"Nor Cruel and Unusual Punishments Inflicted": A Look at the Eighth Amendment and the Evolving Standards of Decency

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Abstract:

This paper seeks to provide a more thorough understanding of two of the most popular — and conflicting — methods of constitutional interpretation: interpretivism and noninterpretivism. In exploring these two approaches, the arguments for and against capital punishment are offered to illustrate their major and minor differences. Furthermore, this paper explores the evolution of Eighth Amendment jurisprudence and constitutional law by assessing nine specific United States Supreme Court cases. Ultimately, this paper seeks to emphasize the bitter dispute between state legislatures and the courts regarding the proper punishment of criminal offenders. The issue of capital punishment's constitutionality is not altogether new and will, most certainly, be reviewed by the Court again and again in the years to come.

"The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [1]

—Chief Justice Earl Warren

Introduction

The Eighth Amendment to the United States Constitution guarantees that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[2] The Eighth Amendment appears to be relatively straightforward at first reading. However, there are certain levels of ambiguity that rest within (i.e., the Cruel and Unusual Punishments Clause). It has been noted that the U.S. Constitution contains certain provisions that are "troublesome" in nature due to their vagueness and uncertainty.[3] The Eighth Amendment can surely be considered a troublesome provision because it offers little specificity as to the punishments it seeks to prohibit. One scholar argues that because of the presence of such provisions, a fundamental question must be answered: What approach to constitutional interpretation should be applied?[4] Though many theories regarding the interpretation of the Constitution have been proposed, there is still little consensus as to which is best.[5] The ultimate aim of this paper is to examine two of the most popular — and conflicting — approaches to constitutional interpretation: interpretivism and noninterpretivism.[6] At the most fundamental level, interpretivism is the idea that constitutional interpretation should be limited exclusively to historical context and the written text itself, while noninterpretivism is the idea that constitutional interpretation should go beyond historical context and the written text in order to apply broader and more comprehensive constitutional principles.[7] In accordance, the arguments for and against capital punishment will be explored via these two contradictory approaches.

The next two sections of this paper will provide a more detailed look at the theories of

interpretivism and noninterpretivism. The focus of this paper will then shift to assessing nine specific capital punishment cases. The cases are all United States Supreme Court cases, and they illustrate the evolution of Eighth Amendment constitutional law. This paper will then close with a brief discussion of the development of the theories of interpretivism and noninterpretivism in interpreting the Eighth Amendment, as well as the prominent significance of these developments as they relate to American society.

The Theory of Interpretivism

The theory of interpretivism is also known as textualism, which "hold[s] that constitutional interpretation should be confined to the 'four corners' of the document, the literal language of the text of the Constitution."[8] Furthermore, this theory asserts that the Court should remain faithful to the "original understanding" and the "original meaning" that was set forth by the Framers of the Constitution.[9] Proponents of this theory, such as Chief Justice William H. Rehnquist, Justice Antonin Scalia, and Judge Robert Bork, "do not claim to be uncovering the Framers' subjective intentions but rather limiting the interpretation of constitutional provisions to those principles that the Framers might be fairly said to have embraced when drafting and ratifying the Constitution."[10] Additionally, interpretivists advocate that capital punishment be held a separate entity, thus excluding it from ever violating the Eighth Amendment's Cruel and Unusual Punishments Clause. This argument is based largely on historical context, which demonstrates that the term "cruel and unusual," at the time of the Constitution's framing, referred specifically to punishments that were more severe than the crimes committed (i.e., physical torture and the prolonging of agony in execution).[11] Thus, because the term "cruel and unusual" was included in the Eighth Amendment to limit torture and atrocious executions, capital punishment itself can never fall victim to the Cruel and Unusual Punishments Clause.

Ronald Dworkin, Professor of Jurisprudence at Oxford, emphasizes that "[t]he Framers would hardly have bothered to stipulate that life may be taken only after due process if they thought that the Eighth Amendment made capital punishment unconstitutional anyway."[12]

The Theory of Noninterpretivism

Unlike interpretivism, noninterpretivism seeks to look for arguments in numerous sources including social sciences, natural law, and philosophy.[13] Moreover, this theory purports that the Constitution should be interpreted as a "living document,"[14] or as "The Living Constitution,"[15] in order to keep up with "the evolving standards of decency that mark the progress of a maturing society."[16] As such, proponents of this theory argue that the standards of decency are considerably more mature today than ever before. Thus, noninterpretivists argue decisively that capital punishment does not meet today's standards and should be struck down as unconstitutional. Furthermore, noninterpretivists argue that the Constitution must be "flexible" and that it "would have snapped if it had not been permitted to bend and grow."[17] Justice William J. Brennan, Jr. argues that the definitive question that must be answered is what the words of the Constitution mean at the present:

> [T]he 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. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. . . . Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.[18]

Furman v. Georgia (1972)

In the landmark case of *Furman v. Georgia* (1972),[19] the Court granted certiorari to consider whether the imposition and carrying out of the death penalty in three somewhat similar cases[20] constituted cruel and unusual punishment and, therefore, violated the Eighth Amendment and the Fourteenth Amendment, which made the Eighth Amendment directly applicable to the states.[21] The Court, in a per curiam opinion, held that the death sentences in these cases were cruel and unusual and were violations of the Eighth and Fourteenth Amendments.[22]

Justice Douglas, in his concurring opinion, argues that the Eighth Amendment's ban against cruel and unusual punishment reflects an aspiration for equality.[23] Douglas continues this argument by articulating the necessity for legislatures to construct laws that are "evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."[24]

Justice Brennan, in his concurring opinion, argues that despite the ambiguity concerning what the Framers thought cruel and unusual, a "conclusion that only torturous punishments [are] to be outlawed"[25] must be rejected. Brennan further argues that constitutional provisions

> [are] enacted . . . from an experience of evils, but its general language should not, therefore, 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.[26]

Brennan continues to argue that the carrying out of the death penalty has little effect on a community's moral reinforcement of fundamental values and is "more likely . . . to lower [the] respect for life and brutalize . . . values."[27]

In his dissenting opinion, Chief Justice Burger argues that these cases turn on the

question of whether the imposition of death is cruel from a constitutional standpoint.[28] Burger further argues that the term "unusual" should not be construed as restricting the ban on cruel punishments.[29] Burger reviews the "facile argument that since capital punishment has always been cruel in the everyday sense of the word, and has become unusual due to decreased use, it is, therefore, now cruel and unusual."[30] Burger maintains that this argument is misplaced and unpersuasive.

Justice Blackmun, in his dissenting opinion, argues adamantly that the Court simply chose to make the "easy" choice:

> It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts — perhaps the rationalizations — that this is the compassionate decision for a maturing society; that this is the moral and the right thing to do; that thereby we convince ourselves that we are moving down the road toward human decency; that we value life even though that life has taken another or others or has grievously scarred another or others and their families; and that we are less barbaric than we [once] were.[31]

Blackmun continues to argue that this is a matter for the states themselves to decide, not the judiciary. Blackmun further points out that the majority simply could not resist crossing the line and allowing personal preferences to guide their decision.

Gregg v. Georgia (1976)

In the case of *Gregg v. Georgia* (1976),[32] the Court had to determine whether the imposition of death for the crime of murder violates the Eighth and Fourteenth Amendments under Georgia law. In a seven-to-two decision, the Court held that "the punishment of death does not invariably violate the Constitution."[33] This decision was based largely on the fact that "the text of the Constitution itself [is evidence] that the existence of capital punishment was accepted

by the Framers."[34] Capital punishment was a frequent sanction at the time the Eighth Amendment was ratified, and furthermore, the Fifth Amendment considers the sustained existence of capital punishment by imposing restrictions on the prosecution in capital cases:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law. . . .

The Court further reasons that the imposition of death "is an expression of society's moral outrage at particularly offensive conduct," and that it "may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes . . . to vindicate their wrongs."[35]

Justice Brennan, in his dissenting opinion, articulates his disbelief at the Court's holding. Brennan heavily cites his concurring opinion from *Furman* and further argues:

> This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, moral concepts require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society.[36]

Brennan continues to argue that the death penalty is a degradation to "human dignity," and that because the death penalty is such a "truly . . . awesome punishment," it should be construed a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause.[37]

Coker v. Georgia (1977)

The Court ruled in *Gregg* that the imposition of death for the crime of murder was not, in

all circumstances, a violation of the Eighth and Fourteenth Amendments. The Court, however, did not address the constitutionality of capital punishment imposed for other crimes. In the case of *Coker v. Georgia* (1977),[38] the Court was presented with the question of whether the imposition of death for the rape of an adult woman violated the Eighth Amendment. The Court, in a plurality decision,[39] ruled that the imposition of death for the crime of rape is a violation of the Eighth Amendment because it "is grossly disproportionate and [an] excessive punishment [to] the crime."[40]

Justice White, writing for the Court, concedes the vast enormity of the crime of rape, specifying that a stern penalty should follow.[41] White points out, however, that the crime of rape is not on the same plane as murder, and as such, does not deserve as severe a punishment.[42] White justifies this disposition by arguing that "[l]ife is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over, and normally is not beyond repair."[43]

In his dissenting opinion, Chief Justice Burger sharply criticizes the plurality's holding and illustrates that the plurality widened the scope of the question that was presented to the Court. Burger articulates that the Court should have been reviewing the question of whether

> the Eighth Amendment's ban against cruel and unusual punishment prohibit[s] the State of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime, and who has not hesitated to escape confinement at the first available opportunity.[44]

Burger continues to argue that "once the Court has held that the punishment of death does not invariably violate the Constitution, it seriously impinges upon the state's legislative judgment to

hold that it may not impose such sentence upon an individual who has shown total and repeated disregard for the welfare, safety, personal integrity and human worth of others, and who seemingly cannot be deterred from continuing such conduct,"[45] and that "the death sentence here imposed is *within* the power reserved to the State."[46]

Lockett v. Ohio (1978)

In the case of *Lockett v. Ohio* (1978),[47] the Court had to determine whether the sentencing of the death penalty to Lockett, under Ohio law, without the consideration of mitigating factors (specifically, the circumstances of the crime, the record and character of the offender) violated the Eighth and Fourteenth Amendments. The Court ultimately held that the failure to consider any mitigating factors prior to sentencing Lockett to death was a violation of the Eighth Amendment.[48]

Chief Justice Burger, writing for the majority, stresses that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[49] Burger further argues that due to the fact that the death penalty, as imposed by the State, is reflectively dissimilar from every other punishment, capital cases require individualized decisions:

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of

the Eighth and Fourteenth Amendments.[50]

Justice Rehnquist, in his separate opinion, which was concurring in part and dissenting in part, sharply disagrees with Chief Justice Burger regarding the striking down of the Ohio statute as unconstitutional. Rehnquist references Justice Harlan's argument on the subject:

> [B]ifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds. . . . The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected.[51]

Rehnquist continues to argue that Lockett was tried in a fair tribunal and, furthermore, was found guilty of aggravated murder.[52] Rehnquist believes that *McGautha* is the proper case in determining the limits of power "to revise state criminal procedures in capital cases under the Eighth and Fourteenth Amendments."[53] Thus, according to Rehnquist, Ohio was not in violation of the Eighth and Fourteenth Amendments because it was not essential to consider any mitigating factors.

Eddings v. Oklahoma (1982)

In the case of *Eddings v. Oklahoma* (1982),[54] the Court held that the conviction for first-degree murder by a minor and the subsequent imposition of the death penalty were unconstitutional due to the failure to consider any mitigating factors in the decision as required by *Lockett*.[55] Justice Powell, writing for the Court, argues that it is obvious that the trial judge did not consider any mitigating factors, as a matter of fact, and, furthermore, he determined, as a matter of law, that he could not give any weight to the mitigating factors.[56] Thus, applying the precedent set forth in *Lockett*, the Court held that Eddings' rights under the Eighth and

Fourteenth Amendments were violated. Powell articulates that the central concern in this case is the "manner of the imposition of the ultimate penalty: the death sentence [being] imposed for the crime of murder upon an emotionally disturbed youth with a disturbed child's immaturity."[57]

In his dissenting opinion, Chief Justice Burger expresses disapproval of the majority's choice to consider a larger question than which certiorari was granted. Burger argues that careful consideration was taken to limit the scope of the question to "whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was 16-years-old in 1977 at the time he committed the offense."[58] Burger adds that the Court far exceeds the issue for which review was granted by basing their opinion on claims that were not argued in the lower court and were not included in the certiorari petition.[59] Moreover, Burger asserts that the Court is desperately scrambling around "a single sentence of the trial court's opinion"[60] to build a "plausible theory to support its mandate for the relief granted."[61] Burger further argues that the decision in *Lockett* is not unlike that of the current case:

> We . . . found the Ohio statute [to be] flawed, because it did not permit individualized consideration of mitigating circumstances — such as the defendant's comparatively minor role in the offense, lack of intent to kill the victim, or age. We did not, however, undertake to dictate the *weight* that a sentencing court must ascribe to the various factors that might be categorized as mitigating, nor did we in any way suggest that this Court may substitute its sentencing judgment for that of state courts in capital cases.[62]

Stanford v. Kentucky (1989)

In the case of *Stanford v. Kentucky* (1989),[63] the Court had to determine "whether the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eighth Amendment."[64] The Court held that

the imposition of a death sentence for a crime committed at ages 16 or 17 does not comprise cruel and unusual punishment and, thus, does not violate the Eighth Amendment.[65] Justice Scalia, writing for the majority, argues that the evolving standards of decency for our "modern American society as a whole"[66] must be determined. In accordance, Scalia argues that there is a lack of a "national consensus [that] this Court has previously thought sufficient to label a particular punishment cruel and unusual,"[67] because "[o]f the 37 states whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders."[68] Based largely on the fact that there is a lack of evidence regarding "a historical [or] a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age,"[69] the Court held that "such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment."[70]

Justice Brennan, in his dissenting opinion, argues that the majority misinterprets the information regarding a national consensus. Brennan maintains that if the 15 states that bar capital punishment to 16-year-olds are added to the 12 states that bar capital punishment to 17-year-olds, a clear majority of 27 states bar capital punishment to juvenile offenders under 18 years of age.[71] Brennan further argues that "[t]he deterrent value of capital punishment rests on the assumption that we are rational beings who always think before we act, and then base our actions on a careful calculation of the gains and losses involved,"[72] and, furthermore, that "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."[73] Brennan concludes that the imposition of capital punishment on juvenile offenders is "excessive and unconstitutional"[74] because "juveniles have [a] less[er] capacity . . . to think in long-range terms than adults,"[75] and that "juveniles have little fear of death, because they have a profound

conviction of their own omnipotence and immortality."[76]

Atkins v. Virginia (2002)

In the case of *Atkins v. Virginia* (2002),[77] the Court had to determine whether the imposition of the death sentence on mentally retarded persons constitutes cruel and unusual punishments as prohibited by the Eighth Amendment.[78] Justice Stevens, writing for the Court, declares that the Eighth Amendment bars excessive punishment. Furthermore, in determining the excessiveness of a punishment, one must look no further than to the standards "that currently prevail."[79] Stevens argues that "there [are] serious question[s] as to whether either justification [i.e., retribution and deterrence] that we have recognized as a basis for the death penalty applies to mentally retarded offenders."[80] Stevens draws the conclusion that if the imposition of capital punishment does not "measurably [contribute] to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment."[81] Furthermore, Stevens argues that another justification prohibiting the mentally retarded from the imposition of capital punishment is their reduced mental capacity.[82] Stevens concludes that "in . . . light of our evolving standards of decency, . . . [capital] punishment is excessive and . . . the Constitution places substantive restriction on the State's power to take the life of a mentally retarded offender."[83]

In his dissenting opinion, Justice Scalia argues that the majority does not have sufficient evidence to stake the evolving standards of decency claim. Scalia points out that "47 [percent] of the death penalty jurisdictions" in no way constitutes a national consensus.[84] Scalia continues his attack of the majority opinion by arguing that the majority provides a pathetic justification of "its embarrassingly feeble evidence" regarding a national consensus.[85] The statement at which Scalia jokes is: "It is not so much the number of these states that is significant, but the *consistency* of

the direction of change."[86] Scalia astutely declares "in what *other* direction *could we possibly* see change? Given that 14 years ago *all* [of] the death penalty statutes included the mentally retarded,"[87] there is only one direction change could possibly occur. Scalia also adamantly argues the "[t]he fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders."[88] Scalia concludes that the Court's holding "promises to be more effective than any of the others in turning the process of capital trial into a game."[89]

Roper v. Simmons (2005)

For the second time in a span of 16 years, the Supreme Court reviewed the constitutionality of juvenile offenders of capital crimes being sentenced to death (e.g., *Stanford v. Kentucky* 1989). In the case of *Roper v. Simmons* (2005),[90] the Court had to determine whether the Eighth and Fourteenth Amendments permit the imposition of death on a juvenile offender who was older than 15, yet younger than 18, at the time he or she committed a capital offense. A divided Court held that the Eighth Amendment forbids the death sentence for juvenile offenders in this age grouping.[91] Justice Kennedy, writing for the Court, articulates that because of the reasoning in *Atkins* — which held that the Eighth and Fourteenth Amendments prohibit the execution of mentally retarded persons — a juvenile who was under the age of 18 when his or her crime was committed could not be sentenced to death.[92] Kennedy further explains that "the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions," and that "th[is] right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[93] Furthermore, Kennedy purports that "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[94] Kennedy ultimately offers three prongs

worth of differences between juveniles under 18 and adults justifying that "juvenile offenders cannot with reliability be classified among the worst offenders."[95] The first prong is that juveniles under the age of 18, more often than adults, demonstrate a "lack of maturity and an underdeveloped sense of responsibility."[96] The second prong is that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[97] The third, and final, prong is that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, [and therefore] less fixed."[98] Thus, Kennedy argues that because of "[t]heir own vulnerability and comparative lack of control over their immediate surroundings, . . . juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[99] Additionally, Kennedy stresses that because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood, [i]t is . . . the age at which the line for death eligibility ought to rest."[100] The decision in *Roper* to overturn *Stanford* is largely based on the fact that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[101] In 1990, there were seven other countries that executed juveniles (i.e., China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen), and all of which have since either "abolished capital punishment for juveniles or made public disavowal of the practice."[102]

Justice O'Connor, in her dissenting opinion, argues that "[a]dolescents *as a class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But . . . at least *some* [adolescent] murderers are sufficiently mature to deserve the death penalty in an appropriate case."[103] In accordance, O'Connor specifies that it has not been properly determined if juries are incapable of assessing the mitigating factor of youth in determining an adolescent

defendant's maturity.[104] O'Connor then turns to addressing the issue of whether the sentencing of juveniles to death is "grossly out of proportion to the severity of the crime"[105] as set forth in *Coker*. O'Connor argues that with regards to capital punishment, "proportionality . . . not only requires an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness."[106] Thus, O'Connor concludes that there is "a constitutional obligation to judge for ourselves whether the death penalty is [an] excessive punishment for a particular offense or class of offenders."[107]

Justice Scalia, contrary to O'Connor, offers a passionate and intense assault on the majority opinion in his dissent. Scalia calls the majority's holding a "mockery"[108] of Alexander Hamilton's expectation that "[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment."[109] Furthermore, Scalia purports that the Court's faith in a national consensus, based on the evolving standards of decency, is misplaced. "Words have no meaning," argues Scalia, "if the views of less than 50 [percent] of death penalty states can constitute a national consensus."[110] Scalia points out that it is absurd to include the states that have barred capital punishment altogether in determining the national consensus concerning juvenile culpability with regards to capital punishment by likening it to the inclusion of "old-order Amishmen in a consumer-preference poll on the electric car. Of *course* they don't like it, but that sheds no light whatever on the point at issue."[111] More interestingly, Scalia argues, is that the 12 states that bar capital punishment altogether, all "permit 16- and 17-year-old offenders to be tr[ied] *as adults* with respect to noncapital offenses."[112] Finally, Scalia concludes that

> it is absurd to think that one must be mature enough to drive carefully, to drink

> responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong. . . . Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another's life.[113]

Kennedy v. Louisiana (2008)

In the case of *Kennedy v. Louisiana* (2008),[114] the Court had to determine if Louisiana violated the Eighth Amendment's ban against cruel and unusual punishment when it sentenced Kennedy to death for the crime of child rape, even though the crime did not and was not intended to result in the death of the victim. The Court ultimately held that this punishment, in relation to the offense, is prohibited by the Constitution and struck down the Louisiana statute that produced the sentencing as unconstitutional.[115] Justice Kennedy, writing for the Court, emphasizes that, in this instance, there is a clear national consensus. There are 44 states that do not enforce capital punishment for the crime of child rape.[116] Kennedy further argues that the imposition of death for the crime of child rape is quite unusual due to the fact that the last time someone was sentenced to death for this crime was in 1964.[117] Kennedy confesses, contrary to the Court's holding in *Coker* (which held that a rape victim's life is not over and usually not beyond repair), that "[r]ape has a permanent psychological, emotional, and sometimes physical impact on [a] child."[118] Despite this admission, Kennedy still purports that the imposition of capital punishment is a disproportionate penalty to the crime:

> The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish be exercised within the limits of civilized standards. Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the

> extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.[119]

Kennedy concludes that "justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense."[120]

Justice Alito, in his dissenting opinion, expresses disgust in the majority's holding that the imposition of capital punishment is unconstitutional "no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be."[121] Alito argues that the Court, when articulating that the last imposition of capital punishment for child rape was in 1964, fails to note that death penalty litigation dramatically decreased in the late 1960s:

> In 1965 and 1966, there were a total of eight executions for all offenses, and from 1968 until 1977, the year when *Coker* was decided, there were no executions for any crimes. . . . [I]n Louisiana, since the state law was amended in 1995 to make child rape a capital offense, prosecutors have asked juries to return death verdicts in [a grand total of] four cases.[122]

Alito further argues that in only two of those four instances did the juries return death sentences.[123] Alito then turns to addressing the issue of hesitation in interpreting the Eighth Amendment as advocated by the majority. Alito argues that a decision in favor of the Respondent would not "extend" nor "expand" the penalty of capital punishment.[124] Alito also

makes sure to specify that the Court has previously held that "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling states from giving effect to altered beliefs and responding to changed social conditions."[125]

Summary and Conclusions

The theories of interpretivism and noninterpretivism have progressed significantly through Eighth Amendment cases before the U.S. Supreme Court. Ultimately, though, the basic contention of each theory remains unchanged. Interpretivists advocate that capital punishment, in nearly all circumstances, is constitutional. Conversely, noninterpretivists advocate that capital punishment, in nearly all circumstances, is unconstitutional. The progression is obviously not concerning the dispositions of these two conflicting theories, but rather, the avenues taken to arrive at these dispositions. For example, noninterpretivists have adopted an argument of the presence of a national consensus in opposing the imposition of capital punishment.

A common interpretivist argument regarding capital punishment is that the Eighth Amendment is "generally specific." This term refers to the fact that capital punishment was a commonly accepted penalty when the Constitution was framed and, therefore, can never fall victim to the Eighth Amendment's ban against cruel and unusual punishment. Furthermore, the Framers would not have stipulated in the Fifth Amendment that "[n]o person shall be . . . deprived of life . . . without due process of law,"[126] if they intended for capital punishment to have the possibility of being barred by the Eighth Amendment.

In contrast, noninterpretivists argue that the Framers, by specifically including the word "unusual" in the phrase "cruel and unusual punishments," is evidence that the Framers sought to include the unconstitutionality of the imposition of capital punishment for future generations.

Noninterpretivists further argue that this inclusion of the word "unusual" signals that capital punishment can become unconstitutional under the Eighth Amendment due to its lessened use over time. Noninterpretivists have also adopted the "evolving standards of decency" argument. Accompanying this argument is the sub-argument of the presence of a "national consensus" that demands more humane standards regarding the punishment of criminals.

Interpretivists, to the contrary, assert that the "evolving standards of decency" argument is not a standard that can be properly applied. Chief Justice Warren, when writing for the Court in *Trop*, fails to provide a reasonable means of determining what these "evolving standards" are. And furthermore, when is it that the standards should be re-determined? Every 10 years, or maybe every 20 years? Warren, in writing what has proven to be a definitive argument for noninterpretivists, instead, only provides an ambiguous statement not unlike that of the Cruel and Unusual Punishments Clause.

In exploring the jurisprudence of cruel and unusual punishments, previous legal philosophers and legal thinkers have shed some much-needed light on the subject. Thomas Jefferson addresses the necessity of punishments to be "strict and inflexible, but proportioned to the crime."[127] Moreover, Jefferson advocates:

> Laws thus proportionate and mild should never be dispensed with. Let mercy be the character of the lawgiver, but let the judge be a mere machine. The mercies of the law will be dispensed equally and impartially to every description of men.[128]

The renowned French philosopher Baron de Montesquieu addresses the danger in the denouncing of dissimilar crimes with an equal punishment:

> It is a great abuse amongst us to condemn to the same punishment a person that only robs . . . and another who robs and murders. Surely, for the public security, some difference

> should be made in the punishment. In China, those who add murder to robbery are cut in pieces: but not so the others; to this difference it is owing that though they rob in that country, they never murder. In Russia, where the punishment of robbery and murder is the same, they always murder. The dead, say they, tell no tales.[129]

Another celebrated French philosopher, Alexis de Tocqueville emphasizes the immense authority that the United States entrusts to its courts:

> [O]n the day when the judge refuses to apply a law in a case, at that instant it loses its moral force. Those whom it has wronged are then notified that a means exists of escaping the obligation of obeying it: cases multiply, and it falls into impotence. One of two things then happens: the people change their constitution or the legislature rescinds the law.[130]

What has emerged from all of this controversy is a bitter dispute between state legislatures and the courts. Whose judgment should prevail? Interpretivists and proponents of capital punishment believe that the judgment of the state legislatures should reign. And noninterpretivists and opponents of capital punishment believe that the judgment of the courts should be supreme. Among all of this ubiquitous disagreement, one thing is certain: jeopardy is evident. The U.S. Supreme Court rarely overrules itself. However, when similar variations of the same issue keep coming before the Court, danger awaits. The Court, in granting review of these similar — or in some instances identical — issues, sends a blurred message. Furthermore, it can be easily argued that the Court is merely encouraging future litigation on this issue. Capital punishment's constitutionality under the Eighth and Fourteenth Amendments to the Constitution, undoubtedly, will be before the U.S. Supreme Court again and again. There is no telling what the future holds, but it will surely be intriguing to watch it unfold.

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Notes

1. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
2. U.S. Const. amend. VIII.
3. Andrew Altman, *Arguing About Law: An Introduction to Legal Philosophy*, 2nd ed. (Belmont, CA: Wadsworth/Thomson Learning, 2001), 83-84.
4. Ibid., 84.
5. Ibid.
6. David M. O'Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties*, Vol. II, 7th ed. (New York, NY: W. W. Norton & Company, 2008), 73.
7. Ibid.
8. Ibid., 75.
9. Ibid., 79.
10. Ibid.
11. Steffen W. Schmidt, Mack C. Shelley, and Barbara A. Bardes, *American Government and Politics Today* (Belmont, CA: Wadsworth/Thomson Learning, 2005), 141.
12. Ronald A. Dworkin, "Comment on Scalia," in David M. Adams, *Philosophical Problems in the Law*, 4th ed. (Belmont, CA: Wadsworth/Thomson Learning, 2005), 186.
13. O'Brien, *Constitutional Law and Politics*, 85.
14. Ibid., 86.
15. David M. Adams, *Philosophical Problems in the Law*, 4th ed. (Belmont, CA: Wadsworth/Thomson Learning, 2005), 181.
16. *Trop*, 101.
17. Adams, *Philosophical Problems in the Law*, 181.
18. William J. Brennan, Jr., "The Living Constitution," (Lecture to the Text and Teaching Symposium, Georgetown University, Washington, D.C., October 12, 1985).
19. *Furman v. Georgia*, 408 U.S. 238 (1972).
20. Petitioner in No. 69-5003 (*Furman v. Georgia*) was convicted of murder in Georgia, and was sentenced to death under Georgia law; Petitioner in No. 69-5030 (*Jackson v. Georgia*) was convicted of rape in Georgia, and was sentenced to death under Georgia law; and Petitioner in No. 69-5031 (*Branch v. Texas*) was convicted of rape in Texas, and was sentenced to death under Texas law.
21. The Fourteenth Amendment, ratified July 9, 1868, makes the Eighth Amendment directly applicable to the States.
22. The decision in *Furman* was 5-4, with a per curiam opinion resulting because the majority could not agree specifically enough about what it wanted to establish; all nine justices wrote an opinion.
23. *Furman*, (Douglas, J., concurring), 255.
24. Ibid., 256.
25. Ibid., (Brennan, J., concurring), 263.
26. Ibid., 263-264.
27. Ibid., 303.
28. Ibid., (Burger, C.J., dissenting), 379.
29. Ibid.
30. Ibid.

31. Ibid., (Blackmun, J., dissenting), 410.
32. *Gregg v. Georgia*, 428 U.S. 153 (1976).
33. Ibid., 169.
34. Ibid., 177.
35. Ibid., 183.
36. Ibid., (Brennan, J., dissenting opinion), 229.
37. Ibid., 230.
38. *Coker v. Georgia*, 433 U.S. 584 (1977).
39. The decision in *Coker* was 4-3-2, with White, Stewart, Blackmun, and Stevens, JJ., making up the plurality; Brennan and Marshall, JJ., concurred in the judgment in separate statements; Powell, J., concurred in the judgment in part and dissented in part; and Burger, C.J., authored a dissenting opinion, in which Rehnquist, J., joined.
40. *Coker*, 592.
41. Ibid., 598.
42. Ibid.
43. Ibid.
44. Ibid., (Burger, C.J., dissenting), 607.
45. Ibid., 610.
46. Ibid., (emphasis added).
47. *Lockett v. Ohio*, 438 U.S. 586 (1978).
48. Ibid., (Burger, C.J., opinion of the Court), 608.
49. Ibid., (emphasis in original), 604.
50. Ibid., 605.
51. Ibid., (Rehnquist, J., concurring in part and dissenting in part; citing *McGautha v. California*, 402 U.S. 183 (1971), Harlan, J., writing for the Court), 632-633.
52. *Lockett*, 633.
53. Ibid.
54. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).
55. The decision in *Eddings* was 5-4, with Powell, Brennan, Marshall, Stevens, and O'Connor, JJ., in the majority; and Burger, C.J., White, Blackmun, and Rehnquist, JJ., in the minority.
56. *Eddings*, (Powell, J., opinion of the Court), 112-113. The record reflects that the trial judge stated that, "in following the law," he could not "consider the fact of this young man's violent background." The trial judge was referring to the mitigating evidence of Eddings' family history.
57. *Eddings*, 116.
58. Ibid., (Burger, C.J., dissenting), 120.
59. Ibid.
60. Ibid., 123-124. Burger, unlike the majority opinion, provides that "single sentence." The trial judge said that he could not "be persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. Nor can the Court, in following the law, in my opinion, consider the fact of this young man's violent background."
61. *Eddings*, 120.
62. Ibid., 121-122.
63. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

64. Ibid., 364-365.
65. The decision in *Stanford* was 5-4, with Rehnquist, C.J., Scalia, White, O'Connor, and Kennedy, JJ., in the majority; and Brennan, Marshall, Blackmun, and Stevens, JJ., in the minority.
66. *Stanford*, 369.
67. Ibid., 370-371.
68. Ibid., 371.
69. Ibid., 380.
70. Ibid.
71. Ibid., (Brennan, J., dissenting), 384.
72. Ibid., 403.
73. Ibid.
74. Ibid., 404.
75. Ibid., 403.
76. Ibid., 403-404.
77. *Atkins v. Virginia*, 536 U.S. 304 (2002).
78. The decision in *Atkins* was 6-3, with Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ., in the majority; and Rehnquist, C.J., Scalia, and Thomas, JJ., in the minority.
79. *Atkins*, 311.
80. Ibid., 318.
81. Ibid., 319.
82. Ibid.
83. Ibid., 321.
84. Ibid., (Scalia, J., dissenting), 343.
85. Ibid., 344.
86. Ibid., (emphasis added).
87. Ibid., (emphasis in original).
88. Ibid., 351.
89. Ibid., 353.
90. *Roper v. Simmons*, 543 U.S. 551 (2005).
91. The decision in *Roper* was 5-4, with Kennedy, Stevens, Souter, Ginsburg, and Breyer, JJ., in the majority; and Rehnquist, C.J., O'Connor, Scalia, and Thomas, JJ., in the minority.
92. *Roper*, (Kennedy, J., opinion of the Court), 559.
93. Ibid., 560.
94. Ibid.
95. Ibid., 569.
96. Ibid.
97. Ibid., 570.
98. Ibid.
99. Ibid.
100. Ibid., 574.
101. Ibid., 575.
102. Ibid., 576.
103. Ibid., (O'Connor, J., dissenting), 588.
104. Ibid.

105. Ibid., 589.
106. Ibid., 590.
107. Ibid.
108. Ibid., (Scalia, J., dissenting), 608.
109. Ibid., (emphasis in original), 607.
110. Ibid., 609.
111. Ibid., (emphasis in original), 611.
112. Ibid., (emphasis added).
113. Ibid., 619.
114. *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008).
115. Ibid., (Kennedy, J., opinion of the Court), 2652.
116. Ibid., 2657.
117. Ibid.
118. Ibid., 2658.
119. Ibid.
120. Ibid., 2665.
121. Ibid., (Alito, J., dissenting).
122. Ibid., 2672.
123. Ibid.
124. Ibid., 2675.
125. Ibid.
126. U.S. Const. amend. V.
127. Thomas Jefferson, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Chicago, IL: University of Chicago Press, 1950), 505.
128. Ibid.
129. Baron de Montesquieu, *The Spirit of Laws*, trans. Thomas Nugent (Chicago, IL: University of Chicago Press, 1750), 16.
130. Alexis de Tocqueville, *Democracy in America*, trans. and ed. Harvey C. Mansfield and Delba Winthrop (Chicago, IL: University of Chicago Press, 2002), 96.