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CRUEL AND UNUSUAL PUNISHMENT: A HUMAN RIGHTS-BASED ARGUMENT FOR EXTENDING THE EIGHTH AMENDMENT TO CAPITAL PUNISHMENT METHODS

*by Brittany Walker**

I. Introduction

Generally, over the past 50 years, Americans have supported capital punishment.¹ That support, however, has limits, and around 50 percent of Americans believe that the punishment is unfairly applied.² In *Gregg v. Georgia*, the Supreme Court of the United States (“the Court” or “Supreme Court”) upheld the constitutionality of the death penalty.³ Additionally, the Court has given deference to states for the methods in which they choose to execute individuals sentenced to capital punishment.⁴ However, some methods seem to be outside the constitutional bounds of the Eighth Amendment of the U.S. Constitution.⁵ For example, on

1 *Brittany Walker is a rising 3L part-time evening student at American University Washington College of Law, and a full-time employee with the U.S. Government. She received a B.A. in Communication from Villanova University and a M.S. in Criminal Justice at Boston University. She aspires to pursue a legal career with a focus on reshaping Criminal Justice policy and advocating for alternatives to incarceration.

2 See Megan Brenan, *New 47% Low Say Death Penalty Is Fairly Applied in U.S.* (Nov. 6, 2023), <https://news.gallup.com/poll/513806/new-low-say-death-penalty-fairly-applied.aspx> (explaining that support for the death penalty has been at or above 50 percent since 1936, except for a period between 1957 and 1972 when support dipped to around 42 percent) [hereinafter Brenan].

3 *Id.*

4 See *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (holding that the punishment of death does not invariably violate the Constitution) [hereinafter *Gregg v. Georgia*].

5 *Id.* at 176 (stating State legislatures are better suited for questions of legislative policy such as capital punishment).

6 U.S. Const. amend. VIII (“Excessive bail shall not be required,

January 25th, 2024, the state of Alabama executed Kenneth Eugene Smith with nitrogen gas, a new and experimental execution method.⁶ Alabama claimed that the new method would be humane, but Mr. Smith suffered for several minutes before succumbing to hypoxia.⁷

While there should be consequences for individuals who commit crime, are they not entitled to humane treatment, even when sentenced to death? There are many issues with how states currently choose to execute individuals sentenced to the death penalty. First, there is concern that the different execution methods used by states to carry out capital punishment violates the Eighth Amendment of the U.S. Constitution.⁸ Additionally, there is little to no regulation of states when they execute inmates, nor accountability by the states when executions fail on the first attempt.⁹ Lastly, the use of certain execution methods, such as electrocution and nitrogen gas, violate Part 3, Article 7 of the International Covenant on Civil and Political Rights (ICCPR).¹⁰ Therefore, the Supreme Court should provide additional guidance to states regarding methods of

nor excessive fines imposed, nor cruel and unusual punishments inflicted”).

6 Kim Chandler, *Alabama Executes a Man with Nitrogen Gas, the First Time the New Method Has Been Used* (Jan. 26, 2024, 6:16 AM), <https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900>.

7 *Id.* (taking 22 minutes for Mr. Smith to succumb to hypoxia, in which he was observed shaking, writhing on the gurney, and pulling against the restraints).

8 *Gregg v. Georgia*, *supra* note 3 at 170 (first quoting *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); then quoting *In re Kemmler*, 136 U.S. 436, 447 (1890); and then quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947)).

9 See Ed Pilkington, *US Death-Penalty States Buck Public Sentiment to Find New Ways to Kill* (Jan. 5, 2024, 8:00 AM), <https://www.theguardian.com/world/2024/jan/05/us-death-penalty-state-method-support> (quoting Megan McCracken, a lawyer, who stated “the states are just trying to give themselves more options so they can do whatever they want without answering to anyone... this is not about carrying out death sentences in a constitutional, legal and appropriate manner, it’s about getting the deed done); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (holding that a second attempt at electrocution didn’t violate the Eighth Amendment since the attempt was not intended to “inflict unnecessary pain”).

10 See G.A. Res. 2200A (XXI), at 50 (Dec. 16, 1966) (“That the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”).

execution used, to ensure that the methods do not inflict any unnecessary nor wanton infliction of pain.¹¹

II. Background

The primary method of execution has changed drastically within the last two centuries. Until the 1890s, hanging was the primary method of execution used in the United States.¹² After the 1890s, Delaware and Washington were the only remaining states that used this execution method, until the courts in both states struck down the death penalty.¹³ In 1890, William Kemmler was convicted of murdering his girlfriend.¹⁴ He was the first person executed by electrocution; but the first attempt failed and they repeated the process until he appeared dead.¹⁵ Nearly 34 years later, the use of cyanide gas was introduced as an execution method.¹⁶ Only nine states authorize this method of execution, and as previously mentioned, Alabama is the only state to perform an execution with nitrogen gas.¹⁷ In January 1977, Garry Gilmore was convicted of murder and elected to be executed by a firing squad.¹⁸ Five states, excluding Utah, where Gilmore was executed, authorize execution by firing squad, though firing squad is not their primary execution method.¹⁹ Lastly, in 1977, Oklahoma became the first state to adopt lethal injection as a means of execution, although that form of execution wasn't used until 1982 in Texas.²⁰ Lethal in-

11 *Gregg v. Georgia*, *supra* note 3 at 173 (summarizing Chief Justice Burger's dissenting opinion, who said that punishment must not involve the unnecessary and wanton infliction of pain, in *Furman v. Georgia*, 408 U.S. 238, 392-93 (1972)).

12 *Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/curriculum/high-school/about-the-death-penalty/methods-of-execution> (last visited Mar. 17, 2024) [hereinafter *Methods of Execution*].

13 *Id.* (mentioning that the last hanging in the United States took place on January 25, 1996, in Delaware).

14 *First Execution by Electric Chair*, HISTORY (Aug. 4, 2021), <https://www.history.com/this-day-in-history/first-execution-by-electric-chair>.

15 *Id.*

16 *The History of the Death Penalty: A Timeline*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline> (last visited Mar. 17, 2024) [hereinafter *History of the Death Penalty*].

17 *Methods of Execution*, *supra* note 12.

18 Robert Lewis, *Gary Gilmore*, <https://www.britannica.com/biography/Gary-Gilmore> (Sept. 18, 2023).

19 *Methods of Execution*, *supra* note 12.

20 *History of the Death Penalty*, *supra* note 16.

jection is the primary method of execution in 28 states, the United States military, and the United States Government.²¹

III. Legal Analysis

A. The Eighth Amendment of the United States

The Supreme Court of the United States has upheld the constitutionality of the death penalty as a form of punishment for crime, based upon the history of the Eighth Amendment.²² The phrase, "cruel and unusual," was taken from the English Declaration of Rights of 1688, and referred to punishments unauthorized by statute as well as those disproportionate to the offense involved.²³ In the first cases that challenged the constitutionality of capital punishment methods, the Supreme Court stated that in order for a method to be cruel, it would have to rise to the level of 'torture' or other 'barbarous' methods.²⁴

B. Article 7 of the International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights is an international treaty, which provides a range of civil and political rights protections.²⁵ The treaty compels governments that have ratified it to take administrative, judicial, and legislative measures to protect citizens' rights and provide effective remedies for violations of the treaty.²⁶ The ICCPR was adopted by the United Nations General Assembly in 1966, was effective beginning in 1976, and was ratified by the United States in 1992.²⁷ When the United States ratified the treaty, the federal government had to abide by the provisions within the treaty.²⁸ Specifically, Article

21 *Methods of Execution*, *supra* note 12.

22 *Gregg v. Georgia*, *supra* note 3 at 169 (holding that the punishment of death does not invariably violate the Constitution); U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

23 *Gregg v. Georgia*, *supra* note 3 at 169.

24 *Gregg v. Georgia*, *supra* note 3 at 170.

25 *See generally* G.A. Res. 2200A (XXI), at 50 (Dec. 16, 1966).

26 *Id.*

27 *Id.*

28 *Id.* (ratifying the ICCPR allowed the treaty to be treated as a federal law under the Supremacy Clause of the United States

7 of the ICCPR states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”²⁹

C. Application

Though the Supreme Court of the United States has held that the death penalty is constitutional, their ruling has not prevented individuals from challenging the punishment under the Eighth Amendment. In *In re Kemmler*, the Court held that “punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution.”³⁰ The Court later articulated in *Trop v. Dulles*, that the Eighth Amendment would ensure that states’ powers to punish would be confined to the limits of civilized standards.³¹ Then in *Gregg v. Georgia*, the Court explained that the death penalty (nor the methods used to carry out the execution) are not per se unconstitutional unless they satisfy the requirements for excessiveness.³² Excessiveness has two aspects, first, the punishment must not involve the unnecessary and wanton infliction of pain, and the second is that the punishment must be proportional to the crime.³³ So, the Court reasons that the death penalty is constitutional because that form of punishment has always existed, and unless the state intentionally tries to inflict unnecessary and malicious infliction of pain, it doesn’t rise to the level of cruel and unusual.³⁴

At times, the Supreme Court provides a vague ruling to allow for flexibility as attitudes change over time. However, there should be parameters when it comes to methods that states can use when carrying out executions. The Supreme Court held that capital punishment, in relation to the Eighth Amendment of the U.S. Constitution, requires an objective indicium

Constitution, and therefore requiring the United States to comply and implement the provisions of the treaty).

29 G.A. Res. 2200A (XXI), at 50 (Dec. 16, 1966).

30 *In re Kemmler*, 136 U.S. 436, 447.

31 *See Trop v. Dulles*, 356 U.S. 86, 100 (1958).

32 *Gregg v. Georgia*, *supra* note 3 at 177-78 (“The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.”).

33 *Id.*

34 *Id.* at 169, 170-71 (holding that the punishment of death does not invariably violate the Constitution).

that reflects the public attitude towards a given sanction.³⁵ As previously mentioned, while there is general approval of the death penalty, more Americans are expressing concern over the fairness on how the death penalty is applied to certain individuals.³⁶ Even more, pharmaceutical companies oppose their medications from being used in executions; some companies have even sued states to prevent their medications from being used for such purposes.³⁷ So, while the Supreme Court gives deference (on this matter) to state legislatures because they “are constituted to respond to the will and . . . moral values of the people,” state legislatures are irresponsive or not responding quickly to the changing attitudes of their constituents.³⁸

The deference that the Supreme Court gives to states, coupled with the supply shortage of medicine used for executions by lethal injection, has led states to experiment with previously authorized but rarely used execution methods.³⁹ While eight states have authorized lethal gas as an execution method – lethal injection being the primary method – only 12 individuals have been executed in this manner since 1976.⁴⁰ The execution of Kenneth Eugene Smith by nitrogen hypoxia sheds light on the desperation of states to execute inmates by any means. The lack of regulation and legislation regarding execution methods permits death row inmates to be treated inhumanely in their final moments on Earth. How can the United States government vehemently criticize the Nazis for killing millions of Jews and others by gas chamber during the Holocaust,

35 *See Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting) (“[D]emocratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.”).

36 Brenan, *supra* note 1.

37 *See Renuka Rayasam, States Try to Obscure Execution Details as Drugmakers Hinder Lethal Injection*, USA TODAY (Mar. 29, 2023, 8:38 AM), <https://www.usatoday.com/story/news/health/2023/03/29/states-obscure-execution-details-drugmakers-hinder-lethal-injection/11550570002/> (arguing that the drugs they manufacture should be used “to heal, not kill, people”).

38 *Gregg v. Georgia*, *supra* note 3 at 175.

39 *Id.* (preventing their medicine from being used to execute inmates by lethal injection, only six of the 27 states that allow the death penalty carried out executions in 2022. The number of executions by lethal injection decreased from 18 nationwide from 98 in 1999).

40 *Methods of Execution*, *supra* note 12 (including Alabama, only four of the eight states specify the use of nitrogen hypoxia, the other States don’t specify what type of gas that would be used for the execution).

but assert that it is not a cruel and unusual punishment for certain convicted individuals in the United States?⁴¹ The killing of individuals by lethal gas cannot be deemed inhumane during the Holocaust, but humane when it concerns individuals sentenced to capital punishment. It is inhumane regardless of the context, and in violation of Article 7 of the ICCPR.⁴²

D. Potential Solutions

So how can there be a resolution when the Supreme Court has held that capital punishment is constitutional and believes only state legislatures (through the democratic process) have the power to either abolish the practice or ensure the methods are not cruel and unusual? First, states can abolish capital punishment if they are unable to ensure the humane treatment of individuals during an execution. As of 2021, almost half of the states have abolished capital punishment.⁴³ And second, if states choose not to abolish capital punishment, the United States Congress can use their powers under the Spending Clause to incentivize states to use certain approved execution methods. With this solution, Congress can provide guidance and uniformity between states, where the Supreme Court has instead left questions. Moreover, this solution will make states accountable to Congress for their actions with death row inmates, it could help develop humane execution methods, and it could establish testing time requirements to ensure a particular execution method is not cruel or unusual punishment prior to it being used.

IV. Conclusion

In conclusion, while capital punishment has been generally favored by Americans over the past 50 years, not all Americans believe the punishment is used

fairly.⁴⁴ When states, like Alabama, experiment with new forms of execution methods, their actions could cause cruel and inhumane treatment for those being executed, which is in direct violation to the Eighth Amendment of the United States Constitution and Article 7 of the International Covenant on Civil and Political Rights.⁴⁵ State legislatures should continue to listen to their constituents to determine (if they haven't already) that capital punishment should be abolished in their state. Congress should incentivize states who wish not to abolish capital punishment, to abide by certain requirements regarding execution methods, to create uniformity and accountability amongst the states. With pharmaceutical companies preventing their medicine from being used for executions and states trying to find other solutions, this solution would hopefully mitigate violations against the Eighth Amendment of the U.S. Constitution. Finally, the Supreme Court should provide additional guidance for states regarding the constitutional bounds for the most commonly adopted methods of execution.

41 See *The Killing Evolution*, PBS, <https://www.pbs.org/au-schwitz/40-45/killing/> (last visited Mar. 29, 2024); *The United States and the Holocaust, 1942-45* (Mar. 30, 2023), <https://encyclopedia.ushmm.org/content/en/article/the-united-states-and-the-holocaust-1942-45> (noting that the War Refugee Board, an independent government agency created in response to the Holocaust, launched a campaign to warn perpetrators that there would be legal repercussions to their actions after the war).

42 See G.A. Res. 2200A (XXI), at 50 (Dec. 16, 1966).

43 See Joe Murphy, *Map: These are the States that Allow the Death Penalty* (Oct. 27, 2021), <https://www.nbcnews.com/news/map-these-are-states-allow-death-penalty-n1282556>.

44 Brennan, *supra* note 1 (noting that from 2000 through 2015, between 51 percent and 61 percent of Americans thought capital punishment was used fairly in the United States, but since 2016, that number has decreased to 49 percent).

45 See G.A. Res. 2200A (XXI), at 50 (Dec. 16, 1966) (declaring that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment).