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**EVOLVING STANDARDS OF DECENCY:
A VIEW OF 8TH AMENDMENT JURISPRUDENCE
AND THE DEATH PENALTY**

Jared Lockhart¹ and Madeline Hill²

In July 1997, Kenneth Foster was indicted on capital murder charges and sentenced to death even though he had only committed robbery.³ On August 14, 1996, Kenneth Foster and his friends, Mauriceo Brown, DeWayne Dillard, and Julius Steen, rented a car and drove to downtown San Antonio, Texas. Later that night, Brown suggested that the men rob a few people in order to make up for the money they had lost while partying. After their second robbery that evening, Foster did not want to continue breaking the law, according to Dillard's courtroom testimony four years later. Dismissing his request, the four persisted in their crime and began to follow a car they believed was headed towards a party. When a woman—later identified as Mary Patrick—stepped out of her car, Brown approached her, asking for her number. Shortly after Brown exited the car, Foster heard gunshots. Confused and scared, he drove away quickly. Foster soon learned that Brown had shot and killed Patrick's boyfriend, Michael LaHood Jr. Within the hour, police arrested Foster, Dillard, Steen, and Brown.

Although Steen bargained a plea deal in exchange for a life sentence and Dillard was never tried for this crime, Foster was tried for

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 - 3 Jordan Smith, *Wrong Place Wrong Time*, Austin Chronicle, <https://www.austinchronicle.com/news/2005-02-11/wrong-place-wrong-time/> (2005).

murder alongside Brown, the man who actually pulled the trigger. And, prosecutors sought the death penalty for *both* men. According to a unique Texas statute, the Law of Parties, the jury did not have to find that Foster had participated or even had any intention to kill or harm LaHood; the jurors simply needed to conclude that Foster may have been aware that Brown's action would result in murder. In the end, the jury found Foster guilty of capital murder under the terms of the Law of Parties and claimed that Foster *should* have been able to predict that Brown would shoot and kill LaHood.⁴ The life of an individual—criminal or not—is not an arbitrary matter, yet Foster's case is just one of many unsettling examples of capriciously prescribing the death penalty and further illustrates why lawmakers should revisit the death penalty as a fair punishment.

The Cruel and Unusual Punishments Clause, which simply states that “cruel and unusual punishments [shall not be] afflicted,” is the most debated aspect of the Eighth Amendment, and perhaps one of the most controversial parts of the Constitution.⁵ As our society grows and progresses, lawmakers must consistently reevaluate the standard by which we allow our government to punish those who break the law. In *Trop v. Dulles* (1958), the Supreme Court established the precedent that “evolving standards of decency,” must be considered in jurisprudence related to the Eighth Amendment.⁶ In other words, for a punishment to not be considered “cruel and unusual,” it must coincide with contemporary societal conventions of morality, which frequently evolve. This standard has since been employed in a variety of Supreme Court decisions dealing with the Eighth Amendment, beginning with *Robinson v. California* (1962), which ruled that it is “cruel and unusual” to imprison people for narcotic addictions. “Evolving standards of decency” has been an especially decisive factor in cases regarding capital punishment, creating a non-static standard that can vary with the composition of who sits on the bench.

4 Tex. Penal Code § 7.01(1994).

5 U.S. Const. amend. VIII.

6 *Trop v. Dulles*, 356 U.S. 86, 87-114 (1958).

This paper explores how the main purposes of punishment are retribution, deterrence, and rehabilitation. Using these lenses, the paper explains how the high cost of the death penalty, racial and socioeconomic biases in the judicial system, and psychological impacts on death row prisoners contribute to why the Supreme Court should halt the prescription of the death penalty according to modern “standards of decency.”

I. BACKGROUND

In the phrase “cruel and unusual,” one way to define a “cruel” punishment is one motivated by cruel intent. However, a magnified look at Parliamentary debates and early American case law reveals that the Founding Fathers would have interpreted “cruel” as being an unjust punishment, regardless of intention.⁷ “Unusual,” on the other hand is more ambiguous and has largely been ignored by the Supreme Court. However, legal scholars generally agree that “unusual” modifies “cruel”; thus, an “usual punishment” is not considered cruel if it was the norm in previous related decisions.⁸

Despite this interpretation, in *Trop v. Dulles*, the Supreme Court established a non-static view of “cruel,” meaning punishments previously deemed “usual” can be abolished. In this case, the Court analyzed how Albert Trop, an Army private that deserted his post in Morocco during World War II, was unable to receive a passport because he had lost his citizenship under the Nationality Act of 1940. The Court’s question was whether taking away Trop’s citizenship was cruel and unusual according to the Eighth Amendment. In the majority opinion, Justice Warren rules in favor of Trop, acknowledging that the Court never had a good chance to define “cruel and unusual punishments.” He argues that “the basic concept underlying the Eighth Amendment is the dignity of man” and that “the Amendment must draw its meaning from the evolving standards of

7 John F. Stinneford, *The Original Meaning of “Cruel”*, 105 *Geo. L.J.* 441, 451-456 (2019).

8 John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 *Wm. & Mary L. Rev.* 559, 613 (2014).

decency that mark the progress of a maturing society.”⁹ The term “evolving standards of decency” remains in play today as the norm for determining whether a punishment is “cruel and unusual.”

The principle of “evolving standards of decency” did not intersect with capital punishment until *Furman v. Georgia*. In this case, the Supreme Court debated if it was constitutional, under the Eighth and Fourteenth Amendments, to have a jury decide if a defendant should receive the death penalty.¹⁰ In a 5-4 decision, the Court ruled that the death penalty, as practiced at the time, qualified as a cruel and unusual punishment. However, each justice in the majority decision wrote a separate opinion, with three claiming that inherent racial bias in death penalty sentencing was itself cruel and unusual, while two justices argued that the death penalty in general violates the Eighth Amendment.

In response, many states adopted a bifurcated trial approach—where the court first holds proceedings to determine the defendant’s guilt, and afterwards carries out an additional trial to determine the punishment based on other factors. This practice was upheld in *Gregg v. Georgia* (1976), which allowed states to reincorporate capital punishment if they used bifurcated trials and created objective guidelines to limit capital punishment sentencing.¹¹ The *Gregg* decision claims that the death penalty is aligned with “evolving standards of decency,” arguing that “legislative measures adopted by the people’s chosen representatives weigh heavily in ascertaining contemporary standards of decency.” In other words, because states such as Georgia legislated new processes for implementing capital punishment after *Furman*, it must have been in the public’s interest to maintain the death penalty and, therefore, does not violate the standards of decency currently held by the public.

Since the *Gregg* decision, the Supreme Court has revised the death penalty according to the “evolving standards of decency” precedent several times. They have determined that it is cruel and

9 *Trop*, 356 U.S. at 101 (Warren, E. majority opinion).

10 *Furman v. Georgia*, 408 U.S. 238, 240-328 (1972).

11 *Gregg v. Georgia*, 428 U.S. 153, 156 (1976).

unusual to execute rapists¹², child rapists¹³, minors¹⁴, and the mentally disabled¹⁵. Twenty-one states have abolished the death penalty and four have placed moratoria as of 2020. To this day, the death penalty remains an open topic for Supreme Court interpretation.

II. RETRIBUTIVISM AND DETERRENCE

In *Harmelin v. Michigan* (1991), the Supreme Court highlighted that for a punishment to not be considered “cruel and unusual,” it should follow at least one of three criteria: rehabilitation, retribution, or deterrence.¹⁶ Rehabilitation refers to a punishment’s capability to change a convicted criminal. In the *Harmelin* majority opinion, Justice Scalia highlights that the death penalty is unique in that it rejects rehabilitation of the convict as a purpose of criminal justice, given that a death row prisoner never returns to society. Thus, the justification for capital punishment balances on retributivism and deterrence. Retributivism refers to a punishment’s ability to bring justice to the victims, while deterrence is the idea that the punishment will prevent future crime.

In the *Gregg* decision, Justice Stewart acknowledged that retribution is not “the dominant objective of criminal law,” but claims that “the instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society

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- 12 Coker v. Georgia, 433 U.S. 584, 586-622 (1977) (determined that capital punishment is a “grossly disproportionate” punishment for rape).
 - 13 Kennedy v. Louisiana, 554 U.S. 407 (2008) (ruled that the death penalty is cruel and unusual for a rape of a child that doesn’t result in death).
 - 14 Roper v. Simmons, 543 U.S. 551 (2005) (barred the death penalty for minors).
 - 15 Atkins v. Virginia, 536 U.S. 304 (2002) (determined that the execution of mentally disabled criminals is cruel and unusual).
 - 16 Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (This case did not have to do with the death penalty, but rather entailed a life sentence without parole for drug possession. The precedent that was set, however, is applicable to all 8th amend. jurisprudence).

governed by law.”¹⁷ His idea is that the death penalty provides retribution for both a victim of capital crime’s family and the community, given that it permanently removes the most heinous criminals from society. However, this factor loses credibility when the docket includes cases such as *Kennedy v. Louisiana* where a man was convicted for raping his eight-year-old stepdaughter. The court ruled that a “national consensus,” or data that represents society’s evolving standards of decency, agreed that it is a disproportionate punishment “no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator’s prior criminal record may be.”¹⁸ With this decision the Court essentially claims that no harm, other than the loss of human life, is sufficient to require capital punishment. This, however, is not reconciled with the doctrine of retribution for the victim and their family. A rape victim must overcome monumental trauma, which can be compounded by the knowledge that the offender is still alive. Additionally, the convicted rapist is not punished in the same manner, or anywhere close in gravity to the act they committed. Thus, the Court’s interpretation of contemporary law is not to administer an equally retributive sentence to the crime committed, nor is it to execute the most odious criminals, but rather to remove them from society to establish order and justice. In order to be consistent under the 14th Amendment, the Supreme Court should ensure the equal protection of all convicted criminals, even murderers.¹⁹

Furthermore, retribution through the death penalty represents a great cost to society that perhaps outweighs its aggregate desire for vengeance. The standard supplement for capital sentences is life in prison without parole. It is estimated that in Florida, the true cost of each execution is \$3.2 million, which is approximately six times more expensive than keeping a convict imprisoned for life without

17 *Gregg*, 428 U.S. at 183 (Stewart, J. majority opinion).

18 *Kennedy*, 554 U.S. at Justice Alito dissenting opinion.

19 See U.S. Const. amend. XIV sec. 1.

parole.²⁰ Similar numbers are seen in Texas and other states that prescribe capital punishment. A study in California found that, since the *Gregg* decision in 1976, Californian taxpayers have spent more than \$5 billion or about \$184 million per year, on death row inmates.²¹ Of the \$5 billion, only \$1 billion constitutes the cost of incarceration. This means that, had the inmates been sentenced to life without parole, the financial burden would have been about one-fifth of the cost incurred on Californians. In fact, researchers found that a death row inmate costs about \$1.12 million more, on average, than prisoners serving a life sentence when totaling the cost of trials, appeals, incarceration, and execution.²² In addition, the California inmates (of whom only 13 were executed) still would have been isolated from their communities. The counterargument to this data is that the high cost of capital punishment comes from frivolous habeas corpus appeals. But, there is already a precedent in place to discern between superfluous and constitution-based petitions through Title I of the Antiterrorism and Effective Death Penalty Act of 1996, which prohibits prisoners who have already sought habeas relief from filing a subsequent appeal without approval from an appellate panel.²³ Also, the appeals process is necessary to ensure due process and prevent unjust execution. Researchers at Stanford University estimated that, in spite of the possibility to appeal, about 1 in every 25 inmates that are executed is innocent.²⁴ Thus, retribution by means of the death penalty is not beneficial for society because of the high cost it imposes, despite the fact that the alternative, life imprisonment, imposes a substantially smaller cost.

20 Dawinder S. Sidhu, *On Appeal: Reviewing the Case of the Death Penalty*, 111 W. Va. L. Rev. 453, 467 (2009).

21 Arthur L. Alarcón, *Executing the Will of the Voters*, 44 Loy. L.A. L. Rev. S40, S221-23 (2011).

22 Torin McFarland, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, 7 Susquehanna U. Pol. Rev. 46, 68-70 (2016).

23 28 U.S.C. § 2254. Also, *Felker v. Turpin*, 518 U.S. 651 (1996).

24 Samuel R. Gross, *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PNAS 7230 (2014).

The remaining justification for the death penalty, deterrence, lacks supporting evidence to prove that the threat and likelihood of capital punishment does in fact deter individuals from committing such crimes. In *Gregg*, Justice Marshall dissents that: “it is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime.”²⁵ Even though this argument was made in 1976, it holds true today that there exists no evidence to prove that capital punishment has any influence to stop someone from committing murder. The deterrence argument ignores two facts about capital crimes. The first is that a long prison sentence, whether for life or shorter, is not a desirable outcome and for some people is worse than execution. Second, due to the arbitrariness of capital sentencing and relative rarity of executions, many criminals find it unlikely that they will be executed. Furthermore, data analyses prove that the death penalty has no influence on the crime rate. Researchers at Stanford looked at statistics from Hong Kong, which abolished the death penalty in the 1990s, and Singapore, which increased the use of capital punishment around the same time. They found no statistically significant differences in crime rate initially or over a 20-year period.²⁶ Then, they conducted the same research in Maine, Massachusetts, and Rhode Island, which eliminated the death penalty for all crimes in the 1980s. Murder rates per capita have remained relatively stagnant in all 3 states. After, they looked at homicide rates per capita and executions per capita by region to see if there was a correlation between the two factors. According to the data, the South executes people 11 times more frequently than the rest of the country yet has maintained a murder rate of 6.8 murders per 100,000 people compared to the 4.9 national average. These numbers reveal that there is no evidence to support capital punishment as a deterrent for murder. Even for premeditated

25 *Gregg*, 428 U.S. at 233 (Marshall, T. dissenting).

26 John L. Donohue, *Estimating the Impact of the Death Penalty on Murder*, U.C. Berkeley Law and Economics, 3-21 (2009).

homicides, life imprisonment is an undesirable outcome and therefore disincentivizes potential killers.

Additionally, there is more evidence to support a brutalization effect, which denotes a correlation between the death penalty and an increase in murder rates. A criminology study found that after every execution in New York, there were two additional homicides committed in the following month, and one additional homicide two months after.²⁷ Although this report uses older data and a specific region, it is one of the most reliable studies due to its comprehensive approach of including myriad other potential factors in the data set. Also, the data does not seem contrived when compared to similar trends that occur following publicized suicides or mass murders. A more recent report found that one execution per year in a state leads to a significant increase in capital crimes.²⁸ The data illustrates that the likelihood that deterrence occurs increases as the number of executions increases. The study concludes that it would take around nine executions per year for a state to have a potential deterrent effect and that only six states (South Carolina, Florida, Texas, Georgia, Delaware, and Nevada) show evidence of possibly having a deterrent effect. In the other twenty-one states that have executed prisoners since the *Gregg* decision, there is evidence of either no impact or a brutalization effect, where the normalization of killing vis a vis the death penalty leads to more violent crime. Thus, in order to potentially reach a deterrent effect, states would have to impose a death penalty quota, an idea that is objectively unconstitutional according to the guidelines of *Gregg*.²⁹

The death penalty fails to manifest its purported duties of retribution and deterrence. Additionally, executing inmates in a safe, constitutional manner is about six times the cost of housing a prisoner for life. Thus, the question should be reframed from whether it

27 William J. Bowers, *Deterrence or Brutalization: What is the Effect of Executions?*, *Crime & Delinquency*, 649-84 (1980).

28 Joanna M. Shepherd, *Deterrence vs. Brutalization: Capital Punishment's Differing Impacts Among States*, 104 U. Mich. L. Rev. 203, 220-47 (2009).

29 *Gregg*, 428 U.S. at 189 (Stewart, P. majority opinion).

is just to kill capital criminals to whether the supposed justifications for the death penalty are met in accordance with modern standards of decency.

III. RACIAL AND SOCIOECONOMIC DISCRIMINATION

Historically, the prescription of the death penalty has conveyed an innate tendency to discriminate against racial and socioeconomic minorities. This was the topic of debate in *McCleskey v. Kemp* (1987), when the petitioner attempted to use a study that showed black defendants were more likely to be sentenced with execution than any other ethnic group, and were even more likely to receive the death penalty when the victim was white.³⁰ The Supreme Court ruled that statistical evidence was not enough to prove intended racial prejudice, and was thus invalid. However, this issue has become increasingly gray, given that most Americans would avoid showing signs of racism, making it difficult to confirm intentional racial bias with today's standards of decency. Additionally, there are many safeguards to prevent racism within the judicial system. For one, if a juror is thought to hold racial biases against a defendant, the defense attorney can propose that they be excluded from the jury.³¹ Also, once a juror votes to execute a criminal, they are required to sign a document claiming that race, color, and other factors did not influence their decision. But, as racism has become rightfully taboo, very few people consider themselves racist, whether they discriminate or not.

A study conducted at the University of Denver proved that Colorado, which is generally viewed as a progressive state, assigned the

30 *McCleskey v. Kemp*, 481 U.S. 279, 279-81 (1987).

See also: David C. Baldus, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 *Journal of Criminal Law and Criminology* (1983).

31 Dawinder S. Sidhu, *On Appeal: Reviewing the Case of the Death Penalty*, 111 *W. Va. L. Rev.* 453, 470-2 (2009).

death penalty in a discriminatory fashion.³² Prosecutors in the state boasted that they only attempted to charge 4% of 1st degree murderers with capital punishment, arguing that this was evidence of their judicial cautiousness. However, researchers found that minorities committed 66% of murders from 1999-2010, yet 91% of capital murder defendants were minorities. This data is much too statistically significant to represent a colorblind system. Unfortunately, these numbers are not an anomaly, but are the norm in other states. Therefore, in spite of current safeguards, there is still significant evidence of racial disparity in capital punishment sentencing, regardless of whether courts carry out discrimination on purpose or not. Instead of accepting racial discrimination as an unfortunate reality, the system should be fixed. Eliminating capital punishment outright would assure that neither a disproportionate number of minorities or the majority population are killed.

Furthermore, the system disfavors the lower class, who cannot afford to pay for adequate defense attorneys. Public defenders receive a set salary and do not get paid for working overtime. In Harris County, Texas, which executes more people alone than any state except Texas, public defenders submitted briefs full of “gibberish. unintelligible arguments, flawed grammar, and even a complaint that [they] would run out of paper.”³³ In addition, there were three cases in which the defense attorney fell asleep during the trial and in all three situations, the defendant was later executed. Approximately ninety percent of people on death row could not afford an attorney of their choice.³⁴ This is not to say that wealthier people shouldn’t have the right to pay for better defense, but that someone’s right to live or die should not balance on their material resources.

32 Meg Beardsley, *Disquieting Discretion: Race, Geography, & The Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 U. Denv. L. Rev. 431, 431-52 (2018).

33 Steven B. Bright, *Independence of Counsel: An Essential Requirement for Competent Counsel and a Working Adversary System*, 55 Hous. L. Rev. 853, 860-72 (2018).

34 James S. Liebman, *A Broken System Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It*, Columbia University (2002).

IV. PSYCHOLOGICAL EFFECT

Another important factor that is considered in this argument is the evolution of psychological and mental standards in the United States. For prisoners sentenced to death row, they may experience “Death Row Phenomenon,” which refers to the “destructive consequences of long-term solitary confinement” that come from the constant feeling of awaiting one’s death.³⁵ These conditions can eventually augment to “Death Row Syndrome” which is classified as a “severe psychological illness.” Solitary confinement generally isolates inmates for 23 hours every day, an environment that provokes psychosis, delusions, paranoia, and self-harming behavior.

Although neither Death Row Syndrome nor Death Row Phenomenon has been formally recognized by the American Psychiatric Association, Death Row Syndrome gained recognition internationally in 1989. In the extradition proceedings of Jens Soering—a German citizen arrested in England for committing murder in the United States and fleeing to Europe—he argued that if England were to send him back to the United States, he would be forced into inhumane and degrading treatment—the death penalty. Because of the inhumane treatment of prisoners on death row, Soering’s defense argued that extradition would be a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; the European Court of Human Rights agreed. The Court elucidated the following: “the condemned prisoner has to endure for many years the conditions on death row and the anguish and mountain tension of living in the ever-present shadow of death.” Therefore, the Court determined that extraditing Soering back to the United States would violate the protections set forth against “inhuman or degrading treatment or punishment.” Although Soering was extradited to the United States, he was sent back on the grounds that he would not receive the death penalty. This case is important because it highlights that England, a western, civilized country similar

35 Amy Smith, *Not “Waiving” But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 18 Pub. Int. L.J. 237, 238-54 (2008).

to the United States, was compelled to intervene in United States proceedings because of the inhumane circumstances of death row. Although the European Court of Human Rights arbitrated this decision, it should serve as an example to the United States for modern “standards of decency” related to punishment in the Western world.

V. CONCLUSION

Opposition to capital punishment is not revolutionary or new. Cesare di Beccaria first expressed aversion to the death penalty in 1764, claiming “laws designed to temper human conduct should not embrace a savage example which is all the more baneful when the legally sanctioned death is inflicted deliberately and ceremoniously. To me it is an absurdity that the law which expresses the common will and detests and punishes homicide should itself commit one.”³⁶ The United States is the only developed western democracy that practices capital punishment. The only countries that execute more people are China, Iran, Saudi Arabia, Iraq, Pakistan, Egypt, and Somalia—all countries with which the United States is rarely aligned ideologically.³⁷ The 142 nations that have abolished the death penalty in law or practice don’t condone murder or sympathize with murderers, rather they have chosen more humane routes to address capital crime.

The death penalty is not rehabilitative, retributive, or deterring, which are the three requisite standards for a punishment to not be considered cruel and unusual. Capital punishment is not intended to rehabilitate simply because the criminal is executed. It does not serve as just retribution because there is no other crime for which the perpetrator receives a punishment proportionate to their offense. There is no evidence that the death penalty prevents future crime in the way it is currently administered, and some evidence indicates that it even galvanizes violent crime.

36 Cesare Beccaria, *On Crimes and Punishment* (1764).

37 “Death Penalty, How Many Countries Still Have It?,” BBC News, <https://www.bbc.com/news/world-45835584> (2018).

Furthermore, capital punishment does not adhere to current standards of decency due to its capricious administration and harmful effect on American minority groups. The original issue with the death penalty in *Furman v. Georgia* (1972) was that its arbitrary use often marginalized minority groups. Despite revisions from *Gregg* (1976), evidence continues to show that minorities are much more likely to be executed, especially if the victim is white. Beyond this, once a prisoner awaits murder on death row, they endure solitary confinement accompanied by high levels of stress and uncertainty that cause permanent medical disorders. According to contemporary western standards of decency, capital punishment should be considered “cruel and unusual.”