THE SWORD OF DAMOCLES IN AMERICAN LAW: THE CRUEL AND UNUSUAL NATURE OF THE DEATH PENALTY

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ABSTRACT

The Eighth Amendment prohibits cruel and unusual punishments. The death penalty, however, is in direct violation of the Eighth Amendment as it is both cruel and unusual. Inmates on death row experience psychological pain and "death" long before they are executed by the state or federal government. Surely, the prolonged periods of psychological suffering that result from a form of punishment, like that of death row, would be considered "cruel" under any other circumstance. This torture does not stop there. When the method of execution administered by the government fails, the psychological torture that prisoners experience is expanded. The death penalty also violates the "unusual" portion of the Eighth Amendment. An examination of numerous studies reveals that the death penalty is consistently applied arbitrarily based on race. Both Black defendants and victims' lives are devalued by the capital punishment system. By allowing the Death Penalty to remain constitutional, with its arbitrary application and cruel nature, the Supreme Court's decisions act as a catalyst in making the death penalty more "cruel" and "unusual" over time.

Table of Contents

I. History of the Eighth Amendment

The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] While the underlying ideas of this amendment take root far before the creation of the American Bill of Rights, the cruel and unusual punishment clause has never been explicitly defined.[2] The Court in *Weems v. United States* (1910) recognized that the wording of the Eighth Amendment is not precise and that its scope is not static.[3] Instead, the current interpretation of the Eighth Amendment rests almost entirely on Supreme Court jurisprudence. These decisions have created a clearer framework through which the amendment may be viewed. In *Weems*, the Court's interpretation of the cruel and unusual punishment clause included a proportionality requirement.[4] This requires that the punishment be proportional to factors such as the crime committed and the degree of involvement.[5] The proportionality principle has played a large role in death penalty jurisprudence, most notably helping to narrow the scope of crimes that may fall under the death penalty. The Court in *Trop v. Dulles* (1958) stated

[1] U.S. Const. amend. VIII.
[2] Weems v. United States, 217 U.S. 349, 368 (1910).
[3] Trop v. Dulles, 356 U.S. 86, 100-101 (1958).
[4] Scott Vollum et al., The death penalty: Constitutional issues, commentaries, and case briefs 300 (2015).
[5] *Id.* at 301-302.

that "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[6] Like proportionality, the evolving standards of decency have remained a core element of the Eighth Amendment since it was interpreted, paving the way for more humane methods of punishment and execution. Although these decisions fundamentally changed the way the Eighth Amendment was applied, they were not originally applicable to state governments. The case *Robinson v. California* (1962) extended the application of the Eighth Amendment to state governments.[7]

II. The Cruel Nature of the Death Penalty

A. The Court's Interpretation of "Cruel"

The Eighth Amendment is vague in regards to the meaning of "cruel," which means that Supreme Court jurisprudence must guide its interpretation. In *Wilkerson v. Utah* (1879), the Court stated that torture and punishments containing unnecessary cruelty are forbidden.[8] The case *In re Kemmler* (1889) reiterates and expands this idea, stating that, "punishments are cruel when they involve torture or a lingering death, but

[6] *Trop*, 356 U.S. at 101.
[7] Vollum Et al., supra note 4.
[8] Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

the punishment of death is not cruel, within the meaning of that word used in the Constitution. It implies there is something inhumane and barbarous, something more than the mere extinguishment of life."[9] The Court in *Helling v. McKinney* (1993) provided a framework through which the Court may analyze Eighth Amendment challenges in the future, stating that the conditions that present the risk must be "sure or very likely to cause serious illness and needless suffering," and they must give rise to "sufficiently imminent dangers."[10]

This Eighth Amendment interpretation extends to psychological harm as well. Justice Blackmun discussed the idea that psychological harm, without any physical harm, can still be cruel or unusual.[11] In his concurrence in *Hudson v. McMillan* (1992), he stated that "the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' rather than 'injury.' 'Pain' in its ordinary meaning surely includes a notion of psychological harm."[12] The idea of psychological harm was also referenced in *Trop*, where the Court found the removal of citizenship as a punishment for a born American to violate the Eighth Amendment.[13] In

[9] In re Kemmler, 136 U.S. 436, 447 (1890).
[10] Baze v. Rees, 553 U.S. 35, 50 (2008).
[11] Hudson v. McMillan, 503 U.S. 1, 16 (1992) (Blackmun concurring).
[12] *Id.*
[13] *Trop*, 356 U.S.

this, the Court recognized that this punishment would subject "the individual to a fate of ever-increasing fear and distress."[14] In doing so, the Court expanded its core definition of cruel punishment to include psychological harm alongside physical suffering. In *Gomez v. Fierro*, Justice Stevens and Justice Breyer explored another way in which this kind of unconstitutional psychological torture manifests. He expressed that the delay of judgments imposing the death penalty, from the inmates' point of view, can become so excessive that it may constitute a cruel and unusual punishment.[15] However, he recognized that the Court refused and remands cases in which the defendants were sentenced to die in 1978 and 1979; thereby leaving these inmates to sit under the Sword of Damocles, the ever-constant threat of death looming over them.[16]

B. Psychological Torture and Death

As an institution, death row can induce different mental illnesses and in some cases cause inmates to regress to a state of psychic numbness that produces psychological death. They must grapple with extreme

[14] *Trop*, 356 U.S. at 102.
[15] Writ of certiorari granted in *Gomez v. Fierro*, CORNELL LAW, https://www.law.cornell.edu/supct/html/95-1830.ZA.html (last visited Nov. 11, 2024).
[16] *Id.*

isolation, reduced stimulation, immobility, and hostile prison staff.[17] One of the leading factors in inmates developing mental illnesses and experiencing psychological death is their environment. Dr. Robert Johnson describes death row as being marked by several distinctly unpleasant features.[18] The cells are close together, narrow, and lack amenities.[19] The toilets are small and cramped, resembling small metal protuberances wedged in the floor rather than typical toilets.[20] The toilets flush poorly and do not clean well, leading to unpleasant smells wafting throughout the cellblock.[21] Virginia's Death Row at Sussex I State Prison was reported to house inmates in 71-square-foot cells that are constantly illuminated.[22] Inmates in this facility were only allowed one hour for outdoor recreation five days a week, which took place in a small wire-mesh enclosure.[23] This reflects the conditions of other states; death row inmates across the United States are generally allowed one, sometimes two, hours outside of their cell.[24] For this time

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[17] Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 Law & Psychological Review 141, 142-143 (1979).
[18] *Id.* at 156.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Paula A. Bernhard & Andrea Dinsmore, *Cruel and Unusual Confinement on Virginia's Death Row*, 48 The Journal Of The American Academy of Psychiatry And The Law 410, 410 (2020).
[23] *Id.*
[24] Gordon A. Crews, Stephen C. Stanko, Garrison A. Crews, Luzenski A. Cottrell, Routledge Handbook On American Prisons 219–40 (1st ed. 2020).

they are always caged by themselves.[25] Inmates on death row experience isolation in every aspect of their daily lives. Dr. Stuart Grassian conducted a study on the effects of these isolative conditions on inmates' psyches, in which the inmates were placed in environments that mirror those of death row inmates in solitary confinement. The psychiatric symptoms reported by the inmates in the study were very similar: more than half of the inmates reported hyperresponsivity to external stimuli; almost a third of the inmates reported perceptual distortions, illusions, or hallucinations; more than half the inmates reported panic attacks; many reported issues with thinking, concentration, and memory; almost half of the inmates reported obsessional thoughts; almost half of the inmates reported paranoia; and slightly less than half of inmates reported impulse control problems.[26] The social isolation and restriction of environmental stimulation produce very harmful effects.[27] In severe conditions, inmates have developed a type of psychosis called florid delirium.[28] The study determined that even inmates who are more resilient will suffer severe psychological pain when placed in solitary confinement, especially for prolonged periods.[29] Inmates are

[25] *Id*.
[26] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L & POL'Y 325, 335-336 (2006).
[27] *Id.* at 354.
[28] *Id*.
[29] *Id*.

required to remain in solitary confinement until their execution date, which averages about 20.2 years.[30] The average time spent on death row has climbed for a variety of factors such as lengthy appeals, temporary stays of execution, and governmental trouble accessing drugs for lethal injection. These inmates are forced to remain in solitary confinement with the ever-present Sword of Damocles hanging over their heads. While the Court has deemed the death penalty to be a constitutional form of punishment in the past, they could not have anticipated the universal death row conditions that have accompanied it. On its own, the psychological effects of continuous solitary confinement on death row prisoners should constitute a violation of the Eighth Amendment's prohibition of "cruel" punishment.

In one study, interviewers were able to categorize three different psychological dimensions when speaking with death row inmates: powerlessness, fear, and emotional emptiness or death.[31] The controlling environment filled with omnipresent rules and staff leads to a sense of powerlessness.[32] The prisoners experience a sense of helplessness and

[30] Death Penalty Information Center, Bureau of Justice Statistics Reports 2021 Showed 21st Consecutive Year of Death Row Population Decline (2023).
[31] *Id.* at 174.
[32] *Id*.

defeat when they feel their autonomy has been stripped from them. [33] The second dimension, fear, is a response to the high-pressure environment created by prison staff to facilitate the execution of its inhabitants.[34] The emotional condition this environment brings forth is one destined to evolve into a profound problem for the inmates who experience it. These individuals are unable to ignore the fact that they will be executed eventually and can become hyper-focused on their impending death. The third dimension, emotional emptiness or death, is reactions to when human needs are discounted and the inmate feels forgotten.[35] These inmates have a decline in mental and physical acuity, a sense of passivity and apathy, and experience continuous decay.[36] Many inmates classified death row as a "living death".[37] They convey a zombie-like existence that is the product of being denied their humanity.[38] The emotional death "produces a psychic numbness that appears comparable to "ontological insecurity."[39] Death row inmates spend an average of 20.2 years enduring near-complete isolation and hostility with only the haunting thought of their impending death. The

[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] DEATH PENALTY INFORMATION CENTER, supra note 30, at 174.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 182.

inherent structure of death row—characterized by prolonged isolation and the constant threat of execution—intensifies these psychological burdens, creating an environment that is uniquely torturous and in violation of the Eighth Amendment.

Additionally, impending death in this prison environment yields further psychological regression and decay.[40] Apathy and deterioration often occur in the minds of death row prisoners.[41] These death row inmates develop a plethora of ways to cope with their impending executions, with many employing denial as a coping mechanism at the outset of their imprisonment.[42] Some prisoners who can no longer deny the situation at hand retreat into the private, psychotic world of their minds in which they envision their freedom [43] Other prisoners attempt to cope through projection; these inmates have been characterized as resentful, suspicious, and hostile.[44] Many inmates describe themselves as weak and emotionally drained and feel as though they are slowly becoming insane.[45] Inmates also reported feeling confused, lethargic, drowsy, listless, forgetful, and slowing

[40] Johnson, supra note 17, at 148.
[41] *Id.* at 144.
[42] *Id*. at 145.
[43] *Id*.
[44] *Id*.
[45] *Id*.

down mentally.[46] This internal mental battle coincides with external torture from prison authorities. Staff harassment of prisoners worsens their mental illness and death anxiety. In certain prisons, inmates are given a tour of the execution room upon admission to death row.[47] This displays the level of control that some staff attempt to maintain over their prisoners. Some inmates believe that the staff run tests on the electric chair on purpose as a malicious way to induce fear within them.[48] The trial tests of the electric chair produce noise and vibrations that are heard and felt by the inmates located in cells above the death room.[49] The tests severely upset the death row prisoners and many report visualizing the electric chair experience in vivid detail.[50] The psychological suffering of death row constitutes a violation of the Eighth Amendment since inmates experience needless suffering and unnecessary pain. They are placed in a state of fear that far surpasses the fear that would be felt by an individual who has his citizenship revoked as the mix of isolation and ever-present death create a psychologically deadly mix.

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[46] Johnson, supra note 17, at 179.
[47] *Id.* at 171.
[48] *Id.* at 172.
[49] *Id*.
[50] *Id*.

In some cases, death row conditions are so severe that inmates attempt suicide. The average amount of time an inmate spent on death row reached 16.5 years in 2011.[51] Living in conditions that provoke mental illness for such a prolonged period correlates with the rate of suicide. David Lester studied suicides on death row between 1977 through 1982 and calculated a rate of 146 per 100,000 inmates, a number approximately seven times higher than that of non-incarcerated men at the time.[52] From 1978 to 2010 the rate was 129.7 suicides per 100,000 inmates every year, which is also substantially higher than both the rate of suicide in state prisons and the rate of suicide for men over 15 outside of prison.[53]

The psychological torture that inmates experience on death row is only made worse in situations where the execution method fails and the inmate is sent back to their cell. Most recently in *Smith v. Hamm* (2024), the state of Alabama failed to execute Kenneth Smith. After strapping Smith's arms above his head, they failed to access a vein after repeatedly stabbing needles into his collarbone, hands, and arms in an attempt to gain access to his veins.[54] Following the event, Smith suffered extreme PTSD,

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[51] Christine Tartaro & David Lester, *Suicide on Death Row*, 117(3) JOURNAL OF FORENSIC SCIENCES, 1656 (2016).
[52] *Id.*
[53] *Id.* at 1657.
[54] Smith v. Hamm, 601 U.S. ___, 2 (2024).

continuously reliving these horrific and violent final moments.[55] This is an unnecessary affliction of mental pain. The state cannot claim this was an "unforeseen accident," as they were warned repeatedly that they would struggle and fail to complete the execution due to their pattern of having difficulty establishing access to a vein.[56] In *Baze v. Rees* (2008), the Court noted that while one mishap may not give rise to an Eighth Amendment violation, a pattern of abortive attempts might.[57] Alabama's consistent history of failed executions is analogous to the abortive attempts mentioned by the Court in *Baze*. It is cruel that the state proceeded with the execution, knowing the likelihood of failure, and it is cruel that the state willingly placed Smith into a position of psychological suffering. The decision in this case will only further the cruel nature of the death penalty going forward.

C. Untested Methods

The use of untested methods of execution merely exacerbates these ethical concerns, as they introduce additional layers of potential suffering and cruelty for inmates. At the beginning of 2024, the Supreme Court

[55] *Id.*
[56] *Id.*
[57] *Baze*, 553 U.S.

permitted the state of Alabama to execute a prisoner with a novel method, nitrogen hypoxia.[58] This untested method of execution is being employed by the state instead of executing Kenneth Smith via lethal injection.[59] It was proven by an expert that Smith had a serious chance of vomiting during this new method of execution because of the symptoms from his post-traumatic stress combined with oxygen deprivation.[60] This would mean that Smith had a large chance of choking on his vomit, resulting in further suffering, rather than dying due to the inhalation of the gas as intended. Alabama furthers this cruel punishment by using a mask without an air-tight seal because they do not believe it to be necessary.[61] Without an air-tight seal, oxygen may leak into the mask leading to a "persistent vegetative state, stroke, or suffocation, superadding pain and prolonging Smith's death."[62] This goes directly against the precedent set in *In re Kemmler* when that Court found that torture and lingering death violate the Eighth Amendment.[63] The Court explicitly went against this foundational principle by allowing Alabama, a state with a pattern of failed executions, to employ a method of execution that has not yet been tested. It is cruel for

[58] *Smith,* 601 U.S. at 1.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 2.
[62] *Id.*
[63] *In re Kemmler*, 136 U.S. at 447.

the state to enact a method of execution that has numerous ways of causing pain or lingering death.

This carelessness and disregard for human life not only violates the Eighth Amendment's prohibition against cruel punishment but also reflects a troubling acceptance of suffering as an inherent aspect of the death penalty. Under the "evolving standards of decency", as articulated in *Trop*[64], this form of punishment would surely not stand. The average person would find it admonishable that the state has the ability to impose the death penalty through untested methods of execution that could ultimately lead to pain and lingering death. Support for the death penalty as a whole has been steadily declining since 1994, decreasing by 30% overall.[65] These numbers suggest a growing concern about the death penalty's ethical and practical implications, and ultimately an increasing rejection by the general population of this form of punishment over time.. Other inmates who suffer the same symptoms as Smith leading up to their execution run the risk of experiencing mental and psychological pain as well. This decision is extremely dangerous as it leaves the door open for states to try other forms of untested execution. As time has evolved, so have the citizens of the United States; it is no longer considered acceptable to impose methods of

[64] *Trop,* 356 U.S. at 86.

[65] Death Penalty Information Center, The Death Penalty in 2023: Year-End Report (2023).

execution with the explicit intent of torture. While states have attempted to excuse the inmates' suffering as being an "unforeseeable accident", this argument does not stand when professionals have cited the various ways in which this method could fail. The state of Alabama knew the risks to Smith specifically as well as the risks this would pose to future inmates and still chose to use the method, thereby making it cruel. This ruling opens a door for the Supreme Court to approve other methods of execution, or other measures taken by the state, that qualify as cruel. This case adds to an ever-growing list of precedents that further cements the cruel nature of the death penalty.

III. The Unusual Nature of the Death Penalty

The Eighth Amendment also prohibits "unusual" punishments. This portion of the amendment was designed to limit excessive and unfair punishment against those convicted of a crime. The vague nature of its wording, however, leaves much up to interpretation. However, the modern application of the death penalty falls into this category due to the arbitrary and discriminatory nature with which it is practiced. Arbitrariness is defined as "the absence of a legitimate justification for an action or pattern

of actions."[66] This definition is reflected in the justices' analysis in *Furman v. Georgia* (1972). The way that the death penalty is set up provides largely unchecked discretion to prosecutors and juries to dictate whether a person is to live or die. Without any kind of standardization inherently comes a disproportionate and arbitrary application of the death penalty. One significant way that this arbitrariness presents itself is through racial disparities. The Supreme Court believed this issue to be reconciled by the time they decided on *Gregg v. Georgia* (1976), however, they are still present in the capital punishment system today.

A. Furman v. Georgia and Gregg v. Georgia

In the landmark case of *Furman*, the Supreme Court found the application of the death penalty at the time to be unconstitutional. In the 5-4 decision, the court stated that the imposition of the death penalty constituted a violation of the Eighth and Fourteenth Amendments and remanded the case for further proceedings.[67]

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[66] Deon Brock, Nigel Choen & Jonathan Sorensen, *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender,* 28 AM. J. CRIM. L. 44, 46 (2000).
[67] Furman v. Georgia, 408 U.S. 240 (1972).

Justices Marshall and Brennan took a firm stance against the death penalty's application, arguing its clear violation of the Eighth Amendment. In his infamous concurrence, now known as the "Marshall Hypothesis", Justice Marshall asserted that if the general population were to know all of the facts regarding capital punishment, they would find it shocking to their conscience and sense of justice.[68] Justice Brennan took a similar stand in his opinion, looking towards the "evolving standards of decency" principle for clarity.[69] Death, as a punishment, has historically caused controversy in the United States.[70] Though once a popular method of punishment, social norms have evolved to a point where society now rejects public executions.[71] Justice Brennan highlighted this social shift, asserting that a given punishment is "cruel and unusual" if it does not comport with human dignity.[72] He contends that the state denies defendants this dignity when it arbitrarily subjects its citizens to unusually severe punishments regardless of the offense.[73] Death, in his opinion, is an unusually severe punishment due to its finality, pain, and enormity.[74] Justice Brennen also took issue with

[68] *Id*. at 369.
[69] *Id.* at 269-271.
[70] *Id.* at 296.
[71] *Id.* at 297.
[72] *Id.* at 270.
[73] *Furman*, 408 U.S. at 286.
[74] *Id.* at 287.

the fact that juries could impose a death sentence wholly unguided by the standards that govern that decision.[75] This leaves defendants largely unprotected against the haphazard exercise of the death penalty.[76]

Taking a similar stance to Justice Brennan, Justice Stewart also took issue with this inconsistency in its application but believed the death penalty ran afoul of the Equal Protection Clause of the Fourteenth Amendment rather than the Eighth Amendment.[77] Agreeing that the death penalty violated the Equal Protection Clause, Justice White pointed to the infrequency with which it was imposed.[78] Due to this infrequency, there is no meaningful way to distinguish the cases in which it is applied and cases it is not, which would indicate arbitrariness. In his opinion, Justice Douglas recognized that the authors of the Eighth Amendment intended for equality in punishment, as their ancestors had long dealt with a system of discrimination from the British.[79] During that period, the target of discrimination was placed on those who opposed an absolutist government, and capital punishment was used as a tool for vengeance.[80] Today, the discretion given to the judicial system allows courts to

[75] *Id.* at 295.
[76] *Id.*
[77] *Id.* at 309.
[78] *Id.* at 313.
[79] *Furman*, 408 U.S. at 255.
[80] *Id.*

selectively apply the death penalty, going against what the authors had envisioned the amendment to protect.[81] In his opinion, Justice Douglas highlighted the issue that there are often prejudices against the defendant; prejudices that tend to grow if the defendant is, "poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority."[82] He also found discretionary statutes to be unconstitutional as they were filled with discrimination;[83] it is unlawful for sentences to be harsher simply because the defendant is a minority or a member of the lower class.[84] Although the justices differed with respect to the root of its unconstitutionality, they agreed that the death penalty violated the Constitution, and as a result, their decision in *Furman* suspended executions until *Gregg*.[85]

Following *Furman*, the federal government and 35 states changed their death penalty laws to avoid violating the Equal Protection Clause.[86] Since three of the Justices rooted their opinions in the Equal Protection Clause, the door was left open for the Court to revisit its decision in

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[81] *Id.*
[82] *Id.*
[83] *Id.* at 256-257.
[84] *Id.* at 257.
[85] VOLLUM ET AL., supra note 4.
[86] *Id.* at 33.

Furman.[87] Had the majority of Justices found the death penalty to violate the Eighth Amendment, the possibility of further examinations into the constitutionality of capital punishment would be effectively closed, foreclosing any further legal scrutiny on the issue. This, however, was not the case. Instead, the Court took up the issue again in *Gregg* when it analyzed the new Georgia statute to determine its constitutionality.[88] The new Georgia law required the jury to consider both the circumstances of the crime and of the criminal before recommending a sentence.[89] The statute also required the Georgia courts to review each sentence of death to determine whether the decision involved prejudice.[90] The Court found this statute constitutional, as they believed the statute, on its face, safeguarded against the arbitrariness and capriciousness that the Court found unconstitutional in *Furman*.[91] While the federal government and states may have changed their laws in order to reinstate the death penalty, the issues the Court found in *Furman* remain today. The death penalty has been and continues to be, applied excessively and is still disproportionately

[87] *Id.*
[88] Gregg v. Georgia, 428 U.S. 153, 197 (1976).
[89] *Id.*
[90] *Id*. at 198.
[91] *Id.* at 197-198.

applied to minorities due to the implicit bias in the justice system and the great deference given to prosecutors and juries.

B. Furman Was Not Reconciled by Gregg

The changes to Georgia's law that made the death penalty constitutional were merely cosmetic. The issues that the Justices found in *Furman* remained present post-*Gregg*, and are still present today. Over ten years after the decision in *Gregg*, legal scholars David Baldus, Charles Pulaski, and George Woodworth completed a study on death sentences in Georgia. The objective of this study was to evaluate whether the Georgia Supreme Court's system of comparative sentence review that was analyzed by the Court in *Gregg* was effective.[92] The researchers set out to determine whether Georgia's new process ensured that no person "'sentenced to die by the action of an aberrant jury' would actually 'suffer a death sentence,'" because this is what the Supreme Court believed the changes in the Georgia statute would accomplish.[93] They began by looking for evidence of arbitrariness and comparative excessiveness in jury death sentencing

[92] David C. Baldus, Charles Pulaski, and George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 679 (1983).
[93] *Id.*

patterns from 1973 to 1978.[94] The data revealed that despite the enactment of Georgia's statute, juries and prosecutors still exercised considerable discretion and only chose some defendants for the death penalty.[95] The data provided by the study strongly points towards the idea that Georgia is "operating a dual system, based upon the race of the victim, for processing homicide cases."[96] The study concluded that cases with Black victims are prosecuted less harshly than those with White victims.[97] Juries are willing to tolerate more aggravating factors without imposing the death penalty if the victim is Black compared to White victims.[98] Prosecutors are no different than juries as many prosecutors will not seek the death penalty *unless* the level of aggravation toward Black victims is substantially greater.[99] It is clear that Georgia, despite its statutory changes, continues to impose the arbitrary and inconsistent death sentences that were condemned in *Furman*.[100] The arbitrary and capricious application of the death penalty is not merely limited to Georgia. University of Washington professor Kathrine Beckett and graduate student Heather Evans conducted

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[94] *Id.*
[95] *Id.* at 689.
[96] *Id*. at 709-710.
[97] *Id.*
[98] Baldus, supra note 92, at 709-710.
[99] *Id.*
[100] *Id.* at 728-730.

a study on the role of race in capital sentencing in Washington which showed a similar effect: prosecutors and juries exercise considerable discretion, with both being more likely to discriminate on the basis of race.[101] Prosecutors were found to be more likely to file a death notice when the case was in a county that has a large Black population.[102] In Thurston County, prosecutors sought the death penalty in 67% of aggravated murder cases, while prosecutors in Okanogan County sought the death penalty in 0% of aggravated murder cases.[103] Thurston County has a Black population of 16,254 (around 3.6%) and Okanogan County has a Black population of 417 (around 0.9%).[104] Juries imposed the death penalty in 64% of cases involving a Black defendant, but only 37% of cases involving White defendants.[105] Juries were found to be four and a half times more likely to impose the death penalty on Black defendants than any other similarly situated defendant.[106] The application of the death penalty shown in this study is arbitrary under the standard presented in *Furman*. The arbitrary manner in which it is imposed and the discretion given to

[101] KATHERINE BECKETT & HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING 32-33 (2014).
[102] *Id.* at 31.
[103] *Id*.
[104] WASHINGTON STATE BLACK POPULATION BY COUNTY, COMMISSION ON AFRICAN AMERICAN AFFAIRS - WASHINGTON STATE.
[105] Beckett & Evans, supra note 101, at 21.
[106] *Id.* at 33.

prosecutors and juries reflect the Georgia capital punishment system that the Court originally took issue with. The pattern of arbitrary and discriminatory application of the death penalty extends to a whole host of states like Pennsylvania where legal scholars David C. Baldus, George Woodworth, David Zuckerman, and Neil Alan Weiner found that effects of race on defendant punishment decisions were substantial and consistent.[107] Comparing the proportion of Black defendants in all the death-eligible cases, with the proportion of Black defendants sentenced to death by a jury shows a 7% increase.[108] This increase indicates that Black defendants are treated more punitively than other similar defendants.[109] An investigation into Alabama in the late 1990s yields the same conclusion. At the time, the Black population in the state was 25% while 47% of their death row inmates were Black.[110] By 1999, 65% of people who were executed in Alabama were Black.[111]

Studies that date back to the 1940s have shown that racial minorities are more likely to receive the death penalty than White defendants, even

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[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] Ruth E. Friedman, Statistics and Death: *The Conspicuous Role of Race Bias in the Administration of Death Penalty*, 11 La Raza J.L. 75, 77 (Spring 1999).
[111] *Id*.

when accounting for all other factors.[112] The General Accounting Office examined studies relevant to the application of the death penalty and found that three-fourths of them determined that Black defendants are more likely to receive the death penalty.[113] This likelihood increases if the victim is White.[114] This fact has been confirmed through numerous studies done by both state and federal governments since 2000.[115] As such, the lives of Black victims are treated as less valuable than other lives by the capital punishment system.[116] Not only is the death penalty imposed on Black defendants at a higher rate, but the cases where the victim is Black are less likely to have the death penalty imposed. This is egregiously arbitrary and in itself should constitute an Eighth Amendment violation.

As has been shown by its discriminatory application across the country, the death penalty has not been changed to reconcile the issues that the Court originally found within the *Furman* decision. Rather, states and the federal government have constructed surface-level reforms to their laws in order to impose the same punishments more discreetly and covertly. When the race of the victim alone, or coupled with the race of the

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[112] M. Cholbi, *Race, Capital Punishment, and the Cost of Murder*, 127 PHILOSOPHICAL STUDIES 255, 256 (2006).
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 268.

defendant, is a primary reason behind the death penalty being sought, its application is arbitrary. The death penalty still disproportionately affects people who are not White. Juries and prosecutors still maintain a great amount of discretion, and in many cases, the death penalty is imposed excessively. The Supreme Court should overturn *Gregg* for these reasons alone. As the Court stated in *Furman*, "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, class, or if it is imposed under a procedure that gives room for the play of such prejudices."[117] Evidence suggests that from *Greggs* until the present, discrimination exists against defendants because of their skin color. While changes have been made, the application of the death penalty in many states still gives room for the play of such prejudices. This discrepancy between theoretical standards and practical application raises serious questions about the constitutionality of the death penalty as envisioned by the founders. With such a prolific pattern of arbitrariness and racial bias, it becomes increasingly difficult to defend the "good-natured" origins of the death penalty and begs the question if there ever existed a

[117] *Furman* 408 U.S. at 408.

reality where an application of the Eighth Amendment could have been applied with the fairness it envisioned.

C. Mccleskey v. Kemp

The Court in *McCleskey v. Kemp* (1987) determined that the risk of racial bias was insufficient to deem Georgia's capital punishment system unconstitutional under the Eighth Amendment. The Court was presented with the Baldus study,[118] which statistically demonstrated racial disparities in Georgia's death penalty sentencing. They acknowledged the study's legitimacy but argued that racial disparities were an "inevitable" part of the criminal justice system.[119] The Court stated that the safeguards in place designed to minimize racial bias in sentencing were adequate and that because of this, the Baldus study was not enough to demonstrate a significant enough risk of racial bias affecting Georgia's system.[120] Moreover, the Court expressed their concern that accepting McCleskey's claim would set a precedent that would allow for claims of arbitrary attributes like attractiveness to have grounds as long as there was a study that proved it.[121] Justice Powell furthered his concern by stating that this

[118] See *supra Section III.B.*
[119] McCleskey v. Kemp, 481 U.S. 279, 311-313 (1987).
[120] *Id.* at 313.
[121] *Id.* at 315-318.

decision would lead to no limiting factors or clear limits leading to a slippery slope.[122]

Justice Brennan, in his dissent, demonstrated ways in which the majority opinion was decided improperly. He stated that it is important to emphasize that the Court's observation that McCleskey cannot prove the influence of race on any particular sentencing decision is irrelevant in evaluating his Eighth Amendment claim.[123] He argues that the decision in *McCleskey* went against years of precedent determining that even a risk of racial bias was impermissible under the Eighth Amendment.[124] Following *Furman*, the Court has only been concerned with the risk of the imposition of an arbitrary sentence, specifically using the diction "substantial risk."[125] The court in *Caldwell v. Mississippi* (1985) stated that the death sentence must be struck down if there is an unacceptable risk of it being imposed arbitrarily.[126] In *Gregg,* the Court looked at the death sentencing system as a whole, and a violation of the Constitution would be established if a "pattern of arbitrary and capricious sentencing" is demonstrated.[127] In *Godfrey v. Georgia* (1980), the Court struck down the sentence because the vague

[122] *Id.* at 317-318.
[123] *Id.* at 322.
[124] *Id.*
[125] *McCleskey*, 481 U.S. at 322.
[126] *Id.* at 323.
[127] *Id.*

nature of the statute created a risk that prejudice might have infected the sentencing decision.[128] Brennan illustrates the idea that defendants have never been required to prove that racial bias has infected their decision but that the system which they were sentenced under posed a risk of occurrence.[129] *McClesky* offered empirical documentation of how the Georgia system was operating and the racial bias that had deeply infected it.[130] Under the Court's precedent, the empirical evidence would be more than enough to prove a risk.

The decision in *McCleskey* acknowledges the history of racism within our justice system yet throws out statistical proof illustrating that even protective safeguards cannot fully eliminate the impact of racial bias. Data indicates that there is a high risk of racial bias and a strong correlation between race and outcomes at every stage of the capital punishment system. This is evident not only in Georgia, but it spreads in numerous states. As Justice Brennan indicated, there is a strong history of the Court's precedent that articulates that the mere risk of racial bias is sufficient. The extreme racial bias proven throughout multiple states should render the death penalty unconstitutional under the Eighth

[128] *Id.*
[129] *Id.*
[130] *Id.*

Amendment. Moreover, Justice Powell's slippery slope argument falls short, as the Court has articulated on numerous occasions that death is different. The finality of the death penalty fundamentally separates it from other areas of law making it unique in its consequences. This idea was recognized in *California v. Ramos* (1983), when the Court stated, "the qualitative difference of death from all other punishments requires a greater degree of scrutiny of the capital punishment system."[131] Under this greater degree of scrutiny, the blatant racial bias within the system is enough to render it unconstitutional. Surely, under the evolving standards of decency and basic morality, citizens of the United States would reject the death penalty if they knew the racially biased nature that has led to its core.

IV. Conclusion

The current application of the death penalty is a clear violation of the Eighth Amendment's cruel and unusual punishment clause. The death penalty is cruel due to the psychological torture that death row inflicts on inmates. The environment in which these inmates live strips them of their humanity and further pushes them towards a state of insanity. This, in

[131] *McCleskey*, 481 U.S. at 335.

combination with the treatment they receive from guards, extreme isolation, and confined living quarters, causes many inmates to experience psychological death alongside their psychological torture. This is a cruel punishment that causes unnecessary pain and suffering, which lies in direct contrast to the defendant's protections outlined in the Eighth Amendment. The Supreme Court has been complicit in upholding this unconstitutionally cruel form of punishment by allowing for untested methods of execution to be used, even when there is a high likelihood of lingering pain and death. Their recent decision in *Smith* disregards the evolving standards of decency as the majority of society would reject execution caused by asphyxiation. The majority of society would also reject the imposition of the death penalty via stroke or suffocation, yet it is permissible in the eyes of the Supreme Court. Additionally, the death penalty qualifies as an unusual punishment that remains in violation of the Court's ruling in *Furman*. It is "unusual" based on its arbitrary and discriminatory nature. Prosecutors and juries are given great discretion, without reason, to decide which defendants get the death penalty. Compounding this issue, the death penalty is imposed disproportionately on minorities in America. These factors conform to the definition of unusual that the Court established in the past in cases like *Cadwell, Godfrey, Furman*, and *Greggs*. The Court in

McCleskey deviates from the Court's precedent entirely and acts as a vehicle for systemic racism to persevere in the capital punishment system. This case demonstrates how the Court's decisions have allowed the death penalty to become more unusual.

The unusual and excessive nature of the death penalty highlights a profound moral failure in our society. The infliction of unnecessary pain and psychological trauma onto its inhabitants should not be permitted to continue. Within the history of the United States, unnecessarily cruel punishments have always been admonished, and yet the modern capital punishment system has been allowed to remain standing even though these ideas are in direct conflict. Under the criminal justice system, no life should ever be treated as more valuable because of the color of one's skin. With a penalty as finite as death, it is imperative that this not be true of the criminal justice system. Even so, numerous studies indicate that this is the current operation of the capital punishment system throughout the United States. Allowing the death penalty to continue to be administered is effectively allowing the criminal justice system to systematically value one life over another. A justice system that values all lives equally cannot coexist with a practice that perpetuates suffering, discrimination, and moral indecency. The time has come to align our legal practices with the

fundamental principles of human dignity and equality, ensuring that our justice system reflects the values we claim to uphold. Only then can we begin to heal the deep wounds inflicted by this inhumane practice and strive toward a more just and equitable society.