"Full of Internal Contradictions": A Neutral Case for the Invalidation of the Death Penalty

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“Full of Internal Contradictions”
A Neutral Case for the Invalidation of the Death Penalty

A thesis submitted in partial fulfillment of the requirement
for the degree of Bachelor of Arts in Government from
The College of William and Mary

by

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Accepted / Not Accepted for Honors

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I. Introduction

“We can either have a death penalty that avoids excessive delays and ‘arguably serves legitimate penological purposes,’ or we can have a death penalty that ‘seeks reliability and fairness in the death penalty’s application’ and avoids the infliction of cruel and unusual punishments. It may well be that we ‘cannot have both.”1

-Justice Stephen Breyer, dissenting opinion in Bucklew v. Precythe.

In Gregg v. Georgia, the Supreme Court ordained a fundamental tension in capital punishment. In permitting the nationwide resumption of executions, the Court established the death penalty as “an expression of society’s moral outrage,” as retribution for heinous crimes. Simultaneously, the Court attempted to create a reliable death penalty that is not implemented in an “arbitrary and capricious manner.”3 Retribution—the death penalty’s primary motivation—must be timely, proportional to the crime, and reflective of the offender’s culpability. A reliable death penalty, for the purposes of this paper, is broadly understood as one which does not execute the wrong people.5 These principles, one fundamental, the other a mandate, are incompatible.

In his dissenting opinion in Bucklew v. Precythe, Justice Breyer recognized the incompatibility of a death penalty both retributive in nature and reliable in its implementation. This was not the first time Justice Breyer questioned the acceptability of capital punishment in the twenty-first century. In his 2015 dissenting opinion in

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1 Bucklew came down during the course of this paper and is further evidence of the tension between retribution and reliability. Bucklew v. Precythe, No. 17-8151, 2019 U.S. LEXIS 2477 (U.S. Apr. 1, 2019).
3 Id. at 188.
5 The irreversibility of a wrongful execution necessitates that this is a broad category of individuals, including the innocent and those of diminished culpability due to intellectual disability or mental illness.
**Glossip v. Gross**—like *Bucklew*, a case challenging a state’s method of execution—Justice Breyer called for a new *Furman v. Georgia*, a case which, in 1972, reckoned with this country’s use of a death penalty riddled with fatal flaws. Doing so subjected him to the wrath of Justice Antonin Scalia, who scoffed at an argument he deemed to be “full of internal contradictions and (it must be said) ‘gobbledy-gook.’”  

In *Glossip*, Justice Breyer demonstrated his distaste for the Court’s tendency “to patch up the death penalty’s legal wounds one at a time.” This tendency has birthed a dissonant death penalty marred by the conflict between reliability and retribution Breyer criticized in *Bucklew*. And Justice Breyer has a good bit of company in condemning capital punishment. Scholars have written at length regarding the problems which plague capital punishment and the precipitous decline in death sentences since the turn of the millennium. In doing so, they have identified disparities in the application of the death penalty, typically focusing on racial biases, insufficient consideration of mental illness, geographic arbitrariness, and other systemic flaws with current death penalty implementation These studies also add context to the decline in death sentencing, focusing specifically on declining murder rates, public disapprobation for executions, high-profile exonerations, difficulty acquiring execution drugs, botched executions, and improved lawyering at the trial and appellate phases.  

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7 *Glossip*, 576 U.S. 1 (Breyer, J., dissenting).  
studies, I focus my analysis on the general conflict which underlies the death penalty, that between retribution and reliability.

Across capital punishment scholarship, there is an inclination to focus on nationwide trends, on a single state, or on counties that make outsized contributions to death sentences. Rather than engaging in a macro- or micro-level analysis, I chart the middle course, analyzing six states in particular: Virginia, Texas, Pennsylvania, California, Colorado, and Wyoming. These states run the gamut of death penalty regimes in the United States and correspond with the categorization of death penalty states put forth by Carol and Jordan Steiker’s *Courting Death: The Supreme Court and Capital Punishment*. Colorado and Wyoming represent the first category, *de facto* abolitionist states. These are states in which, though legally permissible, the death penalty is rarely imposed. California and Pennsylvania are symbolic states, ones in which death sentences are imposed with relative frequency but executions are rare. Finally, Virginia and Texas—states where death sentences and executions both occur with comparative frequency—are executing states. An analysis of these states using the Steikers’ framework serves as the foundation for my approach to the death penalty inspired by Justice Breyer’s *Glossip* and *Bucklew* dissents. Though Justice Breyer

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9 Death sentences and executions are exceedingly rare in Colorado and Wyoming. For this reason, these states do not feature prominently in my analysis.

10 I employ a mixed-methods approach comprising both jurisprudential analysis and a review of 428 high court opinions in Virginia, Texas, California, Pennsylvania, Wyoming, and Colorado over a seven-year period from 1998 to 2004. Brandon Garrett’s *End of Its Rope* database, which compiles the identities of all of those sentenced to death since 1990 served as my guide as I populated my dataset of 428 cases from my six states of interest. I chose the years of 1998 to 2004 in order to straddle the peak and decline of death sentencing as well as to allow a sufficient number of cases to develop their full records and reach their final dispositions.
inspired this work, it is one of his colleagues who will play a more pivotal role in my analysis of the modern American death penalty.

The writings of Justice Antonin Scalia are rarely a first port-of-call for those wishing to see the end of the American death penalty.\footnote{The exception to this rule is, of course, works that seek to challenge Justice Scalia’s unqualified support for capital punishment such as James S. Liebman’s The Wrong Carlos, vii (2014): “In 2006, [Justice Scalia] proclaimed that there has not been ‘a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it: the innocent’s name would be shouted from the rooftops,’’ quoting \textit{Kansas v. Marsh}, 548 U.S. 163, 188 (Scalia, J., concurring) (2006).} Justice Scalia was recognized throughout his career for his staunch support of capital punishment. Nevertheless, elements of Justice Scalia’s method of statutory interpretation offer strong support for the invalidation of the death penalty, a punishment itself full of internal contradictions.

construction have “an impressive pedigree” indeed; despite criticism that these canons are “mechanistic and acontextual,...Anglo-American judges have relied on them for at least 400 years.”14 Judges have continued to do so explicitly or implicitly into the modern era.15 Their continued use may well be attributed precisely to their “mechanistic and acontextual” nature, as canons offer guidance on more than matters of mere textual understanding; they guide courts on “how regulatory statutes should interact with constitutional structure and substantive policy.”16 Canons are typically deployed in those cases in which judges have no policy preferences or the areas of law involved are particularly complex.17 However, the canons’ ability to serve as indispensable tools of ideologically-neutral decision-making position them as attractive candidates for resolving this country’s most divisive matters of law.

We live in an era shaped by polarized political parties and a highly partisan Supreme Court, an era which calls for a new judicial approach.18 Evaluating society’s most contentious issues of law through the apolitical lens of the canons of construction would represent a novel—if not refreshing—approach to law, and should serve as the basis for the kinds of modern reevaluations of capital punishment for which Justice Breyer and others call. Justice Scalia and Bryan Garner offer an outline of how this approach would proceed.

15 Id.
When conflicting motivations or principles threaten a statute’s validity, courts turn first to the harmonious-reading canon. This canon calls for conflicting principles to be interpreted so that they are compatible with one another, so that neither nullifies the other.\(^{19}\) It is only when a statute is so compromised as to foreclose a harmonious resolution that courts deploy the irreconcilability canon. The irreconcilability canon holds that when two simultaneously adopted principles of equal generality are in irreparable conflict, the statute in question must be invalidated.\(^{20}\) While invalidating capital punishment would have seemed “an unappealing course” to Scalia,\(^{21}\) the death penalty, a politically-charged issue, is a prime candidate for this neutral approach.

Again, Scalia and Garner provide for this eventuality, ensuring us that the irreconcilability canon may be applied to penal statutes. They point to *State v. Taylor* as evidence of the irreconcilability canon and rule of lenity at work, citing a penal statute in which “one section declared it a felony to willfully and maliciously maim or wound someone else’s horse, and the very next section declared the same conduct a misdemeanor.”\(^{22}\) The irreconcilability canon and the rule of lenity necessitate the invalidation of such a conflicted statute.

When a penal statute—such as a capital punishment statute—is subject to conflicting interpretations of guiding principles—like reliability and retribution—"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the

\(^{19}\) Scalia & Garner, supra at 181.

\(^{20}\) Id. at 190.

\(^{21}\) Id.

\(^{22}\) Because Taylor had broken into the building which housed the horse he maimed, he was charged with second-degree burglary on the basis of his intent to feloniously maim a horse. Taylor successfully appealed his conviction; however, the court in question overturned his sentence on the grounds that “the last words stand.” Scalia and Garner argue instead that—because such an interpretation does not take into account the rule of lenity—the penal statute should have been invalidated. Scalia and Garner supra at 191, quoting MO. Rev. Stat. § 1987 (1899) and *State v. Taylor*, 85 S.W. 564, 567 (Mo. 1905).
defendants subjected to them...the tie must go to the defendant.”

Importantly, the rule of lenity seeks to prevent “legislative blood lust” which can inspire overly-broad or severe penal codes like those at question in *Furman*. But the rule of lenity is only invoked in certain circumstances, namely, when “a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.”

The Court’s evolving capital punishment jurisprudence has left considerable doubt regarding whether the death penalty’s implementation meets its stated intended scope of only applying to the worst of the worst. And there is surely conflict between its motivating principle of retribution and the reliability mandated since *Gregg*. Justice Breyer’s *Bucklew* and *Glossip* dissents make this clear. If, as Justice Breyer suggests in *Bucklew*, harmoniously reconciling retribution and reliability is impossible, the death penalty must be invalidated, for the equally-general, simultaneously-adopted retributive motivation and mandated reliability of the death penalty are fundamentally at odds.

I will first trace the development of capital punishment jurisprudence to add context to the conflict between reliability and retribution. Then, I will review the scholarship as it pertains to the death penalty’s flaws, reliability, and retribution.

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27 Of course, retribution’s relationship with capital punishment certainly predates *Gregg* in 1976; however, *Gregg* plainly legitimized retribution as a justifiable purpose for capital punishment. See Justice Stewart “capital punishment is an expression of society’s moral outrage at particularly offensive conduct.” *Gregg*, 428 U.S. at 183.
Finally, using state-level data, I will examine the outcomes of those states which emphasize reliability and those which emphasize retribution. This to advance an argument that the modern death penalty is so fundamentally flawed that it must either change significantly or be invalidated in accordance with the irreconcilability canon.
II. “We Cannot Have Both”

The tale of the modern American death penalty is one of landmark cases leaving their indicia on what—given its rarity in the Western world—can only be called a uniquely resilient institution. Along the way, the Court has established that retribution is fundamental to capital punishment while simultaneously seeking to make the death penalty is a reliable punishment. Capital punishment scholarship suggests that, in this endeavor, the Court has not succeeded. The tension between reliability and retribution is as strong as it ever was; the death penalty does not add up to a coherent whole. Though no two cases have more directly and dramatically affected capital punishment than *Furman v. Georgia* and *Gregg v. Georgia*, a supporting cast of cases provide necessary context for an analysis of the death penalty and its subsequent appellate process. After exploring these landmark cases, I will contextualize their effects with a review of relevant scholarly literature.

**Landmark Cases**

Fourteen years before *Furman* questioned whether contemporary capital punishment comported with the Eighth Amendment’s prohibition of cruel and unusual punishment, *Trop v. Dulles* laid the foundation for analyzing such questions. After a would-be World War II deserter was apprehended and stripped of his citizenship, the Court was asked to determine whether denationalization for punitive purposes constituted cruel and unusual punishment. Chief Justice Warren wrote for the majority and determined that—though denationalization was not a physical punishment—it “is offensive to the cardinal principles for which the Constitution stands. It subjects the
individual to a fate of ever-increasing fear and distress.”

In what has since proven to be a seminal quotation in Eighth Amendment interpretation, Chief Justice Warren argues, “the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

*Trop* would later play an instrumental role in *Furman*, as the Court found the death penalty’s arbitrary and capricious application to offend the standards of decency of the day. It continues to shape our evaluation of whether punishments comport with the Eighth Amendment.

In a 1972, five-to-four decision on three consolidated cases, the Supreme Court held that the imposition of the death penalty in cases of rape or murder under contemporary Georgia law violated the Eighth Amendment’s prohibition of cruel and unusual punishment. As many state codes of the day were identical to—or at least only triflingly different from—Georgia’s capital punishment statute, *Furman v. Georgia* effectively invalidated capital punishment in forty-one states.

Justices joined the majority for different reasons. Justice William O. Douglas, rooting his argument in the English Bill of Rights, sought to avoid “arbitrary and discriminatory penalties of a severe nature.”

Justice William Brennan found death to be “a uniquely and unusually severe punishment...fatally offensive to human dignity.”

Quoting *Trop*, Justice Thurgood Marshall argued that prohibitions against cruel and unusual punishments must draw their “meaning from evolving standards of decency that mark the progress of a maturing society.”

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29 *Id.* at 101.
31 *Id.* at 305.
32 *Id.* at 329.
“excessive and unnecessary” and in violation of the Eighth and Fourteenth amendments.\textsuperscript{33} Justice Potter Stewart, in a phrase that has since been repeatedly mobilized by death penalty opponents, held that capital punishment statutes were “cruel and unusual in the same way that being struck by lightning is cruel and unusual—[they] permit this unique penalty to be so wantonly and freakishly imposed.”\textsuperscript{34} Justice Byron White felt the punishment was used too infrequently to adequately deter crime or serve as retribution.\textsuperscript{35}

\textit{Furman} dealt a major—if fleeting—blow to the American death penalty; it was seen as the abolition pursued through years of hard work by groups like the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund. Executions stopped for a time; however, it was not to last, as \textit{Furman} faced significant political backlash resulting in the Court’s about-face four years later in \textit{Gregg}. Despite \textit{Furman}’s short shelf life, its significance looms large even today. Scholars and petitioners alike continue to challenge the arbitrariness and capriciousness lamented in \textit{Furman} and debate whether the post-\textit{Gregg} capital punishment statutes effectively resolved the concerns of \textit{Furman}.

Just four years later, in 1976, the Court made a dramatic departure from \textit{Furman} in \textit{Gregg v. Georgia}. In a seven-to-two decision, the Court held that the death penalty was not “cruel and unusual” \textit{per se} under the Eighth and Fourteenth amendments so long as it is not imposed in an “arbitrary and capricious manner”\textsuperscript{36}—which was, in this Court’s view, all that \textit{Furman} required in the first place. As Justice

\begin{flushright}
\textsuperscript{33} \textit{Id.} at 358.
\textsuperscript{34} \textit{Id.} at 309-310.
\textsuperscript{35} \textit{Id.} at 312.
\textsuperscript{36} \textit{Gregg}, 428 U.S. at 188.
\end{flushright}
Stewart, writing for the majority, noted, “[Furman] did recognize that death is different in kind from any other punishment imposed under our system of government.” So long as it operated under equally distinct sentencing procedures, the death penalty was back in play.

Practically speaking, Gregg opened the door to a new wave of death sentences so long as they were “narrowly focused” and conformed to several requirements: a bifurcated trial, consideration of mitigating and aggravating circumstances, and automatic review by the state supreme court. Importantly, Gregg firmly established that the death penalty is a retributive punishment. Justice Stewart established that “capital punishment is an expression of society’s moral outrage at particularly offensive conduct,” for “the instinct for retribution is part of the nature of man.” Executions resumed en masse following Gregg. Though the Court professed to address Furman’s concerns with Gregg, “virtually every academic study conducted by rigorous standards has found egregious failure” in ensuring that only the “most aggravated” cases result in the death penalty. This decision could have paved the way for a death penalty both retributive and reliable; however, its implementation since has seen both principles undermined.

Since Gregg, the Court has continued to narrow the death penalty’s scope, seeking to improve its reliability and to make its retribution proportional to the crime. In 1977, Coker v. Georgia invalidated the death penalty for rape and effectively limited

37 Id.
38 Baumgartner et al., Deadly Justice, supra at 13.
39 Gregg, 428 U.S. at 183.
40 Id. at 15-16.
the death penalty to just homicides.\textsuperscript{41} A year later, the Court sought to broaden the acceptable kinds of mitigating circumstances in \textit{Lockett v. Ohio}. \textit{Lockett} overturned an Ohio capital punishment statute which made the death penalty mandatory for all defendants found guilty of murder with at least one of seven specific aggravating circumstances.\textsuperscript{42} Chief Justice Burger wrote for the majority and determined that “the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”\textsuperscript{43}

The Court continued its attempt to clarify which murders warranted death in 1980. Though the Court has “struggled” to establish a clear standard for the consideration of aggravating circumstances,\textsuperscript{44} it reaffirmed their centrality to determining whether a murder should be classed as a capital homicide in \textit{Zant v. Stephens}.\textsuperscript{45} Taken together, \textit{Lockett} and \textit{Zant} made capital cases a battleground for aggravation and mitigation, for our desire for retribution and our desire to ensure that only those defendants deserving of the death penalty receive it.

To this end, the Court took steps to better tailor the death penalty to only the most deserving criminals in the early 2000s. In 2002, \textit{Atkins v. Virginia} invalidated the execution of the intellectually disabled. Writing for the Court, Justice Stevens held that

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{41} Victor L. Streib, \textit{Death Penalty in a Nutshell}, 67 (2003).
\item \textsuperscript{42} The statute in question would have exempted Lockett from the death penalty if “(1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she ‘was under duress, coercion, or strong provocation,’ or (3) the offense was ‘primarily the product of [Lockett’s] psychosis or mental deficiency.’” \textit{Lockett v. Ohio}, 438 U.S. 586, 593-594 (1978), quoting Ohio Rev. Code §§ 2929.03-2929.04(B) (1975)
\item \textsuperscript{43} \textit{Id.} at 604-605.
\item \textsuperscript{44} Streib, \textit{supra} at 76.
\item \textsuperscript{45} \textit{Zant v. Stephens}, 462 U.S. 862, 877 (1983).
\end{enumerate}
\end{footnotesize}
the intellectually disabled “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct” due to “their disabilities in areas of reasoning, judgment, and control of their impulses.”\textsuperscript{46} For this reason, executing the intellectually disabled violates the Eighth and Fourteenth amendments. Significant to \textit{Atkins} was the Court’s recognition of “the consistency of the direction of change” at the state level toward abolishing the death penalty for the intellectually disabled.\textsuperscript{47} The Court has traditionally responded to consensus among the states in death penalty cases, but in \textit{Atkins}, the justices saw fit to respond not only to states, but to science. This was a watershed moment in capital punishment jurisprudence, a recognition that the execution of an individual who lacks full culpability for his or her crimes is cruel and unusual. \textit{Atkins} was reaffirmed ten years later in \textit{Hall v. Florida}, in which the Court broadened the acceptable evidence defendants may bring to establish intellectual disability. In doing so, the Court better aligned Eighth Amendment jurisprudence with contemporary medical understanding and society’s standards of decency. 

In 2005, the Court evaluated the relationship between mental development and culpability in \textit{Roper v. Simmons}. Writing for the majority, Justice Anthony Kennedy weighed whether the execution of juveniles constituted cruel and unusual punishment. Justice Kennedy, quoting \textit{Weems v. United States}, argued “that punishment for crime should be graduated and proportioned to [the] offense.”\textsuperscript{48} An evolving understanding of how the human brain develops and the resulting evolution of society’s standards of

\textsuperscript{47} \textit{Id.} at 316.
decency led the Court to determine that age—like intellectual disability in *Atkins*—diminishes a defendant’s culpability for the crime he or she committed.\(^{49}\)

*Atkins* and *Roper* reflect the Court’s sensitivity to societal change and the formative role culpability plays in legitimating our desire for retribution. It is no coincidence that, as society has developed a richer understanding of the human mind, we have narrowed who is eligible to receive the state’s harshest punishment. It is not unimaginable that our evolving understanding of the structural prejudices at work in the criminal justice system and society at large will one day contribute to a wholesale reevaluation of capital punishment in this country.

That wholesale reevaluation is exactly what Justice Breyer hoped to hasten with his dissenting opinion in *Glossip v. Gross*. *Glossip* was, on its surface, a case regarding methods of execution. Despite well-documented botched executions stemming from the use of the controversial drug Midazolam, the Court rejected a challenge to Oklahoma’s drug protocol and affirmed that the use of Midazolam—regardless of the risks of pain it poses—is not in violation of the Eighth Amendment. However, for the purposes of capital punishment scholarship (including this paper), Justice Alito’s majority opinion is less pivotal than Justice Breyer’s fiery dissenting opinion. Due to its growing rarity, “serious unreliability, arbitrariness in application, and unconscionably long delays that undermine the death penalty’s penological purpose,” Breyer called for a reconsideration of whether capital punishment is *per se* cruel and unusual.\(^{50}\) The *Glossip* dissent has made waves in both the lower courts and in legal scholarship circles and represents a modern take on the failures of fifty years of capital punishment jurisprudence.

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\(^{49}\) *Id.* at 567.

\(^{50}\) *Glossip*, 576 U.S. at 2 (2015).
Literature Review

As the court has attempted to “patch up the death penalty’s legal wounds one at a time,” it has created an irreconcilable conflict between its two motivating policies: reliability and retribution. James Coleman (2015) represents the vanguard of scholars inspired by Justice Breyer’s *Glossip* dissent. Coleman notes that “the death penalty is losing much of its allure in the United States,” a claim based both on the number of states opting to abolish the death penalty and the decline in death sentencing at the national, state, and county levels. Whether the death penalty is to be deemed unconstitutional by the Court or abolished via a constitutional amendment, central to its demise is the “continued erosion of public confidence in the death penalty.” Coleman argues that amending the Constitution would require a “Herculean effort” and is an “inconceivable” avenue to abolition. That leaves the Supreme Court. Despite a decreasing number of death sentences, “more and more inmates are being removed from death row alive,” a reality which underscores the gravity of Justice Breyer’s concern with an unreliable death penalty and evinces the need for the Court to remedy capital punishment’s underlying conflict—that between reliability and retribution.

Brandon Garret (2017) and Frank Baumgartner et al. (2017) each evaluate the reliability of the post-*Furman* death penalty. Garrett compares Virginia capital trials from 2005 to 2015 with those from 1996 to 2004 to determine whether twenty-first century changes have increased the death penalty’s reliability nationwide. He suggests

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51 *Id.* at 1.
53 *Id.* at 16.
54 *Id.* at 17.
55 *Id.* at 22.
that, while improved capital sentencing laws contributed to the nationwide sentencing decline, the lion’s share of the receding of death sentencing in Virginia and throughout the United States can be attributed to much-needed improvements to capital defense programs.\textsuperscript{56} However, better lawyer cannot compensate for all of the death penalty’s problems. Insufficient funding, the high-frequency of claims of innocence, the pervasiveness of mental illness among the executed, and the over-reliance on questionable testimony (such as that from eyewitnesses or informants) all “should continue to give pause when considering the reliability of the death penalty.”\textsuperscript{57}

Baumgartner et al. comes to a similar conclusion. He conducts a holistic statistical analysis of the death penalty across the country and determines that the modern death penalty is more arbitrary, flawed, expensive, drawn-out, unreliable,\textsuperscript{58} and cruel than it was before \textit{Furman}. The risk of executing the innocent persists, and “a reasoned assessment based on the facts suggests not only that the modern system flunks the \textit{Furman} test but that it surpasses the historical death penalty in the depth and breadth of the flaws apparent in its application.”\textsuperscript{59}

Garrett and Baumgartner’s qualms with the unreliability of the modern death penalty are not recent innovations. Holewinski (2002) analyzes state sentencing statutes and the rates at which homicide defendants receive the death penalty to evaluate capital punishment’s reliability at the tail-end of its most prolific era. These statutes create “no meaningful basis for distinguishing the few cases in which [the

\footnotesize
\textsuperscript{56} Garrett, \textit{The Decline of the Virginia (and American) Death Penalty}, supra at 666.
\textsuperscript{57} Id., at 724-725.
\textsuperscript{58} Baumgartner measures reliability as a ratio of executions to death sentences, arguing that a reliable capital punishment system narrowly applies death sentences and executes a “substantial portion” of offenders. Baumgartner, \textit{supra} at 14.
\textsuperscript{59} Id. at 351.
death penalty] is imposed from the many cases in which it is not,” and permit “unequal, arbitrary, and capricious application of the death penalty from state to state.”

Seeking a reliable death penalty has driven some states to tolerate decades of delay between sentencing and the final disposition of capital cases. Gerald Uelmen (2009) analyzes delays in California, a state notorious for its drawn-out appellate process. Uelmen calls California’s capital punishment system “completely dysfunctional,” a place “where most of [the condemned] will certainly die before they are ever executed.” Michael Connolly (1997) also explores these delays, focusing on their effects on the condemned. Citing a consensus in international law condemning extended delays prior to execution, Connolly acknowledges that direct and habeas review are necessary safeguards “against the risk of executing innocent persons.” Despite this, a death sentence, “rather than ending the tragedy that brought it about,” tends to extend the trauma, taking “a great toll on the prisoner’s mental and emotional well-being.” States’ attempts to reduce these delays often limit prisoners’ ability to properly appeal relevant claims. However, the blame for these delays does not lie squarely with the states, rather, capital defenders must shoulder some responsibility for tactics that “are nothing more than blatant attempts to prolong the litigation process” and their clients’ lives.

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60 Holewinski, supra at 231-232, quoting Furman, 408 U.S at 238 (White, J., concurring).
63 Id. at 109.
64 Id. at 110.
65 Id. at 111.
Baumgartner, too, addresses these delays. Despite the nationwide decline in
death sentencing, “delays increase every year, on average, and have done so throughout
the last forty years.”66 Maher (2009) points to this sentencing decline as responsible for
states’ improved ability to tailor capital punishment to worst of the worst.67 His
analysis of North Carolina death sentences does, however, reveal that the reliability of
capital trials continues to be undermined by “serious mental illness, the impact of race,
and other issues.”68 Mental illness poses significant problems for a reliable death
penalty. Though not problematic for the Court Atkins, mental illness can render a
defendant unfit to stand trial, as Wilson (2016) notes.69 Wilson analyzes the execution
of the mentally ill as a matter of international law pointing to broad condemnation of
the death penalty in general and, in particular, for the mentally ill.70

Winick (2009) argues mental illness is the “next frontier” for a Court interested
in ensuring death sentences are proportional to capital crimes and the culpability of
those who commit them.71 Winick argues that “certain mental illnesses bear some
striking similarities to both mental retardation and juvenile status”72—both of which
are classes of individuals exempted from execution by Atkins and Roper, respectively.
The execution of the severely mentally ill undermines the death penalty’s reliability,
and, according to Winnick, frustrates retribution as well. Winnick notes that the Court

66 Baumgartner, supra at 158.
67 Thomas K. Maher, Worst of Times, and Best of Times: The Eighth Amendment Implication of Increased
Procedural Reliability on Existing Death Sentences, 1 Elon L. Rev. 95, 96 (2009).
68 Id.
69 Richard J. Wilson, The Death Penalty and Mental Illness in International Human Rights Law: Toward
Abolition, 73 Wash. & Lee L. Rev. 1469, 1473 (2016).
70 Id. at 1478.
71 Bruce J. Winick, The Supreme Court’s Evolving Death Penalty Jurisprudence: Severe Mental Illness as
the Next Frontier, 50 B.C. L. Rev. 785, 788 (2009).
72 Id.
has held that “the execution of a severely mentally ill prisoner may violate the Eighth Amendment for several reasons, including that it ‘serves no retributive purpose.’”\textsuperscript{73}

Winnick is joined in his concern for the death penalty’s retributive purpose by Pojman (2004) and Christopher (2014). Pojman argues that retribution morally justifies the death penalty. Retribution is “rationally supported” and is based on the proportionality of the punishment to the crime.\textsuperscript{74} Though underpinned by “a sense of outrage and passion for revenge,” retribution ensures “orderly” and proportional punishment.\textsuperscript{75} Perhaps most importantly—and in a similar vein to the Court’s views on retribution—because of its retributive value, “The death penalty is a fitting response to evil.”\textsuperscript{76} However, central to retribution is its distinction from simple revenge. Retributivists dating back to Thomas Jefferson have held proportionality as a central component of retribution, one which dictates the punishment fit—not exceed—the crime.\textsuperscript{77} Moreover, guilt and culpability are critical elements of fitting retribution; therefore, the death penalty is only morally justified so long as it does not deliver excessive retribution.\textsuperscript{78} Pojman does not opine on whether decades-long delays exacerbate or diminish retribution to an extent which challenges the death penalty’s retributive value.

Russell Christopher (2014) meets the nexus of retribution and delays head on and demonstrates that they provoke the ire of death penalty proponents and opponents alike. Taking inspiration from the axiom “justice delayed is justice denied,” Christopher

\textsuperscript{73} Id. at 834, quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986).
\textsuperscript{74} Pojman, supra at 57.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 56.
\textsuperscript{78} Id. at 54.
represents capital punishment proponents’ exasperation with delays.\textsuperscript{79} Retribution offers “justification, and the most compelling justification, of capital punishment.”\textsuperscript{80} Though Christopher does take issue with the length and irreparability of death penalty delays,\textsuperscript{81} his primary gripe is that “delay in the enforcement of capital punishment frustrates the purpose of retribution.”\textsuperscript{82} To this end, Christopher analyzes opinions addressing \textit{Lackey} claims and evaluates the relationship between various perspectives on lengthy death row incarceration and retributivism.\textsuperscript{83} Death penalty delays can be conceived as additional and excessive punishment which overdo retribution,\textsuperscript{84} as extensions of life that are too lenient and undermine retribution,\textsuperscript{85} or as an unjustified combination of the two.\textsuperscript{86} All three frustrate retribution in one way or another, and suggest that delays are incompatible with the death penalty’s primary justification.

A death penalty which prioritizes retribution over reliability—and one with little delay—carries with it intolerable risks. James Liebman (2002) reminds us of the importance of a reliable death penalty in his discussion of wrongful execution. He highlights two worrying aspects of wrongful executions, the first of which is the “substantial risk” of executing the innocent.\textsuperscript{87} Liebman cites the work of a team of researchers from Columbia University School of Law in claiming that—in addition to

\begin{thebibliography}{99}
\bibitem{Christopher} Russell L. Christopher \textit{Death Delayed is Retribution Denied}, 99 Minn. L. Rev. 421, 423 (2014).
\bibitem{Christopher2} \textit{Id.}, at 439.
\bibitem{Christopher3} \textit{Id.}, at 424.
\bibitem{Christopher5} \textit{Id.}, at 427-428. These claims argue extended stays on death row violate the Eighth Amendment in accordance with Justice John Paul Stevens’s dissent from denial in \textit{Lackey v. Texas}, 514 U.S. 1045 (1995).
\bibitem{Christopher6} \textit{Id.}, at 459-459.
\bibitem{Christopher7} \textit{Id.}, at 462.
\bibitem{Christopher8} \textit{Id.}, at 465.
\end{thebibliography}
the risk of wrongful execution posed by capital punishment—it is exceedingly difficult to identify a wrongful execution resulting from the death penalty, an institution “designed to kill.”88 Capital cases are not truly concerned with determining guilt; if they were, notoriously unreliable eyewitness testimony would not be so readily-admitted. Rather, capital cases are about “the sufficiency of evidence.” That there is no “systematic effort to determine whether executed individuals were innocent”89 suggests a general indifference to innocence within the capital system. Despite the difficulty associated with collecting evidence of wrongful executions, Liebman points to the 101 individuals ultimately acquitted for whom death warrants had been signed, “leaving the discovery of their innocence to entirely unpredictable fortuities.”90

Capital punishment has been indelibly shaped by the conflict between reliability and retribution. Coleman evidences the importance of the Justice Breyer’s Glossip dissent, while scholars such as Baumgartner, Garrett, and Holewinski have support Breyer’s claims and demonstrated that the death penalty remains as unreliable—if not more so—as it was before Furman. Uelman and Connolly discuss the detrimental effects of delays in California and in the broader United States. Maher suggests that the sentencing decline has enabled states to narrow their application of the death penalty but warns that unreliability stemming from mental illness remains. Wilson identifies a consensus in international law prohibiting the execution of the mentally ill, and Winnick suggests that proscribing their execution should be next on the Court’s capital punishment agenda. Additionally, Winnick raises concerns about the effects of

88 Id.
89 Id. at 79.
90 Id.
executing the mentally ill on the retributive purpose of the death penalty, a purpose which Pojman assures us is valid and morally justifiable. Christopher argues that delays, too, undermine the retribution offered by capital punishment. However, Liebman reminds us that reliability must trump retribution, as there exists an undue risk of the wrongful executions.

The scholarship makes it plain that reconciling reliability and retribution is no easy task, especially since the death penalty is still undermined by serious unreliability and seemingly-interminable delays. More importantly, quantitative and qualitative analyses alike speak to the Court’s failure to adequately heal the “legal wounds” with which Justice Breyer is so concerned. That the death penalty remains seriously flawed in spite of nearly fifty years of post-\textit{Gregg} reflection suggests that capital punishment is due a new \textit{Furman}, one which benefits from the neutral analysis made possible by canons of construction.
III. But Can We Have Either?

**Appellate Processes and Capital Punishment Principles**

Since *Gregg*, the death penalty has been subject to a tug of war between its retributive motivation and its Court-mandated reliability. The variety of speeds with which states finally dispose of capital cases is evidence of this and offers a glimpse into which principle—reliability or retribution—a state favors. States have significant agency in determining both the breadth of capital sentencing statutes and the length of capital appellate processes. It is in the latter where death’s dueling principles become most readily apparent. The first stage of the capital appeals process is the direct appeal to the state high court, a step which can take a decade or more. The condemned may then appeal the state high court decision to the Supreme Court; nearly all of these appeals are fruitless.\(^1\) Then come state habeas proceedings. As all claims must be exhausted in state habeas courts prior to the commencement of federal habeas appeals, these state habeas proceedings provide state courts and capital defenders multiple opportunities to extend the appellate process.

A longer appellate process allows for the full exploration and development of relevant claims and evidence, but at a price: decades-long delays in oppressive conditions dilute the retribution central to capital punishment. These processes represent a prioritization of reliability over retribution. Decades of delay give the condemned more than enough time to develop their claims but do so at the expense of swift retribution. On the other hand, states that railroad direct and state habeas

appeals increase the risk of executing the innocent or those whose claims of trial error could, in time, result in a commutation. These speedy processes clearly prioritize swift retribution over the time necessary to protect against a wrongful execution. Neither long nor short appellate processes sufficiently comply with Gregg’s stated aim of reducing the problems that plagued capital punishment nearly fifty years ago. Both testify to an irrepressible conflict between reliability and retribution.

My analysis of 428 death sentences illustrates the outcomes of these divergent appellate approaches and demonstrates that the modern death penalty is dogged by conflicting principles incapable of being reconciled. This irreconcilability invites the aptly-named irreconcilability canon, which calls for the invalidation of any statute whose competing principles cannot be harmoniously read. Both the decline in nationwide death sentencing and the divergent appellate outcomes experienced in the six states of interest reflect this irreconcilability and the challenges of implementing a death penalty “full of internal contradictions.” Figure one depicts the decline in sentencing from 1998 to 2004 in the six states of interest.

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93 Glossip, 576 U.S. at 2.
Table one also quantifies the significant decline in death sentencing and better situates the six states of interest within larger sentencing trends. Both California and Texas play an outsized role in death sentencing nationwide and deserve significant scrutiny for this reason. These two states are the premier representatives of appellate processes which appear to prioritize reliability and retribution, respectively. It is for this reason that they, alongside Pennsylvania and Virginia, guide the rest of my analysis.
Table 1: Comparing Death Sentencing from States of Interest to Nationwide Sentencing

<table>
<thead>
<tr>
<th>Year</th>
<th>CA</th>
<th>CO</th>
<th>PA</th>
<th>TX</th>
<th>VA</th>
<th>WY</th>
<th>U.S. Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>32</td>
<td>1</td>
<td>13</td>
<td>42</td>
<td>6</td>
<td>0</td>
<td>300</td>
</tr>
<tr>
<td>1999</td>
<td>42</td>
<td>1</td>
<td>13</td>
<td>49</td>
<td>7</td>
<td>0</td>
<td>287</td>
</tr>
<tr>
<td>2000</td>
<td>31</td>
<td>1</td>
<td>9</td>
<td>5</td>
<td>4</td>
<td>0</td>
<td>230</td>
</tr>
<tr>
<td>2001</td>
<td>23</td>
<td>0</td>
<td>4</td>
<td>19</td>
<td>3</td>
<td>0</td>
<td>174</td>
</tr>
<tr>
<td>2002</td>
<td>16</td>
<td>0</td>
<td>10</td>
<td>13</td>
<td>1</td>
<td>0</td>
<td>168</td>
</tr>
<tr>
<td>2003</td>
<td>22</td>
<td>1</td>
<td>6</td>
<td>20</td>
<td>1</td>
<td>0</td>
<td>153</td>
</tr>
<tr>
<td>2004</td>
<td>12</td>
<td>0</td>
<td>4</td>
<td>15</td>
<td>1</td>
<td>1</td>
<td>147</td>
</tr>
<tr>
<td>Total</td>
<td>179</td>
<td>4</td>
<td>59</td>
<td>163</td>
<td>23</td>
<td>1</td>
<td>1459</td>
</tr>
</tbody>
</table>

Percentage of Total Sentences

<table>
<thead>
<tr>
<th></th>
<th>CA</th>
<th>CO</th>
<th>PA</th>
<th>TX</th>
<th>VA</th>
<th>WY</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>12.27%</td>
<td>0.21%</td>
<td>4.04%</td>
<td>11.17%</td>
<td>1.58%</td>
<td>0.07%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Reliability

“It won’t be over until I go to San Quentin. I want to press the button if they’ll let me.”94

· Kirk Wilson

In 1998, Daniel Frederickson “won” what a California district attorney called “a lifetime achievement award” for a career criminal. Frederickson was sentenced to death for a routine homicide during the commission of a robbery, a robbery he planned as a means to return to jail. Was this the work of the worst of the worst? Kirk Wilson, the victim’s brother, certainly thought so, claiming life without parole would be a “reward” for Frederickson, and that “the only thing that will be justice for my family is when I can stand in a room and [Frederickson] is pronounced dead.”95 One wonders if Wilson

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95 *Id.*
still wants to “press the button” in 2019, or if his desire for retribution has been
tempered by the twenty-one years since his brother’s murder. Frederickson’s automatic
appeal is not yet fully briefed as of April 2019. If swift retribution is what victims’
families seek, they are in for a lesson in patience.

Delays like those experienced by Mr. Frederickson frustrate the death penalty’s
retributive purpose. The rarity of executions and the longevity of delays in California
and Pennsylvania speak to those states’ indifference to and attenuated relationship
with retribution. 96 It was for this reason, among others, that United States District
Judge Cormac J. Carney struck down California’s death penalty in the 2014 case
Chappell v. Jones. Judge Carney wrote of the California condemned:

Systemic delay has made their execution so unlikely that the death
sentence carefully and deliberately imposed by the jury has been quietly
transformed into one no rational jury or legislature could ever impose: life
in prison, with the remote possibility of death. As for the random few for
whom execution does become a reality, they will have languished for so long
on Death Row that their execution will serve no retributive or deterrent
purpose and will be arbitrary.97

Table two evidences the delays at the heart of Judge Carney’s opinion and
summarizes the outcomes of each of the 428 death sentences analyzed in California and
the other five states of interest. Noteworthy is that—despite having been sentenced
between fifteen and twenty-one years ago—just over half of these defendants’ cases
have been finally disposed. An even smaller portion—under twenty percent—have
delivered the retribution they promised.98 Pennsylvania, though quicker to resolve

96 California and Pennsylvania, as symbolic states, represent this form of death penalty. In both states, delays are long and executions infrequent.
98 These numbers do not account for those inmates who voluntarily suspended their appeals. As such, they are likely lower than what they would be if I had removed those inmates who voluntarily suspended their appeals.
capital appeals, appears to be equally disinterested retribution: of the thirty-five finally disposed sentences, twenty-four have been overturned.

Table 2: Summary of Sentence Outcomes, 1998-2004

<table>
<thead>
<tr>
<th>State</th>
<th>Total Sentences</th>
<th>Sentences Finally Disposed</th>
<th>Sentences Overturned</th>
<th>Offenders Still on Death Row</th>
<th>Executions</th>
<th>Deaths (suicide or natural causes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>178</td>
<td>33</td>
<td>5</td>
<td>158</td>
<td>0</td>
<td>15</td>
</tr>
<tr>
<td>Colorado</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>59</td>
<td>35</td>
<td>24</td>
<td>35</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Texas</td>
<td>163</td>
<td>121</td>
<td>19</td>
<td>66</td>
<td>69</td>
<td>9</td>
</tr>
<tr>
<td>Virginia</td>
<td>23</td>
<td>23</td>
<td>8</td>
<td>0</td>
<td>12</td>
<td>3</td>
</tr>
<tr>
<td>Wyoming</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1(^{99})</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>428</strong></td>
<td><strong>217</strong></td>
<td><strong>1</strong></td>
<td><strong>259</strong></td>
<td><strong>81</strong></td>
<td><strong>27</strong></td>
</tr>
</tbody>
</table>

California is the primary offender when it comes to delays, marrying a high volume of sentences with an appellate system moving at a snail’s pace. Because of the infrequency of executions\(^{100}\) and the length of their average delays, California—and Pennsylvania, to a lesser extent—serve as the primary representatives of states which prioritize reliability over speedy retribution. During a period spanning the peak and beginning of the decline of death sentencing nationwide, California’s courts showed a disregard for the timely resolution of death sentences and an utter disinterest in executing the condemned. This raises serious questions regarding the purpose behind retaining what is becoming a crueler version of life without parole, one which raises pertinent Eighth Amendment questions given our evolving understanding of the

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\(^{99}\) Dale Eaton, Wyoming’s lone death row inmate, remains on death row while Wyoming challenges the commutation of his sentence.

\(^{100}\) California’s last execution was in 2006, Pennsylvania’s in 1999. Death Penalty Information Center, “Executions by State and Year,” https://deathpenaltyinfo.org/node/5741 (last visit Apr. 18, 2019).
detrimental effects of time spent on death row. And perhaps more importantly, these delays fundamentally undermine the retributive purpose of the death penalty.

Justices have long made it clear that retribution is the primary motivation behind death penalty. The death penalty is a punishment derived from public outrage at heinous crimes and a penalty for crimes “so vicious, so offensive to society’s standards of decency, that they call out for an ultimate sanction.”\textsuperscript{101} Indeed, in 1984, Justice Blackmun declared, “the primary justification for the death penalty is retribution.”\textsuperscript{102} The Court has not since seen fit to advocate incapacitation or deterrence with the same force as retribution. Justice John Paul Stevens, who voted to reinstate the death penalty in \textit{Gregg}, now argues that “the question whether we should retain the death penalty depends on the strength of the interest in retribution.” For Stevens, the answer is to “put an end to what has become a wretched arrangement.”\textsuperscript{103}

This desire for retribution against the accused—a desire forged in the trauma immediately following an atrocity—is fundamentally at odds with our nation’s interest in ensuring that our death penalty is reliable, an interest which has contributed to lengthy delays. Effective retribution does not come decades after the initial “social feeling of revulsion.”\textsuperscript{104} Yet, on average, the condemned spend just under eighteen years on death row.\textsuperscript{105} Many spend far longer than that. Eighteen years should be enough time for the passions fueled by a violent crime to cool and for the retributive value of capital punishment to diminish.

\textsuperscript{103} John Paul Stevens, \textit{Six Amendments: How and Why We Should Change the Constitution} 110-111 (2014).
\textsuperscript{104} Id.
\textsuperscript{105} \textit{Glossip}, 576 U.S. at 18.
For more than two decades, justices have decried the delay in reaching the final disposition of capital cases, whether because of their cruelty or for their role in undermining retribution. In a 1995 dissent from denial of certiorari, Justice Stevens argued that seventeen years on death row constituted a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment and undermined the death penalty’s “two principal social purposes: retribution and deterrence.”\textsuperscript{106} In 2018, Justice Breyer echoed his former colleague, this time dissenting from the denial of certiorari in a case involving a petitioner who had spent forty-two years on death row. Breyer wrote, “more than a century ago, the Court described a prisoner’s four-week wait prior to execution as ‘one of the most horrible feelings to which [a person] can be subjected.’”\textsuperscript{107} Forty-two years is unconscionable.

Justice Breyer is in good company in recognizing the psychological trauma inflicted by decades spent in the shadow of an uncertain death sentence. In her dissent from denial of a writ of certiorari for \textit{Apodaca v. Raemisch}, a case questioning the deleterious effects of solitary confinement on Colorado’s death row, Justice Sotomayor argued that, “in the absence of an especially strong basis for doing so,” prolonged solitary confinement “is deeply troubling—and has been recognized as such for many years.”\textsuperscript{108} Sotomayor contends that the Court is “no longer so unaware” of the “immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers,” a punishment which “comes perilously close to a penal


tomb.” Justice Sotomayor makes a strong case against these delays because society and its courts are now well aware of the severe dehumanization that can result from extended periods of solitary confinement in each of the six states of interest. In California, the condemned spend between sixteen and twenty-three hours per day in solitary confinement: this is comparatively lenient. In Colorado, Pennsylvania, Texas, and Virginia, the condemned spend twenty-three hours per day in solitary, while in Wyoming, they spend all but thirty minutes each day behind bars, alone.109

The effects of solitary confinement have led many California death row inmates to turn to drugs as an escape, a decision for which Nicholas Rodriguez paid the ultimate price. Los Angeles deputy district attorney Michael Camacho (the man who prosecuted Rodriguez), said “The accessibility of narcotics is rampant in the Department of Corrections,” even on death row.110 California never determined whether Rodriguez’s heroin overdose was accidental or suicidal; however, the availability and widespread use of narcotics on death row, where “there are many channels for contraband to reach prisoners”111 speaks to the despair in which the condemned spend the years awaiting an execution that may never come.

These oppressive periods of solitary confinement distort the death penalty, shifting its punitive force from an actual execution to the seemingly-interminable time spent awaiting it. In Bucklew, Justice Gorsuch declared “Both the State and the victims

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109 Id. at 8.
112 Id.
of crime have an important interest in the timely enforcement of a sentence.”

For Gorsuch and other conservative justices, these delays “frustrate” that timely enforcement. It is for this reason that Justice Gorsuch argues the answer to death penalty delays “is not, as [Justice Breyer’s] dissent incongruously suggests, to reward those who interpose delay with a decree ending capital punishment by judicial fiat.”

This view laments the lengthy delays which are now commonplace but places the blame squarely on the condemned without regard for their suffering. Scholars have expressed concerns about the effects of long-term solitary confinement on mental health. There exists “extensive empirical literature that clearly establishes [solitary confinement’s] potential to inflict psychological pain and emotional damage.” The condemned suffer from symptoms such as “appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilation.” More jarring still, the “effects of solitary confinement are analogous to the acute reactions suffered by torture and trauma victims, including post-traumatic stress disorder.”

Like Nicholas Rodriguez, one in four of the defendants studied had died due to suicide or natural causes by early 2019. These deaths demonstrate that, if four weeks was too long in 1890, decades or longer is intolerable in 2019, as not only are these deaths reflective of death row conditions, but of retribution denied. States like California and Pennsylvania delay death penalty proceedings for what must feel like an

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114 Id.
115 Craig Haney, Mental Health Issues in Long-Term Solitary and “Supermax” Confinement, 49 Crime & Del. 124, 130 (2003).
116 Id. Haney cites dozens of studies from multiple disciplines and continents to demonstrate how universally-accepted these symptoms of solitary confinement are.
117 Id. at 131.
eternity, averaging twenty-five\textsuperscript{118} and 17.49 years,\textsuperscript{119} respectively. Though these delays do offer more time to ensure states are not executing the wrong people, they require the condemned to live in unbearable conditions and serve only to undermine the death penalty’s retributive purpose by shifting its punitive focus from the execution itself to the cruel decades spent awaiting it and by rendering the death penalty itself a disproportionately cruel punishment.

\textit{Trop} established that society’s evolving standards of decency are foundation for analyzing the constitutionality of punishments on Eighth Amendment grounds. Given what we have come to understand about the dehumanizing effects of extended periods on death row, there are clear parallels between the denationalization at the heart of \textit{Trop} and the suffering of the condemned today. If stripping one of his or her political identity is unconscionably cruel and unusual, what of stripping one of their humanity? Surely this offends our Constitution’s cardinal principles and suggests that any increased reliability stemming from these delays comes at too great a cost.

The trouble is, reducing delays without significantly undercutting the death penalty’s reliability is no easy task. Death sentencing has ebbed to near-record lows in this country, yet the average delay between sentence and execution, exoneration, or commutation is increasing.\textsuperscript{120} In 2001 the American Bar Association called for improved capital defense systems to address the appalling standard of capital defense at the

\textsuperscript{118} Natasha Minsker et al., \textit{California’s Death Penalty is Dead: Anatomy of a Failure}, ACLU of California 2 (2011).


\textsuperscript{120} Baumgartner, \textit{supra} at 157.
time. 121 In the two decades since, there has been widespread improvement to capital defense. Capital defendants now receive better trial and, crucially, appellate counsel, as the availability and quality of capital defenders has improved drastically since the turn of the millennium. 122 Increased delays are part of an appellate process improved by better lawyering; trained capital defenders keep their clients alive for at all costs. This adds years to the appellate process. 123 Any significant reduction in the delay between sentencing and execution is unlikely without an equally significant sacrifice in reliability.

Post-Gregg capital punishment jurisprudence prohibits such a circumscription of reliability in favor of retribution. A harmonious reading of the death penalty—one which would enable the death penalty to continue to function as a constitutionally viable punishment—requires a reconciliation of these two conflicting principles. California and Pennsylvania are states which meet or exceed the national average for delays, and, in doing so, favor reliability over retribution. However, the delays experienced by the condemned in these states can either undermine retribution or make it excessive through the cruelty of life on death row. This reality highlights the fundamental flaws present in a delayed death penalty—even one which seeks to prioritize reliability over retribution—and foreshadows the impossibility of reconciling the conflict between retribution and reliability.

121 American Bar Association, Section of Individual Rights and Responsibilities, supra.
Retribution

“Psychological reports describe [Masterson’s] upbringing in an abusive home where he was not shown much love. His difficult childhood contributed to a later diagnosis of ‘conduct disorder, solitary aggressive type, moderate atypical personality disorder traits and borderline and possible atypical bipolar traits, and probable mild organic brain dysfunction...[these] records came before the jury, though the defense never highlighted their contents.”

· The Hon. Kenneth M. Hoyt, U.S. District Judge

Capital punishment has long been considered a means of expressing society’s moral outrage. In Gregg, the Court recognized humankind’s instinct for retribution and claimed that, “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.” Appellate processes that swiftly and frequently execute the condemned can help to restore this confidence and deliver retribution, one of the death penalty’s two conflict principles. However, these processes come with their own costs, costs which make it clear that—just as a death penalty solely focused on reliability is impractical—a wholly retributive death penalty is impermissible. That neither a wholly reliable death penalty nor an entirely retributive one seems achievable suggests that the death penalty cannot be resuscitated by the harmonious-reading canon, a reality which calls for the death penalty’s invalidation.

125 Gregg 428 U.S. at 183.
126 Id. at 183, quoting Furman, 408 U.S. at 308 (Stewart, J., concurring).
Capital appeals take time for a reason: trial errors may be slow to come to light and appellants need time for counsel and courts to thoroughly consider their claims. Texas and Virginia are well-known for the speed with which they dispose of capital cases and deliver retribution. This speed does mitigate Eighth Amendment questions arising from long and cruel delays; however, in this instance, solving one problem begets another more fearsome concern. Namely, a speedy capital appellate process contributes to an intolerable risk of wrongfully executing those who would either be exonerated or have their sentences commuted to life. Even when Texas and Virginia allow capital appeals to approach the national average of 18 years, we are still not sure that they get it right. This is evidenced by the cases of Richard Masterson, William Morva, and Alfredo Prieto.

Richard Masterson was sentenced to death for a 2002 crime dubiously deemed capital murder in Texas. Masterson “quickly became a suspect” in the death of Darin Shane Honeycutt, a fixture in Harris county nightclubs and a man often found masquerading as “Brandy Houston.” Mr. Honeycutt was adjudged to have died from asphyxiation—asphyxiation which Mr. Masterson alleged occurred during consensual intercourse. While pursuing Masterson, police apprehended his nephew, who was in possession of cocaine at the time. Once Masterson was in custody, he made what he would later argue was a false and inadmissible confession. Masterson argued his right to counsel was denied, his confession was made in exchange for what he believed was

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127 Glossip, 576 U.S. at 18.
128 Masterson v. Thaler, No. 4:09-CV-2731 at 1-2.
129 Id. at 4.
130 Id. at 3.
131 Id. at 99.
an offer of leniency for his nephew,132 and finally, that he only confessed “because he was embarrassed to admit that he wanted to engage in homosexual relations with the victim.”133 More pressing still was Masterson’s claim of ineffective assistance of counsel, which stemmed from counsel’s failure to even broach Masterson’s extensive record and diagnosis of “several mental health problems.”134

Counsel let Masterson down, but it was Texas that failed him. Not only did Texas courts fail to address Masterson’s ineffective assistance claims, they stood by as “the State affirmatively suppressed evidence” as to the credibility of the medical examiner conducting what was a “critically flawed autopsy examination.”135 Paul Shrode, the examiner in question, operated in such a way that his work could not be reviewed, gave “false testimony” that the victim had defensive wounds,136 and argued the victim had died by strangulation despite the fact that his body “showed no physical signs of strangulation.”137 It is no surprise that the Death Penalty Information Center now lists Masterson among those suspected to have been innocent of the crimes for which they were executed.138 Richard Masterson was executed in 2016.

Masterson’s fourteen years on Texas’s death row make him an outlier. Table three evinces the efficiency with which Texas and Virginia typically dispose of capital cases. Death sentences in Texas and Virginia are not only more efficient, but more solid guarantees of execution. Texas’s 11.7 percent rate of reversals and

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132 Id. at 97.
133 Id. at 6.
134 Id. at 56.
136 Id. at 39
137 Id. at 41.
commutations is far below the national average of 42.4 percent from 1973 to 2013.\textsuperscript{139}

<table>
<thead>
<tr>
<th>State</th>
<th>Percentage of Sentences Resulting in Execution</th>
<th>Percentage of Sentences Overturned</th>
<th>Percentage of Sentences Finally Disposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>California*</td>
<td>0%</td>
<td>.028%</td>
<td>18.54%</td>
</tr>
<tr>
<td>Colorado</td>
<td>0%</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>0%</td>
<td>40.68%</td>
<td>59.32%</td>
</tr>
<tr>
<td>Texas</td>
<td>42.33%</td>
<td>11.66%</td>
<td>74.23%</td>
</tr>
<tr>
<td>Virginia</td>
<td>52.17%</td>
<td>34.78%</td>
<td>100%</td>
</tr>
<tr>
<td>Wyoming</td>
<td>0%</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>18.97%</strong></td>
<td><strong>14.05%</strong></td>
<td><strong>50.59%</strong></td>
</tr>
</tbody>
</table>

It is worth noting that Texas’s reversal rate is, arguably, inflated. Ten out of the nineteen reversals analyzed came via Court-mandated executive clemency in the wake of \textit{Roper v. Simmons}. Without \textit{Roper}, Texas’s reversals would almost certainly decrease, as every individual convicted as a minor would have required relief by some other, unlikely avenue. Table four summarizes the most recent data regarding inmates’ average time spent on death row from state to state and illustrates the speed with which states like Texas and Virginia complete capital appeals. As is evidenced by Table four, Virginia averages just 7.1 years between sentencing and execution. Texas’s 10.87 years is not much better, as it takes, on average, 11.3 years for a wrongful death sentence to result in an exoneration.\textsuperscript{141} Additionally, this table examines exonerations by state and casts a shadow on

\textsuperscript{139} Baumgartner et al., \textit{supra} at 139.
\textsuperscript{140} California’s numbers and the total sentences overturned are distorted by the low volume of finally disposed sentences in California.
Texas death sentences; despite few overturned sentences, Texas is the leader in exonerations among my six states of interest. Eight of Texas’s exonerations are particularly noteworthy, as they came after delays at or well above Texas’s average time on death row.\textsuperscript{142} The numbers make it clear that Texas struggles to reliably impose death sentences.

But Richard Masterson’s case demonstrates that Texas’s reliability problems run deeper than just a speedy appellate process. A Texas police officer interrogated Masterson under dubious circumstances and elicited a questionable confession during an unrecorded conversation.\textsuperscript{143} Texas prosecutors advanced a case against Masterson that hinged on the testimony of a medical examiner the state knew to be unqualified.\textsuperscript{144} Texas courts allowed this to happen, and ensured that, despite credible claims of ineffective assistance of counsel and Masterson’s “severe mental illness,”\textsuperscript{145} Masterson remained on death row. And Texas executed Masterson after fourteen years—still four years fewer than the national average.\textsuperscript{146}

\begin{flushleft}
\textsuperscript{142} Death Penalty Information Center, \textit{Innocence Database}, https://deathpenaltyinfo.org/innocence?inno_name=&exonerated=&state_innocence=All&race=All&dna=All. (last visited Apr. 2, 2019).
\textsuperscript{143} \textit{Masterson v. Stephens}, No. 4:09-CV-2731 at 18.
\textsuperscript{144} \textit{Id.} at 39.
\textsuperscript{145} \textit{Id.} at 19.
\textsuperscript{146} \textit{Glossip}, 576 U.S. at 18.
\end{flushleft}
Table 4: Average Time on Death Row and Exonerations by State

<table>
<thead>
<tr>
<th>Entity</th>
<th>Average Time on Death Row</th>
<th>Exonerations (1976-present)</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>25 years\textsuperscript{148}</td>
<td>5</td>
</tr>
<tr>
<td>Colorado</td>
<td>8.44 years\textsuperscript{149}</td>
<td>0</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>17.49 years\textsuperscript{150}</td>
<td>6</td>
</tr>
<tr>
<td>Texas</td>
<td>10.87 years\textsuperscript{151}</td>
<td>13</td>
</tr>
<tr>
<td>Virginia</td>
<td>7.1 years\textsuperscript{152}</td>
<td>1</td>
</tr>
<tr>
<td>Wyoming</td>
<td>16 years\textsuperscript{153}</td>
<td>0</td>
</tr>
<tr>
<td>United States</td>
<td>17.58 years\textsuperscript{154}</td>
<td>164</td>
</tr>
</tbody>
</table>

Justice David Souter offers a strong argument against the risks of wrongful executions posed by the death penalty in his dissenting opinion in the 2006 case *Kansas v. Marsh*:

Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences.\textsuperscript{155}

That Texas and Virginia’s capital appeals are, on average, completed in fewer than the 11.3-year average between sentencing and exoneration suggests at best

\textsuperscript{147} Id.
\textsuperscript{148} Natasha Minsker, *supra*.
\textsuperscript{149} As Colorado uses its death penalty so infrequently, there is limited data available regarding those sentenced to death between 1976 and 1991, where Brandon Garrett’s database begins. This figure is the result of my averaging of the time spent on death row by those sentenced since 1991
\textsuperscript{150} General Assembly of the Commonwealth of Pennsylvania, *supra*.
\textsuperscript{153} As was the case for Colorado, this figure is an average of Dale Eaton and Mark Hopkinson’s time on Wyoming’s death row.
\textsuperscript{154} Glossip, 576 U.S. at 18.
overconfidence in their appellate systems and at worst a disinterest in reliability. Texas’s high rate of exonerations should give its courts pause before inflicting a death sentence, as its short appellate process may not be robust enough to correct what could become an irreversible mistake. Likewise, Virginians for Alternatives to the Death Penalty said of those exonerated of capital crimes nationwide, “Many of these victims of a faulty justice system would have been executed before evidence of their innocence came to light if they had been convicted in Virginia.”\textsuperscript{156} The same goes for Texas.

Virginia, too, can be accused of championing retribution over reliability. Like Texas, Virginia’s death penalty is marred by high-profile executions of individuals of limited or of no culpability. William Morva exemplifies the former category. In 2006, Morva escaped from jail while at Montgomery Regional Hospital in Virginia, assaulted Deputy Russell Quesenberry, and killed Derrick McFarland and Corporal Eric Sutphin.\textsuperscript{157} Morva was sentenced to death. Before his initial trial, Morva was denied the services of a prison risk assessment expert.\textsuperscript{158} On appeal, Morva challenged this denial and alleged errors in jury selection.\textsuperscript{159} The Virginia Supreme Court was moved by neither of these claims. By 2014, Morva’s mental health—already in question in 2009—had deteriorated significantly. Federal habeas counsel notes that trial counsel failed to adequately explore mitigation evidence including the abuse Morva suffered in jail, his upbringing, and “substantial evidence from lay

\textsuperscript{156} VADP, \textit{supra}.
\textsuperscript{158} \textit{Id.} at 343.
\textsuperscript{159} \textit{Id.} at 339.
witnesses of Morva’s mental illness.”\textsuperscript{160} This may have been the case because even in 2006, Morva was delusional; had his mental illness been adequately explored or medicated, Morva would have likely been able to show remorse at trial and counsel could have provided more compelling mitigation evidence.\textsuperscript{161}

After eight years on death row, Morva showed further “signs of serious mental illness” that rendered him incapable of providing “any assistance” to federal habeas counsel and incompetent to face execution.\textsuperscript{162} Counsel requested Morva’s execution be stayed pending treatment which—according to doctors—could have increased his competency.\textsuperscript{163} Morva was denied that treatment as the United States District Court found his contemporary competence “immaterial.”\textsuperscript{164} William Morva was executed in 2017, eleven years after his initial sentence.

Like Masterson, Morva had more time to develop his appeals than is typically afforded to the condemned in Virginia (or Texas, in Masterson’s case). Like Masterson, Morva was executed despite a record of mental illness. Virginia and Texas exact retribution by railroading capital appeals through the state courts and by executing individuals who may not truly deserve the death penalty. Alfredo Prieto was another one of those individuals, and a man who has the distinction of being sentenced to death in California before being extradited to Virginia, sentenced to death again, and executed. Prieto spent his time on death row fighting to prove

\textsuperscript{160} Morva \textit{v. Davis}, No. 7:13-CV-283, LEXIS 127932, 23 (W.D. Va. 2014).
\textsuperscript{161} Id. at 10-11.
\textsuperscript{162} Id. at 6.
\textsuperscript{163} Id. at 9.
\textsuperscript{164} Id. at 37.
his intellectual disability. He lost that fight and was executed in Virginia in 2015.\textsuperscript{165} Had Prieto remained on California’s death row, he would likely still be alive today.

The speed with which Virginia and Texas dispose of capital cases offers a glimpse of a death penalty which sacrifices reliability in favor of retribution. These states reverse rarely and execute with comparative frequency, delivering retribution without the requisite reliability. Richard Masterson, William Morva, Alfredo Prieto, and others\textsuperscript{166} make it clear that Texas and Virginia have unenviable records of executing the mentally ill\textsuperscript{167} and the innocent, both of which not only speak to an unreliable death penalty, but one which ignores the dictates of retribution: that it should be proportional to the crime committed and the culpability of the offender.\textsuperscript{168} These problems—like those which plague the California and Pennsylvania death penalties—evidence the challenges inherent to a more retributive capital punishment. That both reliability and retribution states have failed to implement the death penalty in a way that adequately balances these competing principles suggests that a harmonious-reading of the modern death penalty is unattainable.

\begin{flushleft}
\textsuperscript{166} See Carlos DeLuna, Cameron Todd Willingham, etc Death Penalty Information Center, \textit{Executed but Possibly Innocent, supra}.
\textsuperscript{167} Though the Court does not proscribe the execution of the mentally ill,\textsuperscript{168} Pojman, \textit{supra} at 54.
\end{flushleft}
IV. Conclusion

States across the country are responding to the death penalty’s conflicting principles with a force not seen since *Furman*. This response has ranged from the nationwide decrease in death sentencing, to executive moratoria, to renewed discussions in state houses across the country regarding the death penalty’s permissibility. Pennsylvania was first to act among the six states of interest. Addressing what he called “a flawed system that has proven to be an endless cycle of court proceedings as well as ineffective, unjust, and expensive,” Governor Tom Wolf imposed a moratorium on Pennsylvania’s death penalty in 2015.169 California Governor Gavin Newsom echoed those arguments in announcing a similar moratorium in March of 2019. Governor Newsom said of his state’s capital punishment, “It has provided no public safety benefit or value as deterrent. It has wasted billions of taxpayer dollars. But most of all, the death penalty is absolute, irreversible, and irreparable in the event of a human error.”170

Death penalty opponents could be forgiven for deriving undue optimism from these moratoria; however, moratoria stand and fall at the behest of a single man or woman. Without judicial intervention, California’s death penalty can only be permanently abolished via referendum, the most recent examples of which saw capital punishment affirmed in 2012 and in 2016. Moreover, moratoria do little to assuage concerns regarding the cruelty of death penalty delays. Those sentenced to death prior

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to the imposition of the Pennsylvania moratorium will remain on death row until their sentences are reversed or they die. This has not stopped the Pennsylvania Department of Corrections from signing death warrants for death row inmates like Lance Arrington, who was sentenced to death in 2000 and whose death warrant has been issued since 2015. Arrington’s life is still by no means assured. His life may once again be under threat should a death penalty proponent assume the governorship. This knowledge must be unbearable.

There is more cause for optimism in the knowledge that, as in Pennsylvania and California, change is coming in the remaining states of interest. In Virginia, the Republican-controlled Senate passed a bill prohibiting severely mentally-ill defendants from receiving the death penalty in the spring of 2019. Though the bill died in committee at the end of the legislative session, even nascent support for death sentencing reform demonstrates the influence of our evolving understanding of mental illness. Likewise, Pennsylvania’s Task Force and Advisory Committee on Capital Punishment recommended the state take the death penalty off the table for the mentally ill. It was the states’ repudiation of executing the intellectually disabled at

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the turn of the millennium that prompted the Court to take up *Atkins*. Writing for the majority, Justice Stevens cited “the consistency of the direction of change” after dozens of states had taken steps to bar execution of the intellectually disabled.\(^{175}\)

Colorado also reflects this direction of change. Though there has not been a state-level discussion of mental illness and capital punishment like there has been in Virginia, Pennsylvania, and California, the jury in the high-profile Aurora movie theater shooting declined to sentence James Holmes to death despite his eligibility.\(^{176}\) Despite having killed twelve people in cold blood, Holmes was sentenced to life after defense counsel presented compelling evidence that Holmes was “in the throes of a psychotic episode when he committed the acts.”\(^{177}\) Though his crimes surely mark Holmes as the worst of the worst, his parents capture the inculpability of the mentally ill in saying “He is not a monster. He is a human being gripped by severe mental illness.”\(^{178}\)

Change is coming to Texas, too. In both 2017 and 2019, the Supreme Court overturned the Texas Court of Criminal Appeals’ determination that Bobby James Moore was not intellectually disabled at the time of his offense in 1980. In 2017, the Court determined that Moore—whose thirty-nine years on Texas’s death row make unique in a state which typically disposes of capital cases in a quarter of that time—had been intellectually disabled from a young age.\(^{179}\) The Texas Criminal Court of Appeals (CCA) reconsidered Moore’s status and, once again, held that he was not

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\(^{175}\) *Atkins* 536 U.S. at 316.

\(^{176}\) Brandon Garrett writes about Holmes’s exoneration extensively in *End of its Rope*, supra at 49-59.


\(^{178}\) *Id.*

intellectually disabled in 1980. In 2019, the Court once again reversed the Texas CCA, and said elements of Texas’s method of determining intellectual disability had “no grounding in prevailing medical practices.”\textsuperscript{180} Texas will now need to change its evaluation of intellectual capability in order to end its reliance on “lay stereotypes of the intellectually disabled.”\textsuperscript{181}

That states—whether by force or by choice—are now once again narrowing their capital punishment statutes to account for increased understanding of mental health suggests that the change to which Justice Stevens referred in \textit{Atkins} has continued. However, the problems with wholly reliable or retributive death penalties are laid bare by states like California, Texas, and Virginia. Those problems ensure that the death penalty cannot be reconciled in accordance with the harmonious reading canon.

Though the direction of change occurring at the state level suggests improvements to the death penalty are coming, there would need to be significant changes made in order to avoid the death penalty’s invalidation in accordance with the irreconcilability canon. Prioritizing reliability invites both states and capital defenders to delay the final resolution of a death sentence, a strategy that can have traumatic consequences for the condemned and undermine the retribution promised by a death penalty. On the other hand, prioritizing retribution is tantamount to accepting the intolerable risk of wrongful executions and flies in the face of our increasing understanding of mental illness. Therefore, a neutral approach to the death penalty necessitates the use of the irreconcilability canon and the rule of lenity. The tie must go to the condemned. The death penalty must fall.

\textsuperscript{180} \textit{Id.} at 669.
However, a death penalty truly reserved for the worst of the worst could resolve the conflict between retribution and reliability. The worst crimes should stoke long-lasting desire for retribution, one which can weather the decades (if need be) of appeals before an execution. If the death penalty is reserved only for especially heinous criminals, death sentences should become rarities. Capital appeals could become more manageable and the death penalty could regain its status as the ultimate penalty, one that signifies society's universal disapprobation of an evil individual.

Such a death penalty may help to avoid the invalidation of capital punishment, but we do not have such a death penalty. Instead, states must make a choice between reliability and retribution. Those states which favor reliability occasion decades-long delays, while those which sacrifice reliability in the interest of speed and retribution risk wrongfully executing individuals whose cases were indelibly shaped by trial errors, the mentally ill, and, at the most extreme, the innocent. Either outcome is untenable.

It is perhaps because of this inherent tension that the modern death penalty is a salient and politically-charged issue. In 2018, fifty-four percent of Americans favored the death penalty, a metric which indicates that support for the death penalty is recovering after it had receded to levels not seen since Furman in 2016.\textsuperscript{182} Though partisan support for capital punishment has fluctuated, it is now very clearly a dividing issue. In 2016, the Democratic Party Platform called for the complete abolition of the death penalty, while its Republican counterpart claimed its constitutionality

was “firmly settled” and that any future consideration should be left to the states.\textsuperscript{183} Though the punishment itself has become partisan, its unreliability and retributive purposes are fundamentally legal issues, and, as such, would benefit from a neutral analysis. And yet the Court did not apply that neutral analysis at its most recent opportunity to do so, when, on April 1, 2019, it handed down an opinion in \textit{Bucklew}.

Justice Neil Gorsuch announced the decision with a statement reminiscent of Justice Scalia’s infamous quote regarding Henry McCollum.\textsuperscript{184} Justice Gorsuch said from the bench, “The Eighth Amendment has never been understood to guarantee a condemned inmate a painless death…That’s a luxury not guaranteed to many people, including most victims of capital cases.”\textsuperscript{185} Capital punishment is, after all, “an expression of society’s moral outrage at particularly offensive conduct.”\textsuperscript{186} But evolving standards of decency have seen states abandon execution by hanging, firing squads, and electrocution in favor of lethal injection. All this to minimize cruelty. \textit{Bucklew}, a five-to-four decision in which justices voted along party lines, bucks this trend and highlights the need for neutral decision-making on one of America’s most contentious issues.


\textsuperscript{184} Referencing McCollum’s alleged crimes, Scalia said “The death by injection which Justice Blackmun describes looks pretty desirable next to…the case of the 11-year old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that!” \textit{Collins v. Collins}, 510 U.S. 1141 (Scalia, J., concurring) (1994). Scalia chose McCollum’s case as representative of the need for the death penalty. McCollum was, of course, later exonerated.


\textsuperscript{186} \textit{Gregg}, 428 US at 183.
The Court—a branch which, by its own admission, should seek to avoid engaging in “political thicket[s],”\textsuperscript{187}—should \textit{embrace} an opportunity to rule on a politically-charged issues in a politically-neutral way. That politically-neutral approach is one in which canons of construction are lynchpins.

A neutral appraisal reveals that saving the death penalty in its current form is an impossible balancing act. Taken together, the six states analyzed make it clear that a reliable death penalty is one which relegates retribution to a second-class concern. The Court has mandated this relegation of retribution, and in doing so, begs the question: if the primary motivation for maintaining a death penalty is of secondary importance, one must ask the question: Why have a death penalty at all? That fifty years of capital punishment jurisprudence has yet to produce a harmonious death penalty suggests that twisting precedents have left doing so impossible. A court concerned with delivering a neutral ruling must fundamentally change the death penalty or invalidate it. But this Supreme Court is not that court. Justice Breyer is right. We cannot have both retribution and reliability. \textit{Bucklew} is a reflection of retribution triumphing over reliability and of partisanship prevailing over evolving standards of decency. In times such as these, the appeal of neutral decision-making is strong. Without significant changes, a neutral evaluation of the death penalty requires its invalidation in accordance with the irreconcilability canon.