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Controversy and the Death Penalty

Samantha Pineo

Abstract

The Declaration of Independence guarantees a right to life that was given by a creator. The Constitution guarantees a right to life, which can be found in both the explicit text itself as well as in between the lines. After looking at the founding documents through the lens of a moral reading, examining the case law, and reviewing the process of execution itself, it becomes clear that the death penalty violates one's inalienable right to life, and is, in fact, a cruel and unusual punishment.

Keywords: *Death Penalty, Moral Reading, U.S. Declaration of Independence, U.S. Constitution, 8th Amendment*

The Eighth Amendment to the United States Constitution states that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹ The Founding Fathers essentially left it up to us to define what this means. What is excessive bail? What is cruel and unusual? The latter has been quite controversial to this day, particularly in discussing capital punishment. The death penalty, other than the four-year period between *Furman v. Georgia* and *Gregg v. Georgia*, has been used since the founding of our nation.² Where the death penalty can be used has altered, but we, as a nation, still allow for it. I am arguing that under no circumstances can the death penalty be justified through the eighth amendment; the death penalty is a cruel and unusual punishment. I will first show that life itself is a guaranteed right by looking at our founding documents through the lens of a moral reading. I will then analyze case law in this area, showing how it has pointed us to believe that capital punishment is in fact cruel and unusual. Lastly, I will show that the process in which someone is executed is, in itself, cruel and unusual. I will then take two objections to my argument. The first objection involves looking at the Constitution through the lens of originalism, instead of that of a moral reading. The second objection takes into question that of a non-citizen, that is, is it constitutional to execute someone who is not an American citizen?

¹ U.S. Const. amend. VIII.

² *Furman v Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

Section 1—The Moral Reading

The United States of America was founded right at the end of the enlightenment period, where new ideas about life and the world in general had been emerging. Thomas Hobbes and John Locke were two extremely influential enlightenment philosophers, both touching upon the idea of the Social Contract. Hobbes argued that without a state, life was “poor, nasty, brutish, and short.”³ Men, by nature, are irrational, violent beings, and that in order to stay alive, they must be protected. “The Social Contract is the most fundamental source of all that is good and that which we depend upon to live well.”⁴ When entering the Social Contract with the state, men had to give up some freedoms, but in return, were kept alive. John Locke drew farther on this idea of the Social Contract. He stated that people entered the state and delegated powers to make things easier and more efficient for themselves, and by delegating these powers, the government was obliged to work for the general welfare. He also stated, that before even entering the state, all had the right to life, liberty, and property under God—even without a state, all have the right to life through God.⁵

The Enlightenment, and particularly these philosophers, had a profound impact on the Founding Fathers, and these ideals pour into both the Declaration of Independence and the Constitution. It is important to look at both to show that life is guaranteed, and cannot be taken away by the state. In the Declaration of Independence, Thomas Jefferson states “we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”⁶ Jefferson pulls right from John Locke’s philosophy on the Social Contract. Perhaps the most famous words in the Declaration of Independence, Thomas Jefferson specifically pinpointed that life itself was an unalienable right that everyone is born with. When looking at just the Declaration of Independence, the moral reading does not even need to be applied; the right to Life is explicitly listed.

³ Kevin McGravey, “The State” (presentation, Merrimack College, North Andover, MA, November 14, 2016).

⁴ Friend, Celeste. "Social Contract Theory," Internet Encyclopedia of Philosophy. <http://www.iep.utm.edu/soc-cont/>.

⁵ Susan Vorderer, “The Enlightenment.” (presentation, Merrimack College, North Andover, MA, February 10, 2016).

⁶ Declaration of Independence (US 1776).

While the Declaration of Independence states the right to life, the Constitution does not. However, this right to life reveals itself when examining the Constitution through a moral reading. The moral reading views the Constitution as a living document that grows with the people, and necessitates that the people should view the constitution as a whole document. This means that the document cannot be cherry-picked for passages, but instead must be evaluated as a whole. When applying the moral reading, it is evident that the state taking away a life is a clear violation of the Constitution and what it stands for. The 1st amendment, the 9th amendment, and the 14th amendment in particular point in this direction.

The 1st amendment states, “Congress shall make no law...abridging the freedom of speech.”⁷ Of course, the Supreme Court has found that there are exceptions to this, but for the most part, the United States is the most ardent defender of free speech in the world. The nation stands alone in allowing all kinds of speech, including hate speech, to be protected under this right. The most significant exception for free speech in this particular case states that there needs to be an imminent lawless action at hand in order for speech to be restricted, that there needs to be a real threat, such as shouting fire in a crowded movie theater.⁸ However, someone imprisoned is there so they do not pose a threat to society. So long as their speech within a prison does not cause harm, then their speech should not, and further cannot, be restricted under the 1st amendment. When the state uses capital punishment and takes a life, they are not only killing someone, they are violating that particular person’s 1st amendment rights. With the loss of life, it follows that this person’s speech is forever restricted because that person can no longer speak. In order for anyone to engage in their first amendment rights, they need to be alive to do so. If the United States truly holds the 1st amendment so dear, it truly needs to be applied to all.

There are rights that are not explicitly listed in the Constitution that have been and are continually recognized by the Court, and the right to life should be included in this category. The 9th amendment states “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁹ Essentially, this amendment states that even if a right is not explicitly listed in the Constitution, it can exist. While the amendment does not mean that the people can just make up rights to engage in, it makes sure that those unalienable

⁷ U.S. Const. amend. I.

⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁹ U.S. Const. amend. IX.

rights are still recognized. The right to privacy is one of those rights that is acknowledged by the Court.¹⁰ In addition, the right to marriage is also not explicitly listed, but today, marriage is recognized across the board. Privacy and marriage existed before the Constitution was written, and so the rights to them have existed before the Constitution. The right to life has also existed before the Constitution was written; it was brought to light during the enlightenment period by philosophers like Locke, and was drawn upon further by the Founding Fathers in the Declaration of Independence. As Thomas Jefferson mentioned in that document, the right to life is inalienable. If the state takes away a life, they are violating that particular person's right to life itself, which is a violation of the 9th amendment because the right has existed long before the Constitution. The right may not be explicitly listed, but is guaranteed through the 9th amendment.

Lastly, capital punishment is a violation of the 14th amendment. The 14th amendment states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹¹ At first glance, it looks like life can be taken away through the due process of law, but this is not the case. The 14th amendment continues and goes on to state that no laws can "abridge the privileges or immunities of citizens of the United States."¹² If a person's rights are abridged, that is a clear violation of the amendment. Moreover, loss of citizenship entirely would most certainly be a violation of the 14th amendment.¹³ Corey Brettschneider, in "The Rights of the Guilty," argues that when the state uses the death penalty, they are not only taking away a life, they are taking away someone's citizenship, which, according to *Trop v. Dulles*, cannot be done (See Section 2).¹⁴ When the death penalty is used, the state ends the relationship between the citizen and the state, violating a person's 14th amendment rights.

When all of these pieces are taken separately and evaluated at face value, it is not very clear that life is guaranteed through our founding documents. However, when the moral reading is applied, and the founding documents are looked at as a whole and read in between the lines, it

¹⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹¹ U.S. Const. amend. XIV.

¹² U.S. Const. amend. XIV.

¹³ *Trop v. Dulles*, 356 U.S. 86 (1958).

¹⁴ Brettschneider, Corey. "The Rights of the Guilty; Punishment and Political Legitimacy." April, 2007.

becomes clearer that the right to life is one that we as a nation guarantee to our citizens. The death penalty takes away a person's life, taking away their citizenship and their ability to engage in their rights, which violates the Constitution.

Section 2—Analyzing Case Law

Over the years, the Court has taken on many cases in regards to the 8th amendment and capital punishment. As time has gone on, the 8th amendment has become more restrictive in its use, growing with the people. For example, *Trop v. Dulles* demands that the 8th amendment be analyzed through an evolving standard of decency. The case law and precedent in this area tells us that the death penalty today is unconstitutional.

Trop v. Dulles is the first landmark case when looking at modern death penalty jurisprudence. In *Trop v. Dulles*, the Court ruled that citizenship could not be taken away as a form of punishment.¹⁵ Once given citizenship, it cannot be taken away—“Citizenship is not a license that expires upon misbehavior.”¹⁶ Drawing again from Brettschneider, the state cannot take away a life without taking away that person's citizenship, going against the holding in *Trop v. Dulles*.¹⁷ The majority in *Trop* also acknowledged that when it comes to analyzing and interpreting the 8th amendment, “the amendment must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society.”¹⁸ So, again, as the nation and the people grow, and norms are changed, the 8th amendment has to change with it. The Court and the states have been applying an evolving standard of decency long before the Court said explicitly to do so. Though public hangings, floggings, and tarring and feathering were all legal and common practices, they were all slowly outlawed because the people realized that these practices were indecent; they were cruel and unusual. If we never evolved as a society when it came to regarding punishments, these punishments, which are now so obviously cruel and unusual, could have lasted a lot longer if we did not apply an evolving standard of decency.

The Court and the states have also been applying this evolving standard of decency to the cases taken after *Trop v. Dulles*. In *Furman v. Georgia*, the Court held that the death penalty was

¹⁵ *Trop v. Dulles*, 356 U.S. 86 (1958).

¹⁶ *Trop v. Dulles*, 356 U.S. 86 (1958), 3.

¹⁷ Brettschneider, Corey. “The Rights of the Guilty; Punishment and Political Legitimacy.” April, 2007.

¹⁸ *Trop v. Dulles* 356 U.S. 86 (1958), 6.

a violation of the 8th and 14th amendments, outlawing the use of the death penalty in the United States. The Court hit upon many points in its reasoning, highlighting that the use of the death penalty is a “denial of human dignity,” that the 8th amendment was put in place to prevent this taking away of dignity, and that the death penalty does not only inflict mental pain, but physical pain as well.¹⁹ Capital punishment is the only punishment in the United States that allows for physical pain to be inflicted. Lastly, the Court reasoned, as Brettschneider did, that when the state takes a life, they are taking away someone’s citizenship, their “right to have rights.”²⁰

Though the Court overturned their ruling in *Furman v. Georgia* in *Gregg v. Georgia*, the Court has still applied the evolving standard of decency established in *Trop v. Dulles* in other cases.²¹ In 1977 in *Coker v. Georgia*, the Court ruled that capital punishment could not be used in rape cases, as that was a cruel and unusual punishment for the crime.²² In 2002 in *Atkins v. Virginia*, the Court held that the death penalty cannot be used when the defendant has a mental disability, overturning *Penry v. Lynaugh*.²³ In 2005 in *Roper v. Simmons*, the Court held that the death penalty cannot be used when the defendant is a juvenile.²⁴ When the Court applies an evolving standard of decency, they often look at what the people have to say. When *Penry* was decided in 1989, only 2 states had prohibited the execution of those who were mentally retarded. By the time *Atkins* was ruled on, 18 states along with the federal government had prohibited the execution of those who were mentally retarded.²⁵ The Court took this movement into account in their ruling; the states were moving to prohibit the execution of those who were mentally retarded, so that is what the Court ruled. When *Roper* was decided, 30 states had outlawed the execution of juveniles, and where it was legal, it was hardly used.²⁶ The national consensus was to not execute minors, and so the Court mirrored that in their ruling. The Court in these three cases reasoned the way they did because society was pushing them in this direction; the Court in these three cases ruled the way they did because they applied an evolving standard of decency.

¹⁹ *Furman v Georgia*, 408 U.S. 238 (1972), 682.

²⁰ *Furman v Georgia*, 408 U.S. 238 (1972), 683.

²¹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

²² *Coker v. Georgia*, 433 U.S. 584 (1977).

²³ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁴ *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁵ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁶ *Roper v. Simmons*, 543 U.S. 551 (2005).

As of today, 19 states have abolished the death penalty. Out of the 31 states where the death penalty is still legal, 18 states have not executed anyone within the last 5 years. And moreover, the federal government and the U.S. Military, where capital punishment is still allowed, have not executed anyone within the last 10 years.²⁷ If the Court today were to rule whether or not the death penalty is a cruel and unusual punishment, they would have to hold that it is. With the way the Court has applied the evolving standard of decency in the past, this is the only possible outcome. The nation is moving towards not using the death penalty; constitutional law should do the same.

Section 3—The Execution

Today, as it was when *Furman v. Georgia* was decided 45 years ago, the death penalty is the only punishment in the United States that continues to inflict pain on those who are executed. There is not a process that makes death completely painless for the person. Though lethal injection is the primary method for execution, there are still states that allow for other methods of execution. Three states allow for firing squads if lethal injection is not a viable option, 3 states allow for hanging, 6 states allow for gas chambers, and 9 states allow for electrocution.²⁸ All of these methods inflict even more pain into the person that is being executed. These methods alone are cruel and unusual.

While lethal injection is the most accepted method for execution, it still causes much pain for the person being executed, and can be easily botched. On January 18, 2017, Ricky Gray was executed in Virginia. Protocol in Virginia had changed so that after the prisoner enters the execution chamber, a curtain is closed while medical staff set up the IV and other necessary tools for the execution to be carried out. The curtain in Ricky Gray's case was closed for 33 minutes, making people believe that something went wrong behind the curtain.²⁹ In another instance on April 4, 2017, the state of Arkansas carried out a double execution, where the first execution of Jack Jones was botched. In his case, medical staff spent 45 minutes attempting to put a "central line" into his neck before giving up and placing it elsewhere. After everything was set and the

²⁷ "Jurisdictions with no recent executions." Death Penalty Information Center. April 21, 2017. Accessed April 30, 2017. <https://deathpenaltyinfo.org/jurisdictions-no-recent-executions>.

²⁸ "Methods of Execution." Death Penalty Information Center. 2018. <https://deathpenaltyinfo.org/methods-execution>

²⁹ "Virginia Increases Execution Secrecy After Difficulty Setting IV in Last Execution." Death Penalty Information Center. March 2017. <https://deathpenaltyinfo.org/node/6711>

execution was under way, “witnesses reported that corrections officials did not wait the mandated 5 minutes to perform a consciousness check on Jones, and that he was moving his lips and gulping for air after the sedative midazolam had been administered.”³⁰ Marcel Williams, the second man to be executed, and his lawyers filed for a stay after observing Jones’ “torturous and inhumane” execution.³¹ The stay was not granted and Williams was executed a few short hours after Jones. The double execution occurred so that the state could use its supply of midazolam, one of the three drugs used in an execution, before it expired. These two instances show how cruel and unusual execution by lethal injection can truly be.

Section 4—The First Objection: Originalism

The moral reading is just one way to interpret the Constitution. Another lens of interpretation is originalism, which asks the reader to examine the Constitution in the context of the time it was written. Thus, the difference between the moral reading and originalism is the difference between analyzing a living document versus a dead document. When looking at the Declaration of Independence and the Constitution through the lens of originalism, the right to life is harder to find. An originalist reading of Jefferson’s words “*all* men” have a completely different meaning. Jefferson did not really mean all men; at the time, he only meant rich white men who owned property, excluding all other races of males and all females entirely. Since the right to life can scarcely be found in the Declaration of Independence, it cannot be found in the Constitution either.

Since the right to life was not guaranteed before the Constitution under the lens of originalism, it cannot be guaranteed after. The right to life cannot be found in the time period that the Constitution was written in either, as hanging was used widely across the nation for most crimes. Though (typically) we do not allow for hanging today, since the right to life was not found at the time of the founding of the nation, it should not be sought after today. Furthermore, the 9th amendment does not guarantee that all unenumerated rights are recognized. The right to contract, though initially recognized through *Lochner v. New York*, is no longer recognized by the Court.³²

³⁰ “Arkansas Performs Double Execution Amid Allegations of Botched Lethal Injection.” Death Penalty Information Center. April 2017. <https://deathpenaltyinfo.org/node/6747>

³¹ “Arkansas”

³² *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

Though the right to privacy was recognized in *Griswold*, Scalia's originalist dissent emphasizes that under originalism, rights that are not explicitly listed in the Constitution are rights that the Court could not and should not touch. The right to life, since not explicitly listed, is one of these.

The issue with originalism is that it cannot stand on all issues; Scalia calls this "faint-hearted originalism." Though the country was essentially founded on slavery, there is no way that anyone today could argue that since it was a common and accepted practice at the time that it should be accepted today. The same goes for tarring and feathering, flogging, etc. Scalia has also recognized that there must be certain restrictions on the 2nd amendment, the right to bear arms. In *DC v. Heller*, Scalia points to this concept of faint-hearted originalism. While Scalia certainly recognized that there was a right to bear arms, he also recognized that guns today are drastically different than the guns that the founding fathers used. There are certain areas where originalism has a place; it does not have a place when it comes to the right to life.

Section 5—The Second Objection; the Non-Citizen

As stated in Section 1, the Declaration of Independence guarantees life to all. This is more important than ever when looking at the case of the non-citizen. In the Declaration of Independence, Jefferson does not say that only those who are (eventually going to be) citizens of the United States are the only ones with unalienable rights. In fact, he is very inclusive, and says that *all* men are created equal and endowed with certain unalienable rights, life being among them. Overtime, we have come to guarantee rights to *all* men and women alike. These unalienable rights that Jefferson discussed in the Declaration of Independence should be included among them.

We typically believe that the Constitution and the rights enumerated in it strictly apply to just citizens, making the Section 1 argument irrelevant. However, upon evaluating the text further, it applies to all people, not just U.S. citizens. The Equal Protection Clause of the 14th amendment states "nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" The Equal Protection Clause does not explicitly say citizens only; it states that any person within its jurisdiction is guaranteed equal protection. Since citizens, through the moral reading and case law, are guaranteed a right to life, so should the non-citizens that the equal protection clause protects.

It is also important to recognize that if someone is not a citizen of our country, then they have to be a citizen of another one. Out of the 196 countries in the world, 104 have completely

abolished the death penalty. Out of the 92 countries that still allow for it, 30 countries have “abolished it in practice,” as they have not executed anyone within the last 10 years. 7 countries only use the death penalty in absolute extreme circumstances or in cases of military law.³³ The world has shifted towards not executing their people, and we lag behind in that movement. We were the last Western Country to abolish the death penalty for juveniles, doing so in 2002.³⁴ Moreover, we are the only Western Country that still uses the death penalty.

Most countries that still allow for capital punishment hail from the Middle East and Central Asia. In 2015, 1,634 people were executed across 25 countries. The countries that conducted the most executions that year were China, Iran, Pakistan, Saudi Arabia and the United States.³⁵ The other countries listed for the most part do not recognize the basic rights that we as a nation do. The United States, in fact, is one of the strongest defenders of basic rights, and is *the* strongest defender of free speech in the world.

The Declaration of Independence guarantees a right to life that was given by a creator. The Constitution guarantees a right to life, which can be found in both the explicit text itself as well as in between the lines. The world as a whole is shifting towards not using the death penalty, and just as the Courts would respect the wishes of the American people, it needs to respect the wishes of all people. The non-citizen cannot be executed for these reasons.

Section 6—Conclusion

“The progressive decline in, and the current rarity of, the infliction of death demonstrates that our society seriously questions the appropriateness of this punishment today.”³⁶ Though this was stated in 1972 in *Furman*, it still rings true. After looking at the founding documents through the lens of a moral reading, the case law, and the process of execution itself, it becomes clear that the death penalty violates one’s inalienable right to life, and is, in fact, a cruel and unusual punishment.

³³ “Abolitionist and Retentionist Countries.” Death Penalty Information Center. 2017. <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries>

³⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

³⁵ “Death Penalty 2015: Facts and figures.” Amnesty International. April 6, 2016.

<https://www.amnesty.org/en/latest/news/2016/04/death-penalty-2015-facts-and-figures/>

³⁶ *Furman v Georgia*, 408 U.S. 238 (1972), 684.

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