

## FROM WOLVES, LAMBS (PART II): THE FOURTEENTH AMENDMENT CASE FOR GRADUAL ABOLITION OF THE DEATH PENALTY

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*Can a state abolish its death penalty for future crimes while retaining it for those already on death row? This turns out to be a novel question in modern death penalty law, one that has not been answered in nearly a century. In 2014, in the case of State v. Santiago, the Connecticut Supreme Court will be the first court in modern times to answer the question. This Article predicts that the answer to the question will be yes.*

*Although the Connecticut Supreme Court will be the first court to answer this question in almost one hundred years, it will not be the last. Two inmates remain on death row in New Mexico following that state's prospective-only repeal in 2009, five inmates remain on death row in Maryland following that state's prospective-only repeal in 2013, and Kansas and Delaware, with a total of twenty-eight inmates on death row, are poised to abolish their death penalties prospective-only in the near future. If the Connecticut Supreme Court upholds Connecticut's repeal in Santiago, the way will be clear for other courts to uphold legislation abolishing the death penalty prospective-only.*

*This Article is the second of two articles examining the emergence of this new trend of "gradual abolition" of the death penalty, by which state legislatures eliminate the death penalty for future crimes only and the executive retains it for those on death row. It begins with a discussion of the*

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legislature's strategic decision to abolish the death penalty prospective-only—a time-tested strategy that helped to end another infamous American institution: slavery. This Article next turns from the legislature to the courts, concluding that prospective-only repeal does not violate the Fourteenth Amendment; rational reasons abound for repealing the death penalty for some but not all, and due process is not offended by retaining death row intact.

Lastly, this Article points the way forward—to the future of those who remain on death row and capital offenders who await sentencing post-repeal. It argues that, post-repeal, the executive should grant clemency and capital sentencing juries should return life sentences—not because it is unconstitutional to execute post-repeal, but because it would be an unfairness of the highest order. Indeed, there is no record of a death row prisoner ever being executed after prospective-only repeal of the death penalty; hopefully, there never will be.

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## INTRODUCTION

On May 2, 2013, Maryland became the eighteenth state to abolish the death penalty—but not for everyone.<sup>1</sup> Maryland’s repeal is “prospective-only”; it applies only to future crimes while leaving intact the sentences of Maryland’s five death row prisoners.<sup>2</sup> Although the governor of Maryland has the power to commute the sentences of these five men, he has not yet exercised this power.<sup>3</sup> Maryland is not alone; it is the third state in five years to abolish its death penalty prospective-only while leaving its existing death row intact. In 2009, New Mexico became the first state in nearly 100 years to abolish the death penalty prospective-only while leaving in place the sentences of its two death row inmates.<sup>4</sup> In 2012, Connecticut followed suit, leaving eleven men on death row.<sup>5</sup>

As these eighteen men lingering on death row suggest, changes are afoot in the movement to abolish the death penalty. Legislatures’ abolition of the death penalty for all future crimes, and the executive’s inability or refusal to commute the sentences of those remaining on death row, evince a new trend in death penalty abolition—that of gradual abolition. Although the modern death penalty abolition

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<sup>1</sup> Act of May 2, 2013, ch. 156, 2013 Md. Laws (repealing the death penalty and substituting life without the possibility of parole); Joe Sutton, *Maryland Governor Signs Death Penalty Repeal*, CNN (May 2, 2013, 2:53 PM), <http://www.cnn.com/2013/05/02/us/maryland-death-penalty>.

<sup>2</sup> Sutton, *supra* note 1.

<sup>3</sup> Brian White, *Md. Governor Slow to Commute Death Sentences*, AP (Sept. 13, 2013, 11:54 AM), <http://bigstory.ap.org/article/md-governor-slow-commute-death-sentences>. In Maryland, “an administrative board makes a non-binding recommendation to the governor, but the ultimate power lies with the governor.” LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 251 & n.10 (2d ed. 2008).

<sup>4</sup> Act of Mar. 18, 2009, ch. 11, 2009 N.M. Laws (abolishing the death penalty and providing for life imprisonment without possibility of parole); see Kevin Barry, *From Wolves, Lambs (Part I): The Eighth Amendment Case for Gradual Abolition of the Death Penalty*, 65 FLA. L. REV. 313 (2014) [hereinafter Barry, *Part I*].

<sup>5</sup> An Act Revising the Penalty for Capital Felonies, Pub. Act 12-5, 2012 Conn. Acts (Reg. Sess. 2012); see Barry, *Part I, supra* note 4. As discussed in Part II.A below, the Connecticut Supreme Court recently overturned the death sentence of Eduardo Santiago, one of Connecticut’s eleven death row prisoners, on grounds that the trial court had improperly failed to disclose privileged records regarding abuse and neglect of Mr. Santiago’s siblings. *State v. Santiago*, 49 A.3d 566, 653–54 (Conn. 2012). Following remand to the trial court for a new penalty phase hearing, Mr. Santiago argued that Connecticut’s prospective-only repeal prohibits the State from seeking the death penalty against him. Supplemental Brief of the Defendant with Attached Appendix at 1–3, *Santiago*, 49 A.3d 566 (No. 17413) (on file with author). Mr. Santiago’s case is once again pending before the Connecticut Supreme Court. Because he remains subject to the death penalty at the time of this writing (albeit not sentenced to death), this Article includes Mr. Santiago within Connecticut’s death row population as a statistical matter. See *Case Detail*, ST. CONN. JUD. BRANCH, <http://appellateinquiry.jud.ct.gov/CaseDetail.aspx?CRN=11507&Type=CaseName> (last visited Mar. 15, 2014). See *infra* Part II.A for a discussion of the pending appeal in *State v. Santiago*.

movement has always been gradual in the sense that it has proceeded state-by-state, using direct legal and policy advocacy to delay executions, narrow the class of crimes and defendants eligible for death, and require meaningful appellate review and other procedural protections,<sup>6</sup> New Mexico, Connecticut, and Maryland suggest the birth of a new gradualism. In these three states, and for the first time ever, abolition is proceeding inmate-by-inmate. Abolition will be achieved in these states when the last death row inmate in each state dies or is released from death row.

The significance of this development cannot be overstated. With the exception of Kansas and Missouri at the turn of the twentieth century,<sup>7</sup> it appears that no state has ever abolished its death penalty for all future crimes while leaving its death row intact.<sup>8</sup> Although New Mexico, Connecticut, and Maryland are the first states to do so in nearly 100 years, they will certainly not be the last. Prospective-only repeal bills have been introduced in Delaware, where eighteen men sit on death row, and in Kansas, where ten men sit on death row.<sup>9</sup> Should those bills

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<sup>6</sup> Hugo Adam Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759, 763–67 (1991).

<sup>7</sup> See *In re Schneck*, 96 P. 43, 44 (Kan. 1908) (discussing Kansas law repealing death penalty prospective-only); *State v. Lewis*, 201 S.W. 80, 85–86 (Mo. 1918) (per curiam) (discussing Missouri law repealing death penalty prospective-only); see also *State v. Hill*, 201 S.W. 58, 61 (Mo. 1918) (same). Both Kansas and Missouri subsequently reinstated their death penalties. FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 29 (1986).

<sup>8</sup> See Barry, *Part I*, *supra* note 4, at 315 n.1.

<sup>9</sup> See S.B. 126, 58th Leg., Reg. Sess. (Kan. 2013), available at [http://www.kslegislature.org/li/b2013\\_14/measures/documents/sb126\\_00\\_0000.pdf](http://www.kslegislature.org/li/b2013_14/measures/documents/sb126_00_0000.pdf) (“No person shall be sentenced to death for a crime committed on or after July 1, 2013. . . . Any person who is sentenced to death for a crime committed prior to July 1, 2013, may be put to death pursuant to the provisions of article 40 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto.” (emphasis added)); H.B. 2397, 58th Leg., Reg. Sess. (Kan. 2013), available at [http://www.kslegislature.org/li/b2013\\_14/measures/documents/hb2397\\_00\\_0000.pdf](http://www.kslegislature.org/li/b2013_14/measures/documents/hb2397_00_0000.pdf) (same); S. Amend. 1 to S.B. 19, 147th Gen. Assemb., 1st Reg. Sess. (Del. 2013) (including “synopsis” stating that “[t]his Amendment removes the retroactive provision in Senate Bill 19”); see also *Death Penalty Repeal Passes Delaware Senate; Defeated in Colorado*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/recent-legislation-death-penalty-repeal-passes-delaware-senate-defeated-colorado> (last visited Feb. 9, 2014) (discussing amendment of Delaware bill in Senate “to exclude current death row inmates”). At the time of this writing, prospective-only bills are pending in a host of other states, including Colorado, New Hampshire, and Washington. See H.B. 13-1264, 69th Leg., Reg. Sess. (Colo. 2014), available at <http://legiscan.com/CO/text/HB1264/id/947306/Colorado-2014-HB1264-Introduced.pdf> (“The bill repeals the death penalty in Colorado for offenses committed on or after July 1, 2013 . . . .”); *id.* (“As of the effective date of this part 9, for offenses committed on or after July 1, 2013, the death penalty shall not be a sentencing option for a defendant convicted of a class 1 felony in the state of Colorado. Nothing in this section shall commute or alter the sentence of a defendant convicted before the effective date of this part 9.”); H.R. 1170-FN, 147th Leg. (N.H. 2014), available at <http://www.gencourt.state.nh.us/legislation/2014/HB1170.pdf> (stating that “[t]his act shall take effect upon its passage,” but otherwise silent as to retroactivity); Floor Amendment to HB 1170-FN, 2014-0916h, <http://www.gencourt.state.nh.us/legislation/amendments/2014-0916H.html> (failed amendment to retroactively apply repeal to “[a]ny

become law, and if the governor in those states is unable or unwilling to commute the sentences of those on death row,<sup>10</sup> gradual abolition will count five states among its ranks, or 25% of all states that have abolished the death penalty.

Gradual abolition is gaining momentum, but important questions remain. Chief among them is a legal question: Can a state abolish its death penalty for future crimes only—retaining it for those already on death row? This turns out to be a novel question in modern death penalty law, one that has not been answered in nearly a century. In 2014, in the case of *State v. Santiago*, the Connecticut Supreme Court will become the first court in modern times to answer the question.<sup>11</sup> This Article predicts that the answer to the question is yes. Given the number of states abolishing prospective-only and the number of prisoners on death row post-repeal, *Santiago*'s reverberations will be widely felt.

This Article is the second of two articles examining gradual abolition of the death penalty. The first article, titled *From Wolves, Lambs (Part I): The Eighth Amendment Case for Gradual Abolition of the Death Penalty*, examined the utility and morality of legislative repeal of the death penalty prospective-only, as well as its validity under the Eighth Amendment and the rules of statutory construction.<sup>12</sup> Specifically, it argued that prospective-only death penalty repeal promises both retraction of the death penalty and preservation of the status quo and is therefore a useful tool for winning states with inmates on death row to the cause of abolition. Furthermore, by retaining the death penalty for some so that no others will ever face a similar fate, prospective-only repeal transforms an immoral punishment into an arguably moral sacrifice: from wolves, lambs. Lastly, that article argued that clearly prospective-only repeals of death penalty legislation are not given retroactive effect under the rules of statutory construction nor are they “cruel and unusual”; there is no national consensus against prospective-only repeal and, even if there were, those remaining on death row post-repeal share no unifying characteristic that diminishes their culpability or susceptibility to deterrence.

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person sentenced to death . . . for an offense committed prior to the effective date of th[e] act”); H.B. 1504, 63rd Leg., 2d Reg. Sess. (Wash. 2014), available at <http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/House%20Bills/1504.pdf> (silent as to retroactivity, stating that various sections of Revised Code of Washington “are each amended” or “are each repealed,” as case may be); see also S.B. 5372, 63rd Leg., 2d Reg. Sess. (Wash. 2014), available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5372&year=2013>; Katharine Q. Seelye, *New Hampshire Nears Repeal of Death Penalty*, N.Y. TIMES, Mar. 13, 2014, at A17 (discussing failed amendment to make New Hampshire’s repeal retroactive).

<sup>10</sup> In Delaware, “the governor may grant clemency only after a recommendation by an administrative board.” CARTER ET AL., *supra* note 3, at 251 & n.11. In Kansas, “the governor has sole authority to grant clemency.” *Id.* at 250 n.8.

<sup>11</sup> See *infra* Part II.A for a discussion of the pending appeal in *State v. Santiago*.

<sup>12</sup> Barry, *Part I*, *supra* note 4.

This Article picks up where its companion leaves off. It proceeds in three parts. Part I of this Article examines the legislature's strategic decision to abolish the death penalty prospective-only. This strategy of gradualism, it turns out, is not new; it was part and parcel of the successful movement to end another infamous American institution: slavery. Lawmakers who support prospective-only repeal of the death penalty are therefore standing on a long and well-worn road.

Part II, the heart of this Article, turns from the strategy of gradual abolition as employed by legislatures to the law of gradual abolition as interpreted by courts. This Article predicts that in 2014, the *Santiago* court will hold that the Constitution permits states to abolish the death penalty for future crimes while leaving their death rows intact.<sup>13</sup> A companion article examines why this result is correct under the rules of statutory construction and the Eighth Amendment.<sup>14</sup> Part II of this Article explains why this result is correct under the Fourteenth Amendment.

Prospective-only repeal does not violate the Equal Protection Clause because those who committed their crimes prior to repeal are not similarly situated to those who committed their crimes after repeal; each committed a crime under a different statutory scheme. Even if they are similarly situated, prospective-only repeal is rationally related to a variety of legitimate governmental interests, ranging from retribution, deterrence, and incapacitation, to finality and avoiding ex post facto claims. Prospective-only repeal also does not violate either procedural or substantive due process. Because legislative consideration of death penalty repeal is not part of the decisional process that precedes an official deprivation of life, no procedural process is due. Prospective-only repeal also does not offend substantive due process because it is rationally related to a variety of legitimate governmental interests.

And although sentencing a person to death based purely on the date of the crime appears to violate notions of "fundamental fairness," this is an argument for governors and pardon boards—not courts. Assuming that the *Santiago* court upholds the validity of prospective-only repeal, the path will be clear for other states to gradually abolish the death penalty by repealing prospective-only.

Given prospective-only repeal's firm footing in the strategy of gradual abolition and the law, Part III of this Article points the way forward—to the future of gradual abolition or, more particularly, to the future of prisoners on death row or capital offenders awaiting sentencing post-repeal. It begins with a discussion of death row prisoners' only remaining remedy: executive clemency.<sup>15</sup> This Part

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<sup>13</sup> See *infra* Part II.A for a discussion of the pending appeal in *State v. Santiago*.

<sup>14</sup> Barry, *Part I*, *supra* note 4.

<sup>15</sup> See generally CARTER ET AL., *supra* note 3, § 18.01–18.05.

argues that notions of “fundamental fairness,” while not sufficient to disturb courts’ interpretation of the Constitution, should weigh heavily in the deliberations of governors and administrative boards when considering whether to commute the sentences of those remaining on death row post-repeal. Indeed, there is no record of a death row prisoner *ever* being executed after prospective-only repeal of the death penalty.

Part III ends with a discussion of those literally caught in the middle of prospective-only repeal—capital offenders who committed their crimes before repeal but will not be sentenced (or resentenced) until after repeal. As the recent case of *Astorga v. Candelaria* demonstrates, capital offenders in pending cases ought to be able to prevail upon juries to return life sentences in light of prospective-only repeal.<sup>16</sup> The “future” of gradual abolition, this Article argues, should not be execution; it should instead be executive clemency for those on death row post-repeal and life imprisonment for capital offenders awaiting sentencing.

#### I. THE STRATEGY OF GRADUAL ABOLITION: THE LEGISLATURE AND PROSPECTIVE-ONLY REPEAL

This is an important time for the movement to abolish the death penalty. Over the past five years, a new trend has emerged, that of *gradual* abolition, by which states eliminate the death penalty for everyone going forward while preserving it for those currently on death row. Two factors define the trend: state legislatures’ use of “prospective-only” language limiting repeal to crimes committed on or after the effective date of the statute, and the executive’s refusal or inability to commute existing death sentences after repeal. This Part addresses the first of these two factors: the legislature’s strategic decision to abolish the death penalty prospective-only—how it came to be and why it will likely continue.

##### A. *Going Prospective*

Many legislators who oppose the death penalty favor complete repeal—both prospective *and* retroactive. They advocate “prospective-only” repeal not because they believe it to be the best policy, but rather

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<sup>16</sup> *Astorga v. Candelaria*, No. 33,152, slip op. at 2–3 (N.M. Sept. 1, 2011) (on file with author) (permitting “closing arguments regarding what consideration, if any[,] jurors may deem appropriate to give [to] the fact that New Mexico has repealed the death penalty for offenses committed after July 1, 2009, in making their own determination whether [Astorga] should be given a life or death sentence”).

because they believe it to be the *only* policy that is politically feasible.<sup>17</sup> Prospective-only repeal allows their fellow lawmakers to discard the death penalty going forward for any number of reasons (morality, discrimination, high costs, risk of executing innocents, false promises to victims), while punting the hard political decisions about what to do with those on death row to the governor or administrative board. For many legislators who oppose the death penalty, prospective-only repeal is therefore a strategic compromise; it is better than nothing.

Consider the words of Representative Gary Holder-Winfield, the sponsor of Connecticut's successful 2012 prospective-only repeal bill, who grudgingly accepted prospective-only repeal as sound strategy:

[I]f I had my way, we would have no death penalty for everyone, including the 11 that this bill will leave on death row [in Connecticut]. . . . But the reality is that I am in a room with 150 other people . . . [I]n 2009 when I attempted to completely abolish the death penalty, I came to the realization that the only way to move forward was with the bill that was prospective. And I have to tell you that when I came to that realization, I did not like it. I did not want to do that because . . . I felt like I'm a purist and we should just move forward with complete abolition. But I realized something, there is nothing wrong with being opposed to the State executing people and saying if I can't get the State to stop executing people that are already on death row, at least, that I can stop the State from executing people that maybe [sic] on death row in the future.<sup>18</sup>

The reason prospective-only repeal is politically viable is, not surprisingly, because it removes what one might call the "victim's mother" effect. As Franklin Zimring and Gordon Hawkins have written,

The victim's mother provides a more specific referent than is usual in the discussion of the functions of punishment—the unmet need for retribution or adequate requital on the part of those close to the victim. A standard feature of the media circuses surrounding recent

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<sup>17</sup> Interview with Gary Holder-Winfield, State Representative, Conn. House of Representatives (July 11, 2013) (stating that while he "abhor[red] the death penalty," retroactive abolition was not politically feasible) (on file with author); cf. Ben Jones, *Testimony on Behalf of the Connecticut Network to Abolish the Death Penalty, in Support of SB-280, Before the Conn. Judiciary Comm.*, at 1 (Mar. 14, 2013), available at <http://www.cga.ct.gov/2012/JUDdata/Tmy/2012SB-00280-R000314-Ben%20Jones-%20ABOLISH-TMY.PDF> ("The [Connecticut Network to Abolish the Death Penalty] prefers complete repeal of the death penalty, but we still support SB-280. Though this bill only repeals the death penalty prospectively, it still makes important progress toward ending capital punishment in our state.")

<sup>18</sup> Conn. Gen. Assemb., H. Sess. Transcript for Apr. 11, 2012, available at <http://www.cga.ct.gov/2012/trn/H/2012HTR00411-R00-TRN.htm> [hereinafter 2012 House Session Transcript]; see also Supplemental Brief of the State of Connecticut-Appellee with Attached Appendix, at 10 n.7, *State v. Santiago*, 49 A.3d 566 (Conn. 2012) (No. 17413), 2013 WL 5776217, at \*10 n.7 [hereinafter Conn. Jan. 2013 Response] ("[W]ithout the assurances of those seeking repeal of the death penalty that [repeal] was prospective only, the Act would not have passed.") (citing legislative history).

executions is the television interview with a member of the victim's family who asserts that he or she will not be able to sleep or resume a normal life until justice has been done and the murderer put to death.<sup>19</sup>

Prospective-only repeal grants the "victim's mother" her pound of flesh and then bids her adieu, leaving only the hypothetical victims of phantasmic future crimes to speak up for the death penalty. Hypothetical victims, of course, are far less persuasive than the real thing, especially when confronted with the very real costs of administering the death penalty, the risk of executing innocents, the lack of convincing evidence supporting its deterrent effect, and so on.

In Connecticut, for example, Dr. William Petit—the lone survivor of a brutal home invasion and triple murder in 2007 in Cheshire that received national media attention—was a fixture before the Connecticut legislature as it considered prospective-only bills in 2009, 2011, and 2012.<sup>20</sup> According to Representative Holder-Winfield, Dr. Petit's presence at the legislature, and the media attention generated by the trial of the two defendants in the Cheshire murder case in 2010 and 2011, made retroactive repeal "beyond the pale" for most lawmakers.<sup>21</sup> Indeed, in a March 2011 poll, over 70% of those surveyed said that they supported the death penalty for the Cheshire defendants.<sup>22</sup> In this climate, a vote in favor of retroactive repeal would have had very real and negative consequences for lawmakers on both sides of the aisle.<sup>23</sup> "Cheshire was the problem," Representative Holder-Winfield recalled, "the 10,000 lb. elephant in the room. A lot of [lawmakers] were hesitant to do anything . . . Even the advocates thought repeal wasn't possible."<sup>24</sup>

According to another Connecticut lawmaker, by introducing a prospective-only repeal bill, Representative Holder-Winfield "took Cheshire out of the equation."<sup>25</sup> The strategy worked. Notwithstanding

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<sup>19</sup> ZIMRING & HAWKINS, *supra* note 7, at 161.

<sup>20</sup> See Barry, *Part I*, *supra* note 4, at 320–22.

<sup>21</sup> Interview with Gary Holder-Winfield, *supra* note 17.

<sup>22</sup> *Death Penalty Support at New High in Connecticut, Quinnipiac University Poll Finds; Voters High on Medical Marijuana, Sunday Liquor Sales*, QUINNIPIAC UNIV. (Mar. 10, 2011), <http://www.quinnipiac.edu/institutes-and-centers/polling-institute/connecticut/release-detail?ReleaseID=1566> ("Connecticut voters favor the death penalty 74-21 percent for Stephen Hayes, who has been convicted in the Cheshire murders, and 72-22 percent for Joshua Komisarjevsky if he is found guilty when his case comes to trial.").

<sup>23</sup> Interview with Confidential State Representative, Conn. House of Representatives (July 8, 2013) (source confidential at request of interviewee; notes on file with author); Interview with Gary Holder-Winfield, *supra* note 17.

<sup>24</sup> Interview with Gary Holder-Winfield, *supra* note 17.

<sup>25</sup> Interview with Confidential State Representative, *supra* note 23. The same strategy appears to have been used in the three other states that have repealed the death penalty in the past five years. In New Mexico, which abolished its death penalty prospective-only in 2009, "[l]egislative debate, according to some involved, on the repeal of the death penalty included a compromise, 'no repeal for [those who committed their crimes pre-repeal].'" Motion to

Dr. Petit's impassioned pleas to retain the death penalty,<sup>26</sup> Connecticut's legislature repealed its death penalty prospective-only based on assurances that the two men who murdered Dr. Petit's family would remain on death row.<sup>27</sup>

B. *A New Gradualism for Death Penalty Abolition*

"Prospective-only" repeal of the death penalty, which promises relief for some but not for all, is not new.<sup>28</sup> Most states that have abolished the death penalty have done so through prospective-only

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Dismiss the Death Penalty with Memorandum of Law at 3, *State v. Astorga*, No. CR-2006-1670 (N.M. Dist. Ct. Nov. 1, 2010) (on file with author). Similarly, in Illinois, which repealed prospective-only in 2011, lawmakers introduced a prospective-only repeal "to eliminate a legislative debate regarding the fate of those already on death row." E-mail from Confidential Source, Ill. (July 18, 2013, 3:31 PM) (source confidential at request of sender; e-mail on file with author) ("We . . . didn't want stories in the media with pictures of those currently on our death row. Abolition is about stopping a deathly broken system, not about individual cases."); *see also* E-mail from Confidential Source, Ill. (July 18, 2013, 2:15 PM) (source confidential at request of sender; e-mail on file with author) (stating that "a retrospective bill . . . would have been much harder, if not impossible, to pass in the state legislature" and that this "certainly played a role in the decision to go prospective only"). Officials in Maryland likewise attribute the success of that state's 2013 repeal, in large part, to the repeal bill's prospective-only feature. Interview with Confidential State Official, Md. (Aug. 9, 2013) (source confidential at request of interviewee; notes on file with author). This strategy has also been used in two states poised to repeal the death penalty. In 2013, the Kansas legislature introduced a prospective-only repeal bill at the urging of members who refused to vote for a bill that would clear death row, largely in response to brothers Reginald and Jonathan Carr's murder, assault, rape, and robbery of five people. Interview with Confidential Advocates, Kan. (Nov. 7, 2013) (sources confidential at request of interviewees; notes on file with author). And in Delaware, a prospective-only repeal bill was introduced in spring 2013 primarily in response to opposition from the family members of victims of two high-profile capital murders: James Cook's murder of University of Delaware student, Lindsey Bonistall, in 2005, and Derrick Powell's murder of police officer, Chad Spicer, in 2009. *See* Jen Rini, *Delaware Senate Votes to Repeal Death Penalty*, DEL. ST. NEWS (Mar. 27, 2013), <http://delaware.newszap.com/centraldelaware/121085-70/delaware-senate-votes-to-repeal-death-penalty>; Interview with Confidential Advocate, Del. (July 11, 2013) (source confidential at request of interviewee; notes on file with author).

<sup>26</sup> *See, e.g.*, Press Release, Governor M. Jodi Rell, State of Conn., Governor Rell Vetoes HB 6578, An Act Concerning the Penalty for a Capital Felony (June 5, 2009), *available at* <http://www.ct.gov/governorrell/cwp/view.asp?A=3675&Q=441204> (quoting Dr. Petit's testimony).

<sup>27</sup> *See, e.g.*, Conn. Gen. Assemb., S. Sess. Transcript for April 4, 2012 [hereinafter 2012 Senate Session Transcript], *available at* <http://www.cga.ct.gov/2012/trn/S/2012STR00404-R00-TRN.htm> (statement of Sen. Coleman, responding to question from Sen. Prague) ("[T]here will be no retroactive application of this change for anyone who's currently on death row."); *see also* Barry, *Part I, supra* note 4, at 319–22 (discussing impact of Cheshire murders on legislative effort to repeal Connecticut's death penalty).

<sup>28</sup> For purposes of simplicity, this Article uses prospective-only "repeal" and "abolition" interchangeably to refer to the total abolition of the death penalty going forward. Throughout history, many states have *partially* abolished the death penalty prospective-only, for example, by prohibiting it going forward for certain types of offenders (such as juveniles) and certain types of crimes (such as non-homicide crimes). Many states have also enacted certain procedural protections prospective-only.

legislation.<sup>29</sup> But few have left prisoners on death row; either the executive commuted the sentences of those remaining on death row, or there simply was no one on death row at the time of repeal.<sup>30</sup>

As indicated by the eighteen men currently lingering on death row in New Mexico, Connecticut, and Maryland, this is no longer the case. State legislatures are repealing the death penalty prospective-only as they have always done, but, for the first time in nearly 100 years, the executive is leaving prisoners on death row.<sup>31</sup> Rather than completely abolishing the death penalty, states are *gradually* abolishing it; they are inching toward abolition as those on death row die or are released. To understand this new trend of gradual abolition, some history is instructive.

Between 1840 and 1917, fifteen states abolished the death penalty.<sup>32</sup> Only two of these states, Kansas and Missouri (both of which later reinstated their death penalties), gradually abolished their death penalties by repealing the death penalty prospective-only and retaining their death rows intact.<sup>33</sup> In the remaining states, abolition appears to have been complete: The executive commuted the sentences of those remaining on death row or there simply was no one on death row at the time of repeal.<sup>34</sup>

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<sup>29</sup> See Barry, *Part I*, *supra* note 4.

<sup>30</sup> See *id.* As discussed below, Kansas and Missouri appear to be the only exceptions. See *infra* note 33 and accompanying text.

<sup>31</sup> *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Feb. 9, 2014).

<sup>32</sup> These states are Michigan (1846), Rhode Island (1852), Wisconsin (1853), Iowa (1872), Maine (1876), Colorado (1897), Kansas (1907), Minnesota (1911), Washington (1913), Oregon (1914), North Dakota (1915), South Dakota (1915), Tennessee (1915), Arizona (1916), and Missouri (1917). ZIMRING & HAWKINS, *supra* note 7, at 29. Eight of these fifteen states (Colorado, Kansas, Washington, Oregon, South Dakota, Tennessee, Arizona, and Missouri) subsequently restored the death penalty and retain it today. See *id.*; see also STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 222 (2002) (discussing legislative abolition of death penalty during this period); *States with and Without the Death Penalty*, *supra* note 31.

<sup>33</sup> In 1907, Kansas abolished its death penalty prospective-only, leaving at least two prisoners, Frank Schneck and Mollie Stewart, on death row. See *In re Schneck*, 96 P. 43 (Kan. 1908); *Ex parte Stewart*, 96 P. 45 (Kan. 1908). The governor did not commute those death sentences. See Brief of Amici Curiae Legal Historians & Scholars at 8 n.25, *State v. Santiago*, 49 A.3d 566 (Conn. 2012) (No. 17413), 2012 WL 7985132 [hereinafter *Historians' Brief*]. Because “Kansas governors refused to sign death warrants during this time period” it appears these prisoners were never executed. *Id.* Missouri abolished its death penalty prospective-only in 1917, leaving at least one man, Ora Lewis, on death row—but not for long. See *State v. Lewis*, 201 S.W. 80, 81 (Mo. 1918) (noting that the trial court commuted punishment of Ora Lewis’s co-defendant and brother, Roy Lewis, “to a life term in the penitentiary”). Approximately one year later, the governor granted him clemency. See *Historians' Brief*, *supra*, at 10. The dearth of case law addressing death row prisoners’ challenges to prospective-only repeal suggests that, in all other states that repealed prospective-only, either there was no one on death row or the executive commuted the sentence of anyone on death row at the time of such repeal. See *id.* at 5–6, 9–10 (discussing commutations).

<sup>34</sup> The dearth of case law addressing challenges to prospective-only repeal of the death penalty suggests that there was no one on death row at the time of repeal or, if there was, their

America's entry into World War I marked the end of the first wave of repeals and led to restoration of the death penalty in a number of states.<sup>35</sup> With the end of World War II, however, executions dropped sharply, and a second wave of death penalty repeals soon followed.<sup>36</sup> Between 1957 and 1969, nine more states abolished the death penalty.<sup>37</sup> Here, too, abolition appears to have been complete, not gradual, as there is no published case of a prisoner challenging his death sentence following repeal in these states.<sup>38</sup>

Gradual abolition did not take hold until a third wave of death penalty repeals approximately forty years later, in the late 2000s. After the Court of Appeals of New York reversed the sentence of New York's last remaining death row inmate in 2007,<sup>39</sup> and New Jersey's governor cleared that state's death row on the eve of repeal that same year,<sup>40</sup> New Mexico became the first state in nearly 100 years to gradually abolish its death penalty.<sup>41</sup> The legislature repealed the death penalty prospective-only in 2009, and successive governors have refused to commute the sentences of the two men on death row.<sup>42</sup> One year after Illinois's governor commuted the sentences of those on death row immediately following that state's prospective-only repeal in 2011,<sup>43</sup> Connecticut abolished its death penalty, but, like New Mexico, Connecticut did so gradually.<sup>44</sup> Its legislature abolished prospective-only, and the Board of Pardons and Parole has not commuted the sentences of the eleven men

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sentences were commuted. *See generally* Barry, *Part I, supra* note 4.

<sup>35</sup> ZIMRING & HAWKINS, *supra* note 7, at 28.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 31. These states are Alaska (1957), Hawaii (1957), Delaware (1958), Oregon (1964), Iowa (1965), West Virginia (1965), Vermont (1965), New York (1966), and New Mexico (1969). *Id.* Oregon and Delaware subsequently restored the death penalty and retain it today; New York and New Mexico also reinstated the death penalty but have since eliminated it. *States with and Without the Death Penalty, supra* note 31.

<sup>38</sup> *See supra* note 34.

<sup>39</sup> *New York*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/new-york-1> (last visited Feb. 9, 2014); *see also* *People v. Taylor*, 878 N.E.2d 969 (N.Y. 2007).

<sup>40</sup> *New Jersey*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/new-jersey-1> (last visited Feb. 9, 2014); *see also* *Governor Corzine's Remarks on Eliminating Death Penalty in New Jersey*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/node/2236> (last visited Feb. 9, 2014).

<sup>41</sup> *New Mexico*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/new-mexico-1> (last visited Feb. 9, 2014).

<sup>42</sup> *Id.*; *see also* Sean Olson, *Dueling over Death Penalty*, ALBUQUERQUE J. (June 8, 2010), <http://www.abqjournal.com/elex/2010generalelection/2010governorrace/082335485340newsstat e06-08-10.htm> (discussing former governor Bill Richardson's support for death penalty in cases in which crimes occurred before effective date of repeal, and current governor Susana Martinez's support for death penalty in all cases).

<sup>43</sup> *Illinois*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/illinois-1> (last visited Feb. 9, 2014).

<sup>44</sup> *Connecticut*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/connecticut-1> (last visited Feb. 9, 2014).

on death row.<sup>45</sup> In 2013, Maryland followed suit; its legislature abolished prospective-only and its governor has refused to commute the sentences of the five men on death row.<sup>46</sup>

As these recent numbers suggest, a new trend in death penalty abolition is emerging—that of gradual abolition. Over the past five years, the legislatures in New Mexico, Connecticut, and Maryland have abolished the death penalty prospective-only and the executive in those states has retained death row intact. That is approximately 16% of all abolitionist states.<sup>47</sup> If Delaware and Kansas pass the prospective-only bills pending in their legislatures, and if their governors refuse to commute the sentences of those remaining on death row, this percentage will jump to 25% of all abolitionist states.<sup>48</sup> Gradual abolition has momentum, and—given that every other retentionist state has prisoners on death row—it shows no signs of stopping.

### C. *The Roots of Gradualism*

Death penalty abolition is, of course, no stranger to the strategy of gradualism. The movement to abolish the death penalty has always been gradual in the sense that it has proceeded state-by-state, using direct legal advocacy and policy advocacy to delay executions (the so-called “moratorium strategy”),<sup>49</sup> narrow the class of crimes and defendants eligible for death, and require meaningful appellate review and other procedural protections.<sup>50</sup> In many ways, then, the legislature’s prospective-only repeal of the death penalty and the executive’s retaining death row intact fit neatly within the abolition movement’s gradualist agenda; it is a means of reducing incrementally the number of people that will be sentenced to death.

But gradual abolition of the sort playing out in New Mexico, Connecticut, and Maryland seems different. For starters, it is inherently more arbitrary than other gradualist strategies.<sup>51</sup> Those who remain under a death sentence after prospective-only repeal are not necessarily more culpable or more susceptible to deterrence than those who are

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<sup>45</sup> *Id.*

<sup>46</sup> *Maryland*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/maryland-1>; see also Act of May 2, 2013, ch. 156, 2013 Md. Laws (codified at MD. CODE ANN. CORR. SERVS. § 7-601 (LexisNexis 2014) (stating that, after effective date of repeal, governor may “change a sentence of death into a sentence of life without the possibility of parole”).

<sup>47</sup> *States with and Without the Death Penalty*, *supra* note 31.

<sup>48</sup> See *supra* note 9 (discussing Kansas and Delaware prospective-only bills).

<sup>49</sup> See ZIMRING & HAWKINS, *supra* note 7, at 152.

<sup>50</sup> See Bedau, *supra* note 6, at 763–67.

<sup>51</sup> Although prospective-only may be arbitrary, it is not *unconstitutionally* so. Compare *infra* Part II.B (discussing arbitrariness under the Fourteenth Amendment), with *infra* Part III (discussing arbitrariness in the context of executive clemency and sentencing juries).

spared—a fact that might justify their remaining on death row. Instead, those on death row post-repeal are those who just so happened to commit murder *before* the legislature decided to pass a prospective-only law.

Gradual abolition is also more sweeping than other gradualist strategies. Moratoria and laws prohibiting the death penalty for certain types of crimes or certain kinds of offenders require further legislation or judicial action to achieve complete abolition. In the case of prospective-only repeal, on the other hand, nothing further need be done. In states like New Mexico, Connecticut, and Maryland, which have repealed prospective-only, abolition is proceeding inmate-by-inmate and will be achieved when the last death row inmate in each state dies or is released from death row.

Perhaps the best support for this new breed of gradualism comes not from the movement to abolish the death penalty but instead from the successful movement to abolish another infamous American institution: slavery. In the popular imagination, the movement to abolish slavery began in 1831 when William Lloyd Garrison began publishing the *Liberator*, a radical abolitionist newspaper dedicated to immediate abolition and full equality for African Americans.<sup>52</sup> But the movement to abolish slavery actually began far earlier, around the time of the American Revolution, and it favored gradual—not complete—abolition.

The Pennsylvania Abolition Society (PAS), the first organization dedicated to securing slavery's end and also one of the most prominent organizations of the early abolition movement, supported laws that would drain slavery from American society over time.<sup>53</sup> One such law, Pennsylvania's Gradual Abolition of Slavery Act of 1780, resembles prospective-only repeal of the death penalty. The Act abolished the enslavement of people born after 1780 and, with certain exceptions, the importation of slaves into Pennsylvania.<sup>54</sup> Slaves born before 1780, like people who committed their crimes before passage of prospective-only

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<sup>52</sup> RICHARD S. NEWMAN, *THE TRANSFORMATION OF AMERICAN ABOLITIONISM: FIGHTING SLAVERY IN THE EARLY REPUBLIC I* (2002).

<sup>53</sup> *Id.* at 16.

<sup>54</sup> An Act for the Gradual Abolition of Slavery, §§ 3, 10 (Penn. 1780), available at [http://avalon.law.yale.edu/18th\\_century/pennst01.asp](http://avalon.law.yale.edu/18th_century/pennst01.asp). Although the Act abolished the *enslavement* of people born after 1780, it deemed the future children of existing slaves indentured servants, to be freed at age twenty-eight. *Id.* § 4. The Act also excepted from its prohibition on the importation of slaves

the domestic slaves attending upon delegates in congress from the other American states, foreign ministers and consuls, and persons passing through or sojourning in this state, and not becoming resident therein; and seamen employed in ships not belonging to any inhabitant of this state, nor employed in any ship owned by any such inhabitant.

*Id.* § 10.

repeal, were unaffected by the Act.<sup>55</sup> “We dare not flatter ourselves with anything more than a very gradual work [of national emancipation],” the PAS said in 1790, for “long habits die hard and strong interests are not overcome in an instant.”<sup>56</sup> By the early 1800s, Connecticut, New York, and New Jersey had implemented similar acts to gradually abolish slavery.<sup>57</sup>

Although the strategy of gradual abolition yielded to a more radical movement demanding a complete end to slavery, it was an integral part of abolition.<sup>58</sup> Far from breaking new ground, then, gradual death penalty abolition may be returning to its roots.

## II. THE LAW OF GRADUAL ABOLITION: THE COURTS AND THE FOURTEENTH AMENDMENT

Part I of this Article was descriptive. It discussed how the past five years have witnessed the dawning of a promising new trend in death penalty abolition, that of gradual abolition, made possible by legislatures’ passage of prospective-only repeal legislation. It also discussed gradualism’s roots in the movement to abolish another infamous American institution: slavery.

Part II, the heart of this Article, is different. It turns from a descriptive account of the legislative strategy behind prospective-only repeal to the legal arguments in support of prospective-only repeal. Specifically, this Part argues that prospective-only repeal legislation—the singling out of those on death row for death—does not violate the Fourteenth Amendment. In 2014, in the case of *State v. Santiago*, the Connecticut Supreme Court will be the first court in nearly a century to address the validity of prospective-only repeal of the death penalty.<sup>59</sup> This Article predicts that the *Santiago* court will find no constitutional violation; rational reasons abound for abolishing the death penalty prospective-only under the Equal Protection Clause, and due process is not offended by retaining death row intact. Although sentencing a person to death based purely on the date of the crime seems fundamentally unfair, this is an argument for governors and pardon boards—not courts.

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<sup>55</sup> See *id.* § 3.

<sup>56</sup> NEWMAN, *supra* note 52, at 41 (alteration in original) (internal quotation marks omitted).

<sup>57</sup> *Id.* at 72.

<sup>58</sup> *Id.* at 1; see also Dwight Aarons, *Reflections on the Killing State: A Cultural Study of the Death Penalty in the Twentieth Century United States?*, 70 TENN. L. REV. 391, 433 n.220 (2003) (noting that “[t]he movement against slavery began as a conservative lobbying effort, advocating gradual legal reform”).

<sup>59</sup> See *infra* Part II.A for a discussion of the pending appeal in *State v. Santiago*.

If this prediction proves accurate, gradual abolition will not only have momentum, it will also have the imprimatur of Connecticut's highest court. The way will be clear for other states to gradually abolish the death penalty by repealing prospective-only.

A. *Prospective-Only Repeal's Test Case: State v. Santiago*

During floor debate on Connecticut's prospective-only repeal, opponents of the bill argued that it was disingenuous—it was “prospective” in name only. “To the notion that somehow this bill will be prospective in nature,” Representative David Labriola stated,

I do believe that that is a complete and utter falsehood. . . . [B]y operation of law the people who are now sentenced to death on our death row in Connecticut, their death penalties will be commuted to life in prison without parole, without question. It's . . . a certainty.<sup>60</sup>

According to Senator John Kissel,

I really can't imagine for a second that [the Connecticut Supreme Court] would allow the execution of the 11 folks on death row while acknowledging that under any legal analysis, this law is the best and most recent indication of evolving standards in our society of human decency.<sup>61</sup>

Abolition's opponents did not have to wait long for their test case. On April 25, 2012, Governor Dannel Malloy signed into law Public Act No. 12-5, abolishing Connecticut's death penalty prospective-only and leaving eleven men on death row.<sup>62</sup> Less than two months later, on June 12, 2012, in the case of *State v. Santiago*, the Connecticut Supreme Court threw out the sentence of one of these men, Eduardo Santiago.<sup>63</sup> Mr. Santiago was convicted of breaking into another man's home in December 2000 and killing him while he slept in exchange for a snowmobile.<sup>64</sup> He was sentenced to death for the crime and appealed that decision to the Connecticut Supreme Court.<sup>65</sup> Holding that the trial court had improperly failed to disclose privileged records detailing child abuse in violation of Mr. Santiago's due process right to present

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<sup>60</sup> 2012 House Session Transcript, *supra* note 18 (remarks of Rep. Labriola).

<sup>61</sup> 2012 Senate Session Transcript, *supra* note 27 (remarks of Sen. Kissel).

<sup>62</sup> *Connecticut*, *supra* note 44; see Press Release, Governor Dannel P. Malloy, State of Conn., Gov. Malloy on Signing Bill to Repeal Capital Punishment (Apr. 25, 2012), available at <http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122>.

<sup>63</sup> 49 A.3d 566, 693 (Conn. 2012).

<sup>64</sup> *Id.* at 580.

<sup>65</sup> *Id.* at 582–83.

mitigating evidence, the Connecticut Supreme Court remanded the case to the trial court for a new penalty phase hearing.<sup>66</sup>

Prior to the new penalty phase hearing, however, the Connecticut Supreme Court granted Mr. Santiago's motion for reconsideration to address whether Connecticut's prospective-only repeal—which was enacted while Mr. Santiago's prior appeal was pending—prohibited the State from executing him.<sup>67</sup> In a brief filed on November 13, 2012, Mr. Santiago conceded that the law's intent was clear; he did not dispute that the legislature *wanted* the death penalty to apply to him.<sup>68</sup> Instead, he argued that the legislature could not apply the death penalty to him because to do so would be so arbitrary as to violate the Constitution.<sup>69</sup> Specifically, Mr. Santiago argued, among other things, that carrying out an execution after passage of prospective-only repeal would violate the equal protection and substantive due process guarantees of the federal and state constitutions.<sup>70</sup> After the State filed its response, the Connecticut Supreme Court invited the parties to file a second supplementary brief responding to a draft of this Article.<sup>71</sup>

In 2014, the Connecticut Supreme Court will become the first court in nearly a century to address the validity of prospective-only repeal of the death penalty.<sup>72</sup> This Article predicts that the *Santiago* court will uphold prospective-only repeal under the Fourteenth Amendment.<sup>73</sup> Assuming the accuracy of this prediction, *Santiago's* reverberations will be widely felt, paving the way for other courts—including New Mexico's and Maryland's—to uphold legislation abolishing the death penalty prospective-only.<sup>74</sup> This Part deals exclusively with the constitutionality of prospective-only repeal under the Fourteenth Amendment; a companion article addresses its validity under the Eighth Amendment and the rules of statutory construction.<sup>75</sup>

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<sup>66</sup> *Id.* at 653–54.

<sup>67</sup> Supplemental Brief of the Defendant with Attached Appendix, *supra* note 5, at 1.

<sup>68</sup> *Id.* at 5 (“Certainly, lawmakers intended the Act to be ‘prospective’ in the sense that it should not by its own terms commute existing death sentences.”).

<sup>69</sup> *Id.* at 1–3.

<sup>70</sup> *Id.* at 25–29.

<sup>71</sup> Letter from Michele T. Angers, Chief Clerk, State of Conn. Supreme Court, to Mark Rademacher, Assistant Pub. Defender, and Harry Weller, Senior Assistant State's Attorney (Feb. 19, 2013) (on file with author); *see also* Second Supplemental Brief of the Defendant with Attached Appendix at 1, *Santiago*, 49 A.3d 566 (No. 17413), 2013 WL 5776219, at \*1 (responding to draft version of this Article).

<sup>72</sup> *See* Brief of Amicus Curiae American Civil Liberties Union Foundation of Connecticut in Support of the Supplemental Brief of the Defendant with Attached Appendix at 8, *Santiago*, 49 A.3d 566 (No. 17413), 2012 WL 7985131, at \*8 [hereinafter ACLU-CT Brief].

<sup>73</sup> *See infra* Part II.

<sup>74</sup> *See supra* notes 41–42, 47–49 and accompanying text (discussing New Mexico and Maryland, which have abolished prospective-only, and Delaware and Kansas, which are poised to do so).

<sup>75</sup> *See Barry, Part I, supra* note 4.

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

Prospective-only repeal, it is argued, singles out people for death based on the date they committed their crime.<sup>76</sup> It is therefore so arbitrary as to violate the Fourteenth Amendment's equal protection and due process clauses, as well as notions of fundamental fairness that emanate from the Fourteenth Amendment.<sup>77</sup> For the reasons discussed below, these arguments are unavailing.

1. Equal Protection

To show an equal protection violation, one must show that similarly situated parties are treated differently.<sup>78</sup> For example, a person on death row who committed first degree murder before repeal might argue that it is a violation of the Equal Protection Clause to impose the death penalty because he is similarly situated to a person who committed first degree murder after repeal and was sentenced to life imprisonment. This argument is unavailing for two reasons.

a. Not Similarly Situated

First, the person on death row and the person not on death row are not similarly situated. Each committed a crime under a different statutory scheme and was therefore on notice at the time the crime was committed that the maximum possible sentence was death or life imprisonment, respectively. As the Indiana Supreme Court stated in *Rondon v. State*, a case in which the court refused to give retroactive effect to a statute repealing the death penalty for people with intellectual disabilities, prospective-only amendments to criminal law

do not create two similarly situated groups of people. Criminal statutes apply exclusively to one class of people, those who violate the law, and they relate to the specific point in time that a violation occurs. Upon alteration of the criminal law, individuals subsequently convicted are not similarly situated and cannot be equated to those previously convicted. . . . [T]he time of a crime is selected as an act of free will by the offender. The criminal, not the State, chooses which statute applies.<sup>79</sup>

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<sup>76</sup> See Supplemental Brief of the Defendant with Attached Appendix, *supra* note 5, at 25.

<sup>77</sup> *Id.*; ACLU-CT Brief, *supra* note 72, at 8.

<sup>78</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

<sup>79</sup> *Rondon v. State*, 711 N.E.2d 506, 513 (Ind. 1999) (citations omitted) (internal quotation marks omitted).

The Connecticut Supreme Court has said as much in a case involving a person who was sentenced to death for first-degree murder under a mandatory scheme and who challenged a subsequent, prospective-only law that gave jurors the option to sentence those convicted of first-degree murder to life imprisonment.<sup>80</sup> According to the court, “the plaintiff is being treated in exactly the same manner as all others who committed murder in the first degree prior to [the effective date of the Act]. He has been accorded the equal protection of the laws.”<sup>81</sup>

This result makes sense. As the United States Supreme Court has stated,

[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the “principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.”<sup>82</sup>

This concept of fair notice is critical. As the Second Circuit recently stated, “[i]t is not irrational for Congress to impose a penalty on those who committed their offenses at a time when they knew or should have known the severity of the applicable penalty, even while reducing the penalty as to future offenders.”<sup>83</sup>

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<sup>80</sup> See *Dortch v. State*, 110 A.2d 471, 476–77 (Conn. 1954).

<sup>81</sup> *Id.*; see also *Sonnier v. State*, 913 S.W.2d 511, 519 n.3, 520–21 (Tex. Crim. App. 1995) (holding that amendment to capital sentencing procedure that applied to offenses committed “on or after September 1, 1991” did not violate equal protection because defendant, who committed capital murder after effective date of amendment, “was treated in the same manner as all those who committed a capital murder after September 1, 1991; that is, he is treated the same as all those ‘similarly situated.’”); cf. *United States v. Santana*, 761 F. Supp. 2d 131, 162 (S.D.N.Y. 2011) (“[T]he result of prospective application of the [Fair Sentencing Act] is, in fact, that similarly situated defendants will be treated similarly. All those who committed their offenses before the enactment of the FSA will be sentenced according to the statutory scheme in place at the time the offenses were committed, while all those who commit crack-related offenses after August 3, 2010, will be subject to the FSA. Defendants suggest that such a temporal distinction might be discriminatory, but the Second Circuit has held that this type of ‘discrimination is not unconstitutional.’” (citation omitted) (quoting *United States ex rel. Hayden v. Zelker*, 506 F.2d 1228, 1230 (2d Cir. 1974))); *Nestell v. State*, 1998 OK CR 6, ¶ 7, 954 P.2d 143, 145 (Okla. Crim. App. 1998) (“Perpetrators of crime cannot claim the benefit of, and are not similarly situated to those subsequently sentenced under, a later enacted statute which lessens the culpability of their crime after it was committed.”).

<sup>82</sup> *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 316 (2001) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).

<sup>83</sup> *United States v. Acoff*, 634 F.3d 200, 202 (2d Cir. 2011), *abrogated by* *Dorsey v. United States*, 132 S. Ct. 2321 (2012); *accord* *Hunt v. Nuth*, 57 F.3d 1327, 1335–36 (4th Cir. 1995). *But cf.* *State v. Fortin*, 843 A.2d 974, 1012–13 (N.J. 2004) (stating, in dicta, that if court were to refuse to give retroactive effect to statute allowing jury to consider life without parole as sentencing option, this would “divide the fates of defendants, who had yet to proceed to the penalty phase, between those whose crimes occurred before and after enactment of [the statute],” thereby treating “similarly situated defendants” differently).

b. Even if Similarly Situated, Rational Basis Applies

But assume that the effective date of a prospective-only repeal turns not on the date of the commission of the crime but instead on the date of trial, the date of conviction, or the date of sentencing—on things well outside of the defendant's notice or control.<sup>84</sup> Here, it is more difficult to argue that the law treats similarly situated groups of people the same; such laws appear to treat defendants in capital murder proceedings very differently—bestowing the benefit of repeal on some but not others.

Even assuming that a law treats similarly situated defendants differently, this does not mean that it violates equal protection. In assessing an equal protection claim, a court must first decide what level of scrutiny to apply in reviewing the challenged law, ranging from deferential (rational basis) to searching (strict scrutiny).<sup>85</sup> The appropriate level of scrutiny, in turn, depends on whether a suspect class or a fundamental right is at issue.<sup>86</sup> Death row prisoners, unlike those of a particular race, religion, or national origin, are not a suspect class.<sup>87</sup> Nevertheless, one might reasonably argue that executing prisoners post-repeal burdens a fundamental right—the right to life—thereby triggering strict scrutiny. While this “right to life” argument favoring strict scrutiny is appealing, it has been soundly rejected by nearly every court that has addressed it.<sup>88</sup>

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<sup>84</sup> See, e.g., *Hunt*, 57 F.3d at 1335 (stating that, “as a matter of Maryland law . . . the life without parole sentence cannot be imposed retroactively on persons *convicted* before July 1, 1987” (emphasis added)); see also *Holiday v. United States*, 683 A.2d 61, 78–79 (D.C. 1996) (discussing manipulations that might occur if effective date of statute were to turn on date of sentencing).

<sup>85</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . The general rule gives way, however, when a statute classifies by race, alienage, or national origin. . . . [T]hese laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution.” (citations omitted)).

<sup>86</sup> *Id.*

<sup>87</sup> See *Davis v. Coyle*, 475 F.3d 761, 779 (6th Cir. 2007) (“Federal courts have consistently held that prisoners do not constitute . . . a [suspect] class, nor do capital defendants.” (citation omitted)); see, e.g., *Graziano v. Pataki*, 689 F.3d 110, 117 (2d Cir. 2012) (“Because prisoners either in the aggregate or specified by offense are not a suspect class, the [classification] will be upheld if [it is] rationally related to a legitimate state interest.” (alterations in original) (quoting *Lee v. Governor of N.Y.*, 87 F.3d 55, 60 (2d Cir. 1996)) (internal quotation marks omitted)); *Nestell v. State*, 1998 OK CR 6, ¶ 7, 954 P.2d 143, 145 (Okla. Crim. App. 1998) (“[M]embership in a class consisting of prisoners does not constitute membership in a suspect class.”); *Clayton v. State*, 892 P.2d 646, 654 (Okla. Crim. App. 1995) (“Petitioner fails to cite any authority, nor does our research disclose any, which holds capital post conviction petitioners constitute a suspect class.”).

<sup>88</sup> See, e.g., *State v. Ramseur*, 524 A.2d 188, 213 n.12 (N.J. 1987) (rejecting argument “that the constitutional status of a right to life as fundamental requires the State to demonstrate a greater justification before imposing death as punishment than it must show in other decisions

The Supreme Court accords states “wide latitude in fixing the punishment for state crimes.”<sup>89</sup> While the Court has stated its unwillingness to expand the death penalty in recent years, it has never retreated from its conclusion in *Gregg v. Georgia* that:

[W]e cannot say that the judgment of [state legislatures] that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.<sup>90</sup>

Given *Gregg*’s deference to legislative judgments about the appropriateness of the death penalty, courts have uniformly concluded that rational basis—not strict scrutiny—is all that is required.<sup>91</sup> According to the Fifth Circuit,

[b]ecause of the complexity of determining the need for the death penalty, the [*Gregg*] Court found that the decision to authorize capital punishment for some classes of crimes was one that was best

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concerning punishment” and stating that “[w]ith one exception”—*Commonwealth v. O’Neal*, 339 N.E.2d 676 (Mass. 1975)—“this claim has been rejected by all other state courts”; see *id.* (citing cases for proposition that “the argument that was accepted in *O’Neal* was rejected by the United States Supreme Court in *Gregg* where that Court concluded that it would presume the validity of legislative choice to impose the death penalty”); see also *Fair v. State*, 702 S.E.2d 420, 425–26 (Ga. 2010) (“[T]he relevant inquiry in determining what analysis to apply is not whether the *punishment* resulting from a violation of the statute interferes with a fundamental right,” but rather “whether that *behavior* involves a fundamental right. The obvious answer is that it does not.” (emphasis added)); *State v. Alcorn*, 638 N.E.2d 1242, 1245 (Ind. 1994) (“The interest that appellee has in life is curtailed by the procedures laid out in the death penalty statute. Further, there is no suspect class affected by the saving clause. Accordingly, the appropriate level of scrutiny to apply is the rational basis analysis, which merely requires the classification to bear some rational relationship to a legitimate state interest or goal.”); *People v. Hale*, 661 N.Y.S.2d 457, 476–77 (Sup. Ct. 1997) (“It is enough to say that there is no support in the federal or state constitution, or any other source of Anglo-American law, for the claim that the convicted perpetrator of a particularly atrocious murder enjoys an unqualified right to life, notwithstanding the legislature’s rational determination that the only appropriate sanction for the defendant’s egregious conduct is death.”); cf. *McGautha v. California*, 402 U.S. 183, 204 (1971) (rejecting death row prisoner’s Fourteenth Amendment argument that “the legislatures have not only failed to provide a rational basis for distinguishing the one group [who lives] from the other [group that dies], but they have failed even to suggest any basis at all” (citation omitted)), *vacated*, *Crampton v. Ohio*, 408 U.S. 941 (1972).

<sup>89</sup> *Williams v. Illinois*, 399 U.S. 235, 241 (1970).

<sup>90</sup> *Gregg v. Georgia*, 428 U.S. 153, 186–87 (1976).

<sup>91</sup> See, e.g., *Gray v. Lucas*, 677 F.2d 1086, 1104 (5th Cir. 1982) (applying rational basis review in rejecting equal protection challenge to death penalty statute); *accord* *Styron v. Johnson*, 262 F.3d 438, 452 (5th Cir. 2001); *Smith v. Mitchell*, No. C-1-99-832, 2003 WL 24136073, at \*27 (S.D. Ohio Sept. 30, 2003); *Gray v. Commonwealth*, 645 S.E.2d 448, 458–59 (Va. 2007); see also *Ramseur*, 524 A.2d at 213 n.12 (stating that “[t]he state is never required to demonstrate a compelling justification in order to impose an otherwise permissible sentence,” including death sentence).

left to the legislature unless “clearly wrong.” . . . [T]he degree of deference which the Court’s “clearly wrong” test accorded the legislative judgment convinces us that the due process and equal protection clauses do not require a higher level of scrutiny for legislative classifications that may result in the death penalty.<sup>92</sup>

Although “[d]eath is, of course, profoundly different from any other punishment in its severity, finality and deprivation of humanity,” it nevertheless remains “a means of punishment within the domain of the Legislature” and is therefore accorded “great deference.”<sup>93</sup> Accordingly, rational basis review applies to equal protection challenges to prospective-only repeal of the death penalty.

Under “rational basis” review, prospective-only repeal need only be rationally related to a legitimate governmental interest. This is not a difficult test to meet. Under the Equal Protection Clause, the application of the death penalty post-repeal is rationally related to the legitimate penological goals of retribution and deterrence.<sup>94</sup>

With respect to retribution, prospective-only repeal ensures that those on death row get their just deserts.<sup>95</sup> Consider the words of Connecticut State Senator Edith Prague, who voted for prospective-only repeal, in part, to ensure that the two men responsible for the home invasion and triple murder in Cheshire, Connecticut would remain on death row: “They should bypass the trial,” Senator Prague stated, “and take that second animal and hang him by his penis from a tree out in the middle of Main Street.”<sup>96</sup> Although Connecticut’s eleven death row prisoners will not die in so cruel a fashion, the result will be the same—they will receive their just deserts; they will either be executed or die of old age waiting for it. The fact that certain members of a legislature may convey their level of retributive desire through pejorative speech is their right, and does not undermine the valid purposes served by prospective-only repeal.

Importantly, this retributive purpose is not diminished by the fact that the legislature has decided to repeal the death penalty. As noted in a companion article discussing prospective-only repeal’s validity under the Eighth Amendment, statutes

“are seldom crafted to pursue a single goal.”<sup>97</sup> The reasons for legislative action are many and varied; they are a dense manifold.

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<sup>92</sup> *Lucas*, 677 F.2d at 1104 (citing *Gregg*, 428 U.S. at 187–88).

<sup>93</sup> *Ramseur*, 524 A.2d at 213 n.12, 214.

<sup>94</sup> See Barry, *Part I*, *supra* note 4, at 371–74.

<sup>95</sup> See Conn. Jan. 2013 Response, *supra* note 18, at 30 (“It is . . . rational for the legislature to retain capital punishment for cases in which courts and juries have completed the arduous process of making a reasoned moral judgment that another citizen deserves to be executed.”).

<sup>96</sup> See *State v. Santiago*, 49 A.3d 566, 696 (Conn. 2012) (Harper, J., concurring in part and dissenting in part) (quoting Sen. Prague) (internal quotation marks omitted).

<sup>97</sup> *Landgraf v. USI Film Products*, 511 U.S. 244, 286 (1994).

This is no less true in the death penalty context. There are many reasons to repeal the death penalty prospective-only, such as avoiding cost,<sup>98</sup> preventing false hopes for victims,<sup>99</sup> and eliminating the risk of executing the innocent.<sup>100</sup> Such reasons do not call the legitimacy of retribution into question. Indeed, if a legislature believes that the death penalty serves no legitimate retributive purpose, it can amend the constitution or abolish the death penalty prospectively *and* retroactively. Legislatures that repeal prospective-only have deliberately chosen not to do either of these things. Prospective-only repeal is therefore not necessarily a rejection of the death penalty's retributive value—a determination “that the death penalty is intolerable under any and all circumstances.”<sup>101</sup> It is not, as Justice Scalia has stated, “a statement of absolute moral repugnance, but one of current preference between two [constitutionally] tolerable approaches”: to keep the death penalty for some or abolish it altogether.<sup>102</sup> . . . [But] even assuming prospective-only death penalty repeal is equivalent to a rejection of the retributive value of the death penalty, it is not a *complete* rejection. It is constitutionally tolerable for a legislature to reject the retributive value of the death penalty going forward but not going backward. A legislature that has

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<sup>98</sup> Lawmakers may rationally seek to avoid the cost of procuring *new* death sentences while maintaining existing death sentences won at significant cost. See Conn. Jan. 2013 Response, *supra* note 18, at 30 (noting “the enormous time, expense and consumption of state resources it takes to prosecute a capital case” as reason to repeal); Response to Petition for Writ of Superintending Control at 11, *Astorga v. Candelaria*, No. 32,744 (N.M. Jan. 26, 2011) [hereinafter N.M.’s Jan. 2011 Response] (noting “perceived high cost of death penalty litigation” as “reason for repealing the death penalty”); cf. *Kennedy v. Louisiana*, 554 U.S. 407, 458–59 (Alito, J., dissenting) (discussing state legislatures’ refusal to pass new capital child-rape laws because of “high associated costs”); Harold J. Krent, *Retroactivity and Crack Sentencing Reform*, 47 U. MICH. J.L. REFORM 53, 83 (2013) (“[L]egislatures may reduce the penalties for particular crimes, not because of changed circumstances or views of the wrongfulness of the underlying conduct, but for instrumental reasons due to the rising cost of incarceration . . . . Such decisions to ameliorate punishment do not necessarily lead to the conclusion that those previously convicted also should have their punishments reduced. A rational legislature could conclude that the social or other benefits of the lightened punishment are more important with respect to those sentenced in the future than those sentenced in the past.”).

<sup>99</sup> Lawmakers may rationally believe in the State’s capacity to keep its “promise” to victims in existing death penalty cases while doubting its capacity to do so in the future.

<sup>100</sup> Lawmakers may rationally believe that no one currently on death row is innocent but seek to avoid the potentiality for error in the future. Cf. 2012 Senate Session Transcript, *supra* note 27 (“[T]here is no one on death row [in Connecticut] who is innocent and . . . there is nothing that could ultimately ever prove their innocence.”) (statement of Sen. McKinney).

<sup>101</sup> *State v. Rizzo*, 31 A.3d 1094, 1167 n.88 (Conn. 2011).

<sup>102</sup> *Id.* (alteration in original) (quoting *Atkins v. Virginia*, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting)) (internal quotation marks omitted); cf. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 664 (1974) (rejecting argument that, by passing a prospective-only statute removing parole ineligibility, Congress “jettison[ed] the retributive approach of the [repealed] law,” and finding no constitutional infirmity in the statute’s prospective-only application); Krent, *supra* note 98, at 81 (stating that, “in the Legislature’s eyes,” crimes committed before passage of ameliorative legislation “may ‘merit’ different punishment” than identical crimes committed after such legislation “because of changed factual circumstances as opposed to morality”).

come to doubt the retributive value of the death penalty may repeal it for future offenders whose “unidentified and unidentifiable victims . . . live under an altered social contract.” At the same time, a legislature may retain it for those who stand outside this “veil of ignorance”—those offenders who were on notice at the time they committed their crimes that death was the punishment, and whose victims are known and now gone.<sup>103</sup>

As for deterrence, prospective-only repeal sends an unmistakable message to would-be first-degree murderers that they will receive life imprisonment, not life imprisonment as modified by some yet-to-be passed ameliorative law. As the California Court of Appeals aptly stated in the non-capital sentencing context,

[i]t is perfectly proper for the Legislature to create a new sentencing procedure which operates prospectively only. Despite the disparity created by rendering different sentences after an admittedly arbitrarily chosen date, prospective application of such a statute does not violate equal protection principles because of the legitimate public purpose of assuring that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.<sup>104</sup>

The legitimate penological goal of incapacitation, of course, is also served. Keeping prisoners on death row post-repeal “prevent[s] . . . crimes that they may otherwise commit in the future.”<sup>105</sup>

Yet another legitimate purpose of prospective-only death penalty repeal is the legislature’s desire to avoid ex post facto claims. A legislature might be concerned about challenges brought by those who committed their offenses at a time when the only sentencing options were death or life imprisonment *with* the possibility of parole, and who are sentenced (or resentenced) after repeal to life imprisonment *without* the possibility of parole. By applying the law prospective-only, the legislature prevents a person sentenced to life without parole from “argu[ing] that he received a greater sentence than if he had received only a life sentence *with* the possibility of parole.”<sup>106</sup>

Finality is another legitimate purpose served by prospective-only repeal.<sup>107</sup> As the Supreme Court of Georgia stated in *Fleming v. Zant*, a

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<sup>103</sup> Barry, *Part I*, *supra* note 4, at 372–73. *Cf.* Krent, *supra* note 98, at 79–80 (“The fact that norms later change in no way undermines the conclusion that the individual knowingly (depending on the mens rea required) violated a rule of the community. . . . Congress rationally could treat those who knowingly violated a social command differently from those who did not, even though the conduct was the same.”).

<sup>104</sup> *People v. Gilchrist*, 183 Cal. Rptr. 709, 713 (Ct. App. 1982) (internal quotation marks omitted).

<sup>105</sup> *Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976).

<sup>106</sup> *Hunt v. Nuth*, 57 F.3d 1327, 1335 (4th Cir. 1995) (emphasis added).

<sup>107</sup> For further discussion of lawmakers’ legitimate interest in finality, see Krent, *supra* note

case in which the court found no equal protection violation in prospective-only repeal of the death penalty for people with intellectual disabilities,

[t]he legislature had to choose some effective date. And, although the legislature certainly could have selected another effective date, such as the date of the offense or the date of sentencing, [the court's] responsibility is not to determine whether the legislature selected the best of possible alternatives, but rather to decide whether the legislative decision is a rational one. . . . The classification bears a reasonable relationship to a legitimate legislative concern for the finality of criminal convictions.<sup>108</sup>

In rejecting an equal protection challenge to the prospective-only application of ameliorative legislation changing various death penalty procedures, the United States District Court for the District of Utah similarly concluded that,

[t]here is no obligation that a state accord retroactive effect to new substantive statutes to allow a convicted person the benefit of a new statute where the conviction is final. The state's interest in maintaining the finality of convictions and sentences justifies a prospective legislative limitation. Such a judgment is not a denial of equal protection. The prospective application of a new statute is rationally related to the state interest.<sup>109</sup>

To find otherwise would mean that “the legislature could never enact a statute that would ameliorate or repeal a prior sentencing provision unless the new law were given retroactive effect. The Constitution contains no such requirement.”<sup>110</sup> As the United States Supreme Court has stated with respect to the retroactive application of constitutional rulings by courts, finality “is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.”<sup>111</sup>

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98, at 82–83 (stating that “Congress might respect the finality line in such contexts due to the plea bargaining that underlies most sentencing today. . . . Retroactive diminution of punishment may unravel the bargain,” and therefore, “Congress readily may satisfy equal protection concerns in withholding full retroactive effect from an amelioration decision”) and Millard H. Ruud, *The Savings Clause—Some Problems in Construction and Drafting*, 33 TEX. L. REV. 285, 286 (1955) (discussing “the legislative intention to preserve the designated expectancies, rights or obligations from immediate destruction or interference” through statutory savings clauses, which “make the transition from one set of laws to another less painful and disrupting”).

<sup>108</sup> 386 S.E.2d 339, 341 (Ga. 1989), *superseded by statute*, GA. CODE ANN. § 17-7-131(c)(3), (j) (2014), *as recognized in* *Turpin v. Hill*, 498 S.E.2d 52 (Ga. 1998).

<sup>109</sup> *Andrews v. Carver*, 798 F. Supp. 659, 662 (D. Utah 1992).

<sup>110</sup> *Fleming*, 386 S.E.2d at 340; *see also infra* notes 124–28 and accompanying text (discussing Sixth Circuit's rejection of constitutional challenge to prospective-only repeal in *United States v. Blewett*).

<sup>111</sup> *Teague v. Lane*, 489 U.S. 288, 309 (1989).

The Supreme Court's decision in *Dobbert v. Florida* is instructive on this point. In that case, the Court held that it was not a violation of equal protection for Florida's courts to apply a new death penalty statute (replacing a prior unconstitutional statute) to capital offenders who were not yet tried and convicted, while commuting the sentences of those already convicted.<sup>112</sup> According to the Supreme Court,

Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process as to be governed solely by the old statute, with the concomitant unconstitutionality of its death penalty provision, and those whose cases involved acts which could properly subject them to punishment under the new statute. There is nothing irrational about Florida's decision to relegate petitioner to the latter class, since the new statute was in effect at the time of his trial and sentence.<sup>113</sup>

By the same token, there is nothing irrational about a legislature's decision to repeal the death penalty prospective-only, leaving the cases of those who committed their crimes before its effective date "to be governed solely by the old statute."<sup>114</sup>

While a rule denying application of an ameliorative statute to a defendant who committed his crime on Day 1, but applying it to a defendant who committed his crime on Day 2, "might seem arbitrary," application of the law based on some *other* date "does not produce any less arbitrary results."<sup>115</sup> If repeal were predicated not on the date of the crime but rather on the date of *sentencing*, for example, "sentencings could get caught up in manipulations with unfair results overall. Some convicted felons . . . might be able to arrange sentencing delays to take advantage of the new sentencing scheme, whereas others could not achieve the same result before less sympathetic judges."<sup>116</sup> "Such an imbalanced effect would produce categories of offenders exposed to disparate results for similar conduct based on the happenstance of a disposition date."<sup>117</sup>

Short of making all laws retroactive, some degree of arbitrariness is unavoidable. According to the Supreme Court, "disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law

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<sup>112</sup> *Dobbert v. Florida*, 432 U.S. 282, 301 (1977).

<sup>113</sup> *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *United States v. Santana*, 761 F. Supp. 2d 131, 162–63 (S.D.N.Y. 2011).

<sup>116</sup> *Holiday v. United States*, 683 A.2d 61, 79 (D.C. 1996).

<sup>117</sup> *State v. Ismaeel*, 840 A.2d 644, 654 (Del. Super. Ct. 2004); *see also Santana*, 761 F. Supp. 2d at 163 ("The timing of a defendant's sentence depends on a myriad of factors beyond the defendant's, counsel's, or the courts' control, starting with the speed with which the Government indicted the case and ending with the availability of counsel on a particular sentencing date.").

changing sentences.”<sup>118</sup> But this does not mean that prospective-only repeal renders existing death sentences unconstitutional. As Justice Stewart once stated, “such discrepancies are the inevitable concomitant of the line drawing that is essential to law making. So long as the classification is rationally related to a permissible legislative end . . . there is no denial of equal protection.”<sup>119</sup> The Constitution does not forbid line-drawing; it only forbids *illegitimate* line-drawing. To strike down prospective-only repeal is to prohibit line-drawing altogether.

c. Non-Capital Cases Supporting Rational Basis Review of Prospective-Only Repeal

Courts in non-capital cases have similarly rejected equal protection challenges to sentencing disparities resulting from prospective-only application of new legislation. In *United States ex rel. Hayden v. Zelker*, the Second Circuit held that prospective-only application of a statute eliminating indefinite sentences did not violate the Equal Protection Clause.<sup>120</sup> The defendant argued that this legislative change “show[ed] that the legislature rejected whatever policy reasons may once have been thought to justify imposing indefinite criminal sentences upon a certain class of people . . . . With the justification for indeterminate life sentences gone,” the defendant argued, “continuing to apply the sentencing scheme to him solely because of the time when he committed his crime is unconstitutional, since it allows incarceration for many years after expiration of the maximum prison term possible under the new law.”<sup>121</sup>

The Second Circuit rejected this argument. While conceding that the prospective statute “*does* discriminate between persons committing similar offenses before and after [the statute’s effective date],” the Second Circuit held that “such discrimination is not unconstitutional.”<sup>122</sup> In reaching this result, the court relied on the U.S.

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<sup>118</sup> *Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012).

<sup>119</sup> *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 637 (1969) (Stewart, J., dissenting).

<sup>120</sup> 506 F.2d 1228, 1229 (2d Cir. 1974). In that case, the repeal statute

contain[ed] a savings clause, clearly applicable here, which provides that: Any offense committed prior to [the statute’s effective date] . . . must be . . . punished according to the provisions of law existing at the time of the commission thereof in the same manner as if (the new law) had not been enacted.

*Id.* (third and fourth alterations in original).

<sup>121</sup> *Id.* (second alteration in original) (footnotes omitted) (internal quotation marks omitted).

<sup>122</sup> *Id.* at 1230 (emphasis added) (citing *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974)); see also *Santana*, 761 F. Supp. 2d at 162–63 (rejecting argument that prospective-only application of Fair Sentencing Act violated equal protection) (“We cannot say that a legislature could not rationally conclude that the best approach would be a purely prospective one, so that all defendants who committed crimes before the statute became

Supreme Court's decision in *Warden, Lewisburg Penitentiary v. Marrero*, which held that Congress "trespassed no constitutional limits" in enacting a prospective-only ameliorative drug sentencing statute, the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>123</sup>

Recently, an en banc panel of the Sixth Circuit reached the same conclusion with respect to an equal protection challenge to the Fair Sentencing Act, which reduced the sentences of crack offenders whose sentences became final after—but not before—enactment.<sup>124</sup> The defendant, whose sentence became final before passage of the Act, argued that "Congress acted 'irrationally' by failing to make the Fair Sentencing Act fully retroactive."<sup>125</sup> The Sixth Circuit disagreed.<sup>126</sup> According to the court,

[t]he government has a powerful interest in avoiding the disruption of final sentences. Congress did nothing extraordinary or for that matter discriminatory when it respected this interest. . . . Ruling otherwise means forgetting [the U.S. Supreme Court's decision in] *Armour v. City of Indianapolis*, which endorsed "the rationality of the distinction . . . the law often makes between actions previously taken and those yet to come," and forgetting [its decision in] *Dillon v. United States*, which was "aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent . . . amendments."<sup>127</sup>

Striking down prospective-only repeals on constitutional grounds, the court concluded, "would have the perverse effect of discouraging lawmakers from *ever* lowering criminal sentences."<sup>128</sup>

In 2003, in *People v. Floyd*, the California Supreme Court rejected an equal protection challenge to an ameliorative sentencing law that reduced the punishment for those convicted of certain drug crimes after

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effective would be treated equally." (quoting *Holiday v. United States*, 683 A.2d 61, 78–79 (D.C. 1996)) (internal quotation marks omitted).

<sup>123</sup> *Marrero*, 417 U.S. at 664 (declining to apply prospective-only ameliorative statute retroactively and stating that, although argument in favor of retroactivity had "[u]ndeniabl[e]" force, "it is addressed to the wrong governmental branch. Punishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds.").

<sup>124</sup> *United States v. Blewett*, Nos. 12-5226, 12-5582, 2013 WL 6231727, at \*12 (6th Cir. Dec. 3, 2013).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (third and fifth alterations in original) (citations omitted) (quoting *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2082 (2012); *Dillon v. United States*, 560 U.S. 817, 828 (2010)); see also *id.* ("[T]he government has a strong interest in the finality of sentences, and the Fair Sentencing Act advances that interest.").

<sup>128</sup> *Id.* at \*13. The *Blewett* court made this observation in rejecting the petitioners' Eighth Amendment challenge to the Fair Sentencing Act, but the court's reasoning is equally applicable to an equal protection challenge. See *id.*

the statute's effective date.<sup>129</sup> The court did not find "a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense," and instead found that "[n]umerous courts" throughout the country had "rejected such a claim."<sup>130</sup> According to the court,

[r]etroactive application of a punishment-mitigating statute is not a question of constitutional right but of legislative intent . . . [T]he ability to elect to be sentenced under a law enacted after the date of the commission of a crime is not a constitutional right but a benefit conferred solely by statute. It is not unconstitutional for the legislature to confer such benefit only prospectively, neither is it unconstitutional for the legislature to specify a classification between groups differently situated, so long as a reasonable basis for the distinction exists.<sup>131</sup>

And in *Lilly v. Commonwealth*, the Virginia Court of Appeals rejected an equal protection challenge to a prospective-only statute that removed the mandatory minimum sentence for recidivist drunk drivers.<sup>132</sup> The defendant argued that the new law "created a situation where two people identically situated—but for time—are treated entirely differently with no discernible state purpose."<sup>133</sup> Applying rational basis, the court stated that "the General Assembly need not actually articulate at any time the purpose or rationale supporting its classification. To be sure, the legislative classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."<sup>134</sup> According to the court, although a prospective-only law

produce[s] an asymmetry of sorts. . . it does not offend the Constitution simply because the classification is not with mathematical nicety or because in practice it results in some inequality. . . Our judicial role is only to ascertain that a rational basis exists for the challenged distinction, not whether it is the best or only choice. That conclusion is all the more true in cases, like this

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<sup>129</sup> 72 P.3d 820, 827 (Cal. 2003).

<sup>130</sup> *Id.* at 825.

<sup>131</sup> *Id.* at 825–26 (internal quotation marks omitted).

<sup>132</sup> 647 S.E.2d 517, 522–23 (Va. Ct. App. 2007).

<sup>133</sup> *Id.* at 522 (internal quotation marks omitted); *id.* ("The underlying premise of [defendant's] argument is little more than a broadside, albeit unintended, against *any* sequential changes in recidivism laws that distinguish between predicate offenses committed before and recidivist offenses committed after each statutory change. Under [defendant's] approach, no substantive amendments could ever be enacted to recidivism statutes because such amendments would, of necessity, divide offenders into before and after categories.").

<sup>134</sup> *Id.* at 521 (citation omitted) (internal quotation marks omitted).

one, involving legislative specification of punishments—matters ordinarily understood as peculiarly questions of legislative policy.<sup>135</sup>

As these cases suggest, prospective-only death penalty repeal easily survives rational basis review under the Equal Protection Clause.

d. A Violation of Equal Protection

Notwithstanding the overwhelming weight of authority holding that prospective-only death penalty repeal does not violate equal protection, one court has held that it does. In *Salazar v. State*, the Oklahoma Court of Criminal Appeals held that it was unconstitutional to deprive a person sentenced to death of the benefit of a prospective-only statute that added the sentencing option of life imprisonment without parole.<sup>136</sup> “To bar appellant from the benefit of having a jury consider the life without parole option under these circumstances,” the court concluded, “would violate due process and equal protection.”<sup>137</sup>

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<sup>135</sup> *Id.* (citations omitted) (internal quotation marks omitted) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Gregg v. Georgia*, 428 U.S. 153, 175–76 (1976)); *see also Thompson v. Mo. Bd. of Parole*, 929 F.2d 396, 400–01 (8th Cir. 1991) (“Legislatures constantly re-evaluate and change the substance of their penal statutes. Implementing these changes necessitates establishment of an effective date, and it is incumbent upon the legislature to determine the point in time when new statutes take effect. It is not irrational for a state to revise its penal laws prospectively, thereby avoiding re-adjudication of all sentences under the prior law. Thus, we find that the state’s decision to maintain its parole system for prisoners convicted prior to [the statute’s effective date] is not irrational or invidiously discriminatory.” (footnote omitted) (citations omitted)); *McQueary v. Blodgett*, 924 F.2d 829, 834 (9th Cir. 1991) (“There is no denial of equal protection in having persons sentenced under one system for crimes committed before [the statute’s effective date] and another class of prisoners sentenced under a different system. The standard is of a rational relation to governmental purpose. Improvement in sentencing is rational governmental purpose.” (citations omitted) (internal quotation marks omitted)); *Frazier v. Manson*, 703 F.2d 30 (2d Cir. 1983) (“[T]here is no requirement that two persons convicted of the same offense receive identical sentences.’ A legislature may prospectively reduce the maximum penalty for a crime even though prisoners sentenced to the maximum penalty before the effective date of the act would serve a longer term of imprisonment than one sentenced to the maximum term thereafter.” (alteration in original) (citation omitted) (quoting *Williams v. Illinois*, 399 U.S. 235, 243 (1970))); *United States v. Douglas*, 746 F. Supp. 2d 220, 227 (D. Me. 2010) (finding “no serious Fifth or Eighth Amendment concern that would cabin Congress’s authority to make its new reform apply only to criminal conduct occurring after the statute’s enactment,” but holding that Fair Sentencing Act nevertheless applied retroactively based on rules of statutory construction); *Holiday v. United States*, 683 A.2d 61, 78–79 (D.C. 1996) (“We cannot say that a legislature could not rationally conclude that the best approach would be a purely prospective one, so that all defendants who committed crimes before the statute became effective would be treated equally. . . . [W]e see nothing irrational in a legislative conclusion that individuals should be punished in accordance with the sanctions in effect at the time the offense was committed . . .”).

<sup>136</sup> 852 P.2d 729 (Okla. Crim. App. 1993). The statute was silent as to retroactivity, stating only that it “would become effective November 1, 1987.” Act of May 18, 1987, ch. 96, 1987 Okla. Sess. Law Serv. (West) (codified as amended at OKLA. STAT. tit. 21, §§ 701.9–701.10 (2013)).

<sup>137</sup> *Salazar*, 852 P.2d at 740; *see also State v. Alcorn*, 638 N.E.2d 1242, 1246–47 (Ind. 1994) (DeBrueler, J., dissenting) (stating that prospective-only provision of statute allowing jury to

Importantly, the court's holding was a narrow one: It applied "only in cases where the life without parole amendments . . . were in effect at the time of trial and conviction."<sup>138</sup>

The two pillars of the court's meager constitutional analysis were that the statutory change was merely "procedural" not "substantive," and that "death is different."<sup>139</sup> In a scathing dissent, Judge Lumpkin attacked both premises. As for the first, Judge Lumpkin correctly noted that the majority was "comparing retroactive apples and *ex post facto* oranges."<sup>140</sup> The Ex Post Facto Clause determines "whether it is *constitutionally permissible* to apply a law retroactively."<sup>141</sup> It prohibits the retroactive application of more onerous substantive legislation from being applied retroactively; it does not prohibit more onerous procedural legislation.<sup>142</sup> Where the legislation is not more onerous but is instead ameliorative, the Ex Post Facto Clause—and its substance-versus-procedure distinction—is simply irrelevant.<sup>143</sup>

When dealing with ameliorative legislation, the critical question is not whether the legislation is *ex post facto* (it clearly is *not*), but rather "whether the [legislation] *was meant to* be applied retroactively *at all* [by the legislature]."<sup>144</sup> To discern a legislature's intent as to retroactivity, rules of statutory construction require that courts look to the plain language of the statute and other indicia of intent.<sup>145</sup> Finding none, courts must apply statutes prospectively only,<sup>146</sup> unless the statute affects

consider life imprisonment without possibility of parole for crimes committed after the effective date lacked rational basis).

<sup>138</sup> *Salazar*, 852 P.2d at 740–41.

<sup>139</sup> *See id.* at 737–39.

<sup>140</sup> *Id.* at 743 (Lumpkin, J., concurring in part and dissenting in part).

<sup>141</sup> *Id.*

<sup>142</sup> *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 & n.28 (1994) ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. . . . While we have strictly construed the *Ex Post Facto* Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening *procedural* changes even if application of the new rule operated to a defendant's disadvantage in the particular case." (emphasis added)); *accord Dobbert v. Florida*, 432 U.S. 282, 293 (1977) ("Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.").

<sup>143</sup> *See Dobbert*, 432 U.S. at 294 ("It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law."); *see also Salazar*, 852 P.2d at 743 (Lumpkin, J., concurring in part and dissenting in part) (stating that the majority had erroneously "allowed itself to get sidetracked on an *ex post facto* question. . . . The question here, and the core of this dissent, is not whether it is *constitutionally permissible* to apply a law retroactively [under the Ex Post Facto Clause], but whether the law *was meant to* be applied retroactively *at all*" under rules of statutory construction).

<sup>144</sup> *Salazar*, 852 P.2d at 743 (Lumpkin, J., concurring in part and dissenting in part).

<sup>145</sup> *See Barry, Part I, supra* note 4, at 340 & n.112–13; *see also Dorsey v. United States*, 132 S. Ct. 2321, 2332 (2012) ("[B]efore interpreting a new criminal statute to apply its new penalties to a set of pre-Act offenders, [courts must] assure themselves that ordinary interpretive considerations point clearly in that direction.").

<sup>146</sup> Courts must apply statutes prospectively only based on state general savings statutes and state constitutional savings clauses, which prohibit courts from giving retroactive effect to

only procedural rights, in which case courts may give the statute retroactive effect.<sup>147</sup> According to Judge Lumpkin, “[t]he session laws d[id] not reflect any intent of the Oklahoma Legislature to attempt a retroactive application of this statutory amendment.”<sup>148</sup> Because punishment provisions such as those affected by the Oklahoma statute “are substantive, not procedural, in nature,”<sup>149</sup> Judge Lumpkin rightly concluded that the appellant who committed his crime three months prior to repeal was not eligible for the punishment of life without parole.<sup>150</sup>

As for the majority’s second argument, Judge Lumpkin acknowledged that death *is* different, but noted that this does not obviate the need for faithfulness to the rule of law:

While the final nature of the death penalty may result in a more microscopic review of the facts of a case, it does not change basic principles of the application of a rule of law, or the manner of consistently applying the law. The basis of the United States Supreme Court’s overturning the application of the death penalty in *Furman v. Georgia* was there must be a consistent application of the law, and that the vague, arbitrary applications of the penalty be removed. That concept of consistency in the application of legal principles must be applied fairly to all aspects of the review in a criminal case, whether it applies to the State or a defendant. For the Court to do otherwise creates aberrations in the law which impede the orderly, consistent application of that law in the trial courts of this State. . . . Death is different; but law is law. This Court in its ruling today stresses the former and ignores the latter.<sup>151</sup>

#### e. Strict Scrutiny

For the reasons discussed above, it is exceedingly unlikely that a court would ever apply strict scrutiny in the context of prospective-only repeal, especially given the real risk of having to apply strict scrutiny to all penal statutes affecting the life interests of prisoners. Furthermore, as Chief Justice Rehnquist noted in *Ohio Adult Parole Authority v. Woodard*, “[t]he distinctions accorded a life [as opposed to a liberty]

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statutes. See Barry, *Part I, supra* note 4, at 340–41 & nn.112–13, 115. Oklahoma has a constitutional savings clause. See OKLA. CONST. art. V, § 54. For an in-depth discussion of savings statutes, specifically, and rules of statutory construction in the retroactivity context, more generally, see Barry, *Part I, supra* note 4.

<sup>147</sup> See Barry, *Part I, supra* note 4, at 342 n.120; see also *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 661 (1974) (“[T]he [federal] general saving clause does not ordinarily preserve discarded remedies or procedures . . .”).

<sup>148</sup> *Salazar*, 852 P.2d at 742 (Lumpkin, J., concurring in part and dissenting in part).

<sup>149</sup> *Id.* at 741 n.1. *But see id.* at 738 (majority opinion) (stating that “[Oklahoma’s constitutional savings clause] does not apply to procedural changes in the law” and therefore “has no bearing on the issues in appellant’s case”).

<sup>150</sup> *Id.* at 737; *id.* at 742 (Lumpkin, J., concurring in part and dissenting in part).

<sup>151</sup> *Id.* at 742–43 (citation omitted).

interest . . . are primarily relevant to *trial*. And this Court has generally rejected attempts to expand any distinctions further.”<sup>152</sup> It therefore seems particularly inappropriate to apply strict scrutiny in this context because prospective-only repeal imposes no new deprivation of one’s life interest, but instead leaves in place a deprivation lawfully imposed. To paraphrase Chief Justice Rehnquist, if the legislature abolishes the death penalty completely, the prisoner “obtains a benefit; if it is denied, he is no worse off than he was before.”<sup>153</sup>

But assuming a court were to find that prospective-only repeal burdens a fundamental right—the right to life—and that strict scrutiny therefore applies, the State would need to show that prospective-only repeal is “narrowly tailored to serve a compelling state interest.”<sup>154</sup> To do so, the Supreme Court explains, “[t]he government must establish that the classification is substantially related to important and legitimate objectives, so that valid and sufficiently weighty policies actually justify the departure from equality.”<sup>155</sup> But strict scrutiny is not “strict in theory” and “fatal in fact.”<sup>156</sup> To the extent that a compelling interest is required, the State’s interests in retribution and deterrence may satisfy this heightened showing and, in any event, far outweigh those interests found lacking in other equal protection cases involving prisoners.<sup>157</sup>

## 2. Due Process

The Due Process Clause of the Fourteenth Amendment prohibits the State from “depriv[ing] any person of life, liberty, or property, without due process of law.”<sup>158</sup> Its protections are of two varieties.<sup>159</sup> Procedural due process concerns whether government action is

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<sup>152</sup> 523 U.S. 272, 281 (1998) (emphasis added) (citing cases declining to provide additional procedural protections to death row inmates).

<sup>153</sup> *Id.* at 285.

<sup>154</sup> *Johnson v. California*, 543 U.S. 499, 509 (2005).

<sup>155</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 (1985) (citation omitted).

<sup>156</sup> *Johnson*, 543 U.S. at 514.

<sup>157</sup> *See, e.g., Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that State’s interest in sterilizing “those who have thrice committed grand larceny” while providing “immunity for those who are embezzlers” did not withstand strict scrutiny because State “ma[de] no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks”).

<sup>158</sup> U.S. CONST. amend. XIV, § 1.

<sup>159</sup> *See, e.g., Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (“We have emphasized time and again that [t]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.” (alteration in original) (citations omitted) (internal quotation marks omitted)).

administered fairly, that is, with notice and procedural protections.<sup>160</sup> Substantive due process concerns “more than fair process” and “cover[s] a substantive sphere as well, barring certain government actions *regardless* of the fairness of the procedures used to implement them.”<sup>161</sup> Prospective-only death penalty repeal offends neither procedural nor substantive due process.

According to the Supreme Court, even after the exhaustion of all judicial remedies to challenge a conviction and death sentence, “[a] prisoner under a death sentence remains a living person and consequently has an interest in his life.”<sup>162</sup> One might argue that prospective-only repeal necessarily violates procedural due process because it deprives those remaining on death row of their life interest without any process whatsoever. (Because the “person has been fairly convicted and sentenced, his *liberty* interest, in being free from such confinement, has been extinguished.”<sup>163</sup>) The question, of course, is what process is due in this context. Given that “the States have considerable expertise in matters of criminal procedure,” the Court has found criminal process lacking *only* where “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>164</sup>

“It is clear that once society has validly convicted an individual of a crime and therefore established its right to punish,” the Court has

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<sup>160</sup> See *id.*; see, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (“The most familiar office of [the Due Process] Clause is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State.”).

<sup>161</sup> *Lewis*, 523 U.S. at 840 (emphasis added) (internal quotation marks omitted).

<sup>162</sup> *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–89 (1998) (O’Connor, J., concurring in part and concurring in judgment) (“[I]t is incorrect, as Justice Stevens’ dissent notes, to say that a prisoner has been deprived of all interest in his life before his execution.”); *id.* at 281 (majority opinion) (suggesting that, after trial and sentencing, an individual’s “residual life interest” is limited to “not being summarily executed by prison guards”); *id.* (“We agree that respondent maintains a residual life interest . . . .”); *id.* at 291 (Stevens, J., concurring in part and dissenting in part) (“There is . . . no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does.”).

<sup>163</sup> *Id.* at 289 (O’Connor, J., concurring in part and concurring in judgment) (emphasis added); *id.* at 280 (majority opinion) (“The individual’s interest in release or commutation . . . has already been extinguished by the conviction and sentence.”); *accord Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (“[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.” (alteration in original) (quoting *Meachum v. Fano*, 427 U.S. 215, 224 (1976)) (internal quotation marks omitted)); see also *Hunt v. Nuth*, 57 F.3d 1327, 1335 (4th Cir. 1995) (“[W]hen the Court of Appeals of Maryland [the highest court in the State] held . . . that the statute did not apply retroactively, a holding to which this Court is bound, it implicitly held that the Maryland legislature did not create the liberty interest for those defendants convicted before the effective date of the statute. Therefore, [defendant] cannot claim that the Maryland courts deprived him of a liberty interest without due process.” (citation omitted)).

<sup>164</sup> *Medina v. California*, 505 U.S. 437, 445 (1992) (citations omitted) (internal quotation marks omitted).

stated, “the demands of due process are reduced accordingly.”<sup>165</sup> Analogy can be made to the Supreme Court’s clemency jurisprudence, such as where the death row prisoner is denied clemency. A plurality of the Court has held that

some *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.<sup>166</sup>

Justice Stevens’s opinion concurring in part and dissenting in part in *Woodard* also suggests that “bribery, personal or political animosity, or the deliberate fabrication of false evidence” might also violate due process.<sup>167</sup>

If clemency represents the outer rim of procedural due process protection, legislative repeal is another galaxy altogether. It may be true that “if a State establishes postconviction proceedings” such as clemency, “these proceedings must comport with due process” and cannot be the stuff of chance or animosity.<sup>168</sup> But legislative repeal of the death penalty is not a post-conviction proceeding by any stretch. It is neither individualized nor guaranteed; it is simply not part “of the decisional process that precedes an official deprivation of life.”<sup>169</sup> Although a legislature’s decision to completely repeal its death penalty confers the same benefit as clemency—the sparing of lives—the similarities end there. The legislature’s discretion to make, amend, and repeal death penalty legislation unfettered by the “unilateral hopes” of those on death row does not offend notions of procedural fairness.<sup>170</sup> For this reason, no process is due.

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<sup>165</sup> *Woodard*, 523 U.S. at 288 (O’Connor, J., concurring in part and concurring in judgment) (internal quotation marks omitted); *id.* at 278 (majority opinion) (“[S]ince clemency was far removed from trial, the process due could be minimal.”); *id.* at 284, 279 (stating that “there is no continuum requiring varying levels of process at every conceivable phase of the criminal system,” and rejecting argument that an individual’s “continuing life interest . . . requires due process protection until [the individual] is executed”); *see also* *McGautha v. California*, 402 U.S. 183, 207–08 (1971) (holding that standardless capital sentencing did not violate procedural due process), *vacated*, *Crampton v. Ohio*, 408 U.S. 941 (1972).

<sup>166</sup> *Woodard*, 523 U.S. at 289 (O’Connor, J., concurring in part and concurring in judgment); *id.* at 290–91 (Stevens, J., concurring in part and dissenting in part) (disagreeing with “view . . . that a clemency proceeding could *never* violate the Due Process Clause”). *But see id.* at 281 (majority opinion) (suggesting that, after trial and sentencing, an individual’s “residual life interest” is limited to “not being summarily executed by prison guards”).

<sup>167</sup> *Id.* at 290–91 (Stevens, J., concurring in part and dissenting in part).

<sup>168</sup> *Id.* at 293; *see also* *Greenholtz*, 442 U.S. at 12 (“[T]he expectancy of release provided in [parole eligibility] statute is entitled to some measure of constitutional protection.”).

<sup>169</sup> *Woodard*, 523 U.S. at 295 (Stevens, J., concurring in part and dissenting in part).

<sup>170</sup> *See* *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (“In terms of the Due Process Clause, a Connecticut felon’s expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate’s expectation, for

A substantive due process claim fares no better. In *Furman v. Georgia*, Justice Marshall stated that “[t]he concepts of cruel and unusual punishment and substantive due process become so close as to merge” because both concern the deprivation of

a fundamental right (i.e., the right to life) . . . [T]he substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment—i.e., punishment may not be more severe than is necessary to serve the legitimate interests of the State.<sup>171</sup>

Although Justice Marshall’s concurring opinion in *Furman* arguably opens the door to a substantive due process challenge to prospective-only repeal,<sup>172</sup> the Court’s subsequent jurisprudence appears to have closed it.

Given its “reluctan[ce] to expand the concept of substantive due process,” the Supreme Court has stated that “[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.”<sup>173</sup> Because a constitutional challenge to prospective-only repeal of the death penalty is plainly “covered by a specific constitutional provision,” namely, the Eighth Amendment, “the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.”<sup>174</sup> Supreme Court precedent makes the point. Since Justice Marshall’s concurring opinion in *Furman*, the Court’s majority has addressed a substantive due process challenge to the death penalty in only one case, where it rejected the argument in a footnote.<sup>175</sup>

Nevertheless, even assuming that a challenge to prospective-only repeal may be analyzed under the rubric of substantive due process, it is

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example, that he will not be transferred to another prison; it is simply a unilateral hope.” (footnote omitted)).

<sup>171</sup> 408 U.S. 238, 359 n.141 (Marshall, J., concurring). Notwithstanding the parallels between substantive due process and the Eighth Amendment, Justice Marshall did not find that the death penalty violated substantive due process; *see id.* (“Capital punishment is unconstitutional because it is excessive and unnecessary punishment [under the Eighth Amendment], not because it is irrational [under the Due Process Clause of the Fourteenth Amendment].”).

<sup>172</sup> *See id.*

<sup>173</sup> *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (second alteration in original) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion)) (internal quotation marks omitted).

<sup>174</sup> *See id.* at 843 (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)).

<sup>175</sup> *See Herrera v. Collins*, 506 U.S. 390, 407 n.6 (1993) (“[P]etitioner does not come before this Court as an innocent man, but rather as one who has been convicted by due process of law of two capital murders. The question before us, then, is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his ‘actual innocence’ claim. This issue is properly analyzed only in terms of procedural [rather than substantive] due process.”).

not a winning argument. “[S]ubstantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.”<sup>176</sup> As Justice Marshall suggests, the argument that execution of death row prisoners post-repeal violates substantive due process closely parallels the Eighth Amendment’s prohibition against punishments that are “more severe than is necessary to serve the legitimate interests of the State.”<sup>177</sup> As a result, the substantive due process analysis collapses into an Eighth Amendment analysis<sup>178</sup> and thus fails for the same reasons, namely, there is no national consensus against prospective-only repeal of the death penalty and, even if there were, those remaining on death row post-repeal share no unifying characteristic that diminishes their culpability or susceptibility to deterrence.<sup>179</sup>

There is little to suggest that, in the context of prospective-only death penalty repeal, substantive due process provides any residual protection not already provided by the Eighth Amendment. But assuming that it does, a substantive due process claim would likely still fail for the same reasons that an equal protection claim would fail—under rational basis, the State has a legitimate interest in executing death row prisoners post-repeal.<sup>180</sup>

### 3. Fundamental Fairness and the “Chancellor’s Foot”

For the reasons discussed above, prospective-only repeal does not violate the Fourteenth Amendment. While it does not seem fair that Mr. Santiago can be sentenced to death for a murder he committed in 2004, when a person who commits an identical crime in 2014 cannot be sentenced to death, it is not unconstitutional.<sup>181</sup> Legislatures have

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<sup>176</sup> *Id.* at 435–36 (citations omitted) (internal quotation marks omitted).

<sup>177</sup> See *Furman*, 408 U.S. at 359 n.141 (Marshall, J., concurring).

<sup>178</sup> See, e.g., *Herrera*, 506 U.S. at 431, 435 (Blackmun, J., dissenting) (stating that execution of innocent was “at odds with contemporary standards of fairness and decency” under Eighth Amendment and “equally offensive to the Due Process Clause of the Fourteenth Amendment” (emphasis added) (internal quotation marks omitted)); *Jackson v. Dickson*, 325 F.2d 573, 575 (9th Cir. 1963) (stating that the U.S. Supreme Court’s holding in *Robinson v. Cole*, 370 U.S. 660 (1961), that a law criminalizing drug addiction was cruel and unusual punishment, “could as well be said to rest upon grounds of substantive due process as upon the Eighth Amendment”); see also Barry, *Part I*, *supra* note 4, at 358–85 (analyzing prospective-only repeal under Eighth Amendment).

<sup>179</sup> See Barry, *Part I*, *supra* note 4, at 358–85.

<sup>180</sup> See *supra* Part II.B.1; cf. *Lilly v. Commonwealth*, 647 S.E.2d 517, 522 n.2 (Va. Ct. App. 2007) (“In cases challenging disparities in statutory criminal penalties, ‘an argument based on equal protection essentially duplicates an argument based on due process.’” (quoting *Chapman v. United States*, 500 U.S. 453, 465 (1991))).

<sup>181</sup> See *supra* Part II.A for a discussion of Mr. Santiago’s pending appeal.

rational reasons for passing prospective-only laws, and rational is all that the Fourteenth Amendment requires in this context.<sup>182</sup>

But the Constitution's equal protection and due process clauses do not end the inquiry. Another argument for striking down prospective-only repeal comes not from the Constitution, strictly-speaking, but rather from "the common-law principle which has constitutional dimension—namely, the principle of fundamental fairness."<sup>183</sup> As Justices Brennan and Marshall have observed, notions of fundamental fairness are "at the heart of Anglo-American law and . . . *independently* influence [its] construction and application."<sup>184</sup> According to Justice Handler of the New Jersey Supreme Court, "[t]he doctrine of fundamental fairness serves, depending on the context, as an augmentation of existing constitutional protections or as an *independent* source of protection against state action. . . . Fundamental fairness thus enhances or extends the scope of other constitutional protections."<sup>185</sup>

Whether viewed as an "integral part of the right to due process . . . [or as] a penumbral right reasonably extrapolated from other specific constitutional guarantees, . . . fundamental fairness is a settled repository of rights of the accused."<sup>186</sup> Central to fundamental fairness is the "imperative that government minimize arbitrariness in its dealing with individual citizens."<sup>187</sup> In the death penalty context, "where the potential harm to the individual from arbitrary state action is greatest," these considerations of fundamental fairness "are particularly heightened."<sup>188</sup>

As the Supreme Court of New Jersey stated in *State v. Biegenwald*, a case involving an ambiguous ameliorative statute that required the State to prove beyond a reasonable doubt that aggravating factors outweighed mitigating factors:

[W]e would regard it as impermissibly harsh to apply to one defendant, on this critical question of life and death, a standard significantly less favorable than that to be applied to another defendant, merely because of the relatively short time differential

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<sup>182</sup> See *supra* Part II.B.1–2.

<sup>183</sup> See Symposium, *Panel II: The Death Penalty on Appeal: Constitutionality, Equality, and Proportionality Review*, 33 SETON HALL LEGIS. J. 95, 97–98 (2008). See generally ACLU-CT Brief, *supra* note 72, at 3–4 ("Although fundamental fairness derives from federal and state constitutional protections . . . [it] is distinct." (footnote omitted)).

<sup>184</sup> See *Moran v. Ohio*, 469 U.S. 948, 955 (1984) (Brennan, J., dissenting from the denial of cert.) (emphasis added); see also *Heath v. Alabama*, 474 U.S. 82, 103 (1985) (Marshall, J., dissenting) (discussing "due process guarantee of fundamental fairness" in death penalty context).

<sup>185</sup> *State v. Ramseur*, 524 A.2d 188, 318–19 (N.J. 1987) (Handler, J., dissenting) (emphasis added).

<sup>186</sup> *State v. Abbati*, 493 A.2d 513, 518–19 (N.J. 1985).

<sup>187</sup> *Ramseur*, 524 A.2d at 319 (Handler, J., dissenting).

<sup>188</sup> *Id.* at 318.

between the commission of their crimes. Much more is at stake than doing justice to [the defendant]. What is at stake is the fundamental fairness of a system that generates life and death decisions.<sup>189</sup>

Those who remain on death row after prospective-only repeal are there not because of a particular characteristic or a particular crime; they are there because of the date they committed their crime. As Mr. Santiago's attorney argued at oral argument, sentencing a person to death because of the date he committed his crime is much like sentencing a person to death based on the first letter of his name.<sup>190</sup> It is the height of arbitrariness; it is fundamentally unfair.

One might argue that Mr. Santiago and those like him are, in Justice Stewart's words, a "capriciously selected random handful upon whom the sentence of death has in fact been imposed."<sup>191</sup> Or worse still, they are, in Justice Marshall's words, "sacrificial lamb[s]"—sent to their deaths so that future offenders will be spared the same fate.<sup>192</sup> It is one thing when the State kills its killers; it is quite another when the State sacrifices them. The death penalty, one might reasonably argue, cannot be visited upon others in so "wanton[]" and "freakish[]" a fashion.<sup>193</sup> If fundamental fairness prohibits anything, it must prohibit this.

The problem with fundamental fairness is that it is an equitable principle unbounded by the rule of law. As a result, it is highly variable, which makes it a crude tool for rooting out injustice. As Judge Lumpkin of the Oklahoma Court of Criminal Appeals memorably stated:

[T]his equitable principle [of fundamental fairness] cannot serve as the basis for a ruling of law. As was said over a century ago:

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<sup>189</sup> *State v. Biegenwald*, 524 A.2d 130, 158 (N.J. 1987); *accord* *People v. Oliver*, 134 N.E.2d 197, 202 (N.Y. 1956) (giving retroactive effect to ambiguous ameliorative statute, and stating that "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance."); *Cheatham v. State*, 900 P.2d 414, 429 (Okla. Crim. App. 1995) (giving retroactive effect to ambiguous ameliorative statute, and stating that, "[q]uite simply, we cannot justify a decision which would act as a total bar to consideration of a punishment alternative to death merely because the crime giving rise to the trial occurred a short time before the effective date of [the ameliorative] legislation. . . . In the interests of fundamental fairness, we find that justice demands the action taken by this Court under these distinctively compelling facts."); *see also* *State v. Koskovich*, 776 A.2d 144, 215 (N.J. 2001) (Zazzali, J., concurring) ("As much as we search for a calculus to make [death penalty] determinations, at the end of the day, after a review of all of the facts and law, it is sometimes best to simply invoke intuition, fundamental fairness, and classic principles of discernment to make a holistic judgment about whether the death penalty ought to be imposed.").

<sup>190</sup> Oral Argument at 20:30, *State v. Santiago*, 49 A.3d 566 (2012) (No. 17143), *available at* <http://ct-n.com/ctnplayer.asp?odID=8931>.

<sup>191</sup> *Furman v. Georgia*, 408 U.S. 238, 309–10 (Stewart, J., concurring).

<sup>192</sup> *See id.* at 364 (Marshall, J., concurring) (internal quotation marks omitted).

<sup>193</sup> *Id.* at 309–10 (Stewart, J., concurring).

Equity is a Roguish thing: for Law we have a measure, know what to trust to, Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure, we call, a Chancellor's Foot, what an uncertain measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. 'Tis the same thing in the Chancellor's Conscience.

What is "fundamental fairness" to one judge may not be "fundamental fairness" to another.

....

Legal nuances of this type lead to an anomaly of the law. The anomaly then skews the principles of law which are to be applied and creates serious cracks in the foundation of our jurisprudence. In addition, it denigrates the principle that this is a nation of laws, and not of men.

....

"[F]undamental fairness" is an easy solution to the problem this Court has created by ignoring its own caselaw in determining "death is different." And as with many easy solutions, it is neat, plausible—and wrong. I cannot agree the doctrines of this Court are to be changed with every succeeding judge, and cannot join in an opinion that in some vague rush to "fairness" varies the law to be applied in such a manner that it is no more consistent than a Chancellor's foot.<sup>194</sup>

Although fundamental fairness arguments against prospective-only repeal have great appeal, "[they are] addressed to the wrong governmental branch."<sup>195</sup> Absent a court's willingness to exalt equity

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<sup>194</sup> *Hain v. State*, 852 P.2d 744, 753–56 (Okla. Crim. App. 1993) (Lumpkin, J., concurring in part and dissenting in part) (citation omitted); see also *Cheatham*, 900 P.2d at 430 (Lumpkin, J., concurring in part and dissenting in part); *Humphrey v. State*, 864 P.2d 343, 345 (Okla. Crim. App. 1993) (Lumpkin, J., concurring in part and dissenting in part); *Salazar v. State*, 852 P.2d 729, 741 (Okla. Crim. App. 1993) (Lumpkin, J., concurring in part and dissenting in part).

<sup>195</sup> *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 664 (1974) (declining to apply ameliorative sentencing statute retroactively and stating that "[p]unishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds. . . . [H]owever severe the consequences for respondent, Congress trespassed no constitutional limits."); see also *United States v. Blewett*, Nos. 12-5226, 12-5582, 2013 WL 6231727, at \*13 (6th Cir. Dec. 3, 2013) (refusing to apply Fair Sentencing Act retroactively to reduce sentences of crack offenders whose sentences became final before Act's passage, but suggesting that Congress "think seriously about making the new minimums retroactive" and noting that Act, "prospective though it is . . . may well be a powerful ground for seeking relief from Congress"); *id.* ("[T]he language of the relevant statutes . . . and the language of the relevant decisions . . . leave us no room to grant that relief here. Any request for a sentence reduction must be addressed to a higher tribunal (the Supreme Court) or to a different forum altogether (the Congress and the President).").

over law, fundamental fairness arguments will fail. These arguments should instead be made to the executive, which is vested with the authority to grant clemency to those on death row as a matter of grace, or, in pending capital cases, to juries.<sup>196</sup> Part III of this Article takes up this issue.

#### 4. Summary of Fourteenth Amendment Analysis

Prospective-only repeal does not violate the Equal Protection Clause because those who committed their crimes prior to repeal are not similarly situated to those who committed their crimes after repeal. Each committed a crime under a different statutory scheme. Even if they are similarly situated, prospective-only repeal is rationally related to a variety of legitimate governmental interests, ranging from retribution, deterrence, and incapacitation, to finality and avoiding *ex post facto* claims.

Prospective-only repeal also does not violate either procedural or substantive due process. Legislative consideration of death penalty repeal is not a post-conviction proceeding by any stretch and is not part of the decisional process that precedes an official deprivation of life. Therefore, no procedural process is due. And, even assuming that substantive due process provides some residual protections not already provided by the Eighth Amendment, prospective-only repeal does not offend substantive due process because it is rationally related to a variety of legitimate governmental interests.

The strongest basis for striking down prospective-only repeal is fundamental fairness—that “penumbral right reasonably extrapolated from other specific constitutional guarantees,”<sup>197</sup> which is “at the heart of Anglo-American law and . . . independently influence[s] the construction and application” of the law.<sup>198</sup> While appealing, these arguments are addressed to the wrong branch of government. Absent a court’s willingness to exalt equity over law, fundamental fairness arguments will almost certainly fail, and should instead be directed to the executive—a proposition to which this Article now turns.

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<sup>196</sup> See *infra* Part III.

<sup>197</sup> *State v. Abbati*, 493 A.2d 513, 519 (N.J. 1985).

<sup>198</sup> *Moran v. Ohio*, 469 U.S. 948, 955 (1984) (Brennan, J., dissenting from the denial of cert.).

### III. THE FUTURE OF GRADUAL ABOLITION: EXECUTIVE CLEMENCY AND THE SENTENCING JURY

As previously discussed, two factors define the trend of gradual abolition underway in New Mexico, Connecticut, and Maryland: state legislatures' use of "prospective-only" language limiting repeal to crimes committed on or after the effective date of the statute, and the executive's refusal or inability to commute existing death sentences after repeal.<sup>199</sup> Part I of this Article discussed the first factor—how prospective-only repeal came to be and why it will likely continue.<sup>200</sup> Part II of this Article argued that prospective-only repeal is perfectly valid as a matter of law and predicted that the Connecticut Supreme Court, in the case of *State v. Santiago*, will uphold the constitutionality of prospective-only repeal under the Fourteenth Amendment.<sup>201</sup>

Given prospective-only repeal's firm footing in the strategy of gradual abolition and in the law, Part III of this Article turns to gradual abolition's second factor: the executive's refusal or inability to commute existing death sentences after repeal. As the ACLU-CT argued in its amicus brief to the *Santiago* court, sentencing one person to death for a crime and not another, based purely on the date of the crime, violates "considerations of fundamental fairness . . . ingrained in the concept of due process of law."<sup>202</sup> Although these fundamental fairness arguments are insufficient to win the day with judges, they should persuade others, namely, the executive and juries. This Part discusses both in turn. The "future" of gradual abolition, I argue, should not be execution; it should instead be executive clemency for those on death row post-repeal and life imprisonment for capital offenders awaiting sentencing.

#### A. Executive Clemency

Assuming that the *Santiago* court upholds the validity of Connecticut's prospective-only repeal, the only recourse left for those on Connecticut's death row (short of retrial and a finding of not guilty or resentencing and a lesser sentence) is executive clemency.<sup>203</sup> While

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<sup>199</sup> See *supra* Part I.

<sup>200</sup> See *supra* Part I.

<sup>201</sup> See *supra* Part II.

<sup>202</sup> ACLU-CT Brief, *supra* note 72, at 3 (quoting *State v. Corchado*, 512 A.2d 183, 186 (Conn. 1986)) (internal quotation marks omitted).

<sup>203</sup> See *supra* Part II.A (discussing pending appeal in *State v. Santiago*). If the *Santiago* court were to strike down the validity of Connecticut's prospective-only repeal, the fate of those on Connecticut's death row could remain uncertain. This is because the *Santiago* court might strike down the repeal in its entirety, thereby reinstating the death penalty, or it might reduce only those death sentences that have not yet become final, thereby leaving in place the

other courts may depart from a decision by the Connecticut Supreme Court upholding the validity of prospective-only repeal, it is far more likely that they will uphold the legislature's decision to abolish prospective-only on the strength of constitutional principles and rules of statutory construction. The importance of executive clemency thus extends well beyond Connecticut's borders.

### 1. An Act of Grace

Clemency refers to one of three distinct remedies: a pardon, which is extremely rare and absolves the defendant of the conviction and sentence; a reprieve, which temporarily delays a death sentence; and a commutation, which is the most common form of clemency and reduces the sentence, typically to life imprisonment without parole.<sup>204</sup> Clemency derives from England, where the king or queen had unfettered discretion to grant it as an act of "grace."<sup>205</sup> Blackstone thought clemency

one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.<sup>206</sup>

In the early development of the United States, clemency was transferred to the executive branch, where it now resides with either the governor or an administrative board.<sup>207</sup> As the U.S. Supreme Court has stated, "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."<sup>208</sup> It "provide[s] the 'fail safe' in our criminal justice system."<sup>209</sup>

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sentences of those death row prisoners who have exhausted their direct appeals. For further discussion of these issues, see Barry, *Part I*, *supra* note 4.

<sup>204</sup> CARTER ET AL., *supra* note 3, at 250.

<sup>205</sup> *Id.* at 251–52.

<sup>206</sup> *Herrera v. Collins*, 506 U.S. 390, 412 (1993) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 397) (internal quotation marks omitted).

<sup>207</sup> CARTER ET AL., *supra* note 3, at 251; *see also* *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 275 (1998) ("[T]he clemency and pardon powers are committed, as is our tradition, to the authority of the executive."); *Herrera*, 506 U.S. at 414 ("The original States were reluctant to vest the clemency power in the executive. And although this power has gravitated toward the executive over time, several States have split the clemency power between the Governor and an advisory board selected by the legislature.").

<sup>208</sup> *Herrera*, 506 U.S. at 411–12 (footnote omitted).

<sup>209</sup> *Id.* at 415.

Unlike the judiciary, which is bound by the rule of law, the executive has “virtually complete discretion . . . to decide whether or not to grant clemency, on what grounds, and by what procedure.”<sup>210</sup> For example, it is rare for a state to have substantive standards to guide the grant or denial of clemency, and there is no stare decisis—governors and administrative boards are not required to be consistent from one case to the next.<sup>211</sup> Clemency “allow[s] the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.”<sup>212</sup> Prescribed procedures are similarly rare and vary greatly from state-to-state. “Some states conduct hearings, others do not. In the course of a hearing, some states permit the inmate to appear, others do not. Some permit counsel to appear, and others do not.”<sup>213</sup>

Notwithstanding the executive’s broad authority to grant clemency, it seldom does so.<sup>214</sup> Two centuries ago, when the death penalty was mandatory upon conviction of a variety of non-homicide crimes, and when appellate review was lacking, “executive clemency played an important role in achieving rough justice by keeping many lesser offenders off the scaffold.”<sup>215</sup> This is no longer the case. Since 1976, 273 people on death row received clemency, compared with 1367 executions.<sup>216</sup> The number of those granted clemency is even less impressive when one considers that well over half of the 273 grants of clemency were blanket commutations issued by the governor of Illinois in 2003 and 2011, respectively.<sup>217</sup>

## 2. Fundamental Fairness Revisited

In those rare cases in which clemency is granted, the decision is generally based on one of three factors: doubts about guilt, mental impairments, and lack of proportionality of the punishment when compared to the punishment imposed on codefendants or others

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<sup>210</sup> CARTER ET AL., *supra* note 3, at 252.

<sup>211</sup> *Id.* at 253–54.

<sup>212</sup> *Woodard*, 523 U.S. at 281 (plurality).

<sup>213</sup> CARTER ET AL., *supra* note 3, at 254.

<sup>214</sup> *See id.* at 253.

<sup>215</sup> THE DEATH PENALTY IN AMERICA 18 (Hugo Adam Bedau ed., 1997).

<sup>216</sup> *Compare Clemency*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/clemency> (last visited Feb. 23, 2014), with *Executions by Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/executions-year> (last updated Feb. 13, 2014 following an execution in Florida).

<sup>217</sup> In 2003, Governor George Ryan commuted the sentences of Illinois’s 167 remaining death row prisoners, “citing the flawed process that led to these sentences.” *Clemency*, *supra* note 216. In 2011, Governor Pat Quinn commuted the sentences of Illinois’s fifteen remaining death row prisoners immediately after signing a prospective-only repeal bill into law. *Id.*

convicted of the same crime.<sup>218</sup> This third factor has particular relevance to prospective-only repeal.

In the context of prospective-only repeal, the only thing that distinguishes those on death row from those not on death row is the date on which the crime occurred. A person who murders on Day 1 can be sentenced to death, while a person who commits an *identical* murder after prospective-only repeal, on Day 2, cannot be sentenced to death. As previously discussed, sentencing a person to death because of the date he committed his crime is not so arbitrary as to violate the Constitution.<sup>219</sup> But it may well be arbitrary enough to warrant the exercise of clemency in light of the disproportionality of a death sentence when compared to those who commit identical crimes after prospective-only repeal. Those who remain on death row are worse off than *every* person who commits a similar crime in the future. Although the exercise of clemency is rare, prospective-only repeal may be reason to reinvigorate the practice, making the executive once more a bastion of “rough justice.”<sup>220</sup>

Besides proportionality, several other reasons support executive clemency in the prospective-only repeal context. First, because the Constitution does not constrain the executive as it does the courts, there is no “Chancellor’s Foot” problem.<sup>221</sup> When governors and administrative boards observe fundamental unfairness of the highest order, their hands are not tied; they are free “to dispense mercy outside of the constraints of the legal process.”<sup>222</sup> As Judge Janice Rogers Brown has stated, “Law is narrower than justice. Mercy is broader than both. Justice can be merciless, but mercy must be just.”<sup>223</sup>

Second, there is strong precedent for the exercise of executive clemency in the prospective-only repeal context. Over the course of the past century, at least thirty-nine prisoners have had their death sentences commuted either in anticipation of or after prospective-only repeal.<sup>224</sup> Importantly, some of these commutations came in the wake of state supreme court decisions upholding the validity of the death penalty after prospective-only repeal.<sup>225</sup> Because the legal literature has

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<sup>218</sup> CARTER ET AL., *supra* note 3, at 254; *see also Clemency, supra* note 216.

<sup>219</sup> *See supra* Part II.B.

<sup>220</sup> THE DEATH PENALTY IN AMERICA, *supra* note 215, at 18.

<sup>221</sup> *See supra* text accompanying notes 194–96 for a discussion of the “Chancellor’s Foot” problem.

<sup>222</sup> CARTER ET AL., *supra* note 3, at 260.

<sup>223</sup> *Id.* (quoting Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. REV. 327, 335 (1992)) (internal quotation marks omitted).

<sup>224</sup> *See* Historians’ Brief, *supra* note 33, at 5–6, 9–10. For a discussion of each of the thirty-nine commutations, *see infra* notes 227–39 and accompanying text.

<sup>225</sup> *See Ex parte Faltin*, 254 P. 477, 479–80 (Ariz. 1927); *State v. Lewis*, 201 S.W. 80, 85–86 (Mo. 1918); *see also* Historians’ Brief, *supra* note 33, at 10 nn.36–37.

not given thorough treatment to commutations arising in response to prospective-only repeal, some specifics are instructive.<sup>226</sup>

In 1911, Minnesota's Board of Pardons commuted the sentences of its two remaining death row inmates immediately prior to that state's prospective-only repeal.<sup>227</sup> Three years later, in 1914, the governor of Oregon commuted the death sentences of its two remaining death row inmates one day before passage of a ballot measure abolishing the death penalty.<sup>228</sup> In 1917, Arizona's Pardon Board commuted the sentences of its death row prisoners, including William Faltin, whom the Arizona Supreme Court decided could be executed notwithstanding the passage of prospective-only repeal of the death penalty in 1916 for the crime of murder in the first degree.<sup>229</sup> Similarly, in 1918, the governor of Missouri commuted the sentence of death row prisoner Ora Lewis, whom the Missouri Supreme Court decided could be executed notwithstanding passage of prospective-only repeal one year earlier.<sup>230</sup> According to the governor, Lewis's execution post-repeal would be "against the will of the people as expressed in the new law."<sup>231</sup>

After reinstating the death penalty in 1920 and abolishing it again in 1964 by popular vote, the governor of Oregon commuted the sentences of its three remaining death row inmates two days after the vote.<sup>232</sup> In 1951, Connecticut passed a prospective-only statute that added life imprisonment without the possibility of parole as a sentencing option.<sup>233</sup> Four years later, in 1955, Connecticut's Board of Pardons commuted the sentence of George Dortch, a death row inmate whom the Connecticut Supreme Court decided could be executed notwithstanding passage of the prospective-only statute.<sup>234</sup> And in 1965, New York passed a law restricting the death penalty to murder of a peace officer or murder committed by a life term prisoner.<sup>235</sup> "[I]n keeping with his announced policy of granting executive clemency in all outstanding cases that would not qualify as capital crimes under the new legislation," Governor Rockefeller commuted five death sentences to

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<sup>226</sup> For an excellent summary of these commutations, see generally Historians' Brief, *supra* note 33.

<sup>227</sup> *Id.* at 4 n.11.

<sup>228</sup> *Id.* at 9 n.35.

<sup>229</sup> *Id.* at 9 n.36; see *Faltin*, 254 P. at 479–80.

<sup>230</sup> Historians' Brief, *supra* note 33, at 9–10 & n.37; see *Lewis*, 201 S.W. at 85–86.

<sup>231</sup> Historians' Brief, *supra* note 33, at 9 n.37 (quoting HARRIET C. FRAZIER, DEATH SENTENCES IN MISSOURI, 1803–2005: A HISTORY AND COMPREHENSIVE REGISTRY OF LEGAL EXECUTIONS, PARDONS, AND COMMUTATIONS 170 (2006)) (internal quotation marks omitted).

<sup>232</sup> *Id.* at 10 n.38.

<sup>233</sup> *Dortch v. State*, 110 A.2d 471, 475–77 (Conn. 1954) (discussing prospective-only statute).

<sup>234</sup> Supplemental Brief of the Defendant with Attached Appendix, *supra* note 5, at 4 n.4.

<sup>235</sup> James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 PACE L. REV. 41, 42 n.4 (1996).

terms of life imprisonment after passage of the law.<sup>236</sup> That same year, the governor of Iowa commuted the sentence of its last remaining death row inmate one month prior to passage of prospective-only repeal.<sup>237</sup>

Commutation in response to prospective-only repeal is not confined to the past; the death penalty's modern era has also seen its fair share of such commutations. In 2007, the governor of New Jersey commuted the sentences of that state's eight remaining death row inmates one day prior to the passage of prospective-only repeal.<sup>238</sup> And, as noted above, in 2011, the governor of Illinois commuted the sentences of that state's fifteen remaining death row inmates immediately after passage of prospective-only repeal.<sup>239</sup>

Although it is difficult to know for certain how many death row prisoners did *not* have their sentences commuted after prospective-only repeal,<sup>240</sup> there is no record of a death row prisoner *ever* being executed after prospective-only repeal of the death penalty.<sup>241</sup> Therefore, even where executive clemency was not granted, governors did not sign death warrants for those remaining on death row post-repeal.<sup>242</sup> This means that, if a governor or administrative board were to permit a prisoner to be executed after prospective-only repeal, it would be the first to do so

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<sup>236</sup> Historians' Brief, *supra* note 33, at 10 (quoting James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 ALB. L. REV. 515, 526 (1990)) (internal quotation marks omitted).

<sup>237</sup> *Id.* at 3 n.7.

<sup>238</sup> *New Jersey*, *supra* note 40; *see also* Historians' Brief, *supra* note 33, at 4 n.12; *Governor Corzine's Remarks on Eliminating Death Penalty in New Jersey*, *supra* note 40. New Jersey's repeal was intended to be retroactive, stating that "[a]n inmate sentenced to death prior to the date of the enactment of this act, upon motion to the sentencing court and waiver of any further appeals related to sentencing, shall be resentenced to a term of life imprisonment during which the defendant shall not be eligible for parole." Act of Dec. 17, 2007, § 2, ch. 204, 2007 N.J. Sess. Law Serv. (West) (codified as amended N.J. STAT. ANN. § 2C:11-3b (West 2014)) (footnote omitted). However, defense lawyers apparently objected to the language requiring "waiver of any further appeals" on grounds that it was unconstitutional as applied to those who were still contesting guilt and thus punishment. Out of concern that a court would invalidate this provision, thereby leaving those on death row where they sat, the governor commuted the sentences of those on death row. E-mail from Confidential Source (Apr. 15, 2013) (source confidential at request of sender; on file with author).

<sup>239</sup> *Illinois*, *supra* note 43; *see also* Historians' Brief, *supra* note 33, at 3 n.6; *Statement from Governor Pat Quinn on Senate Bill 3539*, ILLINOIS.GOV (Mar. 9, 2011), <http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265>.

<sup>240</sup> *Cf.* BANNER, *supra* note 32, at 245 (explaining that "[t]he Justice Department only began collecting nationwide data in 1960, so nothing certain can be said about how these figures compare with earlier periods"); *see also supra* note 33 (discussing Kansas and Missouri as examples of states that abolished prospective-only and either did not commute (Kansas) or did not commute immediately (Missouri)).

<sup>241</sup> Historians' Brief, *supra* note 33, at 1–2.

<sup>242</sup> *See id.* at 8 n.25 (noting that Kansas governors did not sign death warrants for death row prisoners sentenced to death for crimes committed before prospective-only repeal); *see also supra* note 33.

in all of history.<sup>243</sup> Such an enduring lack of executions post-repeal weighs heavily in favor of executive clemency.

Lastly, commutation post-repeal is less likely to invite political backlash given its inherent arbitrariness and the fact that no one has ever been executed post-repeal. In states where governors fear not being reelected or being perceived as “soft on crime,” prospective-only repeal allows them to justify clemency not out of sympathy for a particular prisoner,<sup>244</sup> but rather out of concern for the fundamental fairness of a system that sends some—but not all—murderers to their death. “Death row inmate X has committed horrible acts,” a governor might say, “but his acts are no more horrible than the acts of Defendant Y, who does not face the death penalty based on the date he committed them. I do not think our state should be the first in history to send a person to death for such an arbitrary reason.” The drafters of California’s 2012 unsuccessful ballot initiative (48% to 52%) to repeal the death penalty took a similar tack, advocating retroactive repeal of the death penalty “[t]o achieve fairness, equality and uniformity in sentencing.”<sup>245</sup>

Growing support for abolition among conservatives further reduces the risk of backlash. As Steve Monks, the former GOP Chair for Durham County, North Carolina, recently wrote:

The time has come for conservatives here in North Carolina to ask ourselves if the death penalty really fits with our values. We all want a smaller, more efficient government that does not abuse its power, along with swift and sure justice. . . . Let’s put an end to North Carolina’s seemingly endless death penalty debate by simply bringing our politics in line with our conservative principles—wasteful government programs that don’t work and go against our values should be ended.<sup>246</sup>

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<sup>243</sup> See *id.* at 10.

<sup>244</sup> Cf. John Gizzi, *Death Penalty Decision Puts Colorado Governor on Ropes*, NEWSMAX (June 28, 2013 1:21 PM), <http://www.newsmax.com/John-Gizzi/colorado-governor-death-penalty/2013/06/28/id/512527> (discussing backlash against Colorado Governor John Hickenlooper’s decision to issue temporary reprieve for death row prisoner, Nathan Dunlap, three months before he was due to be executed).

<sup>245</sup> The SAFE California Act § 3(8), in CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 6, 2012: OFFICIAL VOTER INFORMATION GUIDE 95, 96 (2012), available at <http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf>; see also *California Proposition 34, The End [of] the Death Penalty Initiative (2012)*, BALLOTPEDIA.ORG, [http://ballotpedia.org/California\\_Proposition\\_34\\_the\\_End\\_the\\_Death\\_Penalty\\_Initiative\\_\(2012\)](http://ballotpedia.org/California_Proposition_34_the_End_the_Death_Penalty_Initiative_(2012)) (last visited Feb. 23, 2014).

<sup>246</sup> Steve Monks, *Guest Opinion: Steve Monks, Conservatives Concerned About the Death Penalty*, PLAIN TALK POL. (June 17, 2013), <http://plaintalkpolitics.com/2013/06/guest-opinion-steve-monks-conservatives-concerned-about-the-death-penalty>; see also *Conservative Judge Who Imposed Death Sentences Changes His Mind*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/category/categories/states/delaware> (“[I]f a convicted murderer in a capital case does not receive a death sentence, he receives an automatic sentence of life imprisonment without the possibility of parole or any type of early release. Such a

For governors in more liberal states, granting clemency post-repeal is less likely to invite backlash. Just a few months into his first full term as governor, Governor Pat Quinn of Illinois commuted the sentences of fifteen death row prisoners immediately after passage of prospective-only repeal,<sup>247</sup> and he accomplished this feat without significant controversy.<sup>248</sup> In some states, granting clemency post-repeal may even *help* governors' political ambitions.<sup>249</sup>

### B. *Juries in Pending Capital Cases*

Barring a new trial or resentencing, executive clemency is the last hope for those who remain on death row after passage of prospective-only repeal. But what about those who commit their crimes before prospective-only repeal but are not sentenced until *after* passage of prospective-only repeal? Clemency, of course, remains an option if and when they are sentenced to death, but they may have another bite at the apple. They can try to convince juries, the “voice of the people,”<sup>250</sup> not to sentence them to death in the first place in light of the fact that the death penalty has been prospectively repealed. This strategy is not a hypothetical one, as demonstrated by the recent case of *Astorga v. Candelaria*.<sup>251</sup>

On April 14, 2006, the State of New Mexico charged Michael Paul Astorga with the 2005 murder of Candido Ray Martinez and the 2006 murder of Officer James McGrane, Jr.<sup>252</sup> On March 13, 2009, well before Astorga's two murder trials, New Mexico's legislature repealed its death penalty prospective-only.<sup>253</sup> After the bill's passage, the New Mexico

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sentence ensures that the defendant is locked away in a state prison until he dies. There is nothing incompatible with this type of life sentence and being a law-and-order conservative on matters of crime and punishment, which I still consider myself to be. In this age of shrinking budgets and increased costs, the time has come, in my view, to adopt a more enlightened approach to criminal justice.” (quoting Judge Norman Barron, *Costs of Imposing Death Penalty Outweigh Benefits*, DEL. ONLINE (Apr. 23, 2013)) (internal quotation marks omitted)). See *generally New Voices*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/category/categories/resources/new-voices> (last visited Feb. 23, 2014).

<sup>247</sup> *Illinois*, *supra* note 43.

<sup>248</sup> Interview with Confidential Advocate (June 13, 2013) (source confidential at request of interviewee; notes on file with author); see also *supra* note 239.

<sup>249</sup> Interview with Confidential Advocate, *supra* note 248.

<sup>250</sup> Richard C. Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 215, at 116, 120.

<sup>251</sup> *Astorga v. Candelaria*, No. 33,152, slip op. at 2–3 (N.M. Sept. 1, 2011) (on file with author).

<sup>252</sup> Scott Sandlin & Olivier Uyttebroeck, *Astorga Convicted of Killing Sheriff's Deputy*, ALBUQUERQUE J. (June 5, 2010), <http://www.abqjournal.com/news/metro/05235649metro06-05-10.htm>; Maggie Shepard, *Family Feud Had Fugitive on the Run*, ALBUQUERQUE TRIB. (Mar. 21, 2006), <http://www.abqtrib.com/news/2006/mar/21/family-feud-had-fugitive-on-the-run>.

<sup>253</sup> See *supra* notes 41–42 and accompanying text.

Supreme Court, sua sponte, adopted a new rule of procedure “that set up separate juries for the guilt/innocence phase and the penalty phase in capital cases,” upon request.<sup>254</sup> “As justification for that rule, the Court relied on the Legislature’s prospective repeal of the death penalty . . . .”<sup>255</sup>

On June 4, 2010, Astorga was convicted for the murder of McGrane.<sup>256</sup> He filed a “Motion to Dismiss the Death Penalty” on November 1, 2010, arguing, among other things, that it was unconstitutional for the State to pursue the death penalty against him in light of New Mexico’s prospective-only repeal.<sup>257</sup> The trial court denied the motion, finding “[no]thing about it unconstitutional . . . . It’s the Legislature’s prerogative to make a law prospective or retroactive.”<sup>258</sup> On December 13, 2010, Astorga filed a Petition for Writ of Superintending Control and Stay of Proceedings in the New Mexico Supreme Court raising the constitutional argument.<sup>259</sup> The Court granted the stay and, after full briefing, denied the writ and quashed the stay on February 4, 2011.<sup>260</sup>

On the eve of the penalty phase of Astorga’s trial, which was slated for September 11, 2011, Astorga’s attorney informed prosecutors that he intended to present, among other things, “evidence and argument that . . . the death penalty has been repealed and, therefore, will not be imposed for any future killing of a peace officer.”<sup>261</sup> The prosecution filed a motion in limine to prohibit “evidence of the legislative repeal of the death penalty.”<sup>262</sup> The trial court granted the State’s motion and Astorga filed another Petition for Writ of Superintending Control in the

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<sup>254</sup> Scott Sandlin, *Astorga Death Penalty Trial Can Proceed*, ALBUQUERQUE J. (Dec. 3, 2010), <http://www.abqjournal.com/news/metro/032332537958newsmetro12-03-10.htm>; see also State’s Brief in Response to Court’s Question at 1, *Astorga v. Candelaria*, No. 33,152 (N.M. Aug. 29, 2011), 2011 WL 9160216, at \*1 [hereinafter State’s Brief in Response].

<sup>255</sup> State’s Brief in Response, *supra* note 254, at 1.

<sup>256</sup> Bill Diven, *Cop-Killer Astorga May Face Execution*, KRQE.COM (June 4, 2010, 2:23 PM), <https://web.archive.org/web/20100608074748/http://www.krqe.com/dpp/news/crime/jurors-said-to-reach-astorga-verdict> (accessed through Internet Archive index). On January 18, 2012, Astorga was convicted for the second-degree murder of Candido Martinez, among other charges. *Astorga Convicted in Second Murder Trial*, KOAT ALBUQUERQUE (Jan. 18, 2012, 4:48 AM), <http://www.koat.com/Astorga-Convicted-In-Second-Murder-Trial/9708110>. On August 3, 2012, he was sentenced to twenty-eight years in prison for that crime. Hailey Heinz, *Astorga Gets 28 More Years*, ALBUQUERQUE J. (Aug. 3 2012, 10:45 AM), <http://www.abqjournal.com/122206/abqnewsseeker/astorga-gets-28-more-years.html>.

<sup>257</sup> Motion to Dismiss the Death Penalty with Memorandum of Law, *supra* note 25.

<sup>258</sup> Sandlin, *supra* note 254 (internal quotation marks omitted); see also N.M.’s Jan. 2011 Response, *supra* note 98, at 2.

<sup>259</sup> Emergency Petition for Writ of Superintending Control & Request for Stay of Proceedings at 3–11, *Astorga v. Candelaria*, No. 32,744 (N.M. Dec. 10, 2010) (on file with author).

<sup>260</sup> *Astorga v. Candelaria*, No. 32,744, slip op. at 1–2 (N.M. Feb. 4, 2011) (on file with author).

<sup>261</sup> See State’s Brief in Response, *supra* note 254, at 2.

<sup>262</sup> See *id.*

New Mexico Supreme Court.<sup>263</sup> In his brief, Astorga argued that “it is fundamentally unfair to treat one individual different from all others similarly situated” and asked the Court to reverse the trial court’s ruling and allow Astorga “to present in mitigation, evidence and argument of . . . the repeal of the death penalty in the State of New Mexico.”<sup>264</sup> After full briefing, the Court granted the petition, in part, holding that

it is permissible for the parties to make closing arguments regarding what consideration, if any, jurors may deem appropriate to give to the fact that New Mexico has repealed the death penalty for offenses committed after July 1, 2009, in making their own determination whether [Astorga] should be given a life or death sentence.<sup>265</sup>

Astorga’s strategy worked. On May 18, 2012, he was sentenced to life in prison plus thirteen years when a jury failed to unanimously agree on imposition of the death penalty.<sup>266</sup> Astorga’s case thus demonstrates another way around the harsh law of prospective-only repeal. Defendants not yet sentenced (or resentenced) at the time of prospective-only repeal should take a page from Astorga’s book. They should file a motion in the trial court requesting a new jury at sentencing and permission to instruct the jury on the passage of prospective-only repeal, and they should petition the state supreme court if the motion is denied.

Assuming that the Connecticut Supreme Court clears the way for Mr. Santiago to be resentenced to death,<sup>267</sup> it is likely that Mr. Santiago will adopt this strategy at the sentencing phase of his trial. Time will tell if this strategy works for him and for others with pending cases, as it did for Mr. Astorga.

## CONCLUSION

Over the past five years, New Mexico, Connecticut, and Maryland have been at the forefront of a new trend in death penalty abolition—that of gradual abolition. The legislature in each of these states has abolished the death penalty for future crimes only, and the executive has left death row intact. In these three states, and for the first time ever,

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<sup>263</sup> See Emergency Petition for Writ of Superintending Control, *Astorga v. Candelaria*, No. 32,744 (N.M. Aug. 15, 2011), 2011 WL 9191846.

<sup>264</sup> Petitioner’s Brief at 16, 19, *Astorga v. Candelaria*, No. 33,152 (N.M. Aug. 26, 2011), 2011 WL 9191847, at \*16, \*19.

<sup>265</sup> *Astorga v. Candelaria*, No. 33,152, slip op. at 2–3 (N.M. Sept. 1, 2011) (on file with author).

<sup>266</sup> Alex Tomlin, *DA Didn’t Expect Astorga Death Sentence*, KRQE.COM (May 18, 2012, 1:05 PM), <https://web.archive.org/web/20131224131115/http://www.krqe.com/news/crime/jurors-signal-theyre-close-to-verdict> (accessed through the Internet Archive index).

<sup>267</sup> See *supra* Part II.A (discussing pending appeal in *State v. Santiago*).

abolition is proceeding inmate-by-inmate; it will be achieved when the last death row prisoner in each state dies or is released from death row.

This Article begins with the legislature, where gradual abolition also begins. By repealing the death penalty prospective-only, legislatures have left to the courts and the executive the fate of those already on death row or those facing a death sentence. Leaving the utility and morality of prospective-only repeal to a companion article, this Article examines prospective-only repeal as a strategy of gradualism—one with firm roots in the past and undeniable promise for the future.

This Article next turns to the courts, where gradual abolition is being litigated. Prisoners on death row, and capital offenders with cases pending post-repeal, are challenging their death sentences. This Article predicts that in 2014, in *State v. Santiago*, the Connecticut Supreme Court will hold that prospective-only repeal does not violate the Fourteenth Amendment. If this prediction proves accurate, then the *Santiago* court, as the first court in nearly a century to address the validity of prospective-only repeal of the death penalty, will pave the way for other courts—including New Mexico's and Maryland's—to uphold legislation abolishing the death penalty prospective-only.

This Article ends with the future of gradual abolition. Assuming that the Connecticut Supreme Court and other courts uphold the validity of prospective-only repeal, the only remaining remedy for prisoners on death row post-repeal is executive clemency. Capital offenders awaiting sentencing post-repeal have an added remedy—they can prevail on juries to return life sentences. Although it is constitutional for legislatures to repeal the death penalty prospective-only, it is fundamentally unfair for the executive to leave people on death row and for juries to put them there post-repeal. Indeed, there is no record of a death row prisoner *ever* being executed after prospective-only repeal of the death penalty. The “future” of gradual abolition should not be execution; it should instead be executive clemency for those on death row post-repeal and life imprisonment for capital offenders awaiting sentencing.