

Arriving Where We've Been: Death's Indignity and the Eighth Amendment

Phyllis Goldfarb *

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* Jacob Burns Foundation Professor of Clinical Law, George Washington University Law School. I extend my gratitude to the *Iowa Law Review* for inviting me to spend time with Professor Kevin Barry's invigorating article, and to Professor Barry for carrying his concern about the death penalty—evidenced even during law school when he was a student in my Death Penalty class—into both his impressive clinical work and his impressive body of scholarship. I am also grateful to Dean Blake Morant and The George Washington University Law School for the continuing support that enabled this research.

I. INTRODUCTION

Supporting the death penalty in the abstract has always been an easy response to abominable crimes.¹ Far more difficult, however, is the effort to establish and support a legal system that kills—fairly, appropriately, and with near-perfect reliability.² Establishing and supporting a state bureaucracy that requires human beings, as part of their day-to-day job responsibilities, to take the lives of other human beings is a formidable challenge.³ Consequently, perceptions of the death penalty from inside legal institutions and those who populate them—the keepers of the real death penalty—are understandably more complex and ambivalent than expressions of support for the death penalty in the abstract will ever be.⁴

Against this cultural backdrop, it may come as no surprise, then, that the law of the death penalty is a bundle of contradictions. The heightened need for reliability in imposing death sentences requires an extensive appellate regime, but the delays resulting from the course of capital appeals undermine the penological purposes of death sentences and increase their psychological brutality.⁵ The importance of even-handed justice requires that states impose death sentences on a rational and principled basis that is consistently applied, but death sentences must also be individualized, and given only after case-by-case consideration of mitigating evidence and reasons for mercy.⁶

1. See AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 14 (2001) (“Capital punishment provides a seemingly simple solution to complex problems, encouraging our society to focus compulsively on fixing individual responsibility and apportioning blame Instead of the difficult, often frustrating work of understanding what in our society breeds such heinous acts of violence, state killing offers all of us a way out.”).

2. See *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of certiorari) (“[D]espite the effort of the States and courts to devise legal formulas and procedural rules . . . the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.”).

3. See SARAT, *supra* note 1, at 21 (“[I]f legitimacy is to be preserved, the state’s violence must, in the daily operations of the death penalty system, seem different from lawless violence.”).

4. See Michael J. Osofsky et al., *The Role of Moral Disengagement in the Execution Process*, 29 L. & HUM. BEHAVIOR 371, 375 (2005) (“[Q]ualms are eased when execution is viewed in the abstract under the sanitized label of ‘capital punishment.’ People favor the death penalty in the abstract but are . . . hesitant . . . when given information that personalizes the murderer. . . . [T]hose who voice support for the death penalty are far removed from its implementation”) (citation omitted). See generally, e.g., DONALD A. CABANA, *DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER* (1996) (chronicling the author’s experience as a prison warden whose job required that he conduct executions).

5. See *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (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. Ultimately, though these legal causes may help to explain, they do not mitigate the harms caused by delay itself.”).

6. See *Callins*, 510 U.S. at 1144 (Blackmun, J., dissenting from denial of certiorari) (“Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.”) (citations omitted).

Contradictions like these co-exist, and are not easily resolved, because each of the contradictory imperatives is indispensable to the fairness of the death penalty regime.⁷ Yet, in a legal regime that purposefully kills, these contradictions intensify our discomfort with taking life as punishment.⁸ Palpable disjunctions between easy rhetorical support for the death penalty and the difficult realities of establishing official processes for ending human lives have been haunting our legal system for decades.⁹

America's experience of the last forty years has illuminated the extent to which maintaining a death penalty system under law will continue to be an inherently contradictory enterprise.¹⁰ Although constitutional requirements surround the death penalty with special legal procedures designed to allow its application only to those most deserving of the capital sanction, our death penalty law tolerates overwhelming evidence that death sentences are imposed not on the grounds of desert, but for arbitrary and discriminatory reasons.¹¹ Despite our protracted efforts, we have not been able to identify a procedural regime that will rid death sentences of arbitrariness and discrimination.¹²

Perhaps most paradoxically, American law insists that the state kill death-sentenced inmates in a humane manner to avoid Eighth Amendment proscriptions on cruel and unusual punishment.¹³ In the quest for a humane form of execution, America has moved from extreme corporal punishments

7. *Id.* ("It is tempting, when faced with conflicting constitutional commands, to sacrifice one for the other In the context of the death penalty, however, such jurisprudential maneuvers are wholly inappropriate. The death penalty must be imposed 'fairly, and with reasonable consistency, or not at all.'" (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982))).

8. *Id.* at 1143-44 ("But even if . . . these actors will fulfill their roles to the best of their human ability, our collective conscience will remain uneasy. . . . [T]he problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious . . .").

9. *See* SARAT, *supra* note 1, at 24 ("To understand state killing . . . we have to move from the drama and spectacle of cases . . . to the grim, day-to-day realities of the capital punishment system, from the hypervisibility of the celebrated case to the often unnoticed workings of the execution system.").

10. *Callins*, 510 U.S. at 1149 (Blackmun, J., dissenting from denial of certiorari) ("Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual A step toward consistency is a step away from fairness.").

11. *Id.* at 1153 ("It seems that the decision whether a human being should live or die is so inherently subjective—rife with all of life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution.").

12. *Id.* at 1157 ("[D]eath will continue to be meted out in this country arbitrarily and discriminatorily This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.").

13. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (stating that torturous punishments involving "unnecessary cruelty" are forbidden by the Eighth Amendment).

to electrocution, lethal gas, and now lethal injection,¹⁴ only to learn that even execution by injecting deadly chemicals can be its own torturous form.¹⁵ Now that four decades of experience with the modern American death penalty have exposed the irreconcilability of the contradictions in our contemporary requirements for state-imposed death, how can we extricate ourselves from our legal predicament?

As if in answer to this very question, Professor Kevin Barry buoys our hopes and charts a promising course. In *The Death Penalty & the Dignity Clauses*, Professor Barry asserts that these are the death penalty's dying days.¹⁶ Barry confidently predicts that the Supreme Court will soon hold the death penalty unconstitutional under the Eighth Amendment to the U.S. Constitution as a violation of human dignity.¹⁷ His article's through line is that sufficient legal evolution has occurred, and sufficient legal groundwork has been laid, especially in the Court's LGBT-rights jurisprudence, to make his predicted outcome a viable possibility.¹⁸ When that welcome day comes, Barry tells us, Justice Kennedy—dignity's most prominent Supreme Court spokesperson and the Court's perennial tie-breaking vote—will be the author of the death penalty's demise.¹⁹

Professor Barry is likely correct that if the Supreme Court were to hold the death penalty unconstitutional, the notion of human dignity, and the legal doctrine that has grown around it, will play an animating role.²⁰ Whether in a leading or supporting role, whether explicit or implicit, dignity values will surely interact with the Eighth Amendment's prohibition on cruel and unusual punishment. But in what way? Through what arguments? And will

14. See *Baze v. Rees*, 553 U.S. 35, 40–41 (2008) (describing how states have altered execution methods “over time to more humane means of carrying out the sentence” leading to “the use of lethal injection by every jurisdiction that imposes the death penalty”).

15. See Glossip v. Gross, 135 S. Ct. 2726, 2780–81 (2015) (Sotomayor, J., dissenting) (describing how the drugs used in Oklahoma's lethal injection protocol to paralyze the inmate and stop the heart “do so in a torturous manner, causing burning, searing pain”).

16. Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383, 443 (2017) (“The day will soon come when the words ‘death penalty’ will be considered an oxymoron.”).

17. *Id.* at 418–28.

18. *Id.* at 417 (“While the triumph of LGBT rights demonstrates the promise of dignity . . . the Supreme Court should bring coherence to dignity doctrine by finding the death penalty unconstitutional on dignity grounds.”).

19. *Id.* at 391 (“Given Justice Kennedy's affinity for dignity, the Article predicts that the Court, with Justice Kennedy at the helm, will declare the death penalty unconstitutional on dignity grounds.”); see also Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES (June 30, 2009), <http://www.nytimes.com/2009/07/01/us/01scotus.html> (noting that although Kennedy has often “swung right in the cases that really mattered . . . [t]he Constitution, it turns out, means what Justice Kennedy says it means”).

20. The Supreme Court has acknowledged that the protection of human dignity underlies Eighth Amendment protections. See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . [T]he Amendment stands to assure that [the state's power to punish] be exercised within the limits of civilized standards.”).

dignity values be robust enough to prevail against the countervailing values that have kept the death penalty alive to this day?

In Part I of this article, I first examine what Professor Barry foresees and the dignity argument he develops, adding doctrinal specifics and historical notes to his well-supported Eighth Amendment predictions.²¹ In Part II, I review dignity's role in the modern death penalty's legal foundation and identify the cracks in the foundation opened by a number of recent Supreme Court justices who had sought for years to sustain that foundation.²² Next I turn to Justice Kennedy's role in capital cases, since he is the pivotal player in Professor Barry's prediction.²³ After surveying Kennedy's expressed concern for principles of human dignity in capital jurisprudence, I turn in Part III to capital cases in which Justice Kennedy seems to have fallen short of his dignitarian aspirations.²⁴ In this section, I focus primarily on challenges to execution methods, because these are cases that raise stark and divisive questions about dignity and the death penalty,²⁵ and additional questions about the extent to which Justice Kennedy's dignitarian values would define his Eighth Amendment approach to the overall abolition of the death penalty.²⁶ Finally, I conclude by speculating about the complications of prediction in an America currently facing political dynamics that have already toppled expectations and may yet alter institutions as well.²⁷

Regardless of the questions I raise, I am drawn to Professor Barry's abolition optimism. Though I am slightly less sanguine than he is (likely as much an affective distinction as an analytic one), I believe Professor Barry has drafted an appealing blueprint for present-day abolition of the death penalty. In fact, the route he identifies represents both a new breakthrough and a familiar return. Reminiscent of Justice Brennan and Marshall's consistent objections to death as punishment, often voiced in dissenting opinions or dissents from denials of certiorari,²⁸ Professor Barry's prognosis would usher into criminal justice processes a set of fundamental human rights principles

21. See *infra* notes 30–79 and accompanying text.

22. See *infra* notes 80–129 and accompanying text.

23. See *infra* notes 130–56 and accompanying text.

24. See *infra* notes 157–232 and accompanying text.

25. See *infra* notes 168–224 and accompanying text.

26. See *infra* notes 225–32 and accompanying text.

27. See *infra* notes 233–47 and accompanying text.

28. From 1976 until they left the bench, Justices Brennan and Marshall would write opinions in every capital case that repeated some version of this sentence: “Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would vacate the death sentence in this case.” See, e.g., *Jones v. Illinois*, 464 U.S. 920, 920 (1983) (Brennan, J., dissenting from denial of certiorari); see also CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 265 (2016) (“[A] search of the Supreme Court’s database for the phrase ‘Adhering to my view’ . . . turns up . . . Marshall and Brennan’s decades of dissents in all of the Court’s capital cases from the post-*Gregg* era, [and] Blackmun’s dozens of dissents from the latter part of the 1993-1994 term . . .”).

long found in other legal contexts.²⁹ Circling back to these principles would open a new moral chapter in American punishment practices.

II. THE LAW OF DIGNITY

A. BARRY'S CONSTITUTIONAL ARGUMENT

In *The Death Penalty & the Dignity Clauses*, Barry highlights the development of the concept of dignity in the Supreme Court's same-sex marriage cases, decided under the Fourteenth Amendment, then transposes this development to the death penalty's Eighth Amendment context.³⁰ Before beginning this doctrinal journey, he contextualizes the reasons to embark on it, providing narratives of the compelling human stakes of legal decisions like these.³¹ Having drawn us viscerally into the implications of doctrinal judgments involving the dignitary interests of human beings, he begins to explore the doctrine and analyze the judgments at issue.³²

Drawing effectively on the burgeoning literature of the role of dignity interests in law, Barry demonstrates that the Court's notion of dignity protects three primary concerns—life, liberty, and equality.³³ Curiously, Barry notes, Supreme Court decisions such as *U.S. v. Windsor*³⁴ and *Obergefell v. Hodges*³⁵ protect the dignity of liberty and equality under the Fourteenth Amendment, while the Court's death penalty decisions under the Eighth Amendment accord less protection to the dignity of life.³⁶ Since protecting life is the most basic demand of dignity, Barry asserts, coherence in the Court's articulation

29. See, e.g., Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. L.J. 39, 40 (2014) (challenging conventional accounts of sources of dignity jurisprudence, while reporting that “dignity has since proceeded in the last few decades, in tandem with the larger fortunes of international human rights law, to become a crucial watchword, going global in various constitutions and international treaties”).

30. See Barry, *supra* note 16, at 394–416.

31. *Id.* at 385–86 (describing James Obergefell's marriage to his dying partner, John Arthur, held on a medical transport plane on a tarmac in Maryland because their home state of Ohio did not allow them to wed, followed by a description of the execution of Kelly Gissendaner, who, convicted of inducing a man to murder her husband, graduated from a theology program in prison, mentored other prisoners, sought forgiveness, and went to her death sobbing, praying, apologizing, and singing *Amazing Grace*).

32. *Id.* at 386–91.

33. *Id.* at 392–94; see also Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 177 (2011) (identifying five conceptions of dignity—institutional status, equality, liberty, personal integrity, and collective virtue—that protect distinct but related substantive interests).

34. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

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

36. See Barry, *supra* note 16, at 390 (“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.”).

of dignity interests now requires the Court to return to its death penalty jurisprudence and adjudicate an end to the death penalty.³⁷

Barry predicts that the Court will soon do just that, finding the death penalty unconstitutional on dignity grounds.³⁸ In support of that prediction—and to facilitate the realization of that prediction—he rallies statistics on the death penalty’s current decline, adding to these statistics not only the Supreme Court’s recent jurisprudence regarding LGBT rights, but also forty years of death penalty doctrine.³⁹ His doctrinal survey emphasizes recent pronouncements from judges serving on the U.S. Supreme Court and on state supreme courts that have abolished the death penalty as cruel and unusual punishment under their state constitutions.⁴⁰ What emerges from this analysis is the essential place that Justice Kennedy occupies in the predictive account that Professor Barry advances.⁴¹

Professor Barry’s scholarly methodology—juxtaposing two legal regimes that are seemingly doctrinally distinct and highlighting the metaprinciples that join them—carries significant persuasive power. His effort to unify, at a higher analytic level, what are otherwise disparate doctrinal strains helps to rationalize and fortify dignity’s hold on constitutional law and values. Centering our constitutional jurisprudence on the value of protecting human dignity can have wide-ranging implications, some of which Barry describes, underscoring the importance of the analytic claims he offers.⁴²

Since dignity is a foundational value rather than a specific constitutional right, what Barry is predicting in doctrinal terms is the Supreme Court’s abolition of the death penalty on the basis of the Eighth Amendment’s proportionality principles.⁴³ Proportionality is the doctrinal vehicle through which dignity values can be expressed, through a methodology that the Court

37. *Id.* (“Because dignity 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.”).

38. *Id.* at 391 (“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.”).

39. *Id.* at 395–411, 418–22.

40. *Id.* at 411–16.

41. *Id.* at 417 (stating that “the fifth vote, and the death penalty’s likely fate, lay in the hands of Justice Kennedy” because Kennedy has been moving dignity to the center of constitutional law in the opinions he has authored on expanding LGBT rights and limiting use of the death penalty).

42. *Id.* at 440–43 (suggesting that judicial abolition of the death penalty on dignity grounds would lead to Eighth Amendment regulation of other areas of criminal law—such as solitary confinement, life without parole, and racially disparate sentencing—and would give dignity a more prominent place in constitutional interpretation generally).

43. Although Barry does not label it as such, he is clearly adopting a proportionality framework when he states that in considering *per se* abolition of the death penalty, the Supreme Court will “focus on whether the death penalty is categorically ‘excessive.’” *Id.* at 418; *see also* STEIKER & STEIKER, *supra* note 28, at 282 (“The Court’s long and expansive development of Eighth Amendment proportionality doctrine provides a detailed blueprint for a potential categorical constitutional challenge to the American death penalty.”).

has used both to uphold death sentences in *Gregg v. Georgia*,⁴⁴ and to strike down—repeatedly—subcategories of death sentences for certain offenses and offenders.⁴⁵ The methodology consists of two broad inquiries designed to gauge whether “evolving standards of decency” have rendered the death penalty categorically excessive—and therefore cruel and unusual—punishment under the Eighth Amendment.⁴⁶

The Court has developed standard approaches to these two inquiries. First, the Supreme Court assesses the frequency of the punishment’s imposition.⁴⁷ In other words, a clearly discerned trend away from imposing death sentences can support a *per se* ban on death sentences.⁴⁸ Second, the Court exercises its independent judgment to evaluate whether the death penalty is serving legitimate penological ends.⁴⁹

Citing abundant recent evidence of the death penalty’s decline across the country and its overwhelming rejection across the globe, Barry sees the ever-increasing refusals to impose death sentences, in combination with the ever-increasing societal and professional consensus against doing so, as telltale indicators that in the twenty-first century lethal punishment has become an affront to human dignity.⁵⁰ Its violation of dignity norms renders the death

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

45. See STEIKER & STEIKER, *supra* note 28, at 276–82 (describing multiple cases in which the Supreme Court used Eighth Amendment proportionality analysis to limit the use of the death penalty on various classes of offenders, such as defendants convicted of rape or robbery, felony-murder accomplices who do not participate in taking life, intellectually disabled offenders, juvenile offenders, and defendants convicted of child rape or other non-homicide crimes against individuals).

46. The “evolving standards of decency” approach to identifying excessive punishments under the Eighth Amendment’s Cruel and Unusual Punishment Clause was first articulated in the Supreme Court case of *Trop v. Dulles*. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion) (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”). In *Gregg v. Georgia*, the Court measured the evolving standards of decency through a “two-prong [proportionality] framework . . . to uphold the *per se* constitutionality of the death penalty” and used the same framework in “subsequent dignity-of-life decisions that invalidated the death penalty for certain types of offenders and crimes.” Barry, *supra* note 16, at 418.

47. See STEIKER & STEIKER, *supra* note 28, at 282–83 (explaining that “the ‘objective evidence’ prong of the Court’s proportionality doctrine . . . always begins . . . with a legislative head count,” then adds “to ‘objective evidence’ based on the numbers of [capital] statutes, sentences, and executions, the evidence of ‘a much broader societal and professional consensus’ against the death penalty”).

48. See Barry, *supra* note 16, at 421–22 (stating that “[o]ur Nation’s lack of support for the death penalty is bolstered by an overwhelming rejection of the death penalty worldwide,” supporting a judicial finding that the death penalty violates the “dignity of life”).

49. *Id.* at 422 (“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.”).

50. *Id.* at 418–22. One aspect of this picture is that U.S. executions for capital crimes are now limited geographically to a handful of states, and these are states which began in slavery and have continued to enforce policies, including the death penalty, in a racially discriminatory way. *Id.* at 419–20.

penalty excessive, disproportionate, and therefore, cruel and unusual under the Eighth Amendment.⁵¹ In the second part of his inquiry, Barry suggests that the ineradicable arbitrary and discriminatory features of the death penalty's application, the inherent risk of executing people innocent of the crimes for which they are condemned, the length of the inevitable delays in carrying out death sentences, and the protracted physical deprivations and psychological pain that those delays involve, deprive lethal punishment of any superficial claim to a legitimate penological purpose.⁵² Serving no legitimate purpose, the indignities both preceding, and attendant to, execution become excessive, disproportionate, and constitutionally intolerable under the Eighth Amendment's ban on cruel and unusual punishment.⁵³

B. BROADENING THE PERSPECTIVE

Professor Barry notes dignity's increasing salience in recent Fourteenth Amendment doctrine and the corresponding increase in the visibility of dignity concerns—often framed as proportionality concerns requiring avoidance of excessive punishment—in capital jurisprudence.⁵⁴ When we step back to take a longer and broader view, we see that dignity has a central but checkered history in constitutional law.⁵⁵ Deployed powerfully on some occasions and ignored on others, dignity's place in legal thought has been both fundamental and fickle.⁵⁶ Nonetheless, the jurisprudential developments that Barry highlights, exemplified in Justice Kennedy's opinions about the rights and interests of the LGBT community, have shown a resurgence of dignity's influence—contested though its meaning may be—in constitutional doctrine.⁵⁷

51. *Id.* at 427–28 (expressing hope that “the Court will conclude that . . . no purpose can justify the State’s deprivation of the dignity of life,” thereby rendering it an excessive punishment under the Eighth Amendment).

52. *Id.* at 422–28.

53. See STEIKER & STEIKER, *supra* note 28, at 285 (“[T]he [proportionality] doctrine gives the justices a means to abolish the death penalty that is rooted in decades of Court precedent [under the Eighth Amendment] . . .”).

54. See Barry, *supra* note 16, at 398–401 (describing dignity’s growing doctrinal recognition in Supreme Court cases involving LGBT rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the scope of capital punishment under the Cruel and Unusual Punishment Clause of the Eighth Amendment).

55. See Lawrence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 20, 22 (2015) (explaining that although dignity has a “multifarious history” and earlier views of dignity were “hierarchical,” the Court has moved from “the older concept of dignity as an attribute that attaches to powerful institutions [to a] newer concept of dignity as an attribute of all individuals in society”).

56. See Moyn, *supra* note 29, at 41–42 (“[D]ignity’s trajectory . . . suggests that . . . forces can unexpectedly arise to mobilize constitutional or otherwise fundamental terms and concepts in different directions than at the start, long into the history of their interpretation . . .”).

57. *Id.* at 40 (“[I]nterest in dignity swarms in legal cases and philosophical discussions today in ways that demand explanation, and the current dispute among judges and commentators about how to interpret dignity provisions is not uninteresting.”).

Since the Enlightenment, dignity has played multiple roles in political, legal, and moral thought in America and beyond.⁵⁸ Once ascribed only to people of high rank and status, by the late eighteenth century the philosophies of thinkers like Immanuel Kant began to frame dignity as an inherent attribute of personhood.⁵⁹ The human capacities for autonomy and rationality, feeling and suffering, volition and self-consciousness are among the articulated bases for ascribing dignity to all persons.⁶⁰

A number of America's architects apprehended a connection between the evolution of democracy and the evolution of dignity, when understood to mean the intrinsic worth of all human beings.⁶¹ By asserting the inalienability of rights to life, liberty, and the pursuit of happiness, and enshrining numerous individual rights and limits on governmental power in the Constitution and the Bill of Rights, America's founding documents embedded concepts of human dignity as core political and constitutional values.⁶² The Reconstruction era endeavored to universalize these values and remedy misunderstandings of their meaning that were embodied in practices like slavery and coverture, reconstituting America's political and legal structures on more dignitarian terms through the Reconstruction Amendments.⁶³

58. See Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 145, 145–47 (Michael J. Meyer & William Parent eds., 1992) [hereinafter *THE CONSTITUTION OF RIGHTS*] (asserting that “[h]uman dignity is perhaps the premier value underlying the last two centuries of moral and political thought,” and that it is “intertwined with values the Constitution plainly recognizes”).

59. See Tribe, *supra* note 55, at 20 (stating that while at one time “only the nobility were deemed to possess dignity,” a “religious conception of dignity” extending to all people equally “was given secular expression in Kant’s liberal universalism”).

60. See Eric Blumenson, *Who Counts Morally?*, 14 J. L. & RELIGION 1, 9–11 (1999) (discussing the universal attributes of human beings that render them moral subjects with inviolable interests).

61. See JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 64 (1983) (quoting John Bingham, principal drafter of the Fourteenth Amendment, who observed that “[t]he equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which that Constitution rests”).

62. See GARRETT EPPS, *AMERICAN EPIC: READING THE US CONSTITUTION* 141 (2013) (“The Framers all more or less subscribed to the idea Jefferson phrased memorably in the Declaration of Independence: ‘that all men . . . are endowed by their creator with certain unalienable rights.’”) (alteration in original).

63. See BAER, *supra* note 61, at 102–04 (arguing that congressional debates on the Fourteenth Amendment suggest that the Amendment is grounded in “a notion of equality [under law] based on natural entitlement [of human beings] to rights, derived from the Declaration” and intended to protect all American citizens from oppression); see also Phyllis Goldfarb, *Equality Writ Large*, 17 NEV. L.J. 565, 582 (2017) (demonstrating that the Reconstruction Amendments’ primary dignitarian provision was the Privileges or Immunities Clause, and “[m]ost nineteenth century thinkers understood the privileges or immunities of citizenship to encompass the civil rights . . . deemed sufficiently fundamental that they belonged, as a matter of right, to the citizens of all free governments”).

Although dignity interests have been embedded in democratic principles since the time of America's founding, dignity discourse became more nationally and internationally prominent in the mid-twentieth century.⁶⁴ Born of religious constitutionalism, the devastation of the Holocaust and World War II, and the specter of totalitarian governments, universal principles of human dignity became the centerpiece of Europe's political and legal norms and those of the global legal order. This focus is represented in documents such as the UN Charter, the Universal Declaration of Human Rights, and numerous national constitutions.⁶⁵ International human rights, grounded in principles of human dignity, emerged from the same historical forces and political dynamics, and were incorporated into an international treaty framework.⁶⁶

While the United States has maintained an inconsistent posture toward some of these global legal developments,⁶⁷ the world's heightened interest over the past several decades in the dignity values at the center of human rights principles is increasingly evident in American law.⁶⁸ Dignity's scholars report that since the mid-1940s, the words "human dignity" have appeared in hundreds of Supreme Court opinions, a significant percentage of them in the past quarter century.⁶⁹ This literature tells us that cases citing dignity interests and values are accelerating at a rate that is statistically significant, suggesting that, as a matter of constitutional doctrine, dignity is conceptually important.⁷⁰

64. See Henry, *supra* note 33, at 203 ("In the 1940s, the Supreme Court's use of dignity began to shift . . . to a broader vision that included personal and collective types of dignity.").

65. See Moyn, *supra* note 29, at 40–42 (adding Ireland's religiously-based constitutionalism to the more standard account of human dignity principles emerging as global legal constructs in the wake of the Holocaust, World War II, and the rise of totalitarianism and resulting in 1945's UN Charter, 1948's Universal Declaration of Human Rights, and twentieth century European constitutions).

66. See Tribe, *supra* note 55, at 20 ("As numerous scholars have recognized in recent years, the concept of dignity is central to contemporary human rights discourse.").

67. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting) ("There is, after all, no . . . 'Nobility and Dignity' Clause in the Constitution."); see also Henry, *supra* note 33, at 174–76 (describing the "conceptual chaos" surrounding the role of dignity in U.S. law, due to "deep disagreement about its normative, practical, and jurisprudential value").

68. See Tribe, *supra* note 55, at 22 ("[T]he dominant strain in Justice Kennedy's writings on dignity—the strain that achieved full expression in *Obergefell*—has become the notion of *equal dignity* as the very foundation of individual human rights.").

69. See Henry, *supra* note 33, at 178 ("In the last 220 years, Supreme Court Justices have invoked ['dignity'] in more than nine hundred opinions . . . nearly half of these opinions after 1946, when the phrase 'human dignity' first appeared . . . with more than one hundred opinions authored in the last twenty years alone.").

70. *Id.* at 179 ("[T]he percentage of Supreme Court cases that invoke dignity per Term is increasing at a statistically significant rate . . . and the Roberts Court appears prepared not only to continue, but also to accelerate, this trend.").

Professor Bruce Ackerman writes that human dignity, although exceedingly malleable, is a core principle of constitutional law.⁷¹ Lawrence Tribe, Judith Resnick, and many other scholars are in accord.⁷² Across the decades certain Supreme Court justices have been particularly inclined to support their opinions with dignity-based reasoning in particular kinds of cases.⁷³ Significant standard-bearers of dignity norms in previous eras were Justices Frank Murphy, Robert Jackson, and William Brennan.⁷⁴ As Professor Barry observes, today's pre-eminent example is Justice Kennedy, who wrote the Court's majority opinions in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, using principles of human dignity to support LGBT rights under the Fourteenth Amendment.⁷⁵

In an obvious way, the Fourteenth Amendment, designed to universalize democratic freedom and status after slavery's end, links constitutional values to dignitarian values.⁷⁶ So too do other constitutional provisions,⁷⁷ such that the recognition of dignitarian values throughout constitutional thought supports the view that "dignity is the fundamental value underlying the U.S. Constitution."⁷⁸ Barry's prediction that the death penalty's "time is near"

71. See Moyn, *supra* note 29, at 67 (citing BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 137 (2013)).

72. See Judith Resnick & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1926 (2003) (suggesting that the Supreme Court has "embedded the term dignity into the U.S. Constitution"); Tribe, *supra* note 55, at 21 ("[D]ignity is not some alien import with no place in our own constitutional tradition. Just as Germany and South Africa adopted universal human dignity as a lodestar of their legal systems after rejecting devastating racist ideologies, so too the United States adopted the Fourteenth Amendment . . . for strikingly similar reasons . . ."). See generally MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2012) (discussing the historical and modern uses of dignity).

73. See generally Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006) (arguing that the Justices inclined toward dignity principles are likely to use them to give meaning to constitutional rights in particular kinds of cases, where public opinion favors dignity interests over competing state interests).

74. *Id.* at 753–55 (identifying numerous opinions in which Justices Murphy and Jackson cited principles of human dignity as a basis for their constitutional analyses); *id.* at 768–69, 783–88 (identifying numerous opinions in which Justice Brennan cited principles of human dignity as a basis for his constitutional analyses).

75. See Barry, *supra* note 16, at 391 ("Justice Kennedy authored the Court's opinions in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, all of which rule in favor of LGBT people on dignity grounds.").

76. See Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 J. CON. L. 1373, 1374 (2009) ("Because anti-slavery critique informed the process of constitutional reconstruction, it should inform our interpretations of the reconstructed Constitution. The Reconstruction Amendments . . . were intended to universalize human freedom and define human freedom in contrast to slavery [R]esponsive constitutionalism has supported the development of a concept of human dignity.").

77. See Henry, *supra* note 33, at 172–73 ("The Supreme Court has invoked the term [dignity] in connection with the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments." (citations omitted)).

78. See THE CONSTITUTION OF RIGHTS, *supra* note 58, at 47 ("Both the legal scholar Ronald Dworkin and William Brennan, Jr., Associate Justice of the U.S. Supreme Court, have endorsed the idea that dignity is the fundamental value underlying the U.S. Constitution.").

features a dignitarian interpretation of the Eighth Amendment prohibition on government infliction of cruel and unusual punishment.⁷⁹

III. DIGNITY AND THE EIGHTH AMENDMENT

A. THE MODERN DEATH PENALTY'S LEGAL FOUNDATION

Barry's inquiry is well-grounded in Chief Justice Warren's plurality opinion in *Trop v. Dulles*.⁸⁰ In Warren's words: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."⁸¹ Moreover, the plurality indicated that, as a matter of logic, the meaning of "civilized standards" could not remain static.⁸² In keeping with this doctrine, the Court considered the Eighth Amendment's limits in accordance with "evolving standards of decency that mark the progress of a maturing society."⁸³

When the Supreme Court first struck down state death penalty statutes in 1972 in the case of *Furman v. Georgia*,⁸⁴ Justice Brennan wrote that "[t]he primary principle [underlying the Eighth Amendment ban on cruel and unusual punishment] is that a punishment must not be so severe as to be degrading to the dignity of human beings."⁸⁵ Instead, criminal punishment must "comport with human dignity," and a state must conduct the punishment of criminal offenders "with respect for their intrinsic worth as human beings."⁸⁶ In ruling that the death penalty violated the Eighth Amendment, Justice Brennan stated that "death stands condemned as fatally offensive to human dignity."⁸⁷

Brennan's opinion in *Furman* was a concurrence to the Court's brief *per curiam* opinion. Justice Marshall also wrote a concurring opinion in *Furman*, finding the death penalty to contravene the Eighth Amendment in all circumstances.⁸⁸ In reaching this conclusion, Justice Marshall explained that

79. Barry, *supra* note 16, at 388.

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

81. *Id.*

82. *Id.* ("[T]he words of the Amendment are not precise, and . . . their scope is not static.").

83. *Id.* at 101.

84. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (*per curiam*) (finding the death penalty as applied to be cruel and unusual punishment and therefore unconstitutional under the Eighth and Fourteenth Amendments).

85. *Id.* at 271 (Brennan, J., concurring).

86. *Id.* at 270.

87. *Id.* at 305; *see also id.* at 272-73 ("The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the [Eighth Amendment] . . . even the vilest criminal remains a human being possessed of . . . human dignity.").

88. *Id.* at 314-74 (Marshall, J., concurring).

“the Eighth Amendment is our insulation from our baser selves”⁸⁹ and that awareness of the realities of capital punishment supports a determination that it is fundamentally inconsistent with morality and justice.⁹⁰ The three other justices in *Furman* whose rulings overturned state death penalty statutes did so on procedural grounds, finding state death penalty systems arbitrary and discriminatory, resulting in unprincipled and inconsistent decisions about who would live and who would die.⁹¹

The *Furman* decision emptied death rows across the country,⁹² but—joining in the backlash of the 1970s against what many perceived as the unwelcome advance of liberalism and civil rights—a number of states began filling them again under revised statutes that purported to address the procedural concerns raised in *Furman*.⁹³ After changes in Court personnel that brought Republican appointees to the Court,⁹⁴ *Gregg v. Georgia* and its companion cases upheld the death penalty statutes of several states.⁹⁵ Over the objections of Brennan and Marshall alone, who would vote to vacate every

89. *Id.* at 345.

90. *Id.* at 369 (“Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.”).

91. The three other concurring opinions were written by Justices Douglas, Stewart, and White. Although each Justice wrote separately and no single opinion controlled, Justice Stewart’s opinion expressed concerns echoed by the other Justices:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . [I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Id. at 309–10 (Stewart, J., concurring) (footnotes omitted).

92. See EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 237 (2013) (“[T]he decision had broad application. Citing *Furman*, the justices had vacated the sentences in each of the 120 capital cases pending before the Supreme Court. This meant that almost everyone on death row in the United States would be entitled to be resentenced.”).

93. See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (“The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.”) (footnote omitted).

94. The four dissenters in *Furman*—Burger, Powell, Blackmun, and Rehnquist—were all appointed to the Court by Richard Nixon. See MANDERY, *supra* note 92, at 92–93, 125–26. Justice Stevens, who assumed the Supreme Court bench in 1975, was appointed by President Ford. *Id.* at 355–56.

95. In *Gregg* and its companion cases, the Supreme Court upheld the constitutionality of three state statutes—those of Georgia, Florida, and Texas—that purported to guide the sentencing discretion of the capital jury. The cases that accompanied *Gregg* were *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976). At the same time, the Supreme Court struck down mandatory death penalty statutes enacted in North Carolina and Louisiana, because they led automatically to death sentences upon the conviction of specified crimes, without affording discretion to issue a life sentence. See *Woodson v. North Carolina*, 428 U.S. 280, 303–05 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 335–36 (1976).

death sentence that came before them for as long as they remained on the bench, America launched its new death penalty regime.⁹⁶

Due to its Eighth Amendment decisions in *Furman* and *Gregg*, the new death penalty regime was different than the old one. The justices now agreed that an arbitrary or discriminatory death penalty constituted cruel and unusual punishment under the Eighth Amendment, but a majority of the justices believed that a procedurally regulated death penalty could sidestep arbitrariness and discrimination to comport with the Eighth Amendment's requirements.⁹⁷ Thus began the regulated death penalty system that we have today, deploying procedures to eradicate the problems threatening the death penalty's constitutionality.⁹⁸

In the new death penalty regime, the Supreme Court's role in monitoring Eighth Amendment compliance enlarged.⁹⁹ Once *Gregg* had held that the key to constitutionally-compliant death sentences lay in the procedures which imposed them, the Supreme Court became the self-appointed procedural watchdog of state death penalty systems.¹⁰⁰ As Professors Carol and Jordan Steiker have demonstrated, this procedural regime, though quite complex and technical, has proven remarkably ineffectual in addressing problems of arbitrariness and discrimination.¹⁰¹ Although a number of Supreme Court justices took a largely permissive approach to death penalty systems in the 1980s and 1990s when modern-era

96. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 427 (1995) ("Justices Brennan and Marshall formed the abolitionist wing of the Court, contending in every death penalty case that any and all executions constituted cruel and unusual punishment.").

97. See *Gregg*, 428 U.S. at 195 ("[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.").

98. See Steiker & Steiker, *supra* note 96, at 360 ("The public at large . . . presumes that the highly visible continuing involvement of the Supreme Court in regulating capital punishment insures—perhaps *over-insures*—against arbitrary or unjust executions.").

99. *Id.* at 363 ("[T]he very nature of its 1976 [capital punishment] opinions made clear that the Court was assuming a stance of continuing supervision . . . and thus marked the clear commencement of the Court's ongoing regulatory role.") (footnotes omitted).

100. *Id.* ("Gregg and its accompanying quartet [of cases] clarified that . . . the Court would now be involved in the ongoing business of determining which state schemes could pass constitutional muster.").

101. *Id.* at 359 ("The body of [death penalty] doctrine produced by the Court is enormously complex and its applicability to specific cases difficult to discern; yet, it remains unresponsive to the central animating concerns that inspired the Court to embark on its regulatory regime in the first place.").

death sentences reached their peak,¹⁰² the Court has issued several notable opinions restricting the death penalty's use.¹⁰³

B. AN UNSTABLE FOUNDATION?

Over time, some of the Supreme Court justices have arrived at the view that attempts to erect procedural safeguards that can insure the death penalty's constitutionality are unavailing.¹⁰⁴ Drawing from their experiences with the Court's death penalty jurisprudence, these justices concluded—as had Brennan and Marshall before them—that the death penalty was unconstitutional under the Eighth Amendment.¹⁰⁵ Primarily because they had come to believe that the death penalty will always contain an irreducible degree of arbitrariness and discrimination, they now saw it as inherently flawed under the Eighth Amendment.¹⁰⁶ Current sitting Justices Stephen

102. See Richard C. Dieter, *The Future of the Death Penalty in the United States*, 49 U. RICH. L. REV. 921, 922 (indicating that in the United States “in the 1980s and 1990s . . . capital punishment was increased by every measure”). After reaching a high in 1999, executions have declined each year since 2009. See *Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last updated Oct. 20, 2017). The 1980s was a decade when Justice Powell and other Supreme Court justices publicly vented their unhappiness that litigation efforts had dramatically impeded executions in the states. See Linda Greenhouse, *Justice Powell Assails Delay in Carrying Out Executions*, N.Y. TIMES, May 10, 1983, at A16. The outcomes of most of the death penalty cases that the Supreme Court decided in that decade were consistent with these sentiments. See generally, e.g., *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding that indigent capital defendants are not entitled to appointed counsel in state post-conviction proceedings); *Burger v. Kemp*, 483 U.S. 776 (1987) (finding no ineffective assistance of counsel despite representation of co-defendant by defense counsel's law partner and failure to present mitigating evidence at capital sentencing hearing); *Wainwright v. Witt*, 469 U.S. 412 (1985) (retreating from need to show with unmistakable clarity that prospective capital juror would automatically vote against death penalty before being struck for cause from capital case); *Barclay v. Florida*, 463 U.S. 939 (1983) (holding that death penalty was constitutional despite reliance by sentencer on an aggravating circumstance not authorized by state's sentencing statute); *California v. Ramos*, 463 U.S. 992 (1983) (jury instruction that life without parole sentence could be commuted by the governor did not undermine reliability of death sentence); *Zant v. Stephens*, 462 U.S. 862 (1983) (holding that death sentence is constitutional despite invalidation by state supreme court of one of three aggravating circumstances found by jury).

103. See Dieter, *supra* note 102, at 924 (identifying recent cases in which the Supreme Court restricted the death penalty and thereby “contributed to the decline in [its] use”).

104. The most heartfelt statement of this view comes from Justice Blackmun, a dissenter in *Furman* and a member of the majority in *Gregg*, who explains his ultimate change of heart about the death penalty's constitutionality in *Callins v. Collins*. After explaining his conclusion that the death penalty could not be administered fairly, he closes with the words, “[t]he path the Court has chosen lessens us all. I dissent.” See *Callins v. Collins*, 510 U.S. 1141, 1159 (1994) (Blackmun, J., dissenting).

105. See STEIKER & STEIKER, *supra* note 28, at 264 (“As Marshall and Brennan had done after their dissents to the reinstatement of capital punishment . . . [after *Callins v. Collins*] Blackmun refused to vote to uphold any further death sentences . . . [expressing his views in individual cases], no doubt self-consciously, in the same language as that of the original dissenting duo.”).

106. In Justice Blackmun's words:

Breyer and Ruth Bader Ginsburg are the newest members of this select group.¹⁰⁷

In his recent dissenting opinion in *Glossip v. Gross*, Justice Breyer reported that after reviewing the plethora of evidence of the death penalty's unreliability, arbitrariness, discrimination, excessive delays, and decline in use, he had reached the decision that "the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment.'"¹⁰⁸ Later in the same opinion, he wrote that "it [is] highly likely that the death penalty violates the Eighth Amendment."¹⁰⁹ Justice Ginsburg joined Justice Breyer in his dissent.¹¹⁰ While Justices Sotomayor and Kagan did not join Breyer's opinion, dissenting on other grounds, it is possible that the current Supreme Court bench holds four ready votes for abolishing the death penalty under the Eighth Amendment.¹¹¹

Although it is somewhat overstated, these four justices are widely labelled the liberal wing of the current Supreme Court, as were Justices Brennan and Marshall before them.¹¹² Understood in this way, their turn toward an

Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative.

Callins, 510 U.S. at 1145 (Blackmun, J., dissenting).

107. In *Glossip v. Gross*, Justice Breyer, dissenting from the majority's decision to uphold Oklahoma's execution protocol despite evidence that it risked a painful and lingering death, examined extensive evidence that led him to doubt the constitutionality of the death penalty. See *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting) ("In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed.").

108. *Id.* at 2756 (quoting U.S. CONST. amend. VIII).

109. *Id.* at 2776–77.

110. *Id.* at 2755.

111. Justices Breyer, Ginsburg, and Kagan also joined Justice Sotomayor's dissent in *Glossip* that addressed constitutional concerns with lethal injection but not with the death penalty in general. *Id.* at 2780 (Sotomayor, J., dissenting); see also STEIKER & STEIKER, *supra* note 28, at 270 ("Although they . . . have not yet had many opportunities to write death penalty opinions (or decades to become disillusioned with the project of constitutional regulation), Justices Sonia Sotomayor and Elena Kagan . . . seem like plausible future candidates for joining Breyer and Ginsburg in such a ruling [finding the death penalty unconstitutional].").

112. See, e.g., Amanda Cox & Matthew Ericson, *Siding With the Liberal Wing*, N.Y. TIMES, <http://www.nytimes.com/interactive/2012/06/28/us/supreme-court-liberal-wing-5-4-decisions.html> (last visited Oct. 25, 2017) (indicating that from the 100 5-to-4 decisions of the Roberts Court, "[i]n 30 of these decisions, the majority has included the court's four most liberal members [identified in the graphics as current sitting justices Breyer, Ginsburg, Kagan, and Sotomayor] and another justice"); James S. Kunen, *Justices Marshall and Brennan Battle to Keep Liberalism Alive at the U.S. Supreme Court*, PEOPLE (July 7, 1986), <http://people.com/archive/justices-marshall-and->

abolitionist interpretation of the Eighth Amendment might be unsurprising. Perhaps more surprising is the fact that several justices, appointed by conservative Presidents who admired their conservative reputations, reached similar conclusions.¹¹³ Justices Blackmun, Stevens, and Powell are among them.¹¹⁴

Assuming the Supreme Court bench in 1970, Justice Blackmun dissented in *Furman*, and joined the majority in *Gregg*, voting to reinstate the death penalty.¹¹⁵ Even though he referenced in *Furman* his personal abhorrence for the death penalty, he stated that his personal view was irrelevant to decisions regarding the death penalty's constitutionality.¹¹⁶ But on the brink of retirement, Blackmun announced in *Callins v. Collins* that he would "tinker with the machinery of death" no longer.¹¹⁷ More than two decades of frustration with the Court's efforts to regulate the death penalty had taught him that the death penalty was invariably incompatible with constitutional values.¹¹⁸

brennan-battle-to-keep-liberalism-alive-at-the-u-s-supreme-court-vol-26-no-1 ("Six appointments by three Republican Presidents since 1969 have left Brennan and Marshall the only consistently liberal voices on an increasingly conservative Court. They are now a minority of two in finding the death penalty unconstitutional.").

113. See HOWARD BALL, *THE SUPREME COURT IN THE INTIMATE LIVES OF AMERICANS: BIRTH, SEX, MARRIAGE, CHILDREARING, AND DEATH* 12 (2002) (observing that conservative Presidents appoint Justices who share their conservative values, that "[t]here is a significant correlation between the Court appointments by conservative Republican Presidents and the Court's decisions," that Nixon appointed Blackmun and Powell, and Ford appointed Stevens).

114. *Id.* (noting that once on the bench, jurists can "move in a direction different from the one" that the appointing President "hoped for," and that Blackmun and Stevens were "disappointments to the Presidents who nominated them").

115. *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) ("I concur in the judgment. See *Furman v. Georgia*, 408 U.S. 238, 405–14 (BLACKMUN, J., dissenting) . . ."); *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting) (per curiam) ("I join the respective opinions of THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, and add only the following, somewhat personal, comments.").

116. In his dissent in *Furman*, Justice Blackmun wrote:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty For me, it violates childhood's training and life's experiences We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement.

Furman, 408 U.S. at 405–14 (Blackmun, J., dissenting).

117. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.").

118.

For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor The

Joining the Supreme Court after *Furman* was decided, Justice Stevens voted to reinstate the death penalty in *Gregg v. Georgia*.¹¹⁹ Over time, he too became disillusioned with the death penalty.¹²⁰ By 2008, in his opinion in *Baze v. Rees*, Stevens wrote that “[s]tate-sanctioned killing is . . . becoming more and more anachronistic”¹²¹ and professed his agreement with Justice White’s assertion in *Furman* that “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes” offends the Eighth Amendment.¹²² Nonetheless, Stevens’s opinion in *Baze v. Rees* was a concurrence rather than a dissent, stating that his views did not “justify a refusal to respect precedents that remain a part of our law.”¹²³ After he retired in 2010, Stevens told an interviewer that he regretted his vote in *Jurek*—one of *Gregg*’s companion cases—approving Texas’s frequently applied death penalty statute.¹²⁴

Justice Powell dissented in *Furman v. Georgia*¹²⁵ and was one the co-authors of the Court’s opinion in *Gregg v. Georgia*, reinstating the death penalty with certain procedural protections.¹²⁶ A decade later, he wrote the majority opinion in *McCleskey v. Kemp*, upholding the constitutionality of Georgia’s death penalty despite statistical evidence that defendants with white victims were significantly more likely to receive death as punishment for

problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

Id. at 1145–46 (footnote omitted).

119. *Gregg*, 428 U.S. at 158 (indicating that Justice Stevens and Justice Powell joined the opinion of Mr. Justice Stewart). Newly appointed to the Court, Justice Stevens was recruited by Justices Stewart and Powell to join what came to be called “the troika,” the plurality that determined the outcomes of *Gregg* and its four companion cases. See MANDERY, *supra* note 92, at 408–21 (describing the alliance between Stewart, Powell, and Stevens that led to the Court’s authorization of America’s modern-day experiment with the death penalty).

120. During a 1995 interview, Justice Blackmun suggested that Justice Stevens was “deeply concerned about the constitutionality of the death penalty.” See MANDERY, *supra* note 92, at 438 (reporting that Blackmun’s assertion about Stevens’s change of heart “became the subject of widespread speculation in the legal community”).

121. See *Baze v. Rees*, 553 U.S. 35, 80 (2008) (Stevens, J., concurring).

122. *Id.* at 86 (White, J., concurring) (citing *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring) (*per curiam*)).

123. *Id.* at 87.

124. See MANDERY, *supra* note 92, at 439 (reporting that Stevens expressed this regret in interviews with both Nina Totenberg of National Public Radio and Sandra Day O’Connor). Stevens’s post-retirement regrets led Mandery to ask, “[I]f Powell had never convened the troika, would Stevens have had the stomach to cast the deciding vote to send hundreds of people to their death? If not, as his comments to Totenberg and O’Connor suggest, then this history would have quite a different ending.” *Id.* at 440.

125. *Furman*, 408 U.S. 238, 414 (Powell, J., dissenting); see also *id.* at 464–65 (“[A]s a matter of policy and precedent, this is a classic case for the exercise of our oft-announced allegiance to judicial restraint. . . . It seems to me that the sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process.”).

126. *Gregg v. Georgia*, 428 U.S. 153, 158–207 (1976).

murder than were defendants with black victims.¹²⁷ According to Powell's biographer, Powell stated after his retirement in 1987 that he not only regretted his *McCleskey* opinion, he also indicated that he would now vote to abolish the death penalty entirely.¹²⁸

C. JUSTICE KENNEDY'S ROLE

Barring a political upheaval that dramatically changes the current situation, Barry is right that a Supreme Court decision in the near future that abandons the death penalty on dignity grounds will need Justice Kennedy's participation.¹²⁹ In this regard, Barry offers some reasons for hope. Not only has Justice Kennedy—the key swing justice and foremost proponent of dignity principles on the Court—expressed some overall misgivings about the Court's death penalty jurisprudence, he has also played a key role in limiting use of the death penalty in some Eighth Amendment contexts.¹³⁰

Although he is not currently among the Supreme Court justices who have reported a conversion to a view that the death penalty is unconstitutional, Justice Kennedy has served as a colleague to all the justices who came to hold this view in the modern era—with the exception of Justice Powell, the Justice whom Kennedy replaced on the Court.¹³¹ When Powell retired, Ronald Reagan appointed Justice Kennedy, believing Kennedy to be a conservative much like Justice Powell.¹³² As had Powell before him, Kennedy has voted many times to uphold death sentences in capital cases.¹³³ Nonetheless, there is reason to believe that Justice Kennedy's views on the constitutionality of the

127. See *McCleskey v. Kemp*, 481 U.S. 279, 283–320 (1987) (“In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial . . . and the benefits that discretion provides . . . we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”).

128. See MANDERY, *supra* note 92, at 438 (reporting Powell's statement that he would now change his vote in *McCleskey v. Kemp* and every capital case, including *Furman*, because “I have come to think that capital punishment should be abolished”).

129. See Barry, *supra* note 16, at 428 (“If the Court invalidates the death penalty on dignity grounds, it will likely do so by a bare majority.”).

130. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 436–37 (2008) (in disallowing the death penalty for non-homicide crimes against individuals, Justice Kennedy observes that the Court's death penalty jurisprudence “is still in search of a unifying principle” and “has produced results not all together satisfactory”).

131. Appointed to the Court in 1987, Kennedy arrived at the Court before the retirements of Brennan and Marshall, served many years with Blackmun and Stevens, and currently serves with Breyer and Ginsburg. See *Justices*, OYEZ, <https://www.oyez.org/justices> (last visited Oct. 25, 2017).

132. Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court*, N.Y. TIMES (Nov. 12, 1987), <http://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html> (“[H]is approach is similar to that of Justice Lewis F. Powell Jr., whose retirement last June created the vacancy on the Supreme Court. Justice Powell was a nonideological conservative who often cast the deciding vote on the sharply polarized Court.”).

133. See KENNETH JOST, *THE SUPREME COURT A-Z* 78 (5th ed., 2012) (“Kennedy provided a fifth vote in various rulings that made it easier for prosecutors to win or appellate courts to uphold death sentences.”).

death penalty may be evolving, though the extent of the evolution is as yet unknown.¹³⁴

Some attribute Kennedy's growing interest in applying dignity values in constitutional interpretation to his international experiences.¹³⁵ In the summer months, Justice Kennedy frequently teaches constitutional law and international law in Europe, where he also attends international conferences for judges.¹³⁶ For more than a decade, Justice Kennedy has viewed foreign and international law as an interpretive aid in constitutional decisionmaking.¹³⁷ As a result, the concept of human dignity as it is expressed in international human rights law may well have influenced Justice Kennedy's interpretive approach to the U.S. Constitution.¹³⁸

134. If dignity is the unifying principle that Kennedy believes death penalty jurisprudence needs, see *Kennedy v. Louisiana*, 554 U.S. at 437, then he has been refining that conception—as Barry observes—in his landmark rulings on LGBT rights and can use it to anchor an opinion that abolishes the death penalty. See Tribe, *supra* note 55, at 16–17 (stating that Justice Kennedy's decision in *Obergefell* “represents the culmination of a decades-long project that has revolutionized the Court's fundamental rights jurisprudence. . . . Justice Kennedy has thereby fashioned a major shift in constitutional doctrine, one that will have ramifications in many cases to come.”).

135. See Tribe, *supra* note 55, at 21 (“Justice Kennedy, a noted cosmopolitan who spends his summers teaching law in places like Salzburg, Austria, is aware of equal dignity's deep international resonance.”) (footnote omitted).

136. See 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> (“[Kennedy] first went to Salzburg in 1987, to teach for McGeorge as part of a summer program. . . . He returned in 1990 and has taught every summer since. . . . Kennedy happened to spend his summers in the city where the most important international judges' conference takes place.”).

137. *Id.* (“[Kennedy] has become a leading proponent of one of the most cosmopolitan, and controversial, trends in constitutional law: using foreign and international law as an aid to interpreting the United States Constitution.”); see also David G. Savage, *A Justice's International View*, L.A. TIMES (June 14, 2008), <http://articles.latimes.com/2008/jun/14/nation/na-scotus14> (“In recent years, Kennedy . . . has become one of the strongest proponents of interpreting the Constitution's guarantees of liberty and equality broadly and in line with modern human rights law.”).

138. In Justice Kennedy's words:

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. . . . If we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that's at least instructive to us.

Toobin, *supra* note 136. Professor Tribe suggests that Kennedy's views, as articulated here, evince an “educative or pedagogical view of the Constitution.” See Tribe, *supra* note 55, at 27 (“Kennedy's opinions . . . culminating in *Obergefell* [reveal] the belief that the Constitution is written and designed to shed light on society's evolving experience, framing windows through which to view and assess that experience, and to thereby educate us in how we might proceed to form an ever more perfect union.”). According to Tribe, this view has grounded Justice Kennedy's writings on dignity, which—as most fully articulated in *Obergefell*—establish “the

Despite international influences on his thinking about constitutional norms, Justice Kennedy has not yet intimated that he shares Justice Powell's post-retirement epiphanies regarding the death penalty.¹³⁹ He has, however, shown an increasing willingness to limit use of the penalty for certain categories of crimes and offenders. For example, in *Roper v. Simmons*, Justice Kennedy wrote the opinion for a 5-4 majority holding the execution of persons under 18 at the time of a crime to be cruel and unusual punishment in violation of the Eighth Amendment.¹⁴⁰ In *Roper*, Justice Kennedy asserted that "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."¹⁴¹

Kennedy also wrote the 5-4 majority opinion in *Kennedy v. Louisiana* that found a death sentence for non-homicide crimes against persons—in this instance, the rape of a child—to be a disproportionate, and therefore, an unconstitutional penalty under the Eighth Amendment.¹⁴² In so holding, Justice Kennedy observed "[i]t is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of punishment."¹⁴³ This principle, "[c]onfirmed by repeated, consistent rulings of this Court," suggests that "[i]n most cases, justice is not better served by terminating the life of the perpetrator . . ."¹⁴⁴

In other cases as well, Justice Kennedy demonstrated the death penalty restraint that he urged. Although he did not write an opinion in *Atkins v. Virginia*, Justice Kennedy was one of six votes holding unconstitutional under the Eighth Amendment the execution of intellectually disabled offenders.¹⁴⁵ A dozen years later, in *Hall v. Florida*, a capital case applying *Atkins* to the state's procedural system for determining intellectual disability, Kennedy delivered the Court's 5-4 opinion prohibiting states from issuing death sentences in reliance on bright-line IQ thresholds, without allowing further evidence of intellectual functioning for defendants near the threshold

notion of *equal dignity* as the very foundation of individual human rights." See Tribe, *supra* note 55, at 22.

139. See MANDERY, *supra* note 128 and accompanying text.

140. See *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (supporting the unconstitutionality of the juvenile death penalty with evidence of the "stark reality" that America remains the only country to use it and with the observation that "it does not lessen our fidelity to the Constitution . . . to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage").

141. *Id.* at 560.

142. See *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding that where the offender did not kill or intend to kill the victim, or assist another in doing so, the death penalty is not a proportional punishment as required by the Eighth and Fourteenth Amendments).

143. *Id.* at 435.

144. *Id.* at 446–47.

145. *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) (finding the death penalty a disproportionate punishment under the Eighth Amendment when applied to intellectually disabled offenders whose diminished capacity lessens their moral culpability).

levels.¹⁴⁶ The problem with a rigid rule, Kennedy maintained, is that it “creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.”¹⁴⁷

Independent of the pattern of thought revealed by these cases, *Hall v. Florida* alone provides considerable support for Barry’s thesis.¹⁴⁸ Justice Kennedy’s majority opinion in *Hall* is a primer on the dignitarian concerns underlying the Eighth Amendment.¹⁴⁹ Quoting language from previous precedents that supports the Eighth Amendment’s dignity rationale, Justice Kennedy writes that “to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.”¹⁵⁰ Heightening the rhetoric further, Kennedy maintains that “[t]he Eighth Amendment’s protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be,” suggesting—consistent with the “evolving standards of decency” measure—that notions of dignity may advance over time with shifts in cultural norms.¹⁵¹

These cases, the Eighth Amendment proportionality doctrine that frames their analysis, and the dignity values that underlie them, lend support to Professor Barry’s prediction.¹⁵² As well he should, Barry takes heart in Justice Kennedy’s centering of the dignitary interests of the LGBT community in the Fourteenth Amendment decisions of *Lawrence*, *Romer*, *Windsor*, and *Obergefell*,¹⁵³ and in the subtler yet explicit way that Kennedy has deployed dignity norms in Eighth Amendment cases.¹⁵⁴ *Hall v. Florida* is a premier

146. *Hall v. Florida*, 134 S. Ct. 1986, 1999 (2014) (“If the States were to have complete autonomy to define intellectual disability as they wished, the Court’s decision in *Atkins* could become a nullity, and the Eighth Amendment’s protection of human dignity would not become a reality.”).

147. *Id.* at 1990.

148. The record in *Hall v. Florida* may demonstrate to Justice Kennedy how hard it is to enforce cases like *Atkins*—broad rulings protecting the dignity of capital defendants—in states committed to capital punishment. Given Justice Kennedy’s commitment to equal dignity, see Tribe, *supra* note 55, at 17, 22, this realization may assist in his consideration of a blanket Eighth Amendment prohibition on capital punishment.

149. See *Hall*, 134 S. Ct. at 2001 (“Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.”).

150. *Id.* at 1992.

151. *Id.*

152. See Barry, *supra* note 16, at 410–11 (suggesting that *Hall*’s high-minded language reaches “far beyond the dignity interests of people with intellectual disabilities,” implying “a dignity of life that is unqualified: an end to the death penalty”).

153. Barry, *supra* note 16, at 399 (observing that “[i]f *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,” holding state practices unconstitutional “because their purpose was to deprive gay people of ‘equal dignity’”).

154. See Barry, *supra* note 16, at 417–18 (arguing that Justice Kennedy’s rulings “in favor of gays and lesbians on dignity grounds” and “limit[ing] the expansion of the death penalty on

example of the sharpened attention that Justice Kennedy is directing to dignity concerns in capital cases.¹⁵⁵

IV. DIGNITY'S LIMITS AND THE EIGHTH AMENDMENT

A. KANSAS V. MARSH

Despite his language in *Hall v. Florida*, Justice Kennedy has sent some contrary signals in other death penalty decisions. For example, in the 2006 capital case of *Kansas v. Marsh*,¹⁵⁶ Justice Kennedy joined Justice Thomas's majority opinion, overturning a judgment of the Kansas Supreme Court and holding that a capital sentencing system, "which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional."¹⁵⁷ This holding sparked a virulent dissent from the pen of Justice Souter, joined by three other justices—Stevens, Breyer, and Ginsburg.¹⁵⁸ Reporting on the startling numbers of exonerations of condemned inmates, Souter saw the majority opinion as failing to address emerging questions under the Eighth Amendment about the moral soundness of capital sentencing.¹⁵⁹ Further, allowing a state to require a death sentence "when a sentencing impasse demonstrates as a matter of law that the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal . . . mandat[ing] death in what [the Kansas] court identifies as 'doubtful cases'"¹⁶⁰ is "obtuse by any moral or social measure."¹⁶¹

Had Justice Kennedy signed on to Justice Souter's view of *Kansas v. Marsh*, the ruling of the Kansas Supreme Court that had already rejected the Kansas death sentencing scheme would have been upheld, and in response, Kansas would have modified the structure of the sentencing system that so perturbed Justice Souter.¹⁶² If Justice Kennedy had relied on the principles of human dignity that he has expressed in other Eighth and Fourteenth Amendment contexts, Souter's dissenting opinion would likely have attained its fifth vote and become the majority.¹⁶³ Indeed, one might have expected the Justice who

dignity grounds," suggest that Justice Kennedy will provide the fifth vote for finding "the death penalty unconstitutional on dignity grounds").

155. See *Hall*, 134 S. Ct. at 1992 (stating that the Court assesses punishment under the Eighth Amendment's evolving standard of decency measure "to enforce the Constitution's protection of human dignity").

156. *Kansas v. Marsh*, 548 U.S. 163, 181 (2006).

157. *Id.*

158. *Id.* at 203 (Souter, J., dissenting).

159. *Id.* at 207–10.

160. *Id.* at 207, 21.

161. *Id.* at 211.

162. See *id.* at 207 ("A law that requires execution when the case for aggravation has failed to convince the sentencing jury is morally absurd, and the Court's holding that the Constitution tolerates this moral irrationality defies decades of precedent aimed at eliminating freakish capital sentencing in the United States.").

163. See *supra* notes 140–51 and accompanying text.

wrote in *Hall v. Florida* that “to impose the harshest of punishments on [a less morally culpable person] violates his or her inherent dignity as a human being” to be inclined to express agreement with Justice Souter’s concern that a tie between aggravating and mitigating evidence resulted in an automatic—and therefore unlawful—death sentence in *Kansas*.¹⁶⁴ Yet for reasons unknown, Justice Kennedy remained silent in *Kansas v. Marsh*, joining the majority opinion that tolerated the risk of a “morally unjustifiable death sentence.”¹⁶⁵ Instead of “minimizing [that risk] as precedent unmistakably requires,” the Court approved the state’s “guaranteeing that in equipoise cases the risk will be realized [because] state law says that equivocal evidence is good enough and the defendant must die.”¹⁶⁶

B. LETHAL INJECTION CASES

As surprising as this result may be for a justice on record as motivated in his constitutional thinking by dignitarian concerns, an even more alarming signal arises from Justice Kennedy’s role in the lethal injection cases.¹⁶⁷ Perhaps more than any other kind of case, challenges to execution methods raise both moral and constitutional concerns that go to the heart of what cruel and unusual punishment means under the Eighth Amendment, because they force us to confront the brutal material reality of how state employees use bureaucratic processes to kill other human beings.¹⁶⁸ No longer considering

164. See *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014). The Supreme Court outlawed automatic death sentences in *Gregg*’s companion cases, *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976). Each case overturned a state death penalty statute that mandated death as punishment upon conviction of certain crimes, disallowing individualized consideration of the offender or the offense. See *Woodson*, 428 U.S. at 304 (“[W]e believe that, in capital cases, the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”).

165. See *Marsh*, 548 U.S. at 207 (Souter, J., dissenting).

166. *Id.*

167. Justice Kennedy voted to uphold lethal injections against Eighth Amendment challenges in two significant cases: *Baze v. Rees*, 553 U.S. 35 (2008) and *Glossip v. Gross*, 135 S. Ct. 2726 (2015). While Kennedy joined two other Justices in the *Baze* plurality and four more Justices concurred, in *Glossip* Kennedy provided the decisive fifth vote on a bitterly divided Court. See *Baze*, 553 U.S. at 39 (“ROBERTS, C.J., announced the judgment of the court and delivered an opinion, in which KENNEDY and ALITO, JJ., joined.”); *Glossip*, 135 S. Ct. at 2730 (“ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined.”).

168. See Osofsky et al., *supra* note 4, at 379, 385–86 (“Each member straps a particular part of the body. . . . [The execution] is achieved through the collective effort of many people, each efficiently performing a small part. . . . After lethal activities become routinized into separate sub-functions, participants shift their attention from the morality of their activity to the operational details and efficiency of their specific job.”); see also Tolly Moseley, *The Enforcers of the Death Penalty: How Does Capital Punishment Affect the Prison Guards and Wardens Tasked with Carrying It Out?*, ATLANTIC (Oct. 1, 2014), <https://www.theatlantic.com/health/archive/2014/10/the-enforcers-of-the-death-penalty/379901> (“We do these things that personally you would normally never be involved in, because they’re

the death penalty in its abstract or symbolic form, challenges to execution methods directly address the barbarity of lethal punishment, surfacing its gruesome details.¹⁶⁹ The execution process itself—the physical means by which a government kills a person—brings into stark relief the moral, religious, and constitutional reasons to oppose the death penalty.¹⁷⁰ Dignity interests would seem to be at their apex in cases that focus squarely on how the state goes about extinguishing a human life.¹⁷¹

1. Baze v. Rees

These may be among the reasons that the Supreme Court's recent lethal injection cases have been hotly contested, with emotions on ardent display.¹⁷²

sanctioned by the government. And then we start walking through them in a mechanical fashion. We become detached. We lose our humanity.”); Frank Thompson, *Ex-Warden: Death Penalty Doesn't Make Guards Safer*, DELAWARE ONLINE (Apr. 1, 2015, 5:11 PM), <http://www.delawareonline.com/story/opinion/contributors/2015/04/01/ex-warden-death-penalty-make-guards-safer/70791272> (“As someone who has led an execution team . . . I am acutely aware of the immeasurable burden that this process places on correctional officers, and I am continuously being informed, by those who have been personally and directly involved in executing someone, of the awful, lifelong repercussions . . . in carrying out executions.”).

169. See Moseley, *supra* note 168 (speaking to prison wardens after botched executions about “the guard standing at the door to the death chamber, the strap-down team member holding the prisoner’s ankles, and the physician inserting the needle” and wondering “[w]hat must it have been like to be in that room? To watch a person’s body convulse . . . to wait two hours and 600 gasps of air for a man to die”); see also Sara Rimer, *Working Death Row: A Special Report; In the Busiest Death Chamber, Duty Carries Its Own Burdens*, N.Y. TIMES (Dec. 17, 2000), <http://www.nytimes.com/2000/12/17/us/working-death-row-special-report-busiest-death-chamber-duty-carries-its-own.html> (explaining that prison staff would “secure the condemned” to a gurney to be injected with [lethal] drugs, that after the execution the tie-down team would unfasten the straps and load the body “into a waiting hearse,” and that “[t]he death certificate would read: ‘State-ordered legal homicide’”).

170. See Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 773–74 (2005) (asserting that “the government can be seen as committing distinctive moral wrongs through execution because executions, as punishments, have the capacity to be morally problematic in ways that go beyond their wrongness as ‘killing,’” including “suppress[ing] our ordinary human capacities for compassion and empathy” and “weakening . . . psychological constraints against brutality”).

171. Ironically, the concept of dignity appears in Justice Roberts’s plurality opinion in *Baze v. Rees*—an opinion joined by Justice Kennedy—to uphold the use of a paralytic drug in Kentucky’s lethal injection protocol. See *Baze v. Rees*, 553 U.S. 35, 57 (2008) (supporting the state’s argument that pancuronium bromide—which petitioners claimed “serve[d] no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration” of the first drug—“prevents involuntary physical movements [and thereby] preserv[es] the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress”). Justice Kennedy’s concern for the dignity interests inherent in extinguishing human life—rather than the dignity interests inherent in suppressing the disturbing physical effects of extinguishing human life—do not appear in the opinion.

172. See Dahlia Lithwick, *A Horrifying Day at Court*, SLATE (April 30, 2015, 5:48 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2015/04/glossip_v_gross_supreme_court_justices_argue_about_lethal_injection_abolition.html (describing the oral

They may also be among the reasons why cases about execution methods are often the vehicles through which judges express their developing opposition to the death penalty in general. For example, in *Baze v. Rees*, the Supreme Court upheld the constitutionality of Kentucky's three-drug lethal injection protocol over arguments that the risk of botched executions created a "substantial risk of serious harm."¹⁷³ True, in ordinary parlance, being slated for execution itself represents a "substantial risk of serious harm," but in the parlance of capital punishment, the risk at issue is that the inmate would experience a protracted and painful death.¹⁷⁴ Writing for a plurality, Justice Roberts reasoned that the prevailing three-drug execution protocol satisfied the Eighth Amendment because it did not create a "substantial" or "objectively intolerable risk of harm"—presumably in the form of extreme pain, torture, or a lingering death.¹⁷⁵ Although he concurred in the outcome, Justice Stevens chose his concurrence in *Baze v. Rees* to explain why he had come to believe in the categorical unconstitutionality of the death penalty.¹⁷⁶

After reciting a number of concerns—such as the problem of wrongful convictions, discriminatory outcomes, emotions overtaking legal safeguards, the enormous costs of the death penalty for the courts and for society, and the availability of life without parole sentences—Justice Stevens concluded that the death penalty's "negligible returns to the State" render it a "patently excessive and cruel and unusual punishment violative of the Eighth Amendment."¹⁷⁷ Nevertheless, Justice Stevens concurred rather than dissented, indicating that his vote to uphold death sentences was based on his desire to respect *stare decisis* not on his continuing belief in the death penalty's constitutionality.¹⁷⁸ In response, Justice Scalia penned a searing concurrence

arguments in *Glossip*, which "quickly blew up into a proxy war about ideology and politics and the ugly rift between the justices on how we feel about killing people in America. . ." and observing that "[t]he tension in the chamber [was] palpable and unpleasant").

173. *Baze*, 553 U.S. at 50.

174. *Id.* The perverse use of language in this context is related to the elusive quest for a "humane" form of execution. In *Baze*, Chief Justice Roberts credits states with adopting lethal injection on the belief that it would provide a humane form of execution. *See id.* at 51 ("[B]y all accounts, the States have fulfilled [their role to implement execution procedures] with an earnest desire to provide for a progressively more humane manner of death."). Of course, there is reason to doubt whether states have achieved this end. *See* Editorial, *The Humane Death Penalty Charade*, N.Y. TIMES (Jan. 27, 2015), <https://www.nytimes.com/2015/01/27/opinion/the-humane-death-penalty-charade.html> ("When the United States at last abandons the abhorrent practice of capital punishment, the early years of the 21st century will stand out as a peculiar period during which otherwise reasonable people hotly debated how to kill other people while inflicting the least amount of constitutionally acceptable pain.").

175. *See Baze*, 553 U.S. at 50; *cf.* JOHN D. BESSLER, *THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION* (2017) (arguing that state-imposed death is an anachronistic punishment and should be classified under law as torture).

176. *See Baze*, 553 U.S. at 71–87 (Stevens, J., concurring).

177. *Id.* at 86.

178. *Id.* at 87.

of his own, a retort to the legitimacy of the reasoning that Justice Stevens advanced in support of the death penalty's unconstitutionality.¹⁷⁹ Justice Kennedy remained largely silent, playing a limited role at oral argument then joining Justice Roberts's plurality opinion.¹⁸⁰

2. *Glossip v. Gross*

i. *Backdrop*

Seven years later in *Glossip v. Gross*, the Court's review of a Tenth Circuit opinion rejecting a constitutional challenge to lethal injection under 42 U.S.C. § 1983, the rancor had only deepened.¹⁸¹ In fact, the rancor provoked by the case, originally denominated *Warner v. Gross*, began before the Court agreed to hear it.¹⁸² Four petitioners, including Charles Warner and Richard Glossip, petitioned the Court for certiorari because they were the next in line to be executed under Oklahoma's new lethal injection protocol that had led to ghastly spectacles, most notably the execution of Clayton Lockett.¹⁸³ After receiving Oklahoma's lethal drug cocktail, Clayton Lockett had spoken, lifted his head, moaned, writhed, and died of a heart attack 43 minutes later, 10 minutes after his execution had been halted.¹⁸⁴

Warner, the original named petitioner, did not survive long enough to learn the outcome of his appeal, because the Supreme Court refused to grant him a stay of execution.¹⁸⁵ Four justices dissented from the denial of Warner's stay, the four who later became the dissenters when the Supreme Court ultimately ruled in *Glossip* on the lethal injection issues.¹⁸⁶ Because it takes five

179. *Id.* at 87–93 (“What prompts Justice Stevens . . . to adopt the astounding position that a criminal sanction expressly mentioned in the Constitution violates the Constitution? . . . [O]f all Justice Stevens's criticisms, the hardest to take is his bemoaning of ‘the enormous costs [of] death penalty litigation,’[which] in large measure [are] the creation of Justice Stevens and other Justices opposed to the death penalty.”).

180. *Id.* at 39 (majority opinion).

181. See Lithwick, *supra* note 172 (reporting on the “[justices’] rancor and their rudeness,” their “nasty tempers and bitter resentments,” on display during the “horrifying” oral arguments in *Glossip*, a case that brought out “the worst in the justices”).

182. See *Warner v. Gross*, 135 S. Ct. 824, 828 (2015) (Sotomayor, J., dissenting from denial of stay) (“The questions before us are especially important now, given States’ increasing reliance on new and scientifically untested methods of execution. . . . I hope that our failure to act today does not portend our unwillingness to consider these questions.”).

183. See Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015), <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069> (describing details of the attempted lethal injection as “something out of a horror movie”).

184. See Katie Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett Was ‘a Bloody Mess,’* GUARDIAN (Dec. 13, 2014), <https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess> (reporting witness accounts of the gruesome execution scene).

185. *Warner*, 135 S.Ct. at 824 (“The application for stays of execution of sentences of death presented to JUSTICE SOTOMAYOR and by her referred to the Court is denied.”).

186. *Id.* (“JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join, dissenting.”).

justices to grant a stay, but only four to grant certiorari, a courtesy of past Supreme Court practice had been for a fifth justice to join the stay until a vote could be taken on whether to review the case.¹⁸⁷ But courtesy was in short supply in this contentious matter. Neither Justice Kennedy nor any other justice provided the fifth vote to grant a stay, and Warner was executed before his case, now named *Glossip v. Gross*, was heard.¹⁸⁸ After the case was heard, Justice Kennedy gave a fifth vote to Justice Alito, whose majority opinion deserves further scrutiny.¹⁸⁹

Understanding the majority opinion requires a fuller understanding of the changed circumstances that underlie it. Whereas the risk of a painful and lingering death claimed in *Baze* to be cruel and unusual punishment came from the improper administration of lethal drugs by medically untrained executioners,¹⁹⁰ by the time of *Glossip*, the drugs themselves posed a substantial risk of a painful and lingering death.¹⁹¹ The new version of the problem arose because sodium thiopental, a coma-inducing barbiturate, the first of the three drugs that the *Baze* plurality had deemed constitutional under the Eighth Amendment's standards, was no longer available.¹⁹² Consequently, states like Oklahoma had experimented with other drugs—

187. See, e.g., MANDERY, *supra* note 92, at 436–37 (noting that “[b]efore the Court rejected Darden’s appeal, it granted a last-minute stay of execution,” because Powell felt he should add a fifth vote to the stay when there were four votes to hear the case).

188. See Mahita Gajanan, *Oklahoma Used Wrong Drug in Charles Warner’s Execution, Autopsy Report Says*, GUARDIAN (Oct. 8, 2015), <https://www.theguardian.com/us-news/2015/oct/08/oklahoma-wrong-drug-execution-charles-warner> (after lethal injection with the wrong drug in January 2015, Warner said “[m]y body is on fire” and died eighteen minutes later, leading the Oklahoma governor to stay the execution of Richard Glossip. It was “the second time in less than a month that Glossip came within hours of lethal injection”). Many believe that Glossip has a credible case of innocence. See @RichardGlossipIsInnocent, FACEBOOK (Apr. 19, 2017) <https://www.facebook.com/RichardGlossipIsInnocent>. See also Helen Prejean, *Richard Glossip is Innocent*, MINISTRY AGAINST THE DEATH PENALTY, <http://www.sisterhelen.org/richard/> (last visited Oct. 25, 2017) (“I firmly believe, as do so many others in Oklahoma and across the country, that Richard is innocent of the crime that sent him to Oklahoma’s death row.”).

189. *Glossip v. Gross*, 135 S. Ct. 2726, 2730–46 (2015).

190. See *Baze v. Rees*, 553 U.S. 35, 49 (2008) (“Petitioners claim that there is a significant risk that the [execution] procedures will not be properly followed . . .”). In part, this risk comes from the limited involvement in executions of medically trained personnel. See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 77 (2007) (“Although some physicians have indicated a willingness to engage in executions, a number of medical associations have protested.”). In the Kentucky execution procedures at issue in *Baze*, “the protocol allowed improperly trained executioners to insert catheters into an inmate’s neck despite a doctor’s refusal to do so and heated criticism of the procedure.” *Id.* at 56.

191. See *Glossip*, 135 S. Ct. at 2731 (“[Petitioners] argue that midazolam, the first drug employed in the State’s current three-drug protocol, fails to render a person insensate to pain.”).

192. *Id.* at 2733 (stating that “*Baze* cleared any legal obstacle to use of the most common three-drug protocol,” and that “[a]fter other efforts to procure sodium thiopental proved unsuccessful, States sought an alternative”).

notably, midazolam, an anti-anxiety medication—and executions like Clayton Lockett's had gone terribly awry.¹⁹³

ii. *The Majority's Ruling*

Facing the unavailability of the drug protocol approved in *Baze*, *Glossip* held that the courts below had not erred in finding that Oklahoma's new protocol did not entail a substantial risk of severe pain.¹⁹⁴ But the majority went on to hold that, even if the lower courts had erred in that finding, the petitioners could not prevail because they had failed to identify a known and available alternative method of execution that entails a lesser risk of pain.¹⁹⁵ Claiming that this requirement was established in *Baze*, the *Glossip* majority held that a successful challenge to an execution method requires the challengers to identify an available execution method that is safer and more painless.¹⁹⁶ Perversely, finding reliable and painless execution methods for the states to use had somehow become a job for the condemned.¹⁹⁷

Did the *Glossip* majority make proper use of the *Baze* plurality's opinion? In *Baze*, Justice Roberts had stated, "[I]t is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk" of pain, violative of the Eighth Amendment.¹⁹⁸ Standing alone, this sentence would seem to suggest that the Oklahoma protocol—in which midazolam might not reliably sustain unconsciousness when the subsequent paralyzing and heart-stopping drugs are administered, thereby risking excruciating pain—violated the Eighth Amendment's ban on cruel and unusual punishment. The majority in *Glossip*, however, looked for support in another part of the *Baze* opinion. When addressing the *Baze* petitioners' claim that the three-drug protocol could be replaced with a lethal dose of a single barbiturate, Justice Roberts had written

193. See *Arthur v. Dunn*, 137 S. Ct. 725, 733 (2017) (Sotomayor, J., dissenting from denial of certiorari) ("Science and experience are now revealing that, at least with respect to midazolam-centered protocols, prisoners executed by lethal injection are suffering horrifying deaths beneath a 'medically sterile aura of peace.'" (quoting Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 66 (2002))).

194. See *Glossip*, 135 S. Ct. at 2731 ("[T]he District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.").

195. *Id.* at 2738 ("Petitioners . . . have not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain.").

196. *Id.* ("[Petitioners] argue that they need not identify a known and available method of execution that presents less risk. But this argument is inconsistent with the controlling opinion in *Baze*.").

197. *Id.* at 2796 (Sotomayor, J. dissenting) ("[W]hy [lethal drug shortages] compel the Court's imposition of further burdens on those facing execution is a mystery. Petitioners here had no part in creating the shortage . . . [I]t is odd to punish them for the actions of pharmaceutical companies and others who seek to disassociate . . . from the death penalty.").

198. *Baze v. Rees*, 553 U.S. 35, 53 (2008).

that the risk of severe pain from the injection of the three-drug cocktail was not “substantial when compared to the known and available alternatives.”¹⁹⁹

The latter passage arises from Justice Roberts’s rejection of the petitioners’ argument in *Baze* that the Eighth Amendment was violated when the state overlooked the existence of a better alternative—a single, more easily administered barbiturate.²⁰⁰ As a matter of sheer logic, this language cannot transform into a requirement that an Eighth Amendment challenge to a method of execution will not succeed if prisoners cannot provide an available alternative.²⁰¹ Surely Justice Alito is contorting the language of *Baze* when he states that *Baze* imposed such a requirement on the condemned.²⁰²

The Eighth Amendment protects Americans from state infliction of cruel and excessive punishment.²⁰³ By what sleight of hand has the *Baze* plurality turned this absolute Eighth Amendment right into a conditional right? A cruel and excessive punishment violates the Eighth Amendment regardless of whether an alternative exists and whether those who would receive the punishment can propose alternatives for the state to use.²⁰⁴

The sleight of hand begins in *Baze*. Justice Alito in *Glossip* quotes Justice Roberts in *Baze* for the premise that “because it is settled that capital

199. *Id.* at 61.

200. *Id.* at 51 (“Much of the petitioners’ case rests on the contention that they have identified a significant risk of harm that can be eliminated by adopting alternative procedures, such as a one-drug protocol . . . [but] a condemned prisoner cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.”).

201. The plurality’s contention in *Baze* was that the alternative that petitioners chose to proffer was not enough of an improvement for the State’s execution method to constitute an Eighth Amendment violation. *See id.* at 52 (“If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State’s refusal to change its method can be viewed as ‘cruel and unusual’ under the Eighth Amendment.”). It was not a requirement that petitioners had to proffer a significantly better alternative for an Eighth Amendment claim to prevail.

202. Moreover, as Justice Sotomayor observes, Justice Alito bases his majority opinion in *Glossip* on a purported standard from a plurality opinion in *Baze*. Even if the standard were not a misreading of the *Baze* plurality, it was not a standard adopted by a majority of the justices. Sotomayor writes:

[T]he Court cites only the plurality opinion in *Baze* as support for its known-and-available-alternative requirement. Even assuming that the *Baze* plurality set forth such a requirement—which it did not—none of the Members of the Court whose concurrences were necessary to sustain the *Baze* Court’s judgment articulated a similar view. . . . Because the position that a plaintiff challenging a method of execution under the Eighth Amendment must prove the availability of an alternative means of execution did not “represent the views of a majority of the Court,” it was not the holding of the *Baze* Court.

Glossip v. Gross, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting) (citations omitted).

203. *See, e.g., In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death.”); *Wilkinson v. Utah*, 99 U.S. 130, 136 (1879) (stating that punishments involving “unnecessary cruelty” are forbidden by the Eighth Amendment).

204. *See Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (“The Eighth Amendment categorically prohibits the infliction of cruel and unusual punishments.”).

punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'"²⁰⁵ But it bears asking: Why does it necessarily follow? It is also settled law that what constitutes cruel and excessive punishment must be measured by "evolving standards of decency."²⁰⁶ If it is within the logic of Eighth Amendment jurisprudence to find any particular means of execution currently used to be cruel and unusual punishment according to contemporary standards of decency, it is within Eighth Amendment logic to find each particular means, considered independently or collectively, to be cruel and unusual.²⁰⁷

Under Eighth Amendment jurisprudence, a willingness to tolerate the death penalty at one time does not render it constitutional for all time.²⁰⁸ Nor does tolerance of a category of penalty insulate any of the means of inflicting it from Eighth Amendment scrutiny.²⁰⁹ Adding a requirement that offenders find an alternative method of execution before any specific Eighth Amendment challenge to an execution method can succeed is a corruption of Eighth Amendment doctrine, lacking a sound basis in constitutional thought.²¹⁰

Where did a majority that professes fidelity to doctrine and precedent find this Eighth Amendment gloss?²¹¹ Apparently, its grounds are in a

205. *Glossip*, 135 S. Ct. at 2733–34 ("Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008))).

206. See *supra* note 46 and accompanying text; see also *Arthur v. Dunn*, 137 S. Ct. 725, 731 (2017) (Sotomayor, J., dissenting from denial of certiorari) ("Evolving standards have yielded a familiar cycle: States develop a method of execution, which is generally accepted for a time. Science then reveals that—unknown to the previous generation—the States' chosen method of execution causes unconstitutional levels of suffering.").

207. See, e.g., *Graham v. Florida*, 560 U.S. 48, 59 (2010) ("The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances.").

208. See *id.* at 85 (Stevens, J., concurring) ("Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time . . ."); see also *Arthur v. Dunn*, 137 S. Ct. at 733 (Sotomayor, J., dissenting from denial of certiorari) ("What cruel irony that the method that appears most humane may turn out to be our most cruel experiment yet.").

209. See Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, NEW YORKER (May 21, 2016), <http://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs> ("[T]he unsuccessful effort . . . to carry out lethal injections in a manner that meets standards of fairness and reliability has made it increasingly clear that states cannot constitutionally perform these types of executions. If they can't do that, how can the Supreme Court continue to permit capital punishment under the Constitution?").

210. *Graham v. Florida*, 560 U.S. at 85 (Stevens, J., concurring) ("[U]nless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete.") (citation omitted).

211. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) ("Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function."). Justice Alito joined Roberts's concurrence in *Citizens United*. *Id.* at 372.

narrative of conspiracy. The majority alleges that death penalty abolitionists conspired to make drugs for pain-free executions unavailable, and then had the audacity to complain that the available drugs cause pain.²¹² In this conspiracy story, the abolition movement has infected both empirical research and the law itself, drawing gullible judges into its disingenuous grasp.²¹³ So vehemently do the majority and concurring justices rail against abolitionists—of both the lay and judicial variety—that their tirades sometimes resonate like those of nineteenth century Southern politicians condemning the anti-slavery forces to whom the abolitionist label was also applied.²¹⁴

The conspiracy narrative was evident during oral argument in *Glossip*, when Justice Alito opined that lethal injections had been made riskier by prohibitions on the import of barbiturates obtained by those fighting “a guerilla war against the death penalty.”²¹⁵ Justice Scalia followed suit, inquiring about the legal relevance of the abolitionist movement’s involvement in making safer execution drugs unavailable.²¹⁶ When Robin Konrad, the attorney for petitioners, was interrupted before she could fully respond to these challenges posed by Justices Alito and Scalia, Justice

212. See *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015) (“[T]he most common three-drug protocol . . . had enabled States to carry out the death penalty in a quick and painless fashion. But . . . anti-death penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences.”); see also *id.* (“Activists then pressured both [an Italian] company and the Italian Government to stop the sale of sodium thiopental for use in lethal injections in this country. . . . Anti-death penalty advocates lobbied the Danish manufacturer of [a lethal injection] drug to stop selling it for use in executions.”). Cf. *id.* at 2781–82 (Sotomayor, J., dissenting) (“After *Baze* was decided . . . the primary producer of sodium thiopental refused to continue permitting the drug to be used in executions.”).

213. See *id.* at 2746–47 (Scalia, J., concurring) (“Welcome to Groundhog Day. . . . A vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare, insist that *now*, at long last, the death penalty must be abolished for good.”); see also *id.* at 2747 (Scalia, J., concurring) (“[T]oday Justice Breyer takes on the role of the abolitionists in this long-running drama . . . Even accepting [his] rewriting of the Eighth Amendment, his argument is full of internal contradictions and . . . gobbledy-gook. . . . The capital convict will obtain endless legal assistance from the abolition lobby (and legal favoritism from abolitionist judges). . . .”).

214. See, e.g., Diann Rust-Tierney, *We, Too, Are Abolitionists: Black History Month, Slavery and the Death Penalty*, HUFFINGTON POST (Mar. 27, 2009), http://www.huffingtonpost.com/diann-rusttierney/we-too-are-abolitionists_b_168386.html.

215. See Transcript of Oral Argument at 14, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955) (indicating that Justice Alito asked petitioner’s counsel: “[I]s it appropriate for the judiciary to countenance what amounts to a guerilla war against the death penalty which consists of efforts to make it impossible for the States to obtain drugs that could be used to carry out capital punishment with little, if any, pain?”).

216. *Id.* at 15–16 (indicating that Justice Scalia asked petitioner’s counsel: “[T]hose drugs have been rendered unavailable by the abolitionist movement putting pressure on the companies that manufacture them And now you want to come before the Court and say, well, this third drug is not 100 percent sure. The reason it isn’t 100 percent sure is because the abolitionists have rendered it impossible to get the 100 percent sure drugs, and you think we should not view that as . . . relevant to the decision . . . ?”).

Kennedy turned her attention back to their questions, asking Ms. Konrad, “What bearing, if any, should we put on the fact that there is a method, but that it’s not available because of – because of opposition to the death penalty? . . . I—I would like an answer to the question. . . . [I]s it relevant or not?”²¹⁷

Suggesting that they would not be outsmarted by such a self-righteous breed of “anti-death penalty advocates,” the justices in the majority—following up on concerns raised at oral argument—wrought a doctrine that seemed to hold petitioners responsible for the unavailability of better execution drugs.²¹⁸ Who is responsible for their unavailability? The “guerilla warriors” in the lethal injection story are largely European: European manufacturers who refuse to sell their pharmaceuticals for use in American executions, a human rights NGO based in London that assists them in doing so, and pharmaceutical corporations whose commercial interests dictate that they disassociate products designed for improving health from those for inflicting death.²¹⁹ This is not America’s anti-death penalty litigation movement, not the “Groundhog Day” that Justice Scalia’s concurrence decries, but another set of lawfully engaged global players.²²⁰

217. *Id.* at 16–17. One account of Justice Kennedy’s participation in the *Glossip* argument is as follows:

When the argument seemed to move on, Justice Anthony M. Kennedy insisted, with evident impatience, that Konrad had not answered the question of whether the resistance to the death penalty was a factor that the Court should consider in weighing the validity of a given protocol. Although Kennedy’s approach was less emotional, it seemed clear that he, too, was frustrated with the resistance movement and what it required Justices to do to examine each state’s approach to executions.

Lyle Denniston, *Argument Analysis: Impatience With Death-Penalty Resistance*, SCOTUSBLOG (April 29, 2015, 3:14 PM), <http://www.scotusblog.com/2015/04/argument-analysis-impatience-with-death-penalty-resistance>.

218. *See Glossip*, 135 S. Ct. at 2733, 2738–39 (“Petitioners . . . have not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain. . . . *Baze* . . . made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative. . . . [P]etitioners failed to do this . . .”).

219. *See* Ty Alper, *The United States Execution Drug Shortage: A Consequence of Our Values*, 21 BROWN J. OF WORLD AFFS. 27, 28 (2014) (“The media focuses . . . on advocates in Europe who have campaigned to pressure European drug companies to stop distribution . . . [yet] it is the [European] drug companies that have long sought to avoid the use of their products in executions, for moral and financial reasons, [and] to comply with European law.”). For example, according to Alper, the manufacturer of sodium thiopental—whose corporate slogan is “Advancing Wellness”—eventually “realized that the minimal profit made on the drug was vastly outweighed by the bad publicity of assisting executions, and it decided to shut down production of the drug.”). *Id.* at 33–34. Moreover, “European law—not the activism of anti-death penalty crusaders—constrained the abilities of [European] pharmaceutical companies, who already did not want their products used in executions, to export their drugs.” *Id.* at 35. *See also* Caplan, *supra* note 209 (“[G]overnments, drug companies, and activists worldwide have gradually closed the open market for the federally approved drugs that have been used for lethal injections.”).

220. *See* Deborah Denno, *Symposium: “Groundhog Day” Indeed*, SCOTUSBLOG (June 30, 2015, 2:31 PM), <http://www.scotusblog.com/2015/06/symposium-groundhog-day-indeed> (detailing multiple reasons for shortages of execution drugs—reduced production of chemicals needed to

The reasons that previously used barbiturates are no longer available for lethal injections may be galling to some of the justices, but they are not legally relevant to *Glossip*'s Eighth Amendment claims.²²¹ If, as petitioners alleged, the available execution drugs create the “chemical equivalent of being burned at the stake,” then, as Justice Sotomayor observes in dissent, even if no alternative is available, the Eighth Amendment forbids that execution method as much as it forbids burning at the stake.²²² Indeed, Justice Sotomayor asserts, non-medical corrections personnel administering experimental drug protocols on death sentenced people risks torturous executions prohibited by the Eighth Amendment.²²³

iii. *W(h)ither Dignity?*

In *Glossip*'s bitter debate about the constitutionality of Oklahoma's lethal injection protocols, one might expect that the justice who wrote that “under the Eighth Amendment, the state must respect the human attributes even of those who have committed serious crimes,” would have been more inclined toward the dissent's position than the majority's.²²⁴ Yet, despite his affinity for dignitarian principles, for some reason Justice Kennedy found himself unable to side with the dissenters.²²⁵ Instead he threw in his lot with the vituperative justices who, in the absence of an alternative, were willing to interpret the Eighth Amendment to allow what it forbids—the risk of a painful and lingering death—in the interests of avoiding an abolitionist conspiracy.²²⁶ In

produce them, reduced supply due to diminished demand for their non-lethal uses, a 2013 court ruling requiring the FDA to ban the import of substandard drugs—which “have nothing to do with the abolitionist movement”); *see also id.* (“It is easier to scapegoat abolitionists than it is to acknowledge that there is much more at play here . . .”).

221. *Id.* (stating that the conspiratorial claims about “anti-death-penalty advocates” are “extraordinary and unsupported,” and it is “erroneous at best to classify European countries or the European Union itself as ‘abolitionists’”); *see also id.* (“The majority opinion implies that abolitionists have made their drug-shortage bed and now death row inmates must sleep in it . . .”).

222. *See Glossip v. Gross*, 135 S. Ct. 2726, 2781, 2795 (2015) (Sotomayor, J., dissenting) (“[U]nder the Court's new rule [requiring petitioners to identify available alternatives], it would not matter whether the state intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake The Eighth Amendment cannot possibly countenance such a result.”).

223. *Id.* at 2796 (“The execution protocols States hurriedly devise as they scramble to locate new and untested drugs . . . are all the more likely to be cruel and unusual Courts' review of execution methods should be more, not less, searching when States are engaged in what is in effect human experimentation.”).

224. *See Graham v. Florida*, 560 U.S. 48, 59 (2010).

225. *See Denno, supra* note 220 (“In *Glossip*, Justice Anthony Kennedy broke traditional lines to join the Court's more conservative members in a majority decision written by Justice Samuel Alito.”).

226. *See Arthur v. Dunn*, 137 S. Ct. 725, 733 (2017) (Sotomayor, J., dissenting from denial of certiorari) (“[L]ived experience belies any suggestion that midazolam reliably renders prisoners . . . unconscious to the searing pain of the latter two [execution] drugs. . . . Like a hangman's poorly tied noose or a malfunctioning electric chair . . . our latest method of execution [may be] too much for our conscience—and our Constitution—to bear.”).

the impassioned and intemperate partisanship that forged *Glossip*'s majority opinion, dignity principles were sorely absent.²²⁷

More than any other case, *Glossip v. Gross* may represent the vexing fly in Barry's otherwise soothing ointment.²²⁸ Although Justice Kennedy did not write an opinion in *Glossip*, his repetition of abolitionist conspiracy concerns at oral argument, and his willingness to join a harsh majority opinion, are hard to square with the dignity concerns that he expressed in cases like *Roper*, *Louisiana*, and *Hall*.²²⁹ If it is true that challenges to the constitutionality of execution methods are proxies for challenges to the constitutionality of capital punishment, then Kennedy's complicity in the majority's anti-dignitarian approach to *Glossip* is a warning flag on Barry's well-paved path to judicial abolition of the death penalty.²³⁰

Despite *Glossip*'s warning flag, Barry could still be right. In light of his dignitarian commitment and global perspective, Justice Kennedy may well be conflicted about the death penalty. Moreover, if his stated misgivings about the Court's death penalty jurisprudence intensify, he may be willing to step forward and play a decisive role in bringing its current chapter to a close.²³¹ Not all of the signs point in this direction, but some do, and Barry has assembled them into a persuasive argument for impending abolition.

227. See Denno, *supra* note 220 ("[I]t is inexcusable that the Court has enabled for decades a system of execution that has only become more reckless and egregious with each passing year."). Moreover, the dissolution of decorum in *Glossip v. Gross* may be related to the manner in which participating in a death penalty system—as Supreme Court justices surely do—requires moral disengagement that can undermine our better natures. See Osofsky et al., *supra* note 4, at 376 ("In most social systems that trade in death . . . moral self-restraints are gradually weakened through participation in a progression of committing inhumanities . . ."). This observation may represent a version of the concern that a society's death penalty system can inhibit humane and empathic qualities of members of that society, thereby threatening human dignity. See Steiker, *supra* note 170, at 773–74 ("By damaging or destroying human capacities to enter imaginatively into the pain of others, extreme punishments impair us as social agents . . .").

228. See Caplan, *supra* note 209 (*Glossip* was "one of the most important death-penalty cases decided by the Supreme Court in the past generation.").

229. See *supra* notes 140–55 and accompanying text.

230. See Denno, *supra* note 220 ("Like *Baze*, *Glossip* is as much a case about the ongoing existence of the death penalty as it is about one state's use of one particular drug in its lethal injection protocol.").

231. Additional support for this position, written post-*Glossip*, can be found in Robert J. Smith, *The End of the Death Penalty?*, SLATE (July 1, 2015), 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. . . . The Supreme Court's own struggle with capital cases further underscores this sense of plausibility. . . . The reality . . . is that . . . the court's approach is still, as Kennedy says, 'not altogether satisfactory.'").

V. CONCLUSION

Prognostication is a precarious business.²³² Like tornadoes, trends can abruptly shift course and move in other directions, overtaken by new cultural circumstances.²³³ Recent events, ushering in an aberrant presidential administration supported both actively and passively by other political actors, have certainly shown that America, a deeply divided country, is capable of sudden shifts.²³⁴ Death penalty's soothsayers now confront a scenario in which perspectives and dynamics long existing on the margins of political life have taken center stage, although the scope of its impact is as yet unknown.²³⁵

Will the political and legal trend that Barry describes toward universal recognition of claims to human dignity fall victim to 2017's shift toward coarser politics and policies? Emboldened by the ascendancy of newly empowered supporters, will death penalty advocates manage to reverse the death penalty's recent decline? In other words, do reports of the death penalty's impending death suddenly sound premature?

Recent political changes may slow or stall some of the legal developments that Barry musters to support his prediction that the American death penalty's days are numbered. Just as political changes in the 1970s revived a moribund death penalty in the United States—at the same time that other Western nations were firmly abolishing it—it is possible that, at least for a short while, the twenty-first century U.S. death penalty will survive the near-death

232. See STEIKER & STEIKER, *supra* note 28, at 289 (“The many unanticipated consequences produced in the past by the convoluted path of the Supreme Court’s interventions in capital punishment offer ample reason to be cautious in predicting the death penalty’s future.”).

233. The Senate’s confirmation of Neil Gorsuch for the Supreme Court—obtained by an unprecedented rule change to break a Democratic filibuster—is a new cultural circumstance on the path toward judicial abolition of the death penalty. Although Gorsuch’s role on the Court is likely to resemble Scalia’s, he will probably serve as a reliable vote against judicial abolition of the death penalty. See Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch> (“Gorsuch’s position in death penalty cases is . . . very unlikely to make the court any more solicitous of the claims of capital defendants.”).

234. See, e.g., Darlene Superville, *Trump Plugs Away at His Central Goal: Undoing Obama’s Work*, ASSOCIATED PRESS (April 3, 2017), <https://apnews.com/68650994841d43cea2552fede0dbc6a7/bit-bit-trump-methodically-undoing-obama-policies> (“President Donald Trump is steadily plugging away at a major piece of his agenda: Undoing Obama. From abortion to energy to climate change and personal investments, Trump is keeping his promises in methodically overturning regulations and policies adopted when Barack Obama was president.”).

235. See, e.g., John Podesta, *Battling Climate Change in the Time of Trump*, CTR. AM. PROGRESS (March 21, 2017, 12:22 PM), <https://www.americanprogress.org/issues/green/reports/2017/03/21/428812/battling-climate-change-time-trump> (“The administration appears to be on a rampage against environmental laws that protect clean air, water, and our way of life.”); Scott Shane et al., *Trump Pushes Dark View of Islam to Center of U.S. Policy-Making*, N.Y. TIMES (February 1, 2017), <https://www.nytimes.com/2017/02/01/us/politics/donald-trump-islam.html> (“Rejected by most serious scholars of religion and shunned by Presidents George W. Bush and Barack Obama, this dark view of Islam has nonetheless flourished on the fringes of the American right With Mr. Trump’s election, it has now moved to the center of American decision-making on security and law”).

experience that Barry identifies.²³⁶ But if American institutions withstand assaults on their integrity and our constitutional structure remains intact, then despite the dramatic turn and caustic tone of recent political developments, Barry's daring prediction may yet come true.²³⁷

The quest for a humane death penalty system that comports with contemporary standards of fairness and decency has been elusive.²³⁸ Believing that such a system was incapable of being devised, some American states abolished the death penalty in the mid-nineteenth century or early twentieth century and never looked back.²³⁹ Eventually, the Supreme Court followed suit, abolishing the death penalty across the country through the case of *Furman v. Georgia*.²⁴⁰ From that day forward, Justices Brennan and Marshall told us that a humane death penalty system was not possible, that the death penalty was intrinsically offensive to human dignity, that it would weaken our

236. See, e.g., Matthew Haag & Richard Fausset, *Arkansas Rushes to Execute 8 Men in the Space of 10 Days*, N.Y. TIMES (March 3, 2017), <https://www.nytimes.com/2017/03/03/us/arkansas-death-penalty-drug.html> (“[W]hile the Supreme Court has been less than clear on . . . capital punishment, President Trump is an ardent and longtime proponent. The president’s opinions may have little direct effect on state cases, but his blunt, tough-on-crime speech is sure to influence the tone of the national conversation.”).

237. Present risks to democratic institutions were identified by Martha Minow and Robert Post, when they were Deans of the law schools at Harvard and Yale respectively:

If Trump believes he can make an enemy of the law and of the Constitution, then he has truly become a foe of the Republic, despite the oath he swore at his inauguration. The craft and professional culture of law is what makes politics possible; it is what keeps politics from spiraling into endless violence. By questioning the legitimacy and authority of judges, Trump seems perilously close to characterizing the law as simply one more enemy to be smashed into submission. At risk are the legal practices and protections that guard our freedom and our safety from the mob violence that destroyed democracies in the 1930s.

See Martha Minow & Robert Post, *Standing Up for ‘So-Called’ Law*, BOS. GLOBE (Feb. 10, 2017), <https://www.bostonglobe.com/opinion/2017/02/10/standing-for-called-law/VLbDYmrwpdJCn8qs5FPJJaK/story.html>.

238. See *The Humane Death Penalty Charade*, *supra* note 174 (“It is time to dispense with the pretense of a pain-free death. The act of killing itself is irredeemably brutal and violent. . . . When the killing is carried out by a state against its own citizens, it is beneath a people that aspire to call themselves civilized.”).

239. See STEIKER & STEIKER, *supra* note 28, at 22 (“The state of Michigan has the distinction of being the first government in the English-speaking world to abolish capital punishment for murder and lesser crimes. Michigan has maintained its 1846 abolitionist stance to the present day”) (footnote omitted); see also *Furman v. Georgia*, 408 U.S. 238, 406 (1972) (Blackmun, J., dissenting) (per curiam) (“Having lived for many years in a State that . . . effectively abolished [the death penalty] in 1911, and that carried out its last execution [in] . . . 1906, capital punishment had never been a part of life for me. In [Minnesota], it just did not exist . . . in the arsenal of possible punishments”). The Steikers attribute America’s “schizophrenic posture” on capital punishment to “differing attitudes regarding the race-based practice of chattel slavery.” See STEIKER & STEIKER, *supra* note 28, at 22 (“Even after the abolition of slavery, the death penalty abolition movement failed to gain any traction in the South.”).

240. See *supra* note 84 and accompanying text.

progress as a nation, and that abolition of America's death penalty was a moral imperative.²⁴¹

Four years later the Supreme Court decisively rejected Brennan and Marshall's views, authorizing a procedural regime for imposing the death penalty and installing itself as the overseer of the regime.²⁴² Forty years later, the capacity of the procedural regime to deliver a fair and humane death penalty system has proven to be limited, and consequently the death penalty is falling into disfavor once more.²⁴³ Poignantly, years after Brennan and Marshall's deaths, their perspectives on the inherent folly of lethal punishment have a new resonance.²⁴⁴

As Barry's argument reveals, four decades of living with death as a punishment have brought us full circle. Through our hard-won experience with the paradoxes and contradictions of a system of lethal punishment, we are considering anew—with the help of guides like Professor Barry—the lessons of *Furman v. Georgia* and the human dignity concerns that Brennan and Marshall articulated long ago.²⁴⁵ Arriving where we began, we are finally starting to understand these lessons and concerns—vividly, deeply, and experientially—as if for the first time.²⁴⁶

241. See *supra* notes 85–90 and accompanying text.

242. See *supra* notes 96–103 and accompanying text.

243. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting) (“In 1976, the Court thought that the constitutional infirmities of the death penalty [including unreliability, arbitrariness, and delays] could be healed . . . Almost 40 years of studies, surveys, and experience strongly indicate . . . that this effort has failed. Perhaps as a result . . . most places within the United States have abandoned its use.”).

244. See Editorial, *The Death Penalty Endgame*, N.Y. TIMES (Jan. 16, 2016), <https://www.nytimes.com/2016/01/17/opinion/sunday/the-death-penalty-endgame.html> (“The justices . . . can no longer ignore the clear movement of history. They already have all the evidence they need to join the rest of the civilized world and end the death penalty once and for all.”).

245. See *supra* notes 85–91 and accompanying text.

246. Two excerpts from T.S. Eliot's poem, *Little Gidding*, the last of his Four Quartets, illuminate this observation:

Every phrase and every sentence is an end and a beginning,
 Every poem an epitaph. And any action
 Is a step to the block, to the fire, down the sea's throat
 Or to an illegible stone: and that is where we start.
 We die with the dying;
 See, they depart, and we go with them.
 We are born with the dead:
 See, they return, and bring us with them.
 . . .
 We shall not cease from exploration
 And the end of all our exploring
 Will be to arrive where we started
 And know the place for the first time.