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The Road to Abolition: How Widespread Legislative Repeal of the Death Penalty in the States Could Catalyze a Nationwide Ban on Capital Punishment

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THE ROAD TO ABOLITION: HOW WIDESPREAD LEGISLATIVE REPEAL OF THE DEATH PENALTY IN THE STATES COULD CATALYZE A NATIONWIDE BAN ON CAPITAL PUNISHMENT

NICHOLAS M. PARKER*

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INTRODUCTION

On December 17, 2007, former New Jersey Governor Jon Corzine signed into law a bill that abolished his state's death penalty, saying he felt a "moral duty to end 'state-endorsed killing.'"¹ With Corzine's signature, New Jersey became the fourteenth state to eradicate the death penalty,² and the first to do so legislatively since Iowa and West Virginia legislators did away with capital punishment in 1965.³ The vote by New Jersey lawmakers followed close, but ultimately unsuccessful, votes on similar bills in Colorado, Maryland, Montana, Nebraska, and New Mexico earlier in 2007.⁴ And while it took more than thirty-one years for the first state to repeal its post-*Gregg v. Georgia*⁵ death penalty statute legislatively, it took only fifteen months for the second state to follow; on March 18, 2009, former New Mexico Governor Bill Richardson signed legislation to repeal his state's capital punishment statute, saying that his "conscience compel[led him] to replace the death penalty" with a sentence of life in prison without the possibility of parole.⁶ Less than two years after New Mexico jettisoned capital punishment, Illinois became the third state to do so legislatively in the post-*Gregg* era, when Governor Pat Quinn signed a bill repealing the death penalty on March 9, 2011, eleven years after former Governor George Ryan declared a moratorium on executions in the state.⁷ Finally, when Connecticut Governor Dannel P. Malloy, a former prosecutor, signed a bill to abolish his state's death penalty on April 25, 2012—calling it "a moment for sober reflection, not celebration"—he made Connecticut the fourth state in just over five years to eradicate capital punishment via legislative repeal.⁸

As of December 2012, seventeen states and the District of Columbia have eliminated capital punishment.⁹ Ten states have not had the death penalty since before the U.S. Supreme Court's 1972 decision in *Furman v. Georgia*¹⁰ temporarily imposed a de facto nationwide moratorium on capital punishment, while Massachusetts, Rhode Island, and the

¹ Craig R. McCoy, *N.J. First to Abolish the Death Penalty*, PHILA. INQUIRER, Dec. 18, 2007, at A1.

² *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Dec. 19, 2012).

³ Patrick Tyrrell & Nancy Hewitt, Op-Ed., *Beyond New Jersey: The Inevitability of Death Penalty Repeal*, LAS CRUCES SUN-NEWS, Dec. 24, 2007.

⁴ Bradley Olson & Jennifer McMenamin, *Death Penalty Revoked in N.J.*, BALT. SUN, Dec. 18, 2007, at A1.

⁵ 428 U.S. 153 (1976).

⁶ Dan Boyd, *Richardson Signs Bill Abolishing Death Penalty in N.M.*, ALBUQUERQUE J., Mar. 19, 2009, at A1 [hereinafter *Richardson Signs Bill Abolishing Death Penalty*].

⁷ Steve Mills, *Illinois Bans Death Penalty*, CHI. TRIB., Mar. 10, 2011, at A1.

⁸ Daniela Altamari, *Governor Signs Measure Eliminating Capital Punishment*, HARTFORD COURANT, Apr. 26, 2012, at A1.

⁹ *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Dec. 19, 2012).

¹⁰ 408 U.S. 238 (1972).

District of Columbia got rid of their death penalty statutes in the early-mid 1980s.¹¹ Since 1984, five states have abolished capital punishment, and each has done so in the last eight years: New York in 2004 via judicial decision and New Jersey (2007), New Mexico (2009), Illinois (2011), and Connecticut (2012) via legislative repeal.¹² This nationwide flurry of legislative activity comes as public support for the death penalty, while still relatively strong, has nonetheless slipped as DNA evidence continues to exonerate scores of death row inmates.¹³ Cases like that of Troy Davis—a black man convicted of the 1989 murder of a white police officer in Georgia and executed on September 21, 2011 in the face of recanted testimony and other dubious evidence—continue to galvanize anti-death penalty forces and lead to renewed calls for a reconsideration of capital punishment in America.¹⁴

This Article examines legislative repeal of the death penalty and argues that abolition of capital punishment by legislative action is not only more democratically legitimate than repeal by judicial fiat, but also more likely to convince the U.S. Supreme Court that capital punishment violates the Eighth Amendment's prohibition against cruel and unusual punishment in light of "evolving standards of decency."¹⁵ Because judges lack the democratic accountability of legislators,¹⁶ judicial decisions lack the institutional legitimacy of legislative action when it comes to controversial and divisive issues such as capital punishment.¹⁷ Indeed, the Supreme Court emphasized the primacy

¹¹ The District of Columbia struck its death penalty statute from the books in 1981, while Massachusetts and Rhode Island did so in 1984. See *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Dec. 19, 2012).

¹² *Id.*

¹³ See John Schwartz, *In the Debate on Capital Punishment, Davis Execution Offers Little Closure*, N.Y. TIMES, Sept. 23, 2011, at A17 (noting that while an October 2010 Gallup poll pegged public support for the death penalty at 64 percent, down from a high of 80 percent in 1994, the public is "almost evenly split" on whether life imprisonment without the possibility of parole is an acceptable alternative to the death penalty); see also *id.* ("Jurors have shown a growing reluctance to vote for the ultimate penalty; in 1994, 314 people were placed on death row, but that number has dropped by roughly two-thirds since.")

¹⁴ See *id.* (noting "the outpouring of protest worldwide" upon Troy Davis' execution).

¹⁵ *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) ("[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.")

¹⁶ See Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1929 (2005) ("[J]udicial review involves a group of people who seemingly enjoy no democratic legitimacy . . . but who nevertheless thwart the policies of democratic branches of government."). But see Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1458 (2000) ("[T]he judiciary . . . occupies a central place in the American ideal of deliberative democracy, a place coequal to those taken by the political departments.")

¹⁷ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 410–11 (1995) (discussing the idea that the Supreme Court has been wary, in the decades following *Furman* and *Gregg*, to make sweeping death penalty pronouncements due to their cost in terms of institutional legitimacy).

of legislative action in the states in informing “evolving standards of decency” when it held the death penalty unconstitutional as applied to mentally retarded defendants in *Atkins v. Virginia*.¹⁸ Evolving standards of decency, Justice Stevens noted, “should be informed by ‘objective factors to the maximum possible extent.’”¹⁹ The Court added that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”²⁰ As such, according to Colleen Cunningham, a staff member at the anti-death penalty organization Equal Justice USA,²¹ widespread repeal of the death penalty by state legislatures would do more to convince the Supreme Court that nationwide “evolving standards of decency” mandate an end to capital punishment than would piecemeal judicial repeal in the state courts.²²

This Article proceeds in four Parts. Part I illustrates the strategy of capital punishment abolitionists nationwide by discussing the relative superiority of legislative action vis-à-vis judicial decree in the context of the death penalty and “evolving standards of decency.” To do so, it analogizes to the Supreme Court’s decisions in *Atkins* and *Roper v. Simmons*²³ to illustrate the type and breadth of legislative action the Court has recently found sufficient to constitute an “evolving standard[] of decency” for death penalty purposes. Part II examines in detail the repeal processes in New Jersey, New Mexico, Illinois, and Connecticut—the four states that have legislatively abrogated their death penalty statutes since 2007. It catalogues the legislative progression in each state and, where possible, evaluates how courts, legislators, and the public have reacted to abolition there. To do so, it looks to judicial decisions in the wake of repeal, to dissenting legislators’ failed attempts to reinstate the death penalty, and to newspaper editorials that reflect public opinion in the states. Part III considers the likelihood that other states will legislatively repeal their death penalty statutes in the immediate or relatively near future and ponders how many states must abolish capital punishment altogether before the Supreme Court may be compelled to follow suit. Part IV briefly concludes.

¹⁸ 536 U.S. 304, 312 (2002).

¹⁹ *Id.* at 312 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991)).

²⁰ *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

²¹ *About EJUSA*, EQUAL JUSTICE USA, <http://www.ejusa.org/about> (last visited Apr. 9, 2012). Equal Justice USA is a national, grassroots organization dedicated to nationwide repeal of the death penalty. *Id.*

²² Telephone Interview with Colleen Cunningham, State Campaign Organizer, Equal Justice USA (Mar. 28, 2012) (on file with the author).

²³ 543 U.S. 551 (2005). While *Atkins* held the death penalty unconstitutional as applied to mentally retarded defendants, *Roper* barred imposition of capital punishment against defendants who were under 18 when they committed their crimes. *Id.*

I. THE IMPORTANCE OF LEGISLATIVE REPEAL: LEGISLATIVE SUPREMACY, THE DEATH PENALTY & THE U.S. SUPREME COURT

The idea that legislatures are more institutionally authoritative than courts is central to the American system of government.²⁴ Legislators are, after all, democratically accountable to their constituents while (unelected) judges are not.²⁵ As a result, the notion of “legislative supremacy,” which is written into Article I of the Constitution and is considered a fundamental tenet of statutory interpretation, generally gives lawmakers’ actions more weight than judges’ pronouncements.²⁶

The U.S. Supreme Court’s use of the doctrine of statutory *stare decisis* illustrates this principle in action: the Court is usually more reluctant to abandon its statutory precedent than it is to overrule its constitutional precedent, and it therefore gives “special force” to its statutory decisions.²⁷ There are a couple of reasons for this. One is practical: in the context of constitutional precedent, “correction through legislative action is practically impossible,”²⁸ but when it comes to statutory interpretation, Congress can respond to a judicial decision

²⁴ See, e.g., Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281 (1989) (“It is commonplace that . . . judges are subordinate to legislatures in the making of public policy.”); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 9 (1988) (referring to the “deeply-embedded premise of the American political system . . . that, within constitutional limits, the legislature . . . has authority to prescribe rules of law that, until changed legislatively, bind all other governmental actors within the system”); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1391 (2006) (“The system of legislative elections is . . . superior as a matter of democracy and democratic values to the indirect and limited basis of democratic legitimacy for the judiciary.”). Compare U.S. CONST. art. I (delineating Congress’ many powers), with U.S. CONST. art. III (delineating the judiciary’s relatively fewer powers). See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (noting that the Founders intended Congress and state legislatures to have primacy over the judiciary and that they did not contemplate the doctrine of judicial review).

²⁵ See STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 41–42 (1st ed. 1985) (attributing judicial subordination to legislatures to judges’ lack of democratic accountability); Waldron, *supra* note 24, at 1391 (“Legislators are regularly accountable to their constituents and they behave as though their electoral credentials were important in relation to the overall ethos of their participation in political decisionmaking. None of this is true of Justices.”).

²⁶ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389 (2003) (“[L]egislative intent is widely assumed to be the touchstone of statutory interpretation.”).

²⁷ See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (“[T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction”); *Flood v. Kuhn*, 407 U.S. 258, 280–84 (1972) (refusing to overturn statutory precedent despite widespread criticism of the prior decisions). See generally Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005) (providing an overview of statutory *stare decisis* and discussing its (in)applicability in the federal Courts of Appeals).

²⁸ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

by repealing, rewriting or leaving in place the law in question.²⁹ This stems from the idea that Congressional silence in the wake of a judicial decision indicates Congress's tacit approval of that decision.³⁰ A related but distinct rationale for the doctrine of statutory stare decisis has its origins in legislative supremacy and respect for the separation of powers: legislators, not judges, are democracy's primary policymakers and changes to issues of statutory interpretation therefore ought to come from legislatures, not courts.³¹ Scholars generally agree that the latter rationale is stronger than the former, stressing that Congressional silence is often meaningless while separation of powers and legislative supremacy carry great weight.³² And while the roots of statutory stare decisis extend into history, the doctrine is alive and well today, as illustrated by its invocation in two recent Supreme Court decisions.³³

Moreover, though the doctrine of statutory stare decisis is generally associated with the U.S. Supreme Court and its relationship with Congress, its logic applies equally to state supreme courts and their relationships with their respective state legislatures.³⁴ Thus, the widely-accepted idea of legislative supremacy (and its treatment as illustrated by the doctrine of statutory stare decisis) indicates that courts—and

²⁹ *Patterson*, 491 U.S. at 172–73 (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”); see also Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 870 (2012) (“[S]tare decisis should be observed particularly strictly in the statutory context because Congress may intervene to supersede prior judicial interpretations.”).

³⁰ *Flood*, 407 U.S. at 283–84 (refusing to overturn dubious statutory precedent because “Congress, by its positive inaction, has allowed those decisions to stand for so long and . . . has clearly evinced a desire not to disapprove them legislatively”); see also Barrett, *supra* note 27, at 317 (“[T]he [Supreme] Court’s practice of giving its statutory precedent particularly forceful effect reflects its reluctance to abandon statutory interpretations that Congress, through its silence, has effectively approved.”).

³¹ *Flood*, 407 U.S. at 284 (“If there is any inconsistency or illogic in [our statutory precedent], it is an inconsistency and illogic of long standing that is to be remedied by Congress and not by this Court.”); see also Barrett, *supra* note 27, at 317–18 (“[Statutory stare decisis] gains this special force from the principle of legislative supremacy—the belief that Congress, rather than the Supreme Court, bears primary responsibility for shaping policy through statutory law.”); Amy Barrett, *Statutory Stare Decisis*, PRAWFSBLAWG (Apr. 2, 2008, 12:23 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2008/04/statutory-stare.html> (“[H]eightened stare decisis effect respects separation of powers by shifting policymaking responsibility back to Congress, where it belongs.”).

³² See, e.g., Barrett, *supra* note 27, at 318 (“[T]he connection between statutory stare decisis and the separation of powers provides far more credible support for the doctrine than does a theory of congressional acquiescence.”).

³³ See *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 260 (2008) (Roberts, C.J., concurring in part and concurring in the judgment) (“In matters of statutory interpretation, . . . principles of *stare decisis* have their greatest effect”); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (“[S]tare decisis in respect to statutory interpretation has special force”) (internal citations omitted).

³⁴ Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 783–85, 791 (1991) (discussing the California Supreme Court’s use of the doctrine of statutory stare decisis in the 1970s, 80s, and 90s).

the U.S. Supreme Court in particular—give more weight to legislative action than to judicial opinions. And while this is certainly true as a general abstraction, it rings particularly true in the context of the death penalty and the Eighth Amendment’s “evolving standards of decency.”

Twice in the last decade, the Supreme Court has struck down specific applications of the death penalty as violative of the Eighth Amendment’s prohibition against cruel and unusual punishment after determining that a “national consensus ha[d] developed against” the relevant application.³⁵ In both cases, the Court made this determination after a thorough review of the legislative activity occurring throughout the states.³⁶ The rest of this Part examines more closely the Supreme Court’s decisions in *Atkins* and *Roper* to illustrate how legislative activity in the states can persuade the Court that “evolving standards of decency” are such that particular applications of the death penalty violate the Eighth Amendment. By doing so, it implies that if enough state legislatures ban the death penalty altogether, the Supreme Court eventually will be compelled to issue a blanket ruling banning capital punishment in all cases—an implication confronted head on in Parts II and III.

A. ELIMINATING THE DEATH PENALTY FOR THE MENTALLY RETARDED: *ATKINS* V. *VIRGINIA*

Around midnight on August 16, 1996, Daryl Renard Atkins and an accomplice abducted and robbed Eric Nesbitt before driving him to an ATM, where they forced him to withdraw additional cash.³⁷ Atkins and his accomplice, William Jones, subsequently drove Nesbitt to a “secluded area” where they shot and killed him.³⁸ At trial, both defendants testified that the other had actually shot and killed Nesbitt and because Jones’ testimony “was both more coherent and credible than Atkins’,” it was given greater effect by the jury and deemed sufficient to establish Atkins’ guilt.³⁹

At the penalty phase of Atkins’ capital murder trial, the defense relied on the testimony of Dr. Evan Nelson, a forensic psychologist who determined that Atkins was “mildly mentally retarded” when he examined the defendant before trial.⁴⁰ Moreover, a standard IQ test indicated that Atkins had a full scale IQ of 59, a verbal IQ of 64, and a

³⁵ *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (holding the death penalty unconstitutional as applied to mentally retarded defendants); see also *Roper v. Simmons*, 543 U.S. 551 (2005) (holding the death penalty unconstitutional as applied to defendants who were under 18 when they committed their crimes).

³⁶ *Roper*, 543 U.S. at 564–67 (compiling an overview of state legislation); *Atkins*, 536 U.S. at 313–17 (same).

³⁷ *Atkins v. Commonwealth*, 510 S.E.2d 445, 449 (Va. 1999), *rev’d*, 536 U.S. 304 (2002).

³⁸ *Id.*

³⁹ *Atkins*, 536 U.S. at 307.

⁴⁰ *Atkins*, 510 S.E.2d at 451.

performance IQ of 60.⁴¹ Despite these questions concerning the defendant's competence, however, the jury sentenced Atkins to death not once, but twice.⁴² On automatic appeal to the Virginia Supreme Court, Atkins relied on his low IQ score for his argument that he "is mentally retarded and thus cannot be sentenced to death."⁴³ But the Virginia Supreme Court rejected Atkins' argument and affirmed his death sentence because "execution of a defendant who is mentally retarded does not contravene the practices that were condemned when the Bill of Rights was adopted or the evolving standards of decency."⁴⁴ The Virginia Court based its decision largely on *Penry v. Lynaugh*, a U.S. Supreme Court case which held that imposition of the death penalty on a mentally retarded defendant did not violate the Eighth Amendment's prohibition against cruel and unusual punishment solely due to the defendant's mental retardation.⁴⁵

Two Virginia Supreme Court Justices dissented, arguing that, "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive."⁴⁶ It was their dissents, as well as a "dramatic shift in the state legislative landscape," that convinced the U.S. Supreme Court to grant certiorari to revisit the constitutionality of the death penalty for mentally retarded defendants, a proposition it first addressed (and upheld) in *Penry*.⁴⁷ It is to this "dramatic shift" that this Article now turns.

1. LEGISLATIVE REPEAL OF CAPITAL PUNISHMENT FOR MENTALLY RETARDED DEFENDANTS

The Eighth Amendment clearly prohibits "excessive" sanctions.⁴⁸ Whether a particular punishment is excessive, however, is determined by the standards that "currently prevail"—not by those that existed

⁴¹ *Id.* To put these figures in perspective, as of 2006, the average estimated IQ for a person living in Virginia was 101.9. See Michael A. McDaniel, *Estimating State IQ: Measurement Challenges and Preliminary Correlates*, 34 INTELLIGENCE 607, 612 (2006), available at [http://www.people.vcu.edu/~mamcdani/Publications/McDaniel%20\(2006\)%20Estimating%20state%20IQ.pdf](http://www.people.vcu.edu/~mamcdani/Publications/McDaniel%20(2006)%20Estimating%20state%20IQ.pdf) (tabulating average estimated IQs for all fifty states).

⁴² *Atkins*, 536 U.S. at 309. On remand, the Virginia Supreme Court ordered a second sentencing hearing after determining the trial court had issued a misleading jury form. *Atkins*, 510 S.E.2d at 457 (Va. 1999).

⁴³ *Atkins v. Commonwealth*, 534 S.E.2d 312, 318 (Va. 2000).

⁴⁴ *Id.* at 318–19.

⁴⁵ *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) ("[W]e cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person . . . convicted of a capital offense simply by virtue of his or her mental retardation alone.").

⁴⁶ *Atkins*, 534 S.E.2d at 324 (Hassell, J., dissenting).

⁴⁷ *Atkins*, 536 U.S. at 310.

⁴⁸ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

when the Bill of Rights was adopted in 1791.⁴⁹ Thus, the Amendment's meaning changes over time and is informed by "the evolving standards of decency that mark the progress of a maturing society."⁵⁰ Writing for the majority in *Atkins*, Justice Stevens noted that "evolving standards of decency" should take their cues from "'objective factors to the maximum possible extent.'"⁵¹ The Court added that the "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"⁵² Prior to *Atkins*, the Court used such legislative evidence to hold the death penalty unconstitutionally excessive punishment for raping an adult woman,⁵³ or as applied to the insane,⁵⁴ to defendants under age 16 at the time of their offenses,⁵⁵ and to defendants "who neither took life, attempted to take life, nor intended to take life."⁵⁶ In so doing, the Court noted that the legislative posture need not be "'wholly unanimous among state legislatures'" to justify abandoning the practice;⁵⁷ rather, the evidence need only "weigh[] on the side of rejecting capital punishment for the crime at issue."⁵⁸

The Court in *Atkins* provided an exhaustive history of the legislative action regarding execution of mentally retarded defendants.⁵⁹ Excluding the fourteen states that had abolished the death penalty entirely by the mid-1980s,⁶⁰ the first state to legislatively eradicate capital punishment as applied to mentally retarded defendants was Georgia in 1986.⁶¹ The federal government followed in 1988, when Congress enacted legislation that expressly provided that a "sentence of death shall not be carried out upon a person who is mentally retarded."⁶² In 1989, Maryland became the second state to legislatively

⁴⁹ *Atkins*, 536 U.S. at 311 ("A claim that punishment is excessive is judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail.").

⁵⁰ *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) ("[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static.").

⁵¹ *Atkins*, 536 U.S. at 312 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991)).

⁵² *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

⁵³ *Coker v. Georgia*, 433 U.S. 584 (1977).

⁵⁴ *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁵⁵ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁵⁶ *Enmund v. Florida*, 458 U.S. 782, 787, 792–93 (1982).

⁵⁷ *Id.* at 792–93 (quoting *Coker*, 433 U.S. at 596).

⁵⁸ *Id.* at 793.

⁵⁹ See *Atkins*, 536 U.S. at 313–17.

⁶⁰ This count includes both the District of Columbia and New York. The latter had no death penalty between 1965 and 1994, but briefly reinstated capital punishment between 1995 and 2004, a period during which it executed no one. In 2004, the New York Court of Appeals declared that capital punishment violated the New York Constitution. *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004); see also *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Dec. 19, 2012).

⁶¹ GA. CODE ANN. § 17-7-131(j) (1988).

⁶² The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(l), 102 Stat. 4390 (1988). Congress included the same language when it expanded the federal death penalty law in 1994. Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c) (1994).

ban the death penalty for mentally retarded defendants.⁶³ Notably, when the Supreme Court decided *Penry* in 1989, it explicitly stated that the Georgia and Maryland statutes alone “do not provide sufficient evidence at present of a national consensus” to ban the death penalty as applied to mentally retarded defendants.⁶⁴

But, the *Atkins* Court noted, much changed in the wake of *Penry*.⁶⁵ Ten state legislatures passed laws similar to those in Georgia and Maryland between 1990 and 1998.⁶⁶ Six additional states followed suit in 2000 and 2001.⁶⁷ Categorical exclusions for the mentally retarded had also passed at least one legislative body in other states, including Nevada and Virginia, by the time the Court decided *Atkins*.⁶⁸ Even the Texas Legislature passed a similar bill in 2001, though Governor Rick Perry vetoed it.⁶⁹ Importantly, the Court noted, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”⁷⁰ In making this point, the Court noted that many states had passed legislation prohibiting the execution of mentally retarded defendants while there was a “complete absence of States passing legislation reinstating the power to conduct such executions.”⁷¹ Such a trend, the Court said, indicated “powerful evidence” of the country’s views regarding the culpability of mentally retarded criminals.⁷² Finally, the Court observed that even among states that did permit the execution of mentally retarded defendants in 2002, when *Atkins* was decided, the practice was rare.⁷³ Specifically, the Court noted that while New Hampshire and New Jersey authorized the practice, they had not carried out the execution of a mentally retarded offender in decades.⁷⁴ According to the Court, therefore, there was “little need

⁶³ MD. CODE ANN., ART. 27, § 412(f)(1) (1989) (current version at MD. CODE ANN., CRIM LAW § 2-202(b)(2)(ii) (West 2012)).

⁶⁴ *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989).

⁶⁵ *Atkins*, 536 U.S. at 314 (noting that “state legislatures across the country began to address the issue [of executing mentally retarded defendants]” after the Supreme Court decided *Penry*).

⁶⁶ See ARK. CODE ANN. § 5-4-618 (1993); COLO. REV. STAT. § 16-9-401 (1993); IND. CODE § 35-36-9-2 to -6 (1994); KAN. STAT. ANN. § 21-4623 (1994); KY. REV. STAT. ANN. § 532.130, .135, .140 (1990); NEB. REV. STAT. § 28-105.01 (1998); N.M. STAT. ANN. § 31-20A-2.1 (1991); N.Y. CRIM. PROC. LAW § 400.27 (1995); TENN. CODE ANN. § 39-13-203 (1990); WASH. REV. CODE § 10.95.030 (1993).

⁶⁷ See ARIZ. REV. STAT. ANN. § 13-703.02 (2001); CONN. GEN. STAT. § 53a-46a (2001); FLA. STAT. § 921.137 (2001); MO. REV. STAT. § 565.030 (2001); 2001 N.C. Sess. Laws 45; S.D. CODIFIED LAWS § 23A-27A-26.1 (2000).

⁶⁸ See S. 497, 2002 Reg. Sess. (Va. 2002); H.B. 957, 2002 Reg. Sess. (Va. 2002); A. B. 353, 71st Reg. Sess. (Nev. 2001).

⁶⁹ See S. 686, 77th Reg. Sess. (Tex. 2001); H.B. 236, 77th Reg. Sess. (Tex. 2001); see also Gov. Rick Perry, Veto Proclamation, H.B. 236, 77th Reg. Sess. (Tex. 2001).

⁷⁰ *Atkins*, 536 U.S. at 315.

⁷¹ *Id.* at 315–16.

⁷² *Id.* at 316.

⁷³ See *id.*

⁷⁴ *Id.*

to pursue legislation barring the execution of the mentally retarded in those States” prior to *Atkins*.⁷⁵

Given the weight and direction of the legislative evidence, the Court concluded, “it is fair to say that a national consensus has developed against it.”⁷⁶ Justice Stevens reached this conclusion after an “independent evaluation of the issue” that “reveal[ed] no reason to disagree with the judgment of the [state] legislatures . . . that death is not a suitable punishment for a mentally retarded criminal.”⁷⁷ Thus, pursuant to its “narrowing jurisprudence” regarding capital punishment,⁷⁸ the Court held that the execution of mentally retarded offenders violates the Eighth Amendment’s prohibition against cruel and unusual punishment in light of our “evolving standards of decency.”⁷⁹

B. ELIMINATING THE DEATH PENALTY FOR MINORS: *ROPER V. SIMMONS*

Less than three years after it decided *Atkins*, the Supreme Court continued to narrow its death penalty jurisprudence when it ruled in *Roper v. Simmons* that the Eighth Amendment forbids the execution of offenders who were under 18 when they committed their crimes.⁸⁰ In *Roper*, as in *Atkins*, the Court explicitly overruled precedent fewer than twenty years old.

In 1993, when he was a 17-year-old junior in high school, Christopher Simmons and his 15-year-old accomplice Charles Benjamin abducted Shirley Crook in Fenton, Missouri.⁸¹ The two boys used duct tape to cover Crook’s eyes and mouth and to tie her hands before loading her in her minivan and driving to a nearby state park.⁸² There, they put a towel over Crook’s head and walked her to a bridge spanning the Meramec River, where they tied her hands and feet together with electrical wire.⁸³ They then threw her from the bridge, and she drowned in the waters below.⁸⁴ After bragging about the murder to his friends, Simmons confessed to it when the police interrogated him about his involvement.⁸⁵

⁷⁵ *Atkins*, 536 U.S. at 316.

⁷⁶ *Id.*

⁷⁷ *Id.* at 321.

⁷⁸ *Id.* at 319.

⁷⁹ *Id.* at 321.

⁸⁰ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁸¹ *State v. Simmons*, 944 S.W.2d 165, 169–70 (Mo. 2003), *rev’d sub nom. State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003), *aff’d*, 543 U.S. 551 (2005).

⁸² *Id.* at 170.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

The State tried Simmons as an adult and won a guilty verdict after the defense called no witnesses.⁸⁶ During closing arguments at the penalty phase of his trial, the prosecution sought to portray Simmons' age as an *aggravating* factor—defense counsel, of course, relied heavily on Simmons' age as a *mitigating* factor—stating to the jury, “Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.”⁸⁷ The jury recommended the death penalty and the trial judge imposed it.⁸⁸

On appeal, the Missouri Supreme Court affirmed Simmons' death sentence and the U.S. Supreme Court denied certiorari.⁸⁹ These decisions were based in large part on *Stanford v. Kentucky*, a U.S. Supreme Court case which held that imposition of the death penalty on a defendant for a crime committed at age 16 or 17 did not violate the Eighth Amendment's prohibition against cruel and unusual punishment solely on account of the defendant's age.⁹⁰ Shortly after denying certiorari in Simmons' case, however, the Supreme Court decided *Atkins*.⁹¹ In its wake, Simmons filed a new petition for relief in state court, arguing that *Atkins*' logic applied to defendants facing execution for crimes committed before their 18th birthdays and that *Stanford* should thus be overruled, just as *Penry* was by *Atkins*.⁹² The Missouri Supreme Court agreed, finding that “a national consensus has developed against the execution of juvenile offenders.”⁹³ The Missouri Court therefore set aside Simmons' death sentence and re-sentenced him to life in prison without the possibility of parole.⁹⁴ This time, the Supreme Court did grant certiorari when the State appealed, using Simmons' case to revisit the constitutionality of the death penalty for juvenile offenders on the heels of the legislative evidence offered by the Missouri Supreme Court.⁹⁵

⁸⁶ *Roper*, 543 U.S. at 557.

⁸⁷ *Id.* at 558.

⁸⁸ *Simmons*, 944 S.W.2d at 170.

⁸⁹ *Id.* at 169, *cert. denied*, 522 U.S. 953 (1997).

⁹⁰ *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (“We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.”).

⁹¹ See *supra* Part I.A. The Supreme Court denied certiorari in Simmons' case in October 2001 and decided *Atkins* in June 2002.

⁹² *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003).

⁹³ *Id.* (noting that eighteen states had banned executions for juveniles by 2003, that twelve others barred the death penalty altogether, that not one state had lowered its age of execution below 18 since *Stanford* was decided in 1989, and that five states had raised or established the minimum age of eligibility for capital punishment to 18 between 1989 and 2003).

⁹⁴ *Id.* at 400.

⁹⁵ *Id.* at 399, *cert. granted*, 540 U.S. 1160 (2004).

1. LEGISLATIVE REPEAL OF CAPITAL PUNISHMENT FOR JUVENILE OFFENDERS

In 1988, the U.S. Supreme Court decided *Thompson v. Oklahoma*, which barred as unconstitutional the application of the death penalty to defendants who were under 16 when they committed their crimes.⁹⁶ Writing for the plurality, Justice Stevens observed that all “18 States that have expressly established a minimum age in their death penalty statutes . . . require that the defendant have attained at least the age of 16 at the time of the capital offense.”⁹⁷ The Court in *Thompson* catalogued the death penalty statutes in these eighteen states (as well as the laws of various foreign countries) before reaching its determination that the Eighth Amendment prohibits the execution of a defendant who was under 16 at the time of his offense.⁹⁸

The next year, however, the Court decided in *Stanford* that the death penalty was a constitutionally permissible punishment for defendants who were 16 or 17 when they committed their capital offenses.⁹⁹ Over the dissenting opinion of four Justices, the Court—speaking through Justice Scalia—used legislative evidence as proof that “neither a historical nor a modern societal consensus forbid[s] the imposition of capital punishment on any person who murders at 16 or 17 years of age.”¹⁰⁰ The Court noted that twenty-two of the thirty-seven states with the death penalty on their books at the time permitted the execution of 16-year-olds, while twenty-five permitted it for 17-year-olds and determined that these numbers did “not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual.”¹⁰¹ The Court took up this narrow question once again in *Roper*.

As in *Atkins*, the Court in *Roper* began its reconsideration of precedent with “a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question,” noting that such objective indicia provide the Court with “essential instruction.”¹⁰² Writing for the Court, Justice Kennedy noted many similarities between *Roper* and *Atkins* and observed that by 2005, thirty states prohibited the execution of all juvenile offenders—including those aged 16 or 17 when they committed their crimes.¹⁰³ Just as the

⁹⁶ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁹⁷ *Id.* at 829.

⁹⁸ *Id.* at 838.

⁹⁹ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

¹⁰⁰ *Id.* at 380.

¹⁰¹ *Id.* at 370-71.

¹⁰² *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

¹⁰³ *Id.* This total included twelve states that, at the time, had abandoned the death penalty entirely and eighteen that maintained capital punishment but specifically excluded *all* juvenile offenders from its reach. *See id.*

Atkins Court noted the rarity with which mentally retarded defendants were executed even in states that legally permitted the practice, the *Roper* Court observed that only three states (Oklahoma, Texas, and Virginia) had executed a prisoner for a crime committed as a juvenile in the preceding ten years.¹⁰⁴ Even Kevin Stanford—who lent his name to the Supreme Court case—had his sentence commuted by former Kentucky Governor Paul Patton.¹⁰⁵ Despite the many similarities to *Atkins*, the *Roper* Court did address a key difference between the two cases with regard to legislative activity in the states: while sixteen states banned the imposition of the death penalty on mentally retarded defendants in the thirteen years between *Penry* and *Atkins*, only five did so for 16- and 17-year-old offenders in the sixteen years between *Stanford* and *Roper*.¹⁰⁶ And yet, despite the decreased rate of abolition, the Court stated that, “the same consistency of direction of change has been demonstrated,” in part because “no State that previously prohibited capital punishment for juveniles has reinstated it [since *Stanford*].”¹⁰⁷ Given these “objective indicia of consensus,” the Court determined that the Eighth Amendment forbids the execution of defendants who were under 18 when they committed their crimes.¹⁰⁸

II. CASE STUDIES: LEGISLATIVE REPEAL IN NEW JERSEY, NEW MEXICO, ILLINOIS, & CONNECTICUT

The previous Part begs an obvious question: given the Supreme Court’s narrowing death penalty jurisprudence and the precedent set by *Atkins* and *Roper*, how many state legislatures must repeal their death penalty statutes before the Supreme Court determines that a “national consensus” has developed against capital punishment altogether? Currently, seventeen states and the District of Columbia bar capital punishment for all crimes.¹⁰⁹ How many more must abrogate it before the Supreme Court is left with no choice but to determine that the death penalty violates the Eighth Amendment’s prohibition against cruel and unusual punishment in light of our “evolving standards of decency” and holds its use unconstitutional once and for all? Logic would suggest that once a majority of states have abolished their death penalties, a “national consensus” has developed against capital

¹⁰⁴ *Id.* at 564–65.

¹⁰⁵ See Andrew Wolfson, *Patton Pardons 4 in Election Case and Will Commute Death Sentence*, COURIER-J. (Louisville, Ky.), June 19, 2003, at A1.

¹⁰⁶ *Roper*, 543 U.S. at 565. These five states are: Washington (judicially in 1993), Montana (1999), Kansas (2001), Indiana (2002), and New York (2002). *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 408 (Mo. 2003).

¹⁰⁷ *Roper*, 543 U.S. at 566.

¹⁰⁸ *Id.* at 567, 578.

¹⁰⁹ *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Dec. 19, 2012).

punishment. But, as the Supreme Court noted in *Atkins* and as Part I further illustrated, “[i]t is not so much the number of these States that is significant” when making the “national consensus” inquiry.¹¹⁰ Rather, there are other factors that will inform the Supreme Court’s reasoning—among them “the consistency of the direction of change”¹¹¹—and while the recent spate of legislative repeal in the states is a step toward nationwide abolition, anti-death penalty advocates believe it is only a start.¹¹² The rest of this Article probes the questions posed above. This Part examines the legislative repeal process in New Jersey, New Mexico, Illinois, and Connecticut to illustrate how state legislatures are grappling with repeal and how lawmakers, courts, and the general public have reacted to abolition. Part III then looks ahead to evaluate which other states might soon legislatively abrogate their death penalties and to speculate about how many must do so before the Supreme Court may be required to conclude that a “national consensus” has developed against its imposition.

A. NEW JERSEY BECOMES THE FIRST STATE SINCE 1965 TO LEGISLATIVELY REPEAL ITS DEATH PENALTY

On January 22, 1963, New Jersey executed Ralph Hudson in the electric chair after Hudson was convicted of stabbing his estranged wife to death as she worked in an Atlantic City restaurant.¹¹³ After Hudson’s death, however, the State did not impose the death penalty on anyone before the U.S. Supreme Court imposed a de facto nationwide moratorium on capital punishment in *Furman v. Georgia* in 1972.¹¹⁴ The Supreme Court lifted the moratorium and reaffirmed the constitutionality of capital punishment with its 1976 decision in *Gregg v. Georgia*,¹¹⁵ and New Jersey reinstated its death penalty six years later.¹¹⁶ However, despite imposing more than four dozen death sentences between 1982 and 2007—including some affirmed by the State’s highest court¹¹⁷—New Jersey executed no one during that time.¹¹⁸ Thus, while the State had an active death penalty for more than thirty-four

¹¹⁰ *Atkins v. Virginia*, 536 U.S. 304, 315 (2002); see also *supra* Part I.A-B.

¹¹¹ *Atkins*, 536 U.S. at 315.

¹¹² See Interview with Colleen Cunningham, *supra* note 22.

¹¹³ See Joseph F. Sullivan, *High Court in New Jersey Upholds Death Penalties*, N.Y. TIMES, July 29, 1992, at B5.

¹¹⁴ 408 U.S. 238 (1972).

¹¹⁵ 428 U.S. 153 (1976).

¹¹⁶ Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES, Dec. 17, 2007, at A1.

¹¹⁷ See, e.g., *State v. Marshall*, 613 A.2d 1059 (N.J. 1992) (affirming the death sentence of a man who was convicted of hiring a hit man to kill his wife).

¹¹⁸ Peters, *supra* note 116.

years between 1963 and 2007, Hudson remains the last man executed in New Jersey.¹¹⁹

Practically, then, capital punishment has not existed in the Garden State for nearly fifty years. But the repeal process in New Jersey unofficially began in 2004, when an appellate court held that the State's procedures for administering the death penalty violated the New Jersey Constitution.¹²⁰ The procedures, while rewritten, were never finalized, and they expired in 2005.¹²¹ The legislature got involved in 2006, when it passed a bill imposing a moratorium on executions in the State and creating the New Jersey Death Penalty Study Commission.¹²² In January 2007, the Commission recommended abolition of the death penalty by a 12-1 vote, noting that its imposition was "inconsistent with evolving standards of decency," that there was "no compelling evidence" that capital punishment served a legitimate purpose, and that retention of the death penalty raised the specter of an "irreversible mistake."¹²³ The only dissenting member of the Commission was John F. Russo, a former State Senator who sponsored the bill that reinstated capital punishment in New Jersey in 1982.¹²⁴

In early 2007, as New Jersey lawmakers debated repeal, legislators in four other states—Maryland, Montana, New Mexico, and Nebraska—did the same.¹²⁵ In February, Montana lawmakers pushed a repeal bill through the state Senate, but the state House Judiciary Committee killed the legislation in a 9-8 vote in March.¹²⁶ Later that month, despite the strong support of Governor Martin O'Malley, Maryland legislators failed to repeal the death penalty in their state when a bill to end executions deadlocked 5-5 in a state Senate committee, a result which prevented the legislation from moving to the chamber floor.¹²⁷ The same week that the Maryland legislation died in committee, Nebraska abolitionists lost their fight when a repeal bill fell one vote shy of moving to the second of three stages of consideration in the state's unicameral legislature.¹²⁸ Finally, lawmakers in New Mexico

¹¹⁹ *Id.*

¹²⁰ *In re* Readoption with Amendments of Death Penalty Regulations N.J.A.C. 10A:23, 842 A.2d 207 (N.J. Super. Ct. App. Div. 2004).

¹²¹ Peters, *supra* note 116.

¹²² Pub. L. No. 2005, ch. 321 (N.J. 2006).

¹²³ N.J. DEATH PENALTY STUDY COMM'N, N.J. DEATH PENALTY STUDY COMM'N REPORT 23 (2007).

¹²⁴ *Id.* at 79.

¹²⁵ Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3.

¹²⁶ *Montana Assistant Attorney General Calls for Death Penalty Repeal*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/2050> (last visited Apr. 15, 2012).

¹²⁷ John Wagner & Ovetta Wiggins, *Bid Fails to Repeal Death Penalty*, WASH. POST, Mar. 16, 2007, at B1.

¹²⁸ *Nebraska's Death Penalty Repeal Bill Falls One Vote Short*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/339> (last visited Apr. 15, 2012).

pushed repeal legislation through the state House in February 2007, only to see it die on the Senate floor shortly thereafter.¹²⁹

But where legislators in other states fell short, New Jersey lawmakers broke through. On May 10, 2007, the Senate Judiciary Committee approved by a vote of 8-2 a bill that would replace the death penalty with a sentence of life imprisonment without the possibility of parole.¹³⁰ After seven months of inaction on the legislation, the New Jersey Senate passed the bill 21-16 on December 10, 2007—giving it the bare minimum number of votes required to pass the forty-member chamber.¹³¹ Three days later, the General Assembly passed the legislation 44-36, sending it to then-Governor Jon Corzine’s desk.¹³² On December 17, 2007, Corzine, an outspoken and longtime opponent of capital punishment, both signed the measure into law—making New Jersey the first state to legislatively abolish the death penalty since 1965—and commuted the death sentences of the remaining eight inmates on the state’s death row to life in prison with no chance of parole.¹³³

Not only were New Jersey lawmakers not the first in the modern era to take up the issue of legislative repeal, they were not even the first in the post-*Gregg* era to actually pass legislation repealing the death penalty: New Hampshire lawmakers voted to repeal capital punishment in 2000 but then-Governor (and current U.S. Senator) Jeanne Shaheen immediately vetoed the bill.¹³⁴ Nonetheless, aided by a consenting governor and a shifting (and favorable) political climate, the New Jersey legislature succeeded where others had failed. In so doing, New Jersey lawmakers set a precedent for other states to follow, but that precedent might have had less effect if the response to repeal was less positive than it was, both in New Jersey and nationwide. It is to this response that this Article now turns.

1. REACTION TO REPEAL IN NEW JERSEY

As New Jersey lawmakers debated—and then passed—the state’s death penalty repeal bill, they received the nearly unanimous support

¹²⁹ *Legislative Activity — New Mexico*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/legislative-activity-new-mexico> (last visited Apr. 15, 2012). *But see infra* Part II.B (discussing New Mexico legislators’ successful 2009 campaign to repeal the death penalty).

¹³⁰ Ronald Smothers, *New Jersey Moves Closer to Abolishing Death Penalty*, N.Y. TIMES, May 11, 2007, at B4.

¹³¹ Jeremy W. Peters, *With Senate Vote, New Jersey Nears Historic Repeal of the Death Penalty*, N.Y. TIMES, Dec. 11, 2007, at B1.

¹³² Richburg, *supra* note 125.

¹³³ Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3.

¹³⁴ *New Hampshire Governor Vetoes State Senate Bill to Abolish Death Penalty*, DEMOCRACY NOW! (May 22, 2000), http://www.democracynow.org/2000/5/22/new_hampshire_governor_vetoes_state_senate; *see also* Richburg, *supra* note 125.

of editorial boards both in their state and nationwide. The day the State Senate was to vote on repeal, a New Jersey newspaper opined in support of abolition that the bill could “point the Garden State and the nation toward more enlightened times.”¹³⁵ Three days after Corzine signed the repeal bill, a different New Jersey newspaper expressed a similar view in support of repeal, stating that, “New Jersey is taking the lead nationwide It is not cowering to criminals. It is seeking justice.”¹³⁶ After the New Jersey General Assembly passed the repeal bill, sending it to Corzine’s desk, a scathing anti-death penalty editorial in the *New York Times* began by noting the death penalty’s “moral bankruptcy, social imbalance, legal impracticality and ultimate futility.”¹³⁷ It then took a similar tack as the New Jersey editorials noted above, expressing hope that repeal in New Jersey would be a catalyst for nationwide abolition: “[New Jersey lawmakers’] renunciation of the death penalty could prick the conscience of elected officials in other states and inspire them to muster the courage to revisit their own laws on capital punishment. At least that is our fervent hope.”¹³⁸ Similar editorials—many of which expressed optimism that repeal in New Jersey would prompt a nationwide movement—appeared across the country.¹³⁹

The vote prompted more than just abstract hopes that it might catalyze change, however. In the days and weeks after New Jersey lawmakers jettisoned capital punishment in their state, editorial boards and prominent figures in other states began clamoring for repeal of their own death penalty statutes. On December 17, 2007, before New Jersey’s repeal law was formally on the books, the *Hartford Courant* published an editorial urging Connecticut lawmakers to “join this brave if small club.”¹⁴⁰ As the newspaper opined, “Capital punishment isn’t about justice . . . Capital punishment is about revenge.”¹⁴¹ In Ohio, former Cincinnati Mayor Thomas Luken used repeal in New Jersey as

¹³⁵ Editorial, *Lawmakers Should Repeal Death Penalty*, HERALD NEWS (Passaic Cnty., N.J.), Dec. 10, 2007, at A11 (noting that the Editorial Board agreed with the New Jersey Death Penalty Study Commission that “capital punishment is ‘inconsistent with evolving standards of decency’”).

¹³⁶ Editorial, *A Just End to Death Penalty*, ASBURY PARK PRESS (N.J.), Dec. 20, 2007 (noting that the death penalty was “too costly, risked fatal error and . . . was morally wrong”).

¹³⁷ Editorial, *A Long Time Coming*, N.Y. TIMES, Dec. 15, 2007, at A22.

¹³⁸ *Id.*

¹³⁹ See, e.g., Editorial, *Capital Punishment Loses Ground, for Good Reasons*, WASH. POST, Dec. 23, 2007, at B6 (noting that the “best and simplest way” to spark a nationwide anti-death penalty movement is legislative repeal in the states); Editorial, *New Jersey’s Death Penalty Switch-Off*, CHRISTIAN SCI. MONITOR, Dec. 21, 2007, at 8 (“As New Jersey goes, so goes the nation?”).

¹⁴⁰ Editorial, *Abolish State’s Death Penalty*, HARTFORD COURANT, Dec. 21, 2007, at A10 [hereinafter *Abolish State’s Death Penalty*].

¹⁴¹ *Id.* (“An eye for an eye may be a satisfying credo, but it doesn’t heal . . . [A]round the world, [the death penalty] has only fostered hatred and moral blindness.”).

an opportunity to advocate for reconsideration of capital punishment in a *Cincinnati Enquirer* op-ed.¹⁴²

Despite the positive press surrounding repeal, however, there have been rumblings about re-establishing the death penalty in New Jersey. On January 25, 2011, state Senator Robert Singer, a Republican, introduced legislation that would have reinstated the death penalty in New Jersey for the murderers of children and police officers as well as those who participate in a terrorist attack that results in fatalities.¹⁴³ The bill never cleared the Senate Judiciary Committee,¹⁴⁴ and reaction to it across the state was tepid at best.¹⁴⁵ Newspaper editorial boards spoke out against reinstatement,¹⁴⁶ and an informal, online poll conducted shortly after the bill's introduction revealed that fifty-six percent of New Jersey residents opposed reinstatement, while forty-four percent supported it.¹⁴⁷ These results stand in stark contrast to a Quinnipiac University Polling Institute survey conducted in December 2007, as the legislature was debating repeal, which showed that "New Jersey residents oppose abolishing the death penalty 53 percent to 39 percent."¹⁴⁸ Thus, while some individual lawmakers continue to express disapproval with abolition in New Jersey, their sporadic calls for reinstatement appeal to an ever-decreasing portion of the citizenry.¹⁴⁹

Likewise, New Jersey courts have only rarely addressed repeal in their post-2007 jurisprudence. There are few reported cases in the New Jersey courts implicating capital punishment in the five years since legislative abolition, and the cases that do address the death penalty focus not on the constitutionality of repeal but rather on its application to specific criminal defendants.¹⁵⁰ The post-repeal case that most

¹⁴² Thomas Luken, Op-Ed, *Ohio Should Look at Suspending Death Penalty*, CINCINNATI ENQUIRER, Dec. 19, 2007, at B11 (citing DNA exonerations as proof enough that Ohio's current capital punishment scheme is not working).

¹⁴³ Press Release, Senator Robert Singer, *Singer Introduces Bill to Reinstate Death Penalty in New Jersey* (Jan. 25, 2011), available at <http://www.senatenj.com/index.php/singer/singer-introduces-bill-to-reinstate-death-penalty-in-new-jersey/7839>.

¹⁴⁴ Editorial, *No Reason to Bring Back Death Penalty*, HERALD NEWS (Passaic Cnty., N.J.), Dec. 10, 2011, at A13.

¹⁴⁵ Erik Larsen, *Death Penalty Debate is Revived in N.J.*, ASBURY PARK PRESS (N.J.), Apr. 3, 2011, available at http://www.1poanj.org/news/death_penalty_debate_is_revived_in_nj/ ("[T]here is no political groundswell for a return to capital punishment in New Jersey any time soon.").

¹⁴⁶ See *No Reason to Bring Back the Death Penalty*, *supra* note 144 ("America is not a vigilante country . . . [C]ivilized societies do not execute people to punish them.").

¹⁴⁷ *Should N.J. Bring Back the Death Penalty?*, NJ.COM, http://www.nj.com/politics/index.ssf/2011/02/poll_should_nj_bring_back_the.html (last visited Apr. 15, 2012).

¹⁴⁸ Richburg, *supra* note 125.

¹⁴⁹ Cf. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) ("[I]t is a well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime.").

¹⁵⁰ See, e.g., *State v. Cooper*, 2009 WL 2778035 (N.J. Super. Ct. App. Div. Sept. 3, 2009) (holding that abolition did not affect the denial of a capital defendant's petition for post-conviction relief on other charges).

directly addresses capital punishment in New Jersey in the wake of its abolition is *State v. Fortin*.¹⁵¹ In that case, the New Jersey Supreme Court held that a defendant convicted of capital murder before abolition, but not yet sentenced when the legislature repealed the death penalty, could not be sentenced to life in prison without parole unless he were tried at a penalty proceeding and the jury determined the existence of aggravating factors and that such factors outweighed mitigating factors.¹⁵² In the absence of such a proceeding, the Court determined, the Ex Post Facto Clauses of the U.S. and New Jersey Constitutions¹⁵³ would prohibit the imposition of a sentence “greater than the maximum non-death sentence allowed at the time of the offense: life with a thirty-year parole disqualifier.”¹⁵⁴ In effect, the Court held that while the defendant could not automatically be sentenced to life in prison with no chance of parole because he had not yet been sentenced to death when the legislature abolished capital punishment, the State was free to send the defendant through the penalty phase of the trial under the old death penalty statute.¹⁵⁵ If the jury at that proceeding found that aggravating factors outweighed mitigating factors, the trial court could impose a life-without-parole sentence under the new statute; if, on the other hand, the jury did not find that aggravating factors outweighed mitigating factors, the trial court could impose no more than the maximum sentence permissible under the former statute—in this case, a life sentence with no eligibility for parole for thirty years.¹⁵⁶

After the generally positive response to repeal in New Jersey, the question posed by editorial boards of newspapers across the country—would abolition of capital punishment in the Garden State catalyze similar campaigns elsewhere?—seemed to be more one of “when,” than “if.” Indeed, while it took thirty-one years for the first state to legislatively ban the death penalty in the post-*Gregg* era, it took less than fifteen months for the second to follow New Jersey’s lead.

B. REPEAL IN NEW MEXICO: PERSISTENCE PAYS

New Mexico, like New Jersey, rarely used its death penalty even when it actually employed a capital punishment system.¹⁵⁷ In 2001, New Mexico carried out its first death sentence in forty-one years when it executed Terry Clark for the rape and murder of 9-year-old Dena

¹⁵¹ *State v. Fortin*, 969 A.2d 1133 (N.J. 2009).

¹⁵² *Id.* at 1140–41.

¹⁵³ U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); N.J. CONST. art. IV, § 7, ¶ 3 (“The Legislature shall not pass any . . . ex post facto law . . .”).

¹⁵⁴ *Fortin*, 969 A.2d at 1140.

¹⁵⁵ *Id.* at 1141.

¹⁵⁶ *Id.*

¹⁵⁷ Gabriela C. Guzman, *Death Penalty Repeal Advances*, ALBUQUERQUE J., Jan. 31, 2007, at A4.

Lynn Gore—but only after Clark begged for more than two years to be executed rather than continue with his appeals process.¹⁵⁸ The state then resumed its practice of non-use, executing no one in the years following Clark’s death.

Fittingly, then, the history of legislative repeal in New Mexico is full of stops and starts. In each session between 1999 and 2007, state Representative Gail Chasey, a Democrat, introduced legislation that would have abolished capital punishment.¹⁵⁹ The first few measures gained little traction, but the 2005 version of the repeal bill passed the state House and fell short by just one vote in the Senate Judiciary Committee.¹⁶⁰ In February 2007, as New Jersey debated—and ultimately passed—its bill abolishing capital punishment, New Mexico state House members once again passed a death penalty repeal bill, winning the support of the Santa Fe New Mexican’s editorial board in the process.¹⁶¹ As in 2005, however, the bill died in the Senate Judiciary Committee.¹⁶²

In January 2009, Rep. Chasey sponsored House Bill 285, her sixth death penalty repeal bill in the six legislative sessions since 1999.¹⁶³ The bill, which, like its New Jersey counterpart, proposed replacing the death penalty with life imprisonment without the possibility of parole, passed the state House Judiciary Committee by an 8-5 vote on February 6.¹⁶⁴ Less than a week later, the state House passed the abolition bill 40-28, a nearly identical margin to the 2007 vote.¹⁶⁵ The House vote sent the repeal legislation to the Senate Judiciary Committee, which killed similar bills in 2005 and 2007.¹⁶⁶ On March 9, the Senate committee voted 6-5 to send the bill to the Senate floor, setting up the first full vote on abolition in that chamber since 2001, when a similar measure failed by a 20-21 margin.¹⁶⁷ On the back of a strong Democratic majority, the Senate voted 24-18 on March 13 to pass the repeal legislation, sending

¹⁵⁸ Leslie Linthicum & Tania Soussan, *Executed*, ALBUQUERQUE J., Nov. 7, 2001, at A1.

¹⁵⁹ See Guzman, *supra* note 157.

¹⁶⁰ Steve Terrell, *Death Penalty Repeal Passes State House*, SANTA FE NEW MEXICAN, Feb. 13, 2007, at A6.

¹⁶¹ *Id.*; see also Editorial, *Bill, See the Boon in Death-Penalty Ban*, SANTA FE NEW MEXICAN, Feb. 14, 2007, at A7 (arguing that signing a death penalty repeal bill would bolster former New Mexico Governor—and presidential candidate—Bill Richardson’s resume).

¹⁶² Steve Terrell, *House Votes Against Capital Punishment*, SANTA FE NEW MEXICAN, Feb. 12, 2009, at A6 [hereinafter *House Votes Against Capital Punishment*].

¹⁶³ Steve Terrell, *Panel Passes Bill to Repeal Death Penalty*, SANTA FE NEW MEXICAN, Feb. 7, 2009, at A5.

¹⁶⁴ *Id.*

¹⁶⁵ See *House Votes Against Capital Punishment*, *supra* note 162.

¹⁶⁶ See *supra* notes 160, 162 and accompanying text.

¹⁶⁷ Steve Terrell, *Death-Penalty Repeal Clears Panel*, SANTA FE NEW MEXICAN, Mar. 10, 2009, at A1. The 2001 repeal bill was sponsored by a state Senator and never came to a vote in the state House. S.U. Mahesh, *2 Lawmakers Sponsor Bills to Repeal Death Penalty*, ALBUQUERQUE J., Jan. 25, 2001, at A8.

the bill to then-Governor Bill Richardson, who had three days to act on the bill once he received it.¹⁶⁸

Unlike former New Jersey Governor Jon Corzine, Richardson was hardly an anti-death penalty crusader looking for any opportunity to abolish capital punishment. In fact, prior to 2009, Richardson was a “strong supporter” of the death penalty.¹⁶⁹ He voted in favor of capital punishment as a U.S. Congressman in 1994 and said he would have vetoed abolition legislation during his first term as governor, from 2003 to 2007.¹⁷⁰ But growing evidence of DNA exonerations, prosecutorial misconduct, and the high cost of capital punishment had “softened” Richardson’s support for the practice by the time the repeal bill reached his desk on March 14, 2009.¹⁷¹ And, after three days of reflection, Richardson signed the legislation, formally making New Mexico the second state in less than two years to legislatively abolish its death penalty—this after no states had done so in the thirty-one years between 1976 and 2007.¹⁷² Calling his decision to sign the bill “the most difficult . . . of [his] political life,” Richardson expressed deep ambivalence regarding the death penalty even after approving the legislation.¹⁷³ In the end, Richardson said, it was his lack of confidence in the criminal justice system that “compel[led him] to replace the death penalty with a solution that keeps society safe.”¹⁷⁴ Notably, though, Richardson—unlike Corzine—refused to commute the sentences of New Mexico’s two existing death-row inmates.¹⁷⁵ His decision not to exercise his commutation power created an interesting problem for the courts—a problem addressed in the next Subpart, which examines the reaction to repeal in New Mexico.

1. REACTION TO REPEAL IN NEW MEXICO

The reaction to repeal in New Mexico was, in fitting with the views of the two states’ governors, more muted than the reaction in New Jersey. Prior to the Senate vote, the state’s two major newspapers were

¹⁶⁸ Steve Terrell, *Senate Backs Death-Penalty Repeal*, SANTA FE NEW MEXICAN, Mar. 14, 2009, at A1 [hereinafter *Senate Backs Death-Penalty Repeal*].

¹⁶⁹ Dan Boyd, *Senate Passes Repeal, Leaving Decision to Richardson*, ALBUQUERQUE J., Mar. 14, 2009, at A1.

¹⁷⁰ Leslie Linthicum, *Repeal Decision Not Easy for Gov.*, ALBUQUERQUE J., Mar. 22, 2009, at A1.

¹⁷¹ See *Senate Backs Death-Penalty Repeal*, *supra* note 168; see also Linthicum, *supra* note 170.

¹⁷² Steve Terrell, *Death Penalty Repeal Is Law*, SANTA FE NEW MEXICAN, Mar. 19, 2009, at A1 [hereinafter *Repeal Is Law*].

¹⁷³ *Id.*

¹⁷⁴ See *Richardson Signs Bill Abolishing Death Penalty*, *supra* note 6; see also *Governor Bill Richardson Signs Repeal of the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/governor-bill-richardson-signs-repeal-death-penalty> (last visited Apr. 15, 2012) (“[T]he potential for . . . execution of an innocent person stands as anathema to our very sensibilities as human beings.”).

¹⁷⁵ *Repeal Is Law*, *supra* note 172.

split on abolition, with the *Albuquerque Journal* opposing repeal¹⁷⁶ and the *Santa Fe New Mexican* supporting it, if only half-heartedly.¹⁷⁷ New Mexicans themselves, while not exactly united on the subject, were reasonably enthusiastic in support of repeal: more than three-quarters of the people who contacted then-Governor Richardson's office while he mulled over the legislation supported the repeal bill.¹⁷⁸ Even after Richardson signed the legislation eliminating the State's death penalty, though, the *Santa Fe New Mexican* opined that repeal "isn't really that big a deal" given how infrequently the State employed the death penalty to begin with.¹⁷⁹ Indeed, the newspaper observed facetiously, one of the "good reasons" for passing the repeal bill was to "rid[] the [Capitol] of perennial harping from the bleeding-heart bloc."¹⁸⁰ As was the case in New Jersey two years prior, though, the reaction outside New Mexico was largely supportive, with newspaper editorial boards once again expressing hope that legislative repeal might be contagious.¹⁸¹ And like the New Jersey vote before it, the New Mexico vote prompted at least one editorial board to (re)issue its own call for repeal: just as it did when New Jersey abandoned its death penalty in 2007, the editorial board of the *Hartford Courant* opined on April 7, 2009 that Connecticut Governor M. Jodi Rell "should take her cues from New Mexico" if a death penalty repeal bill reached her desk.¹⁸²

But unlike in New Jersey, where reinstatement talk took several years to develop, talk of reversing the repeal began almost immediately in New Mexico—despite broad public support for abolition.¹⁸³ In March 2011, three different bills, one in the state Senate and two in the

¹⁷⁶ Editorial, *Preserve Death Penalty to Protect Our Officers*, ALBUQUERQUE J., Mar. 1, 2009, at B2 (expressing opposition to the repeal legislation based on concerns for the safety of correctional officers). *But see* Leslie Linthicum, Op-Ed., *Governor, We Can't Afford Another Wrong Man on Death Row*, ALBUQUERQUE J., Mar. 15, 2009, at A1 (advocating repeal based on the idea that executing an innocent person is unacceptable).

¹⁷⁷ Editorial, *Death-Penalty Repeal Has Certain Appeal*, SANTA FE NEW MEXICAN, Feb. 13, 2009, at A9 (citing the possibility that innocent people will be executed as the sole justification for abolishing the death penalty).

¹⁷⁸ Steve Terrell, *Feedback Favors Death Penalty Repeal*, SANTA FE NEW MEXICAN, Mar. 17, 2009, at A6 (noting that of the 9,413 people who had contacted the Governor's office, 7,169 favored repeal, while 2,244 asked the governor to veto the legislation).

¹⁷⁹ Editorial, *Death Penalty Repealed, Hurray-Y-Yawn*, SANTA FE NEW MEXICAN, Mar. 21, 2009, at A7.

¹⁸⁰ *Id.*

¹⁸¹ *See, e.g.*, Editorial, *Another State Wises Up on Death Penalty*, SAN JOSE MERCURY NEWS, Mar. 24, 2009 (commending New Mexico for abolishing the death penalty and imploring California legislators to follow suit); Editorial, *Richardson Does Right*, L.A. TIMES, Mar. 20, 2009, at A36 (calling Richardson's decision to sign repeal legislation "the most important act of his political life"); Editorial, *The Cost of Capital Punishment*, BOS. GLOBE, Apr. 15, 2009, at 14 ("[T]wo states have abolished the death penalty in the past three years, and 10 others have legislation pending.").

¹⁸² Editorial, *Do Away with Death Penalty*, HARTFORD COURANT, Apr. 7, 2009, at A25 [hereinafter *Do Away with Death Penalty*].

¹⁸³ *See* Jason Auslander, *Police Back Plan to Reverse Ban*, SANTA FE NEW MEXICAN, Mar. 21, 2009, at C1 (noting that two county sheriffs and the Santa Fe police chief believed abolition "will definitely hurt law enforcement").

state House, that would have reinstated the death penalty languished and eventually died in their respective committees.¹⁸⁴ In January 2012, new Governor Susana Martinez, a conservative Republican, asked New Mexico lawmakers to consider a reinstatement bill.¹⁸⁵ In response, state Representative Dennis Kintigh, the same Republican who introduced both reinstatement bills in 2011, introduced another bill to bring the death penalty back to New Mexico.¹⁸⁶ Like its 2011 predecessors, however, Kintigh's 2012 reinstatement bill failed in a House committee chaired by Rep. Chasey, the original sponsor of the repeal legislation.¹⁸⁷ Thus, while some conservative New Mexico Republicans continue to push for reinstatement, as long as Democrats control both houses of the legislature and as long as the public continues to support abolition, death penalty repeal legislation appears safe in the state.

New Mexico's repeal statute, like New Jersey's, applied only prospectively; section six of the bill explicitly states that, "[t]he provisions of this act apply to crimes committed on or after July 1, 2009."¹⁸⁸ Unlike former New Jersey Governor Corzine, however, former New Mexico Governor Richardson refused to commute the death sentences of the two inmates already on New Mexico's death row when he signed his state's repeal legislation.¹⁸⁹ This in itself did not create a problem for courts—Richardson's decision not to commute the death sentences of Robert Fry and Timothy Allen was perfectly constitutional, if a little unsettling—but it did raise questions about the permissible punishment for Michael Paul Astorga, who killed a police officer in 2006 but was not convicted of capital murder until June 2010—long after the repeal legislation came into effect in July 2009—and whose sentence has yet to be determined.¹⁹⁰ Because Astorga committed his death-eligible crime before July 1, 2009, the State sought the death penalty against him.¹⁹¹ Astorga's attorney argued that abolition meant his client could not receive a death sentence, but the New Mexico Supreme Court disagreed, allowing the penalty phase of Astorga's trial to go forward.¹⁹² Nonetheless, the Court permitted Astorga to discuss the

¹⁸⁴ Dan Boyd, *Bid to Reinstate Death Penalty Stalls*, ALBUQUERQUE J., Mar. 10, 2011, at A6; Matthew Reichbach, *Death Penalty Reinstatement Dies in Committee*, N.M. INDEP. (Mar. 9, 2011, 08:25 AM), <http://newmexicoindependent.com/69203/death-penalty-reinstatement-dies-in-committee>.

¹⁸⁵ Milan Simonich, *Governor: Reinstate Death Penalty*, EL PASO TIMES (Jan. 20, 2012, 02:17 AM), <http://elpasotimes.typepad.com/newmexico/2012/01/governor-reinstate-death-penalty.html>.

¹⁸⁶ *See id.*

¹⁸⁷ Milan Simonich, *Sponsor Says Proposals to Reinstate Death Penalty Have No Chance to Succeed*, ALAMOGORDO DAILY NEWS (N.M.) (Feb. 4, 2012, 04:36 PM), http://www.alamogordonews.com/ci_19894621.

¹⁸⁸ 2009 N.M. Laws, ch. 11, § 6.

¹⁸⁹ *Repeal Is Law*, *supra* note 172.

¹⁹⁰ Astrid Galvan, *High Court: Astorga Case Can Go On*, ALBUQUERQUE J., Feb. 5, 2011, at D1.

¹⁹¹ *Id.*

¹⁹² Scott Sandlin, *Death Penalty Case Goes Forward*, ALBUQUERQUE J., Sept. 2, 2011, at A1.

repeal in his argument and to introduce new evidence on the same theory.¹⁹³ The Court refused, however, to decide explicitly “whether the 2009 death penalty repeal means Astorga can’t be subject to capital punishment.”¹⁹⁴ Thus, while it remains an open question whether capital defendants who committed their crimes prior to repeal may receive death sentences in New Mexico, the state’s highest court has indicated a willingness to abide by the letter of the law in considering prospective repeal *purely* prospective, rather than giving it a form of de facto retroactivity as some commentators believed was likely.¹⁹⁵

As explained later in this Part, the prospective-only nature of death penalty repeal statutes—which the New Mexico Supreme Court rigidly applied to Michael Paul Astorga—has proved to be a controversial compromise for death penalty repeal advocates in other states.¹⁹⁶ Now, though, this Article turns to repeal in Illinois, which followed a slightly different route than repeal in New Jersey and New Mexico.

C. ILLINOIS OFFICIALLY ABANDONS ITS DEATH PENALTY AFTER AN 11-YEAR MORATORIUM

Unlike New Jersey and New Mexico, which employed the death penalty rarely even before it was repealed, Illinois executed ninety-eight people between 1928, when the State took over execution duties from county officials, and 1972, when the U.S. Supreme Court temporarily halted capital punishment nationwide in *Furman*.¹⁹⁷ After a fourteen-year hiatus following the Supreme Court’s reaffirmation of the constitutionality of the death penalty in *Gregg*, Illinois executed twelve more people between 1990 and 1999.¹⁹⁸ Then, suddenly, eleven months after Anthony Porter came within fifty hours of his execution before walking out of jail a free man and ten months after Andrew Kokoraleis died by lethal injection, former Illinois Governor George Ryan imposed a moratorium on executions in the State.¹⁹⁹ Noting that thirteen people on Illinois’ death row had been exonerated since 1977, Ryan stated that

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Cf. *Testimony of Quinnipiac University School of Law Civil Justice Clinic in Support of Raised Bill No. 280 Before the S. Comm. on the Judiciary* (Mar. 14, 2012) (noting that death penalty supporters opposed repeal in Connecticut based on the argument that “a prospective-only death penalty will be interpreted by the Connecticut Supreme Court to retroactively nullify existing death sentences”).

¹⁹⁶ See *infra* Part II.D.

¹⁹⁷ Tim Novak, *Gacy Marks 100th State Execution*, JOLIET PRISONS, <http://www.joliet.com/prisons/executed/gacy5.html>.

¹⁹⁸ *Execution Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/views-executions> (last visited Apr. 15, 2012).

¹⁹⁹ Press Release, Governor George Ryan, *Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System* (Jan. 31, 2000), available at <http://www.illinois.gov/pressreleases/showpressrelease.cfm?subjectid=3&recnum=359>.

he would not approve another execution until the Illinois Commission on Capital Punishment, whose members he appointed in March 2000, gave him its recommendations.²⁰⁰

In April 2002, the Commission proposed a number of changes to Illinois' capital punishment system but did not include a formal recommendation to scrap the death penalty altogether, despite the support of a majority of Commission members for abolition.²⁰¹ Nonetheless, the Commission ultimately concluded that it "cannot guarantee that the innocent will no longer be wrongly condemned."²⁰² After the Illinois legislature refused to work with Ryan to implement some of the Commission's proposed reforms, the former governor took drastic action: on January 11, 2003, with two days left in his term, he commuted the death sentences of all 164 inmates on the state's death row, declaring that, "[t]he Illinois capital punishment system is broken."²⁰³

With the moratorium still in place nearly eight years later, Illinois House members voted 60-54 on January 6, 2011 to pass legislation to formally abolish the State's death penalty.²⁰⁴ The state Senate approved the abolition bill five days later by a vote of 35-22, sending it to Governor Pat Quinn, a Democrat who—like former New Mexico Governor Bill Richardson—long supported the death penalty.²⁰⁵ After almost two months of deliberation, Quinn signed the repeal bill into law on March 9, 2011, making Illinois the third state in five years to legislatively abolish its death penalty.²⁰⁶ Like Richardson, Quinn called abolition "the most difficult decision he has made as governor"; he cited the unacceptable risk that an innocent person could be executed as his primary motivation for supporting repeal.²⁰⁷ Unlike Richardson, though, Quinn commuted to life in prison without parole the sentences of the fifteen men sentenced to death in Illinois since former Governor Ryan issued his blanket clemency order in January 2003.²⁰⁸

²⁰⁰ *Id.*

²⁰¹ Steve Mills & Christi Parsons, *Ryan's Panel Urges Fixes in Death Penalty*, CHI. TRIB., Apr. 15, 2002, at 1.

²⁰² *Id.*

²⁰³ Maurice Possley & Steve Mills, *Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, CHI. TRIB., Jan. 12, 2003, at 1.

²⁰⁴ Ray Long & Todd Wilson, *House Votes to Repeal Illinois' Death Penalty*, CHI. TRIB., Jan. 7, 2011, at 6.

²⁰⁵ Ray Long, Todd Wilson & Ted Gregory, *Historic Measure Awaits Quinn's Signature*, CHI. TRIB., Jan. 12, 2011, at 1 (noting that Quinn said while campaigning for the governor's office in fall 2010 that he "supports capital punishment when applied carefully and fairly").

²⁰⁶ Steve Mills, *Illinois Bans Death Penalty*, CHI. TRIB., Mar. 10, 2011, at 1.

²⁰⁷ *Illinois Death Penalty Abolished*, HUFFINGTON POST, Mar. 9, 2011, http://www.huffingtonpost.com/2011/03/08/illinois-death-penalty-ab_n_833250.html.

²⁰⁸ *Id.*

1. REACTION TO REPEAL IN ILLINOIS

Given the 11-year moratorium in place before formal repeal, reaction to abolition in Illinois—which effectively just cemented the status quo—was more subdued than it was in either New Jersey or New Mexico. But in the weeks leading up to Governor Quinn’s signing of the bill, and in the days immediately following it, both major Chicago newspapers wholeheartedly supported repeal. In late February 2011, with Quinn still sitting on the abolition bill more than six weeks after he received it from the state legislature, the *Chicago Tribune*—whose editorial board long advocated death penalty reform²⁰⁹—urged the governor to sign the repeal legislation, writing that “the [capital punishment] system can’t be trusted.”²¹⁰ The day after Quinn signed the bill, the *Tribune* called his decision a “courageous step” that was “worthy of significant, if sober, celebration.”²¹¹ The *Chicago Sun-Times* joined the *Tribune* in commending Quinn for repealing capital punishment in the State, writing that, “Illinois has . . . taken a step that was as necessary as it was emotionally difficult.”²¹²

Despite overwhelming support in the editorial pages of the state’s two biggest newspapers, however, repeal in Illinois was not uniformly popular. Unlike in New Jersey and New Mexico, where voters backed repeal in relatively large numbers, a majority of Illinois citizens still supported the death penalty in October 2010.²¹³ And just eight days after Governor Quinn signed the repeal bill, state Representative Dennis Reboletti, a Republican, managed to win House committee approval of two bills that would have reinstated the death penalty in Illinois for a narrow subset of crimes.²¹⁴ In April and May 2011, however, the bills were re-referred to state House committees, where they have languished since, having yet to come to a vote in the full chamber.²¹⁵ Thus, as long as Democrats remain in control of the Illinois General Assembly, death penalty reinstatement appears unlikely to gain any traction in the state.

²⁰⁹ Editorial, *Fix This Broken System*, CHI. TRIB., Feb. 1, 2000, at 12 (calling former Governor Ryan’s decision to impose a moratorium on executions “wise and welcome”).

²¹⁰ Editorial, “*Sign It*,” CHI. TRIB., Feb. 28, 2011, at 14 (analogizing Quinn’s decision to former New Mexico Governor Richardson’s and noting the many similarities between the two men with respect to their views on the death penalty).

²¹¹ Editorial, *The End of Death Row*, CHI. TRIB., Mar. 10, 2011, at 22 [hereinafter *The End of Death Row*] (“Illinois is better off without the death penalty.”).

²¹² Editorial, *Death Penalty Repeal a Victory for Justice*, CHI. SUN-TIMES, Mar. 10, 2011, at 20 (“The struggle for justice is one that will never end. But with his signature, Quinn brought us one step closer to that ideal.”).

²¹³ See *The End of Death Row*, *supra* note 211 (citing a poll which found that 56 percent of Illinois voters wanted the moratorium on executions lifted).

²¹⁴ Todd Wilson, *House Panel Approves Bill Reinstating Death Penalty*, CHI. TRIB., Mar. 18, 2011, at 16.

²¹⁵ H.B. 1519, 97th Gen. Assemb., Reg. Sess. (Ill. 2011); H.B. 1738, 97th Gen. Assemb., Reg. Sess. (Ill. 2011).

Finally, though Illinois courts consistently upheld death sentences during the 11-year moratorium between 2000 and 2011 — indeed, fifteen defendants were sent to death row between 2003 and 2011 alone²¹⁶ — there is a dearth of judicial decisions implicating interesting questions regarding capital punishment in the wake of legislative repeal.

D. CONNECTICUT SCRAPS ITS DEATH PENALTY IN THE WAKE OF A BRUTAL TRIPLE HOMICIDE

Connecticut, like both New Jersey and New Mexico, seldom carried out its death penalty in the past half century. Between 1960 and 2012, the state executed only one person — Michael Ross in 2005 — and only after the condemned man waived his right to appeal and effectively begged to die.²¹⁷ Perhaps naturally, then, the repeal process in Connecticut began years before it culminated with abolition in April 2012. Indeed, in May 2009, the General Assembly actually sent a bill that would have eradicated capital punishment to then-Governor M. Jodi Rell.²¹⁸ The legislation, which would have applied prospectively, won only narrow support in the state Senate, but enjoyed a considerably stronger backing in the House.²¹⁹ Nonetheless, Governor Rell, a Republican and a lifelong supporter of capital punishment, vowed to veto the bill as soon as it hit her desk.²²⁰ In a statement, she said she believed the death penalty was “warranted” for “heinous” crimes that are “fundamentally revolting to our humanity.”²²¹ As promised, Rell vetoed the bill, and the tenuous support for abolition in the state Senate dashed all hopes for a veto override.²²²

Less than three years later, though, with a Democrat, Dannel P. Malloy, having replaced Rell at the Governor’s desk, repeal advocates tried again. And on April 11, 2012, the Connecticut House of Representatives voted 86-62 for a bill to repeal capital punishment, sending the legislation to Malloy six days after the state Senate voted 20-16 for abolition.²²³ Malloy, who in the early 1980s served as an Assistant District Attorney in Brooklyn, supported the death penalty as a young man.²²⁴ But his experiences as a prosecutor influenced his

²¹⁶ See *Illinois Death Penalty Abolished*, *supra* note 207.

²¹⁷ See Altimari, *supra* note 8.

²¹⁸ *Rell Votus to Veto Ban on Death Penalty in Connecticut*, N.Y. TIMES, May 23, 2009, at A22.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Christopher Keating, *Rell Vetoes Bill to Abolish Capital Punishment*, HARTFORD COURANT, June 6, 2009.

²²³ Daniela Altimari, *After Wrenching Debate, Senate Backs Repeal*, Hartford Courant, Apr. 6, 2012, at A1 [hereinafter Altimari, *Senate*] (reporting on the 20-16 Senate vote); Daniela Altimari, *House Votes for Repeal*, Hartford Courant, Apr. 12, 2012, at A1 [hereinafter Altimari, *House*] (reporting on the 86-62 House vote).

²²⁴ Altimari, *supra* note 8.

views on capital punishment, and by the time the repeal bill reached Malloy's desk, it was a foregone conclusion that he would sign it.²²⁵ Indeed, on April 25, 2012, two weeks after he received the legislation from the General Assembly, Governor Malloy signed it, making Connecticut the fourth state since 2007 to eradicate its death penalty by statute.²²⁶ Echoing Illinois Governor Pat Quinn, Malloy cited the unacceptable risk of executing an innocent person as a primary justification for abolishing capital punishment: "Doing away with the death penalty," he said just before he signed the bill, "[is] the only way to ensure it [will] not be unfairly imposed."²²⁷ And yet, like former New Mexico Governor Bill Richardson—and unlike former New Jersey Governor Jon Corzine and Illinois Governor Pat Quinn—Malloy did not commute the death sentences of the eleven men currently on death row, who are still facing execution for their crimes despite passage of the abolition bill.²²⁸ Unlike Richardson, however, Malloy did not have a choice; the Connecticut Constitution imposes temporal limits on the governor's commutation powers, providing only for the authority to issue individual stays of execution that expire at the end of the following legislative session.²²⁹ Ultimately, only the Board of Pardons and Paroles has full authority to commute death sentences in Connecticut.²³⁰

Abolition in Connecticut comes at an interesting time in the state's history with capital punishment, and that history may have something to do with the prospective-only nature of the bill. In July 2007, Steven Hayes and Joshua Komisarjevsky savagely beat Dr. William Petit and brutally raped and murdered his wife and two daughters.²³¹ The two men were subsequently convicted of capital murder and sentenced to death.²³² There was broad public support in Connecticut for the death sentences and the *Hartford Courant* called the murders "possibly the most widely publicized crime in the state's history."²³³ It is perhaps not

²²⁵ See Altimari, *House*, *supra* note 223 (noting that Governor Malloy has "pledged to sign" the bill).

²²⁶ Altimari, *supra* note 8.

²²⁷ *Id.*

²²⁸ Editorial, *Repealed, Sort Of*, *HARTFORD COURANT*, Apr. 8, 2012, at C2 [hereinafter *Repealed, Sort Of*] (noting that under the "half-baked [repeal] bill," the 11 men currently on death row would still face execution).

²²⁹ See CONN. CONST. art. IV, § 13 ("The governor shall have power to grant reprieves after conviction . . . until the end of the next session of the general assembly, and no longer."); Palka v. Walker, 198 A. 265, 266 (Conn. 1938) ("A reprieve properly granted during a session of the Legislature may run until the end of the first session which thereafter convenes.").

²³⁰ See Conn. Gen. Stat. Ann. § 54-130a (West 2007) ("[C]ommutations from the penalty of death shall be vested in the Board of Pardons and Paroles.").

²³¹ See generally Alison Leigh Cowan & Stacey Stowe, *Suspects in Deadly Home Invasion Had Been Roommates*, *N.Y. TIMES*, July 25, 2007, at B1 (describing the crime).

²³² Alaine Griffin, *Judge Sentences Komisarjevsky for Petit Murders*, *HARTFORD COURANT*, Jan. 28, 2012, at A1. Alaine Griffin, *Hayes Faces Execution for Cheshire Murders*, *HARTFORD COURANT*, Nov. 9, 2010, at A1.

²³³ Matthew Kauffman, *Lawyers Say Impartial Jury Can Be Impaneled*, *HARTFORD COURANT*, Nov. 10, 2010, at A1.

surprising, then, that Connecticut voters overwhelmingly opposed abolition in March 2012 even as the General Assembly debated the repeal legislation.²³⁴ Indeed, public support for the death penalty actually rose from fifty-nine percent in 2005 to sixty-three percent in 2007, after the triple murders.²³⁵ It rose again, to sixty-five percent, in 2010.²³⁶ Thus, Connecticut lawmakers may have thought a retroactive death penalty repeal bill too compassionate for Hayes and Komisarjevsky, especially given Dr. Petit's fierce and outspoken opposition to repeal.²³⁷ The prospective-only bill that Governor Malloy signed, then, was likely a product of compromise, with legislators attempting to strike a balance between wanting to punish those already on death row, particularly Hayes and Komisarjevsky, and wanting to scrap the death penalty altogether.²³⁸

1. REACTION TO REPEAL IN CONNECTICUT

Because repeal in Connecticut happened so recently, reaction to abolition there has been more limited in scope than in any of the other three states to legislatively eradicate their death penalties since 2007. But the reaction so far, however limited it may be, indicates that public opinion on abolition is as divided as the state Senators who only narrowly supported repeal.²³⁹ For years before April 2012, the state's largest newspaper strongly supported abolition; indeed, in the wake of repeal in both New Jersey and New Mexico, the *Hartford Courant* was among the loudest and most prominent of the newspaper editorial boards calling on its state's leaders to follow suit.²⁴⁰ And when repeal finally did come to Connecticut, the newspaper criticized the "half-baked," prospective-only bill for "continu[ing] the state's vacillation

²³⁴ Daniela Altimari, *Repeal Advances but Foes Cite Public Support for Execution*, HARTFORD COURANT, Mar. 21, 2012, at A1 (noting that a poll conducted between March 14-19, 2012 found that Connecticut voters disapproved of repeal by 62-31 percent, though the margin fell to 48-43 when voters were asked to consider life without parole as the alternative to death).

²³⁵ Daniela Altimari & Christopher Keating, *67% OK with Death Penalty*, HARTFORD COURANT, Mar. 11, 2011, at A1.

²³⁶ *Id.*

²³⁷ See Alaine Griffin, *Petit Talks About God, Fate, Luck*, HARTFORD COURANT, Dec. 10, 2010, at A1 (noting that Petit compared the repeal debate to "death by 1,000 paper cuts"). Prospective-only bills have been something of a boon, though, in the minds of some abolitionists, who view such legislation as a useful bargaining chip in the fight to eradicate the death penalty in the face of persistent opposition. Interview with Colleen Cunningham, *supra* note 22. Such bills provide a means of achieving abolition, albeit in an imperfect form, but they also provide closure for victims' families who fought for—and received—death sentences for the killers of their loved ones. *Id.*

²³⁸ See Alaine Griffin, *Inmate Challenges New Law*, HARTFORD COURANT, June 4, 2012, at A1.

²³⁹ See *supra* note 223 and accompanying text.

²⁴⁰ See *Abolish State's Death Penalty*, *supra* note 140 (advocating for repeal in 2007); *Do Away with Death Penalty*, *supra* note 182 (same for 2009).

over the death penalty, repealing it but not really.”²⁴¹ And yet, the Connecticut citizenry—like that in Illinois—was far less enthusiastic in its support for abolition; a Quinnipiac University poll released the same day that Governor Malloy signed the repeal legislation showed that “nearly two-thirds of Connecticut voters support capital punishment” in the abstract, though that number dropped to forty-six percent when respondents were asked to choose between the death penalty and life in prison with no possibility of parole.²⁴²

Given the repeal legislation’s narrow margin in the state Senate, it is perhaps not surprising that the bill’s opponents wasted little time making their distaste for abolition known. Indeed, some legislators, including Republican Representative Al Adinolfi, indicated the very day that Governor Malloy signed the repeal bill that they would soon start a drive to reinstate capital punishment.²⁴³ These “repeal the repeal” campaigns have yet to produce any proposed legislation or make any headway, however, in the Democratically-controlled General Assembly.

Connecticut courts have also begun to grapple with questions about the constitutionality of the prospective-only nature of the repeal legislation. In particular, pending suits by two of the eleven condemned men currently awaiting execution on death row could prompt the Connecticut Supreme Court to consider the constitutionality of prospective-only repeal.²⁴⁴ The first of these suits was brought by Richard Roszkowski, who murdered three people, including a nine-year-old girl, in September 2006.²⁴⁵ Roszkowski was convicted of capital murder and sentenced to death in 2009, but a judge later dismissed his sentence and ordered a new penalty phase due to a faulty jury instruction.²⁴⁶ At a pretrial hearing in May 2012, Roszkowski indicated that he would petition the Connecticut Supreme Court to determine whether the prospective-only nature of death penalty repeal violates his constitutional rights and whether he can properly be sentenced to death after passage of the repeal legislation, even if he was convicted before abolition.²⁴⁷ The second suit is by Eduardo Santiago, who was convicted of—and sentenced to die for—participating in a murder-for-hire scheme in

²⁴¹ See *Repealed, Sort Of*, *supra* note 228 (calling the bill “cause for consternation,” saying it “should be abolished entirely,” and predicting expensive litigation resulting from challenges by the eleven men currently on death row).

²⁴² Altimari, *supra* note 8; see also *Repealed, Sort Of*, *supra* note 228 (mentioning an earlier poll showing similar results).

²⁴³ Altimari, *supra* note 8.

²⁴⁴ See Griffin, *supra* note 238 (discussing the cases of Eduardo Santiago and Richard Roszkowski).

²⁴⁵ Alaine Griffin, *Triple Murderer Awaits New Penalty Phase*, HARTFORD COURANT, May 31, 2012, at A1.

²⁴⁶ *Id.*

²⁴⁷ *Id.* In this way, Roszkowski’s case brings to mind that of Michael Paul Astorga in New Mexico. See *supra* Part II.B.1.

2005.²⁴⁸ Santiago appealed his sentence to the Connecticut Supreme Court based on the withholding of certain state records pertaining to his family history—records that show “abuse, neglect and abandonment” and paint a picture of Santiago’s “horrific childhood.”²⁴⁹ Having determined that the trial court “improperly failed to disclose certain documents from the [State’s] file that potentially would have given the jury a broader and more comprehensive picture of the defendant’s family history to consider as a mitigating factor,” the Connecticut Supreme Court overturned Santiago’s death sentence and unanimously ordered a new penalty phase.²⁵⁰ The Justices, did not, however, take a stance on the impact of the death penalty repeal legislation on Santiago’s case despite his motion seeking oral argument on—and permission to file briefs addressing—that constitutional question.²⁵¹ While Santiago argued in his motion that abolition “raises serious questions about the validity” of his death sentence,²⁵² the Court delayed its decision on that issue until a later date.²⁵³ Thus, as in New Mexico, it remains an open question in Connecticut whether condemned capital defendants who have earned new post-repeal penalty phases may constitutionally be executed for their crimes.

III. FORGING A “NATIONAL CONSENSUS”: THE STATE OF REPEAL TODAY

So where does repeal stand today? With four states having legislatively abolished their death penalties since 2007, repeal is certainly gaining steam nationwide. But how many more states, if any, must pass legislation to repeal capital punishment before the U.S. Supreme Court has no choice but to determine that a “national consensus” has developed against its imposition altogether? This Part examines the prospects for abolition in a number of other states before offering some thoughts on what the future of the death penalty may look like in the United States.

A. REPEAL PROSPECTS IN OTHER STATES

Repeal campaigns, at their various stages, are underway in several other states, including Maryland—whose Democratic governor, Martin

²⁴⁸ Alaine Griffin, *Death Sentence Tossed, New Penalty Phase Ordered*, HARTFORD COURANT, June 4, 2012, at A1.

²⁴⁹ *Id.*; see also *State v. Santiago*, 305 Conn. 101, 119–20 (2012).

²⁵⁰ *Santiago*, 305 Conn. at 215; see also Griffin, *supra* note 248.

²⁵¹ *Santiago*, 305 Conn. at 307 n.167 (“[T]hese constitutional issues would be more appropriately addressed in the context of postjudgment motions.”).

²⁵² Griffin, *supra* note 248.

²⁵³ *Santiago*, 305 Conn. at 307 n.167.

O'Malley, has called capital punishment "inherently unjust"²⁵⁴—and Nebraska, where abolition bills were introduced but killed early in 2012.²⁵⁵ Repeal legislation is also under consideration in Montana and Colorado, which both recently debated, but ultimately decided against, abolition.²⁵⁶ Grassroots organizations in Delaware and South Dakota are pushing for repeal,²⁵⁷ while anti-death penalty coalitions have also formed in Ohio, Pennsylvania, and Tennessee, though abolition advocates acknowledge that the political climate in those states will make repeal difficult.²⁵⁸

Meanwhile, Oregon Governor John Kitzhaber, a Democrat, declared a moratorium on executions in his state on November 22, 2011, saying that he "simply cannot participate in something [he] believe[s] to be morally wrong."²⁵⁹ Just shy of one year later, state Representative Mitch Greenlick, a Democrat from Portland, announced that he would introduce a bill in the 2013 legislative session to propose a constitutional amendment to replace Oregon's death penalty with a sentence of life in prison without parole.²⁶⁰ If passed by legislators, the proposed amendment would go before Oregon voters—who must approve constitutional amendments by a simple majority—in November 2014.²⁶¹ Shortly after Rep. Greenlick's announcement, the editorial board of the state's largest newspaper, *The Oregonian*, enthusiastically supported placing such a bill in front of voters.²⁶²

And in New Hampshire, the November 2012 election of Democratic Governor Maggie Hassan has breathed new life into the abolition campaign in that state—which has suffered setbacks in the form of vetoes (or veto threats) at the hands of two of its last three governors—whose supporters now feel abolition in New Hampshire is an "inevitability."²⁶³

²⁵⁴ John Wagner, *As O'Malley Eyes Repeal, Md. Death Row Remains at 'Impasse,'* WASH. POST, Nov. 25, 2012, at C1.

²⁵⁵ *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/recent-legislative-activity> (last visited Apr. 15, 2012).

²⁵⁶ Interview with Colleen Cunningham, *supra* note 22.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Kim Murphy, *Oregon's Governor Issues Moratorium on Death Penalty*, L.A. TIMES, Nov. 23, 2011, at A15.

²⁶⁰ See Helen Jung, *Oregon Legislator Prepares Death-Penalty Repeal Bill, as Anniversary of Execution Moratorium Approaches*, OREGONIAN, Nov. 20, 2012, available at http://www.oregonlive.com/politics/index.ssf/2012/11/oregon_legislator_prepares_dea.html.

²⁶¹ *See id.*

²⁶² *See* Editorial, *Oregon's Life-or-Death Vote*, OREGONIAN, Nov. 26, 2012, available at http://www.oregonlive.com/opinion/index.ssf/2012/11/oregons_life-or-death_vote.html ("Oregon voters need a say in this profound question of justice.").

²⁶³ *See* Joseph G. Cote, *Death Penalty Opponents Hopeful New Crop of Lawmakers Will Support Abolishing Law*, NASHUA TELEGRAPH, Nov. 15, 2012, available at <http://www.nashuatelegraph.com/news/983748-469/death-penalty-opponents-hopeful-new-crop-of.html> (noting that state Representative Steve Vaillancourt, a Republican, has submitted a "legislative services request, the precursor to a House bill, to abolish the death penalty again this year").

Indeed, Governor-elect Hassan has publicly stated that she opposes capital punishment “as a matter of personal conscience and faith.”²⁶⁴

The news is not uniformly good for abolition proponents, however. In California, home to the nation’s largest death row,²⁶⁵ a coalition called Taxpayers for Justice placed a death penalty repeal initiative on the ballot in November 2012.²⁶⁶ Proposition 34, as the measure was officially known, would have replaced the death penalty with a sentence of life in prison without the possibility of parole and would have commuted the sentences of the more than 720 inmates currently on California’s death row.²⁶⁷ Despite raising at least \$4.6 million in support of the measure (compared to a mere \$240,000 raised by opposition groups),²⁶⁸ however, repeal supporters failed to muster enough support to pass their initiative, which lost by nearly 500,000 votes—or 52-48 percent.²⁶⁹ Indeed, polls in California have shown strong and consistent support for capital punishment over the years.²⁷⁰

Finally, before discussing the future of the death penalty in the United States viewed through the lens of legislative repeal, it is worth noting that although it was technically the New York Court of Appeals that issued the final word on the death penalty in 2004,²⁷¹ abolition in the Empire State was more the product of legislative acquiescence than of judicial fiat. After the Court determined that the state’s death penalty statute contained an unconstitutional jury deadlock instruction,²⁷² it explicitly stated that, “this defect in the existing statute can only be cured by a new deadlock instruction from the Legislature.”²⁷³ Rather than cure the unconstitutional provision of its death penalty statute, however, the New York Legislature ultimately rejected a revised death

²⁶⁴ Tricia L. Nadolny, *With Hassan in Office, Death Penalty’s Days Could Be Numbered*, CONCORD MONITOR, Nov. 25, 2012, available at <http://www.concordmonitor.com/home/2941576-95/death-penalty-repeal-addison>.

²⁶⁵ *California — Fact Sheet*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/california-1> (last visited July 22, 2012).

²⁶⁶ See Steven Harmon, *California Voters to Have Say on Taxes, State Budgeting Process, Crime and Justice*, SAN JOSE MERCURY NEWS, July 14, 2012; *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/recent-legislative-activity> (last visited Apr. 15, 2012).

²⁶⁷ See Harmon, *supra* note 266.

²⁶⁸ See Sam Stanton, *Proposition 34: Repealing the Death Penalty*, SACRAMENTO BEE, Oct. 7, 2012, at 3A (reporting dollar figures as of October 7, 2012).

²⁶⁹ See CAL. SEC’Y STATE, *STATE BALLOT MEASURES 69 (2012)*, available at <http://www.sos.ca.gov/elections/sov/2012-general/15-ballot-measures.pdf>.

²⁷⁰ See Harmon, *supra* note 266; Maura Dolan, *Voters to Have Say on Death Penalty*, L.A. TIMES, Apr. 24, 2012, at AA1 (“California voters have historically favored capital punishment, passing several measures over the last few decades to . . . expand the number of crimes punishable by death.”).

²⁷¹ See *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004) (invalidating the death penalty in New York but leaving intact provisions of the law that authorize a sentence of life in prison without the possibility of parole for defendants convicted of first-degree murder).

²⁷² *Id.* at 344 (“[T]he jury deadlock instruction prescribed in [New York Criminal Procedure Law § 400.27(10)] is unconstitutional under article I, § 6 of the State Constitution.”).

²⁷³ *Id.*

penalty bill supported by then-Governor George E. Pataki.²⁷⁴ After the Republican-controlled state Senate overwhelmingly approved a legislative fix for the problem identified by the New York Court of Appeals in *People v. LaValle*, the Democratic-controlled state Assembly killed the legislation in an 11-7 committee vote on April 12, 2005.²⁷⁵ That vote eradicated capital punishment in New York—which as of 2005 had executed 695 people, more than any state but Texas—once and for all, and was popular among residents, a “sizeable majority” of whom indicated in polls that they preferred a sentence of life in prison with no chance of parole to a death sentence for convicted murderers.²⁷⁶ Thus, while it was a judicial decision that catalyzed the repeal process in New York, it was a legislative act that hammered the final nail in the coffin of the death penalty in the state.

B. WHAT CONSTITUTES A “NATIONAL CONSENSUS”?: THE FUTURE OF THE AMERICAN DEATH PENALTY

Anti-death penalty advocates readily acknowledge that legislative repeal is politically infeasible in a number of states.²⁷⁷ But, as the Supreme Court noted in *Enmund v. Florida*, the legislative position of the states need not be “wholly unanimous” to justify abandoning the practice because it runs counter to “evolving standards of decency.”²⁷⁸ Rather, the legislative evidence need only “weigh[] on the side of rejecting capital punishment” for the Supreme Court to jettison it.²⁷⁹ Indeed, as the Court pointed out in *Atkins*, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”²⁸⁰ With regard to legislative repeal of the death penalty, the direction of change is clear: five states have abolished their death penalties since 2004—four of them by statute and the other, New York, by a hybrid judicial/legislative process.²⁸¹ Meanwhile, no state has permanently reinstated the death penalty since Kansas in 1994,²⁸² though that state has not actually executed anyone since 1965.²⁸³ Thus, in the years since repeal legislation began to take hold, there has

²⁷⁴ Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment*, WASH. POST, Apr. 13, 2005, at A3.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Interview with Colleen Cunningham, *supra* note 22 (noting that states like Texas and Oklahoma are very unlikely to voluntarily abolish their death penalties).

²⁷⁸ *Enmund v. Florida*, 458 U.S. 782, 787, 792-93 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 596 (1977)).

²⁷⁹ *Id.* at 793.

²⁸⁰ *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

²⁸¹ See *supra* Parts II, III.A.

²⁸² *Kansas — Fact Sheet*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/kansas-1> (last visited Apr. 15, 2012). Notably, this does not include New York, which reinstated its death penalty in 1995 but subsequently abolished it in 2007.

²⁸³ *Id.*

been a “complete absence of States passing legislation reinstating the power to conduct . . . executions.”²⁸⁴ And in none of those states that have legislatively abolished capital punishment has a reinstatement bill actually come to a full vote.²⁸⁵

Here, we can draw another parallel to the Court’s reasoning in *Atkins*. In that case, the Court viewed the fact that executions of mentally retarded defendants were “uncommon” in those states that nominally allowed for the practice in 2002 as a factor counseling for a finding of a “national consensus” against such executions.²⁸⁶ Similarly, executions are rare in many states that currently permit capital punishment: thirteen of the thirty-three states that still have a death penalty on their books have executed fewer than eight people since 1976, when the Supreme Court reaffirmed the constitutionality of capital punishment in *Gregg*.²⁸⁷ Two of these states, in fact, have not executed anyone in more than forty-five years.²⁸⁸ An additional five have not executed anyone this century.²⁸⁹ In many of these states, therefore, there is, as there was in *Atkins*, “little need to pursue legislation barring . . . execution[s].”²⁹⁰ And yet this does not mean that a “national consensus” has not developed, or is not developing, against capital punishment altogether. For anti-death penalty advocates, therefore, nationwide repeal may now be a question of “when” and not “if” — that, at least, is the hope.²⁹¹

The Supreme Court has never provided a clear definition of what constitutes a “national consensus” for Eighth Amendment purposes; its decisions involving such an inquiry thus provide little guidance on the number of states required to establish a consensus.²⁹² For example,

²⁸⁴ *Atkins*, 536 U.S. at 315–16.

²⁸⁵ See *supra* Part II.

²⁸⁶ *Atkins*, 536 U.S. at 316.

²⁸⁷ These states are: Utah (seven executions since 1976); Tennessee (six); Maryland and Washington (five each); Kentucky, Montana, Nebraska, and Pennsylvania (three each); Idaho and Oregon (two each); and Colorado, South Dakota, and Wyoming (one each). *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Apr. 15, 2012).

²⁸⁸ These states are Kansas (last execution in 1965) and New Hampshire (1939). *Kansas — Fact Sheet*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/kansas-1> (last visited Apr. 15, 2012); *New Hampshire — Fact Sheet*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/new-hampshire-1> (last visited Apr. 15, 2012).

²⁸⁹ These states are Colorado (last execution in 1997), Nebraska (1997), Oregon (1997), Pennsylvania (1999), and Wyoming (1992). *Jurisdictions with No Recent Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions> (last visited Apr. 15, 2012).

²⁹⁰ *Atkins*, 536 U.S. at 316.

²⁹¹ Interview with Colleen Cunningham, *supra* note 22.

²⁹² See, e.g., *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that thirteen states constitute a “national consensus”); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (forty-four states); *Roper v. Simmons*, 543 U.S. 551 (2005) (thirty states); *Atkins*, 536 U.S. 304 (2002) (thirty states); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (thirty-two states); *Enmund v. Florida*, 458 U.S. 782 (1982) (forty-two states). *But see, e.g., Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that neither twenty-two nor twenty-five states are enough to constitute a “national consensus”); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (sixteen states not enough).

in *Graham v. Florida*, the Supreme Court determined that the laws of a mere thirteen states constituted a “national consensus” against the imposition of a sentence of life imprisonment with no chance for parole on a juvenile offender who did not commit a homicide.²⁹³ But in *Stanford v. Kentucky*, the Court determined that the laws of as many as twenty-two or even twenty-five states did not constitute a “national consensus” against the imposition of the death penalty on juvenile offenders aged sixteen or seventeen at the time of their crimes.²⁹⁴ The cases for which the Court has canvassed the state legislatures to ferret out the existence of a “national consensus” therefore do not provide a target number or a clear line for death penalty abolition advocates.

Such advocates, for their part, do not believe that a simple majority of states is enough to constitute a “national consensus” when it comes to the death penalty.²⁹⁵ Given the Supreme Court’s “national consensus” precedent, they are probably right.²⁹⁶ What, then, might be a reasonable target for abolitionists? Excluding *Graham* as an outlier, in each case in which the Court has looked to state laws to determine the presence of a “national consensus,” it has required at least thirty states before it will find the existence of such a consensus.²⁹⁷ If thirty is the magic number, then, an additional thirteen states would have to eradicate their death penalties to force the Court’s hand. Another option is borne out of the Constitution itself: perhaps three-quarters of the states must abolish their death penalties before the Supreme Court will determine that a “national consensus” exists against capital punishment altogether.²⁹⁸ If the Court were to use this metric, an additional twenty-one states would have to do away with their capital punishment schemes to constitute a “national consensus.”

A determination that a “national consensus” has developed against a particular punishment does not, however, necessarily sound the death knell for that punishment. Indeed, the Supreme Court affirmed in *Graham v. Florida* that while such consensus is entitled to “great weight,” it is “not itself determinative of whether a punishment is cruel and unusual” and that “the task of interpreting the Eighth Amendment remains [the Court’s] responsibility.”²⁹⁹ To carry out this task, the Court refers to its “own understanding and interpretation of the

²⁹³ *Graham*, 130 S. Ct. at 2023.

²⁹⁴ *Stanford*, 492 U.S. at 371–72.

²⁹⁵ Interview with Colleen Cunningham, *supra* note 22.

²⁹⁶ See cases cited *supra* note 292.

²⁹⁷ See cases cited *supra* note 292.

²⁹⁸ Cf. U.S. CONST. art. V (requiring ratification by “the Legislatures of three fourths of the several States” before a Constitutional amendment is valid).

²⁹⁹ 130 S. Ct. 2011, 2026 (2010) (quoting *Roper*, 543 U.S. at 575 (2005)) (some internal quotation marks omitted).

Eighth Amendment's text, history, meaning, and purpose."³⁰⁰ Given the subjectivity involved in defining the contours of the Eighth Amendment, then, any attempt to predict what might convince the Supreme Court to make such a sweeping ruling regarding the constitutionality of capital punishment must be viewed with much skepticism.

CONCLUSION

Seventeen states and the District of Columbia now prohibit executions for all crimes.³⁰¹ Five of them have officially abandoned capital punishment since 2004. How many more must abolish the death penalty, and how soon, for the U.S. Supreme Court to determine that a "national consensus" has developed against its use? How much longer until the Supreme Court agrees with Justice Blackmun that "the death penalty experiment has failed"?³⁰² While there are few states in which legislative repeal is imminent, the tide is certainly building, and the Supreme Court will likely soon have to take its hardest look since the 1970s at the constitutionality of capital punishment in this country.

³⁰⁰ *Kennedy*, 554 U.S. 407, 421 (2008).

³⁰¹ *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Dec. 19, 2012).

³⁰² *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).