

The Mere Extinguishment of [Human] Life¹

“We must never forget that it is a Constitution we are expounding” — Chief Justice Marshall, in McCulloch v. Maryland, 1819

Capital punishment has been a standard-practice tool of the American criminal justice since colonizers arrived from Europe. Condemned men and women were shot, electrocuted, hanged, crushed, gassed, lethally-injected, and burned at the stake in the name of good order and retribution. As every other western democracy began to abolish the death penalty over the course of the twentieth century, the United States held fast to the age-old practice, repeatedly reforming legislation and rules of fair punishment set down by the Supreme Court to limit and target the penalty to the worst criminals, even pausing the practice nationally for four years amid concerns that death was too arbitrarily imposed.² Yet today, more than forty-three years since the Court allowed executions to resume in 1976, capital punishment in the United States remains as arbitrary and without justificatory effect as ever. Supporters of capital punishment maintain that it has legitimate deterrent and retributive effects,³ that it is more reliable and targeted than ever before,⁴ and that the US Constitution *explicitly* permits its use.⁵ They are wrong on all counts, and furthermore, the argument has been improperly framed.

The position this paper advances is squarely against capital punishment in the United States, yet the primary aim of this work is to reframe the question under a new interpretation of the Eighth Amendment. Through research which qualifies the orthodox historical ‘record,’ close analysis of Supreme Court decisions on death, and extensive use of statistical analysis, it will propose a comprehensive interpretation of the Eighth Amendment that combines two separate threads of death penalty abolitionism and Court precedent to furnish a more effective argument. The first section will briefly review the history of Anglo-American legal thinking on capital punishment, emphasizing with primary sources the unease with which the punishment was

treated during the drafting and ratification period. It will then outline the Supreme Court's role in defining the Eighth Amendment from its earliest cases to the death penalty moratorium in *Furman v. Georgia* (1972). The second section of this article will evaluate the successes and failures of constitutional regulation of capital punishment using the most recently available statistics collected from hundreds of studies. It is necessary to provide such factual grounds as these to demonstrate the urgency of and application for my interpretation of the Eighth Amendment. Having established this necessary predicate, this article will conclude by identifying and combining an "aspirational" and "restrictive" interpretation of the Eighth Amendment's prohibition on "cruel and unusual punishments" to argue that the death penalty is unconstitutional.⁶

Part I: The Road to Regulation

Execution in the Colonies

The first English colonies in America were little different than their motherland in terms of criminal justice. Treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, and theft were all capital crimes in the American Colonies, just like England.⁷ The Northern colonies were more lenient than England in imposing death for property crimes, and even when blasphemy, idolatry, sodomy, and buggery became capital crimes, these statutes were rarely enforced. When England began developing a larger list of capital crimes in the early 1700s, named by critics its "bloody code," the American South was quick to follow suit with statutes only applicable to enslaved Blacks. Slaves were subject to execution for burning or destroying commodities, convincing others to run away, striking and bruising a white, preparing or administering medicine, or conspiring to do any of the above.⁸ The administration of the death

penalty in America has been a racialized affair ever since the first Blacks were imported as slaves in 1619.

A standard capital procedure in the American Colonies was highly ceremonial. Trials were quick and uneventful. Witnesses usually testified only for the government, and defendants rarely had representation.⁹ Once a death warrant was issued, however, a carefully choreographed, three-part show would begin. The day would commence with a procession from the jail house to the gallows. Accompanied by ministers, the local sheriff, deputies and the occasional military escort, prisoners would walk or ride a pre-determined route lined with spectators to the gallows. Once arrived, the prisoner would climb the gallows and deliver a pre-written speech to the audience, often in rhymed verse.¹⁰ These speeches contained passionate, if occasionally inarticulate, appeals for clemency, reaffirmations of the prisoner's innocence, or warnings to the crowd against a life of sin. Copies, often edited to confer the maximum effect, were sold as mementos to onlookers or reprinted in newspapers.¹¹ Finally, a minister would take the stage; he would pray for the repentance of the condemned and earnestly remind the crowd that a life of sin could only lead to an execution like the one before them. Ministers frequently used the captive audience, and the captive himself, to emphasize boilerplate pulpit warnings against the sin of drunkenness, breaking the sabbath, and even reading "idle and romantic books."¹² They were paid well for their work. With a hood pulled over his or her head, the prisoner would then be hanged.

Stuart Banner identifies two purposes for the ceremonial executions of the American Colonies: deterrence and reparation. The procession of armed guards surrounding a trembling prisoner and his repentant presentation before the community at large "provided a way to amplify the message of terror created by the hanging and to broadcast that message to the

public.” It also served to reinforce order, as a ceremony by which the injured community could *reconstitute* itself by eliminating the aberrant among it. Through such ceremony, the pomp-and-circumstance, “the sort of violence that *establishes* order was clearly marked off from the sort of violence that disrupts order.”¹³ Today, the principal rationale for the death penalty has not changed, with the exception that reparation has been re-termed “retribution” so as not to give the condemned too much power.

The People vs. The Person

It is difficult to say exactly why the American Colonies were less likely to administer the death penalty than their English cousins. Lower economic inequality, fervent religious conviction, or strong traditions of executive clemency are all possible explanations. However, the most defining difference between the English and American criminal justice systems was their *locality*. In other words, American officials were inefficient in enforcing the severity of their penal codes because they were ordinary citizens. Local sheriffs were not experienced professionals, nor were they eager to execute a member of their community—they often performed the task drunk.¹⁴ “Executions were often conducted by true representatives of the community, men without any specialized training, men who were known to the spectators as friends and neighbors.”¹⁵ This made the death penalty in America a truly popular exercise, and often created a tension between wide public support for the punishment and the inherently strong apprehension of actually carrying it out.¹⁶

“A Revolution in Public Consciousness”¹⁷

There is a misconception among supporters and abolitionists alike that capital punishment has always enjoyed near-universal support in the United States, and that opposition is purely a modern phenomenon.¹⁸ They often point to the Fifth Amendment’s seeming approval

of ‘deprivation of life’ as incontrovertible evidence, the merits of which will be discussed later in this article. It is essential to note that this version of history is seriously flawed. In reality, capital punishment for property crimes was widely questioned in the 1760s and 1770s, and by the 1780s and 1790s, capital punishment “for *any* crime, even murder, was a bitterly contested issue.”¹⁹ It was the topic of debating societies, college commencement addresses, newspaper articles, and editorials across the American Colonies. James Madison, the drafter of the Bill of Rights, and DeWitt Clinton, soon-to-be governor of New York, opposed capital punishment in all cases. Benjamin Franklin and Thomas Jefferson opposed its use for any crime but murder.²⁰

The seeds of such opposition can be found in a 1764 essay, *On Crimes and Punishments*, in which Italian criminologist and philosopher Cesare Beccaria argued that a republic with popular sovereignty could not justly execute one of its citizens. He also opposed the death penalty on utilitarian grounds, writing that its imposition was too arbitrary and final to be an effective deterrent when compared to life imprisonment.²¹ The essay was translated into English and appeared in London and Dublin by 1767, soon attracting the attention of the foremost American political and legal thinkers. Thomas Jefferson and George Washington bought copies within a few years, and John Adams quoted Beccaria in his 1770 defense of the Boston Massacre soldiers. The first American edition was published in 1777, and newspapers across the colonies serialized the essay in the late 1770s and 1780s.²² William Blackstone, writer of *Commentaries on the Laws of England*, the single most influential work of Anglo-American law and a “runaway bestseller” in the colonies,²³ praised Beccaria as “an ingenious writer,” summarizing his argument against the death penalty in his fourth volume.²⁴ “From the late 1760s until nearly a century later, Beccaria was a name familiar to literate Americans,” and newspapers, debate

societies, activists, and political thinkers frequently followed or expanded upon his line of thinking.²⁵

The problem of capital punishment opposition in the 1760s and 70s became a pandemic during the drafting and ratification period, transitioning from a focus on abolition for property crimes to support for total abolition. Juries from North Carolina to Pennsylvania frequently returned mercy acquittals, the earliest explicit record of which is from 1726.²⁶ Mercy acquittals for property crimes became so frequent that the Georgia Gazette in 1767 proposed a total overhaul of the penal system; the New Jersey Legislature explicitly cited the Colony's inability to obtain capital convictions in its decision to substitute corporal for capital punishment for property crimes in 1769.²⁷ In 1778, Thomas Jefferson drafted a bill for the Virginia Legislature which proposed doing away with capital punishment altogether, claiming that capital statutes "exterminate instead of reforming."²⁸ The Virginia General Court expressed approval for the law, writing to the Governor "we cannot but lament that the laws relating to capital punishments, are in many cases too severe." When the Bill was finally put before the House of Delegates in 1785, it lost by only one vote.²⁹ Five states abolished capital punishment for crimes other than murder from 1794 to 1798, three of which abolished it for some kinds of murder.³⁰

Debates over total abolition of the death penalty were common in late 1780s Philadelphia and spread quickly to other cities in the 1790s, especially New York.³¹ Citing numerous abolitionist writings of the 1780s and 90s, Stuart Banner proposes that because thinkers of the founding period saw themselves as living in an era of great progress, capital punishment was seen as lagging behind, a relic of a "runder, more barbaric time." Arguing against the authority of the Bible, Pennsylvania Attorney General William Bradford argued that "[l]aws might have been proper for a tribe of ardent barbarians wandering through the sands of Arabia which are wholly

unfit for an enlightened people of civilized and gentle manners.” The editor of the *American Minerva* argued that the death penalty can only be justified on the grounds that a criminal’s execution “is *necessary* to the future safety of society,” and if “confinement will effectually answer this end, the question is decided *against all capital punishment*.” The Yale Senior class took up the question for debate in 1784, asking whether the death penalty was “too severe & rigorous [...] for the present stage of society.”³² The idea of *progress* is certainly apparent in Banner’s citations, and his thesis finds support in the contemporaneous development of the American penitentiary and penal system.

Abolitionists saw no justification for the death penalty that was not served by the developing prison system, and ultimately favored its lack of arbitrariness and seemingly more effectual deterrent factor.³³ Although no state abolished capital punishment completely during the founding and ratification period, or for many years after, it was severely limited and in many places barely used. Many states used the benefit of the clergy, an arcane English exemption for members of the priesthood, to give criminals convicted of capital crimes a mulligan.³⁴ They were marked by a burn on the thumb to notify members of the public and prosecutors in other districts of their criminal record.³⁵ Simulated hangings, in which the ‘condemned’ was sentenced to stand on the gallows with a rope around their neck, were often used in sympathetic cases. Gallows reprieves were also common, whereby officials would wait until the last moment to inform the condemned of executive or legislative clemency, maximizing the reforming effect of existential fear without taking the would-be victim’s life.³⁶ In the 1770s and 80s, several state constitutions instructed state legislatures to sharply reduce the number of capital crimes.³⁷ In response, states developed nuanced legal concepts like dividing murder into degrees, excluded property and non-lethal crimes (other than treason) from capital statutes, and built prisons to house convicts who

would have been executed in the past. The development of the penitentiary system was, in fact, a *direct* response to death penalty abolitionism in the 1780s and 90s.

What is most important about this brief history is its divergence from the common narrative. It is true that capital punishment went virtually unquestioned in the early Colonial period, yet the period of the writing and ratification of the Constitution from 1787-89, followed by the ratification of the Bill of Rights in 1791, coincides *exactly* with the apex of early death penalty abolitionism in the United States. James Madison, the writer of the Bill of Rights and most of the Constitution, was not a fringe thinker, nor were Benjamin Franklin, George Washington, or Thomas Jefferson. Abstract political theory like Beccaria was common by the end of the eighteenth century, and American colonists were *extremely* literate in theories of rights and governance.³⁸ The question of the death penalty was hotly contested, and opinions about its legitimacy, morally and theoretically, were seriously in flux. Any suggestion that the founding period lacked serious debate regarding or interest in capital punishment is wrong. A stunning number of scholars have made this mistake, Supreme Court justices among them.³⁹ Banner, the authoritative historian on the death penalty in America, seems miraculously to have uncovered what was at the very least a widespread unease surrounding capital punishment during the founding period.

Nor Cruel and Unusual Punishments Imposed

There is little question as to the origin of the Eighth Amendment. The text is lifted directly from the English Bill of Rights of 1689, with the minor change that excessive bail “shall,” rather than “ought,” not be required. The provision likely had its inspiration in the once-infamous case of Titus Oates and the Bloody Assizes.⁴⁰ Oates, ignominiously called Titus the Liar, was convicted of perjury after delivering false testimony leading to the execution of

multiple people, and was sentenced to be “whipped through the streets of London five days a year for the remainder of his life.”⁴¹ The Assizes were a series of treason-related trials in August of 1685, during which the Lord Chief Justice George Jeffries sentenced almost 1,400 people to death in less than a month, a large portion of which were hanged or hanged, drawn, and quartered.

It is also important to understand the common-law tradition on capital punishment, at least in brief. English common law, at least historically, had little qualms with execution for certain crimes. Death penalty supporters point frequently to this fact, especially when it comes to dignity-based arguments for the Eighth Amendment or abolition. Raoul Berger goes as far as to claim that “English and early American law cared not a whit for ‘human dignity,’” citing Blackstone, the “oracle of the common law,” to make his point.⁴² This paper’s reading of Blackstone’s *Commentaries*, especially his fourth volume, *Of Public Wrongs*, disagrees sharply with this conclusion. It is true that Blackstone seems to endorse manners of punishment which would certainly seem cruel today, but it is also the case that Blackstone treats execution with the utmost care, and subjects it to rigorous, even critical analysis.

First, Blackstone identifies the deterrence rationale as the only legitimate justification for administering death. Only when “offenses grow enormous, frequent, and dangerous to a kingdom or state [...], and to the great insecurity and danger of the kingdom or its inhabitants, [are] severe punishments and even death itself [...] necessary.”⁴³ Even then, “every humane legislator will be [...] extremely cautious of establishing laws that inflict the penalty of death [...]. He will expect a better reason for his so doing, than that loose one which is generally given; that it is found by former experience that no lighter penalty will be effectual. For *is it* found upon farther experience, that capital punishments are more effectual?”⁴⁴ This is because “to shed the

blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither can he resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.”⁴⁵ In his tenth chapter, Blackstone even suggests that “corporal and pecuniary,” rather than capital, punishments are more suited to English law.⁴⁶ Blackstone, contrary to Berger’s reading, seems to care quite a bit for human dignity, insofar as it is inherent to human life. The “oracle of common law,” under a conservative reading, seems incredibly uneasy about the use of the death penalty, suggesting that even the deterrence rationale has little proof of being “effectual.”

When it comes to ratification of the Eighth Amendment to the United States Constitution, some twenty years after Blackstone, there is little discussion of the provision at all. The entire record of the debate from the First Congress is as follows:

“Mr. Smith, of South Carolina, objected to the words ‘nor cruel and unusual punishments;’ the import of them being too indefinite.

Mr. Livermore.— The [Eighth Amendment] seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the term excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and

perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

The question was put on the [Eighth Amendment], and it was agreed to by a considerable majority.”⁴⁷

There is little to be made of this, at least at face value. Justice Brennan, in *Furman*, suggests that in the face of Livermore’s concerns that the Eighth Amendment might someday be used to limit

such “necessary” punishments as whipping, ear cropping, and death, the “considerable majority” was prepared to run that risk.” And “[n]o member of the House rose to reply that the Clause was intended merely to prohibit torture.”⁴⁸

Patrick Henry’s speech to the Virginia House of Delegates during the 1788 ratification debates for the US Constitution provides a clearer, though less authoritative, exposition of the intention behind the Cruel and Unusual Clause⁴⁹ Complaining about the possibility of ratifying the new constitution without a bill of rights, Henry warned his fellow delegates as follows: “What says our Bill of Rights?⁵⁰ ‘That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’ Are you not therefore now calling on those Gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this Bill of Rights? You let them loose—you do more—you depart from the genius of your country.”⁵¹ Patrick Henry fought bitterly against Federalists like Alexander Hamilton and James Madison who did not want a bill of rights to be part of the Constitution. Madison believed that the greatest danger to individual liberty lay in the people themselves, not their elected representatives, and doubted that any formal enumeration of rights could restrict the plasticity of a legislature.⁵² At the time of the ratification, his only hope for the Bill of Rights demanded by the Anti-Federalists was that the underlying principles of the Rights as listed would enter the popular conscience as educational principles. But this was too feeble a restraint on injustice for Patrick Henry and his fellow Anti-Federalists. As Justice McKenna put it, “their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. [They] intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. [So] it must have come to them that there could be exercises of cruelty by laws other than those which

inflicted bodily pain or mutilation.”⁵³ While Madison hoped only for a statement of philosophy, of aspiration even, Henry wanted an elastic tool for future generations to combat the ability of the national legislature to punish. Punishments would evolve, so too must the people’s ability to strike them down. Both Mr. Smith and Mr. Livermore objected to the ambiguity of the clause Henry wanted, seeing its potential to limit the government from once-‘acceptable’ practices in the near future. Many of the Amendment’s ratifiers, it appears, had little qualms with this possibility.

Eighth Amendment Foundations in Weems and Trop

Not until 1910, nearly 120 years after the Eighth Amendment was ratified, would the Supreme Court of the United States get the chance to weigh in on the meaning of the “cruel and unusual punishments” clause.⁵⁴ Paul Weems, a disbursing officer for the United States Coast Guard in the Philippines, was charged and convicted of falsifying a public document for the purposes of defrauding the government after it was discovered he made a mistaken entry in a government accounting book. He was sentenced to fifteen years of hard labor in irons, ordered to pay a 4,000 peso fine, and subject to government surveillance for the rest of his life. In *Weems v. United States* (1910), the Court overturned the conviction as unlawful and determined that the sentence constituted a cruel and unusual punishment proscribed by the Eighth Amendment.⁵⁵ Writing for the Court, Justice McKenna reviewed the history of the Eighth Amendment, and determined based on the arguments of Patrick Henry and his confederates at the Virginia Convention that the Eighth Amendment meant *more* than simply disallowing breaking on the wheel or quartering. In words that would emanate throughout Eighth Amendment jurisprudence, the Court determined Eighth Amendment interpretation

should not [be] necessarily confined to the form that evil had theretofore taken.
Time works changes, brings into existence new conditions and purposes.

Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. [Constitutions] are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.'⁵⁶

The Court worried that this had been forgotten, if it had ever been realized at all, and cautioned explicitly against ignoring the Eighth Amendment's intended role as a limitation on legislative enactments. Lower court Eighth Amendment cases had only gone as far as to invalidate individual discretionary sentences.⁵⁷ In other words, structural challenges, challenges to classes of punishments themselves, were just as good as challenging an individual sentence discretionarily imposed.

The next development in Eighth Amendment jurisprudence would wait until 1958. In 1944, Albert Trop deserted from a US Army stockade in Morocco with a friend. He ran out of food and water in less than a day, and was walking on the main road back to the base when he was approached by a US Army officer. He voluntarily surrendered himself, was court martialed, convicted and sentenced to three years hard labor, forfeiture of pay, and dishonorable discharge. When Trop applied for a passport in 1952 he was denied; the Nationality Act of 1940 contained provisions which automatically denationalized deserters of the US Armed Forces, rendering Trop stateless upon his conviction in 1944. In *Trop v. Dulles* (1958), the Court invalidated the applicable sections of the Nationality Act of 1940, holding that denationalization violates the constitutional proscription of cruel and unusual punishments.⁵⁸

Somewhat surprisingly, without the issue being raised by the facts of the case, Chief Justice Warren began his opinion for the Court by dispensing with the death penalty as an object of concern: as a matter of tradition, it was firmly entrenched, and could not be classified as unacceptable to society at large.⁵⁹ Death penalty supporters often point to this passage,

suggesting that concerns about human dignity are explicitly excluded from the Chief Justice's "endorsement" of capital punishment. The rest of the opinion suggests otherwise.

Building on its interpretation in *Weems*, the Court wrote that "the words of the Amendment are not precise, and that their scope is not static."⁶⁰ Yet,

"[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."⁶¹

Denationalization, the Court held, is decidedly outside such bounds, even though it involves "no physical mistreatment, no primitive torture." Rather, the punishment falls to the Eighth Amendment because it involves "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. [...] [T]he expatriate has lost his right to have rights."⁶² On the precedent of *Weems* and its own disgust with denationalization as a penal measure, the Court fashioned a new rule of Eighth Amendment jurisprudence: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁶³

Important to note from *Trop*⁶⁴ is the irreconcilable disagreement between parts of the opinion only paragraphs apart. The language the Court used to declare denationalization unconstitutional might easily be applied to capital punishment. Does execution not constitute "the total destruction of the individual's status in organized society"? Is it not his loss of the "right to have rights"? But we can also see between the two cases the development of two parts of Eighth Amendment doctrine. The Eighth Amendment is at once based on respect for "the

dignity of man,” yet also draws its meaning from “the evolving standards of decency that mark the progress of a maturing society.” As this paper already noted, the Court took the positions of both Patrick Henry and James Madison at the same time. The Court has never conclusively squared the difference between these two doctrines, nor suggested that one takes precedence over the other.

Death on the Docket

On the backdrop of *Weems* and *Trop*, a conflicting and difficult set of precedents to work with, the Court heard and decided the case of *Furman v. Georgia* (1972), ruling for the first time on a direct challenge to the death penalty as a “cruel and unusual punishment.”⁶⁵ The case is a mess, the longest in Supreme Court history: each of the five Justices in the majority filed separate concurring opinions, as did each of the dissenting Justices. The official holding is that the “the imposition and carrying out of the death penalty [in the cases before the Court] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments,” yet none of the majority agreed in full on *why*.⁶⁶ Justice Douglas worried that the death sentences in the cases before the Court were imposed “arbitrarily and discriminatorily,” Justice Brennan believed the death penalty itself to be an unconstitutional violation of the dignity of man, Justice Stewart found no discrimination, but found that the Constitution could not tolerate the execution of “a capriciously selected random handful” under statutes that seem to ‘strike like lighting,’ Justice White took issue with overly discretionary jury-sentencing procedures, and Justice Marshall thought the death penalty was discriminatorily imposed, excessive, “unacceptable to the people of the United States,” and more.⁶⁷ What was clear, however, was that capital punishment across the country needed reevaluation. Scholars and thirty-five state legislatures soon took up the challenge, building a new capital regime for constitutional approval.

Most of the Court's problems with Georgia's capital sentencing scheme stemmed from two related factors: broad eligibility and extreme discretion. State statutes like Georgia's permitted the death penalty for rapists, armed robbers, and kidnappers, as well as murderers. Yet the Georgia statute provided no guidance for juries on how to sentence those they convicted of these various crimes. A rapist might be executed, be imprisoned for life, or imprisoned for one to twenty years, and juries received no instructions on which types of offenders ought to be sentenced to which.⁶⁸ The combination of these two factors led to extremely rare and uncorrelated sentences, which suggests either that the penalty itself was unpopular, or that some highly "deserving" offenders were executed while similar others are spared for arbitrary reasons.⁶⁹ Only a minor difficulty seemed the fact that the "deserving" offenders tended to be black and their victims white.⁷⁰ The *Furman* majority was especially concerned by the second possibility: that the "right" offenders were not being selected for execution.

Capital trials before *Furman* were customarily unitary, undistinguished proceedings. The lawyers were the same as non-capital lawyers, jury selection was largely based on avoiding people opposed to capital punishment, jurors were not specially instructed, and the verdict and sentence were almost always decided in a one-stage trial, only using evidence related to the crime.⁷¹ This left prosecutors unable to seek capital sentences on crimes linked by similar (legally relevant) factors, and untrained defense attorneys unable to offer mitigating evidence from their client's background during sentencing if irrelevant to the crime. The seeming nonchalance of such procedures left the Court worried that it could not say decisively that the death penalty was not an arbitrary exercise, or that States fully appreciated the urgency of just proceedings where the result would be death.

Out of the *Furman* opinions, scholars have identified four major “doctrines” that would define the Court’s attempts at regulating capital practices. Carol and Jordan Steiker state them concisely:

The first, “**narrowing**,” requires states to limit the types of murders punishable by death through the enumeration of aggravating factors. The second, “**proportionality**,” places constitutional limits on offenses and offenders subject to the death penalty. The third, “**individualized sentencing**,” insists that state statutes permit jurors to reject the death penalty based on mitigating aspects of the offense or the offender. The fourth, “**heightened reliability**,” demands that capital proceedings provide additional safeguards given the categorical difference between death and all other punishments.⁷²

Post-*Furman*, State legislatures rushed to write capital statutes which complied with each of these doctrines, and thus began the era of constitutional regulation of capital punishment.

Part II: The Worm at the Core

Having established the historical background of capital punishment in the United States, the origins and development of Eighth Amendment doctrine, and the foundations of constitutional regulation of capital punishment, this section will delve into the successes and failures of the modern death penalty era. It will evaluate the development of case law following *Furman* and raise concerns about both the *Furman* standards and other precepts of capital punishment jurisprudence developed in the decades following. It will then conclude with an extensive analysis of the heart of the question: whether the death penalty ought to be considered constitutional. Using a historically-informed combination of the two threads of Eighth Amendment doctrine developed by the Court, It will combine a discussion of human dignity with the extensive empirical study below to suggest a unified method by which the death penalty can fall to the Eighth Amendment’s proscription of “cruel and unusual punishments.”

The Modern Death Penalty Era

In 1976, the Supreme Court granted certiorari⁷³ on five cases challenging the constitutionality of state death penalty laws reformed in the wake of *Furman*: *Gregg v. Georgia*, *Proffitt v. Florida*, *Jurek v. Texas*, *Woodson v. North Carolina*, and *Roberts v. Louisiana*.⁷⁴ In this set of cases, often referred to by the lead case, *Gregg*, the Court distinguished between two basic approaches by state legislatures to meeting the *Furman* standards for capital punishment.

Louisiana and North Carolina had responded to *Furman* by limiting jury discretion in the extreme, making the death penalty mandatory for a limited range of crimes defined by specific factors. The Court rejected this approach, holding that mandatory death statutes were unconstitutional in themselves because they did not comport with the “evolving standards of decency” principle established in *Trop*, or individualize sentencing with respect for human dignity.⁷⁵ The Court also pointed to the historic phenomena of mercy acquittals, believing that juries would still exercise discretion when considering the grave consequences of a first degree murder or rape conviction, yet remain without guidance as to which murderers should receive the death penalty.⁷⁶

Georgia, Texas, and Florida responded quite differently, placing great emphasis on both jury discretion *and* targeted statutes. The Court upheld their death penalty schemes, its most extensive analysis being in *Gregg v. Georgia*. The new Georgia capital statute used five principal methods of offering allegedly extensive opportunities for jury discretion and appeal, while also limiting death sentencing to a verifiably ‘worse’ category of offenders: 1) capital sentences were limited to a smaller category of crimes; 2) the trial judge was required to charge offenses below capital crimes “when they are supported by any view of the evidence”; 3) if a defendant was convicted, the defendant would have substantial latitude to present mitigating evidence to avoid

death in a separate sentencing stage; 4) the jury would only be allowed, though not required, to convict if it found the presence of enumerated aggravating factors in the evidence presented by the prosecutor during the trial phase only; 5) the defendant would have a mandatory appeal to the Supreme Court of Georgia upon receiving a sentence of death, and it would be required to consider a claim of discriminatory application.⁷⁷ The Court approved of the bifurcated proceedings and aggravating/mitigating factors scheme, finding that “[w]hile such standards are by necessity general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary.”⁷⁸ The Court praised the mandatory appeal provision for similar reasons, claiming it would effectively screen for arbitrary factors like the influence of race.⁷⁹

Most notably, the Court in *Gregg* dedicated the entire first section of its opinion to explaining that in light of *Furman*’s indecisiveness on the matter, it believed “that the punishment of death does not invariably violate the Constitution.”⁸⁰ It began by recognizing, in the wake of precedent, that the Eighth Amendment is not a static concept, nor can it be limited to modes of torture or seventeenth-century methods of punishment; the Court also reaffirmed that a penalty must “accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’”⁸¹ The Court, however, limited the scope of such an inquiry to the idea that a punishment may not be excessive,⁸² a principle which it then limited again by establishing a constitutional presumption *for* the validity of a penal measure selected by “a democratically elected legislature.”⁸³ Seemingly breaking with *Weems*’ insistence that courts view the Eighth Amendment as a limit on legislatures,⁸⁴ the Court held “[w]e may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the

judgement of the representatives of the people.”⁸⁵ Finally, the Court concluded that the death penalty survived constitutional challenge, and therefore comports with the “dignity of man,” for two reasons. The first was that “a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction,” as demonstrated by the thirty-five state legislatures which enacted new death statutes in response to *Furman* and the fact that juries continued to sentence convicts to death under these statutes.⁸⁶ The second was that the death penalty serves two legitimate social purposes: retribution, which is valid because it allegedly prevents vigilantism, and deterrence, which, though “there is no convincing empirical evidence either supporting or refuting” its true influence, is valid because it makes intuitive sense.⁸⁷ The Court upheld the Florida and Texas statutes on similar grounds.

Unfinished Business

Following *Gregg*, the Court’s woes were not over. It was forced, again and again, to make the kinds of judgements it had tried to defer to legislatures in *Gregg*, enforcing its own *Furman* standards in the decades that followed. In *Coker v. Georgia* (1977), the Court addressed the proportionality standard by invalidating the death penalty for rape.⁸⁸ In *McCleskey v. Kemp* (1987)—a decision that has been called the modern-day *Dredd Scott*⁸⁹—the Court accepted a sophisticated study⁹⁰ that found that defendants killing white victims were more than four times as likely to be sentenced to death as defendants who killed Black victims, yet refused to say that this proved discrimination in the individual case of the black man with a white victim before it.⁹¹ The Court also worried that “McCleskey’s case, taken to its logical conclusion, throws into serious question the principles that underly our entire criminal justice system.”⁹² In *Thompson v. Oklahoma* (1988), the Court invalidated the death penalty as applied to an offender who was fifteen at the time of the crime, reestablishing explicitly the judiciary’s role in continuously

interpreting the Eighth Amendment according to evolving standards of decency.⁹³ In *Stanford v. Kentucky* (1989), the Court approved execution for offenders who were at least sixteen; in *Penry v. Lynaugh* (1989), the Court also approved the execution of the mentally disabled.⁹⁴ In *Atkins v. Virginia* (2002), the Court reversed *Penry* just thirteen years later, holding that execution of the mentally disabled no longer comports with evolving standards of decency.⁹⁵ Three years after, the Court reversed *Stanford* in *Roper v. Simmons* (2005), holding that execution of offending minors no longer comports with evolving standards of decency either.⁹⁶

There are most certainly other cases⁹⁷ in which the Court has considered the death penalty, but the above major cases addresses directly at least one of the *Furman* criteria. Notably, the Court has stayed away from evaluating the success of the “heightened reliability,” “narrowing,” or “individualized sentencing” standards (with the exception of invalidating mandatory statutes in the *Gregg* cases). After a badly botched decision in *McCleskey*, the Court has also resisted hearing challenges based on race, sticking instead to proportionality review in safe areas like the execution of minors, the mentally disabled, or crimes not resulting in death.⁹⁸ Fortunately, legal scholars and statisticians have collected mountains of evidence on the successes and failures of the four *Furman* standards, and their conclusion is nearly universal. The following pages will detail some of this work and the extent to which each of the *Furman* standards have succeeded or failed. It is only with this information that the *structural* success of the death penalty can be evaluated, an exercise necessary for the conclusion of this article.

Narrowing

When the Court ruled against mandatory death schemes in *Woodson* and *Roberts*, it made doctrine of the notion that states had to define specifically an aggravated murder in order to limit the number of crimes eligible for a death sentence. This would allow jurors to exercise “guided discretion.” The Georgia statute upheld in *Gregg* used such aggravating factors for this exact

#	Aggravating Factor <i>As listed in the 1962 Model Penal code</i>
1	The murder was committed by a convict under sentence of imprisonment.
2	The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
3	At the time the murder was committed the defendant also committed another murder.
4	The defendant knowingly created a great risk of death to many persons.
5	The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping.
6	The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
7	The murder was committed for pecuniary gain.
8	The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

purpose. Georgia’s aggravators in *Gregg* were drafted in the image of the list from the 1962 Model Penal Code,⁹⁹ a source which almost every capital State continues to use today.¹⁰⁰

A quick look at the list reveals an obvious problem: nearly every type of premeditated murder one can realistically imagine fits one of these aggravating factors, and *Gregg* requires only that the jury find *one* of these eight in the crime to sentence the defendant to death.¹⁰¹ The eighth aggravator might seem especially egregious, and though the Court once held that a death sentence could not be sustained on

the aggravating factor that a murder was “outrageously or wantonly vile,”¹⁰² it later upheld Idaho’s patently absurd aggravating factor: “By the murder or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.”¹⁰³ In the wake of the *Gregg* decision, states have also continued to add to their list of aggravating factors, a phenomenon named “aggravator creep” by death penalty scholars. At the behest of political pressure, states have modified their statutes to such an extent that most, if not nearly all, homicides in their

jurisdictions are death-eligible.¹⁰⁴ A 1997 study found that 87 percent of all first degree murders in California from 1988-1992 were death-eligible.¹⁰⁵ In Georgia, scholars found that 83 percent of all murder and nonnegligent manslaughter causes were death-eligible.¹⁰⁶ A similar situation was found in Missouri, where 76 percent of all homicides were factually death-eligible.¹⁰⁷ In Colorado, a 2013 study found that a whopping 92 percent of all murder and nonnegligent manslaughter cases were death-eligible.¹⁰⁸ *Deadly Justice: A Statistical Portrait of the Death Penalty*, an analysis of hundreds of death penalty-related studies, suggests two problems with the Court's goal of narrow targeting. First, the most heinous crimes, or "the worst of the worst," are very difficult to define, and if we acknowledge that race, class, and social differences may render jurors more or less outraged at a crime, we cannot expect consistency in their verdicts. Second, the perpetrators of the "worst" crimes are not always the most "deserving" of execution: many of those who commit extremely heinous crimes have strong mitigating factors attached to them, like mental illness or emotional distress.¹⁰⁹

In any case, it is clear that the Court's requirement that states narrow the category of offenders eligible for death has not been met. States have failed categorically to identify a limited number of characteristics which define a heinous murder. Rather, they have "simply described the various factors that collectively account for the circumstances surrounding most murders."¹¹⁰

Individualized Sentencing

The individualized sentencing standard demanded that states allow juries to consider mitigating factors when sentencing a person convicted of a capital crime, yet litigation over mitigating factors has destroyed their effectiveness. The Court has never defined what kinds of evidence judges and juries must be allowed to consider, only that it *can* be unrelated to the crime.¹¹¹ Most trial courts have therefore adopted the principle suggested in *Lockett v. Ohio*

(1978): that potential mitigating factors ought to be unlimited, and judges should not try to instruct juries on how to weigh different mitigating factors against the facts of the crime.¹¹²

Juries have essentially been returned to the pre-*Furman* era, in which they could exercise mercy for essentially any reason, a strong tradition in Anglo-American law. For these reasons, it is extremely difficult to define which mitigating factors (among potentially thousands) matter, and how much influence they have from a statistical standpoint, so only a few empirical studies have taken up the extremely time-consuming task. Even so, “[i]n virtually every large empirical study of who gets death, the accumulation of aggravating factors is strongly correlated with death, but mitigating factors tend to have less impact.”¹¹³ In other words, the standard of individualized sentencing has fallen by the wayside, with no meaningful way to define its scope.¹¹⁴

Proportionality

As noted above,¹¹⁵ most of the Court’s development of death penalty case law has been in the area of proportionality, but the effect has also been minimal. The Court has proscribed the execution of offending minors and the intellectually disabled to date, but these are often the most mitigated cases anyway.¹¹⁶ Proportionality, however, takes forms other than limiting which types of offenders can be executed. In a nod to proportionality, the Court in *Gregg* praised the Georgia mandatory appeals scheme for its requirement that a death sentence be set aside if death had not been imposed for crimes of a similar character.¹¹⁷ In other words, proportionality demands consistent sentencing for the most heinous, death-eligible crimes. In an ideal world, the narrowing standard would force states to determine a small group of especially heinous crimes, and the proportionality standard would lead jurors to sentence most of these offenders to death. This type of proportionality has been studied extensively, and the social science community considers the uniformity of the results to be definitive. The general consensus is that “[w]hile heinousness and torture tend to make a death sentence more likely, the tendency is very weak.

That is, many heinous crimes do not lead to death, and many crimes leading to death were not among the state's most heinous."¹¹⁸ The four studies cited above make the point: In California, only 9.6 percent of death-eligible offenders received a death sentence; in Georgia, only 17 percent. In Colorado, prosecutors sought the death penalty in only 3 percent of death-eligible cases, sought it until the end of the trial in only 1 percent of cases, and won a death sentence in only 0.6 percent. In Missouri the trend continues, where only 2.5 percent of death-eligible homicides received death sentences. An additional study conducted in New Jersey found that 6 percent of death-eligible offenders received the death penalty.¹¹⁹ As only a small percentage of death-eligible convicts are sentenced to death, it is impossible to say that similar offenders receive the same sentences.

An additional proportionality concern lies in the fact that some states sentence extremely high numbers of offenders but execute very few. California, Pennsylvania, and Tennessee house more than three times as many death row inmates as the three leading executioners, Texas, Oklahoma, and Virginia.¹²⁰ Pennsylvania has executed only 3 prisoners out of 408 death sentences reached in the last 40 years.¹²¹ California has executed only 13 prisoners since *Furman* out of over 77,000 death-eligible homicides; in fact, execution is only the third leading cause of death on California's death row, falling behind suicide and natural causes.¹²² The national rate of execution of those sentenced to death is only 16 or 25 percent, depending on whether we consider all death sentences or only those which have exhausted all appeals respectively. The conclusion: "[t]he death penalty is used so rarely in the United States that it cannot be seen as a usual punishment for capital-eligible crimes."¹²³ Proportionality, in both sentencing and actual administration of the death penalty, has therefore failed.

Heightened Reliability

“Heightened reliability” is the most amorphous of the *Furman* standards; this paper defines it as “fundamental fairness.” Reliability concerns as recognized by the Court have taken the shape of quality control for legal representation, the availability of *habeas corpus* petitions to federal courts, and even how courts are required to treat evidence of actual innocence, and while important, are outside the stated scope of this paper¹²⁴ Instead, it is most important to highlight the stunning degree to which race continues to play a definitive role in American capital punishment, despite the “reliability” standard’s intention otherwise.

As has been the case throughout American history, “[w]hen we get to the death penalty, the data suggest that the odds of execution strongly depend on the race and gender of the victim.”¹²⁵ This tendency has been studied dozens of times with exhaustive data sets and extremely sophisticated analysis. In 1990, the US Governmental Accountability Office selected 28 such high quality death penalty studies for analysis, and concluded that 82 percent of them proved that “those who murdered whites were more likely to be sentenced to death than those who murdered blacks, controlling for legally relevant factors.”¹²⁶ Studies demonstrate that Black defendants are *three* times more likely than whites to receive the death penalty when the victim is white, and that all defendants accused of killing white victims were more than *four* times more likely to receive a death sentence than those accused of killing Black victims.¹²⁷ When gender and race are included together, 1.24 percent of homicides with a white female victim result on a death sentence, while only 0.1 percent of homicides with a black male victim result in a death sentence. “[W]hen a white person kills a black victim, especially a male victim, odds of an execution are vanishingly small. In fact, in many US states, such an execution has never occurred...”¹²⁸ The tradition inherited from early colonial death statutes, which wantonly

executed Blacks for the most meager crimes, is exactly the kind of “caste aspect” that led Justice Douglas to find the death penalty unconstitutional as administered in *Furman*, and it lives on in today’s system.¹²⁹ Heightened reliability has failed.

Objective Indicia

In concluding this analysis of constitutional regulation, the serious flaws in the method by which the Court determines “the evolving standards of decency that mark the progress of a maturing society” should be noted.¹³⁰ These are what the Court calls “objective indicia” of the public perception of capital punishment: jury sentencing practices and state legislative practices.¹³¹

Jury sentencing practices are certainly somewhat representative of the social acceptance of capital punishment: if *nobody* is sentenced to death, then society certainly does not approve. Notwithstanding the extremely low sentencing and execution rates, the Court seems to have forgotten that *opponents of capital punishment are not permitted to serve on capital juries*.¹³² In most cases, the prosecutor need not even use a preemptory strike to seek their dismissal. There is no similar exclusion for the stalwart supporter of capital punishment, which obviously makes the jury an unrepresentative sample of public opinion. There is also evidence that prosecutors “frequently rely on racial stereotypes and racially coded presumptions of guilt to achieve convictions and increase the likelihood that the death penalty will be imposed,” thereby adding more arbitrariness to any reliance on jury sentencing practices.¹³³ When considering jury sentencing practices, it must be remembered that they exclude a large portion of society, a group whose opinions are very relevant to determining “evolving standards of decency.”

In relation to state legislative decisions, two points should be noted. First, it has proven to be an unreliable indicator of social consensus. After the Court approved the execution of

mentally disabled offenders in *Penry v. Lynaugh* (1989), nineteen states exempted the mentally disabled from execution which had not done so already. The Court was forced to overturn *Penry* just thirteen years later. The same is true of executing juvenile offenders: the Court reversed itself in *Stanford* just fifteen years later. These cases used state legislatures as “objective indicia,” and both were rejected by many of those same legislatures only a few years later.¹³⁴ Second, using the actions of popularly-elected legislatures to decide the constitutionality of their own policies toward extreme minorities is simply nonsensical. *United States v. Caroline Products* (1938) has recognized that legislative enactments deserve stricter scrutiny when they affect “discrete and insular minorities,” especially those who lack sufficient social or political power to protect their own rights.¹³⁵ Death row inmates are as discrete, insular, politically and socially powerless as it gets. Death penalty statutes are also subject to social order rhetoric which often extends the political will for the death penalty beyond its actual popular support.¹³⁶ These objections call into question the Court’s deference to state legislative judgement in *Gregg* and onward,¹³⁷ not only in their application of the death penalty, but their role in determining “evolving standards of decency.”

Part III: The Heart of the Question

Human Dignity: The First Thread

In light of the repeated and spectacular failures of constitutional regulation, can one still say the death penalty is constitutional *as applied*? Clearly not, at least based on the Court’s own rules. The failures of the system are not simply in the state legislatures, but in the fundamental conflicts of the *Furman* standards themselves. “Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death [...] can never be achieved without compromising an equally essential component of fundamental

fairness—individualized sentencing.”¹³⁸ This impossibility alone has led at least one Supreme Court justice who believed in the constitutionality of the death penalty *per se* to renounce his support.¹³⁹ Yet the Court has continued to regulate, not finding Eighth Amendment justification for invalidating the death penalty on structural grounds. Such justification clearly exists, but the question must go further (or perhaps much less far) than that: there is no constitutional compatibility between respect for human dignity and capital punishment in any circumstance. Following the foundational Eighth Amendment cases of *Weems* and *Trop*, Eighth Amendment doctrines declares that penal measures must comport with respect for human dignity.¹⁴⁰ It is in this first vein that we undertake the following analysis.

“Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.”

Looking back to the text of the Eighth Amendment, one might fairly ask where constitutional recognition of human dignity could arise. Hugo Adam Bedau explains the problem by suggesting three basic approaches to constitutional interpretation: 1) if a term or value is not explicit, there is no constitutional recognition; 2) if a term or value is not explicit, there is a presumption against its constitutional recognition; 3) if a term or value is not explicit, it can only be recognized by the presence of other explicit terms or values which amount to clear recognition of the first term or idea itself.¹⁴¹ In terms of the Bill of Rights, the third approach has been the most popular with the Court. It is obvious, of course, that principles often defend values which they do not explicitly mention,¹⁴² and in the case of the Eighth Amendment, “[w]e cannot make sense of the prohibition [on “cruel” and “unusual” punishments] without acknowledgement of the underling values; we cannot accept the prohibition without tacitly embracing the values it protects.”¹⁴³ Anyone who views the Bill of Rights as strict, unambiguous rules of governance, rather than value-stating principles, will find their position woefully unsupported by the

historical record.¹⁴⁴ James Madison, the very author of the Bill of Rights (and noted death penalty opponent), had no confidence in explicit prohibitions, hoping only that the principles of the Bill would earn “that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite liberty.”¹⁴⁵ It is not surprising, therefore, that the Court identified respect for human dignity as the principle underlying the Eighth Amendment in its earliest cases, a decision which has been accepted by the Court over and over for decades.¹⁴⁶ Inspired by Bedau, one could ask, is it truly possible to say “I am all for the Eighth Amendment’s prohibition on cruel and unusual punishments, but I don’t give a fig about human dignity.”?

The Supreme Court has, however, decided that respect for human dignity is somehow compatible with execution by the State, largely because of the legitimacy of the deterrent and retributive rationales.¹⁴⁷ Each State interest has been the subject of vigorous historic objection,¹⁴⁸ and deterrence especially receives no statistical support after decades of intense study,¹⁴⁹ but the intelligibility of both (insofar as they are state interests to be weighed) relies on either the assumption that the condemned *forfeits* his right to life, or the idea that the State as constituted can *take* his right to life from him in order to further its own interests. This is because it is a basic principle of our founding philosophy that simple considerations of social utility are insufficient to override the basic rights held by individuals. Blackstone is ambivalent between forfeiture and seizure, and offers little critical analysis of how exactly it can be the case that government is empowered to determine that a subject no longer has, by hook or by crook, the basic humanity required to have his right to life.¹⁵⁰ Enlightenment philosophy is somewhat more supportive of “forfeiture,” most clearly in the works of Locke and Rousseau.¹⁵¹ Yet the founding generation seem to have been unimpressed by this argument, at least when drafting their major documents

of political philosophy. The founding period is littered with political speech asserting “inalienable rights.” The Declaration of Independence asserts the inalienable right to life, as does the Virginia Declaration of Rights, and every state constitution in existence during the drafting and ratification period. A contradiction remains: it is *also* uncontroversial that the death penalty was a common feature of criminal justice during this period.¹⁵² A founding-era tension existed between the inalienable rights of man and the traditional practice, inherited from England, of executing criminals.

As already noted, a crucial difference between the criminal justice system from which the founding generation inherited the death penalty and the one they established in the United States, is that the American federal government is built upon popular sovereignty. The people grant certain powers to their government, and reserve all other powers and rights. They also retain sovereignty, which is to say that every action of government is underwritten by the authority of the people, a fact which, when applied to the American death penalty, is clearly illustrated by the entirely local nature of its administration during the founding period.¹⁵³ For this reason, the language of forfeiture is somewhat disingenuous. “[I]t wraps in deceptive legalistic-moralistic language the fact that it is *we* who have decided the murderer shall die, and that *we* are about to kill him.”¹⁵⁴ Such a decision relies on popular power to decide that their fellow man no longer has the right to life, a right, among his others, derived from his inherent dignity/status as a human being. It is unclear where the people derive such power, that is, the power to “decree that someone no longer has the status of a moral human being.”¹⁵⁵

The very purpose of retaining natural and inalienable rights from the government is that it be denied such powers. In fact, our entire criminal justice system *depends* on criminals retaining their dignity. A criminal’s status as a moral being, their dignity and autonomy,¹⁵⁶ is the very

reason that they can be held responsible for a crime, a fact demonstrated by the legal presumption against penalty for the insane or mentally disabled. So, too, demonstrates the fact that murderers retain expansive rights of due process, legal representation, and jury trial before and after their conviction, right up until their execution ends their existence. When this logic is applied to the death penalty, therefore, the principle and the punishment become incompatible. “The judgement that certain persons, who (by virtue of their being persons) are conceded to have had basic human rights prior to their criminal acts, nevertheless forfeit or otherwise relinquish *all* these rights by committing certain crimes—as though they had therewith miraculously ceased to be moral creatures at all—receives no support from experience at all.” Furthermore, “[i]t is conceptually impossible [...] for a person in a given act to deserve condemnation by the law for the criminality of that act *and* for the person to have proved by this act that he is no longer a person at all—but only a creature who now lacks any moral standing in the community of persons.”¹⁵⁷ Recall too the Supreme Court’s own decision in *Trop v. Dulles* stating unequivocally that the government has no power to denationalize its citizens, as this would amount to “[t]he total destruction of the individual’s status in organized society...[his] right to have rights.”¹⁵⁸ It follows that if the government is denied the opportunity to decide which American citizens still have basic rights, which is to say rights essential to their humanity, that the government is equally denied the power to destroy the very source of those rights: the prisoner’s moral and physical personhood.

“Nor Deprived of Life:”¹⁵⁹ the Second Thread

If constitutionally-mandated respect for human dignity is the worm at the core of the death penalty, the Fifth Amendment has played a similar role for abolitionism. Steven Levinson called it a “devastating problem” for constitutional abolitionism especially.¹⁶⁰ Pro-death penalty

scholars, as well as superficial logic, point frequently to the “nor deprived of life” clause as evidence of the Framers’ original intention that the government be granted license to kill.¹⁶¹ It is certainly one potential reason for the traditional persistence of capital punishment in the face of critical analysis of like kind to what we have undertaken thus far. Historical analysis of the Eighth and Fifth Amendments, however, leaves this time-worn talking point with significantly less support, offering in its place a new interpretation of the Eighth Amendment that builds upon our human dignity analysis.¹⁶² It is in reinterpreting the Fifth Amendment that we return to the second thread of Eighth Amendment doctrine: that its purview changes with “the evolving standards of decency that mark the progress of a maturing society.”¹⁶³

Nobody suggests that the Framers produced a Constitution that was exactly reflective of their beliefs or the time in which they lived.¹⁶⁴ Compromise in light of political difference was an essential part of drafting and ratification, as was the very inclusion of the Bill of Rights, demonstrated by the fact that the original Constitution contained clauses sharply in conflict with the overall philosophy of the document. Among the many aspects of founding-era society which the Constitution aspired beyond, slavery is perhaps the most obvious. The Constitution never *explicitly* mentions “slavery” because of the Founders’ distaste for the institution, but contains eleven clauses with implications for slave property and slaveowners’ interests, most notably the “three fifths” clause. Yet it would be anathematic to suggest that each and every other provision for liberty in the Constitution must therefore be sympathetic of slavery. To do so would be to reject the historical record and the analytical reality that “the sometimes inapposite practical immediacy of the Constitution can be separated from the enduring aspiration.”¹⁶⁵

The tension between the new Constitution’s soaring aspirations and certain contemporaneous institutions was intentional, aimed at phasing out practices incompatible with

liberty and progress, at least according to notable figures at the time. Alexander Stephens, the Vice President of the Confederacy, was convinced that the Framers made no effort to accommodate the document to institutions they despised, and realized that the Constitution “could serve as the basis for a declaration that slavery was constitutionally illegitimate in the Union at the very moment in which he spoke, even if it had failed to do so in the founding generation.”¹⁶⁶ Given the history discussed at the beginning of this work—the turmoil surrounding the death penalty during the founding and ratification period, the development of mainstream opposition¹⁶⁷—there is no intellectual dishonesty in considering a similar disagreement with the Constitution and the institution of capital punishment. Recall Banner’s argument that primary sources from the founding period indicate that leading thinkers considered the death penalty ill-suited to the era of progress in which they lived.¹⁶⁸

If one chooses to view the Eighth Amendment as a feature of an aspirational Constitution, a historical record that seemed not to need it begins to make more sense. Why would the founding generation, “already free of the most horrific English punishments” that inspired the provision’s inclusion in the English Bill of Rights, need the same provision in their own Constitution?¹⁶⁹ During the ratification debates in the House of Representatives, Mr. Smith wondered at this very problem. The answer is that the Framers were not interested in creating a government that would function only for the maintenance of the society in which they lived. The Bill of Rights elucidates *principles* of just and republican government, at least in large part to ensure their acceptance in future generations.¹⁷⁰ The Framers were explicit in outlawing certain types of criminal procedure when they wanted to be—ex post facto laws and bills of attainder did not make the cut—so it is hard not to see the Eighth Amendment as *deliberately* ambiguous,

adaptable to new problems or new understandings of old ones.¹⁷¹ The Supreme Court itself agrees with this interpretation of the Eighth Amendment.

Weems v. United States: “Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.”

Trop v. Dulles: “The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our nation.”¹⁷²

Given this interpretation, especially in light of the distaste for capital punishment held by many of the leading figures of the founding generation, This paper follows Gilreath in suggesting that “[l]ike slavery, capital punishment, by the very inclusion of the Cruel and Unusual Clause, is marked for future visitation with a measure of disapprobation that serves as the seed for its eventual obliteration.”¹⁷³ Perhaps Mr. Livermore, who complained about *exactly* this potential during the House ratification debates, was right.¹⁷⁴ The Eighth Amendment *is* capable of wider application than the mischief which gave it birth. Perhaps it even demands it; both Federalists and Anti-Federalists had aspirations for the Bill of Rights to be a set of transcendent principles.¹⁷⁵ To Mr. Livermore’s concern that the Eighth Amendment might someday be used to question the constitutionality of capital punishment, all we can reply is that not one member of the House stood to tell him that he was wrong. And immediately after, the amendment “was agreed to by a considerable majority.”¹⁷⁶

The Fifth Amendment, therefore, ought to be seen as more of an insurance policy than anything else: a recognition that capital punishment existed at the time and required due process just like any other crime. It is hardly an endorsement of the death penalty. It simply “acknowledges that capital punishment was a prevailing practice, but this recognition is similar to the recognition accorded slavery.”¹⁷⁷ When it comes to the constitutional fate of the death

penalty, therefore, our records of the founding period demand that the Eighth Amendment, and not the Fifth, be where we look.

A Total View of the Eighth Amendment

It is clear that the Eighth Amendment can function as both a restrictive and aspirational constitutional mandate. It is restrictive in the sense that it proscribes penal measures which are incongruent with the moral status of every American citizen. Punishments like torture, which throw into question the dignity of the victim, are proscribed. so if we think with any moral clarity about the rights Americans reserved for ourselves from government, indeed the rights that are inalienable from us, we find ourselves at a loss for justification to take by force the very quality of other citizens that makes them bearers of any rights at all. The Court made a great error when it began its decisions on execution by describing it as “the mere extinguishment of life,” for such action is not “mere” at all.¹⁷⁸ When we execute a prisoner who has done violence to a member of our society, we totally destroy his moral and physical existence. It is truly difficult to distinguish such action from shooting a prisoner of war.

The Eighth Amendment is also aspirational. The Framers gifted Americans principles of just and republican government that were better than their time, demanding that we reflect on their meaning and apply them to the injustices of our own age. The Eighth Amendment is one such principle, one which harkens to a more enlightened future in each generation which reads its words. It is a reminder, a call to action, a mandate even, to ensure that institutions, *systems*, which carry out justice in *our name*, on *our authority*, respect human dignity. It gives ammunition to destroy institutions which sentence to death one race more than the other, give different penalties for identical crimes, or fail to respect the humanity of those they act upon. Let us not forget that the government acts only on the authority of the people who decide whether

state and federal governments execute people. Nor should the Court forget that the Eighth Amendment empowers them in a similar way. It is *intended* to curtail legislative enactments like capital statutes, and its aspirational mandate applies no less to the Supreme Court justice than the American voter.¹⁷⁹

Conclusion

This article illustrates the injustice in our capital punishment *system* that the Eighth Amendment demands action upon. In the Court's experience with the death penalty and its attempts to regulate it over more than fifty years, the United States has seen "the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent and reliable sentences of death required by the Constitution."¹⁸⁰ The statistical record of constitutional regulation is incompatible with an aspirational interpretation of the Eighth Amendment, and urgently so. Even if the Court believes that the death penalty comports with Eighth Amendment respect for human dignity, which it obviously does not, the founding generation also gave us and the Court constitutional justification to invalidate capital punishment on *structural* grounds.

The combination of these two threads of Eighth Amendment doctrine, identified by the Court in its first Eighth Amendment cases, is the most comprehensive interpretation of the Eighth Amendment this paper can suggest, and the one most offended by capital punishment. Unfortunately, abolitionists have heretofore been forced to focus on one or the other. Those, like Bedau, who focus on the conflict between respect for human dignity and capital punishment, can demonstrate a clear philosophical incompatibility with the death penalty *as such*, but cannot argue with a Court that has declared otherwise and will only hear challenges on regulation. On the other hand, scholars like Carol and Jordan Steiker and the hundreds of statisticians who have

studied the failures of constitutional regulation, argue that the Court might invalidate the death penalty on structural grounds, but find themselves at a loss for historical and constitutional justification to say that *structural* failures can justify invalidating the death penalty itself.

This historical analysis, combined with identification of these threads of Eighth Amendment interpretation and the clear failures of constitutional regulation, offers a valid interpretation of the Eighth Amendment that combines both *as such* and *structural* claims against the constitutionality of capital punishment. Not only does simple logical analysis of human dignity and capital punishment invalidate its use in individual cases, but the founding history and structural analysis invalidates the capital punishment *system* as a failure of the promise of our republic.

ENDNOTES

¹ *In re Kemmler*, 136 U.S. 447 (1890).

² *Furman v. Georgia*, 408 U.S. 238 (1972).

³ Louis P. Pojman. “Why the Death Penalty is Morally Permissible” in *Debating the Death Penalty: Should America Have Capital Punishment?: The Experts on Both Sides Make Their Case*, Bedau, Adam, and Paul Cassell, eds., (New York: Oxford University Press, 2004).

⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵ Raoul Berger. “Justice Brennan, ‘Human Dignity,’ and Constitutional Interpretation” in *The Constitution of Rights: Human Dignity and American Values*, Meyer, Michael J., and W.A. Parent, eds., (Ithaca, New York: Cornell University Press, 1992), 131.

⁶ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Constitution of the United States of America, Amendment VIII.

⁷ Stuart Banner. *The Death Penalty: An American History*, 2003 Paperback Edition, (Cambridge, Massachusetts: Harvard University Press, 2002), 4.

⁸ *Ibid.*, 6-9.

⁹ *Ibid.*, 16.

¹⁰ *Ibid.*, 24.

¹¹ *Ibid.*, 30.

¹² *Ibid.*, 33-34.

¹³ *Ibid.*, 51-53.

¹⁴ *Ibid.*, 37.

¹⁵ *Ibid.*, 38.

¹⁶ Ibid., 39.

¹⁷ Ibid., 88.

¹⁸ *Baze v. Rees* 553 U.S. 13 (2008), see Justice Scalia's concurring opinion at 88, claiming that no historical or legal precedent, save modern Supreme Court decisions, suggests that capital punishment disagrees with the Constitution. See also Hugo Bedau. *The Courts, The Constitution, and Capital Punishment*, (Washington D.C.: Lexington Books, 1977), 118. "[u]ntil fifteen years ago, save for a few mavericks, no one gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law."

¹⁹ Banner, *supra*, 88.

²⁰ Ibid., 88.

²¹ Cesare Bonesana di Beccaria. "An Essay on Crimes and Punishments - Online Library of Liberty." Accessed November 9, 2019. <https://oll.libertyfund.org/titles/beccaria-an-essay-on-crimes-and-punishments>. Chapter 28, sections 98 and 100.

²² Banner, *supra*., 91.

²³ Akhil Amar. *The Bill of Rights*, (New Haven: Yale University Press, 1998), 109-110.

²⁴ William Blackstone. *Commentaries on the Laws of England: Of Public Wrongs*, Ruth Paley ed., vol. 4, (Oxford University Press, 2016), ch. 1, sec. 17. Quoted in Banner 92.

²⁵ Banner, *supra*, 93-94.

²⁶ Ibid., 89.

²⁷ Ibid., 91.

²⁸ "Founders Online: 64. A Bill for Proportioning Crimes and Punishments in Cases H" Accessed November 30, 2019. <http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0064>.

²⁹ Banner, *supra*., 96.

³⁰ Ibid., 98.

³¹ Ibid., 100, also at 98.

³² Ibid., 100-101.

³³ Ibid., 93, 101, 109,

³⁴ After the Norman Conquest and the subsequent partition of temporal and ecclesiastical English courts, a clergyman charged in temporal court could plead his benefit—the 'clergy'—to prevent prosecution. Due to insufficient records, courts often assessed clerical status by simply testing if the defendant could read, a loophole exploited by illiterate laymen who simply memorized the most commonly used Bible passages. By the late fifteenth century the exemption had become so common that it became a system of leniency for first time offenders; though clergymen could use the benefit as often as needed, laymen were branded on the thumb to indicate that they had already used their immunity. Ibid., 62-64.

³⁵ Ibid., 64.

³⁶ Ibid., chapter 3 generally.

³⁷ Ibid. 94.

³⁸ Ibid. 104; James Hurston. "The Bill of Rights and the American Experience" in *A Culture of Rights*, Lacey and Haakonsson, eds., (Cambridge: 1991), 62-66; Jack Rakove. "Parchment barriers and the politics of rights" in *A Culture of Rights*, Lacey and Haakonsson, eds., (Cambridge: 1991), 102-108.

³⁹ Raoul Berger, in his highly critical essay "Brennan, 'Dignity,' and Constitutional Interpretation" (*supra*) cites Justice Brennan's own writings on the history of the death penalty to

support his conclusion that disagreement between the Eighth Amendment and the death penalty has “no constitutional warrant” (131). See also *Gregg v. Georgia*, 428 US 153 at 176.

⁴⁰ For Titus Oates, see: Laurence Claus. “The Anti-Discrimination Eighth Amendment,” *Harvard Journal of Law and Public Policy*, Vol. 28 (2004), citing Parliament’s explicit recognition of the role of the Oates sentence as inspiration for the cruel and unusual clause. For the Bloody Assizes, see Justice Scalia’s opinion in *Harmelin v. Michigan*, 501 U.S. 957 (1991), at 967-958, writing “Most historians agree that the “cruell and unusuall Punishments” provision of the English Declaration of Rights was prompted by the abuses attributed to the infamous Lord Chief Justice Jeffreys of the King’s Bench during the Stuart reign of James II.”

⁴¹ Steve Pincus. *1688: The First Modern Revolution*, (New Haven: Yale University Press, 2009), p. 153.

⁴² Berger, *Brennan, “Dignity,” and Constitutional Interpretation* (*supra*) at 132.

⁴³ William Blackstone. *Commentaries on the Laws of England: Of Public Wrongs*, Ruth Paley ed., vol. 4, (Oxford University Press, 2016), ch. 1, sec. 13.

⁴⁴ *Ibid.*, (emphasis mine).

⁴⁵ *Ibid.*, section 14.

⁴⁶ William Blackstone. *Commentaries on the Laws of England: Of Public Wrongs*, Ruth Paley ed., vol. 4, (Oxford University Press, 2016), ch. 10, sec. 138.

⁴⁷ 1 Annals of Congress, (1789), 754.

⁴⁸ *Furman v. Georgia*, 408 U.S. 238, Brennan concurrence at 263

⁴⁹ This was during the state round of the ratification of the original US Constitution, while the debates from the Annals of Congress cited above were concerning the ratification of the ten amendments which would comprise the Bill of Rights.

⁵⁰ Which is to say, the Virginia Declaration of Rights

⁵¹ The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan, (Charlottesville: University of Virginia Press, 2009). Original source: Ratification by the States, Volume X: Virginia, No. 3

⁵² Jack Rakove. “Parchment barriers and the politics of rights” in *A Culture of Rights*, Lacey and Haakonsson, eds., (Cambridge: 1991), 129-134.

⁵³ *Weems v. United States*, 217 U.S. 349, at 372

⁵⁴ In *In re Kemmler* (1890), *supra*, the Court considered a *habeas corpus* petition based on an Eighth Amendment challenge to the electric chair. It wrote that “[p]unishments are cruel when they involve torture or a lingering death; but the punishment is not cruel, within the meaning of the word as used in the Constitution. It implies there something more inhuman and barbarous, and something more than the mere extinguishment of life.” Yet the Court in *Weems* distances itself from this opinion, claiming that it has no Eighth Amendment authority because “[t]he case was an application for *habeas corpus*, and went off on a question of jurisdiction, this court holding that the Eighth Amendment did not apply to state legislation. It was not meant in the language we have quoted to give a comprehensive definition of cruel and unusual punishment...”

⁵⁵ *Weems v. United States*, 217 U.S. 349 (1910)

⁵⁶ *Weems* at 373

⁵⁷ *Weems* at 376, the Court specifically cites *Hobbs v. State*, 32 N.E. Rep. 1019 (Indiana Supreme Court) as an example of this sort of mistake.

⁵⁸ *Trop v. Dulles*, 356 U.S. 86.

⁵⁹ *Ibid.*, 99.

⁶⁰ *Ibid.*, 100-101.

⁶¹ *Ibid.*, 100.

⁶² *Ibid.*, 102.

⁶³ *Ibid.*, 100-101.

⁶⁴ *Weems* briefly mentions the death penalty in its discussion of *In re Kemmler*, but offers it no truly critical treatment. The Court, in what looks like an unforced error, seemed to rule casually on the death penalty in *Trop*, only to spend the rest of its opinion declaring denationalization unconstitutional in language that could easily be applied to capital punishment.

⁶⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁶⁶ *Ibid.*, 239-240.

⁶⁷ Douglas at 249-250, Brennan beginning at 258, Stewart at 309-310, White at 314, Marshall from 315 to 372.

⁶⁸ Carol Steiker and Jordan Steiker. *Courting Death: The Supreme Court and Capital Punishment*, (Cambridge, Massachusetts: Harvard University Press, 2016), pg. 156.

⁶⁹ *Ibid.*, 157.

⁷⁰ *Furman v. Georgia*, 408 U.S. 238, see Douglas and Marshall concurrences

⁷¹ Steiker and Steiker, *ibid.*, 158

⁷² *Ibid.*, 158.

⁷³ A writ of certiorari is a writ or order given by a higher court in which it formally notifies a lower court that it will review a judgement for which no appeal is available as a matter of right.

⁷⁴ *Gregg v. Georgia*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242; *Jurek v. Texas*, 428 U.S. 262; *Woodson v. North Carolina*, 428 U.S. 280; *Roberts v. Louisiana*, 428 U.S. 325.

⁷⁵ *Woodson* 289-301, 303-305

⁷⁶ *Ibid.*, 302-303.

⁷⁷ *Gregg* 162-169.

⁷⁸ *Ibid.*, 193-195.

⁷⁹ *Ibid.*, 198.

⁸⁰ *Ibid.*, 169.

⁸¹ *Ibid.*, 173, citing *Trop v. Dulles*, 356 U.S. 86, at 100.

⁸² *Ibid.*, 173, the Court defined excessive punishment as involving “the unnecessary and wanton infliction of pain” or punishment “grossly out of proportion to the severity of the crime,” citing *Furman* 392-393 and *Trop* 100 with *Weems* 376 respectively.

⁸³ *Ibid.*, 175.

⁸⁴ *Weems v. United States*, 217 U.S. 349, at 376; this is especially notable because the court cited *the exact same page* only a few paragraphs earlier.

⁸⁵ *Gregg v. Georgia*, 428 U.S. 153, at 175.

⁸⁶ *Ibid.*, 175-182; State legislative practices and jury sentencing would later be enshrined in *Ford v. Wainwright*, 477 U.S. 399 (1986), as “objective indicia” of “evolving standards of decency.”

⁸⁷ *Ibid.*, 183-186. The exact quotations are as follows. For retribution: “it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs” (183). For deterrence: “[Despite lack of convincing empirical evidence, we] may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty is undoubtedly a significant deterrent. There are carefully-contemplated murders, such as murder

for hire, where the possible penalty of death *may well* enter into the cold calculus that precedes the decision to act” (emphasis mine, at 185-186).

⁸⁸ Coker v. Georgia, 433 U.S. 584 (1977).

⁸⁹ Adam Liptak. “New Look at Death Sentences and Race.” *The New York Times*, April 29, 2008, sec. U.S. <https://www.nytimes.com/2008/04/29/us/29bar.html>.

⁹⁰ David C. Baldus, Charles A. Pulaski, and George G. Woodworth (1983). “Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience”. *Journal of Criminal Law and Criminology*. 74 (3): 661–753.

⁹¹ McCleskey v. Kemp, 481 U.S. 279 (1987)

⁹² *Ibid.*, at 314-315.

⁹³ Thompson v. Oklahoma, 487 U.S. 815 (1988), see Justice Stevens at 821.

⁹⁴ Stanford v. Kentucky, 492 U.S. 361 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989).

⁹⁵ Atkins v. Virginia, 536 U.S. 304 (2002).

⁹⁶ Roper v. Simmons, 543 U.S. 551 (2005).

⁹⁷ The two other major death penalty decisions in the modern era concern challenges specifically to the *method* of execution. In *Baze v. Rees* (2008), the Court held that an execution method must present a “substantial” or “objectively intolerable” risk of serious harm in order to fall to the Eighth Amendment. And state’s refusal to adopt alternative procedures is unconstitutional only where the alternative procedure is feasible, readily implemented, and in fact significantly reduces a substantial risk of pain. In *Glossip v. Gross* (2015), the Court further limited potential Eighth Amendment challenges by holding that condemned prisoners can only challenge their method of execution after providing a known and available alternative method.

⁹⁸ The *McCleskey* decision deserves an article all its own. It is a stunning example of the refusal of the Court to admit the role that race has played in American capital punishment since its inception. *Courting Death* (Steiker and Steiker, *ibid.*) devotes an entire chapter to this ridiculous phenomenon, cataloguing the Court’s various contortions over the years to avoid acknowledging facts about race and the death penalty that are demonstrated by literally dozens of studies (see pg. 78-115). Notably, Justice Lewis Powell, the writer of the *McCleskey* majority opinion, has identified *McCleskey* as the one vote he wish he could go back and change (see Liptak, “New Look at Death Sentences and Race,” *ibid.*).

⁹⁹ American Law Institute 1962, (Model Penal Code §210.6(3)).

¹⁰⁰ Steiker and Steiker, *supra*, 159.

¹⁰¹ Gregg v. Georgia, 428 U.S. 153, at 196-198.

¹⁰² Godfrey v. Georgia, 446 U.S. 420 (1980).

¹⁰³ Arave v. Creech, 507 U.S. 463 (1993), at 465, cited by Steiker and Steiker, *supra*, 160.

¹⁰⁴ Frank Baumgartner, Marty Davidson, Kaneesha Johnson, Arvind Krishnamurthy, and Colin Wilson. *Deadly Justice: A Statistical Portrait Of The Death Penalty*. (New York, New York: Oxford University Press, 2018), 108.

¹⁰⁵ Steven F. Shatz and Nina Rivkind. “The California Death Penalty Scheme: Requiem for *Furman*?” *New York University Law Review* 72 (1997): 61.

¹⁰⁶ David C. Baldus, Charles A. Pulaski, and George G. Woodworth. “Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience.” *Northwestern Journal of Criminal Law and Criminology* 74 (1983).

¹⁰⁷ Katherine Barnes, David Sloss, and Stephen Thaman. “Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases.” *Arizona Law Review* 51, no. 2 (2009): 305.

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- ¹⁰⁸ Justin F. Marceau, Sam Kamin, and Wanda Foglia. “Death Eligibility in Colorado: Many Are Called, Few Are Chosen.” SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, January 31, 2013.
- ¹⁰⁹ Baumgartner et. al., *supra*, 115.
- ¹¹⁰ *Ibid.*, 115.
- ¹¹¹ Steiker and Steiker, 166; Eddings v. Oklahoma, 455 U.S. 104 (1982), at 112-115.
- ¹¹² Lockett v. Ohio, 438 U.S. 586 (1978); Baumgartner et. al. 103.
- ¹¹³ Baumgartner et. al. 103.
- ¹¹⁴ Steiker and Steiker, 167-168.
- ¹¹⁵ See “Unfinished Business,” pg. 20-22.
- ¹¹⁶ Steiker and Steiker, 164: they suggest that “for proportionality limits to have a profound impact, [the Court] would have to limit the death penalty to the most highly aggravated cases (such as mass murder)...”
- ¹¹⁷ Gregg v. Georgia, 428 U.S. 153, at 204-205.
- ¹¹⁸ Baumgartner et. al., 91.
- ¹¹⁹ For more information and commentary on the studies cited *supra* (fn. 112-113), see Baumgartner et. al., 91-94.
- ¹²⁰ Baumgartner et. al., 117-119.
- ¹²¹ <https://deathpenaltyinfo.org/executions/execution-database> (note that each prisoner waived their right to appeal)
- ¹²² Baumgartner et. al., 123; <https://www.cdcr.ca.gov/capital-punishment/condemned-inmates-who-have-died-since-1978/>
- ¹²³ Baumgartner et. al., 145, 135.
- ¹²⁴ Legal representation claims have been mostly ignored by the Court, evidenced by the mountainous standard of misconduct required for relief (Steiker and Steiker 170). *Habeas corpus* petitions to federal courts are often the only way that state inmates can get their case in front of a judge not subject to election, but this right has been sharply limited as well (Steiker and Steiker 172). Even claims of actual innocence have fallen on deaf ears with the Court, which has declined “squarely to embrace the proposition that the Constitution requires judicial relief for a death-sentenced inmate who can prove his innocence,” suggesting instead that such claims are fit for the parole board (Steiker and Steiker 173, Herrera v. Collins, 506 U.S. 390 (1993)).
- ¹²⁵ Baumgartner et. al., 72.
- ¹²⁶ *Ibid.*, 72-73, citing U. S. Government Accountability Office. “Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities,” no. GGD-90-57 (February 26, 1990).
- ¹²⁷ John Donohue. “An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?” *Journal of Empirical Legal Studies* 11, no. 4 (2014): 637–96; Baldus et. al., *supra*.
- ¹²⁸ Baumgartner et. al. 75, 85.
- ¹²⁹ Furman v. Georgia, 408 U.S. 238, at 255.
- ¹³⁰ Trop v. Dulles, 356 U.S. 86, at 100-101.
- ¹³¹ Ford v. Wainwright, 477 U.S. 399.
- ¹³² Such exclusion extends beyond total opposition to capital punishment, including jurors who would be “substantially impaired” in their ability to choose a death sentence by their personal or religious beliefs. See Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 469 U.S. 412 (1985). A further disability is that jury selection decisions may not be appealed beyond the trial court. See Uttecht v. Brown, 551 U.S. 1 (2007), Justice Stevens dissenting.

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- ¹³³ Bryan Stevenson. “Close to Death: Reflections on Race and Capital Punishment in America” in *Debating the Death Penalty*, Hugo Bedau and Paul Cassell eds., (Oxford: New York, New York, 2004), 91. (see footnote 84)
- ¹³⁴ *Penry v. Lynaugh*, 492 U.S. 302, at 330-335; *Stanford v. Kentucky*, 492 U.S. 361, at 370-374.
- ¹³⁵ *United States v. Caroline Products*, 304 U.S. 144, (1938), at 154, fn. 4.
- ¹³⁶ Stevenson 92, *supra*; Joseph Bafumi, and Michael C. Herron. “Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress.” *The American Political Science Review* 104, no. 3 (2010): 519–42.
- ¹³⁷ See “The Modern Death Penalty Era,” pg. 19-20.
- ¹³⁸ *Callins v. Collins*, 510 U.S. 1141 (1994), denial of Petition for Certiorari, Justice Blackmun dissenting at 1144.
- ¹³⁹ *Ibid.* 1145: “From this day forward I will no longer tinker with the machinery of death. [...] Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.”
- ¹⁴⁰ In “Eighth Amendment Foundations in *Weems* and *Trop*” above, we identified two Eighth Amendment doctrines: the Eighth Amendment is at once based on respect for “the dignity of man,” yet also draws its meaning from the evolving standards of decency that mark the progress of a maturing society.”
- ¹⁴¹ Hugo Bedau. “The Eighth Amendment, Human Dignity, and the Death Penalty” in *The Constitution of Rights: Human Dignity and American Values*, Michael J. Meyer and W.A. Parent, eds., (Ithaca, New York: Cornell University Press, 1992), 146-148.
- ¹⁴² *Ibid.*, 149: “norms, including principles, are designed to guide conduct in order to secure respect for, and discourage indifference to, certain values...” Imagine someone saying “do not violate principle x, but if you do it is alright, it does not matter.” Such a statement would render the principle unintelligible.
- ¹⁴³ *Ibid.*, 148.
- ¹⁴⁴ For federalist endorsement of this position, see: Jack Rakove, “Parchment barriers and the politics of rights” in *A Culture of Rights*, Lacey and Haakonsson, eds., (Cambridge: 1991), 142. For Anti-federalist support, see: Herbert Storing, ed. *The Complete Anti-Federalist: What the Anti-Federalists Were For*, vol. 1, (Chicago: University of Chicago Press, 1981), 69-70.
- ¹⁴⁵ Federalist no. 49
- ¹⁴⁶ *Trop v. Dulles*, 356 U.S. 86, at 100.
- ¹⁴⁷ *Gregg v. Georgia*, 428 U.S. 153, at 183.
- ¹⁴⁸ See Blackstone and Beccaria *supra*, for example.
- ¹⁴⁹ Baumgartner et. al., chapter 15.
- ¹⁵⁰ Blackstone, *supra*, vol. 4, ch. 1, sec. 14.
- ¹⁵¹ John Locke. *Second Treatise of Civil Government*, Macpherson ed., (Indianapolis: Hackett, 1980), ch. 4, §23, 17. Rousseau, Jean-Jacques. “On the Social Contract” in *The Basic Political Writings*, Cress ed. and trans., (Indianapolis: Hackett, 2011), 2nd edition, book II, ch. 5, p. 177.
- ¹⁵² See “Execution in the Colonies,” *supra*.
- ¹⁵³ See “The People vs. The Person,” *supra*, and fn. 14-16.
- ¹⁵⁴ Bedau, *supra*, 174
- ¹⁵⁵ *Ibid.*
- ¹⁵⁶ The concept of dignity and autonomy are well established to be closely related in moral philosophy, if not one in the same. See Immanuel Kant’s *Critique of Pure Reason*. Support for

autonomy as a founding-generation value: Akhil Amar. *The Bill of Rights*, (New Haven: Yale University Press, 1998), 114-115.

¹⁵⁷ Bedau, *supra*, 175-176.

¹⁵⁸ *Trop v. Dulles*, 356 U.S. 86, at 101-102

¹⁵⁹ The Fifth Amendment reads: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of the law; nor shall private property be taken for public use, without just compensation.”

¹⁶⁰ Raoul Berger. “Cruel and Unusual Punishment,” in *The Bill of Rights: Original Meaning and Current Understanding*, Hicklock ed., (University of Virginia Press., 1991), 303.

¹⁶¹ Raoul Berger. “Justice Brennan, ‘Human Dignity,’ and Constitutional Interpretation” in *The Constitution of Rights: Human Dignity and American Values*, Michael J. Meyer., and W.A. Parent, eds., (Ithaca, New York: Cornell University Press, 1992), 131.

¹⁶² The argument in this section is derived mostly from the work of Shannon D. Gilreath: Shannon D. Gilreath. “Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent.” *Thomas Jefferson Law Review* 25, no. 3 (July 15, 2003): 559–92.

¹⁶³ *Trop v. Dulles*, 356 U.S. 86, at 100-101.

¹⁶⁴ “Reconciling the new Constitution with popular principles was not easy. There is little doubt on its face the Constitution violated much of the conventional popular thinking of late eighteenth-century America.” Gordon Wood. “Political Ideology of the Founders,” in *Toward a More Perfect Union: Six Essays on the Constitution*, Neil York ed., (Albany: SUNY Press: 1988), 9.

¹⁶⁵ Gilreath, *supra*, 575.

¹⁶⁶ “The prevailing ideas entertained by him [referring to Thomas Jefferson] and by most of the leading statesman at the time of the formation of the old constitution; were that the enslavement of the African was in violation of the laws of nature; that it was wrong in principle, socially, morally, and politically. It was an evil they knew not well how to deal with but the general opinion of the men of that day was, that somehow or other, in the order of Providence, the institution would be evanescent and pass away. The idea, though not incorporated in the Constitution, was the prevailing idea at the time.” – Stephens; Gilreath, *Ibid.*, 577-578

¹⁶⁷ See “A Revolution in Public Consciousness,” *supra*.

¹⁶⁸ See *supra*, pg. 8

¹⁶⁹ Gilreath, *supra*, 578

¹⁷⁰ See text at fn. 144-145

¹⁷¹ “The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. The phrase ‘cruel and unusual punishments’ was used, then, with the awareness that it is ambiguous and open to interpretation.” Justice Brennan, quoted in Gilreath, *supra*, 574

¹⁷² *Weems v. United States*, 217 U.S. 349, at 373; *Trop v. Dulles*, 356 U.S. 86, at 103.

¹⁷³ Gilreath, *supra*, 578.

¹⁷⁴ See Smith and Livermore’s speeches in the ratification debates, quoted *supra*.

¹⁷⁵ See text and notes at fn. 144-145.

¹⁷⁶ See text accompanying fn. 47, *supra*.

¹⁷⁷ Bruce Ledewitz, *Judicial Conscience and Natural Rights: A Reply to Professor Jaffa*, vol. 10, U. Puget Sound L. Rev. 449 (1987). Quoted in Gilreath, *supra*, 575-576.

¹⁷⁸ *In re Kemmler*, 136 U.S. 447 (1890).

¹⁷⁹ *Weems v. United States*, 217 U.S. 349, at 376.

¹⁸⁰ *Callins v. Collins*, 510 U.S. 1141, denial of Petition for Certiorari, Justice Blackmun dissenting, at 1145-1146.