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The Evolution of Cruel and Unusual Punishment

As times change and societies adjust to those changes in their maturation process, the application of laws should also change to reflect the transformations in society, technology, and scientific understanding. People who argue that the Constitution is a "dead" document and that it should be applied in the same way today as when it was originally written might also argue that we should not use electricity nor computers. The United States must continue to evolve in order to strive for the best ideals it was built upon. The founding fathers constructed the Constitution on the foundations of Enlightenment ideals built on reason, liberty, and opposition to the excesses of monarchy. Based on our current and past understanding of the criminal justice system, we can agree that the death penalty is unconstitutional. The death penalty violates the Eighth Amendment because it is a cruel and unusual form of punishment while also violating the due process clause in the Fifth and Fourteenth Amendments.

When the Constitution and Bill of Rights were written times were much different than today. The Fifth Amendment spells out that "No person shall... be deprived of life, liberty, or property, without due process of law" (US Const. amend. V). The Eighth Amendment dictates the importance of protecting individual liberties from the excessive and capricious powers of the state. Though relatively short, it states; "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*" (US Const. amend. VIII). This was adapted from the English Bill of Rights (1689) that protected citizens of Great Britain from excessive power of the monarchy. In the 17th and 18th centuries, the citizenry's goals for just punishment differed from today since cruel and unusual punishment back then referred to torture, including being dis-embowelled alive, beheaded, and quartered. Early Americans wished to avoid the horrors seen in England at the time of absolute monarchy. Sadly, such horrors and in-

justices occurred regularly in the fledgeling United States because of the pervasive scourge of slavery.

Initially the arguments regarding cruel and unusual punishment focused on torture or physically painful forms of punishment. In *Wilkerson v. Utah* (1879) a case was brought to the US Supreme Court arguing that death by firing squad was cruel and unusual punishment because Wallace Wilkerson agonizingly slowly bled to death for nearly thirty minutes because of poor marksmanship (King 2008). Based on the cultural ideas of what constituted cruel and unusual punishment in the 19th century, one of the justices in the majority decision noted that slowly bleeding to death, due to faulty technique, was not cruel and unusual punishment under the Eighth Amendment, referencing the idea that being disemboweled while alive was the standard for judging cruel and unusual punishment ("FindLaw's US Supreme Court case and opinions"). *Weems v. United States* (1910) expanded the definition of cruel and unusual punishment by stating that the punishment may be excessive when compared to the offense, hence cruel and unusual the Court citing "The Eighth Amendment is progressive, and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice…" ("Weems v. United States"). At that time, states and local jurisdictions were given great latitude in how they administered justice until the application of the Fourteenth Amendment clarifying that the Fifth Amendment superseded local and state applications of the Due Process Clause (Staff 2007). In the case of *Furman v. Georgia* (1972), the Supreme Court ruled that in the three cases, the imposition and carrying out of the death penalty constituted cruel and unusual punishment in violation of the Fifth and Fourteenth Amendments (Cruel and Unusual Punishment). The *Furman* decision forced states and localities to limit the use of the death penalty and effectively placed a moratorium on the death penalty af-

ter the decision. However, four years later in *Gregg v. Georgia* (1976), Tory Gregg was found guilty of murder and armed robbery and sentenced to death ("Gregg v. Georgia "). He asked the Supreme Court to rule that the death penalty itself was unconstitutional. However, the court ruled that Georgia had sufficiently improved their procedures for applying the death penalty and applied it fairly in the case of *Gregg* and therefore ruled that the death penalty was constitutional. In the case of *Gregg*, the Court only looked at the process of this specific case and not generally at the constitutionality of the death penalty with all of its nuances. The Court ruled, "...the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State…" ("Gregg v. Georgia (1976)"). Clearly the 1976 Supreme Court ruling was more an originalist view of the Constitution and left it up to the States to determine if they wanted to legislate and enforce the death penalty. This interpretation of the law seems myopic and does not take into account the long arc of history of the death penalty and its imperfections and disparate application. In *Coker v. Georgia* (1977) and *Kennedy v. Louisiana* (2008), the Supreme Court revealed the evolution of the Constitution by finally clarifying that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits imposing the death penalty in cases where the victim did not die and death was not intended based on a national consensus establishing a national standard of proportionality that began with *Weems and Furman* (KENNEDY V. LOUISIANA; Coker v. Georgia).

From the beginnings of our nation, there existed unequal treatment of people in our country. It took a devastating national war to end slavery but the remnant views of African Americans as inferior and undeserving equal treatment among the larger society persists. From the rise of the Ku Klux Klan during and after reconstruction as extrajudicial enforcer of racist views, to the

lynchings and brutalization of entire communities with the rise of Jim Crow, the disenfranchisement due to poll taxes and other methods, to the widespread segregation and discrimination seen in much of the country during the past century, African Americans have not received equal treatment under the law. If the Constitution were a perfect document, racial disparities in the application of justice should be addressed by the Fifth and Fourteenth Amendments with the Due Process Clause to ensure fair procedures in courts. However, there remains significant variation among the fifty states in the application of the trial processes, sentencing, and execution methods. Also, there are discrepancies in the application of the justice system when African Americans are incarcerated at more than five times the rate of whites ("Criminal Justice Fact Sheet"). Although African Americans and Hispanics make up approximately 32% of the US population, they comprised 56% of all incarcerated people in 2015 and 42% of executions ("Criminal Justice Fact Sheet"; Death Penalty Info. Center). Though the Fifth and Fourteenth Amendments are supposed to guarantee reliable procedures that protect innocent people from being executed, since 1973 there have been 160 people released from death row with evidence of their innocence (Death Penalty Info. Center). An examination of the most recent data from the National Registry of Exonerations points to official misconduct and perjury (false accusations) as the two main causes of wrongful convictions in death penalty cases (Death Penalty Info. Center). Analysis of data has shown that jurors in Washington state are four times more likely to recommend a death sentence for a black defendant than for a white defendant in a similar case (Evans & Beckett 2016), while a study in California found that those convicted of killing whites were more than three times as likely to be sentenced to death as those convicted of killing blacks and four times more likely as those convicted of killing Latinos (Law Review). In a report by Professor Baldus in 1998, among 96% of states where there have been reviews of race and the death penalty, there

has been a pattern of either race-of-victim or race-of-defendant discrimination, or both (qtd. in Death Penalty Info. Center). Based on the preceding evidence, it is clear that there are failures in both procedural due process and substantive due process to allow the unbalanced administration of the death penalty in the United States. Our inability to guarantee reliable procedures as required by the Fifth and Fourteenth Amendments that protect the innocent from being executed is a clear example of cruel and unusual punishment.

Frequently supporters of the death penalty argue that its value is the deterrence from committing murder. However, analysis of the execution data and murder rates do not support this assertion. Studies claiming that the death penalty has a deterrent effect on murder rates have been found to be 'fundamentally flawed' and should not be used when making policy decisions since capital punishment has not shown to have any influence on murder rates ("Deterrence and Death Penalty" 2012). According to the FBI Uniform Crime Report for 2016, the South consistently has the highest murder rate and accounts for over 80% of executions in the country ("Table 2" 2017). The aggressive application of the death penalty in the South has not deterred its citizens from committing murder (Death Penalty Info. Center). This conclusion is also supported by a survey of the country's criminologists where 80% rejected the idea that executions lower homicide rates (Death Penalty Info. Center). Reflecting the changing views of the nation, a poll in 2010 found that a "majority (61%) of voters would choose a punishment other than the death penalty for murder" (Death Penalty Info. Center). The Supreme Court's interpretation of the Constitution has evolved with the maturing standards of decency compared to the social norms of 18th century England and colonial America. Our changing views over time caused us to transition from more barbaric forms of execution (hanging, firing squad, electrocution, and gas chamber) which are still options in some states to a more "humane" form of execution, lethal in-

jection. However, several prominent cases have revealed problems with lethal injection questioning its ability to execute convicts in a humane and consistent manner without imposing "unnecessary" or "wanton" pain *Baze v. Rees* (2008), *Glossip v. Gross* (2015) (Pennekamp 2017). In 2016, a federal court found California's lethal injection procedures to be unconstitutional essentially halting all executions in the state (Death Penalty Info. Center).

It is clear from the review of past Supreme Court cases that our view of what is cruel and unusual punishment has evolved to the point where we view lethal injection as the most humane method carrying out the death sentence. Despite this, there has been continued challenge on the effectiveness in providing a painless and quick death through lethal injection. Additionally, there are countless examples of the unreliable application of the death penalty which breaches the guarantee set in the Fifth and Fourteenth Amendments to safeguard against *arbitrary* denial of life, liberty, or property. A majority of Americans do not support the death penalty because there have been so many cases of wrongful prosecution and likely wrongful executions. The progressive drop in the numbers of death sentences since 1995 points to the lack of precision seen in the criminal justice system by jurors, leading them less likely to recommend a death sentence. The current arbitrary and imprecise nature of the judicial system by itself disqualifies it from imposing the death penalty because it violates the Fifth and Fourteenth Amendments. Due to the unequal application of the death penalty it is a form of cruel and unusual punishment and violates the Eighth Amendment. Having violated the Fifth, Eighth, and Fourteenth Amendments makes the death penalty unconstitutional.

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