

The Death Penalty & the Dignity Clauses

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“The question now to be faced is whether American society has reached a point where abolition is not dependent on a successful grass roots movement in particular jurisdictions, but is demanded by the Eighth Amendment.” Justice Thurgood Marshall posed this question in 1972, in his concurring opinion in the landmark case of Furman v. Georgia, which halted executions nationwide. Four years later, in Gregg v. Georgia, a majority of the Supreme Court answered this question in the negative.

Now, 40 years after Gregg, the question is being asked once more. But this time seems different. That is because, for the first time in our Nation’s history, the answer is likely to be yes. The Supreme Court, with Justice Kennedy at its helm, is poised to declare the death penalty unconstitutional. No matter what the Court’s answer, one thing is certain: dignity will figure prominently in its decision.

Dignity’s doctrinal significance has been much discussed in recent years, thanks in large part to the Supreme Court’s watershed decisions in United States v. Windsor and Obergefell v. Hodges, which struck down laws prohibiting same-sex marriage as a deprivation of same-sex couples’ dignity under the Fourteenth Amendment. Few, however, have examined dignity as a unifying principle under the Eighth and Fourteenth Amendments—which have long shared a commitment to dignity—and under the Court’s LGBT rights and death penalty jurisprudence, in particular, which give substance to this commitment. That is the aim of this Article.

This Article suggests that dignity embodies three primary concerns—liberty, equality, and life. The triumph of LGBT rights under the Fourteenth Amendment and the persistence of the death penalty under the Eighth Amendment expose a tension in dignity doctrine: the most basic aspect of dignity (life) receives the least protection under the law. Because dignity doctrine demands liberty and equality for LGBT people, it must also demand an end to the death penalty. If dignity means anything, it must mean this.

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In anticipation of the Court's invalidation of the death penalty on dignity grounds, this Article offers a framework to guide the Court, drawn from federal and state supreme court death penalty decisions new and old, statistics detailing the death penalty's record decline in recent years, and the Court's recent LGBT rights jurisprudence. It also responds to several likely counterarguments and considers abolition's important implications for dignity doctrine under the Eighth Amendment and beyond.

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I. INTRODUCTION

*“I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the [condemned]”*¹

In 2011, a man named James Obergefell and his dying partner, John Arthur, were wed in a medical transport plane on a tarmac in Maryland.² Their home state of Ohio did not permit the two men to be married, so they traveled to Maryland—one of a handful of states that did.³ John died three months later.⁴ On his Ohio death certificate, James was not permitted to be listed as the surviving spouse; the two men were “strangers even in death.”⁵ On June 26, 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court held that state laws prohibiting recognition of same-sex marriages are unconstitutional.⁶ According to the Court, there is dignity in the freedom to marry, and in equal treatment under our marriage laws—a dignity the Constitution protects.⁷ To prohibit marriage is to deny that dignity in violation of the Constitution.

On September 30, 2015, the State of Georgia executed Kelly Gissendaner for recruiting a man with whom she was romantically involved to murder her husband, Douglas.⁸ During her 18 years on death row, Kelly graduated from a theology program in prison and mentored other female prisoners.⁹ She sought, and eventually received, the forgiveness of her and Douglas’ three children, whose pleas for commutation were rejected by Georgia’s parole

1. William J. Brennan, Jr., *The 1986 Oliver Wendell Holmes, Jr. Lecture, Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 331 (1986). Interestingly, and perhaps significantly, Justice Brennan used the word “victim” to refer to the condemned person. *See id.* at 330–31 (“A punishment is ‘cruel and unusual’ if it does not comport with human dignity. The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person’s humanity and thus violates the command of the eighth amendment.”). To avoid confusion between the condemned person and the victim of the crime for which the person was condemned, I have substituted “condemned” for “victim.”

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 2604–05.

7. *See id.* at 2608.

8. Tracy Connor et al., *Georgia Woman Kelly Gissendaner Sings ‘Amazing Grace’ During Execution*, NBC NEWS (Sept. 30, 2015, 8:41 AM), <http://www.nbcnews.com/storyline/lethal-injection/pope-urges-halt-execution-georgia-woman-kelly-gissendaner-n435566> (“She was the first woman executed in Georgia in 70 years and one of a handful of death-row inmates who were executed even though they did not physically partake in a murder.”).

9. *Id.*

board.¹⁰ As reported by a witness to the execution, Kelly was very emotional prior to the execution. “She was crying and then she was sobbing and then [she] broke into [*Amazing Grace*] as well as into a number of apologies When she was not singing, she was praying.”¹¹

Kelly Gissendaner’s execution is upsetting to some, but not for the reasons we often associate with the death penalty. She was not a person of color like so many on death row; she was white.¹² She was not innocent, like the 156 people who have been exonerated from death row; she was guilty of the crime for which she was convicted (although she did not actually commit the murder—her former boyfriend did).¹³ The 18-year period she spent on death row was not beyond the pale; it was average.¹⁴ And her execution was not botched; she was killed without incident.¹⁵ Her execution is upsetting for the same reason that Ohio’s refusal to recognize James Obergefell’s marriage to John Arthur is upsetting—it is a humiliation, a deprivation of dignity. It is not, however, unconstitutional. The Constitution is not violated by strapping a sobbing, praying woman to a gurney and killing her.¹⁶ Kelly Gissendaner’s execution, in the wake of James Obergefell’s soaring legal victory, brings into stark relief dignity’s uncertain place in our constitutional scheme.

Some argue that dignity has absolutely no place in our constitutional scheme. Chief Justice Roberts and Justice Thomas certainly seem to think so. The Constitution contains no “dignity clause,” they say.¹⁷ As a textual matter,

10. *Id.*; see also Moni Basu, *Clemency Board to Review Decision as Children Plead for Death Row Woman’s Life*, CNN (last updated Sept. 28, 2015, 5:17 PM), <http://www.cnn.com/2015/09/27/us/georgia-sets-execution> (discussing children’s support for clemency for Gissendaner).

11. Connor et al., *supra* note 8.

12. Compare *id.*, with DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1–2 (2016), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (showing the number of black people on death row (43%), and the number of black people executed (34.5%)), and *QuickFacts: United States*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Oct. 24, 2016) (stating that in 2015, black people accounted for 13.3% of U.S. population).

13. Compare Connor et al., *supra* note 8 (discussing Gissendaner’s execution), with *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Oct. 24, 2016) (listing exonerations of people on death row).

14. Compare Connor et al., *supra* note 8 (discussing Gissendaner’s execution), with *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting) (citing the statistic that “[i]n 2014 . . . executions occurred, on average, nearly 18 years after a court initially pronounced its sentence of death”).

15. Compare Connor et al., *supra* note 8 (discussing Gissendaner’s execution), with Michael L. Radelet, *Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last visited Oct. 24, 2016) (listing and describing botched executions).

16. See Connor et al., *supra* note 8 (discussing Gissendaner’s execution).

17. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting) (“There is, after all, no ‘Companionship and Understanding’ or ‘Nobility and Dignity’ Clause in the

the Justices are correct.¹⁸ But as a matter of doctrine, they could not be more wrong. Over the past 70 years, the Court has used the word “dignity” in over 400 cases interpreting a diverse array of constitutional amendments.¹⁹ In the Eighth and Fourteenth Amendment contexts, in particular, which are the focus of this Article, dignity has been the touchstone for measuring the limits of governmental power for approximately the past half-century.²⁰ The dissenting Justices’ protestations notwithstanding, the Eighth Amendment’s cruel and unusual punishment clause and the Fourteenth Amendment’s Due Process and Equal Protection Clauses *are*, as a matter of doctrine, the “Dignity Clauses;” their interpretation tells much about what dignity “is and must become”—about “the Nation we have been, the Nation we are, and the Nation we aspire to be.”²¹

It is only a matter of time before the Supreme Court takes up the question posed by Justice Thurgood Marshall over 40 years ago, in his concurring opinion in the watershed case of *Furman v. Georgia*: “whether American society has reached a point where abolition [of the death penalty] is not dependent on a successful grass roots movement in particular jurisdictions, but is

Constitution.”); *id.* at 2639 (Thomas, J., dissenting) (“[T]he Constitution contains no ‘dignity’ Clause, and even if it did, the government would be incapable of bestowing dignity.”).

18. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1736 (2008) (observing that “[t]he United States Constitution does not have a dignity clause”).

19. See Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178–79 (2011) (“In the last 220 years, Supreme Court Justices have invoked the term in more than nine hundred opinions. The Justices issued nearly half of these opinions after 1946, when the phrase ‘human dignity’ first appeared in an opinion, with more than one hundred opinions authored in the last twenty years alone.” (footnotes omitted)); see also Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 23 (2015) (arguing that “the conception of equal dignity” is not “mere rhetoric,” but “in fact has a considerable doctrinal pedigree, one stretching across some of the most high-profile cases decided by the Court in the past half-century”); Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3087–88 (2014) (“[S]ince the 1940s . . . [t]he Court has deployed the term in a wide array of contexts, and Justice Kennedy appears to be particularly drawn to it. . . . Justice Kennedy has deployed the word ‘dignity’ repeatedly in cases ranging from prison conditions to partial-birth abortions.” (footnotes omitted)).

20. See Henry, *supra* note 19, at 178–81; see also *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (discussing dignity under the Due Process Clause), *overruled in part by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion); *Duncan v. Louisiana*, 391 U.S. 145, 212 (1968) (Fortas, J., concurring) (“It is the progression of history, and especially the deepening realization of the substance and procedures that justice and the demands of human dignity require, which has caused this Court to invest the command of ‘due process of law’ with increasingly greater substance.”); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (discussing dignity under the Equal Protection Clause); *Trop v. Dulles*, 356 U.S. 86, 99–100 (1958) (discussing dignity under Eighth Amendment).

21. *Obergefell*, 135 S. Ct. at 2603; *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014); see also *supra* note 17 and accompanying text (discussing dissenters’ views in *Obergefell*).

demanded by the Eighth Amendment.”²² Three recent legal developments suggest that the time is near.²³ On July 16, 2014, in *Jones v. Chappell*, the U.S. District Court for the Central District of California held that California’s imposition of the death penalty violates the Eighth Amendment based on the extraordinary, decades-long delay that precedes execution in the state.²⁴ The Ninth Circuit reversed the district court’s decision on procedural grounds, never reaching the merits.²⁵ A year after the district court’s decision in *Chappell*, on June 29, 2015, in *Glossip v. Gross*, a 5 to 4 majority of the U.S. Supreme Court rejected a challenge to Oklahoma’s lethal-injection protocol.²⁶ In a 42-page dissenting opinion citing *Chappell*, Justice Breyer, joined by Justice Ginsburg, argued that it is “highly likely that the death penalty violates the Eighth Amendment” for a litany of reasons, and invited full briefing on the issue.²⁷ And just eight weeks after *Glossip*, the Connecticut Supreme Court handed down a sweeping decision in *State v. Santiago*, which ruled Connecticut’s 400-year-old death penalty cruel and unusual in violation of the state’s constitution.²⁸ It is the third state high court in history to do so.²⁹

Although the answer to Justice Marshall’s question is subject to debate, one thing is certain: when the Court considers the constitutionality of the death penalty, dignity will figure prominently. This Article offers four insights on dignity and the death penalty.

22. *Furman v. Georgia*, 408 U.S. 238, 341–42 (1972) (Marshall, J., concurring); *see also Defendants Begin Systemic Challenges to Constitutionality of Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6313> (last visited Oct. 24, 2016) (discussing nationwide per se challenges to death penalty).

23. *See* Richard C. Dieter, *The Future of the Death Penalty in the United States*, 49 U. RICH. L. REV. 921, 921 (2015) (“There are . . . concrete reasons to believe that the story of the death penalty in the United States may be approaching its final chapter.”); *see also* The Editorial Board, Editorial, *The Death Penalty Endgame*, N.Y. TIMES (Jan. 16, 2016), <http://www.nytimes.com/2016/01/17/opinion/sunday/the-death-penalty-endgame.html> (stating that the Supreme Court may be on the verge of ending the death penalty); Robert J. Smith, *The End of the Death Penalty?*, SLATE (July 1, 2015, 1:37 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/07/death_penalty_at_the_supreme_court_kennedy_may_vote_to_abolish_capital_punishment.html (“[I]t is no longer unthinkable that there are five votes for ending the death penalty.”).

24. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1067 (C.D. Cal. 2014).

25. *Jones v. Davis*, 806 F.3d 538, 553 (9th Cir. 2015) (holding that the court could not assess on habeas review the validity of a prisoner’s novel claim of unconstitutional systemic delay).

26. *Glossip v. Gross*, 135 S. Ct. 2726, 2746 (2015).

27. *Id.* at 2776–77 (Breyer, J., dissenting).

28. *See State v. Santiago*, 122 A.3d 1, 84–85 (Conn. 2015). Connecticut’s legislature repealed the death penalty prospectively only in 2012, leaving 11 men on death row. *Connecticut*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/connecticut-1> (last visited Oct. 25, 2016). In *Santiago*, the court struck down the death penalty entirely and, with it, the death sentences of the 11 men. *Santiago*, 122 A.3d at 9.

29. *See id.* at 218 (Zarella, J., dissenting) (stating that, in addition to Connecticut, California and Massachusetts are “the only two jurisdictions in which the state’s highest court had deemed the death penalty facially unconstitutional”).

The first considers the concept of dignity. As Professor Kenji Yoshino has discussed in the Fourteenth Amendment context, the concept of dignity embodies both liberty and equality concerns.³⁰ They are, in his words, like two “horses that r[u]n in tandem.”³¹ Relying on the work of Professor Reva Siegel, this Article supplements Professor Yoshino’s account by arguing that the concept of dignity embodies a third concern—life.³² It further argues that there is a hierarchy among these concerns; they form three concentric rings, with life at the center. We have intrinsic value as human beings (dignity of life), we have equal value to other human beings (dignity of equality), and we also have certain freedoms as human beings (the dignity of liberty).

A second insight considers the doctrine of dignity. Although much has been said about the concept of dignity over the years, far less has been said about its application to law.³³ As a result, the doctrine of dignity “has gone largely unanalyzed” in legal scholarship.³⁴ But this is changing. With the triumph of LGBT rights—and the achievement of marriage equality, in particular—all eyes are rightly on dignity. Over the past several years, legal commentary has filled the void by examining what some have referred to as the Supreme Court’s “jurisprudence of dignity.”³⁵

Many commentators have discussed dignity in the context of LGBT rights under the Fourteenth Amendment, while others have discussed dignity in the context of the death penalty under the Eighth Amendment.³⁶ Few, however, have pointed to dignity as a unifying principle in the Court’s LGBT rights and death penalty jurisprudence, and virtually none have done so post-*Windsor* and *Obergefell*.³⁷ Although Professor Yoshino has argued that the concept of dignity extends beyond the law of due process and equal protection to the Eighth Amendment and the death penalty,³⁸ his comments were “tantalizingly brief”³⁹—and for good reason. His focus was the advancement of

30. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) (stating that an “overarching term like ‘dignity’ . . . acknowledges the links between liberty and equality”).

31. *Id.* at 781.

32. Siegel, *supra* note 18, at 1737 (discussing “three distinct usages of dignity in the substantive due process and equal protection cases: dignity as life, dignity as liberty, and dignity as equality”).

33. See Henry, *supra* note 19, at 175–76.

34. *Id.* at 176.

35. See generally Henry, *supra* note 19; see also Tribe, *supra* note 19, at 23 (defending dignity’s “considerable doctrinal pedigree”).

36. See *infra* notes 74–75 and accompanying text.

37. See *infra* notes 76–77 and accompanying text.

38. Yoshino, *supra* note 30, at 791.

39. See Yoshino, *supra* note 19, at 3082 (referring to Professor Bruce Ackerman’s discussion of the nexus between Ackerman’s anti-humiliation principle and human dignity).

constitutional civil rights under the Fourteenth Amendment, not abolition of the death penalty.⁴⁰

This Article supplements his analysis by examining the intersection between the Eighth and Fourteenth Amendments, which have long shared a commitment to dignity, and between the Court's LGBT rights and death penalty jurisprudence, in particular, which gives substance to this commitment.⁴¹ In the LGBT rights context, the dignity of liberty means autonomy with respect to certain intimate conduct, including sex (*Lawrence*) and marriage (*Obergefell*), and, more broadly, freedom from laws whose essence is to disparage and injure (*Windsor*).⁴² The dignity of equality means not being singled out for harm—for example, not being written out of antidiscrimination laws (*Romer*), branded a criminal (*Lawrence*), or denied the benefits of marriage (*Windsor* and *Obergefell*).⁴³ In the death penalty context, the dignity of liberty means freedom from a method of execution that is inherently barbaric (*Baze* and *Glossip*); the dignity of equality means that the administration of the death penalty must not be arbitrary (*Furman*); and the dignity of life means that the death penalty must not be imposed on certain less culpable offenders and for certain less serious crimes (*Furman*, *Atkins*, *Roper*, *Louisiana*, and *Hall*).⁴⁴ Critically, the Court has not yet recognized an *unqualified* dignity of life: the Court has never found the death penalty to be inherently cruel and unusual.⁴⁵

The third insight is both normative and predictive. The triumph of LGBT rights under the Fourteenth Amendment and the persistence of the death penalty under the Eighth Amendment exposes a tension in dignity doctrine: the most basic aspect of dignity (life) receives the least protection under the law.⁴⁶ Because dignity demands liberty and equality for LGBT people, it must also demand an end to the death penalty.⁴⁷ If dignity means anything, it must mean this.

40. See *id.* at 3082–83; see also Tribe, *supra* note 19, at 17 (stating that the Court's LGBT rights jurisprudence “fashioned a major shift in constitutional doctrine . . . that will have ramifications in many cases to come” under the Fourteenth Amendment).

41. See *infra* Part III.

42. See *infra* Part III.A.1.

43. See *infra* Part III.A.2.

44. See *infra* Part III.B.

45. Compare *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015) (citing cases that have held “capital punishment is not *per se* unconstitutional”), with *Furman v. Georgia*, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (noting a “fundamental inconsistency” between society's assertion of “the dignity of the individual . . . [as a] supreme value” and “the practice of deliberately putting some of its members to death”).

46. See *infra* Part IV.

47. Cf. Brennan, *supra* note 1, at 331 (juxtaposing the prohibition of racial segregation and the persistence of the death penalty, characterizing the “momentous” insight “that separate can never be equal” as a “building block[] of progress” upon which abolition of the death penalty would be built). Courts, practitioners, and commentators have begun drawing connections between the advancement of LGBT rights and the end of the death penalty—a trend that is likely

This Article argues that the Supreme Court should—and soon will—bring coherence to dignity doctrine by finding the death penalty unconstitutional on dignity grounds. As Professor Yoshino has written, “when Justice Kennedy ascribes dignity to an entity, that entity generally prevails.”⁴⁸ Justice Kennedy authored the Court’s opinions in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, all of which ruled in favor of LGBT people on dignity grounds.⁴⁹ He also authored the Court’s opinions in *Roper*, *Louisiana*, and *Hall*, all of which limited the expansion of the death penalty on dignity grounds.⁵⁰ Given Justice Kennedy’s affinity for dignity, this Article predicts that the Court, with Justice Kennedy at the helm, will declare the death penalty unconstitutional on dignity grounds.⁵¹ In anticipation of this holding, this Article offers a framework to guide the Court, drawn from federal and state supreme court death penalty decisions new and old, statistics detailing the death penalty’s record decline in recent years, and the Court’s recent LGBT rights jurisprudence.⁵² It also anticipates some likely objections to the Court’s invalidation of the death penalty.⁵³

A final insight considers dignity doctrine after the death penalty. Judicial abolition of the death penalty on dignity grounds may well be the criminal law’s *Lawrence*, loosening the linchpin that currently sustains racially disparate sentencing, solitary confinement, and even life without the possibility of parole.⁵⁴ Abolition will also fortify dignity’s doctrinal significance, pushing it beyond the Eighth and Fourteenth Amendments toward its rightful place at the center of American constitutional law.⁵⁵

Part II of this Article examines the tripartite concept of dignity: liberty, equality, and life. Part III turns to the Supreme Court’s doctrine of dignity

to continue. *See, e.g.*, *State v. Peeler*, 140 A.3d 811, 838 n.6 (Conn. 2016) (Robinson, J., concurring) (stating that death row inmates’ “life interest” in abolition of death penalty “differ[s] only in kind, and not degree” from LGBT couples’ interest in recognition of same-sex marriage); Petitioner’s Motion to Reopen Post-Conviction Petition at 21, 27, *Wright v. Tennessee* (5th Cir. Ct. Davidson, Cnty. Tenn. June 21, 2016) (No. 84-F-1624) [hereinafter *Wright Motion*] (on file with author) (stating that “[j]ust as no state can deny the fundamental right to marry, *a fortiori*, no state can deny the fundamental right to life, which is *the* fundamental human right and provides the predicate for the exercise of all other rights,” and arguing that the court “should conclude that *Obergefell* establishes a new substantive rule of constitutional law that recognizes [death row prisoner’s] fundamental right to life and human dignity, and precludes the state from taking that right away”); Robert Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment* 45 (2016) (unpublished manuscript) (on file with author) (“[T]he ascendancy of constitutional liberty [and dignity] in the marriage doctrine . . . can foretell to some degree the likely direction of the Court’s developing Eighth Amendment doctrine.”).

48. Yoshino, *supra* note 19, at 3088.

49. *See infra* Part III.A.

50. *See infra* Part III.B.3.i.

51. *See infra* Part IV.

52. *See infra* Part IV.A.

53. *See infra* Part IV.B.

54. *See infra* Part V.

55. *See infra* Part V.

under the Fourteenth Amendment's Due Process and Equal Protection Clauses and the Eighth Amendment's "cruel and unusual punishment" clause. Part IV discusses the incoherence between the triumph of LGBT rights and the persistence of the death penalty, predicts the Supreme Court's invalidation of the death penalty on dignity grounds, and discusses some likely counterarguments. Part V considers abolition's possible implications for dignity doctrine, and Part VI offers some concluding remarks.

II. THE CONCEPT OF DIGNITY

Dignity is a concept as compelling as it is elusive.⁵⁶ Theologians, moral philosophers, and sociologists, among others, have debated its usefulness for some time, praising it as an essential "value underlying [over 200 years] of moral and political thought," or dismissing it as a useless proxy for moral intuitions and feelings.⁵⁷ This Article does not plumb the depths of this debate, nor does it need to.⁵⁸ While dignity's finer contours are not always easy to discern, its basic shape is clear enough.

At bottom, dignity is our inherent worth as human beings—what Professor Reva Siegel has called "the inherent worth of a life."⁵⁹ It is the understanding that, as human beings, we all have worth; none of us is worthless—better off dead or not having been born at all.⁶⁰ It does not necessarily mean being equal, nor does it necessarily mean being free.⁶¹ It

56. For a helpful discussion of dignity generally, see Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 777 (2006); Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. L.J. 39, 40 (2014); and Tribe, *supra* note 19, at 20 (discussing dignity's "multifarious history," rooted in "premodern, hierarchical society in which only the nobility were deemed to possess dignity," "the Christian notion of grace," "Kant's liberal universalism, best captured in his famous maxim that human individuals should be treated as ends in themselves, and never as means to an end," and international human rights discourse).

57. See Henry, *supra* note 19, at 172–75; Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity'*, ATLANTIC (Apr. 29, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796> ("The word dignity eludes narrow definition, or for that matter, any generally agreed upon definition.").

58. For a helpful summary of this debate, see Henry, *supra* note 19, at 172–75, 181–82.

59. Siegel, *supra* note 18, at 1738 (discussing dignity as "the inherent worth of a life" in the context of Fourteenth Amendment abortion jurisprudence); see also *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (discussing dignity as one's "intrinsic worth as [a] human being[]" in the context of Eighth Amendment death penalty jurisprudence).

60. See, e.g., *Furman*, 408 U.S. at 273 (Brennan, J., concurring) (stating that, as "human being[s] possessed of common human dignity," we are not "objects to be toyed with and discarded"); Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145, 171 (Michael J. Meyer & William A. Parent eds., 1992) (describing dignity as "the right to one's status as a moral being, a right that is implied in one's being a possessor of any rights at all. . . . The possession of such a right is a consequence of one's status as a person" (quoting Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 270 (1981))).

61. See Siegel, *supra* note 18, at 1738–39 (discussing dignity as life, as liberty, and as equality).

means being. This is dignity in its most primordial form. It is, literally, our birthright: the dignity of life.⁶²

A second aspect of dignity is equality.⁶³ Not only are we not worthless—we are not worth *less* than others. Dignity is equal value as a human being. It is not being hated, or what Professor Siegel calls “the right of persons to be respected as an equal member of the polity rather than denigrated, subordinated, or excluded.”⁶⁴ This is dignity once removed. It means more than having some bare minimum value as a human being (what I am calling the “dignity of life”); it means having value equal to all other human beings.⁶⁵ But it is not all encompassing; equality permits negative treatment so long as *all* are negatively treated—not some. Its proscription boils down to this: “We’re in this together.”

A third aspect of dignity is liberty.⁶⁶ As people with equal value, there are limits to the harms that may be imposed on us. Dignity is autonomy; it is freedom from those harms that make us the object of another’s will.⁶⁷ This is dignity at an even higher level of generality, dignity’s outer rim.⁶⁸ We have intrinsic value as human beings (dignity of life), we have equal value to other human beings (what I am calling the “dignity of equality”), and we also have liberty—what Professor Siegel calls “the right of individuals to be self-governing and self-defining” (what I am calling the “dignity of liberty”).⁶⁹

The dignity of life, equality, and liberty interact. They reduce to what Professors Bruce Ackerman and Kenji Yoshino suggest is the right not to be humiliated,⁷⁰ whether that humiliation arises from the infliction of death, unequal treatment, or equally harmful treatment.

62. Cf. *Screws v. United States*, 325 U.S. 91, 133 (1945) (Rutledge, J., concurring) (discussing “the right which comprehends all others, the right to life itself”); *Commonwealth v. O’Neal*, 327 N.E.2d 662, 668 (Mass. 1975) (“[T]he right to life is the basis of all other rights and in the absence of life other rights do not exist.”); Daniel G. Bird, Note, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329, 1354 (2003) (“Formalistically, life cannot be less fundamental than any specific liberty interest held to be fundamental because dying deprives one of the ability to exercise such rights.”).

63. See Siegel, *supra* note 18, at 1739.

64. *Id.*

65. See *id.*

66. See *id.* at 1738–39.

67. See *id.* at 1738.

68. See Yoshino, *supra* note 30, at 776, 793 (stating that liberty analysis “draws on a broader, more inclusive form of ‘we’” than equality analysis, and “stresses the interests we have in common as human beings rather than the demographic differences that drive us apart”).

69. Siegel, *supra* note 18, at 1738.

70. Yoshino, *supra* note 19, at 3082 (discussing Ackerman’s anti-humiliation principle, asking “what, after all, is the opposite of ‘humiliation’ but ‘dignity?’”); see also William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 60, at 62 (defining dignity as “a negative moral right not to be regarded or treated with unjust personal disparagement”); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1943 (1991) (arguing that modern shaming sanctions, whose principal purpose is to humiliate, represent a “potential assault on human

Life, equality, and liberty, in that order, form dignity's three concentric rings—with life at its center. The reason for this hierarchy is straightforward: if our lives have no value, and we should just as soon be dead, we are obviously neither equal nor free. Extinguishment of life is the ultimate humiliation.⁷¹ Importantly, the converse is not true: if our lives do have value—dignity's rock bottom—then equality and liberty may, but not must, follow. Put another way, being equal and free necessarily means being alive, but being alive does not necessarily mean being equal or free.

III. THE DOCTRINE OF DIGNITY

While much has been written about the concept of dignity, far less has been said about its application to law—the doctrine of dignity.⁷² But this is changing. Over the past several years, many commentators have discussed how dignity has driven the Court's LGBT rights jurisprudence under the Fourteenth Amendment.⁷³ Others have discussed how dignity has driven the Court's death penalty jurisprudence under the Eighth Amendment.⁷⁴ Some, including Professor Yoshino, have gone further, suggesting a connection between the two.⁷⁵ Few, however, have examined dignity as a unifying principle in LGBT rights and death penalty jurisprudence post-*Windsor* and

dignity"); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1164 (2004) (equating dignity to protection "from shame and humiliation").

71. See *Furman v. Georgia*, 408 U.S. 238, 291 (1972) (Brennan, J., concurring) ("[T]he deliberate extinguishment of human life by the State is uniquely degrading to human dignity."); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 467 (2005) (discussing how the death penalty is a form of degradation at odds with broader precepts of retributive justice and collective dignity); see also MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 203–06 (2004) (discussing shame, humiliation, and embarrassment in the context of social issues).

72. See Henry, *supra* note 19, at 175–76 ("[D]ignity's growing presence in Supreme Court decisions has received scant attention.").

73. See, e.g., 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 304–09 (2014); Yoshino, *supra* note 19, at 3084–86; see also Tribe, *supra* note 19, at 22–23 (discussing dignity's "considerable doctrinal pedigree," which is "most apparent in the gay-rights triptych of [*Lawrence*, *Windsor*, and *Obergefell*]").

74. See, e.g., Bedau, *supra* note 60, at 151–61; Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1935 (2003) (stating that "the concept of dignity as a personal attribute of humans has become central to elaborating the meaning of the Eighth Amendment," particularly in the death penalty context); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 771–74 (2005) (discussing "the claim that, unlike many ordinary punishments, [the death penalty] violates human dignity").

75. See Yoshino, *supra* note 30, at 791–92 (gesturing to a connection between dignity in the Fourteenth Amendment LGBT rights context and the Eighth Amendment death penalty context); see also, e.g., Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381, 403–11, 418 (2011) (discussing dignity in LGBT rights and death penalty contexts); Goodman, *supra* note 56, at 772–78 (same); Henry, *supra* note 19, at 211–12, 223–25 (same).

Obergefell.⁷⁶ That is the aim of this Part, which discusses how the tripartite concept of dignity (liberty, equality, and life) guides death penalty and LGBT rights jurisprudence under the Eighth and Fourteenth Amendments.⁷⁷ As this jurisprudence makes clear, dignity is not a constitutional right,⁷⁸ but is instead a core value “underlying, or giving meaning to, existing constitutional rights and guarantees”⁷⁹—“a lens through which to make sense of the [Constitution’s] structural and individual rights guarantees.”⁸⁰ Like the invisible matter that holds our universe in place, dignity is the foundation for our constellation of rights.⁸¹

A. DIGNITY AND THE FOURTEENTH AMENDMENT

Professor Laurence Tribe has likened the Fourteenth Amendment’s Due Process and Equal Protection Clauses to a legal “double helix,” tightly wrapped around a core of dignity.⁸² As his metaphor suggests, the concept of dignity underlies the Constitution’s protection of liberty under the Due Process Clause and equality under the Equal Protection Clause.⁸³ To keep

76. For a thoughtful and concise discussion of this issue, see Smith, *supra* note 23. See also *Wright Motion*, *supra* note 47, at 2 (arguing that the death penalty violates death row prisoner’s “basic human dignity and fundamental right to life” under *Obergefell*); Smith & Robinson, *supra* note 47, at 45–52 (discussing the “symbiotic” nature of the Supreme Court’s substantive due process and Eighth Amendment jurisprudence, and arguing that the Court’s reliance on “constitutional liberty (and the synonymous value of dignity)” in striking down prohibitions on same-sex marriage portend the end of the death penalty and other harsh punishment practices).

77. Although the *concept* of dignity suggests a hierarchy among liberty, equality, and life, see *supra* Part II (discussing hierarchy), the *doctrine* of dignity does not. Where dignities compete under the law, such as in the abortion and right-to-die contexts, the hierarchy does not—and, indeed, should not—always hold. See *infra* note 153 and accompanying text (discussing competing dignities in the abortion and right-to-die contexts); see also Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 174–75, 178–79 (2015) (discussing the role of anti-subordination in the Court’s right-to-life and abortion decisions).

78. But see Rosen, *supra* note 57 (arguing that Justice Kennedy and the Court’s majority has “constitutionaliz[ed] . . . a right to dignity,” which “may lead to results in the future that liberals come to regret” (emphasis added)).

79. Goodman, *supra* note 56, at 743.

80. Siegel, *supra* note 18, at 1736; see also *Screws v. United States*, 325 U.S. 91, 135 (1945) (Murphy, J., dissenting) (discussing “all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution”); Parent, *supra* note 70, at 47 (discussing dignity as “the fundamental value underlying the U.S. Constitution”).

81. Cf. Dennis Overbye, *Tantalizing New Clues into the Mysteries of Dark Matter*, N.Y. TIMES (April 3, 2013), <http://www.nytimes.com/2013/04/04/science/space/new-clues-to-the-mystery-of-dark-matter.html> (describing “dark matter” as “the mysterious stuff that serves as the gravitational foundation for galaxies”).

82. Tribe, *supra* note 19, at 17.

83. See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) (discussing “the Constitution’s elusive but unquestionably central protections of liberty, equality, and—underlying both—respect for human dignity”).

faith with the Fourteenth Amendment, the government must respect the dignity of liberty and equality.

1. The Dignity of Liberty and LGBT Rights

The dignity of liberty finds expression under the Due Process Clause, which prohibits the deprivation of certain liberty interests.⁸⁴ Under this Clause, not every liberty interest is accorded constitutional protection—only those liberties deemed sufficiently important.⁸⁵ According to the Supreme Court’s traditional formulation, liberty interests received constitutional protection if they were “deeply rooted in our history and traditions, or . . . fundamental to our concept of constitutionally ordered liberty,”⁸⁶ so “that ‘neither liberty nor justice would exist if they were sacrificed.’”⁸⁷ This is no longer the case. “[H]istory and tradition guide and discipline the inquiry,” the Court has stated, “but do not set its outer boundaries.”⁸⁸ As the LGBT rights cases demonstrate, the concept of dignity greatly informs the inquiry: liberty interests receive constitutional protection if they implicate dignity.⁸⁹

In *Lawrence v. Texas*, for example, the Supreme Court invalidated laws criminalizing same-sex sodomy on grounds that private, consensual sexual activity is a constitutionally protected liberty interest.⁹⁰ Importantly, the Court’s holding was premised on dignity. “[C]hoices central to personal dignity and autonomy,” the Court stated, “are central to the liberty protected by the Fourteenth Amendment.”⁹¹ Our liberty to decide whom to have private consensual sex with is constitutionally protected because it implicates our “dignity as free persons.”⁹² By criminalizing these intimate decisions, subjecting gays and lesbians to “a lifelong penalty and stigma,” same-sex sodomy laws deprived gays and lesbians of this dignity in violation of due process.⁹³ *Lawrence* explicitly overruled the holding of *Bowers v. Hardwick*,

84. U.S. CONST. amend. XIV, § 1.

85. Generally speaking, if the liberty interest at issue is not considered sufficiently important, it will not receive constitutional protection; in that case, the government action need only be “rationally related to a legitimate government purpose”—a burden that is easily met. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 558 (4th ed. 2011) (discussing substantive due process).

86. See *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

87. *Id.* at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 326 (1937)).

88. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015); see also Tribe, *supra* note 19, at 17 (stating that *Obergefell* “finally displaced decisively” *Glucksberg*’s traditional formulation of substantive due process rights requiring that liberties be rooted in American history and tradition); Yoshino, *supra* note 77, at 169 (“The *Obergefell* methodology is strikingly different from the *Glucksberg* methodology. It is much more akin to what Justice Kennedy did in *Lawrence*.”).

89. See *infra* notes 90–104 and accompanying text.

90. *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003).

91. *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

92. *Id.* at 567.

93. *Id.* at 584 (O’Connor, J., concurring in judgment) (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

which was decided nearly two decades earlier.⁹⁴ Notably, the word “dignity” appeared only once in *Bowers*—in Justice Stevens’ dissent upon which the *Lawrence* majority relied.⁹⁵

In striking down the Defense Against Marriage Act’s (“DOMA”) exclusion of state-sanctioned same-sex marriages in *United States v. Windsor*, the Court again relied on dignity to find a constitutionally protected liberty interest.⁹⁶ Importantly, *Windsor* did not find a fundamental right to marriage; that decision would come two years later, in *Obergefell*.⁹⁷ While not a model of clarity with respect to its due process analysis, *Windsor* can be fairly read to protect the “liberty of the person”⁹⁸ against the “power [of the Government] to degrade or demean,” or to impose “injury and indignity.”⁹⁹ Freedom from such degradation is constitutionally protected because it necessarily implicates dignity. DOMA’s “essence” was to “disparage and to injure,” and “to impose . . . a stigma” on gays and lesbians, depriving them of the dignity conferred upon them by the States in violation of due process.¹⁰⁰

And in *Obergefell*, the Court invalidated state laws prohibiting recognition of same-sex marriages on grounds that such laws violated gay and lesbian couples’ fundamental right to marry “inherent in the liberty of the person.”¹⁰¹ Here, too, dignity was center stage: “The fundamental liberties protected by [the Due Process Clause] . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”¹⁰² Our liberty to choose whom to marry is constitutionally protected because it implicates “dignity in the bond between two men or two women . . . and in their autonomy to make such profound choices.”¹⁰³ By refusing to recognize these profound choices among same-sex couples, the state laws at issue deprived gays and lesbians of dignity in violation of due process.¹⁰⁴

94. *Id.* at 578.

95. *See Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting) (stating that recognition and protection of liberty is guided by “respect for the dignity of individual choice in matters of conscience”).

96. *See United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”).

97. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (“[T]he right to marry is a fundamental right inherent in the liberty of the person . . .”).

98. *Windsor*, 133 S. Ct. at 2695.

99. *Id.* at 2695, 2681.

100. *Id.* at 2693, 2696, 2681. DOMA’s exclusion of state-sanctioned same-sex marriages constituted “a deprivation of an essential part of the liberty protected by the Fifth Amendment,” and that, “[b]y seeking to injure the very class New York seeks to protect, DOMA violates basic due process and equal protection principles . . .” *Id.* at 2681.

101. *Obergefell*, 135 S. Ct. at 2604.

102. *Id.* at 2597.

103. *Id.* at 2599.

104. *See id.* at 2604–05.

These three cases give shape to the dignity of liberty under the Fourteenth Amendment. The dignity of liberty means autonomy with respect to certain intimate conduct, including sex (*Lawrence*) and marriage (*Obergefell*), and, more broadly, freedom from laws whose essence is to disparage and injure (*Windsor*).

2. The Dignity of Equality and LGBT Rights

The dignity of equality finds expression under the Fourteenth Amendment's Equal Protection Clause.¹⁰⁵ Under this Clause, laws may not single out a class of people for adverse treatment without good reason.¹⁰⁶ The Supreme Court's traditional approach to equal protection challenges relied on the characteristics of the group classified: laws that burdened people based on race, alienage, and national origin received "strict" scrutiny and were nearly always invalidated; laws that burdened people based on sex and illegitimacy of birth received "intermediate" scrutiny and were often invalidated; and laws burdening all other groups required only a "rational basis" and were nearly always upheld.¹⁰⁷ Over the past two decades, however, in a small number of cases, the Court has eschewed this "tiers-of-scrutiny" framework in favor of a more straightforward purpose test.¹⁰⁸ As the LGBT rights cases demonstrate, dignity informs the inquiry: if the purpose of the law is to deprive a class of people of their dignity—a bare desire to harm—the law will most likely be invalidated.¹⁰⁹

In *Romer v. Evans*, the Supreme Court invalidated a state constitutional amendment that prohibited all existing and future anti-discrimination laws protecting lesbian, gay, and bisexual people, while leaving all other anti-

105. U.S. CONST. amend. XIV, § 1.

106. See CHEMERINSKY, *supra* note 85, at 684–86 (discussing equal protection). The Equal Protection Clause is sometimes used as a basis for protecting a fundamental right, in which case the analysis is the same as in the due process context. See *id.* at 812–13 (discussing fundamental rights protected under due process "and/or" equal protection, and stating that "[r]elatively little depends on whether the Court uses due process or equal protection as the basis for protecting a fundamental right"); see also *supra* Part III.A.1 (discussing substantive due process).

107. CHEMERINSKY, *supra* note 85, at 552–54.

108. See, e.g., Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 545–48 (2016) (discussing the Court's application of demanding rational basis to invalidate laws whose purpose was to harm LGBT people); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 545 (2004) ("Whether characterized as 'animosity,' 'mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [in the relevant context],' or 'irrational prejudice,' the Court has firmly singled out a set of government interests that are illegitimate and, thus, impermissible, even under the most lenient review." (footnotes omitted)); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 889, 904 (2012) (arguing that evidence of animus is a "doctrinal silver bullet" that "poisons the well, discrediting other explanations as mere pretext for unconstitutional discrimination").

109. See *infra* notes 110–20 and accompanying text.

discrimination laws intact.¹¹⁰ Although the Court did not explicitly invoke the word “dignity,” its holding embraced this concept by repudiating a law “born of animosity,”¹¹¹ whose purpose was to “harm” gays, lesbians, and bisexuals by deeming them strangers to the law, “unequal to everyone else.”¹¹² By seeking to deprive gays, lesbians, and bisexuals of their dignity, the law furthered no legitimate state interest in violation of equal protection.¹¹³

Lawrence’s invalidation of same-sex sodomy laws is also instructive.¹¹⁴ Although *Lawrence* was decided under the Due Process Clause’s substantive guarantee of liberty, it sounds in equal protection.¹¹⁵ The purpose of same-sex sodomy laws was to deprive gay people of dignity—to express moral disapproval of same-sex intimacy and “demean[] the lives of homosexual persons,” stigmatizing them.¹¹⁶ Such laws, the Court held, “further[] no legitimate state interest.”¹¹⁷ Justice O’Connor’s concurring opinion, which explicitly argued for invalidation of same-sex sodomy laws under equal protection, likewise emphasized the indignity of laws that “brand[ed] all homosexuals as criminals.”¹¹⁸

If *Romer* and *Lawrence* sounded the drumbeat of dignity for gay people under the Equal Protection Clause, *Windsor* and *Obergefell* were its crescendo. The Court invoked “dignity” over ten times in both cases, concluding that DOMA and state laws prohibiting same-sex marriage violated equal protection because their purpose was to deprive gay people of “equal dignity.”¹¹⁹ According to the Court in *Windsor*, DOMA imposed “a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”¹²⁰ The law effectively told

110. *Romer v. Evans*, 517 U.S. 620, 629–30, 635–36 (1996).

111. *Id.* at 634.

112. *Id.* at 635.

113. *See id.* at 635–36.

114. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003).

115. *Id.* at 578; *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603–04 (2015) (“Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State.”).

116. *Lawrence*, 539 U.S. at 575; *see also id.* at 577 (discussing the law’s imposition of stigma and suggesting that the law was motivated by the governing majority’s view that same-sex intimacy was “immoral”).

117. *Id.* at 578.

118. *Id.* at 581; *see also id.* at 584 (O’Connor, J., concurring) (“The State has admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal.”).

119. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *see also Obergefell*, 135 S. Ct. at 2608 (“[P]etitioners in these cases . . . ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

120. *Windsor*, 133 S. Ct. at 2681.

[same-sex] couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage . . . [that] demeans the couple[,] . . . humiliates tens of thousands of children now being raised by same-sex couples[,] . . . [and] instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.¹²¹

In addition to burdening the fundamental right of marriage, the state laws at issue in *Obergefell* were “in essence unequal: [denying] same-sex couples . . . all the benefits afforded to opposite-sex couples.”¹²² Like DOMA, these laws were “hurtful”—imposing “a grave and continuing harm . . . on gays and lesbians [that] serve[d] to disrespect and subordinate,”¹²³ “demean[]” and “disparage,”¹²⁴ and that resulted in “stigma and injury,” “[d]ignitary wounds,” and “pain and humiliation” for same-sex couples and their children.¹²⁵

Together, these four cases give shape to the dignity of equality under the Fourteenth Amendment. The dignity of equality means not being singled out for harm—for example, not being written out of antidiscrimination laws (*Romer*), branded a criminal (*Lawrence*), or denied the benefits of marriage (*Windsor* and *Obergefell*). The dignity of equality is more basic than the dignity of liberty because the former does not turn on the importance of the underlying conduct at issue; it demands equal treatment, regardless of the conduct’s importance.

B. DIGNITY AND THE EIGHTH AMENDMENT

Dignity also finds expression under the Eighth Amendment, which prohibits “cruel and unusual punishments.”¹²⁶ For over 50 years, the Supreme

121. *Id.* at 2694, 2696.

122. *Obergefell*, 135 S. Ct. at 2604. Although *Obergefell*’s analysis focused primarily on infringement of same-sex couples’ fundamental right of marriage under due process and equal protection, the Court also invoked equal protection’s prohibition of discrimination against gays and lesbians as a class. *See* CHEMERINSKY, *supra* note 85, at 691 (distinguishing between fundamental rights analysis and discriminatory classification analysis under the Equal Protection Clause). *Compare* *Obergefell*, 135 S. Ct. at 2604 (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”), *with id.* at 2604 (stating that laws prohibiting same-sex marriage impose a “disability on gays and lesbians” and that, as a result of such laws, “same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right”) (emphasis added), *and id.* at 2604 (citing cases invalidating discriminatory classifications under the Equal Protection Clause).

123. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2604 (2015).

124. *Id.* at 2602.

125. *Id.* at 2606.

126. U.S. CONST. amend. VIII.

Court has interpreted this phrase to “draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” and to safeguard “nothing less than the dignity of man.”¹²⁷ Even as it punishes, the State “must treat its members with respect for their intrinsic worth as human beings.”¹²⁸

Importantly, the Court has not yet recognized an unqualified dignity of life: the Court has never found the death penalty to be inherently cruel and unusual.¹²⁹ Rather, as the late Supreme Court Justice Antonin Scalia remarked, the Court has “pecked away” at the death penalty.¹³⁰ The Court has acknowledged a dignity of liberty by requiring that the means of execution not be inherently barbaric, a dignity of equality by invalidating certain procedures that result in the arbitrary imposition of the death penalty, and a qualified dignity of life by categorically barring the death penalty as an “excessive” punishment for certain types of offenders and crimes.¹³¹

1. The Dignity of Liberty and the Death Penalty

One line of death penalty cases that touches on dignity involves challenges to the method of execution.¹³² Importantly, these cases do not implicate the dignity of equality; there is no dispute that the person was sentenced to death under procedures that were fair. Nor do these cases implicate the dignity of life; there is no dispute that the State can lawfully sentence the person to death. Instead, these cases implicate the dignity of liberty under the Eighth Amendment: the freedom of the condemned not to be killed in an “inhuman and barbarous” way, that is, by a method of execution that presents a “substantial” or “objectively intolerable risk of harm.”¹³³

In *Baze*, a plurality of the Court held that the risk of pain created by the improper administration of a three-drug lethal injection protocol (which first

127. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion); *see also* *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (“A penalty also must accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’” (quoting *Trop*, 356 U.S. at 100)).

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

129. *See* *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015) (citing cases). *But see* *Furman*, 408 U.S. at 296 (Brennan, J., concurring) (noting a “fundamental inconsistency” between “dignity of the individual” and the death penalty).

130. *See* Debra Cassens Weiss, *Scalia Says He ‘Wouldn’t be Surprised’ If SCOTUS Overturns the Death Penalty*, ABAJ., (Sept. 24, 2015, 7:16 AM), http://www.abajournal.com/news/article/scalia_says_he_wouldnt_be_surprised_if_scotus_overturns_the_death_penalty.

131. *See infra* Part III.B; *see also* *State v. Santiago*, 122 A.3d 1, 15–16 (Conn. 2015) (stating that “the United States Supreme Court has indicated that at least three types of punishment may be deemed unconstitutionally cruel” under the Eighth Amendment, namely: “inherently barbaric punishments,” “arbitrary or discriminatory punishments,” and categorically “excessive and disproportionate punishments” (citing *Graham v. Florida*, 560 U.S. 48, 59 (2010))).

132. *See infra* notes 134–42 and accompanying text.

133. *Baze v. Rees*, 553 U.S. 35, 49–50 (2008); *see also* *Glossip*, 135 S. Ct. at 2737 (reciting *Baze*’s requirement of showing an “objectively intolerable risk of harm”).

anesthetizes, then stops respiration, and finally stops the heart) did not violate this standard, even though veterinarians refuse to use the protocol to euthanize animals.¹³⁴ According to Chief Justice Roberts' plurality opinion, adoption of the petitioners' recommended one-drug protocol used on animals likely *would* deprive dignity by prolonging the person's death and permitting involuntary convulsions or seizures during unconsciousness.¹³⁵ The dignity at stake in *Baze*, then, was the freedom to not be treated worse than an animal. The plurality held that the three-drug protocol did not violate this dignity, noting that such drugs were consistent with the societal trend "to[ward] more humane methods of carrying out capital punishment."¹³⁶

In 2015, in *Glossip v. Gross*, the Court similarly held that the State's use of the anesthetic, midazolam, in its three-drug protocol was not cruel and unusual because it did not create an objectively intolerable risk of harm, despite two botched executions involving use of the drug.¹³⁷ Like *Baze*, the dignity at stake in *Glossip* was of the meanest sort: the freedom not to be subjected to needless suffering.¹³⁸ Although the failure of midazolam results in excruciating pain—what Justice Sotomayor referred to in her dissent as "the chemical equivalent of being burned at the stake"¹³⁹—the Court held that risk of such a failure was not substantial and, in any event, petitioners did not identify a safer available alternative.¹⁴⁰

Eighth Amendment challenges to the death penalty based on innocence and prolonged death row delay similarly invoke the dignity of liberty: freedom from wrongful execution¹⁴¹ and from "decades of especially severe, dehumanizing conditions of confinement."¹⁴² Like Eighth Amendment

134. *Baze*, 553 U.S. at 72–73 (Stevens, J., concurring) ("It is unseemly—to say the least—that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets.").

135. *See id.* at 57–58.

136. *Id.* at 62.

137. *Glossip*, 135 S. Ct. at 2745–46 (discussing the botched executions of Clayton Lockett and Joseph Wood).

138. *See id.* at 2737.

139. *Id.* at 2781 (Sotomayor, J., dissenting).

140. *Id.* at 2738. Petitioners identified two other drugs, both of which were unavailable to Oklahoma's Department of Corrections. *Id.* at 2733–34.

141. *See* *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring) (stating that "executing the innocent is inconsistent with the Constitution"); *id.* at 430–31 (Blackmun, J., dissenting) (same); *see also* *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002) (holding that the federal death penalty violates due process by depriving innocent people of opportunity for exoneration).

142. *See* *Johnson v. Bredeesen*, 558 U.S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of certiorari); *see also* *Glossip*, 135 S. Ct. at 2765–67 (Breyer, J., dissenting) (citing cases). Execution custom, which provides the condemned an opportunity to request a last meal and make a final speech, also confirms this dignity of liberty. *See* Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 LAW & SOC. INQUIRY 701, 704 (2007) (stating that such practices "allow[] for the representation of offenders as autonomous, volitional individuals within a structure that simultaneously maintains them as irredeemable, controllable others").

challenges to the method of execution, neither reaches the dignity of life—the legitimacy of swiftly and painlessly executing guilty people.

2. The Dignity of Equality and the Death Penalty

Another line of death penalty cases that touches on dignity involves challenges to the procedures used to sentence the person to death.¹⁴³ Unlike *Baze* and its progeny, these cases do not implicate the dignity of liberty; there is no dispute that the method of execution is constitutional.¹⁴⁴ Nor do these cases implicate the dignity of life; there is no dispute that the State can lawfully sentence the person to death, provided the proper procedures are followed.

In 1972, the Supreme Court in *Furman v. Georgia*, in five separate concurring opinions, famously declared the administration of the death penalty cruel and unusual under the Eighth Amendment.¹⁴⁵ For Justices Brennan and Marshall, the death penalty was “fatally offensive to human dignity” and therefore per se unconstitutional.¹⁴⁶ Had their appeals to the dignity of life found favor with the three other Justices in the majority, there would be no death penalty today. But their per se arguments did not win the day.¹⁴⁷

What mattered to Justices Douglas, Stewart, and White was not the dignity of life but rather the dignity of equality among criminal offenders. For these Justices, the decision to sentence some to death and others to life was arbitrary and capricious and, for Justices Douglas and Stewart, was (certainly or probably) racially discriminatory.¹⁴⁸ As Justice Stewart memorably stated, being sentenced to death was equivalent to “being struck by lightning.”¹⁴⁹ *Furman*’s 5 to 4 holding was thus premised on equality: the State can kill, but not willy-nilly. It is the absence of standards to guide capital sentencing—not

143. See *infra* Part III.B.3.

144. See *supra* Part III.B.1.

145. *Furman v. Georgia*, 408 U.S. 238 (1972).

146. *Id.* at 305 (Brennan, J., concurring); see also *id.* at 358–60 (Marshall, J., concurring) (concluding that the death penalty was “excessive” and “morally unacceptable” in violation of Eighth Amendment).

147. See *id.* at 257 (Douglas, J., concurring) (declining to reach whether death penalty is unconstitutional per se); *id.* at 306 (Stewart, J., concurring) (same); *id.* at 311 (White, J., concurring) (same).

148. See *id.* at 250, 257 (Douglas, J., concurring) (“The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups” and therefore is “not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.” (quoting PRESIDENT’S COMM’N ON LAW ENF’T, THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT 143)); *id.* at 310 (Stewart, J., concurring) (“[I]f any basis can be discerned for the selection of these [random] few to be sentenced to die, it is the constitutionally impermissible basis of race.”); see also *id.* at 313 (White, J., concurring) (“[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”).

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

the death penalty in and of itself—that violates the Eighth Amendment.¹⁵⁰ The Court confirmed as much four years later, in *Gregg v. Georgia*, when it upheld the constitutionality of the death penalty per se and also the constitutionality of death penalty statutes that provide standards to guide sentencing discretion.¹⁵¹ Predictably, the dignity of life was nowhere to be seen, save for Justice Brennan’s and Marshall’s dissenting opinions.¹⁵²

3. The Dignity of Life and the Death Penalty

Before discussing the dignity of life in the context of the death penalty, it should be noted that there are other contexts in which the dignity of life resounds, namely, the right to abortion and the right to die under the Fourteenth Amendment.¹⁵³ Although the dignity of life is implicated in these contexts, it is far more attenuated than in the death penalty context, for two reasons. First, the abortion and right-to-die contexts involve the balancing of competing dignities.¹⁵⁴ In the abortion context, for example, the dignity of

150. See *id.* at 256–57 (Douglas, J., concurring) (concluding that “discretionary [death penalty] statutes are unconstitutional in their operation”).

151. *Gregg v. Georgia*, 428 U.S. 153, 187, 195 (1976).

152. See *id.* at 230 (Brennan, J., dissenting) (stating that “even the vilest criminal remains a human being possessed of common human dignity,” and “[a]s such [death] is a penalty that subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by” the Eighth Amendment (citations omitted)); see also *id.* at 240–41 (Marshall, J., dissenting) (“[S]uch a punishment has as its very basis the total denial of the wrong-doer’s dignity and worth.”).

153. See, e.g., Goodman, *supra* note 56, at 779–83 (discussing dignity in right-to-die context); Siegel, *supra* note 18, at 1737–40 (discussing dignity in abortion context); cf. CHERMERINSKY, *supra* note 85, at 590–91 (discussing right to life in abortion and right-to-die contexts).

154. When the Court confronts competing dignities, such as in the abortion and right-to-die contexts, the dignity of life does not always prevail. See *supra* note 77 (distinguishing the concept of dignity and its hierarchy of interests (life-equality-liberty), from the *doctrine* of dignity, under which the hierarchy does not always hold). Instead, anti-subordination weighs heavily in the Court’s calculus. See Yoshino, *supra* note 77, at 174–75, 178–79 (discussing the role of anti-subordination in the Court’s right-to-life and abortion decisions). For a discussion of the dignity of life and competing dignities in the abortion and right-to-life contexts, see *infra* notes 155–61 and accompanying text. For other contexts implicating the dignity of life and competing dignities, compare *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021 (2014) (holding that a police officer’s use of deadly force against a suspect during a high-speed car chase did not violate the Fourth Amendment given the threat to “lives of innocent bystanders” (quoting *Scott v. Harris*, 550 U.S. 372, 386 (2007))), and *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 836, 853–55 (1998) (holding that a police officer’s accidental collision with, and killing of, a motorcycle passenger during a high-speed pursuit did not violate the Due Process Clause given the motorcycle driver’s threat to others), with *Tennessee v. Garner*, 471 U.S. 1, 9, 22 (1985) (holding that a law authorizing police to use deadly force to apprehend suspects who are not obviously armed or otherwise dangerous violated the Fourth Amendment given “[t]he suspect’s fundamental interest in his own life”). See also *Selective Draft Law Cases*, 245 U.S. 366, 380–81, 387–89 (1918) (upholding constitutionality of congressional conscription in recognition of the government’s interest in protecting others’ life, liberty, and property); Hugo Adam Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759, 770 (1991) (distinguishing death penalty from police use of deadly force); Dieter, *supra* note 24, at 927–28 (distinguishing the death penalty from law enforcement’s and soldiers’ exercise of the right to self-defense “on our behalf whenever individual lives or our collective lives as a country are in

life (the potential life of a fetus) contends with the dignity of liberty (women's autonomy in choosing whether to bear a child) and equality (women's right to be treated "as an equal member of the polity"¹⁵⁵ as opposed to an incubator—something men can never be).¹⁵⁶ And in the right-to-die context, the dignity of life (the life of an ill person) competes with the dignity of liberty (the person's autonomy in choosing to die by refusing life-sustaining treatment or ingesting lethal medication prescribed by a physician).¹⁵⁷

In the death penalty context, by contrast, there is no competing dignity.¹⁵⁸ Although the State has a penological interest in retribution and

imminent danger"). For a helpful discussion of these issues from an international law perspective, see generally DOUWE KORFF, *THE RIGHT TO LIFE: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2006), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680007ff4e> (discussing the right to life in the context of abortion, right-to-die, deadly force, and the death penalty).

155. Siegel, *supra* note 18, at 1739.

156. Compare Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 852 (1992) (reaffirming the right to abortion in recognition of "the liberty of the woman" and the "anxieties . . . physical constraints . . . [and] pain that only she must bear"), and *id.* at 927–28 (Blackmun, J., concurring in part) (discussing abortion law's "infringe[ment] upon a woman's right to bodily integrity" and deprivation of a woman's "right to make her own decision about reproduction and family planning" in violation of due process, as well as its conscription of "women's bodies into its service" in violation of equal protection), and *Roe v. Wade*, 410 U.S. 113, 113, 153 (1973) (striking down a law prohibiting abortion in recognition of the "distressful life and future" that "[m]aternity, or additional offspring, may force upon the woman"), with *Gonzales v. Carhart*, 550 U.S. 124, 158–59 (2007) (upholding the federal Partial Birth Abortion Act in recognition of a "[r]espect for human life" and Congress's interest in "draw[ing] a bright line that clearly distinguishes abortion and infanticide" (citation omitted)).

157. See Goodman, *supra* note 56, at 779–80, 779 n.264 (discussing competing dignities of liberty and life in right-to-die context). Compare *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 281 (1990) (recognizing a competent adult's right to refuse medical care, but upholding a law requiring clear and convincing evidence of such refusal in recognition of a state's interest in "guard[ing] against potential abuses" by family members who do "not act to protect a patient" (citation omitted)), and *id.* at 273 ("On balance, the right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death." (quoting *In re Conroy*, 486 A.2d 1209, 1225 (1985) (citation omitted))), with *Washington v. Glucksberg*, 521 U.S. 702, 731–32 (1997) (upholding a law prohibiting competent adults from committing physician-assisted suicide in recognition of a state's "interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons . . . from coercion . . . prejudice, negative and inaccurate stereotypes, and 'societal indifference'" (citation omitted)).

158. The same is true in the LGBT rights context. For example, in *Obergefell*, the Court acknowledged the competing liberty interests of those who, for religious or philosophical reasons, opposed same-sex marriage, but it rejected the argument that these interests implicated dignity. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 2606–07 (2015). In contrast to gays and lesbians, who, according to the Court, were "disparaged" and "diminish[ed]" by prohibitions on same-sex marriage, "neither [same-sex marriage opponents] nor their beliefs are disparaged here." *Id.* at 2602. Recognition of same-sex marriage, the Court concluded, would not "harm marriage as an institution by leading to fewer opposite-sex marriages," nor would it prevent opponents from "continu[ing] to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id.* at 2606–07; see also *id.* (stating that same-sex marriages "would pose no risk of harm to . . . third parties"). But see *id.* at 2639 (Thomas,

deterrence, it does not have an interest in the dignity of life, equality, and liberty.¹⁵⁹ Retribution, for example, sounds in equality—an “eye for an eye”¹⁶⁰—but it is equality of a different sort. It seeks not the dignity of equality but rather the *indignity* of equality; it does not affirm the equal value of life but instead the equal devaluing of life for the benefit of victims, their family members, and society more generally.¹⁶¹ Deterrence, for its part, sounds in liberty and even life—the freedom of innocent people to not be killed by would-be murderers, what Professors Cass Sunstein and Adrian Vermeule have called “statistical [saved] lives.”¹⁶² But such claims of deterrence rely on a causal link that is unproven and likely unprovable—that the death penalty, as opposed to some less severe penalty, actually deters murder.¹⁶³ In sum, neither the State nor victims, their family members, or society more generally have a coherent dignity interest in the death of a condemned person.

The second reason that the dignity of life is more attenuated in the context of abortion and the right-to-die is that, in both contexts, the issue before the Court is not whether the State can constitutionally deprive life, but rather whether it can constitutionally *sustain* life through regulation of abortion and medical care.¹⁶⁴ The death penalty, by contrast, is the only

J., dissenting) (discussing competing “dignity” of those “who continue to adhere to the traditional definition of marriage”).

159. See *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) (stating that “[t]he State thereby suffers nothing and loses no power” when the Court invalidates punishment as unconstitutionally severe (quoting *Weems v. United States*, 217 U.S. 349, 381 (1910))); Bedau, *supra* note 154, at 770–71 (distinguishing the death penalty from abortion, suicide, and mercy killings).

160. *Furman*, 408 U.S. at 333 n.41 (Marshall, J., concurring); see also *Gregg v. Georgia*, 428 U.S. 153, 183–84 (1976) (discussing retribution); *State v. Santiago*, 122 A.3d 1, 61–62 (Conn. 2015) (same).

161. See *Gregg*, 428 U.S. at 184 (“[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”).

162. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life–Life Tradeoffs*, 58 STAN. L. REV. 703, 740 (2005).

163. See, e.g., *Furman*, 408 U.S. at 347 (Marshall, J., concurring) (“Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged.” (quoting MELVIN F. WINGERESKY, REPORT OF ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949–1953 at 17–18 (1953))); *id.* at 312 (White, J., concurring) (“[T]he penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others.”); see also *Glossip v. Gross*, 135 S. Ct. 2726, 2768 (2015) (Breyer, J., dissenting) (finding “it difficult to believe (given the studies of deterrence . . .) that such a rare event significantly deters horrendous crimes”); cf. Sunstein & Vermeule, *supra* note 162, at 716 (assessing the morality of capital punishment “given the *assumption* of a substantial deterrent effect” (emphasis added)).

164. See CHEMERINSKY, *supra* note 85, at 591 (stating that debates over abortion and the right to refuse life-saving treatment “are not over the meaning of ‘life,’” but instead are “about whether women have a right to terminate their pregnancies and whether fetuses should be considered persons under

context in which the State kills.¹⁶⁵ While the harnessing of state power to save lives tells us something about the dignity of life under our constitutional scheme, the use of state power to take lives tells us much more. In this context only, it is the individual who seeks to preserve the dignity of life and the State that seeks to deprive it.¹⁶⁶

With these preliminary observations concluded, this Part now turns to the line of death penalty cases that implicate the qualified and unqualified dignity of life.

i. A Qualified Dignity of Life

Although the Court has never retreated from its holding in *Gregg* that the death penalty is per se constitutional, it has steadily narrowed its application by categorically barring the death penalty for certain offenders and certain crimes.¹⁶⁷ Unlike the *Baze/Glossip* and *Furman* lines of cases, which addressed the dignity of liberty and equality in the administration of the death penalty,¹⁶⁸ the Court's decisions erecting categorical bars to the death penalty are premised on the dignity of life—albeit not *all* life.

the Constitution,” and “whether individuals have a liberty interest in refusing treatment and the circumstances under which the state can interfere with such choices,” respectively).

165. See AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 3–30 (2001) (discussing state killing in the context of the death penalty); cf. *Furman*, 408 U.S. at 346 (Marshall, J., concurring) (“[W]hether or not they should be able to choose death as an alternative is a far different question from that presented here—*i.e.*, whether the State can impose death as a punishment.”). One caveat is in order: the State also kills when law enforcement uses deadly force against a suspect. See *supra* note 154 (discussing cases involving police officers’ use of deadly force). But the permissibility of deadly force does not support the permissibility of deadly punishment. Unlike the use of deadly force, imposition of the death penalty does not implicate the balancing of competing dignities, such as the dignity of lives of innocent bystanders. See *supra* note 154 (citing cases and commentary supporting use of deadly force to protect others’ lives). Furthermore, unlike the use of deadly force, “[w]hen the state kills a prisoner, an alternative was available—incarceration, isolation, temporary sedation—that would effectively reduce the risk of harm to others.” Bedau, *supra* note 154, at 771; see also Dieter, *supra* note 23, at 928 (“The death penalty . . . involves the calculated taking of life . . . of a person in secure custody who is no longer an imminent danger to society.”).

166. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 294 (1998) (Stevens, J., concurring in part and dissenting in part) (“From the point of view of society, the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action.”); *State v. Ramseur*, 524 A.2d 188, 365 (N.J. 1987) (Handler, J., dissenting) (contrasting “a [constitutional] system that circumscribes state power to safeguard individual life” with “the exercise of ultimate state power against the individual, the denial of that life”); FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 23 (1986) (stating that opposition to death penalty “involves a negative constraint on government regarding its use of individuals as a means to political ends”).

167. Compare *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), with *infra* Part III.B.3.i (discussing *Ford* and its progeny).

168. See *supra* Part III.B.1–2.

In 1986, in *Ford v. Wainwright*, the Supreme Court held that it was cruel and unusual to execute a person who is insane at the time of execution.¹⁶⁹ Nearly two decades later, in *Atkins v. Virginia*, the Court held that it was cruel and unusual to execute a person with an intellectual disability.¹⁷⁰ And three years after that, in *Roper v. Simmons*, Justice Kennedy, writing for the majority, held that it was cruel and unusual to execute a person who was under 18 years old at the time of the offense.¹⁷¹

In all three cases, the Court explicitly invoked dignity. Importantly, it was not a dignity of equality; there was no claim that the death penalty was arbitrary or discriminatory.¹⁷² Nor did the Court rely on the dignity of liberty, for there was no claim that the death penalty was painful, wrongful, or unduly delayed.¹⁷³ Instead, the Court relied on the dignity of life—the belief that executing certain classes of offenders was impermissibly “excessive” under the Eighth Amendment.¹⁷⁴ Applying its now-familiar two-prong “excessiveness” test, the Court concluded that executing such people: (1) was unacceptable to contemporary society, as determined by states’ unwillingness to impose it; and (2) served no legitimate penological purpose, as determined by the Court.¹⁷⁵ *Ford*, *Atkins*, and *Roper* thus affirm the dignity of the lives of vulnerable people who, because of mental impairment or youth, know not

169. *Ford v. Wainwright*, 477 U.S. 399, 417–18 (1986).

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

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

172. *See supra* Part III.B.2.

173. *See supra* Part III.A.1.

174. *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (stating that “[t]he Eighth Amendment succinctly prohibits ‘[e]xcessive’ sanctions,” and concluding that execution of people with intellectual disabilities was impermissibly excessive punishment in violation of Eighth Amendment).

175. *See Roper*, 543 U.S. at 564; *accord Atkins*, 536 U.S. at 312–13; *Ford v. Wainwright*, 477 U.S. 399, 408–09 (1986). This two-prong test, consisting of: (1) objective indicia of acceptability to contemporary society; and (2) the Court’s subjective determination of penological purpose, is often referred to as the “excessiveness” or “proportionality” inquiry. CARTER ET AL., UNDERSTANDING: CAPITAL PUNISHMENT 33, 96 (3d ed. 2012). This test roughly approximates the inquiry used by the Court in 1976 in *Gregg* to sustain the per se constitutionality of the death penalty, and the Court has applied it ever since in cases challenging the constitutionality of the death penalty’s application to certain crimes and certain offenders. *Compare Gregg v. Georgia*, 428 U.S. 153, 173, 182–83 (upholding constitutionality of death penalty based on its “acceptab[ility] to contemporary society” as determined by “objective indicia,” and the Court’s determination of “whether it comports with the basic concept of human dignity at the core of the Amendment”—including whether the death penalty is “totally without penological justification”), *with Atkins*, 536 U.S. at 312 (holding execution of people with intellectual disabilities unconstitutional based on “objective evidence” of acceptability as well as the Court’s “own judgment”), *and State v. Santiago*, 122 A.3d 1, 17 (Conn. 2015) (stating that “the eighth amendment mandates that punishment be proportioned and graduated to the offense of conviction” and that “[a] reviewing court engages in a two stage analysis in determining whether a challenged punishment is unconstitutionally excessive and disproportionate”). *Cf. Graham v. Florida*, 560 U.S. 48, 59, 61 (2010) (discussing a two-prong approach in death penalty cases to address the proportionality of sentencing).

what they do.¹⁷⁶ Significantly, *Atkins* and *Roper* overruled two earlier Court decisions—neither of which mentioned the term dignity.¹⁷⁷

Three years after *Roper*, in *Kennedy v. Louisiana*, Justice Kennedy, writing for the majority, held that it was cruel and unusual to execute a person for crimes that do not take the life of the victim.¹⁷⁸ In *Louisiana*, the Court went further than *Ford*, *Atkins*, and *Roper* by affirming the dignity of the lives of all people—vulnerable or not—who commit nonhomicide crimes.¹⁷⁹ “Evolving standards of decency,” Justice Kennedy wrote, “must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.”¹⁸⁰ This respect for dignity recognizes the bare minimum value inhering in the life of the offender: the capacity “to understand the enormity of his offense.”¹⁸¹ It is *Louisiana*, then, that comes nearest to affirming the absolute dignity of life, as the following Scalia-esque alterations to one of its final passages suggest:

The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must [*be reserved for the worst of crimes and limited in its instances of application*] cease. [*In most cases*] [J]ustice is not better served by terminating the life of the perpetrator rather than confining him¹⁸²

176. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (discussing an insane person’s lack of “comprehension of why he has been singled out and stripped of his fundamental right to life” and “the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity”); accord *Roper*, 543 U.S. at 571 (discussing “diminished culpability” of children who have committed death-eligible crimes); *Atkins*, 536 U.S. at 318 (discussing “diminish[ed] . . . personal culpability” of people with intellectual disabilities).

177. See, e.g., *Roper*, 543 U.S. at 574 (abrogating *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Atkins*, 536 U.S. at 321 (abrogating *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

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

179. *Id.* at 467 (Alito, J., dissenting) (“The Court’s decision here stands in stark contrast to *Atkins* and *Roper*, in which the Court concluded that characteristics of the affected defendants—mental retardation in *Atkins* and youth in *Roper*—diminished their culpability.”). As in *Ford* and its progeny, the *Louisiana* Court based its decision on: (1) a national consensus against the punishment; and (2) the Court’s independent determination that the punishment served no legitimate penological purpose. See *id.* at 421 (categorically barring death penalty for nonhomicide crimes).

180. *Id.* at 420.

181. *Id.* at 447; see also *Glossip v. Gross*, 135 S. Ct. 2726, 2769 (2015) (Breyer, J., dissenting) (“[S]everal decades after the crime was committed . . . [t]he offender may have found himself a changed human being.” (citation omitted)); *Furman v. Georgia*, 408 U.S. 238, 280 n.25 (1972) (Brennan, J., concurring) (stating that the “purpose of punishment” includes giving “hope . . . for the reformation of the criminal” (quoting *Weems v. United States*, 217 U.S. 349, 381 (1910))).

182. *Louisiana*, 554 U.S. at 446–47. The author’s addition are underscored; deletions are italicized. Other passages likewise portend the end of the death penalty. See *id.* at 447 (“Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, *at this stage of evolving standards* and in

One other recent case deserves mention. In 2014, in *Hall v. Florida*, Justice Kennedy, writing for the Court, fortified *Atkins*' prohibition on executing people with intellectual disabilities by striking down a Florida rule that narrowly interpreted "intellectual disability."¹⁸³ More remarkable than the Court's holding was its expansive articulation of dignity:

The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force.¹⁸⁴

The Constitution not only demands that our Nation protect dignity; it demands that our Nation be a *leader* in protecting dignity—a teacher of dignity.¹⁸⁵ Echoing his opinions in the LGBT context, Justice Kennedy tells us that it is our Nation's "duty to teach human decency as the mark of a civilized world."¹⁸⁶

According to *Hall*, then, the Eighth Amendment's protection of dignity is incomplete because dignity is always expanding. The purpose, and indeed the *duty*, of our Nation is to aspire to protect—and to teach—this expanding dignity, lest our Constitution's protection of dignity lose its force, and lest our Nation lose its place among the civilized nations of the world.¹⁸⁷ These

cases of crimes against individuals, for crimes that take the life of the victim." (emphasis added)); *id.* at 436–37 (stating that "tension" in death penalty case law between general rules that channel sentencing discretion and requirement that sentencer retain discretion to consider case-specific circumstances "has produced results not altogether satisfactory" and that, after 32 years, case law "is still in search of a unifying principle"). *Cf.* *United States v. Windsor*, 133 S. Ct. 2675, 2709–10 (2013) (Scalia, J., dissenting) (altering the language of the majority decision to illustrate how the Court would likely invalidate state laws prohibiting same-sex marriage).

183. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

184. *Id.* at 1992; *cf.* *Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., concurring) ("In the best tradition of the common law, the pace of [the] evolution [of our standards of decency] is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text.").

185. *See Hall*, 134 S. Ct. at 2001.

186. *Id.*; *see also* Lani Guinier, *The Supreme Court 2007 Term, Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 7 (2008) ("The Constitution is the enduring and common link that we have as Americans and it is something that we must teach to and transmit to the next generation." (quoting Justice Kennedy responding to a Harvard Law School student's question)); Tribe, *supra* note 19, at 24 n.57 ("This vision of the Constitution as a great teacher recurs throughout Justice Kennedy's writings on the bench in *Obergefell* and elsewhere.").

187. *Hall*, 134 S. Ct. at 1992; *see also* Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER (Sept. 12, 2005), <http://www.newyorker.com/magazine/2005/09/12/swing-shift> ("Why should world opinion care that the American Administration wants to bring freedom to oppressed peoples? Is that not because there's some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity means? I think that's what we're trying to tell the rest of the world, anyway." (quoting Justice Anthony Kennedy)).

passages, without alteration, obviously reach far beyond the dignity interests of people with intellectual disabilities at stake in *Hall*.¹⁸⁸ They strongly suggest a dignity of life that is unqualified: an end to the death penalty.

ii. *An Unqualified Dignity of Life*

Although the Supreme Court recognized the dignity of life in *Ford* and its progeny, it is a qualified dignity limited to the lives of those who are less culpable and those who commit less serious crimes.¹⁸⁹ There is, however, precedent for the Court's recognition of an unqualified dignity of life. It comes not from a majority of the Supreme Court, but instead from the three state high courts that have declared the death penalty unconstitutional per se and from multiple Supreme Court Justices—past and present—that have urged the Court's majority to do likewise.¹⁹⁰ Together, these sources point the way forward, toward a more fulsome understanding of the dignity of life and a corresponding end to the death penalty.

California, Massachusetts, and Connecticut are the only three states in which a court has declared the death penalty unconstitutional per se.¹⁹¹ California's high court abolished its death penalty in February 1972, several months before the Supreme Court in *Furman* announced a de facto moratorium on executions nationally.¹⁹² Massachusetts' high court followed

188. *Hall*, 134 S. Ct. at 2001.

189. See *supra* Part II.B.3.i; see also Goodman, *supra* note 56, at 777 (“[I]n death penalty cases, human dignity underlying the Eighth Amendment has faltered even with regard to the mentally retarded inmate and the inmate under the age of eighteen. . . . [T]he Court has advanced the dignity of only the death row inmates who lack the ability or maturity to reason.”).

190. See *infra* Part III.B.3.ii.

191. See *supra* notes 28–29 and accompanying text (discussing states' judicial abolition of death penalty). In addition to the state high court justices in California, Massachusetts, and Connecticut who abolished the death penalty, at least ten other state high court justices and one federal judge have argued that the death penalty is per se unconstitutional. See, e.g., *United States v. Quinones*, 205 F. Supp. 2d 256, 257 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002) (holding, in effect, that the federal death penalty is per se unconstitutional because it deprives innocent people of continued opportunity for exoneration throughout the course of one's natural life); *State v. Santiago*, 49 A.3d 566, 700 (Conn. 2012) (Harper, J., concurring in part and dissenting in part) (arguing that the death penalty is unconstitutional per se under state constitution); *State v. Webb*, 750 A.2d 448, 458 (Conn. 2000) (Katz, J., dissenting) (same); *State v. Ross*, 646 A.2d 1318, 1388 (Conn. 1994) (Berdon, J., dissenting in part) (same); *Adams v. State*, 271 N.E.2d 425, 431–42 (Ind. 1971) (DeBruler, J., concurring in part and dissenting in part) (same); *State v. Kills on Top*, 787 P.2d 336, 355 (Mont. 1990) (Sheehy, J., dissenting) (same); *State v. Dicks*, 615 S.W.2d 126, 142 (Tenn. 1981) (Brock, C.J., concurring in part and dissenting in part) (same); *State v. Pierre*, 572 P.2d 1338, 1357–59 (Utah 1977) (Maughan, J., concurring in part and dissenting in part) (same); *State v. Rupe*, 683 P.2d 571, 599 (Wash. 1984) (Dolliver, J., concurring in the result) (same); *Hopkinson v. State*, 632 P.2d 79, 199 (Wyo. 1981) (Rose, C.J., dissenting in part and concurring in part) (same).

192. *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27; see also *People v. Frierson*, 599 P.2d 587, 605 (Cal. 1979) (discussing California constitutional amendment abrogating judicial abolition of the death penalty in *Anderson*). The California Supreme Court was the first court ever to declare the death

suit in 1980, four years after the Supreme Court in *Gregg* lifted *Furman*'s moratorium.¹⁹³ And in 2015, Connecticut's high court abolished that state's nearly 400-year-old death penalty.¹⁹⁴

In reaching their historic decisions, each state high court relied on at least one of the two factors used by the Supreme Court in *Ford* and its other dignity-of-life decisions: (1) the death penalty's unacceptability to contemporary society, as determined by society's unwillingness to impose it;¹⁹⁵ and (2) the death penalty's lack of any legitimate penological purpose.¹⁹⁶ Although equality (concern with arbitrariness and discrimination) and liberty (concern with pain, unreliability, and undue delay) in the administration of the death penalty factored into the state high courts' decisions,¹⁹⁷ it was the dignity of life that appears to have weighed most heavily on the courts, driving them to abolish the death penalty. California's high court, for example, stated that the death penalty demeaned "[t]he dignity of man, the individual and the society as a whole."¹⁹⁸ Citing Justice Kennedy's majority opinion in *Hall*, Connecticut's high court reasoned that the death penalty was at odds with "dignity reflect[ing] . . . the nation we aspire to be."¹⁹⁹ And the Massachusetts

penalty per se unconstitutional. *See Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting) (opining that the *Furman* majority was "somewhat propelled toward its result by the interim decision of the California Supreme Court" in *Anderson*).

193. *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1286–87 (Mass. 1980), *superseded by constitutional amendment*, MASS. CONST. art. CXVI, *and by statute*, MASS. GEN. LAWS ch. 265, § 2 (2008); *see also Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 117–18 (1984) (discussing Massachusetts' constitutional amendment abrogating the judicial abolition of the death penalty in *Watson*, and holding unconstitutional the death penalty provisions of MASS. GEN. LAWS ch. 265, § 2).

194. *State v. Santiago*, 122 A.3d 1, 84–85 (Conn. 2015).

195. *See Anderson*, 493 P.2d at 894, 898 (discussing "[t]he steady decrease in the number of executions" nationally and the "world-wide trend towards abolition"); *Santiago*, 122 A.3d at 35–39 (discussing, *inter alia*, "Connecticut's steadily waning commitment to capital punishment"); *Watson*, 411 N.E.2d at 1282 (discussing "[t]he complete absence of executions in the Commonwealth through these many years").

196. *See Anderson*, 493 P.2d at 895 ("[The State] has not demonstrated that the death penalty can be justified as necessary to any state interest."); *Santiago*, 122 A.3d at 73 ("[T]he death penalty no longer serves any legitimate penological goal in our state."). The Massachusetts Supreme Judicial Court in *Watson* did not discuss whether the death penalty served a legitimate penological purpose and instead "proceed[ed] to the issues of contemporary standards of decency and of arbitrariness." *Watson*, 411 N.E.2d at 1275 n.2.

197. *See, e.g., Anderson*, 493 P.2d at 895 (discussing "brutalizing psychological effects of impending execution"); *Santiago*, 122 A.3d at 62–71 (discussing "caprice and bias," "possibility of error," and delay in the administration of the death penalty); *Watson*, 411 N.E.2d at 1283–87 (discussing racial discrimination in administration of death penalty).

198. *Anderson*, 493 P.2d at 895.

199. *Santiago*, 122 A.3d at 32 (quoting *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014)); *see also id.* at 99 (Norcott & McDonald, JJ., concurring) ("Execution represents a complete and utter rejection of the personhood and humanity of the condemned, an irreversible banishment from the moral community. 'The death sentence itself is a declaration that society deems the prisoner a nullity, less than human and unworthy to live.'" (quoting *Watson*, 411 N.E.2d at 1274)).

high court offered up an unparalleled endorsement of the dignity of life—calling life “a fundamental right ‘explicitly or implicitly guaranteed by the Constitution’” and “the natural right of every man.”²⁰⁰ Citing Justice Brennan’s concurring opinion in *Furman*, the Massachusetts high court rejected the death penalty as “a denial of the executed person’s humanity.”²⁰¹

Although a majority of sitting U.S. Supreme Court Justices has never questioned the constitutionality of the death penalty, six past and current Justices have.²⁰² Their concurring and dissenting opinions, like the three state high court decisions abolishing the death penalty, recognize a dignity of life at odds with the death penalty.

200. *Watson*, 411 N.E.2d at 1282 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1973)); *see also* *Sacramento v. Lewis*, 523 U.S. 833, 856 (1998) (Kennedy, J., concurring) (stating that life interest was “protected by the text of the [Due Process Clause]”); *Screws v. United States*, 325 U.S. 91, 133 (1945) (Rutledge, J., concurring) (discussing “the right which comprehends all others, the right to life itself”); *Id.* at 134–35 (Murphy, J., dissenting) (discussing “right to life itself” that entitles every human being to “respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution”); *State v. Ross*, 646 A.2d 1318, 1395 (Conn. 1994) (Berdon, J., dissenting in part) (acknowledging a right to life and stating that “[n]o other right is more precious; indeed, it is the one right that brings everyone, rich and poor, down to a common denominator”); *Commonwealth v. O’Neal*, 327 N.E.2d 662, 668 (Mass. 1975) (“We believe that the right to life is fundamental and, further, that this proposition is not open to serious debate. . . . [T]he right to life is the basis of all other rights and in the absence of life other rights do not exist.” (citation omitted)); *Wright Motion*, *supra* note 47, at 21 (“Just as no state can deny the fundamental right to marry, *a fortiori*, no state can deny the fundamental right to life, which is *the* fundamental human right and provides the predicate for the exercise of all other rights.”); James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1335 n.170 (1989) (citing scholarship contending that death penalty denies fundamental right to life); *Bird*, *supra* note 62, at 1355–56 (discussing right to life in Supreme Court case law).

201. *Watson*, 411 N.E.2d at 1283 (quoting *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring)).

202. *See infra* notes 203–27 and the accompanying text (discussing Justices’ opinions challenging constitutionality of death penalty); *see also* Smith, *supra* note 23 (discussing Justices’ opposition to death penalty). In addition to these Justices, at least six other Justices—Felix Frankfurter, Robert Jackson, Tom Clark, Earl Warren, Arthur Goldberg, and Lewis Powell—have declared their opposition to the death penalty in public statements and private correspondence. *See* STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 238–39, 249–50 (2002) (discussing public statements of Justices Frankfurter, Clark, and Warren; Justice Goldberg’s internal memorandum to the Court proposing that the Eighth and Fourteenth Amendments proscribed capital punishment; and Justice Jackson’s unpublished draft concurring opinion in the death penalty case of *Francis v. Resweber*); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994) (quoting retired Justice Lewis Powell’s statement to his biographer that, if he could change his vote in any case, he “would vote against capital punishment” in any capital case, including *Furman v. Georgia*, because he had “come to think that capital punishment should be abolished”); *see also* *Haley v. Ohio*, 332 U.S. 596, 602 (1948) (Frankfurter, J., joining in judgment) (“I disbelieve in capital punishment. But as a judge I could not impose the views of the very few States who through bitter experience have abolished capital punishment upon all the other States, by finding that ‘due process’ proscribes it.”); Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment, October Term, 1963*, 27 S. TEX. L. REV. 493, 499 (1986) (“[T]he evolving standards of decency that mark the progress of [our] maturing society’ now condemn as barbaric and inhuman the deliberate institutionalized taking of human life by the state.”).

In 1971, the Supreme Court in *Furman* invalidated the procedures used by states to carry out the death penalty.²⁰³ As explained above, Justices Brennan and Marshall, concurring in the judgment, went further—arguing that the death penalty was per se unconstitutional because of its unacceptability to contemporary society and its lack of a valid penological purpose,²⁰⁴ as well as its inherently painful, discriminatory, and unreliable administration.²⁰⁵ Particularly troubling to Justice Brennan was the death penalty's severity: it "treat[ed] members of the human race as nonhumans, as objects to be toyed with and discarded," and was "thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity."²⁰⁶ According to Justice Brennan, "[a] prisoner remains a member of the human family"²⁰⁷; an executed prisoner does not—he has "lost the right to have rights."²⁰⁸ Justice Marshall's concurring opinion sounded a similar theme, proclaiming the death penalty's "[dis]regard for civilization and humanity"²⁰⁹ and its appeal to "our baser selves."²¹⁰

In 1994, dissenting from a denial of certiorari in the case of death-row inmate Bruce Edward Callins, Justice Blackmun famously declared that he would "no longer . . . tinker with the machinery of death" and urged the abandonment of the death penalty altogether.²¹¹ Although his objections centered on the flawed administration of the death penalty, which was "fraught with arbitrariness, discrimination, caprice, and mistake,"²¹² the undertone of his opinion was the dignity of life. "On February 23, 1994, at approximately 1:00 a.m.," Justice Blackmun's opinion began

Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold

203. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

204. *Id.* at 359 (Marshall, J., concurring) (discussing the lack of valid penological justifications); see also *id.* at 300–06 (Brennan, J., concurring) (same).

205. See *id.* at 288–90 (Brennan, J., concurring) (discussing the death penalty's "degrading and brutalizing" psychological effects and unreliability (quoting *People v. Anderson*, 493 P.2d 880, 894 (1972))); *id.* at 366 (Marshall, J., concurring) (discussing death penalty's discriminatory application to "the poor, and the members of minority groups").

206. See *id.* at 272–73 (Brennan, J., concurring).

207. *Id.* at 290 (Brennan, J., concurring).

208. *Id.* at 274 n.15 (Brennan, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 102 (1958)).

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

210. *Id.* at 345 (Marshall, J., concurring).

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

212. *Id.* at 1144, 1159 ("I believe that the death penalty, as currently administered, is unconstitutional.").

Callins, no longer a defendant, an appellant, or a petitioner, but *a man*, strapped to a gurney, and seconds away from extinction.²¹³

It surely mattered to Justice Blackmun that those sentenced to death were often black people (like Callins).²¹⁴ It also mattered to Justice Blackmun that those sentenced to death were sometimes innocent people.²¹⁵ But what appears to have mattered most to Justice Blackmun was that those sentenced to death were *people*—the unqualified dignity of life.²¹⁶

In 2008, in *Baze v. Rees*, Justice Stevens concurred in the judgment upholding the constitutionality of Oklahoma’s three-drug protocol but wrote separately to register his opposition to the death penalty *per se*.²¹⁷ In addition to his objections implicating unreliability, arbitrariness, and discrimination in the administration of the death penalty,²¹⁸ Justice Stevens implied the dignity of life—the “diminishing force” of *any* justification for depriving a person of life.²¹⁹ The death penalty had become, in his words, “anachronistic”—a relic of a bygone era.²²⁰ Justice Stevens, like Justice Blackmun, was particularly well-suited to critique that era, as he was part of it; he supported the death penalty for over 30 years on the bench.²²¹

And on June 29, 2015, in *Glossip v. Gross*, a 5 to 4 majority of the U.S. Supreme Court rejected a challenge to Oklahoma’s lethal-injection protocol.²²² In a 42 page dissenting opinion, Justice Breyer, joined by Justice Ginsburg, argued that it is “highly likely that the death penalty violates the Eighth Amendment,”²²³ based on the death penalty’s unacceptability among most states,²²⁴ its lack of a legitimate penological purpose in light of prolonged delays,²²⁵ and its unreliability and arbitrariness.²²⁶ Although Justice Breyer’s litany of concerns focused primarily on the hopelessly flawed administration of the death penalty, his carefully crafted opinion relied on

213. *Id.* at 1143 (emphasis added).

214. *See id.* at 1153–55.

215. *See id.* at 1158 & n.8.

216. *See id.* at 1143–45.

217. *Baze v. Rees*, 553 U.S. 35, 86–87 (2008) (Stevens, J., concurring).

218. *See id.* at 84–86.

219. *Id.* at 81.

220. *Id.* at 80 (“[O]ur society has moved away from public and painful retribution toward ever more humane forms of punishment. State-sanctioned killing is therefore becoming more and more anachronistic.”); *see also* JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 108 (2014) (“[E]ven if the death penalty was justified in 1982, this is no longer the case.”).

221. *See Baze*, 553 U.S. at 78 (Stevens, J., concurring) (citing joint opinion of Justices Stewart, Powell, and Stevens upholding death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976)).

222. *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

223. *Id.* at 2776–77 (Breyer, J., dissenting).

224. *Id.* at 2772–74 (Breyer, J., dissenting).

225. *Id.* at 2769–70 (Breyer, J., dissenting).

226. *Id.* at 2759, 2763–64 (Breyer, J., dissenting).

Justice Kennedy's decisions in *Roper*, *Louisiana*, and *Hall*—all three of which invoked the dignity of life to categorically prohibit the death penalty for certain types of crimes and offenders.²²⁷

IV. CONTRADICTION AND COHERENCE

One might reasonably believe that the more basic the dignity, the more robust the legal protection.²²⁸ But this is not the case. The progress of LGBT rights and the persistence of the death penalty expose a tension in dignity doctrine: the most basic aspect of dignity—life—receives the least protection under the law.²²⁹ The Constitution prohibits the government from telling us whom we can love and marry, and from depriving some of us the legal benefits conferred upon others—as well it should.²³⁰ But the Constitution does not prohibit the government from killing us. Although the Court has recognized that the method of execution must not be inherently barbaric, the administration of the death penalty must not be arbitrary, and the death penalty must not be imposed on certain types of offenders and for certain types of crimes, the Court has never retreated from its contention that the death penalty, itself, is constitutional.²³¹

The result is that whom we love and marry receives more protection under the law than whether we live. Put another way, our law prohibits humiliations that deprive us of liberty and equality, but not the ultimate humiliation of death. The law allows James Obergefell to call his dying life partner his beloved spouse, but it does not prevent the State of Georgia from strapping down a hysterically crying woman who played a role in the death of

227. See *supra* notes 179–200 and accompanying text. Justice Breyer also relied on Justice Stevens' majority opinion in *Atkins*, which Justice Kennedy joined. See generally *Atkins v. Virginia*, 536 U.S. 304 (2002) (categorically prohibiting the death penalty on dignity grounds for people with intellectual disabilities).

228. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 291–93 (1998) (Stevens, J., concurring in part and dissenting in part) (“Thus, we may conclude, for example, that a prisoner has no ‘liberty interest’ in the place where he is confined . . . or that an at-will employee has no ‘property interest’ in his job There is, however, no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does The interest in life . . . warrants even greater protection than the interests in liberty” (citations omitted)).

229. Although the progress of LGBT rights powerfully underscores the tension, the LGBT rights decisions did not create the tension. The Eighth Amendment, for example, has always embodied this tension—prohibiting methods of execution that impose a substantial risk of pain (dignity of liberty) and arbitrary imposition of the death penalty (dignity of equality), but not prohibiting the death penalty itself (dignity of life). See *Baze v. Rees*, 553 U.S. 35, 81 (2008) (Stevens, J., concurring) (“This trend [toward ever more humane forms of punishment], while appropriate and required by the Eighth Amendment’s prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution rationale is based.”).

230. See *supra* Part III.A.

231. See *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015) (citing cases indicating that capital punishment is not per se unconstitutional).

her husband 18 years earlier, and killing her.²³² So long as the death penalty remains a lawful punishment, the contradiction remains.²³³

While the triumph of LGBT rights demonstrates the promise of dignity, the persistence of the death penalty shows that dignity still has work to do. The time has come for dignity to reach not just our liberty and our equality, but also our lives. Dignity's next frontier should be the end of the death penalty; the Supreme Court should bring coherence to dignity doctrine by finding the death penalty unconstitutional on dignity grounds.

This normative claim is, of course, highly contested. Many fervently believe, as the late Justice Scalia did, that the Supreme Court should leave the death penalty be.²³⁴ But few believe that the Supreme Court *will* leave the death penalty be. In 2015, Justice Scalia told an audience of college students that he “wouldn’t be surprised” if the Court overturns the death penalty, adding that four of his colleagues believe the death penalty is unconstitutional.²³⁵

The four colleagues to whom he referred are undoubtedly Justices Ginsburg, Breyer, Kagan, and Sotomayor—the same four Justices who dissented from the Court’s recent decision in *Glossip* upholding the constitutionality of Oklahoma’s lethal injection protocol.²³⁶ Chief Justice Roberts and Justices Thomas and Alito, on the other hand, firmly support the constitutionality of the death penalty.²³⁷ Not surprisingly, the fifth vote, and the death penalty’s likely fate, lay in the hands of Justice Kennedy—the Justice who authored the Court’s opinions in *Romer*, *Lawrence*, *Windsor*, and *Obergefell* that ruled in favor of gays and lesbians on dignity grounds; the Justice who authored the Court’s opinions in *Roper*, *Louisiana*, and *Hall* that limited the expansion of the death penalty on dignity grounds; and the Justice who, in the words of Professor Tribe, has played a leading role in “pushing ‘dignity’ closer to the center of American constitutional law and discourse” for a quarter-century.²³⁸ As Professor Yoshino has written, “when Justice Kennedy

232. See *supra* notes 2–16 and accompanying text (discussing James Obergefell and Kelly Gissendaner).

233. See *supra* note 47 and accompanying text (juxtaposing the prohibition of racial segregation and the persistence of the death penalty).

234. See, e.g., *Glossip*, 135 S. Ct. at 2750 (Scalia, J., concurring) (arguing that the permissibility of the death penalty should be “left . . . to the People to decide”).

235. Weiss, *supra* note 130; see also ZIMRING & HAWKINS, *supra* note 166, at 156–58 (“Ultimately, the leadership . . . that results in elimination of the death penalty will almost certainly emanate from the Supreme Court,” motivated not by a change in “personnel or a single event but by a sense of the necessity of living up to history’s demands.”).

236. See *Glossip*, 135 S. Ct. at 2780 (Sotomayor J., dissenting).

237. See *id.* at 2731.

238. Tribe, *supra* note 19, at 21; see also Siegel, *supra* note 18, at 1703 (stating that “dignity figures . . . frequently and consequentially in the decisions of . . . Justice [Kennedy] who is now playing a leading role in the development of American constitutional law”). At the time of this writing, there are only eight Justices of the Supreme Court. Following Justice Scalia’s death on February 13, 2016, Senate Republicans refused to hold confirmation hearings or vote on any replacement nominations until after

ascribes dignity to an entity, that entity generally prevails.”²³⁹ In short, the death penalty’s days are numbered.

This Part predicts that the Court, with Justice Kennedy at its helm, will soon declare the death penalty unconstitutional on dignity grounds. In anticipation of this holding, this Part offers a framework to guide the Court, drawn from federal and state supreme court death penalty decisions new and old, statistics detailing the death penalty’s record decline in recent years, and the Court’s recent LGBT rights jurisprudence.²⁴⁰ It also responds to several likely objections from the dissenting Justices.²⁴¹

A. THE FRAMEWORK FOR ENDING THE DEATH PENALTY

When the Court considers the per se constitutionality of the death penalty, its analysis will not focus on whether the method of execution is inherently barbaric or whether death penalty procedures result in the arbitrary imposition of death sentences.²⁴² Instead, the Court will almost certainly focus on whether the death penalty is categorically “excessive”—adopting the two-prong framework that it used in 1976 in *Gregg* to uphold the per se constitutionality of the death penalty, and in *Ford* and subsequent dignity-of-life decisions that invalidated the death penalty for certain types of offenders and crimes.²⁴³ The first prong is an objective inquiry that considers the death penalty’s acceptability to contemporary society as gauged by its willingness to impose it.²⁴⁴ The second prong is a subjective inquiry that considers whether the death penalty meaningfully contributes to the penological purposes of retribution or deterrence.²⁴⁵ Both prongs strongly support invalidation of the death penalty on dignity grounds.

1. Unacceptable to Contemporary Society

The death penalty is unacceptable to contemporary society, as evidenced by the overwhelming number of states that have turned their back on the

the November 2016 presidential election. See Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 55–57 (2016).

239. Yoshino, *supra* note 19, at 3088.

240. See *infra* Part IV.A.

241. See *infra* Part IV.B.

242. See *supra* note 131 and accompanying text (discussing analysis used by Supreme Court in cases challenging death penalty as “inherently barbaric” and “arbitrary or discriminatory”).

243. See *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting) (stating that a per se challenge to the death penalty implicates “a claim that punishment is excessive” and inviting full briefing on such a challenge); *State v. Santiago*, 122 A.3d 1, 16–17, 32 (Conn. 2015) (applying the Supreme Court’s two-prong “excessiveness” test to invalidate Connecticut’s death penalty); see also *supra* note 176 and accompanying text (discussing the Supreme Court’s use of two-prong analysis in cases challenging categorically excessive punishments).

244. See, e.g., *Atkins v. Virginia* 536 U.S. 304, 311–12 (2002).

245. See *id.* at 319.

death penalty. Twenty states have abolished the death penalty, including eight in the past decade; none have reinstated it.²⁴⁶

Assuming, as the Court does, that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change,” this evolution away from the death penalty is significant.²⁴⁷ In the words of the Connecticut Supreme Court, the past decade has seen “a gradual but inexorable extinction” of the death penalty—“the sociological equivalent of the meteor that, it is believed, suddenly ended the reign of the dinosaurs.”²⁴⁸

Thirty states retain the death penalty, but few states use it with any frequency.²⁴⁹ As Justice Kennedy stated in *Lawrence* in the context of sodomy laws, a “pattern” or “history of nonenforcement suggests the moribund character” of laws that no longer enjoy support.²⁵⁰ In that vein, only 25 states with the death penalty have carried out an execution since 1997,²⁵¹ and only 19 of those states have carried out an execution since 2006.²⁵² Given their unwillingness to impose the death penalty for nearly a decade or more, those

246. See *Executions by State and Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5741> (last visited Oct. 24, 2016). Four of these eight states (New Mexico, Illinois, Connecticut, and Maryland) abolished the death penalty prospectively only. See Kevin Barry, *Going Retro: Abolition for All*, 46 LOY. U. CHI. L.J. 669, 672–73 (2015) (discussing repeals). While this arguably suggests some lingering support for the death penalty for those on death row, it may also reflect something far more mundane: state legislatures’ reluctance to disturb final sentences out of respect for the separation of powers. *Id.* at 676 (discussing separation-of-powers concerns); see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (holding that separation of powers prohibits Congress from making retroactive laws that require courts to reopen final judgments). No matter what legislators’ motivation, the Court has made clear that prospective repeal counts as repeal. See *Atkins*, 536 U.S. at 314–15.

247. *Roper v. Simmons*, 543 U.S. 551, 566 (2005) (quoting *Atkins v. Virginia*, 536 U.S. at 315) (alteration in original).

248. *State v. Santiago*, 122 A.3d 1, 34 (Conn. 2015); see also *State v. Peeler*, 140 A.3d 811, 822 (Conn. 2016) (Palmer, J., concurring) (noting the “accelerating” pace of “decline in the imposition and implementation of the death penalty nationwide”).

249. *Glossip v. Gross*, 135 S. Ct. 2726, 2773–74 (2015) (Breyer, J., dissenting). New Hampshire and Kansas have not executed anyone since the death penalty was reinstated in 1976. See *State by State Database*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state_by_state (last visited Oct. 24, 2016).

250. *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring)); see also Smith, *supra* note 23 (“[Justice] Kennedy has embraced a view of societal norms that is much more holistic than a simple exercise that counts state legislative decisions.”). Compare *Lawrence*, 539 U.S. at 572, with *Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014) (counting Oregon, which formally retains the death penalty, as “[o]n the other side of the ledger” because it “suspended the death penalty and executed only two individuals in the past 40 years”).

251. *Executions by State and Year*, *supra* note 246. In three of these states—Colorado, Oregon, and Pennsylvania—the Governor has imposed a moratorium on executions. *Death Penalty in Flux*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-penalty-flux/#exe> (last visited Oct. 24, 2016).

252. *Executions by State and Year*, *supra* note 246. In Washington, which last executed a person in 2010, the governor has imposed a moratorium on executions. *Death Penalty in Flux*, *supra* note 252.

11 states that have not executed anyone in a decade should be considered “on the [abolitionist] side of the ledger.”²⁵³

Although 19 states with the death penalty have imposed the death penalty since 2006, the number of executions nationwide has steadily declined.²⁵⁴ In 2015, there were only 28 executions—a 25-year low.²⁵⁵ With the exception of one execution each in Oklahoma and Virginia, all others occurred in four states: Florida, Georgia, Missouri, and Texas.²⁵⁶ In 2014, there were 35 executions, almost 90% of which occurred in the same four states.²⁵⁷ These four states are “the proverbial tail wagging the dog of our [Nation’s] standards of decency;” they are our Nation’s dinosaurs.²⁵⁸

This paltry number, alone, suggests a punishment at odds with dignity. But there is more. As a majority of the Connecticut Supreme Court recently noted, executions overwhelmingly cluster among those states where, at least as a historical matter, the dignity of black lives has not mattered: “The thirteen states that comprised the Confederacy have carried out more than 75 percent of the nation’s executions over the past four decades.”²⁵⁹ The fact that “executions are overwhelmingly confined to the South (and states bordering the South)—the very same jurisdictions that were last to abandon slavery and segregation and that were most resistant to the federal enforcement of civil rights norms”—is truly remarkable, and quite telling.²⁶⁰

253. *Hall*, 134 S. Ct. at 1997. These 11 states, and the dates of their last executions, are as follows: Arkansas (2005), California (2006), Colorado (1997), Kansas (none), Montana (2006), Nevada (2006), New Hampshire (none), North Carolina (2006), Oregon (1997), Pennsylvania (1999), and Wyoming (1992). See *Glossip*, 135 S. Ct. at 2773 (Breyer, J., dissenting) (discussing states that have not conducted an execution since 2006).

254. *Executions by State and Year*, *supra* note 246; see also *State v. Peeler*, 140 A.3d 811, 822 (Conn. 2016) (Palmer, J., concurring) (“The number of executions carried out nationally has continued to decline, falling by more than one third from 2011 to 2015, and is now lower than at any time since 1991.”).

255. See *Number of Executions Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last updated Oct. 19, 2016). There were 14 executions in 1991. *Id.*

256. *Executions by State and Year*, *supra* note 246. At the time of this writing, there have been 17 executions in 2016. *Execution List 2016*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2016> (last visited Oct. 24, 2016). With the exception of one execution each in Alabama, Florida, and Missouri, all of this year’s executions have occurred in just two states: Georgia and Texas. *Id.*

257. *Id.* In 2014, there was one execution in Ohio and one in Arizona. *Id.*

258. See Kevin M. Barry, Opinion, *State by State, the Death Penalty is Losing Ground*, L.A. TIMES (Aug. 19, 2015, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-barry-death-penalty-retroactive-repeal-20150819-story.html>.

259. *State v. Santiago*, 122 A.3d 1, 52 (Conn. 2015) (“Adding in Oklahoma and Arizona—not yet states at the time of the civil war—brings the total to nearly 90 percent.”).

260. *Id.* at 53 n.86 (quoting C. Steiker & J. Steiker, *Report to the American Law Institute Concerning Capital Punishment*, in A.L.I., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY (April 15, 2009)); see also *McCleskey v. Kemp*, 481 U.S. 279, 329 (1987) (Brennan, J., dissenting) (“[Georgia’s] criminal law expressly differentiated between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of slavery.”).

As President Obama recently reminded the Nation, the former Confederate states lost the war for slavery.²⁶¹ And as execution numbers strongly suggest, these states are the only ones still fighting the war for the death penalty.²⁶² A punishment that retains robust support among only those states with a legacy of racial animus is a penalty that has lost the support of the Nation. Add to this a nationwide drop in new death sentences, “from modern era highs of more than 300 annually in the mid-1990s to modern era lows of 85 or fewer since 2011,” culminating in a 40-year low of 49 sentences in 2015,²⁶³ together with polling data confirming that a majority of Americans prefer life without the possibility of parole (“LWOP”) to the death penalty,²⁶⁴ and it is plain that the death penalty is unacceptable to contemporary society.

Our Nation’s lack of support for the death penalty is bolstered by an overwhelming rejection of the death penalty worldwide. As Justice Kennedy stated in *Lawrence*, “[w]hen our precedent has been thus weakened, criticism from other sources is of greater significance.”²⁶⁵ The death penalty’s

261. *Remarks by the President in Eulogy for the Honorable Reverend Clementa Pinckney*, WHITE HOUSE, (June 26, 2015, 2:49 PM), <https://www.whitehouse.gov/the-press-office/2015/06/26/remarks-president-eulogy-honorable-reverend-clementa-pinckney> (“[T]he cause for which they fought—the cause of slavery—was wrong . . .”).

262. *See supra* notes 256–59 and accompanying text (discussing state executions in 2014 and 2015).

263. *Santiago*, 122 A.3d at 51; *see also* *State v. Peeler*, 140 A.3d 811, 822 (Conn. 2016) (Palmer, J., concurring) (“[T]he total [number of new capital sentences imposed] fell by nearly 40 percent between 2011 and 2015, and is now by far the lowest of the post-*Furman* era.”); *DPIC Releases Year End Report: Historic Declines in Use of Death Penalty in 2015*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6329> (last visited Oct. 24, 2016) (“There have now been fewer death sentences imposed in the last decade than in the decade before the U.S. Supreme Court declared existing death penalty laws unconstitutional in 1972.”).

264. *See* Betsy Cooper et. al, *Anxiety, Nostalgia, and Mistrust: Findings from the 2015 American Values Survey*, PRRI (Nov. 17, 2015), <http://www.prii.org/research/survey-anxiety-nostalgia-and-mistrust-findings-from-the-2015-american-values-survey> (finding that “a majority (52%) of Americans say they prefer life in prison with no chance of parole, compared to 47% who say they prefer the death penalty”); Reid Wilson, *Support for Death Penalty Still High, but Down*, WASH. POST (June 5, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down> (finding that “more than half of Americans [52%] say they prefer life sentences for convicted murderers, rather than the death penalty . . . while 42 percent said they favored execution”); *see also* *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Oct. 24, 2016) (stating that 37% of respondents answered “no” when asked whether they were “in favor of the death penalty for a person convicted of murder”—the highest rate of death penalty opposition in 43 years; 61% answered yes—down 2% from 2014 and 19% from an all-time high of 80% in 1994); *cf.* ZIMRING & HAWKINS, *supra* note 166, at 154 (stating that abolition had “limited public support” and was “contrary to the manifest weight of public opinion . . . in every [abolitionist] nation where public opinion on abolition has been studied”).

265. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003); *see also* *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (stating that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation” of the conclusion that the death penalty is a disproportionate penalty for offenders under age 18); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (considering world community’s disapproval of death penalty for crimes committed by people with intellectual disabilities).

inconsistency with the world community's standards of decency is unmistakably clear: 140 countries have abolished the death penalty formally or in practice, just 58 countries retain it,²⁶⁶ and only seven countries other than the U.S. use it with any frequency—China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, and Yemen.²⁶⁷ Dubious company, indeed.

The reasons for the Nation's and the world's movement away from the death penalty are, of course, many and varied. Although it is far from clear that the dignity of life (as opposed to, say, cost, inconsistency, inefficiency, or unreliability) is the *only* reason for this movement away from the death penalty, it is clearly one reason.²⁶⁸ States' repeal of the death penalty, as well as their refusal to impose and carry it out, confirm the dignity of life—that no one should be executed, no matter how affordable, consistent, efficient, or reliable the process may be.

2. No Legitimate Penological Purpose

After concluding that the death penalty is unacceptable to contemporary society, as determined by states' unwillingness to impose it, the Court will next turn to the death penalty's lack of any legitimate penological purpose.²⁶⁹ The three "I's" will figure prominently in this determination: inconsistency, inefficiency, and innocence (unreliability).

i. Inconsistency

All three state high courts that have declared the death penalty unconstitutional have relied, in part, on the hopelessly arbitrary process of

266. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (last visited Oct. 25, 2016).

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

268. *Compare Santiago*, 122 A.3d at 43 ("The fact that supporters voted to abolish capital punishment [in Connecticut] for *both moral and practical* reasons"—including "[practical] concerns over monetary or practical challenges facing [Connecticut's] capital punishment system"—"in no way demonstrates that the death penalty continues to comport with contemporary standards of decency in Connecticut. An indecent punishment is no less indecent for the fact that it is also costly and ineffectual."), and *Statement from Concerned Conservative Nebraskans*, NEBRASKANS FOR ALTERNATIVES TO THE DEATH PENALTY (May 1, 2015), <http://nadp.net/statement-from-concerned-conservative-nebraskans> ("As conservative and Republican leaders in Nebraska . . . our core principles—limited government, fiscal responsibility, *the right to life* and liberty—unite us in our shared concerns about the death penalty." (emphasis added)), with FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 27 (2003) (discussing transformation in European policy toward the death penalty at the close of the late 20th century, from a matter of internal criminal justice policy to a matter of "human dignity and human rights," and noting Western European governments' explicit opposition to the death penalty as "a violation of the most fundamental of human rights—the right to life" (quoting an appeal of presidents of nine national parliaments)).

269. *See Atkins*, 536 U.S. at 319.

selecting people for death.²⁷⁰ Massachusetts and Connecticut went further, suggesting an arbitrariness that is not random: the disproportionate selection of *people of color* for death.²⁷¹ Justices Marshall and Brennan, and every other Supreme Court Justice to have questioned the constitutionality of the death penalty over the past forty years, have sounded a similar theme, as have countless scholars.²⁷² Even Justice Scalia, who believed the death penalty to be constitutional, acknowledged as much, stating that “unconscious operation of irrational sympathies and antipathies including racial upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable”²⁷³ Because prosecutors retain discretion not to seek the death penalty, because juries and judges are constitutionally required to consider any mitigating factor before imposing the death penalty, and because racism persists in our society, the arbitrary and discriminatory selection of people for death is simply inevitable.²⁷⁴

270. See *People v. Anderson*, 493 P.2d 880, 897 (Cal. 1972) (“[F]ar from being a certain penalty with acknowledged deterrent effect, capital punishment today is rarely imposed or implemented.”).

271. Compare *Santiago*, 122 A.3d at 66 (“[T]he selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias.”), and *id.* at 70 (“[T]here can be no death penalty scheme ‘adequate to cure the influence of arbitrariness and race in the overall equation that results in the imposition of death.’” (quoting *State v. Webb*, 680 A.2d 147, 237 (Conn. 1996) (Norcott, J., dissenting))), and *id.* at 92–94, 96, (Norcott & McDonald, JJ., concurring) (compiling studies on racial disparity in capital sentencing, and stating that “we would be hard-pressed to dismiss or explain away the abundant evidence that suggests the death penalty in Connecticut, as elsewhere, has been and continues to be imposed disproportionately on racial and ethnic minorities, and particularly on those whose victims are members of the white majority”), and *State v. Peeler*, 140 A.3d 811, 824 (Conn. 2016) (Palmer, J., concurring) (stating that any death penalty sentencing scheme “that allows prosecutors not to seek and jurors not to impose the death penalty for any reason ‘necessarily opens the door’ to caprice and bias of various sorts, racial or otherwise [and] cannot, in principle, ensure that the ultimate punishment will be imposed fairly and objectively, as it must be” (quoting *Santiago*, 122 A.3d at 67)), with *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (“[E]xperience has shown that the death penalty will fall discriminatorily upon minorities, particularly blacks.”).

272. See *Glossip*, 135 S. Ct. at 2762 (Breyer, J., dissenting) (stating that “research strongly suggests” that “factors—such as race, gender, local geography, and resources—do significantly determine who receives the death penalty”); see also *Santiago*, 122 A.3d at 68–69 (citing opinions of former Supreme Court Justices Marshall, Brennan, Blackmun, and Stevens as well as legal scholarship regarding discrimination in administration of death penalty); Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1794 (1970) (“As long as class and racial prejudice is prevalent, imposition of the death penalty probably will not simply be random but discriminatory.”).

273. CARTER ET AL., *supra* note 175, at 353 n.54 (quoting memorandum from Justice Scalia to Justice Marshall).

274. See, e.g., *Glossip*, 135 S. Ct. at 2755 n.4 (Thomas, J., concurring) (noting that the Court’s “decision holding mandatory death penalty schemes unconstitutional . . . may have introduced the problem of arbitrary application” (citation omitted)); *Callins v. Collins*, 510 U.S. 1141, 1151 (1994) (Blackmun, J., dissenting) (recognizing “‘tension’ between the need for fairness to the individual and the consistency promised in *Furman*”); *Santiago*, 122 A.3d at 67 (concluding that “individualized sentencing requirement inevitably allows in through the back door the same sorts of caprice and freakishness that the court sought to exclude in *Furman*” and “necessarily opens

The death penalty's inconsistent application deprives it of a penological purpose. A punishment that is inherently arbitrary—or worse, discriminatory—does not deter offenders, especially white offenders.²⁷⁵ As Judge Alex Kozinski has colorfully remarked, “[t]o get executed in America these days you have to be not only a truly nasty person, but also very, very unlucky”²⁷⁶ Retribution is also not served. An arbitrary punishment is not retributive because it gives “just deserts”²⁷⁷ to only some offenders, provides closure to only some victims and family members, and expresses society's outrage for only some murders. It therefore does not restore balance to the moral order—it perpetuates imbalance. And a punishment that is not only arbitrary but also *discriminatory* serves the ends of retribution in the same way that lynching and genocide do—an illegitimate purpose if ever there was one.²⁷⁸

The truism that arbitrariness and discrimination are “present in the imposition of *any* criminal punishment, not only the death penalty,”²⁷⁹ does not undermine the death penalty's deficiencies; it merely highlights the

the door to racial and ethnic discrimination in capital sentencing” (footnote omitted)); *id.* at 68 n.105 (stating “that the decisions of individual jurors and prosecutors may at times be tainted by the same sorts of subconscious biases and prejudices with which all of us wrestle”); *id.* at 95–96 (Norcott & McDonald, JJ., concurring) (noting “recent scientific studies that now document what has long been recognized: most, if not all, of us exhibit unconscious or implicit bias,” and stating that “[i]t likely is the case that many, if not most, of the documented disparities in capital charging and sentencing arise not from purposeful, hateful racism or racial animus, but rather from these sorts of subtle, imperceptible biases on the part of generally well-meaning decision makers”); *State v. Webb*, 680 A.2d 147, 237 (Conn. 1996) (Norcott, J., dissenting) (“As long as racial prejudice is a factor in our lives, and it is an undeniable factor in every facet of American life, there can be no place for a capital penalty in our society.”).

275. See *Santiago*, 122 A.3d at 60 (discussing the lack of deterrent value of the death penalty, given “the sheer rarity with which death sentences are imposed and carried out”); see also *Glossip*, 135 S. Ct. at 2768 (Breyer, J., dissenting) (“[I]t [is] difficult to believe . . . that such a rare event [as execution] significantly deters horrendous crimes.”); *Furman v. Georgia*, 408 U.S. 238, 293, 302 (1972) (Brennan, J., concurring) (stating that “[w]hen the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily,” and concluding that the death penalty lacks deterrent value, in part, because it is not “invariably” imposed).

276. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 25 (1995).

277. See *Santiago*, 122 A.3d at 61 (discussing retribution).

278. See *Santiago*, 122 A.3d at 66 (“To the extent that the ultimate punishment is imposed on an offender on the basis of impermissible considerations such as his, or his victim's, race, ethnicity, or socio-economic status, rather than the severity of his crime, his execution does not restore but, rather, tarnishes the moral order.”); see also Benjamin Fleury-Steiner, *Death in “Whiteface”: Modern Race Minstrels, Official Lynching, and the Culture of American Apartheid*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 150, 173 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (describing the death penalty as “official lynching” and symbolic of “a much broader and enduring culture of American apartheid”).

279. *Santiago*, 122 A.3d at 236 (Espinosa, J., dissenting).

presence of such deficiencies throughout our criminal sentencing scheme.²⁸⁰ As Justice Brennan argued in his dissenting opinion in *McCleskey v. Kemp*, a case in which the Court upheld the constitutionality of the death penalty despite statistical evidence of systemic racial discrimination, this argument reduces to “a fear of too much justice.”²⁸¹ For this reason, several state high courts have roundly rejected the argument.²⁸²

ii. *Inefficiency*

Prolonged delay between sentencing and execution is a second reason that state high courts, Supreme Court Justices, and commentators have concluded that the death penalty is unconstitutional.²⁸³ Such delay is inevitable because it results from the constitutional imperative of due process; all legal avenues must be explored before the irrevocable penalty of death is finally carried out.²⁸⁴

The death penalty’s inefficiency deprives it of any deterrent or retributive effect. Would-be offenders face not a swift and certain death, but instead what one federal district judge has rightly called “life in prison, with the remote possibility of death.”²⁸⁵ This is hardly a deterrent. Retribution is also not

280. For example, the Fair Sentencing Act reduced crack cocaine sentences out of concern for unjustified race-based differences in the length of drug sentences. *Dorsey v. United States*, 132 S. Ct. 2321, 2328 (2012).

281. *McCleskey v. Kemp*, 481 U.S. 279, 339, 342 (1987) (Brennan, J., dissenting) (rejecting the Court’s “fear that recognition of [petitioner’s] claim [of racial discrimination] would open the door to widespread challenges to all aspects of criminal sentencing” as “greatly exaggerated” and “baseless”).

282. See, e.g., *Santiago*, 122 A.3d at 66–67 (implicitly rejecting *McCleskey* and holding that death penalty “fails to achieve its retributive goals” because, *inter alia*, “the selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias”); *id.* at 96, 102 (Norcott & McDonald, JJ., concurring) (expressing “serious, indeed grave, doubts” regarding *McCleskey*’s holding, and “express[ing] to our sister courts, for whom the issue is not yet a dead letter, our suggestion that they consider closely whether the legal standard articulated in *McCleskey* . . . affords adequate protection to members of minority populations who may face the ultimate punishment” (citation omitted)); *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (holding, pre-*McCleskey*, that the death penalty was unconstitutional based, in part, on fact that “the death penalty will fall discriminatorily upon minorities, particularly blacks”); *State v. Marshall*, 613 A.2d 1059, 1108, 1110 (N.J. 1992) (rejecting *McCleskey*’s determination that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system,” but finding no “evidence of constitutionally-significant race-based disparities in sentencing” in New Jersey (alteration in original)).

283. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting) (discussing excessive delays in imposition of death penalty); *Santiago*, 122 A.3d at 57–60 (same); *Watson*, 411 N.E.2d at 1283 (same).

284. See *Watson*, 411 N.E.2d at 1283 (citing *Furman v. Georgia*, 408 U.S. 238, 302 (1972)); see also *Glossip*, 135 S. Ct. at 2764 (Breyer, J., dissenting) (“[U]nless we abandon the procedural requirements that assure fairness and reliability, we are forced to confront the problem of increasingly lengthy delays in capital cases.”).

285. *Jones v. Chappell*, 31 F. Supp. 3d, 1050, 1053 (C.D. Cal. 2014); see *Furman*, 408 U.S. at 302 (Brennan, J., concurring) (“A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed

served. Decades after the crime, community outrage has subsided as the community has changed.²⁸⁶ Family members seeking closure have instead been retraumatized during protracted legal proceedings that force them to relive their loved one's murder.²⁸⁷ And the offender who once "deserved" death "may have found [herself] a changed a human being"—like Kelly Gissendaner, a once-vengeful spouse who died a woman of faith seeking and preaching forgiveness.²⁸⁸ Several state high courts and Supreme Court Justices have gone further, arguing that prolonged death row delay is literally "too much" retribution because of the "brutalizing psychological effects of impending execution,"²⁸⁹ namely, prolonged solitary confinement and the "uncertainty as to whether a death sentence will in fact be carried out."²⁹⁰

One obvious counterargument, voiced most notably by Justice Scalia, is that condemned prisoners should not be able to avail themselves of delay that they themselves create.²⁹¹ The state high courts that have faced this argument have rightly rejected it. As the California Supreme Court concluded, "[a]n appellant's insistence on receiving the benefits of appellate review of the judgment condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription."²⁹²

in the distant future."); *see also Glossip*, 135 S. Ct. at 2767 (Breyer, J., dissenting) (stating that lengthy delays undermine the death penalty's deterrent effect); *Santiago*, 122 A.3d at 58 (same).

286. *See Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting) ("By then the community is a different group of people.").

287. *See, e.g., State v. Peeler*, 140 A.3d 811, 828 (Conn. 2016) (Palmer, J., concurring) (stating that the death penalty's promise to families of "restoration and closure . . . has proved to be a false hope"); *Santiago*, 122 A.3d at 64 (discussing the "retraumatization that our capital punishment scheme often inflicts on victims' families"); *see also* Khalilah Brown-Dean & Ben Jones, *Building Authentic Power: A Study of the Campaign to Repeal Connecticut's Death Penalty*, in *POLITICS, GROUPS, AND IDENTITIES* 13 (2015) (discussing death penalty's "infl[ic]tion of] further pain on murder victims' families").

288. *Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting); *see also supra* notes 8–16 and accompanying text (discussing Gissendaner); *Santiago*, 122 A.3d at 63 (questioning "whether there can be any true retribution when the middle aged inmate who goes to the gallows bears little resemblance to the individual who offended years before").

289. *People v. Anderson*, 493 P.2d 880, 895 (Cal. 1972).

290. *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting); *see also Anderson*, 493 P.2d at 895 (discussing "brutalizing psychological effects of impending execution"); *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (discussing "mental agony" of impending execution).

291. *See Glossip*, 135 S. Ct. at 2749 (Scalia, J., concurring) ("[Justice Breyer's] invocation of the resultant delay as grounds for abolishing the death penalty calls to mind the man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan.").

292. *Anderson*, 493 P.2d at 895; *see also Watson*, 411 N.E.2d at 1283 ("[T]he right to pursue due process of law must not be set off against the right to be free from inhuman treatment."); *cf. Jones v. Chappell*, 31 F. Supp. 3d 1050, 1066 (C.D. Cal. 2014) (finding that "much of the delay in California's postconviction review process is created by the State itself, not by inmates' own interminable efforts to delay").

iii. *Innocence*

A third reason for declaring the death penalty unconstitutional is its inherent unreliability. Since 1973, 156 people have been exonerated from death row, including six people in 2015.²⁹³ It does not take a mathematical model (though there are some) to conclude from these astonishingly high numbers that “innocent Americans have been and will continue to be executed in the post-*Furman* era.”²⁹⁴

Killing an innocent person, of course, serves no penological purpose because it is not punishment at all—it is murder, or something “perilously close” to it.²⁹⁵ A majority of the Court has therefore concluded that “the execution of a legally and factually innocent person *would be* a constitutionally intolerable event.”²⁹⁶ But the Court has not gone further to find that the *substantial risk* of executing a legally and factually innocent person is constitutionally intolerable. Some authorities have made this leap. Among them are multiple Supreme Court Justices, the Connecticut Supreme Court, and U.S. District Court Judge Jed S. Rakoff, who equated execution under the Federal Death Penalty Act to “foreseeable, state-sponsored murder of innocent human beings.”²⁹⁷

Inconsistency, inefficiency, and innocence deprive the death penalty of any penological purpose. They convincingly demonstrate the death penalty’s inherently flawed administration, one that can never be remedied so long as prosecutors and juries retain discretion, racism persists, due process is required, and human beings remain fallible.

But the Court should do more than advance arguments that target problems endemic to the administration of the death penalty.²⁹⁸ Hopefully,

293. *Innocence: List of Those Freed from Death Row*, *supra* note 13.

294. *State v. Santiago*, 122 A.3d 1, 65 (Conn. 2015) (citing studies); *see also Glossip*, 135 S. Ct. at 2758 (Breyer, J., dissenting) (citing studies); *Callins v. Collins*, 510 U.S. 1141, 1159 n.8 (1994) (Blackmun, J., dissenting) (“Innocent persons *have* been executed, perhaps recently, and will continue to be executed under our death penalty scheme.” (citations omitted)).

295. *Santiago*, 122 A.3d at 65 (quoting *State v. Cobb*, 743 A.2d 1, 146 (Conn. 1999)).

296. *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O’Connor, J., concurring) (emphasis added); *see also Callins*, 510 U.S. at 1158 (Blackmun, J., dissenting) (discussing *Herrera*).

297. *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002), *rev’d*, 313 F.3d 49 (2d Cir. 2002); *see, e.g., Baze v. Rees*, 553 U.S. 35, 85–86 (2008) (Stevens, J., concurring) (discussing the risk of error in death penalty cases); *Callins*, 510 U.S. at 1158 (Blackmun, J., dissenting) (same); *Santiago*, 122 A.3d at 65 (same). The Massachusetts Supreme Court similarly noted the death penalty’s unreliability, invoking the words of American Revolutionary War General Marquis de Lafayette, who famously stated, “I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me.” *Watson*, 411 N.E.2d at 1287 & n.16; John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL’Y 195, 215 n.122 (2009) (noting that the quotation was erroneously attributed to Thomas Jefferson).

298. *See, e.g.,* Petition for Writ of Certiorari, *Walter v. Pennsylvania*, 119 A.3d 255 (2015) (No. 15–650) (challenging the constitutionality of the death penalty per se, but not invoking dignity); *The Death Penalty Endgame*, *supra* note 23 (discussing the petition).

the Court will conclude that, even if the death penalty were administered consistently, swiftly, and reliably, the death penalty would still lack a legitimate penological purpose because *no* purpose can justify the State's deprivation of the dignity of life. In support of this argument, the Court might cite the high court decisions from California, Massachusetts, and Connecticut that abolished the death penalty because of its inconsistency with the "dignity of man, the individual and the society as a whole."²⁹⁹ The Court might also find support for the dignity of life in the opinions of former and current Supreme Court Justices, beginning with Justice Brennan's enunciation of "the right to have rights" and continuing up to the present, with Justice Breyer's extension of the Court's dignity-of-life decisions beyond certain types of crimes and offenders to the death penalty itself.³⁰⁰

B. OBJECTIONS

If the Court invalidates the death penalty on dignity grounds, it will likely do so by a bare majority. Here, I gesture toward some of the dissenters' likely objections and venture some possible responses.

1. Dignity Cannot Be Given

In *Obergefell*, Justice Clarence Thomas argued that dignity is innate—it cannot be taken away by one branch of government (i.e., the legislature) or given back by another (i.e., the Court).³⁰¹ In support of his dignity-is-innate argument, Justice Thomas looked to history. "Slaves did not lose their dignity . . . because the government allowed them to be enslaved," Justice Thomas argued; they always had their dignity.³⁰² Attractive in its simplicity, this argument is wrong.

Dignity is not like the sense of smell, the instinct to flee, or an immutable trait like skin color or sexual orientation. Dignity does not exist apart from others; it is socially constructed—it is contingent upon the society in which we live, and therefore exists or ceases to exist only because of our society.³⁰³ Without society, dignity is the proverbial felled tree in a lonely wood.

299. *People v. Anderson*, 493 P.2d 880, 895 (Cal. 1972); *see also supra* notes 192–203 and accompanying text (discussing *Anderson*, *Watson*, and *Santiago*).

300. *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring); *see also supra* notes 201–30 and accompanying text (discussing the opinions of Justice Blackmun and Justice Stevens, as well as Justice Breyer's reliance on *Roper*, *Louisiana*, and *Hall*).

301. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting).

302. *Id.*

303. *See* IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* 31 (1999); *see also* Kevin Barry, *Gray Matters: Autism, Impairment, and the End of Binaries*, 49 *SAN DIEGO L. REV.* 161, 206 (2012) ("Ideas are not inevitable—they are the product of social practices and institutions and are therefore socially constructed.").

Justice Thomas' arguments notwithstanding, enslaved people's dignity was not innate, impervious to government action.³⁰⁴ When Frederick Douglass escaped from slavery, he did not find dignity (liberty and equality) in *himself*; he found it in the North, which did not have slavery. It was the legally sanctioned institution of slavery that deprived people of color the dignity of liberty and equality; it was the abolition of slavery that restored it.³⁰⁵

The same goes for lesbian and gay people. Before *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, lesbians and gays did not have dignity; they were outcasts.³⁰⁶ Their very being was outlawed.³⁰⁷ When they were arrested for having sex, and excluded from marriage and civil rights protections, they did not say, "Well, at least we have our dignity." Because that is exactly what they had lost by operation of law: their dignity of liberty and equality.³⁰⁸

In Justice Thomas's rendering, dignity appears to be something akin to honor: the ability to command respect.³⁰⁹ Even if it were true (and it is not) that dignity begins and ends with honor and does not encompass the greater concerns of liberty, equality, and life, Justice Thomas is wrong to suggest that honor is somehow innate. Honor is a characteristic that we ascribe, an accolade that we bestow, praise that we heap on others. In a word, honor is given; it is dependent on society to bestow it.

One might argue, for example, that Kelly Gissendaner never lost her honor when the State executed her; she was brave and contrite to the end.³¹⁰ Similarly, enslaved people surely possessed honor in the eyes of those whose

304. See *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting).

305. See Bernard R. Boxill, *Dignity, Slavery, and the Thirteenth Amendment*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 60, 117 ("[T]he Thirteenth Amendment . . . abolished one frightful challenge to the human dignity of black people in America . . ."). Although the abolition of slavery restored *some* dignity to people of color, other deprivations of dignity remain. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 12 (2010) (discussing the phenomenon of mass incarceration of people of color and legally sanctioned discrimination against ex-offenders in employment, housing, education, public benefits, voting, and jury service).

306. See *Obergefell*, 135 S. Ct. at 2600 (stating that, even after invalidation of same-sex sodomy laws in *Lawrence*, gays and lesbians remained "outcast[s]").

307. See *Lawrence v. Texas*, 539 U.S. 558, 584 (2003) (O'Connor, J., concurring) (stating that, "because of the sodomy law, *being* homosexual carries the presumption of being a criminal").

308. See *supra* Part III.A (discussing deprivation of dignity of liberty and equality in LGBT rights cases).

309. See *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting) (equating dignity to the Declaration of Independence's "vision of mankind in which all humans are created in the image of God and therefore of inherent worth"); see also Henry, *supra* note 19, at 212, 215 (describing dignity as "personal integrity" and observing "that people who persevere in the face of adversity, maintain composure in spite of fear, and display self-control despite great suffering are [said to be] dignified").

310. See Henry, *supra* note 19, at 216 (contrasting "[p]eople who appear poised, graceful, polished, and stately" and therefore "exude 'an air of dignity,'" with those who "have 'fallen apart' under conditions that are aesthetically unsettling, embarrassing, humiliating, shameful, disgraceful, demeaning, and self-destructive" (footnotes omitted)).

homes dotted the Underground Railroad, just as gays and lesbians had honor in the eyes of their straight allies.³¹¹ But this misses the point. Although enslaved people and gays and lesbians surely commanded the respect of some segment of society, they did not command the respect of their government, which permitted them to be enslaved or otherwise subordinated. In the eyes of the State, then, they were without honor. And so it is for death row prisoners like Kelly Gissendaner whose government treats them not with respect, but rather “as nonhumans, as objects to be toyed with and discarded.”³¹²

Regardless of how one conceives of dignity, it is anything but innate. Like slavery and laws targeting the LGBT community, the death penalty deprives people of dignity. An end to the death penalty would restore this dignity.

2. Dignity Should Not Be Given to Murderers

Some might argue that people who commit murder (as opposed to, say, innocent gay and lesbian people) do not deserve dignity and, therefore, the law should not provide it. By devaluing others’ lives, the argument goes, the value of murderers’ lives is net zero; they are something less than human, and so have forfeited their birthright.³¹³ The dignity of life simply does not apply to them by dint of their crime.

As Chief Justice Roberts stated in another context, “[w]hatever force that belief may have as a matter of moral philosophy, it has no . . . basis in the Constitution”³¹⁴ There is no “Except for Murderers” Clause. The Eighth

311. See *id.* at 215 (“A slave, who has been deprived of equality and liberty as dignity, can nevertheless possess personal integrity as dignity by expressing his sense of moral worth and self-respect in the face of oppression.”).

312. *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring). Another version of dignity as “honor” extends beyond the individual to the broader community. Many abolitionists, for example, argue that the death penalty deprives the community of honor, “lessen[ing] us all.” *Callins v. Collins*, 510 U.S. 1141, 1159 (1994) (Blackmun, J., dissenting); see also *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (discussing “concern for the society that diminishes itself whenever it takes the life of one of its members”); *State v. Ross*, 646 A.2d 1318, 1395 (Conn. 1994) (Berdon, J., dissenting) (“[T]he death penalty . . . degrades and dehumanizes a society that permits it to be imposed, calling into question the morality of every one of us. . . . [A]ll of our lives are cheapened when a human being is executed.”); *SARAT*, *supra* note 165, at 250 (“State killing diminishes us”); Henry, *supra* note 19, at 221 (“Treating a person in a subhuman manner is wrong not only for the effect it has on that individual, but also for the consequences it has on collective humanity and society.”); Steiker, *supra* note 74, at 773 (arguing that the death penalty “violates human dignity—not because of what it does to the punished, but rather because of what it does to all of us[,] . . . damag[ing] or destroy[ing] the human capacities of those of us in whose name the punishment is publicly inflicted”).

313. See, e.g., *State v. Santiago*, 122 A.3d 1, 99 (Conn. 2015) (Norcott & McDonald, JJ., concurring) (“The death sentence itself is a declaration that society deems the prisoner a nullity, less than human and unworthy to live.” (quoting *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1293 (Mass 1980) (Liacos, J., concurring))).

314. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J., dissenting) (rejecting the majority’s recognition of right to marriage for same-sex couples as “rest[ing] on

Amendment accords those who commit murder some dignity of liberty (e.g., freedom from barbaric punishments) and some dignity of equality (e.g., assurance that their sentence is not imposed arbitrarily).³¹⁵ It is, of course, a lesser dignity than the dignity accorded innocents; punishment—by definition—involves the deprivation of liberty and also differential treatment.³¹⁶ But it is dignity nonetheless. If people who commit murder retain some dignity of liberty and equality under the Constitution, it does not follow that they somehow forfeit the dignity of life under the Constitution.

3. Dignity is Given

One might argue that, even assuming dignity can be given, it *is* given in the death penalty context. In recognition of the fact that “death is different,” the argument goes, the Court requires states to follow meticulous procedures to ensure that the ultimate punishment is not doled out barbarically, inconsistently, or unreliably.³¹⁷ This argument also misses its mark.

While such safeguards arguably provide some measure of dignity of liberty³¹⁸ and equality,³¹⁹ they do not assure the dignity of life because they still permit life to be taken away.³²⁰ Life is all or nothing. Unlike *some* liberty and *some* equality, there is no such thing as some life.

4. The Dignity of Life is at Odds with the Fifth Amendment

One might argue that, even if the concept of dignity is firmly embedded in Eighth Amendment doctrine, it cannot be interpreted to prohibit the death penalty because the Constitution’s Fifth Amendment expressly

nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to . . .”).

315. See *supra* Part III.B.1–2.

316. See *Punishment*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law.”).

317. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice” and therefore “could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”).

318. See *Baze v. Rees*, 553 U.S. 35, 49 (2008) (discussing freedom from barbaric punishments). *But see* *Glossip v. Gross*, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting) (stating that execution by Oklahoma’s three-drug protocol may be “the chemical equivalent of being burned alive”).

319. See *Gregg*, 428 U.S. at 188 (discussing standards to guide jury discretion so that the death penalty is not imposed “freakishly”). *But see supra* notes 271–75 and accompanying text (discussing tension between fairness and consistency).

320. See *supra* Part III.B.3.i (discussing qualified dignity of life in *Ford* and its progeny).

mentions the death penalty.³²¹ Justice Scalia advanced this position numerous times, most recently in his concurring opinion in *Glossip*.³²²

At first blush, this argument seems reasonable. For example, gays and lesbians who won the right to marry did not have to contend with constitutional text that contemplated marriage as being between a man and a woman.³²³ Conversely, enslaved people seeking freedom *did* have to contend with constitutional text that contemplated slavery; they did not win freedom until the Constitution was amended.³²⁴ So, the argument goes, the death penalty is akin to slavery, not marriage, and what the People need to do is amend the Constitution.

On closer scrutiny, this argument is too facile. As Professor Joseph Blocher has written, “the Fifth Amendment contains *prohibitions*, not powers, and there is no reason to suppose that they somehow nullify *other* constitutional prohibitions—most importantly, the ban on cruel and unusual punishment.”³²⁵ Justice Stevens appreciated this distinction. “[T]he guarantees of procedural fairness contained in the Fifth and Fourteenth Amendments do not resolve the substantive questions relating to the separate limitations imposed by the Eighth Amendment.”³²⁶ Indeed, “[n]ot a single Justice in *Furman* [either concurring or dissenting] concluded that the mention of deprivation of ‘life’ in the Fifth and Fourteenth Amendments insulated the death penalty from constitutional challenge.”³²⁷ And all three state supreme courts that abolished the death penalty have done so notwithstanding reference to capital punishment in their state constitutions.³²⁸

As stated in *State v. Peeler*, the 2016 case that upheld the Court’s decision in 2015 to abolish the death penalty:

321. See U.S. CONST. amend. V (stating that “[n]o person shall be held to answer for a *capital* . . . crime, unless on a presentment or indictment of a Grand Jury,” and no person shall “be deprived of *life* . . . without due process of law.” (emphasis added)).

322. *Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring).

323. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting) (“The Constitution itself says nothing about marriage . . .”).

324. See CHEMERINSKY, *supra* note 85, at 707–08 (discussing the Constitution’s references to slavery).

325. Joseph Blocher, *The Death Penalty and the Fifth Amendment*, 111 NW. U. L. REV. ONLINE 1, 2–3 (2016) (footnote omitted).

326. *Baze v. Rees*, 553 U.S. 35, 86 n.19 (2008) (Stevens, J., concurring).

327. *Id.*; see also *Furman v. Georgia*, 408 U.S. 238, 283 (1972) (Brennan, J., concurring).

328. See *People v. Anderson*, 493 P.2d 880, 886 (Cal. 1972) (“[N]one of the incidental references to the death penalty purport to give its existence constitutional stature.”); see also *State v. Santiago*, 122 A.3d 1, 49 (Conn. 2015) (“[I]ncidental references to the death penalty in a state constitution merely acknowledge that the penalty was in use at the time of drafting; they do not forever enshrine the death penalty’s constitutional status as standards of decency continue to evolve.”) (citing *Anderson*, 493 P.2d at 886); *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1286–87 (Mass. 1980) (holding that death penalty was unconstitutional, notwithstanding reference to death penalty in the Massachusetts constitution).

[A] declaration of rights such as that contained in article first of the Connecticut constitution, or the federal Bill of Rights, is not a grant of governmental authority; rather, it delineates the rights and freedoms of the people *as against the government*. . . . [T]here is no governmental *right to kill*.³²⁹

The rules of grammar also support this construction. As several of the *Peeler* Court's concurring justices explained, "due process is a *necessary* condition for the imposition of the death penalty" under the Fifth Amendment, but not "a *sufficient* condition."³³⁰ Without due process, the State may not kill; but, even *with* due process, the State *still* may not kill if such killing is cruel and unusual or otherwise impermissible under the law.³³¹

In short, the Framers recognized the risk that the dignity of life might one day call for the end of the death penalty, but they did not shut the door to the possibility.³³² They certainly could have, adding a proviso to the Eighth Amendment stating that "[n]o provision of the Constitution . . . shall be construed as prohibiting the imposition of the punishment of death."³³³ Because they did not, that door remains open.

5. Judicial Abolition of the Death Penalty is Undemocratic

One might argue, as did the defendants in *Obergefell*, that there has been "insufficient democratic discourse" to warrant invalidation of the death

329. *State v. Peeler*, 140 A.3d 811, 829 (Conn. 2016) (Palmer, J., concurring) (citations omitted).

330. *Id.*

331. *Id.* To find otherwise would be to commit what Indiana Supreme Court Justice Roger DeBrueler, over 40 years ago, called:

[T]he classical fallacy known as 'denying the antecedent of a conditional statement.' . . . [This] . . . is committed when a statement in the conditional form 'if P then Q' [i.e., if due process is denied, then deprivation of life is not allowed] is taken to imply 'If not P, then not Q [i.e., if due process is given, then deprivation of life is allowed].' . . . This violates the rules of deduction, as may be seen in this example: 'If Columbia University is in California, then it is in the United States. Columbia University is not in California. Therefore, Columbia University is not in the United States.'

French v. State, 362 N.E.2d 834, 843 n.1 (Ind. 1977) (De Brueler, J., concurring in part and dissenting in part); see also Blocher, *supra* note 325, at 9–10 (distinguishing necessary from sufficient conditions).

332. See *Furman*, 408 U.S. at 263 (Brennan, J., concurring) (stating that, while one of the Framers objected to the cruel and unusual punishment clause on grounds that it "might someday prevent the legislature from inflicting what were then quite common and, in his view, 'necessary' punishments—death, whipping, and earcropping[,] [the] considerable majority' was prepared to run that risk"); see also *Anderson*, 493 P.2d at 892–93 (discussing Framers's understanding that existing punishments might later be held to be unconstitutionally cruel).

333. *E.g.*, MASS. CONST. Pt. 1, art. XXVI; see also CAL. CONST. art. I, § 27 ("The death penalty . . . shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments . . . nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.").

penalty.³³⁴ But as Justice Kennedy wrote in *Obergefell*, this inclination “to proceed with caution—to await further legislation, litigation, and debate” should be resisted.³³⁵ Like the debate over the freedom to marry, public controversy surrounding the death penalty has prompted “referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings”³³⁶—in other words, the late Justice Scalia might say, “democracy.”³³⁷ This democratic discourse has yielded a Nation that has overwhelmingly turned its back on the death penalty.³³⁸

More “plebiscites, legislation, persuasion, and loud voices”³³⁹ would therefore do little good. Given the death penalty’s precipitous decline in recent years,³⁴⁰ there is little indication that such measures will revive support for the death penalty and every indication that they will merely extend the death penalty’s numbered days, prolonging the inevitable. As a result, more deliberation would do real harm, because people would die in the interim. In *Obergefell*, Justice Kennedy defended the Court’s decision in favor of same-sex couples by noting that a contrary decision would impose “[d]ignitary wounds [that] cannot always be healed with the stroke of a pen.”³⁴¹ A ruling upholding the death penalty to encourage further debate would impose wounds of a different kind—ones that can *never* be healed with the stroke of a pen.

Even assuming sufficient public support for abolition of the death penalty, one might argue that judicial abolition of the death penalty is inconsistent with the principle of “judicial self-restraint” underpinning federalism and the separation of powers.³⁴² In his dissenting opinion in *Obergefell*, for example, Chief Justice Roberts chided the majority for failing to exercise judicial self-restraint in recognizing the right of same-sex couples to marry.³⁴³ In support of his critique, the Chief Justice cited the infamous 1857 case of *Dred Scott v. Sandford*, in which the Court invalidated the Missouri Compromise, a federal law restricting the institution of slavery, as a violation

334. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

335. *Id.*

336. *Id.*

337. *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting).

338. Compare *Obergefell*, 135 S. Ct. at 2611, app. B (noting that 16 states had legalized same-sex marriage), with *Executions by State and Year*, *supra* note 246 (stating that 20 states have abolished the death penalty).

339. *Windsor*, 133 S. Ct. at 2710 (Scalia, J., dissenting).

340. See *supra* Part IV.A.1.

341. *Obergefell*, 135 S. Ct. at 2606.

342. *Id.* at 2618 (Roberts, C.J., dissenting) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

343. *Id.* (Roberts, C.J., dissenting); see also *id.* at 2643 (discussing majority’s lack of “judicial self-restraint”) (Alito, J., dissenting).

of slaveowners' implied right of property in their slaves.³⁴⁴ In the Chief Justice's rendering, the Court in *Dred Scott* reached the wrong result because it failed to exercise self-restraint; it identified a constitutionally-protected property right in slaves that did not exist.³⁴⁵ Deciding the constitutionality of the death penalty, the argument goes, would repeat the error of *Dred Scott*.

But *Dred Scott* might have been wrongly decided for a very different reason—not because of a lack of judicial self-restraint, but rather because of the Court's implication of the wrong right. Rather than identifying a property right in slaves, the Court could have followed the lead of the Massachusetts Supreme Judicial Court nearly a century earlier and held that the institution of slavery violated the liberty rights of enslaved people.³⁴⁶ Far from undermining judicial abolition of the death penalty, then, the legacy of *Dred Scott* can be fairly read to support it. By declaring the death penalty unconstitutional, the Court avoids the error of *Dred Scott*.

6. Judicial Abolition of the Death Penalty is Irreversible

Even assuming that the death penalty violates the dignity of life according to *contemporary* standards of decency, one might argue that the Court should not declare the death penalty unconstitutional because, in the future, our standards of decency may evolve in the opposite direction, *toward* the death penalty. Simply put, society may one day want its death penalty back and be unable to procure it. Justices Scalia and Alito have referred to this as the problem of the “one-way ratchet,” which “prohibits legislatures from adopting new capital punishment statutes to meet new problems” by turning temporary consensus on leniency into a “permanent constitutional maximum.”³⁴⁷

344. See *id.* at 2616 (Roberts, C.J., dissenting); see also *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393, 452 (1856) (“[I]t is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void . . .”).

345. *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

346. See Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1331, 1332 n.180 (2015) (discussing Quock Walker cases, in which Chief Justice William Cushing of the Massachusetts Supreme Judicial Court, in 1783, concluded that slavery was at odds with the Massachusetts Constitution's declaration “that all men are born free and equal”); see also *Dred Scott*, 60 U.S. at 575 (Curtis, J., dissenting) (stating that the framers of Massachusetts, New Hampshire, New York, and New Jersey constitutions did not “intend[] to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts”).

347. *Kennedy v. Louisiana*, 554 U.S. 407, 466, 469 (2008) (Alito, J., dissenting); see also *Roper v. Simmons*, 543 U.S. 551, 612 (2005) (Scalia, J., dissenting) (stating that Court's prohibition on death penalty for juvenile offenders was “irreversible”); *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (stating that “the Eighth Amendment is not a ratchet” that “disabl[es] the States from giving effect to altered beliefs”).

This argument is overblown because no *permanent* constitutional maxim is present. If states want their death penalty back, they can have it: Congress can amend the Constitution, or a new segment of the Court can overrule the former one.³⁴⁸ To borrow a phrase from Justice Scalia, judicial invalidation of the death penalty would not mean that the “game” is over—only that the “game” has changed.³⁴⁹ A discussion of the two options for overturning judicial abolition of the death penalty follows.

i. Constitutional Amendment

If the Court were to abolish the death penalty, Congress could bring it back by amending the Constitution to read:

No provision of the Constitution . . . shall be construed as prohibiting the imposition of the punishment of death. [Congress] may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.³⁵⁰

This is not a fanciful idea. It is precisely what the California legislature did in 1972, the year after its high court abolished the death penalty.³⁵¹ It is also what the Massachusetts legislature did in 1981, the year after its high court abolished the death penalty.³⁵² And it is what several dissenting justices have suggested the Connecticut legislature do in response to the Connecticut high court’s decision invalidating the death penalty in 2015.³⁵³

348. See *infra* notes 344–67 and accompanying text.

349. See *Atkins*, 536 U.S. at 348 (Scalia, J., dissenting) (rejecting the majority’s reasons for prohibiting execution of people with intellectual disabilities as “just a game, after all[,]” reflecting majority’s own moral sentiments as opposed to those enshrined in the Eighth Amendment or those currently held by the American people).

350. See MASS. CONST. Pt. 1, art. XXVI.

351. See *supra* note 192 and accompanying text (discussing the constitutional amendment abrogating judicial abolition of death penalty in California).

352. See *supra* note 193 and accompanying text (discussing the constitutional amendment abrogating judicial abolition of the death penalty in Massachusetts).

353. Compare *State v. Santiago*, 122 A.3d 1, 81 n.115 (“Of course, if the citizens of Connecticut wish to reinstate the death penalty, they may always amend the state constitution, as the citizens of California and Massachusetts did, to clarify that the punishment is and will remain constitutional notwithstanding any evolution in the state’s standards of decency.”), *with id.* at 288 (Zarella, J., dissenting) (stating that “both the legislature and this court are free to revisit” the permissibility of the death penalty), *and id.* at 241 (Espinosa, J., dissenting) (“[T]oday’s decision [invalidating Connecticut’s death penalty] does not strike a dagger into the heart of the death penalty. Rather, it should be understood as an opportunity for the legislature to review and consider . . . whether the death penalty comports with contemporary standards of decency in this state.”).

To pass a constitutional amendment, Congress would need the support of 38 states.³⁵⁴ There are 30 states with the death penalty.³⁵⁵ Nineteen of these states have executed a prisoner within the past nine years,³⁵⁶ so one might reasonably assume that these states would support the amendment. The remaining 11 states with the death penalty, which have not executed anyone since 2006, are essentially retentionist-in-name-only: two have not executed anyone since the Court reinstated the death penalty in 1976 and the remainder have executed a total of 105 prisoners over 40 years (with just two states accounting for two-thirds of those executions).³⁵⁷ Nevertheless, it is possible that they, too, would support such an amendment on federalism and separation of powers grounds: even though they do not use it, the federal judiciary should not be able to tell them they lose it.³⁵⁸ Adding Massachusetts, whose state constitution expressly permits the death penalty, as well as New York and Delaware, whose high courts have never declared the death penalty unconstitutional per se and whose legislatures have never repealed the death penalty,³⁵⁹ yields a total of 33 states that may favor a constitutional amendment upholding the death penalty.

354. *Constitutional Amendment Process*, NAT'L ARCHIVES, <https://www.archives.gov/federal-register/constitution> (last visited Oct. 24, 2016).

355. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 22, 2016).

356. *Executions by State and Year*, *supra* note 246. These states are: Alabama, Arizona, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington. *Id.*

357. Kansas and New Hampshire have not executed anyone since the Supreme Court reinstated the death penalty in 1976. *Executions by State and Year*, *supra* note 246. The other states, and their total executions since 1976, are as follows: Arkansas (27); California (13); Colorado (1); Montana (3); Nevada (12); North Carolina (43); Oregon (2); Pennsylvania (3); and Wyoming (1). *Id.*

358. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) (discussing federalism concerns); *Santiago*, 122 A.3d at 226 (Zarella, J., dissenting) (discussing separation of powers concerns).

359. *Compare* MASS. CONST. Pt. IV, art. CXVI ("No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death."), *with* *Rauf v. State*, No. 39, 2016, 2016 WL 4224252, at *1 (Del. Aug. 2, 2016) (holding that Delaware's death penalty statute violates the Sixth Amendment role of the jury); *People v. Taylor*, 878 N.E.2d 969, 998 (N.Y. 2007) (holding that the deadlock jury instruction rendered "the death penalty sentencing statute . . . unconstitutional on its face" and that "it [wa]s not within [the court's] power to save the statute"). Although support for a constitutional amendment in Massachusetts and New York is possible, it is not likely, particularly given polling data reflecting strong opposition to the death penalty in both states. *See* Evan Allen, *Few Favor Death for Dzhokhar Tsarnaev, Poll Finds: Less than 20% of Mass. Residents Support Execution*, BOS. GLOBE (Apr. 26, 2015), <https://www.bostonglobe.com/metro/2015/04/26/globe-poll-shows-diminishing-support-for-death-penalty-for-tsarnaev/S3GMhFlGj5VUkZrmlLzh1iN/story.html> (stating that only approximately "a third of Massachusetts residents say they support the death penalty for egregious crimes," and "less than 20 percent believe Boston Marathon bomber Dzhokhar Tsarnaev should be put to death"); *OPINION POLLS: Majority of New Yorkers Reject the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/1687> (last visited Oct. 22, 2016) (discussing a 2006 Newsday poll, which found that "53% of N.Y. adults said LWOP is the better penalty, whereas only 38% chose the death penalty, with 9% uncertain").

Garnering the support of five of the remaining 17 abolitionist states seems plausible, especially if one looks to the states that have most recently repealed the death penalty. New Mexico (2009), Illinois (2011), Connecticut (2012), and Maryland (2013) repealed the death penalty prospectively only, leaving their death rows intact.³⁶⁰ This arguably suggests at least some support in these states for the death penalty.³⁶¹ Nebraska is another. After Nebraska repealed the death penalty prospectively *and* retroactively in 2015, a successful petition drive suspended the repeal and forced a statewide referendum in 2016 on the future of Nebraska's death penalty.³⁶² If there really is a national consensus in favor of the death penalty, the States can prove it by amending the Constitution.

ii. *Statutory Reenactment and Invitation to Overrule*

Another option for reinstating the death penalty would be for Congress to reenact death penalty legislation, citing a change in society's standards of decency post-abolition, and invite the Court to overrule itself.³⁶³ As a majority of the Connecticut Supreme Court recently stated in its decision striking down the death penalty:

[S]ociety's standards of decency need not always evolve in the same direction. We express no opinion as to the circumstances under which a reviewing court might conclude, on the basis of a revision to our state's capital felony statutes or other change in the[] indicia [of society's evolving standards of decency], that capital punishment

360. See Barry, *supra* note 246, at 672–73 (discussing prospective-only repeals). New Jersey's 2007 repeal was retroactive. See *id.* at 678 n.41 (stating that a retroactivity provision became moot when "New Jersey's governor commuted all existing death sentences immediately prior to the effective date of the law").

361. See, e.g., *Santiago*, 122 A.3d at 231 (Espinosa, J., dissenting) ("Obviously, the legislators who enacted [Connecticut's prospective repeal] realized that popular support for abolishing the death penalty simply did not exist, hence the *partial* repeal."). As in Massachusetts and New York, polling data in Maryland suggests strong opposition to the death penalty and, presumably, to a constitutional amendment permitting the death penalty. See *State Polls and Studies*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-polls-and-studies> (last visited Oct. 22, 2016) (compiling state polling information, including 2007 *Washington Post* poll that found that "52% [of Maryland adults] said they favored life without parole and 43% supported capital punishment"). By contrast, polling data in New Mexico, Illinois, and Connecticut (some of it dated), suggests support for the death penalty. *Id.*

362. Julie Bosman, *Nebraska to Vote on Abolishing Death Penalty After Petition Drive Succeeds*, N.Y. TIMES (Oct. 16, 2015), <http://www.nytimes.com/2015/10/17/us/politics/nebraska-to-vote-on-abolishing-death-penalty-after-petition-drive-succeeds.html>.

363. This would not be the first time that the Court has abrogated a prior decision in the death penalty context. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (abrogating *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Atkins*, 536 U.S. at 321 (abrogating *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

again comports with Connecticut's standards of decency and, therefore, passes constitutional muster.³⁶⁴

Practically speaking, Congress could establish a commission to study the death penalty's acceptability to contemporary society and hold hearings.³⁶⁵ Congress could then pass legislation finding that, although the Supreme Court declared the death penalty cruel and unusual, its holding was premised on society's evolving standards of decency, which have since changed.³⁶⁶ Evidence of changed standards could include, for example, post-abolition polling data reflecting popular support for the death penalty in a substantial number of geographically diverse states, nonbinding state resolutions supporting the death penalty, and a significant number of democratic countries that have reinstated and used the death penalty post-abolition.³⁶⁷ Such findings might also provide convincing new evidence of the death penalty's deterrent effect, perhaps noting increases in first-degree murder correlated to abolition.³⁶⁸ When charged under the reenacted statute, a criminal defendant could ask for a declaratory judgment regarding the statute's constitutionality, thus putting the issue before the Supreme Court and inviting the Court to overrule itself.³⁶⁹

This, too, is not a fanciful idea. On January 7, 2016, approximately five months after the Connecticut Supreme Court abolished the state's death penalty in *State v. Santiago*, a newly constituted court agreed to revisit its decision in the case of another inmate on Connecticut's now-defunct death row.³⁷⁰ Although the Connecticut Supreme Court ultimately decided not to reverse course out of respect for *stare decisis*,³⁷¹ there would be nothing to stop

364. *Santiago*, 122 A.3d at 86 n.88.

365. See, e.g., MATTHEW E. GLASSMAN & JACOB R. STRAUS, R40076, CONG. RESEARCH SERV., CONGRESSIONAL COMMISSIONS: OVERVIEW, STRUCTURE, AND LEGISLATIVE CONSIDERATIONS 1 (2015), <https://www.fas.org/sgp/crs/misc/R40076.pdf> (discussing commissions and hearings).

366. See *Santiago*, 122 A.3d at 55 n.88.

367. See *supra* Part IV.A.1 (discussing factors relating to the death penalty's acceptability to contemporary society); see also *Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989) (finding state consensus against the death penalty for people with intellectual disabilities based, in part, on passage of a Georgia Senate resolution urging commutation of sentences of people with intellectual disabilities).

368. See *supra* Part IV.A.2 (discussing the death penalty's penological purposes).

369. See *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1275 (Mass. 1980) (entertaining a suit for declaratory judgment concerning validity of Massachusetts death penalty statute and holding the statute unconstitutional).

370. See *Connecticut Supreme Court Hears Prosecutors' Argument Seeking to Overturn Death Penalty Ban*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6348> (last visited Oct. 25, 2016).

371. *State v. Peeler*, 140 A.3d 811, 813 (Conn. 2016) (Rogers, C.J., concurring) ("I strongly believe that, in and of itself, a change in the membership of this court within a relatively short period of time cannot justify a departure from the basic principle of *stare decisis*, especially on an issue of such great public importance."); *id.* at 831 (Palmer, J., concurring) ("For this court to entomb the death penalty in *Santiago*, and then to exhume and revive it nine months later, would be unprecedented and would make a mockery of the freedoms enshrined in article first of

a reconstituted U.S. Supreme Court from doing just the opposite—especially after the passage of some years and a strong showing of societal acceptance and deterrent effect.³⁷²

V. AFTER THE DEATH PENALTY

Judicial abolition of the death penalty will have important implications for dignity under the Eighth Amendment and the Constitution more generally. This Part considers a few of them.

First, with respect to the Eighth Amendment, abolition may do for criminal sentencing law what *Lawrence* did for LGBT rights. In *Lawrence*, the Court invalidated laws criminalizing same-sex intimacy but expressly declined to reach the issue of same-sex marriage.³⁷³ Justice Scalia predicted that the Court's decision could not be cabined, and he was right.³⁷⁴ Twelve years later, in *Obergefell*, the Court explicitly relied on *Lawrence* to invalidate laws prohibiting recognition of same-sex marriage: “[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”³⁷⁵

A decision abolishing the death penalty could well be the criminal law's *Lawrence*—a giant “step forward” toward “the full promise” of dignity under the Eighth Amendment.³⁷⁶ For example, if it violates dignity to sentence people of color to death in disproportionate numbers, perhaps it also violates dignity to incarcerate them in disproportionate numbers.³⁷⁷ Similarly, if it violates dignity to require death row prisoners to spend much of their lives in

the state constitution.”); *id.* at 833 (Robinson, J., concurring) (“[The *Santiago* decision] is not so clearly wrong that we should risk damaging this court's institutional stability by overruling it.”).

372. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”); *Payne v. Tennessee*, 501 U.S. 808, 849 (1991) (Marshall, J., dissenting) (enumerating justifications for departing from precedent, including “the advent of ‘subsequent changes or development in the law’ that undermine a decision's rationale . . . the need ‘to bring [a decision] into agreement with experience and with facts newly ascertained’ . . . and a showing that a particular precedent has become a ‘detrimment to coherence and consistency in the law’” (citations omitted) (alteration in original)); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970) (“[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision” (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (alteration in original))).

373. See *Lawrence*, 539 U.S. at 578 (declining to reach “whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).

374. See *id.* at 604 (Scalia, J., dissenting) (stating that the “logical conclusion” of invalidating same-sex sodomy laws is “judicial imposition of homosexual marriage”).

375. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

376. *Id.*

377. See *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987) (stating that if the Court were to find that “racial bias ha[d] impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty” where racial disparity is alleged).

solitary confinement awaiting execution,³⁷⁸ perhaps solitary confinement is, itself, a violation of dignity. Justice Kennedy has strongly signaled as much, calling solitary confinement “a further terror,” one that may bring prisoners “to the edge of madness, perhaps to madness itself.”³⁷⁹ And if the death penalty violates dignity, perhaps LWOP—“the second most severe penalty permitted by law”³⁸⁰—does as well. The Supreme Court has already prohibited or severely restricted LWOP in the juvenile context;³⁸¹ abolition of the death penalty may pave the way for extending this prohibition to adults.³⁸²

378. See *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (“[N]early all death penalty States keep death row inmates in isolation for 22 or more hours per day.”).

379. *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015); see also Alex Kozinski, *Worse Than Death*, 125 YALE L.J.F. 230, 230 (2016) (“Solitary confinement is just as bad as the death penalty, if not worse.”).

380. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991); see also *Graham v. Florida*, 560 U.S. 48, 69–70 (2010) (“[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. . . . [They] deprive[] the convict of the most basic liberties without giving hope of restoration . . . [T]his sentence ‘means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.’” (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989))). Significantly, the European Court of Human Rights has concluded that adult LWOP sentences violate the European Convention on Human Rights’ prohibition on “inhuman or degrading treatment or punishment” because they are incompatible with “respect for human dignity”—the “very essence of the [Convention system.]” *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 1, 41–42 (2013); *Id.* at 54 (Power-Forde, J., concurring) (stating that the Convention “encompasses what might be described as ‘the right to hope,’” which is “an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.”); see also William W. Berry III, *Life-With-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1069 (2015) (arguing that “LWOP sentences impinge on the human dignity of the offender”).

381. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016) (stating that juvenile LWOP is unconstitutional “for all but the rarest of children, those whose crimes reflect ‘irreparable corruption’” (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005))). Compare *Graham*, 560 U.S. at 82 (prohibiting LWOP for juveniles convicted of nonhomicide offenses), with *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (prohibiting mandatory LWOP for juvenile homicide offenders).

382. See THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 18 (2013) (“Many of the arguments presented to support parole review for [juveniles sentenced to LWOP] could be applied to adult offenders as well. That is, adolescence is not the only period in which transformation and reform are possible and a meaningful opportunity for release does not have to be limited to those who commit crime in their youth.”). Although judicial abolition of adult LWOP on dignity grounds is probably inevitable, it is most likely a long way off, given the rising number of life sentences in recent years and the lack of political will to address violent offenses. *Id.* at 13, 18 (stating that “[t]he rise in parole ineligible life sentences is increasing at a faster pace than for those serving life sentences with the chance for release. [Between 2008 and 2012], there has been a 22.2% rise in life without parole sentences,” and observing that “life sentences . . . are excluded from serious consideration in sentencing reform

Second, judicial abolition of the death penalty has implications beyond the Eighth Amendment. In a thoughtful article written over a decade ago, Professor James Whitman praised Justice Kennedy's invocation of dignity in *Lawrence* but wondered whether such dignity talk, which lacked a "doctrinal hook," had much of a future in American law.³⁸³ *Windsor* and *Obergefell* leave little doubt that dignity has a doctrine, and a future, under the Fourteenth Amendment.³⁸⁴ But abolition of the death penalty will do even more for dignity. By protecting dignity's most basic principle—the value of life—abolition will confirm the salience of dignity in our constitutional scheme, fortifying its doctrinal significance and pushing it beyond the Eighth and Fourteenth Amendments toward its rightful place at the center of American constitutional law. Dignity will not be an aberration to be later distinguished, or what Professor Samuel Moyn has called "an essentially contested notion of little use to further debate and a possible distraction from it,"³⁸⁵ but instead a concept as central to our laws as it is to our humanity.

Lastly, judicial abolition of the death penalty will demonstrate dignity's interpretive force in the modern era—toppling an institution older than the Republic itself.³⁸⁶ To appreciate the significance of this feat, consider the Supreme Court's impotence in addressing another infamous American institution: slavery. Prior to Congress's adoption of the Thirteenth Amendment in 1865, the Constitution expressly contemplated the institution of slavery.³⁸⁷ Significantly, in all those years, the Supreme Court never seriously questioned its constitutionality.³⁸⁸ Instead, for nearly a century, the Court sat idly by:

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of . . . laws [regarding slavery]. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.³⁸⁹

In short, it was the Union Army and a constitutional amendment that ended slavery—not the Court.

discussions," with "[m]ost of the dialogue regarding sentencing reform center[ing] on nonviolent offenses").

383. See Whitman, *supra* note 70, at 1214.

384. See *supra* Part III.A.

385. See Moyn, *supra* note 56, at 42.

386. THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 3–4 (Hugo Adam Bedau ed., 1997) (discussing the death penalty in colonial America).

387. CHEMERINSKY, *supra* note 85, at 707–08.

388. *Id.* at 708–09.

389. *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393, 405 (1856).

The death penalty is expressly contemplated by the Constitution,³⁹⁰ as slavery once was. But times have changed. In the late 18th and early 19th centuries, dignity was without a doctrine, scarcely appearing in judicial opinions.³⁹¹ Judicial abolition of the death penalty at the beginning of the 21st century will demonstrate how far that doctrine has come. This time around, it is the Justice's pen, not the Framers' precise words, that controls.³⁹² The Constitution does not countenance indignity—not even indignities expressly contemplated by its authors. Justice Kennedy's opinion in *Obergefell* is a case in point and a fitting rejoinder to the reasoning of *Dred Scott*:

[T]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. Thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking.³⁹³

VI. CONCLUSION

The day will soon come when the words “death penalty” will be considered an oxymoron.³⁹⁴ “Death vs. life” will take its place alongside notorious debates of old, like “slavery vs. freedom,” “segregation vs. integration,” “defense of marriage vs. freedom to marry.”³⁹⁵ When that day comes, dignity will play a decisive role. This Article has offered four insights on dignity and the death penalty.

First, the concept of dignity embodies three primary concerns—life, equality, and liberty—with life at its center. We have intrinsic value as human beings (dignity of life), we have equal value to other human beings (dignity

390. See *Glossip v. Gross*, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring).

391. See *Henry*, *supra* note 19, at 178–79 (noting that “[i]n the last 220 years, Supreme Court Justices have invoked the term [“dignity”] in more than nine hundred opinions,” nearly half of which were issued after 1946 (footnote omitted)).

392. For a thoughtful discussion of why judicial abolition of the death penalty is *consistent* with originalist and textualist approaches to the Eighth Amendment, see Blocher, *supra* note 325, at 12–16.

393. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (quoting *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014) (citations omitted)).

394. ZIMRING & HAWKINS, *supra* note 166, at 13 (surveying history of abolition among Western countries and noting that, “once abolition is accomplished, the death penalty, though previously the subject of wide-spread debate, ceases to be a pressing public issue” and “support for the death penalty diminishes”).

395. See Brennan, *supra* note 1, at 331 (comparing an anticipated Supreme Court decision abolishing the death penalty to the Court's “understand[ing] that separate can never be equal”); see also ZIMRING & HAWKINS, *supra* note 166, at 23 (noting “correlation between an absence of execution and governmental respect for human rights” among Western countries, and stating that “[b]oth nonexecution and human rights policy are derived from the same conception of the proper relationship between citizen and government in the political and social order”).

of equality), and we also have certain freedoms as human beings (the dignity of liberty).

Second, the concept of dignity finds expression under the Eighth and Fourteenth Amendments. It is a unifying principle in the Supreme Court's LGBT rights and death penalty jurisprudence, as demonstrated by the Court's decisions striking down prohibitions on same-sex intimacy, marriage, and civil rights protections for LGBT people, and prohibiting inhumane execution methods, arbitrary imposition of the death penalty, and imposition of the death penalty for certain less culpable offenders and nonhomicide crimes.

Third, the triumph of LGBT rights under the Fourteenth Amendment and the persistence of the death penalty under the Eighth Amendment expose a tension in dignity doctrine: the most basic aspect of dignity (life) receives the least protection under the law. By declaring the death penalty unconstitutional, the Supreme Court will bring a long-awaited coherence to dignity doctrine.

And lastly, judicial abolition of the death penalty has important implications for dignity doctrine—loosening the linchpin that currently sustains racially disparate sentencing, solitary confinement, and life without the possibility of parole, and situating dignity at the center of American constitutional law.

As Justice Brennan once wrote:

I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the [condemned] and transgresses the prohibition against cruel and unusual punishment. That day will be a great day for our country, for it will be a great day for our Constitution.³⁹⁶

And for Kelly Gissendaner, wherever she is, it will be a new reason to sing.

396. Brennan, *supra* note 1, at 331.