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Applications of the Death Penalty

Occurring for thousands of years, the death penalty represents a more merciless and brutal chapter in history. However, the uses and applications of the death penalty have been in flux for the past century, as new improvements and new challenges cast uncertainty on future uses. Within the past 50 years, the death penalty has seen countless revisions as technology advances and attitudes with it. What was once considered moral and legal 20 years ago is so greatly different than today, reflecting different societal standards and questions of morality in the law. Through these constant changes, the death penalty has lost its legitimacy as a punishment. Due to the narrowly tailored applications of capital punishment stemming from decades of Supreme Court precedent and shifting public opinion, the death penalty is on its way to being marked obsolete within the next 50 years.

The Eighth Amendment states, “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (US Const. am. 8). Through the case *Robinson v. California*, 370 U.S. 660 (1962), the 8th Amendment was made applicable to the states through the process of selective incorporation. The Supreme Court had already ruled on cases about the death penalty years before, starting all the way back in 1879, but the death penalty saw the most change within the last 50 years following a pair of cases, *Furman v. Georgia* and *Gregg v. Georgia*. *Furman v. Georgia* represented the first time that the Court has taken substantive measures to strike down death penalty laws across the country. A heavily split 5-4 Court issued a short 2 paragraph per curium opinion, where the only thing the majority could agree on was “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment” *Furman v. Georgia*, 408 U.S. 238 (1972). Due to the *Furman* decision, the Court had “effectively voided 40 death penalty statutes, thereby commuting the sentences of 629 death row inmates around the country and suspending the death penalty” (“Constitutionality of the Death Penalty”). Citing “arbitrary sentencing”, the majority couldn’t agree on one reason to strike down the death penalty laws, and two of the five justices, Justices Brennan and Marshall went so far as to claim that the death penalty by nature is unconstitutional (“Constitutionality of the Death Penalty”). However, this suspension of the death penalty was short lived, as the Court refused to strike down the death penalty in its totality, declaring that “the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense” *Gregg v. Georgia*, 428 U.S. 153 (1976). Since reinstatement of the death penalty in *Gregg*, the Court has narrowed the applications of the death penalty, paving the way for the death penalty to be completely abandoned altogether.

*Furman v. Georgia* and *Gregg v. Georgia* represent monumental in reshaping the death penalty, but in the 40+ years since those decisions, the Court has taken two paths in limiting the death penalty by the crime committed and who the criminal is. With respect to the crime itself, the Court ruled in *Kennedy v. Louisiana* that, “difficulties in administering the [death] penalty… require adherence to a rule reserving its use… for crimes that take the life of the victim” *Kennedy v. Louisiana,* 554 U.S. 407 (2008). On the other hand, the Court has also taken steps to limit who can be sentenced with the death penalty. In *Roper v. Simmons*, the court overturned *Stanford v. Kentucky*, ruling that, “the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed” *Roper v. Simmons,* 543 U.S. 551 (2005). Mental illness has been given special treatment by the Supreme Court, with multiple cases deciding what constitutes mental illness and whether they are eligible for the death penalty. In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court found it unconstitutional to execute insane persons, and 16 years later the Court ruled that executing the mentally ill is unconstitutional in *Atkins v. Virginia*, 536 U.S. 304 (2002). More recently, the Court has had to tackle the question of what defines mentally ill and if someone who cannot remember their crime due to a stroke is eligible to be executed. With so many caveats and limitations of who can be executed and for what crime, it is not too far of a stretch to say that the Supreme Court could strike down the death penalty. However, given the Supreme Court’s respect for precedent, this might not happen with the current ideological makeup, but future justices could be presented with the constitutionality of the death penalty.

Public opinion and other external pressures are far more important in deciding Supreme Court cases and shifting policy towards the death penalty. Statistically, the death penalty has been utilized at a very low rate, with only 21 executions in 2019 compared to the peak of 98 in 1998 (“Facts about the Death Penalty” 1). Public opinion has shifted against the death penalty, with 61% of Americans supporting some other type of punishment than the death penalty (“Facts about the Death Penalty” 4). The federal government itself faces pressure from both home and abroad, with 106 countries actively prohibiting the death penalty, and 21 states plus the District of Colombia outlawing it as well (“Facts about the Death Penalty” 1). This shift in opinion has led to every major 2020 Democratic candidate to oppose the death penalty, who would have the most immediate impact on the death penalty if elected (Egelko). The President could ask the Attorney General to review the federal death penalty and determine whether it should be continued, as President Obama did briefly in 2015 following the botched execution of an Oklahoma inmate (Apuzzo). While Attorney General Eric Holder resigned and thus the issue was dropped, the federal government has had a de facto moratorium on the death penalty as the federal government has not executed a death row inmate since 2003. However, Attorney General William Barr has scheduled 5 death row inmates for execution in the coming months, setting up a legal battle that will ultimately end in the Supreme Court (Benner). If a Democrat wins the 2020 election, then they will certainly ask their Attorney General to place a moratorium on federal executions. By doing so, “such a declaration would have pressured states to do the same” (Apuzzo). However, in order to formally outlaw the death penalty for not just the federal government and the states, the President would need Congress to create and pass a law. In total, federal executions could be stopped, but there needs to be more direct pressure to fully outlaw it at the state level.

Whenever the justice system makes an error, there is usually some way to remedy this with concern to the inmate. When the justice system executes the wrong person, then there is nothing the state can do to remedy this injustice caused upon the victim’s family. The criminal justice system is nowhere near perfect, and there will always be discrepancies in evidence and proof that can lead to innocent people being charged. Since 1976, 166 death row inmates have been exonerated, and 15 people have been exonerated since 2015 (“Facts about the Death Penalty”). Wrongful killings have no place in an advanced society like the United States. Accidentally sentencing someone to death is leagues worse than life imprisonment, whereas death cannot be undone once the execution has taken place. As Justice Brennan put it with his concurring opinion in *Furman v. Georgia*, “When a man is hung, there is an end of our relations with him. His execution is a way of saying, ‘You are not fit for this world, take your chance elsewhere’” *Furman v. Georgia*, 408 U.S. 238 (1972). Death cannot be undone or remedied. Beyond this, there exists risks within the three-drug or one-drug lethal injections that are used in most executions. Despite the constitutionality of these lethal injections, there are risks associated with them that the Supreme Court has failed to act on and recognize as legitimate concerns. In *Glossip v. Gross*, the Court upheld lethal injection even when “petitioners claim that midazolam cannot be expected to perform that function, and they have presented ample evidence showing that the State’s planned use of this drug poses substantial, constitutionally intolerable risks” *Glossip v. Gross*, 576 U.S. \_\_ (2015). Likewise, the Court ignored a challenge to one-drug injection when, “[the] state’s protocol would cause *him* [the petitioner] severe pain because of his particular medical condition” *Bucklew v. Precythe* 587 U.S. \_\_ (2019).These risks presented before the Court show that a lot can go wrong with the current methods of execution, not to mention problems with other methods as well. Nobody should have to face a slow and agonizing death, even if they are sentenced to death, contrary to what the Supreme Court has said.

A damning factor in applications of the death penalty is systemic racism that prevails among those sentenced to the death penalty. Yet the Supreme Court failed to act on this and turned a blind eye when the case *McCleskey v. Kemp* was put before the Court. In it, an important question was presented: was the death penalty being administered with racial bias towards African-Americans, especially when the victim was white? The plaintiffs presented the Baldus study, which “found a strong and consistent pattern of discrimination in the use of the death penalty against defendants who were charged with killing white victims compared to those who were charged with killing black victims” (Gross 1912). Despite this evidence, the Supreme Court rejected the plaintiff’s arguments, ruling 5-4 in favor of Kemp. In this holding, the Court found that “the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose” *McCleskey v. Kemp*, 481 U.S. 279 (1987). The failure to act on this evidence shows a clear indifference towards racial discrimination in the criminal justice system by the Supreme Court. The evidence has not changed since this ill-fated decision, with studies proving that these statistics have not changed much since then. For example, “the odds of a death sentence were 97% higher for those whose victim was white than for those whose victim was black [in Louisiana]” (“Facts about the Death Penalty” 2). Additionally, 291 people were executed when the defendant was black with a white victim, while on 21 people were executed when the defendant was white with a black victim (“Facts about the Death Penalty” 2). Ruling the death penalty unconstitutional on the grounds of racial discrimination would not completely eradicate the death penalty as states could just alter their methods to ensure a less discriminatory practice, but rather would help strengthen the already downward spiral of the death penalty in American criminal justice.

Supporters for the death penalty cite deterrence as a main reason to keep the death penalty and won key victories through “tough on crime” laws like the Violent Crime Control and Law Enforcement Act of 1994. This law expanded the death penalty to dozens of crimes, including, but not limited to, “murder by a federal prisoner, civil rights murders, murder of federal law enforcement officials, rape and child molestation murders, sexual exploitation of children, and murder by escaped prisoners” 42 U.S.C. ch. 136. This law only covers federal crimes, doing nothing for individual states who are responsible for most uses of the death penalty. However, even in local and state law enforcement, the death penalty fails to deter crime in any measurable way. Many Northern states which have outlawed the death penalty see lower crime rates compared to Southern states, where crime rates remain high despite most high amounts of executions happening here (“Facts about the Death Penalty” 3). While there are other factors affecting crime rate in these regions including race and socioeconomic status, the more important question to ask is who exactly is being deterred through the death penalty? People commit crimes for various reasons, and they also choose to not commit crimes for other reasons, among these, “moral scruples, fear of revenge, and the likelihood of severe punishment, short of the death penalty” (Friedman and Hayden 218). Surely it is not a stretch to say that the possibility of going to prison deters most crime, especially with the hardships faced by prisoners after completing their sentences. The death penalty fails to deter most crime, given that the probability of being sentenced to death is so small that only 16.1% of death row inmates are actually executed, and .24% of all homicides resulted in an execution (Mandery). To sum up this lack of deterrence, “the death penalty may work efficiently in some societies—societies that use it quickly, mercilessly, and frequently. It cannot work well in the United States, where it is relatively rare, slow, and controversial” (Friedman and Hayden 218). Ideally, when punishments serve only to deter and fail at doing so, then they should not be used due to ineffectiveness.

What might ultimately lead to the decline in the death penalty is not through any sort of moral grounds but rather through the financial costs and the long appeals process guaranteed to every inmate sentenced to the death penalty. As per guidelines set by the Supreme Court, defendants are given an automatic appeal to a higher court if sentenced to death. They then have many more options after this automatic appeal, including appealing to federal Appellate courts and the Supreme Court multiple times during the post-conviction appeals process. The length and thoroughness of the state and federal appeals process can prolong death penalty cases, where a “death penalty trial takes about four times longer than a non-capital murder trial” (“Millions Misspent”). This length of these trials increases costs exponentially through trail fees and state-appointed defense lawyers. Costs associated with the appeals process are unrecognizable compared to a non-capital case, considering that, “trial costs alone were about $200,000 more for each death penalty imposed than if no death penalty was involved” (“Millions Misspent”). By granting every death row inmate these automatic appeals, “the death penalty is draining state treasuries of funds which could be spent on effective crime prevention measures” (“Millions Misspent”), taking away key funds that could be used for more effective forms of policing instead of being used in pursuit of the death penalty. This is especially apparent at the local level, where the death penalty places a “crushing financial burden” on local governments, who are also “the primary deliverers of local health and human services in the public sector” (“Millions Misspent”). ­­­­­­And it is highly unlikely that the appeals process, nor the costs associated with them are going to change anytime soon, as the Court has consistently upheld and even expanded the appeals process. The death penalty should not continue to persist when it wastes so many taxpayer dollars.

Most of the aforementioned Supreme Court decisions find the bulk of their reasoning based upon a line of reasoning buried in an obscure case from the 1950s, where the Court ruled that, “the [8th] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society” *Trop v. Dulles*, 356 U.S. 86 (1958). Within this one line lies the central question surrounding the death penalty: what do our standards of decency mandate today? As a country, we must ask ourselves what we want our legacy to be and how we want our future to look. The United States has been deified as the champion of freedom and equality, but yet we fall behind other countries in many areas of the law, including our reluctance to get rid of the death penalty. While the Supreme Court might be reluctant to overturn 100+ years of established precedent, our society still is maturing, evidenced every time a jury refuses to sentence a prisoner to death and a new state rewrites or eliminates their death penalty laws.

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