Dead (and Innocent) Men Walking: Will Foster v. Chatman Mark the Beginning of the End for the Death Penalty?

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The arbitrary imposition of punishment is the antithesis of the rule of law.\(^\circ\)

I. Introduction

In Foster v. Chatman,\(^1\) the United States Supreme Court will rule upon a case that may mark the beginning of the end for the death penalty. As discussed in Part II of Foster’s Petition for Writ of Certiorari,\(^2\) the issue before the Court is whether the prosecution violated Batson v. Kentucky\(^3\) when it used peremptory challenges to strike all African Americans (four total) from the jury pool.\(^4\) Under Batson, the prosecution may not strike jurors solely on the basis of race, and if the defense comes forth with evidence of a Batson violation, the burden shifts to the prosecution to demonstrate that the strikes were motivated by race-neutral motives.\(^5\)

In Foster, the prosecution used a green highlighter to identify each potential African-American juror,\(^6\) and circled the word “Black” next to the race question on the jury questionnaire.\(^7\) Additionally, the prosecution’s investigator ranked the African-American jurors against each other in order of preference, should “it


\(^3\) 476 U.S. 79 (1986) (holding that peremptory challenges may not be used to strike jurors solely on the basis of their race).

\(^4\) See Petition for Writ of Certiorari, supra note 2, at 2.

\(^5\) See Batson, 476 U.S. at 89, 93.

\(^6\) Petition for Writ of Certiorari, supra note 2, at 5.

\(^7\) Id. at 6.
[have come] down to having to pick one of the black jurors." As discussed in more detail below, in response to defense counsel’s objections pursuant to *Batson v. Kentucky*, the prosecution offered forty reasons for the strikes that were either unpersuasive or entirely unbelievable, and strongly suggested that race was a substantial motivating factor.

Notwithstanding, the Superior Court of Butts County, Georgia, and Supreme Court of Georgia denied defendant Timothy Foster’s Petition for a Writ of Habeas Corpus. The United States Supreme Court subsequently granted certiorari to determine whether the Supreme Court of Georgia erred by failing to hold that the prosecution engaged in impermissible race discrimination. This Article argues that the Court should not only overrule the Georgia Supreme Court, but it also should hold that the death penalty, as currently applied, violates the Eighth Amendment’s ban on cruel and unusual punishment. What makes cases like Foster remarkable is not whether the prosecutors committed a Batson violation. The case is remarkable because nearly forty years after the Supreme Court ruled that Georgia’s death penalty statute was unconstitutional, the State continues to engage in precisely the type of conduct that makes imposition of the death penalty arbitrary, discriminatory, and contrary to “evolving standards of decency [as] mark[ed by] the progress of a maturing society.”

For example, in 2015, Georgia executed five inmates, the highest annual total in Georgia over the last quarter-of-a-century. The latest inmate to face execution in Georgia’s lethal injection chamber, Brian Keith Terrell, “insisted he was innocent [and] shook his head while looking at state officials before his death sentence was carried out.” Terrell’s lawyers had unsuccessfully argued that “no physical evidence connected Terrell to the killing and that prosecutors had used false and misleading testimony to secure the conviction that drew the death penalty.” The courts disagreed.

Terrell’s execution occurred only months after Georgia had temporarily suspended all executions in the State because “they noticed solid chunks had formed in the normally clear compounded pentobarbital solution” during the execution of convicted murderer Kelly Gissendaner. Not surprisingly, during Terrell’s execution nurses “appeared to have trouble placing the needle in his...”

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8 *Id.* at 7 (citation omitted).
9 *Id.* at 3.
10 *Id.* at 1.
12 See Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).
15 *Id.*
16 *Id.*
17 *Id.*
left arm, and the process took about an hour, which is longer than usual." The events in Georgia should trouble anyone who believes in the rule of law—and human dignity.

To make matters worse, the death penalty is no longer, and likely never was, reserved for defendants “whose extreme culpability makes them ‘the most deserving of execution,’” but is imposed upon those who are poor, indigent, and lack access to high-quality legal representation. Thus, imposing the death penalty in light of its systemic flaws cannot be said to “make the application of the death penalty less arbitrary by restricting its use to those whom . . . [are] ‘the worst of the worst.’” Foster, however, is different in one respect: the prosecution’s racially-motivated reasons for striking African Americans from the jury reminds us that the country we live in today is not much different than the one we lived in before Gregg v. Georgia was decided.

That the Court will rule in favor of the defendant is by no means certain, because the Court’s death penalty jurisprudence has enabled the execution of brain damaged, intellectually disabled, innocent, and mentally ill defendants. Additionally, the Court has made it nearly impossible for capital defendants to prove ineffective assistance of counsel allowed egregious examples of prosecutorial misconduct to go unremedied, disregarded evidence of factual innocence, and failed to intervene in cases that raise grave doubts about the constitutionality of state statutes governing the sentencing phase of capital trials. To make matters worse, Congress, through the Antiterrorism and

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18 Id.
21 428 U.S. 153 (1976) (upholding the constitutionality of the death penalty, provided that juries are given objective criteria to consider when deciding whether to impose the death penalty, including factors in mitigation of the defendant’s guilt).
22 See discussion infra Part III.A.3.
23 See, e.g., Strickland v. Washington, 466 U.S. 668, 687, 694 (1984) (establishing the benchmark of ineffective assistance of counsel as requiring a showing that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result”).
24 See, e.g., Wolfe v. Clarke, 134 S. Ct. 1281 (Feb. 24, 2014) (denial of certiorari). Here, the Court refused to review a Fourth Circuit decision to vacate a District Court Order, which the District Court issued after granting a Writ of Habeas Corpus, barring retrial after prosecutors were found to have “contravened [Wolfe’s] Fourteenth Amendment rights by failing to disclose favorable and material evidence,” allowing a witness to testify “despite having information that his testimony was false,” and “striking a qualified venireman.” See Wolfe v. Clarke, 718 F.3d 277, 280–81, 291 (4th Cir. 2013).
25 See, e.g., Daniel H. Benson, Hans Hansen & Peter Westfall, Executing the Innocent, 3 Ala. C.R. & C.L. Rev. 1 (2013) (discussing the likelihood that the death penalty has resulted in the execution of innocent defendants).
26 See, e.g., Woodward v. Alabama, 134 S. Ct. 405 (2013) (denial of certiorari). By denying certiorari in Woodward, the Court refused to examine the constitutionality of an Alabama statute allowing a judge to impose the death penalty despite a jury’s recommendation of life imprisonment. See id. at 405–06 (Sotomayor, J., dissenting).
Effective Death Penalty Act of 1996 (AEDPA), has precluded meaningful appellate review of capital sentences. Ultimately, the Court’s jurisprudence has shown that death is anything but different, and Foster provides the Court with a perfect opportunity to say what has become obvious: the death penalty has no place in a society that values human dignity.

Part II of this Article examines the death penalty’s jurisprudence over the last quarter century and argues that it has led to a swath of wrongful executions, including those of Cecil Clayton, who was recently executed despite the fact that twenty percent of his frontal lobe was missing, and Warren Hill, who a state court twice adjudged to be mentally disabled. In addition, Part II discusses Furman v. Georgia and Gregg v. Georgia, the two decisions that have shaped the Court’s death penalty jurisprudence. Part III examines the systemic and pervasive flaws in the death penalty, which Justice Stephen Breyer highlighted in his dissent in Glossip v. Gross, when he demonstrated that the death penalty is not imposed only on defendants “whose extreme culpability makes them ‘the most deserving of execution.” Part IV discusses the pending case of Foster v. Chatman, a Georgia case in which the prosecutor allegedly used peremptory strikes to remove all African Americans from the jury pool. This Article concludes by arguing that Foster gives the Court an opportunity to create broader protections for capital defendants, and to begin a shift that may ultimately lead to the elimination of the death penalty. Simply put, the criminal justice system “permit[s] this unique penalty to be so wantonly and so freakishly imposed” that it makes the death penalty an arbitrary—and unconstitutional—punishment.

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27 28 U.S.C.A. § 2254(d) (West 2015) (“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”).  
29 See Hill v. Humphrey, 662 F.3d 1335, 1341–42 (11th Cir. 2011) (reviewing a Georgia Supreme Court order vacating a lower court’s grant of Hill’s habeas petition).  
30 408 U.S. 238 (1972) (per curiam).  
34 Foster v. Chatman, No. 14-8349 (U.S. argued Nov. 2 2015).  
II. The Death Penalty Dies—Then Comes Back to Life

The Court’s decisions in *Furman v. Georgia*[^36] and *Gregg v. Georgia*[^37] provide the historical backdrop and conceptual framework by which to examine the death penalty’s constitutionality.

A. *Furman v. Georgia*

In *Furman*, the Supreme Court held, in a *per curium* opinion, that the death penalty as applied violated the Eighth Amendment’s ban on cruel and unusual punishment.[^38] The case involved a Georgia statute that authorized the death penalty for murder and forcible rape, but that lacked any standards to guide the jury’s discretion in deciding between life and death.[^39] Several Justices issued concurring opinions emphasizing that the death penalty was arbitrarily and discriminatorily imposed in violation of the Eighth Amendment and the Equal Protection Clause.[^40]

Justice Douglas issued a concurring opinion in which he concluded that “there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns.”[^41] Specifically, the death penalty is “disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.”[^42]

These sentiments echoed the statements of then-Attorney General Ramsey Clark, who stated that “[i]t is the poor, the sick, the ignorant, the powerless and the hated who are executed.”[^43] Accordingly, the process for imposing the death penalty violated the “basic theme of equal protection [that] is implicit in ‘cruel and unusual’ punishments,” and the principle that the death penalty “should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatorily.”[^44]

[^36]: Id.
[^38]: *Furman*, 408 U.S. at 240 (per curium).
[^39]: Id. at 239.
[^40]: Id. at 240 (noting that Justice Douglas, Justice Brennan, Justice Stewart, Justice White, and Justice Marshall each filed separate opinions in support of the judgment).
[^41]: Id. at 249 (Douglas, J., concurring) (quoting President’s Law Enf’t & Admin. of Justice, The Challenge of Crime in a Free Society 143 (1967)).
[^42]: Id. at 249–50 (citation omitted).
[^43]: Id. at 251 (quoting Ramsey Clark, Crime in America: Observations on Its Nature, Causes, Prevention, and Control 335 (1970)).
[^44]: Id. at 249 (Douglas, J., concurring) (quoting Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1790 (1970)). In support of the conclusion that the death penalty was arbitrarily imposed, Justice Douglas relied on statements made by the Warden of Sing Sing prison:

Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favour the rich, the law is theoretically impartial, but the defendant with ample means is able to
Justice William Brennan also concurred, and relied on four principles to guide his analysis of whether the death penalty violated the Eighth Amendment. First, a punishment cannot be “so severe as to be degrading to the dignity of human beings.” 45 Second, the government “must not arbitrarily inflict a severe punishment.” 46 Third, “a severe punishment must not be unacceptable to contemporary society.” 47 Finally, Justice Brennan stated, “a severe punishment must not be excessive” or disproportional to the offense of conviction. A punishment is excessive “if it is unnecessary,” achieves “nothing more than the pointless infliction of suffering,” or if there exists a “significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted.” 48

Applying these principles, Justice Brennan concluded that the death penalty is inherently cruel and unusual. 50 Noting that “[d]eath is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity,” 51 Justice Brennan held that “the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.” 52 In addition, the death penalty is imposed arbitrarily, as “thousands of murders and rapes are committed annually in States where death is an authorized punishment for those crimes,” yet “death is inflicted in only a minute fraction of these cases.” 53 Based on the fact that “the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily,” and “smacks of little more than a lottery system.” 54

— have his case presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case.

Id. (Douglas, J., concurring) (quoting Lewis Edward Lawes, Life and Death in Sing Sing 155–60 (1928)).

45 Id. at 271 (Brennan, J., concurring).
46 Id. at 274.
47 Id. at 277.
48 Id. at 279.
49 Id. (citing Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958)).
50 Id. at 305.
51 Id. at 287.
52 Id. at 291.
53 Id. at 293.
54 Id. Justice Brennan further stated:

When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction.

Id. at 294.
To make matters worse, the procedures for selecting those who receive the death penalty, “rather than resulting in the selection of ‘extreme’ cases for this punishment, actually sanction an arbitrary selection.”\(^5\) Relying on the Court’s precedent that “juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision,”\(^6\) Justice Brennan concluded that such procedures “are not constructed to guard against the totally capricious selection of criminals for the punishment of death.”\(^7\)

Justice Potter Stewart also concurred and, writing for three-members of the Court, emphasized that Georgia’s statute arbitrarily imposed the death penalty and “[g]o[es] beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary.”\(^8\) To begin with, “of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”\(^9\) Furthermore, “if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”\(^10\) Additionally, the death sentences were “‘unusual’ in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare.”\(^11\) This led Justice Stewart to conclude that the death sentences were “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”\(^12\) For these reasons, “the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”\(^13\)

Ultimately, the Court’s decision in *Furman* stood for the proposition that the death penalty cannot withstand constitutional scrutiny if it is applied in an unequal, discriminatory, or arbitrary manner. Justice Douglas stated as follows:

Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was not the blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments’ recurring efforts to foist a particular religion on the people. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban

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\(^5\) Id. at 295.
\(^6\) Id. (citing McGautha v. California, 402 U.S. 183, 196–208 (1971)).
\(^7\) Id.
\(^8\) Id. at 309 (Stewart, J., concurring) (citing Weems v. United States, 217 U.S. 349 (1910)).
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.
\(^13\) Id. at 310.
against “cruel and unusual punishments” contained in the Eighth Amendment.64

A close analysis of the death penalty in Furman revealed that “the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.”65

B. Gregg v. Georgia

In response to Furman, legislators in Georgia amended its death penalty statutes to minimize the risk of arbitrariness.66 And in Gregg, the Court held that the recently-enacted amendments to Georgia’s death penalty statutes passed constitutional muster.67 The statutes narrowed the class of death-eligible offenders, bifurcated the guilt and penalty phases of the trial to permit defense attorneys to offer evidence in mitigation of the defendant’s culpability, and guided juror discretion with a statutory list of aggravating and mitigating factors. In addition, the statute required the Georgia Supreme Court to determine whether a sentence of death was disproportional to the punishments imposed in similar cases.68

Writing for a bare majority, Justice Stewart began the Court’s analysis by stating that the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,”69 which requires an “assessment of contemporary values concerning the infliction of a challenged sanction.”70 Against this backdrop, Justice Stewart held that “despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.”71 For example, “the legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person,”72 and Congress “enacted a statute [in 1974] providing the death penalty for aircraft piracy that results in death.”73 Furthermore, one state “adopted a constitutional amendment that authorized capital punishment.”74 Thus, the death penalty was not inconsistent with contemporary public attitudes.

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64 Id. at 255 (Douglas, J., concurring).
65 Id.
67 Id. at 207.
68 See id. at 167–68.
69 Id. at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
70 Id.
71 Id. at 179.
72 Id. at 179–80.
73 Id. at 180.
74 Id. at 181.
Turning to whether the death penalty “comports with the basic concept of human dignity,” the Court held that state legislatures could properly conclude that the death penalty served to deter future crimes. Justice Stewart explained that the “value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.” The Court also held “that the punishment is [not] invariably disproportionate to the crime [of murder],” and that the “infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.”

Finally, the Court held that the “concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.” The Court held that the amendment to Georgia’s death penalty statute appropriately minimized the risk of arbitrariness:

These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as Furman’s jury did: reach a finding of the defendant’s guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury’s attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury’s attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)? As a result, while some jury discretion still exists, “the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.”

The Court also noted that the “automatic appeal of all death sentences to the State’s Supreme Court” provided an “important additional safeguard against arbitrariness and caprice.” As part of the review, the Georgia Supreme Court “compares each death sentence with the sentences imposed on similarly

71 Id. at 182.
72 Id. at 186–87.
73 Id. at 186.
74 Id. at 186–87.
75 Id. at 187.
76 Id. at 195.
77 Id. at 197–98 (quoting Coley v. State, 204 S.E.2d 612, 615 (Ga. 1974)).
78 Id. at 198.
situating defendants to ensure that the sentence of death in a particular case is not disproportionate.” 83 For these reasons, the Court held that Georgia’s procedures for determining death eligibility “[o]n their face . . . seem to satisfy the concerns of Furman,” 84 to avoid having “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.” 85

Ultimately, the Court’s decisions in Furman and Gregg stand for the following four broad propositions. To withstand constitutional scrutiny, the death penalty must reflect “evolving standards of decency” 86 as reflected by contemporary values and opinions regarding its imposition, must be consistent with “the basic concept of human dignity,” 87 must be proportional to the offense, and must not be arbitrarily imposed. The question then becomes, after Gregg, have the concerns about human dignity, cruelty, and arbitrariness been satisfactorily addressed? The answer is a resounding no. In the years since Furman and Gregg were decided, nothing has changed.

Nowhere is this more evident than in Justice Stephen Breyer’s dissenting opinion in Glossip v. Gross, 88 in which the Court ruled by a 5–4 margin that Oklahoma’s protocol for executing condemned inmates by lethal injection did not violate the Eighth Amendment’s ban on cruel and unusual punishment. 89 Justice Breyer’s compelling dissent bore an eerie similarity to the concurring opinions of Justices Brennan and Stewart in Furman, showing that the death penalty is “disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups,” 90 and “uniquely degrading to human dignity.” 91 Justice Breyer’s opinion reminded us that the death penalty invalidated by the Court in Furman is still the death penalty we have today. As Justice Breyer stated, although “[f]our decades ago, the Court believed it possible to interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence . . . that no longer seems likely.” 92

III. The Long, Shameful, and Arbitrary History of the Death Penalty

In Glossip, Justice Breyer summarized in one sentence why the death penalty cannot pass constitutional muster under the four principles set forth in Gregg, and can no longer be considered a legitimate punishment in civilized society:

83 Id.
84 Id.
85 Id. (alteration in original) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)).
87 Gregg, 428 U.S. at 182.
89 See U.S. Const., amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).
90 Furman, 408 U.S. at 249–50 (Douglas, J., concurring) (quoting President’s Comm’n on Law Enf’t & Admin. of Justice, supra note 42, at 143).
91 Id. at 291 (Brennan, J., concurring).
92 Glossip, 135 S. Ct. at 2762 (Breyer, J., dissenting).
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Whether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—do significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as "egregiousness"—do not determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily. 93

As discussed below, the process for imposing the death penalty rests "not on equal justice, but on discrimination," 94 and not on fairness, but on arbitrariness. In the decades since Gregg was decided, it has become evident that the death penalty contravenes evolving standards of decency, does not comport with basic human dignity, is arbitrarily imposed, and disproportionate to the offense of conviction.

A. The Death Penalty Does Not Comport with the Basic Concepts of Human Dignity

The death penalty now contravenes our evolving standards of decency. Public attitudes toward the death penalty are shifting, and rightfully so. With mounting evidence that the death penalty has resulted in the execution of innocent, intellectually disabled, and brain-damaged defendants, public attitudes are increasingly opposed to its imposition. 95 With this shift, public attitudes toward the death penalty are now in line with the basic concepts of human dignity, with which the death penalty does not comport.

1. The Death Penalty Leads to the Execution of Innocent People

Justice Breyer highlighted the fact that the death penalty has likely resulted in the death of innocent people. In fact, "despite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that in the past three decades, innocent people have been executed." 96 Indeed, "researchers estimate that

93 Id.
94 Furman, 408 U.S. at 255 (Douglas, J., concurring).
96 Glossip, 135 S. Ct. at 2756 (Breyer, J., dissenting) (citing James S. Liebman, Fatal Injustice; Carlos DeLuna’s Execution Shows That a Faster, Cheaper Death Penalty is a Dangerous Idea, L. A. TIMES, June 1, 2012, at A19 (describing the results of a four-year investigation, later published as The Wrong Carlos: Anatomy of a Wrongful Execution, that led its authors to conclude that Carlos DeLuna, sentenced to death and executed in 1989, six years after his arrest in Texas for stabbing a single mother to death in a convenience store, was innocent)); see also David Grann, Trial By Fire: Did Texas Execute An Innocent Man?, NEW YORKER, Sept. 7, 2009, at 42 (discussing the case of Cameron Todd Willingham, who was executed in 2004 for the ostensibly motiveless murder of his three
about 4% of those sentenced to death are actually innocent.”\textsuperscript{97} Thus, “there is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law’s view) do not warrant the death penalty’s application.”\textsuperscript{98}

2. The Death Penalty Results in Wrongful Convictions—and Life-Saving Exonerations

In 2014 alone, “six death row inmates were exonerated based on actual innocence,” all of whom had been “imprisoned for more than 30 years (and one for almost 40 years) at the time of their exonerations.”\textsuperscript{99} Furthermore, exonerated defendants spend, on average, ten years in prison before being released. One commentator states as follows:

Of the 1,281 exonerations recorded by the Registry from 1989 through 2013, almost all the individuals had been in prison for years; half for at least 8 years; more than 75% for at least 3 years. As a group, the defendants had spent nearly 12,500 years in prison for crimes for which they should not have been convicted - an average of 10 years each.\textsuperscript{100}

Since 2002, there have been 115 exonerations in capital cases.\textsuperscript{101} In the case of Glenn Ford, who was exonerated in 2014, the prosecutor admitted that “[a]t the time this case was tried there was evidence that would have cleared [him],” and issued a public apology stating that, “at the time of Ford’s conviction, he was ‘not as interested in justice as [he] was in winning.’”\textsuperscript{102} The sheer number of exonerations is powerful evidence that the process for determining who lives and who dies is deeply flawed, and that some who have been sentenced to death are innocent.


\textsuperscript{98} Id. at 2759.

\textsuperscript{99} Id. (citing NAT’L REGISTRY OF EXONERATION, EXONERATIONS IN 2014 2 (2015)).


\textsuperscript{101} Glossip, 135 S. Ct. at 2757 (Breyer, J., dissenting).

\textsuperscript{102} Id. at 2757–58 (alteration in original) (quoting A.M. Stroud III, Lead Prosecutor Apologizes for Role in Sending Man to Death Row, SHREVEPORT TIMES, Mar. 27, 2015) (alteration in original).
3. The Death Penalty Is Imposed on the Brain-Damaged and Mentally Ill

In a study addressing the prevalence of head injuries among various groups of offenders, researchers discovered that “61% of habitually violent offenders had a history of head injuries, compared with 67% of convicts on death row . . . 58% of juvenile convicts on death row (before Roper v. Simmons was decided) . . . 40% of severely psychopathic criminals, and . . . 36% of sexual offenders.”

Two recent executions—Cecil Clayton and Warren Hill—underscore the troubling fact that the death penalty is imposed on brain-damaged and mentally ill offenders. Discussed below, these are two examples of defendants who should never have been executed.

a. Cecil Clayton

Cecil Clayton was executed in Missouri despite missing twenty percent of his brain due to a sawmill accident in 1972 “that forced doctors to remove one-fifth of his frontal lobe.” As Clayton’s attorney, Elizabeth Unger Carlyle, stated, “Cecil Clayton had—literally—a hole in his head,” and “[e]xecuting him without a hearing violated the Constitution, Missouri law and basic human dignity.” As Ms. Unger stated, he “suffered from severe mental illness and dementia related to his age and multiple brain injuries,” and “[t]he world will not be a safer place because Mr. Clayton has been executed.”

b. Warren Hill

In Atkins v. Virginia, the Supreme Court held that the execution of intellectually disabled defendants violates the Eighth Amendment’s ban on cruel and unusual punishment. Unfortunately, some states reacted to Atkins by making it nearly impossible to prove intellectual disability. Warren Hill is a perfect example.

Warren Hill’s recent execution in Georgia is a perfect example of injustice—and arbitrariness—at work. On two separate occasions, a district court in Georgia declared that Hill was mentally retarded. Georgia, however, still managed to execute Hill, and did so by relying on a state statute that requires defendants to prove intellectual disability beyond a reasonable doubt. On its face,
the Georgia statute may not seem problematic but for the fact that it is nearly impossible to prove mental disability. To begin with, the evidence most often relied on to probe intellectual disability—an IQ test—is inherently imprecise. An individual’s IQ score is reported as a ten-point range to account for the standard error of measurement, and expert testimony regarding intellectual disability is often discussed in probabilistic, not definite, terms. Thus, as a practical matter, erecting such a high barrier to prove intellectual disability means that those whom the Constitution protects from execution are precisely those who will be executed.

The most troubling aspect of Hill’s execution is that the state and federal courts allowed it to happen. For example, the Eleventh Circuit relied on the AEDPA to hold that its reviewing authority was “greatly circumscribed and . . . highly deferential to the state courts.” The majority went so far as to say that “even a strong case for relief does not mean that the state court’s contrary conclusion was unreasonable.” Rather, its role was to “‘guard against extreme malfunctions in the state criminal justice systems,’ and not act as a means of error correction.”

In her sharply worded dissent, Eleventh Circuit Judge Rosemary Barkett took aim at Georgia’s statute, recognizing that “[r]equiring proof beyond a reasonable doubt, when applied to the highly subjective determination of mental retardation, eviscerates the Eighth Amendment constitutional right of all mentally retarded offenders not to be executed.” Judge Barkett stated as follows:

This deference requires so detailed and demanding a level of specificity in Supreme Court holdings that it eliminates any federal review whatsoever. Indeed, the State’s position, endorsed by the majority, is that Atkins does not preclude the State from setting the bar of proof as high as it wishes or defining mental retardation to include only those persons whose IQ falls below 30, a level which includes only 4% of the mentally retarded, thereby leaving 96% of all recognized mentally retarded persons subject to execution. This cannot be squared with the command of Atkins, which protects all of the mentally retarded from execution—whether their mental retardation is mild or severe. And when a state court decision eviscerates the substantive constitutional right the Supreme Court has explicitly recognized, it is contrary to that Supreme Court precedent.

The effect of the Eleventh Circuit’s decision, and the Georgia appellate court’s rejection of the trial court’s finding of intellectual disability by a

\[111\] Hill, 662 F.3d at 1343 (quoting Payne v. Allen, 539 F.3d 1297, 1312 (11th Cir. 2008)).
\[112\] Id. at 1345 (emphasis added).
\[113\] Id. at 1347 (quoting Greene v. Fisher, 132 S. Ct. 38, 43 (2011)).
\[114\] Id. at 1365 (Barkett, J., dissenting).
\[115\] Id.
preponderance of the evidence, is to allow states to undercut constitutional
civilized society can justify the execution of a man like Warren Hill, and his
society may allow states to undercut constitutional rights through legislation that renders the right illusory.

[A] constitutional prohibition cannot be transgressed indirectly by the
creation of a statutory presumption any more than it can be violated by
direct enactment. The power to create presumptions is not a means of escape
from constitutional restrictions. And the state may not in this way
interfere with matters withdrawn from its authority by the Federal
Constitution, or subject an accused to conviction for conduct which it is
powerless to proscribe.\textsuperscript{116}

As a result, “if a State’s procedures transgress a substantive constitutional
right, ‘in their natural operation,’ those procedures are unconstitutional.\textsuperscript{117} No
civilized society can justify the execution of a man like Warren Hill, and his execution was a damning statement on American jurisprudence.

4. The Length of Confinement

Death row inmates are incarcerated for, “on average, nearly 18 years after a
court initially pronounced its sentence of death,”\textsuperscript{118} which is a dramatic increase
since 1960, when the “average delay between sentencing and execution was two years.”\textsuperscript{119} These delays subject “death row inmates to decades of especially severe, dehumanizing conditions of confinement.”\textsuperscript{120} For example, the last 10 prisoners who were executed in Florida spent an average of nearly twenty-five years on death row.\textsuperscript{121} In addition, “nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day.”\textsuperscript{122}

5. The Horrors of Execution

Two recent executions—Clayton Locket in Oklahoma and Dennis McGuire
in Ohio—show that the process of ending someone’s life can be excruciating and
inhumane.

a. The Botched Execution of Clayton Lockett

The execution of Clayton Lockett would trouble even the most ardent death
penalty supporters.\textsuperscript{123} After being “stuck with needles more than a dozen
times,”\textsuperscript{124} and being rendered unconscious, Lockett was injected with

\textsuperscript{116} Id. at 1368 (quoting Bailey v. California, 219 U.S. 219, 239 (1911)).
\textsuperscript{117} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 2765 (quoting Johnson v. Bredesen, 558 U.S. 1067, 1069 (2009) (Stevens, J.,
statement respecting denial of certiorari)).
\textsuperscript{121} See id. at 2764.
\textsuperscript{122} Id. at 2765.
\textsuperscript{123} Jeffrey E. Stern, The Cruel and Unusual Execution of Clayton Lockett, ATLANTIC
(June 2015), http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton
lockett/392069/.
\textsuperscript{124} Id.
vecuronium bromide, a paralytic, before he was to be injected with potassium chloride, which would stop his heart immediately. Notably, paralytics like vecuronium bromide do not work to sedate nor anesthetize an individual; their sole function is to disable movement. Incomplete sedation or inadequate anesthesia considered unethical by the medical community and would subject an individual to a death that would be cruel and unusual by any measure. Lockett’s execution had both. Without proper sedation and anesthesia, the individual “might look serene, because his face muscles are paralyzed,” but the truth is that the individual is “suffocating[,] and when he tries to expand his chest and draw breath, nothing happens.” That is exactly what happened to Lockett. After being injected with vecuronium bromide, Lockett “began to breathe heavily,” “clenched his teeth,” “rolled his head,” and “[t]hen he tried to speak.” Soon thereafter, Lockett “lurched up against the restraints,” and “started writhing as if trying to free himself, to get up off the gurney.” Eventually, “Lockett got his whole head up off the gurney” and “kept trying to speak but couldn’t form the words.” The “potassium chloride was supposed to stop Lockett’s heart immediately,” but while “Lockett’s heart was slowing, it kept beating. In addition, when “it looked like his heart muscles were starting to fire erratically” a paramedic lifted the sheet covering Lockett and saw a “protrusion almost the size of a tennis ball on Lockett’s groin.” Although the governor’s counsel soon gave the warden authority to stop the execution, Lockett succumbed, as he had “been dying amidst all the chaos, just very slowly and in

125 Jeremy P. Hampton, Rapid Sequence Intubation and the Role of the Emergency Department Pharmacist, 68 Am. J. Health-Sys. Pharmacists, 1320, 1325 (2011) (“Neuromuscular blocking agents (NMBAs) paralyze skeletal muscle by blocking impulse transmission at the neuromuscular junction. . . . NMBAs do not possess any sedative, amnestic, or analgesic properties and should be coadministered with a sedative. Patients receiving an NMBA alone will remain fully aware of their surroundings and will retain all sensory perception (including painful stimuli).”); see Michael J. Murray, MD, PhD, FCCM, et al., Clinical Practice Guidelines for Sustained Neuromuscular blockade in the Adult Critically Ill Patient, 30 Crit. Care Med. 142, 148 (2002) (describing the proper medical protocol when using paralytics in light of the “multiple admonitions that NMBAs have no analgesic or amnestic effects”).

126 Nancy Ballard, et al., Patients’ Recollections of Therapeutic Paralysis in the Intensive Care Unit, 15 Am. J. Crit. Care 87 (2006) (“Use of NMBAs is ethically and therapeutically contraindicated in patients who have not received satisfactory amounts of sedatives and analgesics.”); see Steven B. Greenberg, MD & Jeffrey Vender, MD, MBA, FCCP, FCCM, The Use of Neuromuscular Blocking Agents in the ICU: Where Are We Now?, 41 J. Crit. Care Med. 1332, 1337 (2013) (“It is imperative to achieve a deep sedative state with sedatives and analgesics prior to the initiation of an NMBA to mitigate the risk of awareness.”).

127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
apparent agony.” Later that week, when President Barack Obama was questioned about Lockett’s execution, he responded: “We do have to, as a society, ask ourselves some difficult and profound questions.” The next person to die in Oklahoma’s lethal injection chamber was Charles Warner, who stated during his execution: “My body is on fire.”

It was only one week later that the U.S. Supreme Court agreed to hear a challenge to Oklahoma’s lethal injection protocol. In a 5-4 decision, the Court held that it did not violate the Cruel and Unusual Punishment Clause.

b. The Inhumane Execution of Dennis McGuire

In Ohio, convicted killer Dennis McGuire experienced “true pain and suffering” on the lethal injection table. Dr. Kent Dively, an anesthesiologist concluded “to a degree of medical certainty [that] this was not a humane execution.” It took twenty-six minutes for McGuire to die, and during this time he reportedly “gaped, choked, clenched his fists and appeared to struggle against his restraints for about 10 minutes after the administration of two drugs, midazolam and hydromorphone.” Dr. Dively noted that this did not “provide for an execution in a professional, humane, sensitive and dignified manner. Allowing the inmate to suffer for a prolonged period struggling to get free and gasping for air before death certainly is not dignified nor humane.”

6. Race and Gender Influence the Death Determination

In his Glossip dissent, Justice Breyer provided compelling evidence that “individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty.” Indeed, “racial and gender biases may, unfortunately, reflect deeply rooted community biases (conscious or unconscious), which, despite their legal irrelevance, may affect a jury’s evaluation of mitigating evidence.” In addition, “studies have found that the gender of the defendant or the gender of the victim makes a not-otherwise-warranted difference.” Furthermore, “[g]eography also plays an

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134 Id.
135 Id.
136 Id.
139 Id.
140 Id.
141 Id.
142 Glossip, 135 S. Ct. at 2759 (Breyer, J., dissenting).
143 Id. at 2762–63; see also Collins v. Collins, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting from denial of certiorari) (“Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death.”).
144 Glossip, 135 S. Ct., at 2761.
important role in determining who is sentenced to death,"\textsuperscript{145} and even "\textit{within} a
dearth penalty State, the imposition of the death penalty heavily depends on the
county in which a defendant is tried."\textsuperscript{146} Moreover, "the racial composition of
and distribution within a county plays an important role."\textsuperscript{147}

Other studies "indicate that the disparity reflects the decisionmaking
authority, the legal discretion, and ultimately the power of the local prosecutor," and "that the availability of resources for defense counsel (or the lack thereof)
helps explain geographical differences."\textsuperscript{148} Perhaps not surprisingly, "political
pressures, including pressures on judges who must stand for election, can make a
difference."\textsuperscript{149}

7. Capital Trials Are Riddled with Prejudicial Procedural Errors and
   Lack Meaningful Procedural Safeguards

Justice Breyer explained in his dissent that "between 1973 and 1995, courts
identified prejudicial errors in 68% of the capital cases before them,"\textsuperscript{150} whereas
"[s]tate courts on direct and postconviction review overturned 47% of the
sentences they reviewed,"\textsuperscript{151} and "[f]ederal courts, reviewing capital cases in
habeas corpus proceedings, found error in 40% of those cases."\textsuperscript{152} This is likely
due in substantial part to the lack of procedural safeguards at the trial and
appellate stages of capital trials.

a. Ineffective Assistance of Counsel

One of the gravest injustices in our criminal justice system, particularly in
capital trials, is the poor quality of representation that indigent defendants
receive, and the almost insurmountable barriers the Supreme Court has erected
to show that counsel’s performance was defective under the Constitution.
Indeed, "capital defendants are typically represented by the worst of the
worst,"\textsuperscript{153} and the Court’s jurisprudence "has led to the miserable quality of
capital defense advocacy."\textsuperscript{154} Specifically, in \textit{Strickland v. Washington},\textsuperscript{155} the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id. at 2762.
\item \textsuperscript{149} Id.; see also Woodward v. Alabama, 134 S. Ct. 405, 408 (2013) (Sotomayor, J.,
dissenting from denial of certiorari) (noting that empirical evidence suggests that, when
Alabama judges reverse jury recommendations, these “judges, who are elected in partisan
proceedings, appear to have succumbed to electoral pressures”).
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Adam Lamparello, \textit{Establishing Guidelines for Attorney Representation of Criminal
Defendants at the Sentencing Phase of Capital Trials}, 62 Me. L. Rev. 97, 102 (2010)
(quoting Craig M. Cooley, \textit{Mapping the Monster’s Mental Health and Social History: Why
Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of
Mitigation Specialists}, 30 Okla. City U. L. Rev. 23, 66 (2005)).
\item \textsuperscript{154} Id. at 100 (quoting Cooley, supra note 155, at 65).
\item \textsuperscript{155} 466 U.S. 668 (1984).
\end{itemize}
\end{footnotesize}
Court held that capital defendants must show not only that counsel’s performance was deficient, but that it affected the outcome of the trial.\(^{156}\) However, it is all but impossible to show that, but for the attorney’s deficient performance, the outcome of the trial would have been different, particularly where courts willingly defer to “incomprehensible ‘strategic’ decisions provided by trial counsel rationalizing their slothful representation.”\(^{157}\) In fact, \textit{Strickland} has been rightly criticized for “fostering tolerance of abysmal lawyering”\(^{158}\) such that, in the sixteen years following its decision, “the Court found ineffectiveness in only one capital case.”\(^{159}\)

To make matters worse, approximately ninety percent of capital defendants are indigent, and have been represented by lawyers who are “unqualified to handle a capital case,”\(^{160}\) “unaware of the governing death penalty statute,”\(^{161}\) “and not even aware that a separate sentencing proceeding would be held in a capital case.”\(^{162}\) In Alabama, for example, “court-appointed attorneys representing capital defendants were subject to disciplinary action, including disbarment, at a rate twenty times higher than that of the bar as a whole, and [f]or those attorneys whose clients were executed, the rate of disciplinary sanctions was almost forty times that of the bar as a whole.”\(^{163}\) As one commentator explains, “[a]lthough courts today universally recognize indigent defendants’ right to state-appointed counsel, underfunding and structural deficiencies that plague public defenders often render that right illusory.”\(^{164}\)

\textbf{b. Antiterrorism and Effective Death Penalty Act of 1996}

In holding that Warren Hill was not entitled to a writ of habeas corpus, the Eleventh Circuit relied on AEDPA,\(^{165}\) stating that it “restricted federal review to whether the state court’s decision is ‘contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

\begin{footnotes}
\item Id.
\item Lamparello, \textit{supra} note 155, at 100–01 (quoting John H. Blume & Stacy Neumann, \textit{“It’s Like Deja Vu All Over Again”: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard, and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel,} 34 \textit{Am. J. Crim. L.} 127, 142 (2007)).
\item Id. at 101 (quoting Cooley, \textit{supra} note 155, at 76 (quoting William S. Geimer, \textit{A Decade of Strickland’s Tin Horn: Doctrinal and Practical Understanding of the Right of Counsel,} 4 \textit{Wm. & Mary Bill Rts. J.} 91, 94 (1995))).
\item Id.
\item Id. (quoting Galia Benson-Amram, \textit{Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases,} 29 \textit{N.Y.U. Rev. L. & Soc. Change} 425, 433 (2004)).
\item Id.
\item Id. at 101–02.
\item Id. at 102 (quoting Benson-Amram, \textit{supra} note 162, at 433).
\item 28 \textit{U.S.C.A.} § 2254 (West 2015).
\end{footnotes}
Thus, its reviewing authority was “greatly circumscribed and . . . highly deferential to the state courts.”\textsuperscript{166} In the majority’s view, even a “strong case for relief does not mean that the state court’s contrary conclusion was unreasonable.”\textsuperscript{168} Rather, its role was to guard against “extreme malfunctions in the state criminal justice systems,”\textsuperscript{169} and not act as a “means of error correction.”\textsuperscript{170} As the majority stated, “[i]f this standard is difficult to meet, that is because it was meant to be.”\textsuperscript{171}

c. Alabama’s Judicial Override

Alabama permits a judge to overturn a jury’s recommendation of life imprisonment without parole. In \textit{Woodward v. Alabama},\textsuperscript{172} the Supreme Court refused to grant certiorari in a case challenging the law. Justice Sotomayor dissented from the Court’s ruling, stating as follows:

What could explain Alabama judges’ distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.\textsuperscript{173}

Furthermore, as Justice Sotomayor noted, “Alabama judges frequently override jury life-without-parole verdicts even in cases where the jury was unanimous in that verdict.”\textsuperscript{174} In one case, a judge overturned a jury’s recommendation of life imprisonment without parole for a defendant with an IQ of sixty-five, stating that “[t]he sociological literature suggests Gypsies intentionally test low on standard IQ tests.”\textsuperscript{175} These facts led Justice Sotomayor to conclude that “permitting a single trial judge’s view to displace that of a jury representing a cross-section of the community, Alabama’s sentencing scheme has led to curious and potentially arbitrary outcomes.”\textsuperscript{176}


\textsuperscript{167} Id. (quoting Hill, 662 F.3d at 1343).

\textsuperscript{168} Id. (quoting Hill, 662 F.3d at 1343).

\textsuperscript{169} Id. (quoting Hill, 662 F.3d at 1347).

\textsuperscript{170} Id.

\textsuperscript{171} Id. (quoting Hill, 662 F.3d at 1345).

\textsuperscript{172} 134 S. Ct. 405 (2013) (denying certiorari).

\textsuperscript{173} Id. at 408 (Sotomayor, J., dissenting); see also Spaziano v. Florida, 468 U.S. 447 (1984) (upholding Florida’s judicial override); Harris v. Alabama, 513 U.S. 504 (1995) (upholding Alabama’s judicial override).

\textsuperscript{174} Woodward, 134 S. Ct. at 409 (Sotomayor, J., dissenting).

\textsuperscript{175} Id.

\textsuperscript{176} Id.
d. Florida’s Jury Provision

Florida and Delaware are the only two states where a defendant can be sentenced to death by a bare majority vote (7–5) of the jury.177 It is a mystery how this approach is consistent with identifying the “worst of the worst,”178 or the claim that enhanced safeguards are necessary because “death is different.”179

B. The Death Penalty Is Not a Proportional Punishment for Any Offense

There is no logical basis to distinguish between the depravity of individuals who receive and those who are spared the death penalty. In his Glossip dissent, Justice Breyer stated as follows:

Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and an after-the-fact robbery), while another defendant does not, despite having kidnapped, raped, and murdered a young mother while leaving her infant baby to die at the scene of the crime. Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and acting recklessly with a gun), while another defendant does not, despite having committed a “triple murder” by killing a young man and his pregnant wife? For that matter, why does one defendant who participated in a single-victim murder-for-hire scheme (plus an after-the-fact robbery) receive the death penalty, while another defendant does not, despite having stabbed his wife 60 times and killed his 6-year-old daughter and 3-year-old son while they slept?180

Justice Breyer’s statements echoed the Court’s ruling in Godfrey v. Georgia,181 in which a plurality found that “[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.”182

C. The Death Penalty Is Imposed Arbitrarily

Justice Breyer highlighted the arbitrariness with which the death penalty is imposed, stating that “40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, i.e., without the ‘reasonable consistency’ legally necessary to reconcile its use with the Constitution’s

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181 Id. at 433.
182 Id. at 433.
commands.”183 Indeed, “of all the people convicted of [death-eligible crimes],
many just as reprehensible as [the] petitioners are among a capriciously selected
random handful upon which the sentence of death has in fact been imposed.184

In other words, although “the Court has consequently sought to make the
application of the death penalty less arbitrary by restricting its use to . . . ‘the
worst of the worst,’” 185 few who have been executed would fit this description.
Justice Breyer cited to a study concluding that death was more likely a result of
chance rather than moral depravity:

[The study] found 205 instances in which Connecticut law made the
defendant eligible for a death sentence. Courts imposed a death
sentence in 12 of these 205 cases, of which 9 were sustained on appeal.
The study then measured the “egregiousness” of the murderer’s
conduct in those 9 cases, developing a system of metrics designed to do
so. It then compared the egregiousness of the conduct of the 9
defendants sentenced to death with the egregiousness of the conduct of
defendants in the remaining 196 cases (those in which the defendant,
though found guilty of a death-eligible offense, was ultimately not
sentenced to death). Application of the studies’ metrics made clear that
only 1 of those 9 defendants was indeed the “worst of the worst” (or
was, at least, within the 15% considered most “egregious”). The
remaining eight were not. Their behavior was no worse than the
behavior of at least 33 and as many as 170 other defendants (out of a
total pool of 205) who had not been sentenced to death.186

Furthermore, “since this Court held that comparative proportionality review is
not constitutionally required, it seems unlikely that appeals can prevent the
arbitrariness I have described.”187

D. The Underlying Question: What Is the Value of Imposing Death?
The flaws in the death penalty begs the question whether there is any
value—or meaning—in executing anyone and, as Justice Brennan concluded
whether the death penalty is inherently cruel and unusual. The answer is yes. To
begin with, executions do not serve any penological purpose. First, statistical

183 Glossip, 135 S. Ct. at 2760 (Breyer, J., dissenting).
184 Id. at 2759 (first alteration in original) (quoting Furman v. Georgia, 408 U.S. 238,
309–10 (1972) (Stewart, J., concurring)).
185 Id. at 2760 (quoting Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J.,
dissenting)).
186 Id. (citations omitted).
187 Id. at 2763 (citation omitted) (quoting Kaufman–Osborn, Capital Punishment,
Proportionality Review, and Claims of Fairness (with Lessons from Washington State), 79
WASH. L. REV. 775, 791–92 (2004)) (“[A]fter Pulley, many States repealed their
statutes requiring comparative proportionality review, and most state
high courts ‘reduced proportionality review to a perfunctory exercise.’”); see also Pulley
evidence suggests that the death penalty does not have a deterrent effect. As Justice Brennan stated in Furman, “the available evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment.” As the Table below shows, states without the death penalty have a lower murder rate than those with the death penalty:

<table>
<thead>
<tr>
<th>Year</th>
<th>States Without the Death Penalty</th>
<th>States with the Death Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>3.4</td>
<td>4.4</td>
</tr>
<tr>
<td>2012</td>
<td>3.7</td>
<td>4.7</td>
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<tr>
<td>2011</td>
<td>3.1</td>
<td>4.7</td>
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<tr>
<td>2010</td>
<td>2.9</td>
<td>4.6</td>
</tr>
<tr>
<td>2009</td>
<td>2.8</td>
<td>4.9</td>
</tr>
</tbody>
</table>

In addition, Alabama, Mississippi, and Louisiana have the highest murder rates despite being among the top fourteen states that most frequently impose the death penalty. Thus, when coupled with the fact that most inmates spend decades on death row before facing execution, and that there is no meaningful distinction between those who receive the death penalty and those who do not, the argument for deterrence lacks merit. Furthermore, to the extent a defendant “poses a danger to society, effective administration of the State’s pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined. Thus, when coupled with the fact that most inmates spend decades on death row before facing execution, and that there is no meaningful distinction between those who receive the death penalty and those who do not, the argument for deterrence lacks merit. Furthermore, to the extent a defendant “poses a danger to society, effective administration of the State’s pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined. For many of the same reasons, the death penalty cannot be said to serve a retributive purpose. Implicit in the concept of retribution is “just deserts,” or the notion that a punishment will be proportional to the offense of conviction. As Justice Breyer noted in Glossip, proportionality is lacking in the death penalty context because there are no principled distinctions between those who are deemed “the worst of the worst,” and those who are sentenced to life imprisonment. Moreover, proportionality is difficult to argue when those who receive the death penalty — “the poor, the sick, the ignorant, the powerless” — are among those who, if anything, should not be executed.

189 Furman, 408 U.S., at 301 (Brennan, J., concurring).
190 Murder Rates Nationally and by State, supra note 191.
192 Furman, 408 U.S., at 300-01 (Brennan, J., concurring).
194 Furman, 408 U.S., at 251 (Douglas, J., concurring) (quoting Clark, supra note 44 at 335).
Proportionality becomes nearly impossible to argue when the decision-making process is characterized by subjectivity. For example, in *Woodward*, twelve jurors recommended life imprisonment, only to be overridden by just one judge. In cases like this, a sentence of death is more the product of politics than proportionality.

The argument that the death penalty serves to express society’s moral outrage at the commission of a particular crime makes little sense given the infrequency and randomness with which it is imposed. As Justice Brennan stated, “if capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely inflicted upon the criminals who commit the crimes.” Likewise, if a death sentence is inconsistently imposed on defendants who are convicted of similar crimes—or imposed by a single judge overriding a jury’s recommendation of life imprisonment—then how can it be considered an expression of society’s collective outrage? And in circumstances where the victim’s family prefers life imprisonment, or in the case of the “Boston Bomber,” an entire city prefers life imprisonment, imposing the death penalty contravenes both the individual and societal interests.

IV. *Foster v. Chatman*: Underscoring the Broader problems with the Death Penalty

One of the core premises in *Gregg* was that the death penalty could be fixed. The problems that have continued in the nearly forty years since *Gregg* was decided demonstrate why that assumption is wrong. Ultimately, the Court’s case law and the realities governing the death penalty’s administration lead to the following conclusions:

- The death penalty has likely resulted in the execution of innocent people.
- The death penalty has led to inhumane executions.
- The death penalty is disproportionately imposed on indigent defendants.
- Brain-damaged, mentally ill, and intellectually disabled defendants are among those who are executed.
- Many defendants receive substandard representation.
- Federal and state laws narrow the scope of appellate review.
- There is no meaningful way by which to distinguish the culpability of those who receive the death penalty and those who do not.

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196 *Furman*, 408 U.S., at 303 (Brennan, J., concurring).
The death penalty does not deter crime.

Given these facts, and considering that the cost of imposing the death penalty is often greater than the cost of imprisoning a defendant for life, what value does the death penalty add to our criminal justice system, particularly one that is predicated on principles of fairness, due process, and equal protection? Furthermore, even if the death penalty has intrinsic value, does it outweigh the harms, such as those listed above, that result? Any society that subscribes to evolving standards of decency would answer in the negative.

In Foster, the prosecution’s purportedly “race neutral” justifications for striking every potential African-American juror are as flimsy as the Batson standard itself, particularly given the prosecution’s focus on skin color during jury selection. By circling “Black” next to the race question on the jury questionnaire, and ranking the African-American jurors against each other if “it comes down to having to pick one of the black jurors,” there is at least a strong suspicion that that the prosecution intentionally targeted the jurors because of their race. Furthermore, the fact that the prosecution struck every African-American juror, and focused heavily on race during jury selection, only strengthens this suspicion. At the very least, the prosecution’s conduct should have caused Georgia’s courts to closely scrutinize the prosecution’s stated “race-neutral” reasons. The courts did the opposite, stating in a conclusory fashion that “the State put forward multiple race-neutral reasons for striking each juror” that were “reasonably related to the case to be tried, and were clear and reasonably specific.” The relevant inquiry, however, should have been “whether the stated reasons were the actual reasons for the strikes in light of all relevant circumstances.” The answer to this question is no.

To demonstrate, one African-American juror was struck because she worked with underprivileged children, another because he was allegedly too young, even though the prosecution accepted five white prospective jurors who were younger, and another because he had a son who was the same age as the defendant. The prosecution also claimed to strike one African-American juror because she worked “with low income, underprivileged children” through her job as a teacher’s aide, even though the prosecution “accepted a teacher’s aide and three public school teachers who were white.” Furthermore the prosecution stated that it struck one juror because she “didn’t ask off [the jury] because of sequestration,” yet struck an African-American juror precisely

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199 Petition for Writ of Certiorari, supra note 2, at 7.
200 Id. at 9.
201 Id. at 11–12.
202 Id. at 14.
203 Id. at 16.
204 Id. at 17.
205 Id. at 15.
206 Id.
because he did “ask[] to be off the jury.” These are only a sample of the reasons cited by the Georgia courts as evidence that the strikes were race-neutral. Given the internal inconsistency of the prosecution’s justifications, coupled with the fact that African-American jurors were struck for reasons that Caucasian jurors were not, there is little basis upon which to conclude that the strikes were motivated by anything but race. Indeed, if the prosecution’s reason’s for striking the jurors are deemed acceptable, it is difficult to envision any circumstances where the Court would likely conclude that a Batson violation occurred. For these reasons, the Supreme Court should reverse the Georgia Supreme Court and declare that death, as a legal and constitutional matter, is truly plagued by defects that render it cruel and unusual.

Ultimately, the good news is that whatever the Court decides in Foster, the death penalty is beginning to lose its appeal throughout the United States. A recently published article highlights the fact that executions are slowly declining, based in part on the problems associated with its administration:

The emotional and financial toll of prosecuting a single capital case to its conclusion, along with the increased availability of life without parole and continuing court challenges to execution methods, have made the ultimate punishment more elusive than at any time since its reinstatement in 1976. Prosecutors, judges and juries also are being influenced by capital punishment’s myriad afflictions: racial and ethnic discrimination, geographic disparities, decades spent on death row and glaring mistakes that have exonerated 155 prisoners in the last 42 years.

These statistics suggest that the death penalty “may be living on borrowed time,” and that attitudes toward the death penalty are beginning to shift in favor of abolition. The article highlights the following:

- Seven states have repealed the death penalty since 2007. Among the 31 that retain it, governors have imposed a moratorium in 4, and most others have not executed anyone in years. Only 7 states carried out executions in the past 2 years.
- The number of death sentences dropped from a high of 315 in 1996 to 73 last year—half of them coming in just 2% of the nation’s counties.
- The number of executions peaked at 98 in 1999 and has dropped since then, hitting a low of 35 last year. In the first 8 months of this year, 20 prisoners have been killed—16 of them in Texas and Missouri.

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207 Id. at 16.
209 Id.
210 Id.
The federal government has not carried out an execution since 2003. Furthermore, the State of Texas, which has historically been among the leaders in the number of executions per year, has not executed a single prisoner in 2015.\textsuperscript{211} The slow but steady decline in execution most likely reflects the belief that “[t]he imposition and implementation of the death penalty seems capricious, random, indeed arbitrary.”\textsuperscript{212} The sheer arbitrariness of the death penalty is evident by the fact that some of the most heinous criminals, such as James Holmes, who killed twelve people and injured seventy at a Colorado movie theater, and Michele Anderson, who along with a co-defendant was convicted of killing six family members, did not receive the death penalty.\textsuperscript{213} These examples confirm that, as Justice Breyer reiterated in \textit{Glossip}, “there is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.”\textsuperscript{214}

\section*{V. Conclusion}

The death penalty is a cancer on this country’s legal system, particularly its commitment to fairness, due process, and equal protection of the law. Whether it is the number exonerations, the mental illnesses and neurological disorders of inmates who are executed, the problems with lethal injection procedures, the ability of judges to override a jury’s recommendation of life imprisonment, the lack of access to quality defense counsel, or the substantial barriers to meaningful appellate review, the death penalty is plagued with problems that make its existence contrary to any sense of common decency.

Put simply, to the extent that death is really different, the most significant difference is the unfairness and arbitrariness with which it is imposed. When the Supreme Court issues its ruling in \textit{Foster}, it should not focus on merely whether the prosecution violated \textit{Batson} when striking all African Americans from the jury pool. The Court should remember the words written by Justice Brennan in \textit{Gregg} and Justice Breyer in \textit{Glossip}, and hold that the death penalty constitutes cruel and unusual punishment. By doing so, the Court would breathe life into the notion that the “arbitrary imposition of punishment is the antithesis of the rule of law.”\textsuperscript{215}

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\begin{itemize}
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Id. (quoting Glossip v. Gross, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting)).
\item \textsuperscript{213} Id. (noting that “[a] Colorado jury was unable to reach a unanimous decision to execute Holmes . . . because there was one holdout,” and that “[a] Washington state prosecutor withdrew the state’s notice to seek death in the murder trial of Michele Anderson . . . after a jury could not render a unanimous decision to seek death for Anderson’s accomplice, Joseph McEnroe”).
\item \textsuperscript{214} Glossip, 135 S. Ct. at 2763 (Breyer, J., dissenting) (quoting Godfrey v Georgia, 446 U.S. 420, 433 (1980)).
\item \textsuperscript{215} Id. at 2759.
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