

Spring 2015

## Toward A Uniform Standard Of Decency: Connecticut's Prospective Capital Punishment Repeal And The Eighth Amendment

Suchitra Paul

---

### Recommended Citation

Suchitra Paul, *Toward A Uniform Standard Of Decency: Connecticut's Prospective Capital Punishment Repeal And The Eighth Amendment*, 10 Nw. J. L. & Soc. POL'Y. 280 (2015).  
<http://scholarlycommons.law.northwestern.edu/njlsp/vol10/iss1/6>

This Note or Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized administrator of Northwestern University School of Law Scholarly Commons.

# TOWARD A UNIFORM STANDARD OF DECENCY: CONNECTICUT’S PROSPECTIVE CAPITAL PUNISHMENT REPEAL AND THE EIGHTH AMENDMENT

*Suchitra Paul\**

INTRODUCTION .....	281
I. CONNECTICUT’S DEATH PENALTY AND THE CURRENT STATE OF THE LAW .....	283
<i>Conditions Leading Up to Repeal and the Donohue Study</i> .....	283
<i>Current State of the Law of Prospective Death Penalty Repeals</i> .....	288
1. The Case of New Mexico: <i>State v. Astorga</i> .....	290
2. Connecticut Precedent: <i>Dortch v. State</i> .....	292
II. CONSTITUTIONALITY UNDER THE EIGHTH AMENDMENT .....	295
A. <i>Central to the Eighth Amendment: Proportionality</i> .....	296
1. Proportionality I: Procedural Safeguards for Consistency and Individualization .....	297
2. Proportionality II: Special Classes of Offenders and Offenses .....	302
B. <i>The Politics of Repeal</i> .....	310
1. A Compromise Statute: From Veto in 2009 to Approval in 2012 .....	310
2. Wielding Legislative Intent .....	314
CONCLUSION .....	317

---

\* J.D., Northwestern University School of Law, 2014.

## INTRODUCTION

In *Furman v. Georgia*, the U.S. Supreme Court held that the “death penalty must be imposed fairly and with reasonable consistency, or not at all.”<sup>1</sup> It is “indisputable fact that more than twenty years after the Court’s opinion in *Furman v. Georgia*, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.”<sup>2</sup> And yet, currently in the U.S., thirty-two states and the federal government continue to use capital punishment.<sup>3</sup> Out of at least 1,280 state executions in the U.S. since 1976,<sup>4</sup> more than 1,000 occurred in the South, with the remaining numbers across the Midwest, West, and Northeast.<sup>5</sup> Texas alone accounts for more than 500 of these executions.<sup>6</sup>

---

<sup>1</sup> *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting) (citing *Furman v. Georgia*, 408 U.S. 239 (1972) (per curiam)); *accord* *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

<sup>2</sup> William J. Brennan, Jr., *Foreword: Neither Victims Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1 (1994) (citing *Callins*, 510 U.S. at 1144) (internal quotation marks omitted).

<sup>3</sup> *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Jan. 21, 2014).

<sup>4</sup> See Peter Applebome, *In Connecticut Vote, Death Penalty Critics Don’t See Major Shift*, N.Y. TIMES (Apr. 12, 2012), <http://www.nytimes.com/2012/04/13/nyregion/death-penalty-critics-dont-see-nationwide-shift-in-connecticut-vote.html?ref=connecticut>.

<sup>5</sup> *See Number of Executions by State and Region*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Jan. 21, 2014).

<sup>6</sup> *Id.* Also, since 1988 (when the federal death penalty was reinstated), the federal government has pursued capital punishment for about 500 defendants. Only three of those defendants have been executed, however, and the last execution occurred at least a decade ago. Katharine Q. Seelye, *U.S. Weighs Pursuit of Death Penalty for Suspect in Boston Bombing*, N.Y. TIMES (Jan. 23, 2014), [http://www.nytimes.com/2014/01/24/us/us-weighs-pursuit-of-death-penalty-in-boston-bombing.html?hpw&rref=us&\\_r=0](http://www.nytimes.com/2014/01/24/us/us-weighs-pursuit-of-death-penalty-in-boston-bombing.html?hpw&rref=us&_r=0).

However, recent years signal a hopeful shift in public opinion as more states are abolishing capital punishment.<sup>7</sup> In April 2012, Connecticut Governor Dannel P. Malloy signed into law a repeal of the state's death penalty, making Connecticut the seventeenth state—and the fifth state since 2007—to abandon capital punishment.<sup>8</sup> The repeal replaces the death penalty with life in prison without the possibility of parole, but only *prospectively*, not retroactively.<sup>9</sup> This means that those who committed a capital offense before the repeal's effective date could still be sentenced to death and executed today.<sup>10</sup> Currently Connecticut houses eleven adult males on death row.<sup>11</sup>

At issue is whether, under the Eighth Amendment, Connecticut can impose capital punishment after repealing it prospectively. This issue may grow as more states like Connecticut find prospective repeal easier to pass than complete abolition. When Connecticut prospectively repealed its death penalty, New Mexico was the only other state to have done so (in 2011).<sup>12</sup> Maryland then joined the list in 2013.<sup>13</sup>

The death penalty might be per se constitutional under the Eighth Amendment, but the U.S. Supreme Court continues to closely

---

<sup>7</sup> The death penalty is being abolished in states where executions are not actually occurring. Though, unfortunately, it remains largely untouched where executions are active. Applebome, *supra* note 4.

<sup>8</sup> Lincoln Caplan, *A Trial on Death Row*, N.Y. TIMES (Sept. 1, 2012), <http://www.nytimes.com/2012/09/02/opinion/sunday/a-trial-on-death-row.html>.

<sup>9</sup> See 2012 Conn. Pub. Acts 13 (Reg. Sess.) (under “Public Act No. 12-5”), S.B. 280, 2012 Gen. Assemb., Feb. 2012 Reg. Sess. (Conn. 2012), *available at* [http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=280&which\\_year=2012&SUBMIT1.x=13&SUBMIT1.y=5&SUBMIT1=Normal](http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=280&which_year=2012&SUBMIT1.x=13&SUBMIT1.y=5&SUBMIT1=Normal)

<sup>10</sup> See *infra* note 39.

<sup>11</sup> *Frequently Asked Questions*, CONN. DEP'T OF CORR., <http://www.ct.gov/doc/cwp/view.asp?q=265472> (last visited Aug. 27, 2014) [hereinafter *Conn. Dep't of Corr. FAQ*].

<sup>12</sup> *States With and Without the Death Penalty*, *supra* note 3.

<sup>13</sup> *Id.*; see S.B. 276, 2013 Gen. Assemb., 2013 Reg. Sess. §§ 3, 5 (Md. 2013) (amending §§ 7-601, 7-201 to repeal death sentencing procedures), *available at* <http://mgaleg.maryland.gov/webmga/frmMain.aspx?stab=01&pid=billpage&tab=subject3&id=SB0276&ys=2013RS>.

monitor capital punishment cases for constitutional violations.<sup>14</sup> Connecticut's prospective death penalty repeal would probably survive an Eighth Amendment challenge.<sup>15</sup> But its prospective nature resulted from political compromise.<sup>16</sup> The repeal is a step in the right direction, but it is nonetheless unsettling that lawmakers are giving up lives now to ensure the abolition of capital punishment in the future.

## I. CONNECTICUT'S DEATH PENALTY AND THE CURRENT STATE OF THE LAW

### A. *Conditions Leading Up to Repeal and the Donohue Study*

Capital punishment in Connecticut began in 1639.<sup>17</sup> From 1639 to 2005, Connecticut performed a total of 127 executions using different methods over time, first from hanging, then the electric chair (until 1973), and finally lethal injection (current form).<sup>18</sup> But in the last half century, Connecticut executed only one person: Michael Bruce Ross, a serial killer who voluntarily gave up on appeals and was executed in 2005, which made him the first person to be executed in Connecticut since 1960.<sup>19</sup>

Stanford Law professor John Donohue recently conducted a comprehensive study of Connecticut's death penalty; the findings

---

<sup>14</sup> See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (finding the death penalty to be per se constitutional).

<sup>15</sup> See *infra* pp. 15-30.

<sup>16</sup> See *infra* pp. 30-34 (discussing how some lawmakers conditioned their support of repeal on it being prospectively applied).

<sup>17</sup> CHRISTOPHER REINHART, OFFICE OF LEGIS. RESEARCH, CONN. GEN. ASSEMB., OLR RESEARCH REPORT 0321: DEATH PENALTY 2 (2012), available at <http://www.cga.ct.gov/2012/rpt/pdf/2012-R-0321.pdf>; Peter Applebome, *Death Penalty Repeal Goes to Connecticut Governor*, N.Y. TIMES (Apr. 11, 2012), <http://www.nytimes.com/2012/04/12/nyregion/connecticut-house-votes-to-repeal-death-penalty.html?pagewanted=all>. Capital crimes historically included murder, witchcraft, and blasphemy. REINHART, *supra* note 17, at 4.

<sup>18</sup> Applebome, *supra* note 17; *Executions in Connecticut Since 1894*, CONN. STATE LIBRARY, <http://www.cslib.org/executions.htm> (last visited Jan. 21, 2014).

<sup>19</sup> See Applebome, *supra* note 17.

provide further insight.<sup>20</sup> As Connecticut is a relatively small state, the Donohue study analyzed every capital murder case from 1973 (when Connecticut reinstated the death penalty) to 2007. The study found that “[t]he extreme infrequency with which the death penalty [was] administered in Connecticut raise[d] a serious question as to whether the state’s death penalty regime [was] serving *any* legitimate social purpose.”<sup>21</sup> It examined whether Connecticut’s capital punishment system operates lawfully and reasonably, or whether this system is tainted with arbitrariness, caprice, or discrimination. The study findings suggest that those sentenced to death are not necessarily the “worst of the worst.”<sup>22</sup>

Specifically, of the 4,686 murders committed in Connecticut during the thirty-four year period, 205 convicted murderers were death-eligible, meaning they committed murders that included at least one aggravating circumstance.<sup>23</sup> Nearly a third, forty-nine, of these 205 were not prosecuted as capital offenses; only sixty-six were convicted of capital murder; twenty-eight went to a death penalty sentencing hearing; nine sentences were sustained; and one person was executed (in 2005).<sup>24</sup>

Overall, the Donohue study resulted in seven main findings.<sup>25</sup> First, Connecticut sustained death sentences for only nine of the 205 death-eligible offenders, which resulted in a 4.4% rate of imposing the death sentence.<sup>26</sup> This rate is among the lowest in the nation.<sup>27</sup> To put this in perspective, the Supreme Court suggested that a 15% rate

---

<sup>20</sup> See generally JOHN J. DONOHUE III, STANFORD LAW SCHOOL, NAT’L BUREAU OF ECON. RESEARCH, CAPITAL PUNISHMENT IN CONNECTICUT, 1973-2007: A COMPREHENSIVE EVALUATION FROM 4686 MURDERS TO ONE EXECUTION 1 (2013), available at [http://works.bepress.com/john\\_donohue/87/](http://works.bepress.com/john_donohue/87/).

<sup>21</sup> *Id.* (original emphasis).

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.* at 1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.*

in pre-*Furman* Georgia meant the death penalty was “freakishly rare,” and therefore arbitrarily imposed and unconstitutional.<sup>28</sup>

Second, by using an “egregiousness” ratings system to compare all 205 death-eligible cases, the study found that the cases prosecuted as capital murders were not necessarily “more egregious” than those *not* prosecuted as capital murders.<sup>29</sup> In other words, the study found no meaningful basis in Connecticut for distinguishing the very few inmates who did receive death sentences from the many death-eligible murderers who did not.<sup>30</sup> Such a finding contradicts arguments from death penalty proponents that the relative infrequency of death sentences demonstrates “the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.”<sup>31</sup>

Third, at every level of egregiousness, defendants received a wide range of sentences. For instance, only one of Connecticut’s nine sustained death sentences was among the 15 cases with the highest egregiousness ratings.<sup>32</sup>

Fourth, the sample of 205 death-eligible cases likely understated the degree of arbitrariness in the system that may be revealed if all death-eligible murders in the state’s history were taken into account.<sup>33</sup> Fifth, the study found the capital punishment system to be discriminatory because when the victim was white and defendants were Hispanic or non-white, those defendants were significantly more

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 5. The study considered four factors: victim suffering (e.g., duration of pain); victim characteristics (e.g., age); defendant’s culpability (e.g., motive, intoxication); and the number of victims. *Id.* at 102. The study omitted the official case names, outcomes, and the race of the defendants or victims. Students from two law schools used the four factors to rate each case on a scale of 1 to 5, with 5 being the most egregious. *Id.* at 103-104, n. 209. The study also allowed participants to rate the overall egregiousness of each case on a scale of 1 to 5 to capture the general subjective reaction of each participant. *Id.* at 103.

<sup>30</sup> *See id.* at 3-4.

<sup>31</sup> *See* *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (citing *Furman v. Georgia*, 408 U.S. 239, 388 (1972) (Burger, J., dissenting)).

<sup>32</sup> *See* DONOHUE, *supra* note 20, at 5.

<sup>33</sup> *Id.* at 6.

likely to receive death sentences than white defendants.<sup>34</sup> Sixth, after receiving a death sentence, defendants who had murdered white victims were more likely to be executed than were those who murdered non-white victims, especially if the defendants themselves were minorities.<sup>35</sup> Finally, the study found arbitrariness based on geography, as death-eligible defendants in Waterbury, Connecticut were sentenced to death at much higher rates than were death-eligible defendants elsewhere in the state.<sup>36</sup>

By showing the Connecticut death penalty's arbitrary use in recent decades, the Donohue study helped lay the groundwork for the legislature to abolish capital punishment. On April 25, 2012, Connecticut Governor Dannel P. Malloy signed into law a repeal of Connecticut's death penalty, making it the seventeenth state without capital punishment.<sup>37</sup> Connecticut also became the fifth state since 2007 to repeal its death penalty, joining New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), and Maryland (2013).<sup>38</sup>

But Connecticut's repeal abolished the death penalty only for future capital crimes, not for capital offenses committed before the

---

<sup>34</sup> *Id.* at 7.

<sup>35</sup> *Id.* at 7-8.

<sup>36</sup> *Id.* at 8.

<sup>37</sup> Caplan, *supra* note 8.

<sup>38</sup> *See States With and Without the Death Penalty*, *supra* note 3; *see also With Senate Vote, Connecticut Is on Track to End Capital Punishment*, N.Y. TIMES (Apr. 5, 2012), <http://www.nytimes.com/2012/04/06/nyregion/death-penalty-repeal-bill-passes-connecticut-senate.html> [hereinafter *Connecticut on Track*].



repeal's effective date.<sup>39</sup> This means that a defendant who committed a capital offense before April 25, 2012 could still be sentenced to

---

<sup>39</sup> CONN. GEN. STAT. § 53a-46a(a) (2012) provides: "A person shall be subjected to the penalty of death for a capital felony committed prior to April 25, 2012 . . . only if a hearing is held in accordance with the provisions of this section.":

CONN. GEN. STAT. § 53a-45(a) (2012) provides: "Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a, unless it is a capital felony committed prior to April 25, 2012, punishable in accordance with subparagraph (A) of subdivision (1) of section 53a-35a, murder with special circumstances committed on or after April 25, 2012, punishable as a class A felony in accordance with subparagraph (B) of subdivision (1) of section 53a-35a, or murder under section 53a-54d." In other words, murder is a class A felony (maximum of life) unless the death sentence is imposed under § 53a-46.

CONN. GEN. STAT. § 53a-35a (2012) provides: "For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines the crime specifically provides otherwise, the term shall be fixed by the court as follows: (1) (A) For a capital felony committed prior to April 25, 2012 under the provisions of section 53a-54b in effect prior to April 25, 2012, a term of life imprisonment without the possibility of release unless a sentence of death is imposed in accordance with section 53a-46a, or (B) for the class A felony of murder with special circumstances committed on or after April 25, 2012 under the provisions of section 53a-54b in effect on or after April 25, 2012, a term of life imprisonment without the possibility of release[.];";

CONN. GEN. STAT. § 53a-54b (2012) (defining capital felony, or "murder with special circumstances," as (1) murder of a public officer, (2) murder for hire, (3) murder when defendant had previously been convicted of murder or felony-murder, (4) murder when defendant was serving a sentence of life imprisonment, (5) murder during the course of a kidnapping, (6) murder accompanied by first-degree sexual assault, (7) murder of two or more persons at the same time, or (8) murder of a person under sixteen years of age); CONN. GEN. STAT. § 53a-46b(a) (2012) (providing for automatic review of death sentences by state

capital punishment and executed today. Accordingly, Connecticut continues to maintain its death row, which now houses eleven adult males.<sup>40</sup>

### B. *Current State of the Law of Prospective Death Penalty Repeals*

Other than Connecticut, New Mexico and Maryland are the only states to have prospectively repealed the death penalty while keeping their existing death row intact.<sup>41</sup> New Jersey's legislature completely abolished the death penalty in 2007 by repealing all statutory provisions concerning capital punishment.<sup>42</sup> Illinois's legislature completely abolished the death penalty in 2011 and redirected all capital punishment funds to the families of homicide or murder victims and the training of law enforcement personnel.<sup>43</sup> Illinois Governor Pat Quinn then commuted the sentences of the fifteen inmates on death row to life without parole.<sup>44</sup> The New York Court of Appeals found New York's death penalty statute to be unconstitutional in 2004, and lawmakers have not since moved to amend or reinstate it.<sup>45</sup>

---

Supreme Court in conjunction with direct appeal); CONN. GEN. STAT. § 54-100 (2012) (providing that the method of inflicting the death penalty shall be by lethal injection).

<sup>40</sup> *Conn. Dep't of Corr. FAQ*, *supra* note 11.

<sup>41</sup> *See States With and Without the Death Penalty*, *supra* note 3.

<sup>42</sup> *See* N.J. STAT. § 2C:11-3 (2007) (amended to delete current statutory subsections c. through h., effectively eliminating the death penalty and replacing it with life imprisonment without eligibility for parole in certain circumstances); *see also* N.J. STAT. §§ 2A:165-1 to 2A:165-12 (2007); N.J. STAT. §§ 2C:49-1 to 2C:49-12 (2007) (repealed by L.2007, c. 204, § 7, eff. Dec. 17, 2007).

<sup>43</sup> 2011 Ill. Laws 7778-79 (Reg. Sess.) (under "Public Act 96-1543"), S.B. 3539, 96th Gen. Assemb., Reg. Sess. (Ill. 2011), *available at* <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=096-1543>.

<sup>44</sup> Ray Long, *Quinn Signs Death Penalty Ban, Commutes 15 Death Row Sentences to Life*, CHI. TRIB. (Mar. 9, 2011, 12:41 PM), [http://newsblogs.chicagotribune.com/clout\\_st/2011/03/quinn-signs-death-penalty-ban-commutes-15-death-row-sentences-to-life.html](http://newsblogs.chicagotribune.com/clout_st/2011/03/quinn-signs-death-penalty-ban-commutes-15-death-row-sentences-to-life.html).

<sup>45</sup> *See* *People v. LaValle*, 817 N.E.2d 341, 368 (N.Y. 2004); *see also* *People v. Taylor*, 878 N.E.2d 969, 979 (N.Y. 2007); Applebome, *supra* note 17.

In contrast, New Mexico's repeal, effective since July 1, 2009, mirrors Connecticut's prospective repeal and benefits only those who committed aggravated first-degree murder on or after the repeal's effective date.<sup>46</sup> New Mexico's death row houses two inmates whose sentences went unchanged.<sup>47</sup> Like Connecticut, at the time of the repeal, New Mexico had executed only one person since it reinstated the death penalty in 1979.<sup>48</sup>

Maryland, the first state south of the Mason-Dixon Line to abolish capital punishment, also prospectively repealed its death penalty, beginning October 1, 2013.<sup>49</sup> The repeal did not apply to the four men on Maryland's death row, but in 2014 Maryland governor Martin O'Malley commuted these remaining death sentences to life without parole.<sup>50</sup> But, unlike New Mexico and Connecticut, Maryland

---

<sup>46</sup> See H.B. 285, 49th Leg., Reg. Sess. (N.M. 2009), available at <http://www.nmlegis.gov/Sessions/09%20Regular/final/HB0285.pdf> (abolishing the death penalty but providing, in relevant part, that "[t]he provisions of this act apply to crimes committed on or after July 1, 2009.").

<sup>47</sup> See *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES (Mar. 18, 2009), <http://www.nytimes.com/2009/03/19/us/19execute.html>.

<sup>48</sup> See *Number of Executions by State and Region*, supra note 5. Child killer Terry Clark was executed in New Mexico in 2001. *Death Penalty Is Repealed in New Mexico*, supra note 47. Before signing the prospective repeal into law, New Mexico Governor Bill Richardson expressed concerns about the high costs of death penalty litigation and the burden on the state budget, in addition to the unnerving frequency with which wrongful convictions occurred. Ian Urbina, *Citing Costs, States Consider End to Death Penalty*, N.Y. TIMES (Feb. 24, 2009), <http://www.nytimes.com/2009/02/25/us/25death.html?pagewanted=all>.

<sup>49</sup> See S.B. 276, 2013 Gen. Assemb., 2013 Reg. Sess. § 5 (Md. 2013), available at <http://mgaleg.maryland.gov/webmga/frmMain.aspx?stab=01&pid=billpage&tab=suobject3&id=SB0276&ys=2013RS>; see also *Maryland Abolishes Death Penalty as Governor Signs Bill into Law*, GUARDIAN (May 2, 2013), <http://www.theguardian.com/world/2013/may/02/maryland-abolishes-death-penalty-governor-law> [hereinafter *Maryland Governor Signs Bill*].

<sup>50</sup> See Alan Blinder, *Life Sentences for Last Four Facing Death in Maryland*, N.Y. TIMES (Dec. 31, 2014), [http://www.nytimes.com/2015/01/01/us/maryland-governor-omalley-commutes-death-sentences-emptying-death-row.html?ref=us&\\_r=0](http://www.nytimes.com/2015/01/01/us/maryland-governor-omalley-commutes-death-sentences-emptying-death-row.html?ref=us&_r=0); S.B. 276, 2013 Gen. Assemb., 2013 Reg. Sess. § 3 (Md. 2013) (amending § 7-601), available at

does not allow any new death sentences, regardless of when the offense was committed relative to the repeal's effective date.<sup>51</sup> Maryland's last execution occurred in 2005.<sup>52</sup>

### 1. The Case of New Mexico: *State v. Astorga*

Whether prospective repeal violates the Eighth Amendment would be an issue of first impression in both Connecticut and the U.S. Supreme Court. Thus far, the only state to decide the issue is New Mexico.<sup>53</sup> (The Connecticut Supreme Court, in *State v. Santiago*, recently refused to overrule its past decisions that the death penalty is per se constitutional, but it did not address the constitutionality of prospective repeal on point.<sup>54</sup>

In *State of New Mexico v. Astorga*, defendant Michael Astorga faced charges for the highly publicized 2006 murder of a police

<http://mgaleg.maryland.gov/webmga/frmMain.aspx?stab=01&pid=billpage&tab=subject3&id=SB0276&ys=2013RS>; *Maryland Governor Signs Bill*, *supra* note 49.

<sup>51</sup> S.B. 276, 2013 Gen. Assemb., 2013 Reg. Sess. § 3 (Md. 2013) (amending § 2-201 to repeal death sentencing procedure), *available at* <http://mgaleg.maryland.gov/webmga/frmMain.aspx?stab=01&pid=billpage&tab=subject3&id=SB0276&ys=2013RS>.

<sup>52</sup> *Capital Punishment History: Persons Executed in Maryland Since 1923*, MD. DEP'T OF PUB. SAFETY & CORRECTIONAL SERVICES, [http://www.dpscs.state.md.us/publicinfo/capitalpunishment/demographics\\_persons1923.shtml](http://www.dpscs.state.md.us/publicinfo/capitalpunishment/demographics_persons1923.shtml) (last visited Jan. 21, 2014).

<sup>53</sup> See Alaine Griffin, *Death Penalty Repeal Changes the Legal Landscape*, HARTFORD COURANT (Apr. 13, 2012), [http://articles.courant.com/2012-04-13/news/hc-death-penalty-repeal-impact-0415-20120413\\_1\\_death-row-death-penalty-julia-ashe/2](http://articles.courant.com/2012-04-13/news/hc-death-penalty-repeal-impact-0415-20120413_1_death-row-death-penalty-julia-ashe/2).

<sup>54</sup> See *State of Connecticut v. Eduardo Santiago (SC 17413)* (Conn. 2012), *available at* <http://www.jud.ct.gov/external/supapp/Cases/AROCR/CR305/305CR121.pdf>; see also *Case Detail: State of Connecticut v. Eduardo Santiago*, CONN. JUD. BRANCH, <http://appellateinquiry.jud.ct.gov/CaseDetail.aspx?CRN=11507&Type=PartyName> (last visited Dec. 16, 2014). Defendant Eduardo Santiago was convicted of capital felony and sentenced to death for participating in a murder-for-hire scheme in 2000. See *Case Description: State v. Eduardo Santiago, SC 17413*, JUD. DIST. OF HARTFORD, *available at* <http://blog.ctbriefsonline.com/?p=2164>.

officer during a traffic stop.<sup>55</sup> In 2010—after the state repealed capital punishment—a jury convicted Astorga of first-degree murder.<sup>56</sup> Before and during sentencing, Astorga challenged New Mexico’s prospective death penalty repeal under the Eighth Amendment, arguing that the repeal “sets forth an evolved standard of decency which makes it Cruel and Unusual Punishment . . . to impose the Death Penalty.”<sup>57</sup> But the New Mexico Supreme Court refused to make the repeal retroactive; in 2011, it ruled that a jury could consider the death penalty.<sup>58</sup> Also, in the past, New Mexico courts have recognized that the legislature is “invested with plenary legislative power”<sup>59</sup> such that “the power to define crimes and to establish criminal penalties is exclusively a legislative function.”<sup>60</sup>

---

<sup>55</sup> Barry Massey, *N.M. Supreme Court to Consider Astorga Case, Death Penalty Repeal*, ALBUQUERQUE J. (Aug. 18, 2011, 4:56 PM), <http://www.abqjournal.com/50999/news/state-supreme-court-to-look-at-death-penalty-in-astorga-case.html>.

<sup>56</sup> *See id.*

<sup>57</sup> Petitioner’s Brief at 9, *Astorga v. Candelaria*, No. 33,152 (N.M. Aug. 26, 2011); accord Kevin Barry, *From Wolves, Lambs (Part I): The Eighth Amendment Case for Gradual Abolition of the Death Penalty*, 66 FLA. L. REV. 313, 317-19 (2014).

<sup>58</sup> Russell Contreras, *Astorga Death Penalty Case Will Proceed*, LAS CRUCES SUN-NEWS (Sept. 2, 2011, 3:36 AM), [http://www.lcsun-news.com/las\\_cruces-news/ci\\_18809641](http://www.lcsun-news.com/las_cruces-news/ci_18809641).

<sup>59</sup> *State v. Thompson*, 260 P.2d 370, 374 (N.M. 1953) (noting that defining crime and prescribing punishment are legislative functions).

<sup>60</sup> *State v. Martinez*, 137 P.3d 1195, 1197 (N.M. Ct. App. 2006). The New Mexico Supreme Court elaborated in *Thompson*:

It is no part of the duty of the courts to inquire into the wisdom, the policy, or the justness of an act of the legislature. Our duty is to ascertain and declare the intention of the legislature, and to give effect to the legislative will as expressed in the laws. Every legislative act comes before this court surrounded with the presumption of constitutionality, and this presumption continues until the act under review clearly appears to contravene some provision of the Constitution. The courts are by the constitution not made critics of the legislature, but rather guardians of the Constitution; and, though the courts might have a doubt as to the

The Connecticut Supreme Court might follow New Mexico's lead. Connecticut even recognized that "the New Mexico ban is prospective only and no clemency has been granted to convicted capital offenders, leaving that state's existing death row intact. Given that circumstance, it is unlikely that the New Mexico legislature was convinced that the death penalty is intolerable under any and all circumstances."<sup>61</sup> But, even if the ruling of the New Mexico Supreme Court could be persuasive, Connecticut courts are not bound to follow it.<sup>62</sup>

## 2. Connecticut Precedent: *Dortch v. State*

In the past, Connecticut enforced prospective amendments to its death penalty statutes—*Dortch v. State* is one such example. In 1951, the Connecticut legislature prospectively amended § 8351 of the state's death penalty statute.<sup>63</sup> Before the amendment, the death penalty was mandatory for first-degree murder convictions.<sup>64</sup> After the amendment, a jury could impose either the death penalty or life in prison without parole for first-degree murder.<sup>65</sup>

---

constitutionality of the legislative act, all such doubts must be resolved in favor of the law.

*Thompson*, 260 P.2d at 374 (internal citations omitted).

<sup>61</sup> *State v. Rizzo*, 31 A.3d 1094, 1167 n. 88 (Conn. 2011).

<sup>62</sup> *See State v. Jenkins*, 3 A.3d 806, 840 (Conn. 2010) (reasoning that in construing the contours of the state constitution, the Connecticut Supreme Court looks to decisions of other state courts only as persuasive authority); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 421 (Conn. 2008) (reasoning that sister-state decisions are one of six factors the Connecticut Supreme Court considers when construing the contours of the Connecticut constitution—as provided by *State v. Geisler*, 222 Conn. 672, 685 (Conn. 1992)—but also that “not every *Geisler* factor is relevant in all cases.”) (citations omitted).

<sup>63</sup> *See* CONN. GEN. STAT. § 2463c (Supp. 1953) (amending CONN. GEN. STAT. § 8351); *see also* *Dortch v. State*, 110 A.2d 471, 475-76 (Conn. 1954).

<sup>64</sup> *See* GEN. § 2463c; *see also* *Dortch*, 110 A.2d at 476.

<sup>65</sup> *See* GEN. § 2463c; *see also* *Dortch*, 110 A.2d at 475-76.

In *Dortch v. State*, a jury convicted a man of first-degree murder in 1950 (before the amendment's effective date of October 1, 1951).<sup>66</sup> The conviction automatically subjected him to the death penalty. After the amendment passed, he argued on appeal that he was denied equal protection and due process in violation of the state and federal constitutions because those who committed murder on the same day, but who were tried and sentenced after October 1, 1951, might "escape with life imprisonment."<sup>67</sup> The Connecticut Supreme Court held that, because the legislature "expressed no intent that [the amendment] should operate retrospectively," the amendment had no retrospective effect.<sup>68</sup>

Because the petitioner committed his capital offense before the amendment's effective date, he could not benefit from the new amendment:

As the law now stands, the penalty for all first degree murders committed prior to October 1, 1951 is death; for all first degree murders committed thereafter, the penalty is either death or life imprisonment. It follows that the [petitioner] is being treated in exactly the same

---

<sup>66</sup> *Dortch*, 110 A.2d at 472, 476. On September 3, 1949, the petitioner, while intoxicated, attacked his former lover and stabbed her 23 times with a hunting knife until she died. *Id.* at 473-74. He then fled the scene, hid behind a stone wall nearby, and attempted to kill himself. *Id.* at 474. Petitioner in guilt proceedings testified that soon after the murder, he surrendered at a police station. *Id.* at 474-75.

<sup>67</sup> *Id.* at 476.

<sup>68</sup> *Id.* (citing CONN. GEN. STAT. § 8872 (1949) (now CONN. GEN. STAT. § 54-194), which provides: "The repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect."); *see also* CONN. GEN. STAT. § 8890 (1949) (now CONN. GEN. STAT. § 1-1(t) (1949), which provides: "The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed.").

manner as all others who committed murder in the first degree prior to October 1, 1951.<sup>69</sup>

Thus, the petitioner's death sentence was mandatory, regardless of when the trial or sentencing occurred.<sup>70</sup> The court held that the petitioner received equal protection of the laws and had not been denied due process.<sup>71</sup>

Similarly, a Connecticut court today might apply *Dortch* to those who committed a capital offense before April 25, 2012. Just as the 1951 amendment was not explicitly retroactive, the 2012 repeal is not explicitly retroactive.<sup>72</sup> Also, the 2012 repeal, like the 1951 amendment, allows capital offenders a new option of life imprisonment instead of death row.

But a Connecticut court today could very well stray from *Dortch* for several reasons. First, *Dortch* addressed a claim under the Fourteenth Amendment, not the Eighth Amendment, so it is merely persuasive, not binding, authority.<sup>73</sup> Second, *Dortch's* 1951 amendment allowed either the death penalty or life imprisonment for offenses committed on or after its effective date;<sup>74</sup> here, the 2012

---

<sup>69</sup> *Dortch*, 110 A.2d at 476-77.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 477. The Connecticut Supreme Court also cited a 1936 case, *Simborski v. Wheeler*, 183 A. 688 (Conn. 1936), which held that the petitioner—who was sentenced to be hanged before the state changed its method of execution to electrocution—could still lawfully be hanged because the repealed statute remained in full effect. *Dortch*, 110 A.2d at 476.

<sup>72</sup> See generally 2012 Conn. Pub. Acts 13 (Reg. Sess.) (under “Public Act No. 12-5”), S.B. 280, 2012 Gen. Assemb., Feb. 2012 Reg. Sess. (Conn. 2012), available at [http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=280&which\\_year=2012&SUBMIT1.x=13&SUBMIT1.y=5&SUBMIT1=Normal](http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=280&which_year=2012&SUBMIT1.x=13&SUBMIT1.y=5&SUBMIT1=Normal) (last visited Nov. 24, 2014).

<sup>73</sup> See *Dortch*, 110 A.2d at 475-76; see also *Carey v. Musladin*, 549 U.S. 70, 79 (2006) (reasoning that as a general rule, *stare decisis* “directs [the Court] to adhere not only to the holdings of . . . prior cases, but also [to] their explications of the governing rules of law”) (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986)).

<sup>74</sup> See *Dortch*, 110 A.2d at 475-76.



repeal takes the death penalty off the table altogether. Third, times have changed: the 2012 prospective repeal shows that public opinion in Connecticut is less accepting of the death penalty today than it was in the 1950s.<sup>75</sup> So, while the 1951 amendment and the 2012 repeal may be structurally similar, based on *Dortch*, a Connecticut court would not be bound to uphold the 2012 repeal against defendants like the eleven inmates on death row under the Eighth Amendment.

## II. CONSTITUTIONALITY UNDER THE EIGHTH AMENDMENT

Connecticut's prospective death penalty repeal would probably survive an Eighth Amendment challenge. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>76</sup> Even after repeal, a court would likely find that the death penalty is a proportional, not "cruel and unusual," punishment in Connecticut because (1) the state's death penalty statute aims to achieve consistent, individualized sentencing; and (2) the remaining death row inmates would likely not be treated as a special class of offenders exempt from capital punishment.<sup>77</sup> But the prospective nature of the repeal came from political compromise. While the 2012 repeal shows progress, it is nevertheless troubling that lawmakers are giving up lives now to abolish capital punishment in the future.

---

<sup>75</sup> See *State v. Ross*, 646 A.2d 1318, 1378 (Conn. 1994) (reasoning that "public opinion must be gleaned from a society's actual record in carrying out the death penalty").

<sup>76</sup> U.S. CONST. amend. VIII. "Cruel and unusual" was lifted from the English Bill of Rights of 1688. See *In re Kemmler*, 136 U.S. 436, 443-44, 446 (1890) (citing 1 St. Wm. & Mary, c. 2 (Eng.)). The Eighth Amendment is applicable to the States by way of the Due Process Clause of the Fourteenth Amendment. See *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008); see also *Robinson v. California*, 370 U.S. 660, 675 (1962). If a state supreme court affirms the validity of the prospective repeal of the death penalty, a federal court cannot disturb its judgment unless it finds "some right guaranteed by the Federal Constitution was denied[.]" *Howard v. Fleming*, 191 U.S. 126, 135 (1903).

<sup>77</sup> See *infra* pp. 17-30.

*A. Central to the Eighth Amendment: Proportionality*

Because the words “cruel and unusual” are not precise, the U.S. Supreme Court interprets the Eighth Amendment in “a flexible and dynamic manner” as shifting public opinion becomes “enlightened by a humane justice.”<sup>78</sup> Cruel and unusual punishment easily includes “inherently barbaric punishments” such as torture.<sup>79</sup> However, the concern with torture is more about prohibiting excessive punishment than pain:

[W]hy do we, and why did the Framers care so much about pain? . . . The true significance of the thumbscrew, of the iron boot, of the stretching of limbs, is that they treat members of the human race as nonhumans, as objects to be hurt and then discarded. . . . Mutilations and tortures are not unconstitutional merely because they are painful—they would not, I submit, be saved from unconstitutionality by having the convicted person sufficiently anesthetized such that no physical pain were felt; rather, they are unconstitutional because they are inconsistent with the fundamental premise of the [E]ighth [A]mendment that even the vilest criminal remains a human being possessed of common human dignity.<sup>80</sup>

Thus, prohibiting cruel and unusual punishment is about “guarantee[ing] individuals the right not to be subjected to excessive sanctions.”<sup>81</sup>

---

<sup>78</sup> *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)); *accord Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

<sup>79</sup> *Graham v. Florida*, 560 U.S. 48, 59 (2010); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878).

<sup>80</sup> Brennan, *supra* note 2, at 7 (internal quotation marks omitted).

<sup>81</sup> *See Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)); *accord Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Gregg*, 428 U.S. at 173.

Freedom from excessive sanctions “flows from the basic precept of justice that punishment for crime should be *proportioned* to both the offender and the offense.”<sup>82</sup> For instance, the state cannot impose capital punishment for a petty crime or fine, or imprison someone for being sick.<sup>83</sup> Put simply, proportional punishment is central to the Eighth Amendment.<sup>84</sup> Proportionality breaks down into two paths of Eighth Amendment analysis.<sup>85</sup>

### 1. Proportionality I: Procedural Safeguards for Consistency and Individualization

First, proportionality prohibits the arbitrary and capricious imposition of punishment by requiring procedural safeguards to guide the discretion of sentencing authorities.<sup>86</sup> For example, the Court in *Furman v. Georgia* invalidated capital sentencing procedures that, due to their lack of specificity, created a substantial risk that the death penalty would be inflicted in an arbitrary and capricious manner.<sup>87</sup>

The Georgia death penalty statute in *Furman* was problematic because it failed to mention any aggravating or mitigating circumstances that allowed juries to “reach a finding of the defendant’s guilt and then, without any guidance or direction, decide whether he should live or die.”<sup>88</sup> While the Supreme Court does not prescribe any single structure for capital punishment systems, states must avoid arbitrary and capricious capital punishment, at least, by focusing the discretion of sentencing authorities.<sup>89</sup> “[T]he concerns

---

<sup>82</sup> *Miller*, 132 S.Ct. at 2463 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)) (emphasis added) (internal quotation marks omitted).

<sup>83</sup> See *Robinson v. California*, 370 U.S. 660, 676 (1962).

<sup>84</sup> *Miller*, 132 S.Ct. at 2463 (citing *Graham*, 560 U.S. at 59).

<sup>85</sup> *Graham*, 560 U.S. at 59-61 (2010).

<sup>86</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 302-04 (1987); *Furman v. Georgia*, 408 U.S. 239, 256, 274 (1972) (Douglas, J. and Brennan, J., concurring) (per curiam).

<sup>87</sup> See *Furman*, 408 U.S. at 239-40.

<sup>88</sup> *Gregg v. Georgia*, 428 U.S. 153, 197 (1976).

<sup>89</sup> See *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) (“As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.”).

expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.<sup>90</sup>

To ensure that sentencing authorities will not have unconstitutionally unbridled discretion, capital punishment statutes must meet the dual requirements of *consistency* and *individualized consideration*.<sup>91</sup> To achieve *consistency* in sentencing, a state must statutorily narrow the pool of persons eligible for death row by either (1) narrowly defining capital offenses (e.g., homicide through an intentional mail-bombing) or (2) broadly stating the offense but providing a finite list of aggravating circumstances (any one of which could make a defendant death-eligible).<sup>92</sup> For instance, a statute could require that at least one aggravating circumstance be found before the death penalty could be imposed.<sup>93</sup> And an aggravating circumstance might be that the capital offense occurred during a burglary or arson, or that it involved the murder of a police officer, judge, or district attorney.<sup>94</sup>

Then, when choosing who from the pool of death-eligible defendants will receive capital punishment, the sentencing authority must give each defendant *individualized consideration* by weighing the aggravating circumstances with any statutory or non-statutory mitigating circumstances (e.g., the character and record of the individual offender, the circumstances of the particular offense, etc.).<sup>95</sup> Sentencing authorities must consider the individual's personal

---

<sup>90</sup> *Gregg*, 428 U.S. at 195.

<sup>91</sup> See *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

<sup>92</sup> See *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Lowenfield v. Phelps*, 484 U.S. 231, 231 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (plurality opinion); *United States v. Cheely*, 36 F.3d 1439, 1449 (9th Cir. 1994).

<sup>93</sup> See *Blystone v. Pennsylvania*, 494 U.S. 299, 302 (1990); see also *Gregg*, 428 U.S. at 198.

<sup>94</sup> *Gregg*, 428 U.S. at 198.

<sup>95</sup> *Kennedy*, 554 U.S. at 436; *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion) (holding that in any capital case, a defendant has wide latitude to raise any aspect of his or her character or record as a mitigating circumstance that

history and the full scope of the offense before delivering a death sentence.<sup>96</sup> The Court provides no rules for how to balance aggravating with mitigating circumstances in capital sentencing.<sup>97</sup> But to further promote individual consideration, the Court recommends that states use bifurcated hearing approach that addresses guilt and sentencing in separate proceedings.<sup>98</sup> Moreover, because the death penalty is “unique in its severity and irrevocability,” the Court requires that it be “reserved for a small number of extreme cases.”<sup>99</sup>

Here, the Court would likely find Connecticut’s current capital punishment statute sufficient to achieve consistency and individualization. In *State v. Ross*, the Connecticut Supreme Court upheld the constitutionality of the state’s death penalty statute (pre-repeal).<sup>100</sup> The court approved Connecticut’s sentencing procedure,

---

offers a basis for a sentence less than death); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion).

<sup>96</sup> See *Miller v. Alabama*, 132 S.Ct. 2455, 2463-64 (2012); see also *Sumner v. Shuman*, 483 U.S. 66, 72 (1987); *California v. Brown*, 479 U.S. 538, 541 (1987) (quoting *Woodson*, 428 U.S. at 304, for the proposition that considering mitigating evidence is a “constitutionally indispensable part of the process of inflicting the penalty of death”); *Lockett*, 438 U.S. at 604 (“[The] qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”); *Woodson*, 428 U.S. at 303 (holding that the Constitution mandates “particularized consideration” of the offender’s character and record before the death sentence can be imposed).

<sup>97</sup> *Franklin v. Lynaugh*, 108 S.Ct. 2320, 2330 (1998) (plurality opinion) (noting that the Court has “never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required”).

<sup>98</sup> *Gregg*, 428 U.S. at 195 (“As a general proposition, [the concerns of *Furman*] are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of information.”).

<sup>99</sup> See *id.* at 187, 181 (citing *Furman v. Georgia*, 408 U.S. 239, 382 (1972) (Burger, C.J., dissenting)); accord *Kennedy*, 554 U.S. at 436-37; *Roper v. Simmons*, 543 U.S. 568 (2005); see also *Brown*, 479 U.S. at 541 (“[D]eath penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.”).

<sup>100</sup> *State v. Ross*, 646 A.2d 1318, 1351 (Conn. 1994). While the Connecticut Supreme Court has been willing to consider claims that the Connecticut constitution provides broader protection to capital defendants than the federal Constitution,

which was structured as a three-tiered pyramid where each tier narrowed the class of death-eligible defendants.<sup>101</sup>

The “first tier” of the statute required a bifurcated sentencing proceeding for those found guilty of a capital felony.<sup>102</sup> The “second tier” required the sentencing authority to find, beyond a reasonable doubt, at least one statutory aggravating factor.<sup>103</sup> Finally, the “third tier” required the trier to assess, by a preponderance of the evidence, the existence of any mitigating factors.<sup>104</sup> A defendant could be death-eligible only if at least one aggravating factor and no mitigating factors existed, or if the aggravating factor outweighed the mitigating factor; otherwise, if the mitigating factor outweighed the aggravating factor, the death penalty was disallowed.<sup>105</sup> Thus, Connecticut’s three-

---

“those claims rarely have been successful.” *State v. Rizzo*, 31 A.3d 1094, 1140 (Conn. 2011).

<sup>101</sup> *Ross*, 646 A.2d at 1350.

<sup>102</sup> *Id.* (citing CONN. GEN. STAT. § 53a-46a(b) (2011)).

<sup>103</sup> *Id.* (citing GEN. § 53a-46a(b), (e), (f), and (h)).

<sup>104</sup> *Id.* (citing GEN. § 53a-46a(e)).

<sup>105</sup> Connecticut has the sentencing authority weigh aggravating with mitigating factors as follows:

(f) If the jury or, if there is no jury, the court finds that (1) none of the factors set forth in subsection (h) exist, (2) one or more of the aggravating factors set forth in subsection (i) exist and (3)(A) no mitigating factor exists or (B) one or more mitigating factors exist but are outweighed by one or more aggravating factors set forth in subsection (i), the court shall sentence the defendant to death.

(g) If the jury or, if there is no jury, the court finds that (1) any of the factors set forth in subsection (h) exist, or (2) none of the aggravating factors set forth in subsection (i) exists, or (3) one or more of the aggravating factors set forth in subsection (i) exist and one or more mitigating factors exist, but the one or more aggravating factors set forth in subsection (i) do not outweigh the one or more mitigating factors, the court shall impose a sentence of life imprisonment without the possibility of release.

*See* GEN. § 53a-46a(f)-(g); *see also* *Ross*, 646 A.2d at 1350-51 (citing GEN. § 53a-46a(f)).

tiered pyramid sought consistency by narrowing the pool of death-eligible defendants in the first two tiers and individualization by considering mitigating factors in the third and final tier. These pre-repeal sentencing procedures were retained in Connecticut's 2012 prospective repeal.<sup>106</sup> And, because the Connecticut Supreme Court found that this capital sentencing structure achieves consistency and individual consideration before, it might make the same finding today.

But the U.S. Supreme Court in *Gregg v. Georgia* also left a door open, as “each distinct [capital punishment] system must be examined on an individual basis.”<sup>107</sup> Just because a sentencing system is structured like that of Georgia in *Gregg* does not mean it would inevitably satisfy *Furman*. Thus, while Connecticut's pre-2012 three-tiered pyramid was intended to prevent arbitrary and capricious death sentences, it is now operating within an entirely different context—a post-repeal system in which eligibility for capital punishment turns on whether an offense was committed on or before the arbitrary date of April 25, 2012. Death penalty proponents could argue that before April 25, 2012, capital offenders were on notice that death was a possible sentence.<sup>108</sup> But if the death penalty was repealed in Connecticut precisely because it was arbitrarily and capriciously imposed, then why hold onto a vestige of that dysfunctional system?<sup>109</sup>

---

<sup>106</sup> 2012 Conn. Pub. Acts 13 (Reg. Sess.) (under “Public Act No. 12-5”), S.B. 280 § 5, 2012 Gen. Assemb., Feb. 2012 Reg. Sess. (Conn. 2012), available at [http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=280&which\\_year=2012&SUBMIT1.x=13&SUBMIT1.y=5&SUBMIT1=Normal](http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=280&which_year=2012&SUBMIT1.x=13&SUBMIT1.y=5&SUBMIT1=Normal) (amending subsection (a) of § 53a-46a of the General Statutes).

<sup>107</sup> *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

<sup>108</sup> See *Dortch v. State*, 110 A.2d 471, 476-77 (Conn. 1954).

<sup>109</sup> The death penalty was repealed because lawmakers found it hypocritical for the state to “conclude that violence is a deterrent to violence and that it could make the point that killing is wrong by killing,” especially when “the death penalty in the State of Connecticut has at various times been described as arbitrary, biased, capricious, random, haphazard, discriminatory and disparate, among other things.” CONN. GEN. ASSEMB., CONN. S. SESSION TR., April 4, 2012, 2012 SESS. 44 (2012), available at <http://www.cga.ct.gov/2012/trn/S/2012STR00404-R00-TRN.htm>

## 2. Proportionality II: Special Classes of Offenders and Offenses

The second way to analyze proportionality examines certain classes of offenders (e.g. children and the mentally disabled) and offenses (e.g. non-homicide crimes) and categorically bans sentencing practices that mismatch the culpability of a class of offenders with the severity of a penalty.<sup>110</sup> In these types of cases, the Supreme Court looks to the “*evolving standards of decency* that mark the progress of a maturing society.”<sup>111</sup> The Court also exercises its general judicial discretion to determine whether a given punishment could be justified.

---

[hereinafter CONN. S. TR.] (statements by Senator Eric D. Coleman). Additionally, proponents argued that “the death penalty does not bring finality,” as the cost of maintaining death row and the litigation that follows a death sentence “plac[e] a tremendous burden on . . . [the state’s] law enforcement and . . . public defenders.” CONN. GEN. ASSEMB., CONN. H.R. SESSION TR., APRIL 11, 2012, 2012 SESS. 46-47 (2012), *available at* <http://www.cga.ct.gov/2012/trn/H/2012HTR00411-R00-TRN.htm> [hereinafter CONN. H.R. TR.] (statement by Representative Gerald Fox III). Thus, “by eliminating the death penalty we’re not letting any guilty person go free, but we are making sure that we do not execute anyone who is innocent,” for no one can deny that “the criminal justice system makes mistakes.” CONN. S. TR., *supra* note 109, at 279 (statement by Senator Gayle S. Slossberg).

<sup>110</sup> *See, e.g.*, *Miller v. Alabama*, 132 S.Ct. 2455, 2475 (2012) (finding life without parole unconstitutional for juvenile homicide offenders); *see Graham v. Florida*, 560 U.S. 48, 74 (2010) (finding life without parole unconstitutional for juvenile non-homicide offenders); *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (invalidating the death penalty for a crime “where the victim’s life was not taken”); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (invalidating the death penalty where the offender was under 18 years old at the time of the offense); *Atkins v. Virginia*, 536 U.S. 304, 304 (2002) (invalidating the death penalty for the mentally disabled); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (invalidating the death penalty for those who committed an offense while they were under 16-years-old); *Enmund v. Florida*, 458 U.S. 782 (1982) (finding the death penalty disproportionate to the offense of aiding and abetting a robbery during which a murder was committed if the offender did not himself or herself kill, attempt to kill, or intend to kill); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (finding the death penalty disproportionate punishment for rape of an adult woman).

<sup>111</sup> *See, e.g., Miller*, 132 S.Ct. at 2463 (internal citations omitted) (emphasis added).



### i. Evolving Standards of Decency

Because defining punishment involves a moral judgment, the Eighth Amendment's scope is not static, and the suitability of a punishment for certain people "must change as the basic mores of society change."<sup>112</sup> Evolving standards of decency are measured by "objective indicia" of society's standards, as expressed by state legislation and sentencing practices.<sup>113</sup> Thus, to determine whether a class of offenders should be categorically excluded from receiving the death penalty, the Court would analyze whether other states demonstrate a national consensus against that sentencing practice.<sup>114</sup> For example, in *Kennedy v. Louisiana*, the Court found a national consensus against making the crime of rape punishable by death.<sup>115</sup>

Here, in the case of Connecticut, the prospective death penalty repeal created a class consisting of those who committed a capital offense before April 25, 2012. But the Supreme Court would likely find no national consensus against capital punishment of such a class because more than half (thirty-two) of the states and the federal government continue to employ capital punishment against similar offenders.<sup>116</sup> Also, as previously discussed, New Mexico and Maryland's legislatures recently enacted similar prospective repeals.<sup>117</sup>

---

<sup>112</sup> *Kennedy*, 554 U.S. at 419 (quoting *Furman v. Georgia*, 408 U.S. 382 (1972) (Burger, C.J., dissenting)) (internal quotation marks omitted); *accord* *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

<sup>113</sup> *Graham*, 560 U.S. at 62 ("[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (quoting *Atkins v. Virginia*, 536 U.S. 304, 312)); *Kennedy*, 554 U.S. at 420; *Roper*, 543 U.S. at 563; *Coker*, 433 U.S. at 600; *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

<sup>114</sup> *See, e.g., Graham*, 560 U.S. at 48; *Roper*, 543 U.S. at 563-64.

<sup>115</sup> *See Kennedy*, 554 U.S. at 422-26.

<sup>116</sup> *See States With and Without the Death Penalty*, *supra* note 3; *Number of Executions by State and Region*, *supra* note 5. Here, "similar offenders" refers to adult capital offenders who are not mentally disabled, and who do not otherwise belong to a group of offenders that is specifically exempt from capital punishment.

<sup>117</sup> *See States With and Without the Death Penalty*, *supra* note 3.

On the other hand, just because most states actively use capital punishment does not necessarily mean that most states agree with carrying out death sentences after the repeal of capital punishment.<sup>118</sup> Likewise, the prospective repeals in New Mexico and Maryland do not show significant national consensus *for* the practice of maintaining death row after repeal. And, the very repeal of Connecticut's death penalty could itself constitute sufficient consensus against capital punishment, as nothing precludes the Court from measuring consensus within a state instead of on a national scale.

Nonetheless, the Court has cautioned that “[c]onsensus is not dispositive.”<sup>119</sup> The Court also looks to jury behavior as another “objective index of contemporary values” because juries are so directly involved in each case.<sup>120</sup> Since the prospective repeal in 2012, one Connecticut jury re-sentenced a defendant to capital punishment.<sup>121</sup> But, in the *Astorga* case in New Mexico, after weeks

---

<sup>118</sup> See *Graham*, 560 U.S. at 49 (“[T]hat many jurisdictions do not expressly prohibit the sentencing practice at issue is not dispositive because it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that such sentences would be appropriate.”).

<sup>119</sup> *Kennedy*, 554 U.S. at 421.

<sup>120</sup> *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 439-40 (1972) (Powell, J., dissenting)).

<sup>121</sup> The defendant, Richard Roszkowski, has been on death row since 2009. The original 2009 verdict of death was vacated later that year due to errors during the penalty phase of the trial. The new penalty proceeding, completed in 2014, ended with a renewed verdict of death. *State v. Roszkowski*, No. FBTCR06218479T, 2014 WL 279567, at \*1-2 (Conn. Super. Ct. Jan. 2, 2014); Jeff Cohen, *Despite Death Penalty Repeal, Conn. Hands Down a Death Sentence*, NPR (June 14, 2014), <http://www.npr.org/2014/06/14/321670966/despite-death-penalty-repeal-conn-hands-down-a-death-sentence>; see also Randall Beach, *Joshua Komisarjevsky Sent to Death Row for Deeds of ‘Unimaginable Horror and Savagery’ in Cheshire Slayings*, NEW HAVEN REG. (Jan. 27, 2012), <http://nhregister.com/articles/2012/01/27/news/doc4f22f2e2ea7d0712572476.txt>; *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008#2010> (last visited Jan. 21, 2014); *2012 Sentencing*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/2012-sentencing> (last visited Jan. 21, 2013).

of hearings and days of deliberations, the sentencing jury could not unanimously agree to sentence Astorga to death, and so the jury sentenced him to life in prison.<sup>122</sup> A sentencing jury in Connecticut could likewise choose to impose life in prison without parole, despite the continuing availability of the death penalty.

## ii. Justification of Punishment and Culpability

Because “the task of interpreting the Eighth Amendment remains [the Court’s] responsibility,”<sup>123</sup> the Court also evaluates the proportionality of capital punishment to a class of offenders based on its general exercise of judicial discretion.<sup>124</sup> This exercise of general discretion weighs the culpability of offenders with the severity of punishment.<sup>125</sup> In its inquiry, the Court considers “whether the challenged sentencing practice serves legitimate penological goals.”<sup>126</sup> As the Court stated in *Gregg*:

[T]he Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment . . . [any] sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.<sup>127</sup>

---

<sup>122</sup> *Astorga Will Not Be Put to Death*, ALBUQUERQUE J. (May 18, 2012, 4:16 PM), <http://www.abqjournal.com/107496/abqnewsseeker/astorga-jurors-express-concern-for-their-safety.html>. Federal juries have also been more inclined in recent years to impose life without parole instead of death. Seelye, *supra* note 6. According to one study, since 2000, juries have favored life over death by a ratio of two to one. *Id.*

<sup>123</sup> *Graham v. Florida*, 560 U.S. 48, 67 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 575 (2005)) (internal quotation marks omitted).

<sup>124</sup> *Kennedy*, 554 U.S. at 421 (noting that the Court will also look to its own interpretation of the Eighth Amendment’s “text, history, meaning, and purpose”).

<sup>125</sup> *Graham*, 560 U.S. at 67; *Roper*, 543 U.S. at 568.

<sup>126</sup> *Graham*, 560 U.S. at 67.

<sup>127</sup> *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976) (internal citations omitted).

Likewise, in *Furman* the Court reasoned that a severe punishment is unconstitutionally excessive if it is unnecessary:

The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.<sup>128</sup>

So, what is the Connecticut legislature's justification for continuing the death penalty for some, but not for others? The *Gregg* Court reasoned that the death penalty is "said to serve two principal purposes: retribution and deterrence of capital crimes by prospective offenders."<sup>129</sup> Of these two purposes, retribution is more likely to "contradict the law's own ends," especially in capital cases, because "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."<sup>130</sup>

In Connecticut, executing the eleven on death row cannot be justified under a theory of deterrence. Anyone who commits a capital offense after April 25, 2012 could not be deterred because he or she would not be eligible for capital punishment. Thus, under *Gregg*, retribution is likely the main justification for maintaining death row.

In debates over the repeal, Connecticut legislators cited retribution as justification for capital punishment. One representative stated, "I am for the Connecticut death penalty because it is

---

<sup>128</sup> *Furman v. Georgia*, 408 U.S. 239, 279 (1972) (Brennan, J., concurring) (citations omitted).

<sup>129</sup> *Gregg*, 428 U.S. at 183. In addition to retribution and deterrence, the Court also recognizes isolation and rehabilitation as proper justifications of punishment. *Furman*, 408 U.S. at 343 (Marshall, J., concurring).

<sup>130</sup> *Kennedy v. Louisiana*, 554 U.S. 420 (2008).

retribution which accomplishes justice.”<sup>131</sup> Another stated, “I continue to be hung up on the thought that this State made a promise to the families of the 11 people on death row, and we made a promise to the victims’ families that those villains would receive the death penalty, and I truly believe we are breaking that promise by the passage of this bill.”<sup>132</sup> Similarly, another stated, “this debate shouldn’t be about emotions. . . . [i]t’s about retribution. It’s about justice . . . .”<sup>133</sup>

But is retribution alone enough to justify execution? In *Gregg*, the U.S. Supreme Court suggests that retribution alone could justify capital punishment in Connecticut: “Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men.”<sup>134</sup> The Court elaborated further:

[R]etribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they “deserve,” then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.<sup>135</sup>

And, with social conditions differing from state to state, the Court in *Gregg* chose not to second-guess the Georgia legislature’s justifications for capital punishment:

---

<sup>131</sup>CONN. H.R. TR., *supra* note 109, at 82 (statement by Representative Lawrence Cafero).

<sup>132</sup> *Id.* at 365-66 (statement by Representative Penny Bacchiochi).

<sup>133</sup> *Id.* at 224 (statement by Representative Christopher Davis).

<sup>134</sup> *Gregg*, 428 U.S. at 183-84 (internal citations omitted).

<sup>135</sup> *Id.* at 183 (quoting *Furman*, 408 U.S. 239, 308 (1972) (Stewart, J., concurring)) (internal quotation omitted).

In sum, we cannot say that the judgment of the Georgia Legislature 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 dea[th] as a punishment for murder is not without justification and thus is not unconstitutionally severe.<sup>136</sup>

The Court would probably defer to the Connecticut legislature in the same way because the Court has never required a state to have more than one justification of punishment.<sup>137</sup> Thus, the Court could find that retribution alone is enough justification to continue capital punishment in Connecticut.<sup>138</sup>

Also, with respect to culpability, the Court might not treat Connecticut's eleven death row inmates as a special class of offenders, like it treats children and the mentally disabled, because these groups are fundamentally different. The Supreme Court has held that "children are constitutionally different from adults for purposes

---

<sup>136</sup> *Id.* at 186-87.

<sup>137</sup> *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("[P]unishment is justified under *one or more* of three principal rationales: rehabilitation, deterrence, and retribution.") (emphasis added).

<sup>138</sup> In *Furman*, Justice Marshall made a compelling argument in dicta that punishment for the sake of retribution alone was prohibited by the Eighth Amendment "if the 'cruel and unusual' language were to be given any meaning" and that the Court's recognition of retribution as a justification for punishment "does not mean that retribution may then become the State's sole end in punishing." *Furman*, 408 U.S. at 343-44 (Marshall, J., concurring). Otherwise, "all penalties selected by the legislature would [by] definition be acceptable means for designating society's moral approbation of a particular act" and the cruel and unusual language would be read out of the Constitution. *Id.* at 344 Despite this argument, the Court today still might defer to the state legislature if it finds that the death penalty could serve an isolation function. *Id.*

of sentencing”<sup>139</sup> because their immaturity and underdeveloped sense of responsibility, susceptibility to negative influences, and the transitory nature of their personality reduce their culpability, and it would be “misguided to equate the failings of a minor with those of an adult[.]”<sup>140</sup> Because juveniles have diminished culpability, the Court reasoned that the death penalty was not justified, noting that “the case for retribution is not as strong with a minor as with an adult.”<sup>141</sup> Similarly, the Court has held that having a mental disability diminishes personal culpability even if the offender can distinguish right from wrong because he or she “ha[s] diminished capacities to understand and process information . . . to abstract from mistakes and learn from experience, [and] to engage in logical reasoning . . . .”<sup>142</sup> This diminished capacity weakens the case for retribution and makes it less likely that the death penalty will have a deterrent effect.<sup>143</sup>

While the Supreme Court expanded the Eighth Amendment to protect minors<sup>144</sup> and the mentally disabled from execution,<sup>145</sup> it would probably not do so for the eleven adults on death row in Connecticut, whose culpability or blameworthiness did not lessen after the repeal. And, because the heart of the retribution rationale relates a given sentence directly to an offender’s blameworthiness, the Court would likely defer to the state legislature’s judgment that maintaining death row has retributive value in Connecticut.<sup>146</sup>

For these reasons, under this second proportionality analysis, the Supreme Court would probably not find that death is a punishment “mismatched” to the eleven inmates on Connecticut’s death row. No national consensus or pattern of jury verdicts contradicts such a practice, though the Court could measure consensus within the state

---

<sup>139</sup> *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012).

<sup>140</sup> *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

<sup>141</sup> *Id.* at 571.

<sup>142</sup> *Atkins v. Virginia*, 536 U.S. 305, 318 (2002). The Court further noted that “[t]heir deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.” *Id.* at 318.

<sup>143</sup> *Id.* at 318-19.

<sup>144</sup> *See Roper*, 543 U.S. at 551.

<sup>145</sup> *See Atkins*, 536 U.S. at 316.

<sup>146</sup> *See Graham v. Florida*, 560 U.S. 48, 71 (2010).

as well. Retribution alone might justify the punishment, and since the inmates' mental capacities are more developed than children and the mentally disabled, their culpability is fundamentally different.

### B. *The Politics of Repeal*

#### 1. A Compromise Statute: From Veto in 2009 to Approval in 2012

Connecticut's prospective death penalty repeal was largely a result of political maneuvering. 2012 did not mark Connecticut's first attempt to prospectively repeal the death penalty.<sup>147</sup> In 2009, the state senate and house of representatives—both led by Democrats—approved a bill that would have eliminated capital punishment for crimes committed on or after the bill's effective date but Governor M. Jodi Rell vetoed it.<sup>148</sup> A two-thirds vote by both houses would have overridden the veto, but the initial senate vote to pass the bill was so close (19 to 17) that overcoming the veto was not even attempted.<sup>149</sup>

Only three years later, the state's judiciary committee again introduced and approved a bill that replaced Connecticut's death penalty with life in prison without parole in all future cases.<sup>150</sup> In April 2012 the senate passed the bill (20 to 16).<sup>151</sup> Less than a week

---

<sup>147</sup> *Rell Vows to Veto Ban on Death Penalty in Connecticut*, N.Y. TIMES (May 22, 2009), <http://www.nytimes.com/2009/05/23/nyregion/connecticut/23death.html> [hereinafter *Rell Vows to Veto*]. Six times in the last twenty years, Connecticut's House of Representatives debated whether to continue the death penalty. See CONN. H.R. TR, *supra* note 109, at 82 (statement by Representative Lawrence Cafero).

<sup>148</sup> Press Release, State of Conn. Exec. Chambers, Governor Rell Vetoes HB 6578, An Act Concerning the Penalty for a Capital Felony (Jun. 5, 2009), available at <http://www.ct.gov/governorrell/cwp/view.asp?A=3675&Q=441204>; *Rell Vows to Veto*, *supra* note 147.

<sup>149</sup> See *Rell Vows to Veto*, *supra* note 147. The bill passed 90 to 56 in the house.

<sup>150</sup> *Substitute for Raised S.B. No. 280, Session Year 2012*, CONN. GEN. ASSEMB., [http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=280&which\\_year=2012&SUBMIT1.x=13&SUBMIT1.y=11&SUBMIT1=Normal](http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=280&which_year=2012&SUBMIT1.x=13&SUBMIT1.y=11&SUBMIT1=Normal) (last visited Jan. 21, 2014) (under "Bill History").

<sup>151</sup> *Connecticut on Track*, *supra* note 38.



later, the house also voted in favor of repeal (86 to 62).<sup>152</sup> On April 25, 2012, Governor Dannel P. Malloy signed the bill into law.<sup>153</sup>

What had changed just three years after the 2009 veto? In the interim three-year period, defendants Steven J. Hayes and Joshua Komisarjevsky were convicted and sentenced to death for the gruesome, highly publicized 2007 home invasion and triple murder of a mother and her two daughters in Cheshire, Connecticut.<sup>154</sup> The 2009 veto had occurred amidst the immediate publicity surrounding the Cheshire murders, and a repeal bill never even made it to the senate floor in 2011 while one of the two defendants was still facing trial.<sup>155</sup>

After both men were sentenced to death, some conservative legislators concerned with keeping “the worst of the worst . . . similar to Mr. Hayes, similar to Mr. Komisarjevsky” on death row continued to support capital punishment and “absolutely disagree[d] with . . . the

---

<sup>152</sup> See Applebome, *supra* note 17.

<sup>153</sup> See generally 2012 Conn. Pub. Acts 13 (Reg. Sess.) (under “Public Act No. 12-5”), S.B. 280, 2012 Gen. Assemb., Feb. 2012 Reg. Sess. (Conn. 2012), available at [http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=280&which\\_year=2012&SUBMIT1.x=13&SUBMIT1.y=5&SUBMIT1=Normal](http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=280&which_year=2012&SUBMIT1.x=13&SUBMIT1.y=5&SUBMIT1=Normal)

<sup>154</sup> *Connecticut on Track*, *supra* note 38. Defendants killed the suburban mother and her two daughters, ages 17 and 11, after holding them hostage in their home and raping two of the three. Applebome, *supra* note 17. Defendants also beat the girls’ father and set the house on fire. *Id.* The father managed to survive and has since vehemently advocated for Connecticut to keep its death penalty. *Id.* Hayes and Komisarjevsky were sentenced to capital punishment on November 10, 2010 and December 9, 2011, respectively. William Glaberson, *Death Penalty for 2nd Man in Connecticut Triple-Murder Case*, N.Y. TIMES (Dec. 9, 2011), <http://www.nytimes.com/2011/12/10/nyregion/joshua-komisarjevsky-gets-death-for-cheshire-killings.html?ref=petitfamily>; William Glaberson, *Death Penalty for a Killer of 3 in Connecticut*, N.Y. TIMES (Nov. 8, 2010), <http://www.nytimes.com/2010/11/09/nyregion/09cheshire.html>.

<sup>155</sup> *Connecticut on Track*, *supra* note 38. In 2011, the repeal bill’s passage was undermined after two senators reversed their votes. *State v. Santiago*, 49 A.3d 566, 696 (Conn. 2012) (Harper, J., concurring in part and dissenting in part). Those two senators revealed that they had changed their votes out of sympathy for one victim of the Cheshire murders. *Id.*

notion that the death penalty has no purpose.”<sup>156</sup> Others who had previously opposed death penalty repeal in 2009 flipped to support the 2012 bill. For example, one senator who had opposed repeal in 2009 supported the 2012 bill because she could not “stand the thought of being responsible for somebody being falsely accused and facing the death penalty . . . [because] mistakes are obviously made[.]”<sup>157</sup>

Still, many were on the fence. As a condition of their support, conservative lawmakers insisted that the repeal be prospective only:

[I]t seems pretty clear to many of us that there are people in the Legislature who feel strongly about a prospective bill before us. . . . And that some . . . have stated publicly that the only way that they could support the death penalty bill before us is if, in fact, they have assurances that those who are on death row are not affected by this prospective look in legislation.<sup>158</sup>

For some legislators still reeling from the recent Cheshire murder trials, retroactive repeal was never on the table: “[L]et’s talk about Hayes and Komisarjevsky. Let’s . . . get right to it, because . . . there’s no political will to abolish the death penalty because of those two recent trials and those folks on death row right now.”<sup>159</sup>

Thus, to gain the support of those on the fence, bill proponents argued that the death penalty repeal would be unambiguously prospective.<sup>160</sup> The senate also amended the repeal bill so that inmates

---

<sup>156</sup> CONN. S. TR., *supra* note 109, at 52-53 (statements by Senator John Kissel).

<sup>157</sup> *Connecticut on Track*, *supra* note 38 (statement by Senator Edith G. Prague).

<sup>158</sup> CONN. S. TR., *supra* note 109, at 169 (statement by Senator Michael McLachlan).

<sup>159</sup> *See id.* at 51 (statement by Senator John Kissel).

<sup>160</sup> *See id.* at 169 (statement by Senator Michael McLachlan that the repeal “draws a very clear, distinct line” and “states very clearly to the court what the intention of this Legislature is. And frankly, [it states] what is the intention of those who were on the fence with repeal of the death penalty and feel very strongly that if it are [sic] to be prospective it must not interfere with those on death row . . . So, if among my fellow Senators here tonight, there are those who feel . . . that in fact, we

receiving life sentences under the new law would face harsh prison conditions replicating those on death row, “including separate housing, noncontact visitation and mandated cell movement every 90 days.”<sup>161</sup>

Connecticut’s current death penalty policy sets a double standard. It is designed to retaliate against the Cheshire murderers and others now on death row. Capital punishment and life without parole are each per se constitutional under the Eighth Amendment.<sup>162</sup> But, prospective repeal—while a step in the right direction—creates an inconsistent standard that weakens the law: “If it is the will of this chamber that this state is no longer in the business of executing people, then let’s say it and do it. You cannot have it both ways.”<sup>163</sup>

Prospective repeal is an unsatisfying compromise precisely because “the death penalty is different from other punishments in kind rather than degree.”<sup>164</sup> The term “evolving standards of decency” suggests that capital punishment may change over time, or differ from state to state. But the problem with evolving standards is that too many standards now exist, and prospective repeal only further complicates the issue. Instead, in the decent treatment of human beings there should be one uniform standard with respect to the death penalty. In other words, if “[e]volving standards of decency must embrace and express respect for the dignity of the person,”<sup>165</sup> then

---

must not interfere with the tried, convicted and sentenced cases on death row, then I urge you to support this amendment tonight.”).

<sup>161</sup> *Connecticut on Track*, *supra* note 37. The amendment aimed to “exactly mirror the conditions for those prisoners on death row.” *Connecticut Senate Votes to Abolish Death Penalty*, N.Y. DAILY NEWS (Apr. 5, 2012, 8:22 AM), <http://www.nydailynews.com/news/politics/connecticut-senate-votes-abolish-death-penalty-article-1.1056500?localLinksEnabled=false>.

<sup>162</sup> *See* *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (death penalty per se constitutional); *see also* *Harmelin v. Michigan*, 501 U.S. 957 (1991) (mandatory life without parole per se constitutional).

<sup>163</sup> Applebome, *supra* note 17 (statement by House Republican Lawrence Cafero Jr.).

<sup>164</sup> *Graham v. Florida*, 560 U.S. 48, 90 (2010) (quoting *Solem v. Helm*, 463 U.S. 277, 294 (1983)).

<sup>165</sup> *See* *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

only one standard should exist, and the death penalty should be completely abolished.

## 2. Wielding Legislative Intent

From its inception, the constitutionality of Connecticut's prospective repeal was an issue for state lawmakers on both sides of the political spectrum.<sup>166</sup> Opponents to the bill predicted endless appeals on the issue.<sup>167</sup> Even bill proponents admitted they were concerned about whether the new law would pass constitutional muster.<sup>168</sup> To quiet these concerns, proponents cited New Mexico's prospective repeal and the Connecticut Supreme Court's decision in *Dortch*.<sup>169</sup> As discussed above, however, no authority actually guarantees the prospective repeal's constitutionality.

With constitutionality left up to the courts, the Connecticut legislature made its intent clear because, as the U.S. Supreme Court has noted, legislative intent matters:

[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people. This is true in part because the constitutional test is intertwined with an assessment of contemporary

---

<sup>166</sup> See generally CONN. S. TR., *supra* note 109.

<sup>167</sup> *Connecticut on Track*, *supra* note 38

<sup>168</sup> CONN. S. TR., *supra* note 109, at 57 (statement by Senate Democrat Eric D. Coleman).

<sup>169</sup> See *id.* at 59 (statement by Senator Eric D. Coleman referencing a 1951 case known as *Dortch*).

standards and the legislative judgment weighs heavily in ascertaining such standards.<sup>170</sup>

In other words, defining punishment is peculiarly a question of legislative policy because “in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.”<sup>171</sup> Thus, the Court exercises extreme caution before overturning a state penalty under the Eighth Amendment because such a decision “cannot be reversed short of a constitutional amendment,” and would therefore shut off “[t]he ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda[.]”<sup>172</sup>

A court would easily find that the Connecticut legislature intended for the repeal to be prospective. For instance, Section 38 of the repeal bill cross-references and incorporates the provisions of Sections 1-1 and 54-194 of Connecticut’s General Statutes.<sup>173</sup> Section 1-1, subsections (t) and (u) of Connecticut’s General Statutes provide:

(t) The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense

---

<sup>170</sup> *Gregg v. Georgia*, 428 U.S. 153, 175 (1976); *accord Williams v. Illinois*, 399 U.S. 235, 241 (1970) (“A State has wide latitude in fixing the punishment for state crimes.”).

<sup>171</sup> *Gregg*, 428 U.S. at 175-76 (citing *Furman v. Georgia*, 408 U.S. 238, 383 (1972)).

<sup>172</sup> *Id.* at 176.

<sup>173</sup> Section 38 of the session law provides: “The provisions of subsection (t) of section 1-1 of the general statutes and section 54-194 of the general statutes shall apply and be given full force and effect with respect to a capital felony committed prior to the effective date of this section under the provisions of section 53a-54b of the general statutes in effect prior to the effective date of this section.” 2012 Conn. Pub. Acts 13 (Reg. Sess.) (under “Public Act No. 12-5”), S.B. 280, 2012 Gen. Assemb., Feb. 2012 Reg. Sess. (Conn. 2012), *available at* [http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=280&which\\_year=2012&SUBMIT1.x=13&SUBMIT1.y=5&SUBMIT1=Normal](http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=280&which_year=2012&SUBMIT1.x=13&SUBMIT1.y=5&SUBMIT1=Normal)

committed, or for the recovery of a penalty or forfeiture incurred under the act repealed.

(u) The passage or repeal of an act shall not affect any action then pending.<sup>174</sup>

Additionally, Section 54-194 provides that the “repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute.”<sup>175</sup>

The explicit incorporation of these two savings clauses into the death penalty repeal means that a new penalty does not change prior penalties given. The incorporation of these provisions “may add nothing to the underlying bill, but it certainly takes nothing away. At best, if a court were to look and have some question whether [legislators] really meant this to be prospective, this removes any doubt,” and adds “belts and suspenders” to the legislature’s intent that the bill be prospective, not retroactive.<sup>176</sup>

In addition to the statute itself, legislative history underscores the legislature’s prospective intent. As one senator stated, “the intent of this amendment and this bill is to very clearly be prospective in nature. I want to make the declaration that this bill is intended to be prospective and to have no retroactive application at all.”<sup>177</sup> Similarly, one representative noted that “[t]he bill expressly states that the penalty is prospective. I believe and I expect that the intent—the legislative intent, as we leave this chamber, as well as was clearly stated in the Senate, is that, yes, the legislation is intended to be prospective.”<sup>178</sup>

Overall, the Connecticut legislature’s intent that the repeal be prospective is made explicitly clear from both the incorporation of

---

<sup>174</sup> CONN. GEN. STAT. § 1-1 (t)-(u) (1949).

<sup>175</sup> CONN. GEN. STAT. § 54-194 (1949).

<sup>176</sup> CONN. S. TR., *supra* note 109, at 233 (statement by Sen. John McKinney).

<sup>177</sup> *Id.* at 58 (statement by Democratic Sen. Eric D. Coleman).

<sup>178</sup> CONN. H.R. TR., *supra* note at 73 (statement by Rep. Gerald M. Fox III).

Sections 1-1 and 54-194 in the legislation and from legislative debates leading up to the repeal. The presumption that legislatures have wide latitude to set the punishment for state crimes would place a court under enormous pressure to uphold the Connecticut repeal under the Eighth Amendment.<sup>179</sup>

## CONCLUSION

The Supreme Court could uphold Connecticut's prospective death penalty repeal under the Eighth Amendment. Under the first line of proportionality analysis, the Court could find that the state's death penalty statute aims to achieve consistent, individualized sentences. But if the death penalty was repealed in Connecticut precisely because it was arbitrarily and capriciously imposed, holding onto a piece of that broken system is counterintuitive. Under the second line of proportionality analysis, the Supreme Court might not find that capital punishment is mismatched to the eleven inmates on Connecticut's death row. Even if no national consensus supports or contradicts continuing the death penalty after repeal, the Court would probably not treat the death row inmates as a less culpable class like children or the mentally disabled, who are exempt from capital punishment. Retribution alone might be enough to the Court to justify capital punishment.

The intent of the Connecticut legislature also puts significant pressure on courts to uphold the repeal under the Eighth Amendment. And the legislature made its intent clear—Connecticut wanted prospective repeal. Still, the results are imperfect. If a court upholds the prospective repeal, a double standard of decency and only partial abolition of capital punishment remains.<sup>180</sup> If a court strikes it down, not having the bargaining chip of prospective repeal may make it harder for other states to abolish the death penalty in the first place. Also, instead of severing only the prospective provisions, there is a

---

<sup>179</sup> See *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970).

<sup>180</sup> The inmates on death row could attempt to have their death sentences commuted. In Connecticut, this would be handled by the governor-appointed Board of Pardons & Paroles. See CONN. GEN. STAT. § 54-124a (2010).

risk that the court could strike down the *entire* act—which could, in turn, reinstate the death penalty in the state—yet another issue of concern, albeit one that goes beyond the scope of this argument.<sup>181</sup>

While a sign of progress, prospective repeal is not ideal policy. The Court could uphold Connecticut’s prospective repeal under the Eighth Amendment, but it does not have to. After all, “[j]udicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires.”<sup>182</sup> Put simply, death is different. The Eighth Amendment requires that courts both review the law, and bar certain punishments, “whether legislatively approved or not.”<sup>183</sup>

---

<sup>181</sup> See *Seals v. Hickey*, 441 A.2d 604, 612 (Conn. 1982) (“[W]here a portion of the statute is invalid, the valid part can stand only if it and the invalid part are not so mutually connected and dependent as to indicate a legislative intent that they may be inseparable.”).

<sup>182</sup> *Furman v. Georgia*, 408 U.S. 239, 313-14 (1972) (White, J., concurring)).

<sup>183</sup> *Id.* at 314.