.* at 202.

213. *Id.* at 204.

214. *Id.* at 202. Significantly, the court limited its holding to pending cases, noting “the settled rule that, once final judgment has been pronounced, a change in the law does not arrest or interfere with execution of the sentence.” *Id.* at 203 (quoting *Welch v. Hudspeth*, 132 F.2d 434, 436 (10th Cir. 1942)) (internal quotation marks omitted); *id.* (“[T]he construction that we are here according to the amendment cannot be applied in favor of an offender tried and sentenced to imprisonment before its enactment.”); *id.* (“Whenever the Legislature alters existing law, a certain measure of inequality is bound to ensue.”); *see also* *Mitchell*, *supra* note 106, at 8 n.48, 47–51 (discussing state savings statutes that contain exceptions allowing retroactive application of ameliorative legislation in cases that are not final).

215. 464 N.E.2d 1037 (Ill. 1984).

216. *Id.* at 1042–45. The repealing statute made a defendant eligible for a death sentence when the defendant killed a child under twelve years of age—as opposed to sixteen years of age under the former statute—in a particularly brutal or heinous fashion. *Id.* at 1043–44. The victim in *Kellick* was fifteen years old. *Id.* at 1042.

217. *Id.* at 1043–45; *see id.* at 1045 (“Retroactive legislation is not favored, and as a general rule statutes are construed to operate prospectively *unless the legislative intent that they be given retroactive operation clearly appears from the express language of the acts, or by necessary or unavoidable implication.*” (quoting *U.S. Steel Credit Union v. Knight*, 204 N.E.2d 4, 6 (1965)) (internal quotation marks omitted)). Interestingly, the court did not discuss Illinois’ ameliorative amendment exception to its general savings clause, which states that “if any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the

3. Summary of Statutory Construction Analysis

As a matter of statutory construction, clearly prospective-only repeals of death penalty legislation are not given retroactive effect. Likewise, clearly retroactive repeals of death penalty legislation *are* given retroactive effect. When repeals are silent or ambiguous as to whether they are prospective-only, most courts construe them as being prospective-only by resorting to general savings statutes, which prohibit retroactive application of laws absent contrary legislative intent. Some courts have applied ambiguous repeals retroactively when legislative history or fundamental fairness concerns favored retroactive application.

In the case of prospective-only death penalty repeal, then, the critical legal question is *not* whether the legislature intended the law to apply retroactively. It will most likely be clear from the repeal statute's savings clause—or from a state's general savings statute as it applies to the repeal—that the legislature did not intend the repeal to be retroactive, and courts will respect such intent. Rather, the question is whether the prospective-only law renders the sentences of people already on death row unconstitutional. Although it is a familiar rule of statutory construction that courts should not decide constitutional questions when a case does not require it,²¹⁸ there is no escaping those questions here. Prospective-only death penalty repeal raises significant questions of constitutional law.

B. *Prospective-Only Death Penalty Repeal Does Not Violate the Eighth Amendment*

The two most likely constitutional challenges to prospective-only repeal are that it violates the Eighth Amendment (as applied to states through the Fourteenth Amendment), and the Fourteenth Amendment's Equal Protection and Due Process Clauses.²¹⁹ This Article addresses the stronger

party affected, be applied to any judgment pronounced after the new law takes effect.” 5 ILL. COMP. STAT. ANN. 70/4 (West, Westlaw through P.A. 98-626 of 2013 Reg. Sess.).

Early cases likewise support the retroactive application of death penalty repeals that are ambiguous as to retroactivity. *See, e.g.*, *State v. Williams*, 31 S.C.L. (2 Rich.) 418, 422–23 (1846) (retroactively applying an ambiguous statute that abolished the death penalty for forgery because the statute provided that, in lieu of death, “the person convicted”—not the person *who shall be convicted* in the future—“shall be sentenced to be whipped thirty nine lashes”); *Rex v. Davis*, (1785) 168 Eng. Rep. 238 (K.B.); 1 Leach 271 (retroactively applying an ambiguous statute that abolished the death penalty for killing deer), *discussed in* Comment, *supra* note 15, at 123.

218. *E.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”).

219. Two other likely constitutional arguments are that prospective-only repeal violates the Bill of Attainder Clause and the Ex Post Facto Clause. *See* U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl.

of the two challenges: the Eighth Amendment. A companion article, *From Wolves, Lambs (Part II): The Fourteenth Amendment Case for Gradual Abolition of the Death Penalty*, addresses the equal protection and due process arguments under the Fourteenth Amendment.²²⁰

There are three general types of Eighth Amendment challenges to the death penalty: (1) the death penalty is invariably, or per se, unconstitutional;²²¹ (2) the death penalty is unconstitutional as applied to a particular defendant based on the character of the defendant's crime or a characteristic of the defendant;²²² and (3) the death penalty is unconstitutional as applied to a particular defendant based on the procedures used to sentence the person to death.²²³ The issue of prospective-only repeal is unique in that it raises questions under all three types. While forceful, none of the Eighth Amendment arguments against prospective-only repeal are winning ones. Indeed, only two cases have struck down prospective-only death penalty repeal under the Eighth Amendment or its state corollaries.²²⁴

1. For the sake of brevity, this Article will not give detailed treatment to these arguments, which are unpersuasive. Nevertheless, some brief points are instructive. Bills of attainder are “legislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.” *United States v. Lovett*, 328 U.S. 303, 315 (1946), *quoted with approval in* *United States v. Brown*, 381 U.S. 437, 448–49 (1965); *see Brown*, 381 U.S. at 442 (“[T]he Bill of Attainder Clause was intended . . . as an implementation of the separation of powers, a general safeguard against . . . trial by legislature.”). Prospective-only death penalty repeal is not a bill of attainder because it does not apply to a particular group of people; it applies to crimes committed before its effective date (assuming the effective date turns on the date of the crime, as in *Connecticut and New Mexico*). Although people currently on death row remain eligible for death, so do those who committed a capital crime prior to repeal but have not yet been charged (e.g., “cold cases”), convicted, or sentenced. Prospective-only repeal therefore applies to more than just those currently on death row. More importantly, prospective-only repeal does not inflict punishment without a judicial trial; it *preserves* punishment *after* a judicial trial. For these reasons, prospective-only death penalty repeal does not violate the Bill of Attainder Clause. Prospective-only repeal also does not violate the Ex Post Facto Clause because it does not “make[] more onerous the punishment for crimes committed before its enactment”; it merely preserves intact the punishment in existence at the time the crime was committed. *Miller v. Florida*, 482 U.S. 423, 435 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 36 (1981), *abrogated on other grounds by* *Collins v. Youngblood*, 497 U.S. 37 (2010), and *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499 (1995) (internal quotation marks omitted), *abrogated on other grounds by Collins*, 497 U.S. 37); *see id.* at 430 (“[W]e have recognized that central to the *ex post facto* prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.” (quoting *Weaver*, 450 U.S. at 30) (internal quotation marks omitted)).

220. *See* Barry, *From Wolves, Lambs (Part II)*, *supra* note 1.

221. CARTER ET AL., *supra* note 19, at 25–26.

222. *Id.* at 26–32.

223. *Id.* at 22–24.

224. *See infra* Subsection III.B.2.c (discussing the *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989) and *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001) cases).

1. Unconstitutional Per Se

In 1976, in *Gregg v. Georgia*²²⁵ and its four companion cases,²²⁶ the Supreme Court addressed the issue of whether the death penalty was per se cruel and unusual punishment in violation of the Eighth Amendment (as applied to the states through the Fourteenth Amendment).²²⁷ The Court answered this question in the negative and upheld three of the five statutes, all of which attempted to alleviate the arbitrariness in sentencing that had led the court to effectively invalidate the death penalty nationwide just four years earlier in the case of *Furman v. Georgia*.²²⁸ Relying in part on the fact that a staggering thirty-five states had reenacted death penalty statutes in the four years since *Furman*,²²⁹ and on the acceptability of the death penalty's penological goals—retribution, deterrence, and incapacitation²³⁰—the Court held both that “the punishment of death does not invariably violate the Constitution” and that it “is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.”²³¹

The Eighth Amendment argument against prospective-only repeal is, in effect, an argument that the death penalty is per se unconstitutional. Accordingly, it should fail under *Gregg*. Those who remain on death row do not share a common characteristic or crime putting them in a class that the Supreme Court considers ineligible for the death penalty: they are not insane,²³² they are not minors,²³³ they do not have an intellectual disability,²³⁴ and they have all committed crimes involving the taking of a life.²³⁵ They are, quite literally, “everyone else.” Their only similarity is that, because of prospective-only repeal, they face the death penalty and all

225. 428 U.S. 153 (1976).

226. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

227. *Gregg*, 428 U.S. at 162 (plurality opinion).

228. *Compare id.* at 207 (holding that the death penalty was not unconstitutional per se and upholding the Georgia death penalty statute as applied in that case), *Proffitt*, 428 U.S. at 242 (upholding the Florida death penalty statute as applied in that case), and *Jurek*, 428 U.S. at 276 (upholding the Texas death penalty statute as applied in that case), with *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (holding that the death penalty was unconstitutional as applied). In two companion cases to *Gregg*, the Court struck down two statutes that made the imposition of the death penalty mandatory for first-degree murder. See *Woodson*, 428 U.S. at 305 (striking down the North Carolina death penalty statute); *Roberts*, 428 U.S. at 336 (striking down the Louisiana death penalty statute).

229. See *Gregg*, 428 U.S. at 179–80.

230. *Id.* at 183 & n.28.

231. *Id.* at 169, 187.

232. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

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

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

235. *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008).

others do not. But the effective date of a statute, without more, is not a meaningful basis for establishing a constitutionally protected class immune from the death penalty. Indeed, it would be the height of irony if, in attempting to maintain the status quo for those on death row, legislators created a catch-all class protected from the death penalty by repealing it prospectively.

An argument against applying the death penalty to the unprotected remainder is therefore an argument that the death penalty cannot be imposed at all, against anyone. While the Supreme Court has “insist[ed] upon confining the instances in which [capital] punishment can be imposed” in recent years,²³⁶ it has never retreated from *Gregg*’s reasoning that the death penalty is constitutional, provided that “the circumstances of the offense,” “the character of the offender,” and “the procedure followed in reaching the decision to impose [the death penalty]” pass muster.²³⁷ None of these caveats are at issue here. It is one thing to say that the death penalty cannot be imposed against any person on death row with an intellectual disability, for example, but quite another to say it cannot be imposed against *any person* on death row—full stop. This would effectively strike down death sentences post-repeal, in contradiction of *Gregg*.

2. Unconstitutional as Applied: *Atkins* and Its Progeny

Since *Gregg*’s rejection of the argument that the death penalty is unconstitutional *per se*, most constitutional challenges to the death penalty have contested the excessiveness of the death penalty as applied to particular classes of defendants and crimes.²³⁸ In 2002, for example, in *Atkins v. Virginia*,²³⁹ the Supreme Court held that it was cruel and unusual to execute a person with an intellectual disability (referred to by the Court as “mental retardation”).²⁴⁰ In its opinion, the Court’s majority articulated a two-prong test to determine whether a punishment is excessive as applied to particular classes of defendants and crimes.²⁴¹

In conducting this two-prong inquiry into the excessiveness of the death penalty, the Court is guided not by the standards that prevailed “when the Bill of Rights was adopted,” or some other time in the past, but rather by “those that currently prevail”; that is, the Court is guided by “the evolving standards of decency that mark the progress of a maturing society.”²⁴² In determining whether the death penalty, as applied, is inconsistent with

236. *Id.* at 420.

237. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion).

238. *CARTER ET AL.*, *supra* note 19, at 26.

239. 536 U.S. 304 (2002).

240. *Id.* at 321.

241. *Id.* at 312–13.

242. *Id.* at 311–12.

evolving standards of decency, the Court first looks to “objective evidence of contemporary values.”²⁴³ This evidence includes jury verdicts as well as “the legislation enacted by the country’s legislatures,” which is “the clearest and most reliable objective evidence of contemporary values.”²⁴⁴ But “objective evidence, though of great importance, d[oes] not ‘wholly determine’ the controversy,”²⁴⁵ even if it evinces a “national consensus.”²⁴⁶ In the end, the Constitution requires that the Court bring its “own judgment . . . to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”²⁴⁷ The court must determine “whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”²⁴⁸

This second prong of the test is subjective.²⁴⁹ In exercising its own judgment, the Court considers whether the death penalty “measurably contributes”²⁵⁰ to one or both of “two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes by prospective offenders.”²⁵¹ Retribution is “the interest in seeing that the offender gets his ‘just deserts’”²⁵² for the “hurt he caused,”²⁵³ it is an expression of the “community’s moral outrage,” “an attempt to right the balance for the wrong to the victim.”²⁵⁴ “[C]ulpability or blameworthiness”²⁵⁵—the offender’s “personal responsibility and moral guilt”²⁵⁶—figure prominently into the Court’s analysis.²⁵⁷ If an offender is less blameworthy, as in the

243. *Id.* at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304 (2002)) (internal quotation marks omitted).

244. *Id.* (quoting *Penry*, 492 U.S. at 331) (internal quotation marks omitted); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (plurality opinion) (“The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.”); *see also id.* at 175 (“[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.” (alteration in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (Burger, C.J., dissenting)) (internal quotation marks omitted)).

245. *Atkins*, 536 U.S. at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

246. *See id.* at 312–13; *see also, e.g., id.* at 314 (using the phrase “national consensus”)

247. *Id.* at 312 (quoting *Coker*, 433 U.S. at 597) (internal quotation marks omitted).

248. *Id.* at 313.

249. *See id.* at 312.

250. *Id.* at 319 (“Unless the imposition of the death penalty on a mentally retarded person ‘measurably contributes’ to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.” (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)) (internal quotation marks omitted)).

251. *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (quoting *Atkins*, 536 U.S. at 319) (internal quotation marks omitted).

252. *Atkins*, 536 U.S. at 319.

253. *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008).

254. *Roper*, 543 U.S. at 571.

255. *Id.*

256. *See id.* at 589 (O’Connor, J., dissenting).

257. *Id.* at 571 (majority opinion); *id.* at 589 (O’Connor, J., dissenting); *see also Atkins*, 536 U.S. at 319 (“[T]he severity of the appropriate punishment necessarily depends on the culpability of

case of a minor or a person with intellectual disabilities, that person is not “the most deserving of execution” and, therefore, retribution is sufficiently served by a less severe punishment.²⁵⁸

Deterrence, on the other hand, is “the interest in preventing capital crimes by prospective offenders.”²⁵⁹ As the Court notes, “[t]he theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.”²⁶⁰ “Although some . . . studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view,” and the Court accepts that “there are murderers . . . for whom . . . the death penalty undoubtedly is a significant deterrent.”²⁶¹ The Court requires at a minimum, though, that future offenders have the capacity to “process the information of the possibility of execution as a penalty and . . . control their conduct based upon that information.”²⁶²

“Unless the imposition of the death penalty on a [prisoner] measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.”²⁶³

In *Atkins*, the Court credited “the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions)” as evincing a “national consensus” against executing people with intellectual disabilities.²⁶⁴ While thirty states prohibited the execution of people with intellectual disabilities, the Court noted that “[i]t is not so much the number of these States that is significant, but the consistency of the

the offender.”).

258. *Atkins*, 536 U.S. at 319; see also *Kennedy*, 554 U.S. at 420 (“[C]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.” (quoting *Roper*, 543 U.S. at 568)).

259. *Atkins*, 536 U.S. at 319.

260. *Id.* at 320.

261. *Gregg v. Georgia*, 428 U.S. 153, 185–86 (1976) (plurality opinion) (footnote omitted), quoted in *Kennedy*, 554 U.S. at 440–41; accord *Roper*, 543 U.S. at 571.

262. *Atkins*, 536 U.S. at 320.

263. *Id.* at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)) (internal quotation marks omitted). Justice Scalia, in his dissenting opinion in *Atkins*, suggested a third social purpose earlier recognized by the Court: “incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.” *Id.* at 350 (Scalia, J., dissenting) (quoting *Gregg*, 428 U.S. at 183 n.28); see *id.* (noting that the majority “conveniently ignores [this] third ‘social purpose’ of the death penalty”).

264. *Id.* at 315–16 (“The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.”).

direction of change.”²⁶⁵ This national consensus, together with the Court’s own judgment that retribution and deterrence were not served by executing a person with reduced cognitive capacity and therefore reduced culpability, led the Court to hold the death penalty unconstitutional as applied to people with intellectual disabilities.²⁶⁶

Employing *Atkins*’ two-part analysis, the Court subsequently struck down the death penalty in two other cases: the first involving children who were under 18 at the time of the offense,²⁶⁷ and the second involving crimes that do not take the life of the victim.²⁶⁸ One might argue that prospective-only repeal is unconstitutional as applied to those currently on death row because it is inconsistent with evolving standards of decency. This argument is unavailing in light of the Supreme Court’s two-pronged test under *Atkins* and its progeny.

a. There Is No National Consensus Against Prospective-Only Repeal

This subsection analyzes state legislation for indications of national consensus regarding prospective-only repeal. Exploring several avenues for comparing states’ application of repeal legislation, it finds, at best, an even split, and concludes that there is no consensus against prospective-only repeal of the death penalty.

i. “45:3”

Thirty-two states retain the death penalty.²⁶⁹ Because the legislatures in these states support the death penalty, it seems far-fetched to think that they would object to prospective-only repeal because it leaves in place the sentences of those on death row. Retentionist states *like* the death penalty, and it is therefore safe to assume that they would find a decision to maintain the state’s death row intact post-repeal to be a rather reasonable compromise—not beyond the pale. In fact, if any of these thirty-two states were to object to prospective-only repeal, it would most likely be for the *opposite* reason—that the death penalty should not be repealed for *anyone*, let alone those currently on death row.

265. *Id.* at 315; Entzeroth, *supra* note 191, at 815 (noting that “eighteen death penalty states and twelve non-death-penalty states prohibited the death penalty against mentally retarded offenders”).

266. *Atkins*, 536 U.S. at 319–20 (“If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. . . . [I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”).

267. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

268. *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008).

269. *States with and Without the Death Penalty*, *supra* note 59.

The eighteen states (plus the District of Columbia) that have abolished the death penalty provide little support for a national consensus against prospective-only repeal. Only three of these states, West Virginia, North Dakota, and New Jersey, unambiguously abolished the death penalty retroactively,²⁷⁰ while three other states, New Mexico, Connecticut, and

270. See Act of Dec. 17, 2007, ch. 204, § 2, 2007 N.J. Laws 1427, 1429–30, available at http://www.njleg.state.nj.us/2006/Bills/PL07/204_.PDF (“An inmate sentenced to death prior to the date of the enactment of this act, upon motion to the sentencing court and waiver of any further appeals related to sentencing, shall be resentenced to a term of life imprisonment during which the defendant shall not be eligible for parole. Such sentence shall be served in a maximum security prison. Any such motion to the sentencing court shall be made within 60 days of the enactment of this act. If the motion is not made within 60 days the inmate shall remain under the sentence of death previously imposed by the sentencing court.”); Act of Mar. 9, 1915, ch. 63, § 1, 1915 N.D. Laws 76, 76 (“Every person *who has been or may be hereafter convicted of murder in the first degree* shall be punished by confinement at hard labor in the State Penitentiary for life.” (emphasis added)); Act of Mar. 12, 1965, ch. 40, 1965 W. Va. Acts 203, 207 (“[N]o person . . . shall be executed, irrespective of whether the crime was committed, the conviction had, or the sentence imposed, before or after the enactment of this section.”). Although the intent of the legislatures in each of these states was clearly to abolish *all* death sentences—both final and not yet final—it is not clear that repeals of final sentences, if challenged, would withstand scrutiny under separation-of-powers principles. Although important, this issue is beyond the scope of this Article.

One might reasonably argue that New Jersey’s repeal was not truly retroactive because it did not simply convert all death sentences to life without parole (LWOP), but rather required inmates on death row to file a court motion and waive further appeals before being resentenced to LWOP. Cf. Historians Brief, *supra* note 1, at 6 (listing only two states, North Dakota and West Virginia, as having explicitly retroactive legislation). This argument has merit. Nevertheless, because New Jersey’s repeal explicitly provided for resentencing death row inmates to LWOP upon fulfillment of certain non-onerous conditions, and because the decision to resentence was to be automatic—not discretionary—the stronger argument is that New Jersey’s repeal was retroactive, albeit less straightforward than North Dakota’s or West Virginia’s repeals. Indeed, in a case that indirectly raised this question, New Jersey’s State’s Attorney did “not dispute that the Legislature clearly intended to retroactively apply the amended sentencing statute to defendants who committed crimes prior to [the 2007 repeal].” *State v. Fortin*, 969 A.2d 1133, 1138 (N.J. 2009). The fact that New Jersey’s governor preemptively commuted the sentences of those on death row immediately prior to repeal—effectively mooted the repeal’s retroactive language—does not alter this conclusion. See *New Jersey*, *supra* note 197. Lawyers for inmates on New Jersey’s death row objected to the repeal statute’s requirement that inmates waive any further appeals on grounds that it was unconstitutional as applied to those who were still contesting guilt and thus punishment. Out of concern that a court would invalidate this provision, thereby leaving those on death row where they sat, Governor Corzine commuted the sentences of those on death row. Email to author (Apr. 15, 2013) (source confidential at request of interviewee; notes on file with author); see also *New Jersey*, *supra* note 197. Further, although New Jersey’s death penalty repeal was not explicitly retroactive as to inmates *awaiting* sentencing, this was strongly implied, as conceded by the State in *Fortin*, 969 A.2d at 1138.

“In 1915, North Dakota [retroactively] abolished the death penalty [for all but] two crimes: treason and murder committed by an inmate already serving a life sentence.” *North Dakota*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/north-dakota-0> (last visited Feb. 28, 2014). When North Dakota completely abolished its death penalty in 1973, it did so prospective-only. See Act of Mar. 15, 1973, ch. 116, §§ 1, 41, 1973 N.D. Laws 215, 216, 300 (replacing the old criminal code with a new criminal code without the death penalty and providing that the new code

Maryland, went the other way—unambiguously abolishing the death penalty prospective-only.²⁷¹

Of the remaining twelve abolitionist states, Massachusetts and New York (and the District of Columbia) did not abolish the death penalty legislatively. Instead, they did so through judicial action (i.e., striking down the death penalty on constitutional grounds) coupled with legislative *inaction* (i.e., failing to resurrect the death penalty).²⁷² Because legislatures and, to a lesser extent, juries (not courts) are the best indicator of evolving standards, these two states and the District of Columbia neither support nor undermine a national consensus against prospective-only repeal. As a result, they should be excluded from the tally.

The remaining ten abolitionist states passed statutes that were silent, or ambiguous at best, as to retroactivity.²⁷³ These states should be considered to be supportive of prospective-only repeal for the following reasons: First, as discussed above, in states with general savings statutes, there is a presumption *against* retroactive application of statutes unless the repeal statute explicitly states otherwise, as was the case in West Virginia, North Dakota, and New Jersey.²⁷⁴ Because all ten states appear to have had general savings statutes at the time of repeal, any ambiguity would have been construed against retroactivity.²⁷⁵ Second, in four states with people

“shall not apply to offenses committed prior to its effective date. Prosecutions for such offenses shall be governed by prior law, which is continued in effect for that purpose”); Rodney S. Webb, *A Prosecutor Looks at the Criminal Code*, 50 N.D. L. REV. 631, 631, 633 (1974) (similar).

271. See *supra* notes 2–3 and accompanying text.

272. See *Massachusetts*, *supra* note 59; *New York*, *supra* note 59; *District of Columbia*, *supra* note 59.

273. Those ten states are Alaska, Hawaii, Illinois, Iowa, Maine, Michigan, Minnesota, Rhode Island, Vermont, and Wisconsin. See *Historians Brief*, *supra* note 1, at 3–5 (compiling abolition statutes); *id.* at 6 (suggesting that statutes in those ten states were silent or ambiguous); see also *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.25 (1988) (compiling abolition statutes).

274. See *supra* note 270 and accompanying text.

275. See *Mitchell*, *supra* note 106, at 47–51 (compiling savings statutes, but excluding Minnesota, among others); MINN. STAT. ANN. § 645.35 (West, Westlaw through 2013 1st Special Sess.) (Minnesota savings statute); accord *Ruud*, *supra* note 76, at 296 & n.54; Comment, *supra* note 15, at 127–28 & nn.51–52. In his 1955 article discussing state savings statutes, Professor Millard H. Ruud noted that the “general statistical data presented here are based upon an examination of the available statutes and not upon a study of all the statutory and case law on the subject in each state,” and is therefore “sufficiently,” but perhaps not “completely” accurate. *Ruud*, *supra*, at 76 n.54. The same caveat applies here. For example, it is not clear when Maine, Michigan, Minnesota, and Vermont enacted their savings statutes, so it is difficult to know whether their statutes were in effect at the time of repeal. Likewise, although Iowa and Vermont have adopted ameliorative amendment exceptions to their general savings statutes, thereby giving retroactive effect to ameliorative legislative changes, it is not clear whether these amendments were in effect at the time of repeal. (Illinois’ ameliorative amendment exception was clearly in effect at the time of its repeal in 2011.) Even assuming that these ameliorative amendments were in effect at the time of repeal, they would have applied only to pre-final judgment defendants, *not to those already on death row*, thereby “resulting in a limited number of defendants being eligible to receive the

on death row at the time of repeal, governors (or, in one state, the Board of Pardons) commuted those death sentences immediately after, or in anticipation of, repeal—proof positive that the repeals were not retroactive.²⁷⁶ If they had been retroactive, there would have been no death sentences to commute. And finally, even if these states' repeals were interpreted to apply retroactively, such an interpretation would most likely have extended only to capital offenders whose sentences had not yet become final.²⁷⁷ Absent language like North Dakota's, West Virginia's, or New Jersey's, these statutes do not evince an intent to abolish the death penalty for all capital offenders.

This means that a total of forty-five states (thirty-two retentionist plus thirteen abolitionist—three of which were clearly prospective-only) support prospective-only repeal; three do not. In *Roper* and *Atkins*, the Court held that thirty states' rejection of the death penalty for juvenile offenders and people with intellectual disabilities, respectively, constituted a consensus against the death penalty.²⁷⁸ Here the complete opposite is true: well over thirty states *support* prospective-only repeal. This is not evidence of a consensus against prospective-only repeal and, in fact, strongly suggests consensus *for* it.

ii. "13:3"

The Court's majority, when surveying the actions of legislatures to discern evolving standards of decency, includes *all* states in their tally, those that have abolished the death penalty as well as those that have not.²⁷⁹ That same reasoning applies here; evolving standards of decency regarding prospective-only repeal should be gauged by looking at both retentionist and abolitionist states. As noted above, this reasoning yields a strong majority of states—forty-five—in favor of prospective-only repeal, and only three against it.

benefits of an ameliorative sentencing change." Mitchell, *supra* note 106, at 20; *see supra* notes 117–18 and accompanying text (noting that courts have not interpreted ameliorative amendments to apply retroactively to final sentences). Because the repeals in Iowa, Vermont, and Illinois were, at best, only partially retroactive—as opposed to those in North Dakota, West Virginia, and New Jersey, which were complete—these three states should be counted as supporting prospective-only repeal.

276. *See* Historians Brief, *supra* note 1, at 3 nn.5–7, 4 nn.11–12 (discussing prospective-only repeals and commutations in Hawaii, Illinois, Iowa, and Minnesota with the commutations in Iowa and Minnesota occurring before repeal).

277. *See supra* note 184 and accompanying text (noting that state courts have interpreted death penalty repeals to apply retroactively only to capital offenders who have not exhausted their direct appeals).

278. *See Roper v. Simmons*, 543 U.S. 551, 564 (2005) (counting thirty states and noting that *Atkins* involved thirty states as well); *see also Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008) (noting that forty-five states' rejection of the death penalty for child rape constituted significant evidence of the national consensus against the practice).

279. *See Roper*, 543 U.S. at 564.

But perhaps including retentionist states in the tally is improper in this context. The fact that thirty-two states retain the death penalty, one might argue, tells us that the *death penalty* is popular—not that prospective-only repeal is popular. As Justice Scalia has reasoned in a slightly different death penalty context, the fact that thirty-two states favor executions says something about consensus for the death penalty, but nothing—“absolutely nothing”—about consensus that those on death row should remain on death row after prospective-only repeal of the death penalty.²⁸⁰

When the thirty-two retentionist states are left out of the tally, thirteen abolitionist states have statutorily abolished the death penalty prospective-only (three of them explicitly), while three others have abolished the death penalty retroactively. Stated another way, approximately 19% of the abolitionist states that have statutorily abolished their death penalties (three out of sixteen) opposed prospective-only repeal. That percentage falls well short of the 47% of retentionist states that opposed the execution of minors and people with intellectual disabilities at the time of *Roper* and *Atkins*, and which the Court used to support finding the death penalty unconstitutional in both cases.²⁸¹ Furthermore, as the Court’s majority has repeatedly stated, “It is not so much the number of . . . States that is significant, but the consistency of the direction of change.”²⁸² The four most recent states to repeal the death penalty legislatively, New Mexico (2009), Illinois (2011), Connecticut (2012), and Maryland (2013), all did so through prospective-only statutes.²⁸³ The direction of change thus points unmistakably toward prospective-only repeal, evincing a trend in favor of the practice or, as Justice Alito might say, perhaps “the beginning of a new evolutionary line.”²⁸⁴

280. *See id.* at 610–11 (Scalia, J., dissenting) (“Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of course they don’t like it, but that sheds no light whatever on the point at issue.”).

281. *See id.* at 564 (majority opinion) (noting that eighteen of thirty-eight retentionist states prohibited execution of juveniles and individuals with intellectual disabilities); *see also id.* at 562 (citing *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989), *abrogated on other grounds by Roper*, 543 U.S. 551, for the proposition that twelve out of thirty-seven retentionist states’ prohibition of execution of people who were seventeen at the time of the offense—or approximately 32% of all retentionist states—was not sufficient to constitute a national consensus against such executions); *Atkins v. Virginia*, 536 U.S. 304, 314 (2002) (citing *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304, for the proposition that two out of thirty-six retentionist states’ prohibition of execution of individuals with intellectual disabilities—or approximately 6% of all retentionist states—was not sufficient to constitute a national consensus against such executions).

282. *E.g.*, *Atkins*, 536 U.S. at 315.

283. *See supra* text accompanying notes 63–66.

284. *Kennedy v. Louisiana*, 554 U.S. 407, 455 (2008) (Alito, J., dissenting). However, in *Kennedy*, the Court held that “six new death penalty statutes, three enacted in the last two years” did not “reflect a consistent direction of change in support of the death penalty for child rape.” *Id.* at

iii. “3:3”

When the six states to have explicitly addressed prospective-only repeal are looked at in isolation—North Dakota (1915), West Virginia (1965), New Jersey (2007), New Mexico (2009), Connecticut (2012), and Maryland (2013)—the percentage of abolitionist states opposing prospective-only repeal increases to 50%; three for prospective-only repeal (New Mexico, Connecticut, and Maryland), and three against (North Dakota, West Virginia, and New Jersey).²⁸⁵ Here, too, the direction of change is significant. In the past five years, no state has repealed the death penalty retroactively and prospectively; rather, three states have explicitly repealed the death penalty prospective-only. At best, these numbers demonstrate no consensus—for or against—prospective-only repeal.

iv. “0:50”

The fact that four states (New Mexico, Illinois, Connecticut, and Maryland) in the past five years—and thirteen states in U.S. jurisprudential history—have abolished the death penalty prospective-only, one might argue, obscures the fact that *not one offender* has apparently ever been executed after prospective-only repeal.²⁸⁶ In Hawaii, Illinois, Iowa, Minnesota, and New Jersey, for example, the governor or board of pardons commuted the sentences of those on death row in anticipation of or immediately following prospective-only repeal.²⁸⁷ In many other abolitionist states, commutation was not necessary because there appears to have been no one on death row at the time of repeal.²⁸⁸ Because apparently no state has ever executed a person on death row post-repeal, one might reasonably argue that New Mexico, Connecticut, and Maryland, all of which have preserved their death rows intact post-repeal, are an anomaly among abolitionist states—not a new evolutionary line entitled to respect.

431–32. This was because the recent trend in favor of the death penalty for child rape was counterbalanced by the total number of states—a whopping forty-four plus the federal government—that had recognized the impropriety of the practice. *See id.* at 423, 426, 431–33. In the prospective-only context, there is no inconsistency between past and present; the recent trend in favor of prospective-only repeals matches the historical trend of prospective-only repeals among states.

285. *See supra* notes 2–3, 60 and accompanying text.

286. Historians Brief, *supra* note 1, at 1, 10.

287. *Id.* at 3 nn.5–7, 4 nn.11–12. *Contra id.* at 5 (mentioning Iowa).

288. *See supra* note 1 (arguing that the dearth of case law addressing challenges to prospective-only repeals suggests that there was no one on death row in some abolitionist states). *See generally* Historian’s Brief, *supra* note 1, at 3–5 (noting that five executives commuted death sentences immediately before or after repeal, and that there is no record of executions being carried out after repeal). Further research into abolitionist states’ death row populations is needed in order to distinguish states in which commutation was not needed because there simply was no one on death row at the time of repeal, from states that had inmates on death row at the time of repeal but refused to sign death warrants.

While this argument has considerable merit, it fails for two reasons. First, consensus about prospective-only repeal is not principally amassed from the whim of boards of pardon and outgoing governors. As the Court has repeatedly stated, it is the country's legislatures (and, to a lesser extent, juries) that are the "clearest and most reliable objective evidence of contemporary values," not its executive officials.²⁸⁹ Although "review of national consensus is not confined to tallying the number of States with applicable death penalty legislation," and therefore includes "[s]tatistics about the number of executions," it is legislation that matters most.²⁹⁰ In *Kennedy*, for example, the infrequent execution of people convicted of child rape "confirm[ed]" the consensus of forty-five jurisdictions with statutes prohibiting the practice.²⁹¹ In *Roper* and *Atkins*, the infrequent execution of juveniles and people with intellectual disabilities, respectively, supported the consensus of thirty jurisdictions with statutes prohibiting the practice.²⁹² Thus, while execution statistics may support a strong demonstration of national consensus as expressed by the acts of the legislature, or "counterbalance an otherwise weak demonstration of [national] consensus"²⁹³ as expressed by the acts of the legislature, they do not substitute for the acts of the legislature. Four states in the past five years, and a majority of all abolitionist states through death penalty history, have abolished the death penalty prospective-only.²⁹⁴ To exalt the infrequency of post-repeal executions over the frequency of legislation repealing the death penalty prospective-only would make execution statistics the tail that wags the dog of national consensus.

Second, giving undue import to execution statistics is particularly inappropriate in the context of prospective-only repeal. Because establishing the effective date of a statute uniquely implicates the

289. *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 312 (2012) ("We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304)); *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (stating that "objective indicia of consensus [are] expressed *in particular* by the enactments of legislatures that have addressed the question" (emphasis added)); *accord Kennedy*, 554 U.S. at 422 ("The existence of objective indicia of consensus . . . was a relevant concern in *Roper*, [and] *Atkins* . . . and we follow the approach of those cases here.").

290. *Kennedy*, 554 U.S. at 426, 433; *cf. Atkins*, 536 U.S. at 323 (Rehnquist, C.J., dissenting) (stating that "the actions of sentencing juries[are] entitled to less weight than legislative judgments").

291. *Kennedy*, 554 U.S. at 433–34 (confirmation); *id.* at 426 (forty-five jurisdictions).

292. *Roper*, 543 U.S. at 564–65; *Atkins*, 536 U.S. at 315–16.

293. *Cf. Kennedy*, 554 U.S. at 431 (noting that the consistent change in direction of legislative support for the death penalty of child rapists "might counterbalance an otherwise weak demonstration of consensus" (citing *Atkins*, 536 U.S. at 315)); *Roper*, 543 U.S. at 565–66 (same).

294. *See supra* Subsection III.B.2.a.i–ii (noting the four recent prospective-only repeals and arguing that thirteen states had prospective-only statutory repeals out of sixteen states with statutory repeals).

lawmaking function, legislatures are not simply the best source for gauging the propriety of prospective-only repeal. They are, in fact, the *only* source. Setting effective dates of legislation (as opposed to considering culpability or other mitigating factors post-sentencing) is not the province of the executive. Legislatures have the discretion to preserve death sentences post-repeal,²⁹⁵ and governors and boards of pardon have “virtually unfettered discretion” to commute those sentences post-repeal.²⁹⁶ Executive officials’ decisions to exercise their discretion (by commuting sentences) do not render legislatures’ decisions to exercise their own discretion (by passing prospective-only laws) unconstitutional. For this reason, it is a mistake to conclude that consensus has evolved against prospective-only repeal based on the absence of people on death row in most abolitionist states.

Atkins and its progeny support this reasoning. In determining whether there was a national consensus against the execution of people with intellectual disabilities, the Court did not scrutinize whether certain states abolished prospective-only, let alone whether the executive in certain states commuted sentences after prospective-only repeal.²⁹⁷ As *Atkins* demonstrates, it is the legislative act of prospective-only repeal that is of primary importance in determining consensus—not the subsequent actions of the executive.

b. Prospective-Only Repeal Furthers Retribution and Deterrence

Both retribution and deterrence are served by prospective-only repeal, which leaves intact the sentences of those already on death row. That such repeals serve only one of these goals is all the Constitution requires.²⁹⁸

As for retribution, consider again the words of Connecticut state

295. See *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (“The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for these are peculiarly questions of legislative policy.” (citation omitted) (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)) (internal quotation marks omitted) (citing *Furman v. Georgia*, 408 U.S. 238, 465–70 (1972) (Rehnquist, J., dissenting))).

296. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292 (1998) (Stevens, J., concurring in part and dissenting in part) (“[A] State . . . unquestionably may allow the executive virtually unfettered discretion in determining the merits of appeals for mercy.”).

297. Compare *Atkins*, 536 U.S. at 314–15 (compiling legislation abolishing the death penalty for people with intellectual disabilities), with *id.* at 342 (Scalia, J., dissenting) (“Not 18 States, but only 7—18% of death penalty jurisdictions—have legislation [forbidding *all* executions of individuals with intellectual disabilities]. Eleven of those that the Court counts enacted statutes prohibiting execution of mentally retarded defendants *convicted after, or convicted of crimes committed after, the effective date* of the legislation; those already on death row, or consigned there before the statute’s effective date, or even (in those States using the date of the crime as the criterion of retroactivity) tried in the future for murders committed many years ago, could be put to death.” (footnote omitted)).

298. See *Atkins*, 536 U.S. at 319 (stating that the death penalty must “measurably contribute[] to one or both of these goals” (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982))).

Senator Edith Prague, who voted for prospective repeal in part to ensure that those responsible for the home invasion and triple murder in Cheshire, Connecticut would remain on death row. “They should bypass the trial,” Senator Prague stated, “and take that second animal and hang him by his penis from a tree out in the middle of Main Street.”²⁹⁹ Although the eleven offenders in Connecticut will not die in so cruel a fashion as envisaged by Senator Prague, the result will be the same—they will get their just deserts; they will be executed, or they will die of old age waiting for that fate. The same can be said for the five men who remain on Maryland’s death row and the two men who remain on New Mexico’s death row post-repeal.

Culpability, moreover, has absolutely no role to play in this context. Unlike youth and disability, which render one less deserving of death, prospective-only repeal does not reduce an offender’s blameworthiness. “[T]he severity of the appropriate punishment,” the Supreme Court has stated, “necessarily depends on the culpability”—not the good fortune—“of the offender.”³⁰⁰ Those who remain on death row post-repeal are unlucky, to be sure, but not less culpable.

A counter-argument is that prospective-only repeal of the death penalty is somehow equivalent to a rejection of the retributive value of the death penalty. This argument has two significant faults. The first is the assumption that death penalty repeal necessarily calls into question the legitimacy of retribution. As the Court stated in the context of civil remedies in *Landgraf v. USI Film Products*, “Statutes are seldom crafted to pursue a single goal.”³⁰¹ The reasons for legislative action are many and varied; they are a dense manifold. This is no less true in the death penalty context. There are many reasons to repeal the death penalty prospective-only, such as avoiding cost,³⁰² preventing false hopes for victims,³⁰³ and

299. *State v. Santiago*, 49 A.3d 566, 696 (Conn. 2012) (Harper, J., concurring in part and dissenting in part) (quoting Sen. Prague) (internal quotation marks omitted).

300. *Atkins*, 536 U.S. at 319. The Court gives no consideration to the fortuity of statutory changes.

301. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994).

302. Lawmakers may rationally seek to avoid the cost of procuring *new* death sentences while maintaining existing death sentences won at significant cost. See CT’s January 2013 Response, *supra* note 78, at 30 (noting “the enormous time, expense and consumption of state resources it takes to prosecute a capital case” as reason to repeal); NM’s January 2011 Response, *supra* note 3, at 11 (noting the “perceived high cost of death penalty litigation” as a “reason for repealing the death penalty”); *cf.* *Kennedy v. Louisiana*, 554 U.S. 407, 458–59 (2008) (Alito, J., dissenting) (discussing state legislatures’ refusal to pass new capital child-rape laws because of “high associated costs” (quoting Tavia D. Green, *Small Victory in Big Fight for Tougher Sex Abuse Laws*, LEAF-CHRON. (May 8, 2008), available at 2008 WLNR 26988729) (internal quotation marks omitted)); Krent, *supra* note 106, at 83 (“[L]egislatures may reduce the penalties for particular crimes, not because of changed circumstances or views of the wrongfulness of the underlying conduct, but for instrumental reasons due to the rising cost of incarceration Such decisions to ameliorate punishment do not necessarily lead to the conclusion that those previously convicted also should have their punishments reduced. A rational legislature could conclude that the social or

eliminating the risk of executing the innocent.³⁰⁴ Such reasons do not call the legitimacy of retribution into question. Indeed, if a legislature believes that the death penalty serves no legitimate retributive purpose, it can amend the constitution or abolish the death penalty prospectively *and* retroactively. Legislatures that repeal prospective-only have deliberately chosen not to do either of these things. Prospective-only repeal is therefore not necessarily a rejection of the death penalty's retributive value—a determination “that the death penalty is intolerable under any and all circumstances.”³⁰⁵ It is not, as Justice Scalia has stated, “a statement of absolute moral repugnance, but one of current preference between two [constitutionally] tolerable approaches”: to keep the death penalty for some or abolish it altogether.³⁰⁶

The second fault is that, even assuming prospective-only death penalty repeal is equivalent to a rejection of the retributive value of the death penalty, it is not a *complete* rejection. It is constitutionally tolerable for a legislature to reject the retributive value of the death penalty going forward but not going backward. A legislature that has come to doubt the retributive value of the death penalty may repeal it for future offenders whose “unidentified and unidentifiable victims . . . live under an altered social contract.”³⁰⁷ At the same time, a legislature may retain it for those who stand outside this “veil of ignorance”—those offenders who were on notice at the time they committed their crimes that death was the punishment, and whose victims are known and now gone.³⁰⁸

Although retribution seems clear enough in this context, deterrence is a

other benefits of the lightened punishment are more important with respect to those sentenced in the future than those sentenced in the past.”).

303. Lawmakers may rationally believe in the state's capacity to keep its “promise” to victims in existing death penalty cases while doubting its capacity to do so in the future.

304. Lawmakers may rationally believe that no one currently on death row is innocent but seek to avoid the potential for error in the future. *Cf.* 2012 S. Sess. Transcript, *supra* note 33 (“[T]here is no one on death row [in Connecticut] who is innocent and . . . there is nothing that could ultimately ever prove their innocence.”).

305. *State v. Rizzo*, 31 A.3d 1094, 1167 n.88 (Conn. 2011).

306. *Id.* (quoting *Atkins v. Virginia*, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting)); *cf.* *Warden v. Marrero*, 417 U.S. 653, 664 (1974) (rejecting argument that, by passing a prospective-only statute removing parole ineligibility, Congress “jettison[ed] the retributive approach of the [repealed] law,” and finding no constitutional infirmity in the statute's prospective-only application), *superseded by statute on other grounds*, Act of Oct. 26, 1974, Pub. L. No. 93-481, 88 Stat. 1455, 1455; Krent, *supra* note 106, at 81 (stating that, “in the Legislature's eyes,” crimes committed before passage of ameliorative legislation “may ‘merit’ different punishment” than identical crimes committed after such legislation because of changed factual circumstances as opposed to morality”).

307. CT's January 2013 Response, *supra* note 78, at 31.

308. *Cf.* Krent, *supra* note 106, at 79–80 (“The fact that norms later change in no way undermines the conclusion that the individual knowingly (depending on the mens rea required) violated a rule of the community. . . . Congress rationally could treat those who knowingly violated a social command differently from those who did not, even though the conduct was the same.”).

somewhat harder case. How, one might ask, can the death penalty deter future offenders if no future offender will ever be put to death? The answer is that by imposing the death penalty against those currently on death row, prospective-only repeal “communicate[s] to all criminals that they will be held to account for their crimes in the manner in which the law provides *when they commit them*.”³⁰⁹ Through prospective-only repeal, the legislature is making absolutely clear to future offenders that it means what it says—that they should be under no illusion that a change in law tomorrow will spare them the consequences of their actions today. Offenders sentenced to death will not benefit from the subsequent repeal of the death penalty, any more than future offenders sentenced to life in prison without the possibility of parole (LWOP) will benefit from some yet-to-be-enacted repeal of LWOP down the road.³¹⁰ “Future offenders beware,” the legislature is saying. “You get what we say you get, not what we say as modified by what we haven’t said yet (in future legislation).”

c. Cases Giving Retroactive Effect to Prospective-Only Repeal Pursuant to the Eighth Amendment or State Corollaries

Few cases address the constitutionality of death sentences post-repeal under the Eighth Amendment or its state corollaries. As discussed above, upon finding that the legislature intended the repeal to be prospective-only, courts have overwhelmingly given effect to the legislature’s intent.³¹¹ In the few cases addressing the constitutionality of death sentences post-repeal, courts have generally upheld those sentences.³¹²

309. NM’s January 2011 Response, *supra* note 3, at 10 (emphasis added); *cf.* *People v. Gilchrist*, 133 Cal. App. 3d 38, 45 (Cal. Ct. App. 1982) (holding that the “disparity created by rendering different sentences after an admittedly arbitrarily chosen date . . . does not violate equal protection principles because of the legitimate public purpose of assuring ‘that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written’” (quoting *In re Kapperman*, 522 P.2d 657, 659 (Cal. 1974))).

310. *Cf.* David R. Dow, *Life Without Parole: A Different Death Penalty*, NATION (Oct. 26, 2012), <http://www.thenation.com/article/170852/life-without-parole-different-death-penalty> (discussing the unfairness of LWOP).

311. *See supra* Subsection III.A.2.a; *cf.* *Dillon v. U.S.*, 130 S. Ct. 2683, 2692 (2010) (“We are aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent . . . [ameliorative] amendments.”); *Hunt v. Nuth*, 57 F.3d 1327, 1335 (4th Cir. 1995) (stating that, by refusing to give retroactive effect to the prospective-only repeal, the Court of Appeals of Maryland had “implicitly held” that there was no constitutional violation).

312. *See, e.g., State v. Keen*, 31 S.W.3d 196, 216–17 (Tenn. 2000) (rejecting Eighth Amendment challenge to death sentence based on prospective-only legislation requiring jury to consider sentencing option of life imprisonment without parole); *Rondon v. State*, 711 N.E.2d 506, 515 (Ind. 1999) (rejecting Eighth Amendment challenge to a death sentence based on a prospective-only repeal of the death penalty for people with intellectual disabilities); *id.* (“We do not find today sufficient objective evidence of contemporary standards of decency which demonstrates that a categorical exemption of the mentally retarded from the death penalty is mandated by the Eighth

Importantly, two state supreme courts have declared the death sentences of those with intellectual disabilities unconstitutional after their legislatures repealed the death penalty prospective-only for such people. In 1989, in *Fleming v. Zant*,³¹³ the Supreme Court of Georgia held that it was cruel and unusual punishment under the Georgia Constitution to execute death row prisoners with intellectual disabilities after Georgia repealed its death penalty prospective-only for people with such disabilities.³¹⁴ While acknowledging the absence of a “national consensus” against the execution of people with intellectual disabilities, the *Fleming* Court found a consensus “among Georgians” based on the state’s (prospective-only) repeal, coupled with the subsequent passage of a Georgia Senate resolution “urging [its] Board of Pardons and Paroles to give special consideration to commuting the sentences of mentally retarded offenders.”³¹⁵ In a vigorous dissent, Justice Smith argued that the majority’s retroactive application of a clearly prospective-only repeal “usurp[ed] legislative power,” upending an “express[ion of] the people’s legitimate concern for finality.”³¹⁶ “Senate resolutions,” Justice Smith further argued, “do not express the will of the majority of the citizens of this State; they express the will of the Senator or Senators who introduced them” and therefore do not support retroactive

Amendment.”); *see also* *Allen v. State*, 686 N.E.2d 760, 786 (Ind. 1997) (stating that there may be a moral argument for exempting “mentally retarded criminals from the death penalty,” but the legislature and the Governor specifically legislated “a statute of repose for claims of mental retardation in capital cases . . . rather than amending the Constitution or leaving the act open-ended for judicial interpretation”), *abrogated on other grounds by Atkins*, 536 U.S. 304; *infra* notes 358–61 and accompanying text (discussing *State v. Alcorn*’s rejection of an Eighth Amendment challenge to a prospective-only law that allowed the jury to consider the sentencing option of LWOP); *cf.* *United States v. Santana*, 761 F. Supp. 2d 131, 162 n.28 (S.D.N.Y. 2011) (rejecting argument that “there is an Eighth Amendment violation from sentences under the [repealed statute] because such sentences would no longer serve any of the permissible purposes of criminal punishment (retribution, deterrence, etc.). Simply put, the import of *Marrero* is that if Congress does not expressly provide that it intends the new law to be applied retroactively, then there is no frustration of the purposes behind the new law, or, therefore, anything improper, in not applying it retroactively” (citation omitted)).

313. 386 S.E.2d 339 (Ga. 1989).

314. *Id.* at 343 (“[W]e conclude that the execution of mentally retarded offenders violates the Georgia constitutional guarantee against cruel and unusual punishment.”); *see id.* (Smith, J., dissenting) (“[T]he legislature specifically limited the applicability of the statute to ‘the trial of any case in which the death penalty is sought which commences on or after July 1, 1988’” (second alteration in original) (quoting statute repealing death penalty for persons with intellectual disabilities)). The court’s decision in *Fleming* to apply a prospective-only repeal retroactively to people with intellectual disabilities is in striking contrast with its 1966 decision in *Cobb v. State*, 152 S.E.2d 403 (Ga. 1966), in which it refused to give retroactive effect to a prospective-only repeal of the death penalty for people who were less than seventeen years of age at the time of their offense. *See supra* note 152 and accompanying text.

315. *Fleming*, 386 S.E.2d. at 342.

316. *Id.* at 343–44 (Smith, J., dissenting) (“It is not this Court’s prerogative to determine social policies; the power to determine policy questions rests in the legislative branch, not the judicial branch.”).

application.³¹⁷

In 2001, in *Van Tran v. State*,³¹⁸ the Tennessee Supreme Court went further, holding that it was cruel and unusual punishment under both the Tennessee *and* federal constitutions to execute death row prisoners with intellectual disabilities after Tennessee repealed the death penalty prospective-only for people with such disabilities.³¹⁹ In that case, the court relied on a *national* consensus against the execution of people with intellectual disabilities, as evidenced by, among other things, Tennessee's (prospective-only) repeal of the practice, other states' repeals, public opinion polls, and jury sentencing data showing an opposition toward the practice.³²⁰ The court also relied on the lack of penological objectives served by the death penalty in this context, given the reduced culpability of people with intellectual disabilities.³²¹

Two other cases involving the retroactive application of prospective-only death penalty repeals deserve mention. In 1989, in *Cooper v. State*,³²² the Indiana Supreme Court held that it was "inappropriate" to execute a death row prisoner who committed her crime at the age of fifteen after Indiana repealed the death penalty prospective-only for people who were minors at the time of the offense.³²³ Invoking the "more intensive level of scrutiny" demanded by its state constitution in capital sentencing decisions,³²⁴ the court concluded that the defendant "would be both the *first and the last* person ever to be executed in Indiana for a crime

317. *Id.* at 344.

318. 66 S.W.3d 790 (Tenn. 2001).

319. *Id.* at 809 ("[W]e hold that the execution of mentally retarded individuals fails to achieve legitimate penological objectives for punishment as required by the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution."). Unlike *Fleming*, the repeal statute at issue in *Van Tran* was silent as to retroactivity—not explicitly prospective-only. *See id.* at 797 (stating that the repeal statute "provided only an effective date of July 1, 1990, and it contained no other specific language requiring retroactive application").

320. *Id.* at 801–04. The court also ostensibly relied on a consensus within Tennessee. *Id.* at 804–05.

321. *Id.* at 806–09.

322. 540 N.E.2d 1216 (Ind. 1989).

323. *Id.* at 1219 ("This act does not apply to a case in which a death sentence has been imposed before September 1, 1987." (quoting An Act to Amend the Indiana Code Concerning Children Accused of Murder, Pub. L. No. 332, § 3, 1987 Ind. Acts 3040, 3043)). Legislative history further clarified that the repeal was intended to be prospective-only. *See id.* ("The bill's sponsors declared openly that [the prospective-only provision] was purposeful. . . . [I]t was apparent that the authors wished to enact a general policy without the passion that legislating on a particular case would arouse."). The court's decision in *Cooper* that it was "inappropriate" to execute a person who was a minor at the time of the crime is in striking contrast with its decision ten years later in *Rondon v. State*, 711 N.E.2d 506 (Ind. 1999), in which it refused to give retroactive effect to a prospective-only repeal of the death penalty for people with intellectual disabilities. *See supra* note 151 and accompanying text.

324. *Cooper*, 540 N.E.2d at 1218; *see id.* (noting "[t]he thoroughness and relative independence of this Court's review" of death sentences).

committed at the age of 15,” which “ma[de] her sentence unique and disproportionate to any other sentence for the same crime.”³²⁵ Significantly, the court did not find the sentence to be cruel and unusual under the state constitution; rather, its decision was based on its mandatory review of “whether the sentence of death is appropriate” in light of mitigating and aggravating circumstances.³²⁶

In reliance on *Cooper*, the Indiana Supreme Court in *Saylor v. Indiana*³²⁷ held that it was “inappropriate” to execute a person who was sentenced to death by a judge over a unanimous jury recommendation against death after Indiana eliminated such overrides prospective-only.³²⁸ Of particular importance to the court was the fact that the prisoner was “one of only three individuals currently under a death sentence despite a jury’s recommendation to the contrary.”³²⁹

In *Fleming*, *Van Tran*, and *Cooper*, state legislatures repealed the death penalty prospective-only for those whose particular characteristic—intellectual disability or age—reduced their culpability and susceptibility to deterrence.³³⁰ In *Fleming* and *Van Tran*, the courts held that a consensus—either state or national—had emerged against execution of those who shared the characteristic, thereby making it cruel and unusual to execute them.³³¹ In *Cooper*, the Indiana Supreme Court took a different tack, holding that it was “inappropriate” (but not cruel and unusual) under its state constitution’s heightened standard of review to execute a person who was fifteen at the time of the offense.³³² Taken together, these cases stand for an unremarkable proposition: a characteristic that diminishes culpability and susceptibility to deterrence must diminish it for *all* who share that characteristic.³³³ This proposition has no traction here.

325. *Id.* at 1219–20 (emphasis added).

326. *Id.* at 1218 (“The object of this review is to assure consistency in the evenhanded operation of the death penalty statute.”). The court also found the execution to be in violation of the Eighth Amendment, but grounded its analysis in Justice O’Connor’s concurring opinion in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), which declared that it is unconstitutional to execute a person under a death penalty statute that, like Indiana’s, “specifies no minimum age at which the commission of a capital crime can lead to the offender’s execution.” *Id.* at 1220–21 (“We are persuaded that Indiana’s statute fits under *Thompson v. Oklahoma* and violates the eighth amendment of the United States Constitution.”).

327. 808 N.E.2d 646 (Ind. 2004).

328. *Id.* at 650–51; see IND. CODE ANN. § 35-50-2-9(e) (West, Westlaw through 2013 legislation) (“For a defendant sentenced after June 30, 2002, . . . if the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed. . . . If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly.”).

329. See *Saylor*, 808 N.E.2d at 651.

330. See *supra* notes 313–26 and accompanying text.

331. See *supra* notes 313–21 and accompanying text.

332. See *supra* notes 322–26 and accompanying text.

333. Cf. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“Unless the imposition of the death

In the context of prospective-only repeal of the death penalty *in toto*, there simply is no shared characteristic that reduces offenders' culpability or undermines the goal of deterrence. In fact, prospective-only repeal has nothing to do with offenders' characteristics at all. Rather, it has to do with the wisdom of the death penalty going forward—a “complex factual issue the resolution of which properly rests with the legislatures.”³³⁴ In sum, prospective-only repeal of the death penalty, unlike characteristics such as youth or intellectual disability, does not undermine offenders' personal responsibility for their crimes or the deterrent impact of their punishment. The penological goals of retribution and deterrence are served by imposition of the death penalty against those sentenced to death, whether carried out before or after repeal.

Among the cases in which courts have given retroactive effect to prospective-only repeals under the Eighth Amendment or its state corollaries, *Saylor* is perhaps the most difficult to distinguish. In that case, the statutory text was absolutely clear and there was no mitigating characteristic at issue like age or disability.³³⁵ What appears to have been at the heart of the court's decision was fundamental fairness—that “common-law principle [with a] . . . constitutional dimension,”³³⁶ which requires “that government minimize arbitrariness in its dealing with individual citizens.”³³⁷ Given the sympathetic facts of that case, which involved a unanimous jury recommendation against death and the defendant's being one of just three people under a death sentence despite a jury recommendation to the contrary, the court relied on its “intensive” standard of appellate review to remedy the perceived unfairness.³³⁸

3. Unconstitutional as Applied: *Furman* Arbitrariness

In addition to the Supreme Court's *Atkins* line of cases, one might argue that, under *Furman v. Georgia*, prospective-only repeal is unconstitutional as applied to those currently on death row because of its

penalty on a mentally retarded person ‘measurably contributes to one or both of the[] goals [of retribution or deterrence], it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.’” (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

334. See *Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (plurality opinion), *quoted in Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008).

335. See *supra* notes 327–29 and accompanying text.

336. James R. Zazzali et al., *Panel II: The Death Penalty on Appeal: Constitutionality, Equality, and Proportionality Review*, 33 SETON HALL LEGIS. J. 95, 97–98 (2008).

337. *State v. Ramseur*, 524 A.2d 188, 319 (N.J. 1987) (Handler, J., dissenting).

338. *Saylor v. Indiana*, 808 N.E.2d 646, 650–51 (Ind. 2004). For in-depth discussions of fundamental fairness in the context of prospective-only death penalty repeal, see generally Barry, *From Wolves, Lambs (Part II)*, *supra* note 1, and ACLU-CT Brief, *supra* note 90, at 3–8; see also *infra* notes 377–80 and accompanying text; *supra* note 209 (discussing Judge Lumpkin's dissents rejecting a fundamental fairness argument in the context of prospective-only repeal).

arbitrary and capricious selection of those to be executed.³³⁹ In *Furman*, five justices, each writing separately, agreed that, in the absence of standards to guide capital sentencing, the imposition of death is arbitrary and capricious in violation of the Eighth Amendment's prohibition on cruel and unusual punishment.³⁴⁰ Justice Stewart stated:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [P]etitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.³⁴¹

Justice White likewise decried the lack of any “meaningful basis for distinguishing the few cases in which [the death penalty was] imposed from the many cases in which it [was] not.”³⁴² For Justice Brennan, “the conclusion [wa]s virtually inescapable that [the death penalty was] being inflicted arbitrarily. Indeed, it smack[ed] of little more than a lottery system.”³⁴³ For this and other reasons, Justice Brennan concluded, the death penalty was unconstitutional *per se*.³⁴⁴

Of particular concern to the two remaining justices in the majority was the complexion of the “random handful”³⁴⁵ on death row. According to Justices Douglas and Marshall, the death penalty was “pregnant with discrimination,” disproportionately targeting poor people and people of

339. See 408 U.S. 238, 239–40 (1972) (per curiam) (holding “the death penalty in these cases” unconstitutional), *construed in* CARTER ET AL., *supra* note 19, at 23–24 (recognizing the “dominant theme . . . [as] the arbitrary and capricious imposition of the death penalty.”).

340. See *id.*; see also CARTER ET AL., *supra* note 19, at 23–24. Although this “arbitrary and capricious” rationale also sounds in due process, *Furman* was decided under the Eighth Amendment (as applied to states through the Fourteenth Amendment). See *Furman*, 408 U.S. at 240. In *McGautha v. California*, 402 U.S. 183 (1971), *reh'g granted and vacated on other grounds by* Crampton v. Ohio, 408 U.S. 941 (1972), a case decided just one year before *Furman*, the Court held that standardless capital sentencing did *not* violate the Due Process Clause. See *id.* at 207 (“In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.”); see also *Lockett v. Ohio*, 438 U.S. 586, 599 (1978) (plurality) (“Thus, what had been approved under the Due Process Clause of the Fourteenth Amendment in *McGautha* became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in *Furman*.”).

341. *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

342. *Id.* at 313 (White, J., concurring).

343. *Id.* at 293 (Brennan, J., concurring).

344. *Id.* at 305 (“The punishment of death is therefore ‘cruel and unusual,’ and the States may no longer inflict it as a punishment for crimes.”).

345. *Id.* at 248 n.11 (Douglas, J., concurring).

color—an arbitrary and capricious criteria for death if ever there was one.³⁴⁶ “Regarding discrimination,” Justice Marshall wrote, “it has been said that ‘[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society’s sacrificial lamb.’”³⁴⁷ Like Justice Brennan, Justice Marshall concluded that the death penalty was therefore unconstitutional per se.³⁴⁸

Given the majority’s concerns in *Furman*, one might reasonably argue that nothing could be more arbitrary and capricious than allowing eligibility for the death penalty to depend on the date of one’s crime. Despite its superficial appeal, this argument misunderstands *Furman*’s reach. At issue in *Furman* was whether the discretion of juries was adequately channeled, “thereby reduc[ing] the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary.”³⁴⁹ As the Court subsequently explained in *Gregg*, a case in which it upheld the constitutionality of Georgia’s death penalty sentencing procedures:

Furman mandates that where discretion is afforded a *sentencing body* on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

. . . .
 . . . [T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the *sentencing authority* is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.³⁵⁰

The operative term here is “sentencing authority.” The *Furman* Court was concerned that *juries*’ “unbridled discretion in determining the fates of those charged with capital offenses” created “a substantial risk that the

346. *Id.* at 257; *see id.* at 364 (Marshall, J., concurring).

347. *Id.* at 364 (Marshall, J., concurring) (quoting *Hearings on S. 1760 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. of the Judiciary*, 90th Cong. 11 (1968) (statement of Michael V. DiSalle, Chairman, Nat’l Comm. to Abolish the Death Penalty)).

348. *Id.* at 358–59 (Marshall, J., concurring) (“[T]he death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment.”).

349. *Gregg v. Georgia*, 428 U.S. 153, 194–95 (1976) (plurality opinion).

350. *Id.* at 189, 195 (emphasis added).

punishment will be inflicted in an arbitrary and capricious manner.”³⁵¹ Importantly, the Court was not concerned with the discretion of *legislatures* to change their sentencing laws. And for good reason. As noted by one of *Furman*’s four dissenters, the legislature possesses a

wide range of power . . . to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency[.]

. . . [L]egislative judgments as to the efficacy of particular punishments are presumptively rational and may not be struck down under the Eighth Amendment because this Court may think that some alternative sanction would be more appropriate.

. . . To do so is to usurp a function committed to the Legislative Branch and beyond the power and competency of this Court.³⁵²

This general warning applies with special force to prospective-only repeal, by which the legislature has decided to abolish the death penalty on a selective basis. Again, one of the *Furman* dissenters stated:

The legislatures are free to eliminate capital punishment for specific crimes *or to carve out limited exceptions to a general abolition of the penalty*, without adherence to the conceptual strictures of the Eighth Amendment. . . . If legislatures come to doubt the efficacy of capital punishment, they can abolish it, either completely *or on a selective basis*. . . . An Eighth Amendment ruling by judges cannot be made with such flexibility or discriminating precision.³⁵³

Because the legislature’s decision to repeal a law has nothing to do with a jury’s decision to sentence a person to death, and has everything to do with the separation of powers between the judicial and legislative branches, *Furman* is inapplicable to prospective-only repeal. As the Court in *Gregg* made clear, if “the sentencing authority is apprised of the information relevant to the imposition of [a] sentence and provided with standards to

351. *California v. Brown*, 479 U.S. 538, 541 (1987) (citing *Gregg*, 428 U.S. 153 (plurality opinion) and *Furman*, 408 U.S. 238); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion) (citing *Gregg*, 428 U.S. at 189 (plurality opinion) and *Furman*, 408 U.S. 238); *see also id.* at 428 (“It must channel the sentencer’s discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death.” (footnotes omitted) (internal quotations marks omitted)).

352. *Furman*, 408 U.S. at 432, 456, 458 (Powell, J., dissenting).

353. *Id.* at 403–04 (Burger, J., dissenting) (emphasis added).

guide its use of the information,” the risk of an arbitrary and capricious sentence in violation of the Eighth Amendment is removed.³⁵⁴ The sentence does not suddenly become arbitrary and capricious because the legislature decides to repeal the death penalty prospective-only at some later date. In short, *Furman* concerns whether a jury’s sentence of death was arbitrary and capricious, not whether a state’s eventually carrying out that sentence might be.

The absurdity of applying *Furman* to prohibit execution post-repeal is clear when one considers the risks at stake. The risk that concerned the majority in *Furman* was that the procedures used to sentence a person to death were arbitrary and “pregnant with discrimination,” thereby rendering the sentence constitutionally defective.³⁵⁵ In the prospective-only repeal context, the risk is not that the death sentence is somehow defective, but that it will be carried out at all. This, of course, is not the kind of “risk” that bothered the Court in *Furman*. It is not arbitrary and capricious for a state to actually do what the jury has directed it to do; the fact that a state has abolished the death penalty going forward at the time it carries out a jury’s sentence does not change this determination.

Indeed, it is no more arbitrary and capricious for a legislature to maintain its death row intact after prospective-only repeal than it is for one state to abolish and another to retain the death penalty. As Justice Burger stated in *Furman*, the fate of those on death row is “controlled by a fortuitous circumstance,” but “this element of fortuity” does not render the death penalty’s imposition arbitrary and capricious.³⁵⁶ These decisions are the exclusive prerogative of state legislatures and, while they may be inconsistent, they are not constitutionally defective, “for no human institution performs with perfect consistency.”³⁵⁷ Were the Eighth Amendment to require this kind of absolute consistency, the death penalty would not be permitted in *any* state under *any* circumstances.

Furthermore, a determination that prospective-only repeal is arbitrary and capricious as applied to those on death row, when taken to its logical conclusion, would mean that every prospective-only change in sentencing law that reduces punishment for a particular crime necessarily violates the Eighth Amendment. This has never been the law. As discussed above, the rules of statutory construction suggest exactly the opposite.³⁵⁸ The case of *State v. Alcorn* is instructive on this point.³⁵⁹ In that case, the defendant argued that application of a savings clause “resulted in arbitrary or capricious application of the death penalty and thus cruel and unusual

354. *Gregg*, 428 U.S. at 195 (plurality opinion).

355. *See supra* notes 341–48 and accompanying text.

356. *Furman*, 408 U.S. at 389 (Burger, J., dissenting).

357. *Cf. id.* (discussing consistency with regard to juries).

358. *See supra* Subsection III.A.1.

359. 638 N.E.2d 1242 (Ind. 1994).

punishment” because it denied him the benefit of “jury instructions on life imprisonment without parole . . . based simply on an arbitrary fact that the crime occurred before June 30, 1993.”³⁶⁰ The court rejected this claim, holding that “[t]he mere application of the saving clause will not result in cruel and unusual punishment.”³⁶¹

In the end, an Eighth Amendment challenge to prospective-only repeal on the grounds that it is arbitrary and capricious is really an equal protection claim in disguise, and should be analyzed as such.³⁶² Indeed, “[the Court] h[as] never before held it to be cruel and unusual punishment to impose a sentence in violation of some *other* constitutional imperative.”³⁶³ Although the Eighth Amendment proves a limited vehicle for challenging prospective-only repeal, a companion article, *From Wolves, Lambs (Part II): The Fourteenth Amendment Case for Gradual Abolition of the Death Penalty*, concludes that the Fourteenth Amendment is weaker still.³⁶⁴ Prospective-only repeal is constitutional under the Equal Protection and Due Process Clauses.

4. Policy Considerations Regarding the Eighth Amendment’s Reach

Policy considerations undergirding the Court’s Eighth Amendment analysis also support prospective-only repeal. In its death penalty jurisprudence, both the Court’s majority and its dissenters have expressed dueling concerns over the reach of the Eighth Amendment. The dissenters warn that “[t]he Eighth Amendment is not a ratchet”; standards of decency do not necessarily evolve toward abolition, they may also evolve the other way.³⁶⁵ “[T]emporary consensus on leniency for a particular crime,” as Justice Scalia originally stated, does not “fix[] a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.”³⁶⁶ Were that the case, the Court in *Furman* would have declared the death penalty unconstitutional per se after executions dramatically declined after World War II and ground to a

360. *Id.* at 1246.

361. *Id.*

362. *See Furman*, 408 U.S. at 390 (Burger, J., dissenting) (“It must be noted that any equal protection claim is totally distinct from the Eighth Amendment question Evidence of a discriminatory pattern of enforcement does not imply that any use of a particular punishment is so morally repugnant as to violate the Eighth Amendment.”).

363. *Atkins v. Virginia*, 536 U.S. 304, 352 (Scalia, J., dissenting); *cf. Kennedy v. Louisiana*, 554 U.S. 407, 464 (Alito, J., dissenting) (“[T]he Eighth Amendment provides a poor vehicle for addressing problems regarding the admissibility or reliability of evidence . . .”).

364. *See Barry, From Wolves, Lambs (Part II)*, *supra* note 1.

365. *See, e.g., Kennedy*, 554 U.S. at 466 (Alito, J., joined by Roberts, C.J., and Scalia and Thomas, JJ., dissenting) (alteration in original) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (Scalia, J.)) (internal quotation marks omitted); *see also Atkins*, 536 U.S. at 349 (Scalia, J., dissenting) (same).

366. *Harmelin*, 501 U.S. at 990 (Scalia, J.), *quoted in Kennedy*, 554 U.S. at 466 (Alito, J., joined by Roberts, C.J., and Scalia and Thomas, JJ., dissenting).

halt beginning in 1968.³⁶⁷ “The mistaken premise of the decision,” Justice O’Connor has stated, “would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.”³⁶⁸

The majority, on the other hand, advances the opposite concern. When it comes to the death penalty, the Eighth Amendment is not too strong (a “ratchet” in the dissenter’s usage); rather, it can never be strong enough. Given its “unique . . . severity and irrevocability,”³⁶⁹ the Court must be “most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty. . . . [D]ecency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.”³⁷⁰ Accordingly, the Court’s job, as the majority sees it, is to be a formidable gatekeeper, “confining the instances in which capital punishment may be imposed.”³⁷¹ If the screw is to be turned away from abolition, it must be for a very good reason.

Prospective-only repeal upsets neither the majority’s nor the dissenters’ view of the Eighth Amendment. Prospective-only repeal is not, after all, an “extension of the death penalty.”³⁷² It is exactly the opposite—a retraction of the death penalty, albeit a measured one. Therefore, it would be strange for courts to object to prospective-only repeal on the same grounds that the Supreme Court in *Kennedy* objected to a law that made rape punishable by death.³⁷³ The former abolishes the death penalty while preserving the status quo for those on death row; the latter radically alters the status quo by expanding the list of crimes punishable by death.

Striking down prospective-only repeal as applied to those on death row, moreover, would lead to the very result criticized by the dissenters. It would prevent states “from giving effect to altered beliefs” (that those on death row should die, but no one else should) and freeze into constitutional law a standard (“Complete repeal or no repeal”) that some states do not share.³⁷⁴ If prospective-only repeal is prospective in name only, these states may simply choose not to abolish the death penalty at all, thereby fossilizing their standard of decency rather than allowing it to evolve. As

367. *See Atkins*, 536 U.S. at 345 (Scalia, J., dissenting) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 854–55 (1988) (O’Connor, J., concurring in the judgment)).

368. *Id.* (quoting *Thompson*, 487 U.S. at 855 (O’Connor, J., concurring in the judgment)).

369. *Kennedy*, 554 U.S. at 437 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion)) (internal quotation marks omitted).

370. *Kennedy*, 554 U.S. at 435 (internal quotation marks omitted) (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

371. *Id.* at 437; *see also id.* at 420.

372. *Id.* at 435.

373. *See id.* at 437, 441 (“[T]he death penalty should not be expanded to instances where the victim’s life was not taken. . . . Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure.”).

374. *See id.* at 466 (Alito, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (Scalia, J.)) (internal quotation marks omitted).

an en banc panel of the Sixth Circuit recently acknowledged in the non-capital context, the “Eighth Amendment is not a ratchet that makes a harsher system of penalties unconstitutional the moment a more lenient one is (prospectively) adopted, a theory that would have the perverse effect of discouraging lawmakers from *ever* lowering criminal sentences.”³⁷⁵

To further the dissenters’ analogy, prospective-only repeal will not loosen the screw one iota; it will not cause abolition’s frame to come tumbling down. It merely allows states to turn the screw at their own pace, and to gather more hands to do so. If prospective-only repeal is not permitted, courts will not only have required states to use a ratchet (in the sense that the screw must turn *toward* abolition, not away), but to ratchet with a zeal that outpaces the ratcheter (in the sense that the screw must turn toward prospective *and* retroactive abolition). Ironically, this may leave retentionist states without the hands needed to perform the task before them; they may forgo picking up their tools altogether, stunting progress that might otherwise have been made. The House of Abolition needs walls, and prospective-only repeal is one way to build them.

5. Summary of Eighth Amendment Analysis

Prospective-only death penalty repeal does not violate the Eighth Amendment. Because the death penalty remains constitutional *per se*, the Eighth Amendment permits states to abolish the death penalty without wiping their death rows clean. Although the death penalty has been found unconstitutional as applied in a variety of circumstances, those circumstances do not apply here. First, unlike in *Atkins*, there is no national consensus against prospective-only repeal; in fact, recent repeals in New Mexico, Illinois, Connecticut, and Maryland suggest the opposite to be true. And because those remaining on death row post-repeal share no unifying characteristic that diminishes their culpability or susceptibility to deterrence, legitimate penological goals are served by preserving their death sentences intact. Second, unlike in *Furman*, the death sentences at issue are not “pregnant with discrimination”; they were arrived at under a constitutional scheme and they remain constitutional post-repeal.

CLOSING ARGUMENT

Over the past five years, a new trend has emerged in death penalty abolition—that of gradual abolition. State legislatures in New Mexico, Connecticut, and Maryland have abolished the death penalty prospective-only, that is, for everyone in the future, and the executive in each state has

375. *United States v. Blewett*, Nos. 12-5226, 12-5582, 2013 WL 6231727, at *13 (6th Cir. Dec. 3, 2013) (“Withholding the benefits of a change from previously sentenced defendants at any rate is not ‘unusual,’” the Sixth Circuit further noted, but rather “is the general practice in federal sentencing, as *Dorsey* and § 109 confirm.”).

been unwilling or unable to commute the sentences of those on death row. As a result, a total of eighteen men in New Mexico, Connecticut, and Maryland remain on death row post-repeal.

This Article answers three fundamental questions raised by prospective-only death penalty repeal. The first question is a pragmatic one that is being asked by advocates of abolition: Is prospective-only repeal helpful to abolition? This Article concludes that it is. Prospective-only repeal is a retraction of the death penalty, albeit a measured one. States like New Mexico, Connecticut, and Maryland *are* evolving, one might say; they are just doing it more slowly. Some advocates will say that supporting prospective-only repeal is equivalent to “betting against one’s own horse,” but this depends on how one characterizes the horse. If the horse is a prisoner who remains on death row post-repeal, it is true that prospective-only repeal does not help him. But then again, prospective-only repeal does not hurt him either. It does not accelerate in the slightest his march to the death chamber; all it does is preserve the status quo. If, on the other hand, the horse is a Supreme Court decision declaring the death penalty unconstitutional *per se*, prospective-only abolition is a better bet. Thirty-three states retain the death penalty and all of them have prisoners on death row.³⁷⁶ Odds are good that prospective-only repeal will be an enticing option for many of these states. While abolition’s principles may be at odds with prospective-only repeal, abolition’s progress may not be.

The second question is a moral one, which has been advanced by legislators on both sides of the death penalty debate: Is prospective-only repeal morally coherent? In other words, is it moral to cast a vote that will prohibit the death penalty for some but not all? This Article concludes that while it may be immoral to *punish* people with death, prospective-only repeal is not about punishment; it is about *ending* punishment. By retaining the death penalty for some so that no others will ever face a similar fate, legislators arguably transform an immoral punishment into a moral sacrifice. This is the uneasy morality of gradual abolition; by dying, those on death row destroy the death penalty.

The third and last question is a legal one to be decided by the courts: Is prospective-only repeal permissible under the law? This Article concludes that, as a matter of statutory construction, clearly prospective-only repeals are not given retroactive effect. Constitutional questions are admittedly less straightforward, especially given the novelty of legal challenges to prospective-only death penalty repeal. Nevertheless, the overwhelming weight of authority suggests that prospective-only repeal is on firm ground. Under the Eighth Amendment, the death penalty remains constitutional *per se*, and an “as-applied” challenge under *Atkins* or *Furman* fares no better. There simply is no national consensus against prospective-only repeal.

376. *Death Row Inmates by State*, *supra* note 4.

Most legislatures have abolished the death penalty prospective-only. Although some executives have commuted the sentences of those remaining on death row post-repeal, others have kept their death rows intact. Furthermore, the “group” to which the death penalty is to be applied post-repeal has been sentenced under a constitutional, non-arbitrary scheme, and its members share no characteristic diminishing their culpability. A companion article, *From Wolves, Lambs (Part II): The Fourteenth Amendment Case for Gradual Abolition of the Death Penalty*, concludes that prospective-only repeal is likewise constitutional under the Fourteenth Amendment’s Equal Protection and Due Process Clauses.

The strongest basis for striking down prospective-only repeal is fundamental fairness—that “penumbral right reasonably extrapolated from other specific constitutional guarantees,”³⁷⁷ which is “at the heart of Anglo-American law and . . . independently influence[s] the construction and application” of the law.³⁷⁸ For hundreds of years, courts have permitted the State to kill its killers; now courts will have to decide whether the State can sacrifice them. As Justice Thurgood Marshall observed in *Furman*, the Constitution does not look kindly on states that make “sacrificial lambs” of their citizenry.³⁷⁹ If fundamental fairness prohibits anything, it may well prohibit this.³⁸⁰

And so Abolition’s eyes are now on Connecticut. As I have previously observed:

If the Connecticut Supreme Court applies Connecticut’s death penalty repeal retroactively, it will be reason to rejoice. It means that the court has defied its own precedent and the precedent of other federal and state courts, and has discovered a ram in the thicket of death penalty jurisprudence, a better angel to avert the sacrifice.

But if the Connecticut Supreme Court upholds the death penalty in this case, we should not lament. Instead, it is time for the gradualists to move. Bottle prospective repeal and sell it to every state with the death penalty. And as we use prospective repeal to win states to the abolitionist cause, let us use every tactic we can to delay to the executions of those who remain on death row. Delay them long enough to win over that magic number of states that will lead the U.S. Supreme Court to abolish the death penalty for good.³⁸¹

377. *State v. Abbati*, 493 A.2d 513, 519 (N.J. 1985).

378. *Moran v. Ohio*, 469 U.S. 948, 955 (1984) (Brennan, J., joined by Marshall, J., dissenting); see also *supra* notes 335–74 and accompanying text (discussing fundamental fairness).

379. See *supra* note 347 and accompanying text.

380. For an in-depth discussion of this argument, see Barry, *From Wolves, Lambs (Part II)*, *supra* note 1.

381. Barry, *supra* note 91.