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# EVOLVING STANDARDS OF IRRELEVANCY?

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## I. INTRODUCTION

*"You keep using that word. I do not think it means what you think it means."*[1]

The United States Supreme Court optimistically believed it knew what 'evolving' meant back in 1958 when it announced that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[2] The unspoken premise underlying that standard is that the word 'evolving' means changing in one, ever-improving direction. That, however, is not the definition of to "*evolve*."[3] The Supreme Court assumed that standards of decency would always evolve to become more humane.[4] Such naiveté further produced false hope in those opposed to the death penalty that either the words "cruel and unusual" would one day evolve to mean executions will be found unusually cruel and thus unconstitutional[5] or that the American citizenry would evolve away from endorsing government-sanctioned killing.[6]

As the years passed, the Court has been either unable or unwilling to find evidence that Americans have evolved away from supporting harsh punishments, including the death penalty.[7] This idea that a maturing society becomes ever more humane over time and relegates brutal punishments to the primitive, uneducated past[8] conflicts with harsh reality. It appears that "[a]s societal attitudes have become more punitive, the Supreme Court's reliance on evolving standards of decency has

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[1] THE PRINCESS BRIDE (Twentieth Century Fox Film Corp. 1987).

[2] Trop v. Dulles, 356 U.S. 86, 101 (1958) (finding a violation of the Eighth Amendment when the defendant lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion).

[3] *Evolve*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/evolve (accessed Sept. 20, 2022) (defining *evolve* as "to develop gradually, or to make someone or something change and develop gradually.").

[4] John F. Stinneford, *The Original Meaning of Unusual: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1750–51 (2008).

[5] *See, e.g.*, Robert M. Casale & Johanna S. Katz, *Would Executing Death-Sentenced Prisoners after the Repeal of the Death Penalty Be Unusually Cruel under the Eighth Amendment?*, 86 CONN. B. J. 329, 344 (2012).

[6] Stinneford, *supra* note 4, at 1751.

[7] John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENTENCING REP. 87, 88 (2010) [hereinafter Stinneford, *Evolving Away*].

[8] *Id.*

become increasingly problematic."[9] At times unable to find evidence that Americans are evolving in a way that supports the Supreme Court's rulings, the Court broadened its search for evolving standards of decency by turning to international authorities to find evidence of an ever more just society.[10]

Perhaps because of the abolition of the death penalty in Europe, American scholars[11] and American media[12] contend that Europeans display a more progressive and enlightened understanding of human

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[9] *Id.*

[10] Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) ("More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself.").

[11] *See, e.g.*, JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICAN AND EUROPE 16 (2003) ("German and French lawyers can often be heard making this claim: their countries, they say, learned the lesson of fascism in the 1930s and 1940s, and that is why they have turned to human practices today."); William W. Berry II, *The European Prescription for Ending the Death Penalty*, 2011 WIS. L. REV. 1003, 1004 (2011) (reviewing ANDREW HAMMEL, *supra* note 64) ("Europeans, particularly in the academic community, continue to express outrage and disbelief at its persistence, especially given America's twentieth-century role as the world leader in challenging abuses of human rights."); *see also* Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 132 (2002) ("While most Americans remain unaware of the embarrassment the imposition of the death penalty—especially when employed against juveniles and the mentally challenged—causes its diplomats abroad and in international fora, the U.S. fight against terrorism will increasingly highlight the problems the imposition of the death penalty constitutes in creating an international coalition and providing for effective cross-border cooperation."). *But see* Andrea Pin, *The Costs and Consequences of Incorrect Citations: European Law in the U.S. Supreme Court*, 42 BROOK. J. INT'L L. 129, 185 (2016). Italian Professor Andrea Pin notes that the European abolition stems in part from pressure imposed by the European Council of Human Rights:

> Since 1993, applicant states to the Council of Europe must undertake to sign and ratify the ECHR and its Protocols, so all post-Thirteenth Protocol candidates have no choice but to abolish the death penalty. In fact, central and eastern European countries have joined the abolitionist regimes under the pressure of the Council of Europe, mainly through amending their penal laws or constitutions. Only a handful of countries have become abolitionist through a Constitutional Court decision (Albania, Hungary, and Lithuania). Overall, the judicial outlawing of the death penalty is more the exception than the norm in this increasingly abolitionist wave.

*Id.*

[12] *See* Editorial, *Europe's View of the Death Penalty*, N.Y. TIMES (May 13, 2001), http://www.nytimes.com/2001/05/13/opinion/europe-s-view-of-the-death-penalty.html ("European politicians and intellectuals, who view the death penalty as a human rights issue, are incredulous that Americans support a punishment that fails to deter crime, targets mainly those who cannot afford a decent lawyer, is used on the mentally retarded and has often gotten the wrong man.").

rights. The reference to this abolition implies the belief that European society has correctly evolved. The international abolition movement strongly influenced several Supreme Court death penalty decisions.[13] In *Roper v. Simmons*, the Court held that the execution of defendants who were juveniles at the time of the commission of their crimes violates the Eighth Amendment's prohibition against cruel and unusual punishment.[14] In doing so, the Court found Americans un-evolved compared to other countries.

The overwhelming weight of international opinion against the juvenile death penalty is not controlling here; rather, it confirms the Court's determination that the penalty is a disproportionate punishment for offenders under eighteen.[15] Prior to *Roper*, the United States was the only country in the world that continued to give official sanction to the juvenile death penalty.[16] The Court stated, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom."[17] Underlying the Court's reasoning is the assumption that the death penalty has been abolished by other countries, especially in Europe, because execution is cruel and barbaric.[18] Yet, the Court cites no historical or scholarly support for this conclusion.[19] Instead, the Court simply concludes, without any evidence, that the abolition of

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[13] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 622 (Scalia, J., dissenting). Justice Scalia harshly criticized this approach, stating, "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage." *Id.* By contrast, Justice O'Connor's dissent found legitimacy in the Court's consideration of international opinion:

> At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.

*Id.* at 605 (O'Connor, J., dissenting). *See also* Atkins v. Virginia, 536 U.S. 304, 325 (2002).

[14] *Roper*, 543 U.S. at 578.

[15] *Id.* at 578.

[16] *Id.* at 575. The Court further notes, "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." *Id.*

[17] *Roper*, 543 U.S. at 578.

[18] *Id.* at 577.

[19] *See generally id.* at 551 (lacking any historic or scholarly support as to the underlying reason for death penalty abolition in foreign nations).

the death penalty in Europe demonstrates "the progress of a maturing society."[20]

This article first details the history and application of the evolving standards of decency doctrine. Secondly, the article uses the history of Europe's abolition of the death penalty to demonstrate the irrelevancy of comparisons to the United States. Thirdly, the article examines the abolition movement in the United States. Finally, the article suggests that the death penalty abolition movement in the United States should acknowledge that after more than sixty years of failure to demonstrate American evolution against the death penalty, it is past time to concentrate on more innovative arguments to put an end to the death penalty.

## II. EVOLVING STANDARDS OF DECENCY

In 1958, the United States Supreme Court announced that the Eighth Amendment's ban on cruel and unusual punishment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[21] Since *Trop v. Dulles*, majority, concurring, and dissenting opinions involving criminal punishments have applied the 'evolving' standard.[22] In particular, opinions in cases involving capital punishment frequently cite the standard.[23]

### *A. Background*

In 1972, the Court's ruling in *Furman v. Georgia* invalidated then-existing capital punishment statutes, effectively commuting the sentences of every federal and state defendant awaiting execution from the death sentence to life imprisonment.[24] The *per curiam* opinion is quite brief:

> Certiorari was granted limited to the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" . . . . The Court holds

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[20] *Id.* at 560–61 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[21] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[22] Stinneford, *Evolving Away*, *supra* note 7, at 87.

[23] John H. Blume & Brendan van Winkle, *Execution Methods and Evolving Standards of Decency*, 48 NO. 3 LITIG. 29, 29 (2022).

[24] *See* Joanmarie Ilaria Davoli, *Playing Politics with Executions: Abuse of Executive Discretion*, 30 GEO. MASON U. C.R. L.J. 307, 319 (2020) ("As a direct result of Furman, over 500 death row inmates had their sentences converted to life in prison. The ruling did not disturb the convictions but instead prevented the executions of everyone on death row.").

> that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. So ordered.[25]

In his concurring opinion, Justice Marshall references the evolving standard from *Trop* and states that "[w]e achieve 'a major milestone in the long road up from barbarism' and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment."[26] Justice Marshall clearly expects that mature societies evolve in only one direction: away from barbarism and toward a more humane society. Unfortunately, sometimes society in general—and society's view on criminal punishments in particular—evolve away from increased humanity.

One modern case demonstrates that society sometimes evolves backward. Reminiscent of the stocks and pillory punishments from seventeenth-century colonial life, twentieth-century Alabama prison guards disciplined inmates by handcuffing them to a hitching post.[27] The case opinion describes such treatment:

> On May 11, 1995, while Hope was working in a chain gang near an interstate highway, he got into an argument with another inmate. Both men were taken back to the Limestone prison and handcuffed to a hitching post. . . . Because he was only slightly taller than the hitching post, his arms were above shoulder height and grew tired from being handcuffed so high. Whenever he tried moving his arms to improve his circulation, the handcuffs cut into his wrists, causing pain and discomfort.
>
> On June 7, 1995, Hope was punished more severely. . . . Four other guards intervened, subdued Hope, handcuffed him, placed him in leg irons and transported him back to the prison where he was put on the hitching post. The guards made him take off his shirt, and he remained shirtless all day while the sun burned his skin. He remained attached to the post for

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[25] Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (citation omitted).

[26] *Id.* at 371 (Marshall, J., concurring) (quoting RAMSEY CLARK, CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL (1970)).

[27] Hope v. Pelzer, 536 U.S. 730, 733 (2002).

> approximately seven hours. During this 7-hour period, he was given water only once or twice and was given no bathroom breaks. At one point, a guard taunted Hope about his thirst. According to Hope's affidavit: "[The guard] first gave water to some dogs, then brought the water cooler closer to me, removed its lid, and kicked the cooler over, spilling the water onto the ground."[28]

In *Hope v. Pelzer*, quoted above and decided in 2002, the Supreme Court held that such treatment violated the cruel and unusual prohibition of the Eighth Amendment.[29]

The Supreme Court's application of the Eighth Amendment's prohibition against cruel and unusual punishment limits the death penalty to crimes that result in death or crimes against the State; espionage, treason, and the like.[30] In 1977, the Court held that the death penalty for the rape of an adult woman was unconstitutional.[31] In 2008, the Court found that the death penalty for the rape of a child was unconstitutional.[32] The Court has held that it is unconstitutional to execute a defendant who was under the age of eighteen at the time of the offense.[33] Additionally, the Court has found that it is unconstitutional to execute an individual with

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[28] *Id.* at 734–35.

[29] *Id.* at 737.

[30] *See* Kennedy v. Louisiana, 554 U.S. 407, 435 (2008) ("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."). The Court further stated that the imposition of the death penalty "should not be expanded to instances where the victim's life was not taken" while refusing to address "offenses against the State[,]" which impliedly leaves open the possibility that it may be imposed for such crimes. *Id.*

[31] Coker v. Georgia, 433 U.S. 584, 592 (1977). Justice Powell relied upon the evolving standard to resolve the unraised issue of whether a brutal rape might call for the death penalty: "Thus, it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape. Final resolution of the question must await careful inquiry into objective indicators of society's 'evolving standards of decency,' particularly legislative enactments and the responses of juries in capital cases." *Id.* at 598–99, 603 (Powell, J., concurring).

[32] *See Kennedy*, 554 U.S. at 435.

[33] *See* Roper v. Simmons, 543 U.S. 551, 560–61, 575 (2005) ("The prohibition against cruel and unusual punishments, like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual.").

an intellectual disability.[34] The Court has further found that the death penalty is unconstitutional for defendants with no intent to kill[35] and that it is unconstitutional to execute an inmate who is insane.[36]

For many years, the Court applied the evolving standard to criminal cases by weighing the proportionality of the punishment against the severity of the crime.[37] Unfortunately, applying the standard requires determining whose standards of decency apply, which renders the standard almost meaningless.[38] When the Court found that a statute invalidated the cruel and unusual standard, the Court was essentially overruling the legislatures who wrote the laws, as well as the governors who signed the laws. When the Court found that the sentences imposed by juries violated the standard, it essentially found that the jurors who applied the laws to the facts violated the standards. Thus, the elected representatives of the people, as well as the people themselves, were not demonstrating the level of decency that the Court expected.

As a result, the Court's evolving standards of decency rule has become nearly incomprehensible, in addition to being impossible to apply. Professor John Stinneford reviewed the Court's application of the evolving standards of decency in three recent cases and found that the Court relies on such varied sources to find the appropriate standard as to make the term incomprehensible:

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[34] *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.").

[35] Arguing in dissent, Justice faults the majority opinion for failure to properly apply evolving standards of decency. *See* Enmund v. Florida, 458 U.S. 782, 801, 823 (O'Connor, J., dissenting) (1982) ("For this reason, I conclude that the petitioner has failed to meet the standards in Coker and Woodson that the 'two crucial indicators of evolving standards of decency . . .—jury determinations and legislative enactments—both point conclusively to the repudiation' of capital punishment for felony murder. . . . In short, the death penalty for felony murder does not fall short of our national 'standards of decency.'").

[36] Ford v. Wainwright, 477 U.S. 399, 406, 417 (1986) ("Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the 'evolving standards of decency that mark the progress of a maturing society.' In addition to considering the barbarous methods generally outlawed in the 18th century, therefore, this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects." (citations omitted)).

[37] Stinneford, *supra* note 4, at 1819.

[38] For the definitive analysis of the history and application of the evolving standards of decency, see *id.* at 1743.

> [I]t is hard to make sense of the evolving standards of decency test. In all three cases, the Supreme Court struck down a punishment that appeared to enjoy significant public support. In *Roper*, the Court treated the absolute number of states that approved the punishment as unimportant; all that mattered was the trend toward abolition. In *Kennedy*, the Court treated the trend as unimportant; all that mattered was the absolute number of states. In *Graham*, the Court treated both the absolute number of states and the trend as unimportant; all that mattered was rarity of imposition.
>
> In fact, the only common aspect of the reasoning in these cases was the fact that the Court itself considered each punishment to be cruelly excessive in light of the offender's culpability. In other words, the Court's own judgment drove the decision in all three cases. In order to effectuate this judgment, the Court stretched the evolving standards of decency test to its limits and beyond. The test no longer has any coherent core.[39]

Thus, with no consistent way to apply, standards to measure, or agreement on what is cruel and unusual, the standards of decency test has evolved into meaninglessness.

### *B. Back to the Future*

The Supreme Court has long upheld the constitutionality of executions while simultaneously finding that torture violates the cruel and unusual standard of the Eighth Amendment. In 1878, the Court upheld the sentencing in which a judge told the condemned defendant that he was to "be publicly shot until [he was] dead."[40] The Court found execution by shooting constitutional based on the implementation of such punishments in other contemporary contexts.[41] The Court, however, distinguished between lawful execution and torture:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel

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[39] Stinneford, *Evolving Away*, *supra* note 7, at 89.

[40] Wilkerson v. Utah, 99 U.S. 130, 131 (1878).

[41] In making the argument, the Court explained that, although the Constitution prohibits cruel and unusual punishments, "the authorities referred to [in the case] are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category within the meaning of the Eighth Amendment." *See id.* at 134–35.

> and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.[42]

In 1890, the Court reiterated that execution itself does not constitute torture, stating that "[p]unishments 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. It implies there something inhuman and barbarous—something more than the mere extinguishment of life."[43] Having distinguished between torture and lawful execution, the Court has upheld the constitutionality of a wide variety of execution methods, including the electric chair, firing squad, and lethal injection.[44]

Despite attempts to demonstrate the inherent cruelty in killing a living person, the Court has rationalized that there must be a constitutional method of execution, as the Constitution itself provides for death sentences as a possible punishment.[45] The Supreme Court has upheld the constitutionality of execution by lethal injection, including when defendants challenge the make-up of the lethal drugs themselves.[46] In 2015, the Court added a macabre twist to death penalty jurisprudence, requiring that a defendant challenging one method of execution must himself propose humane alternatives.[47]

In 2019, the Court ruled that

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[42] *Id.* at 135–36.

[43] In re Kemmler, 136 U.S. 436, 447 (1890).

[44] *See generally* Glossip v. Gross, 576 U.S. 863, 869 (2015) (describing the history of execution methods utilized in the United States).

[45] *See id.* at 869 ("Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out.")

[46] *Id.* at 877–78.

[47] *See* Nance v. Ward, 142 S.Ct. 2214, 2219–20 (2022) (citing *id.*) ("A death row inmate may attempt to show that a State's planned method of execution, either on its face or as applied to him, violates the Eighth Amendment's prohibition on 'cruel and unusual' punishment. To succeed on that claim . . . he must satisfy two requirements. First, he must establish that the State's method of execution presents a 'substantial risk of serious harm'— severe pain over and above death itself. . . . Second, and more relevant here, he 'must identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." (citations omitted)).

> [e]ven if a death row prisoner can demonstrate that a state's method of execution is likely to cause severe pain and suffering, if there are no available alternatives, the state may proceed. *Bucklew v. Precythe* took this restriction further: states do not have to be the first to test a method of execution, and prisoners have a heavy burden to prove that there is a readily available alternative that will reduce a substantial risk of pain from the state's chosen method. *Bucklew* also demonstrates that a majority of the Court has totally abandoned the evolving standards of decency standard.[48]

In *Bucklew*, the Court applied the *Baze v. Rees* case, in which the evolving standard was replaced with the rule that the execution method cannot enhance or "superadd" to the pain beyond what is necessary to kill the defendant.[49]

In response to the unavailability of execution drugs,[50] some legislatures have proposed returning to long-abandoned types of executions, such as firing squad.[51] In 2022, Georgia death row inmate Michael Nance complied with the Supreme Court's ruling in *Glossip* and offered fairly gruesome evidence about his upcoming execution by lethal injection. Nance proposed a firing squad as the more humane option to lethal injection given his specific medical conditions:

> In his complaint, Nance alleges that applying that method to him would create a substantial risk of severe pain. According to Nance, his veins are "severely compromised and unsuitable for sustained intravenous access." They are, Nance says, likely to "blow" during the execution, "leading to the leakage of the lethal injection drug into the surrounding tissue" and thereby causing "intense pain and burning." On top of that, Nance asserts, his longtime use of a prescription drug for back pain creates a risk that the sedative used in the State's lethal injection

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[48] Alexandra Klein, *When Police Volunteer to Kill*, 74 FLA. L. REV. 205, 248 (2022) (citing Bucklew v. Precythe, 139 S.Ct. 1112 (2019)).

[49] Baze v. Rees, 553 U.S. 35, 48 (an execution method is unconstitutional when it intensifies the sentence of death with a (cruel) "superadd[ition]' of "terror, pain, or disgrace"); *see also id.* at 96 (Thomas, J., concurring); Bucklew v. Precythe, 139 S.Ct. 1112, 1123 (2019).

[50] *See* discussion *infra* Section III (discussing the European impact on death penalty).

[51] Rob Tornoe, *Missouri, Wyoming Lawmakers Open to Allowing Executions by Firing Squad*, PHILA. INQUIRER (Jan. 19, 2014), http://www.philly.com/philly/news/nation_world/Missouri_Wyoming_lawmakers_open_to_allowing_executions_by_firing_squad.html#XlGJWrg64WZxlLTo.99.

> protocol will fail to "render him unconscious and insensate." Nance proposes, as a "readily available alternative" method of execution, "death by firing squad." As noted earlier, four other States have approved that method. Use of a firing squad, Nance says, will lead to "swift and virtually painless" death. [52]

While one can certainly imagine a system that is even crueler, requiring the defendant to fashion an execution method for his own death is reminiscent of medieval torture.

Additionally, while courts and scholars often repeat Nance's optimism about the painlessness of death by firing squad,[53] it is "unclear whether a correctly-performed shooting is physically painful."[54] In his article surveying execution methods, Professor John Blume notes that the firing squad has only been used in the United States three times in the past fifty years.[55] "Even under the best circumstances, however, when a person is shot in the chest, he or she will remain sensate while the oxygen in the brain dissipates."[56] The pain level involved in being shot to death by a firing squad simply lacks empirical research.[57]

Indeed, there is no way to kill that doesn't include pain, as the Court acknowledges by applying the common law:[58]

> [W]here (as here) the question in dispute is whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would

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[52] Nance v. Ward, 142 S.Ct. 2220 (2022) (citations omitted).

[53] *See, e.g.*, Klein, *supra* note 48, at 250–51 (arguing that "[d]ying by firing squad may be quicker and less painful than lethal injection.").

[54] Deborah W. Denno, *The Firing Squad as a "Known and Available Alternative Method of Execution" Post-Glossip*, 49 U. MICH. J.L. REFORM 749, 785 (2016).

[55] Blume & van Winkle, *supra* note 23, at 32.

[56] *Id.*

[57] *See* generally Denno, *supra* note 54, at 785–76, 791–92 (discussing the question of whether death by firing squad causes any pain or how much pain is involved); *see id.* at 785 n.258 (noting lack of authority on methods of execution); *but see id.* at 785 ("More solid evidence suggests that a competently performed shooting may lead to nearly instant death."); *see also id.* at 785–86 (describing how one death row inmate allowed doctors to trace his heartbeat during his execution) ("After the bullets hit the target, the inmate's heartbeat stopped 15.6 seconds later, yet he was not declared dead until two-and-a-half minutes after the shooting.").

[58] Bucklew v. Precythe, 139 S.Ct. 1112, 1126–27 (2019) ("As we've seen, when it comes to determining whether a punishment is unconstitutionally cruel because of the pain involved, the law has always asked whether the punishment 'superadds' pain well beyond what's needed to effectuate a death sentence.").

> significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason. . . . *Glossip* left no doubt that this standard governs 'all Eighth Amendment method-of-execution claims.'"[59]

The Supreme Court jurisprudence has moved away from trying to apply evolving standards of decency and instead developed a process in which the defendant is forced to play the equivalent of "go out and get the switch."[60] It may be impossible to find a method to kill that lacks pain; and, consequently, cruelty.[61] There is simply no way to apply the evolving standard. States are left to confront their options: "[E]liminate the death penalty, as many have already done; halt executions until a truly humane method of carrying out the ultimate penalty can be developed (which is unlikely); or return to 19th-century methods of execution previously discarded as barbaric . . . ."[62]

Lacking proof that American culture has evolved to ban the death penalty, the Court strayed further afield to find proof that the death penalty is no longer acceptable before pivoting back again and searching the common law for a clear explanation of pain versus super-pain. The path forward remains unclear.

## III. IRRELEVANCY

Both the Academy and the American media have given the abolition of the death penalty in Europe extensive attention. By the early twenty-first century, every country on the continent of Europe, with the exception of Belarus, had abolished capital punishment.[63] By 2000, admission to the European Union required abolition.[64] The abolition of the death penalty appears to be a settled matter in Europe.

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[59] *Id.* at 1125.

[60] For an example of the phrase, see Josh Peter, *Whippings part of Adrian Peterson's childhood*, USA TODAY (Sept. 15, 2014), https://www.usatoday.com/story/sports/nfl/vikings/2014/09/15/adrian-peterson-minnesota-vikings-child-abuse-whippings-indictment-son/15696169/.

[61] *See* Blume & van Winkle, *supra* note 23, at 33.

[62] *Id.* (discussing the options states have under the context of execution drug shortages).

[63] Amnesty Int'l, *Belarus: Amnesty International condemns another death sentence execution*, (June 14, 2019) AI Index: EUR 49/0535/2019; *see also* Michael Schwirtz, *Belarus Censured for Executing 2 in Subway Bombing*, N.Y. TIMES (Mar. 18, 2012) https://belarusfeed.com/another-death-sentence-carried-belarus/.

[64] Charter of Fundamental Rights of the European Union ch. I, art. 2, Dec. 18, 2000, 2000 O.J. (C 364) 1; FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL

European sensibilities influence the Supreme Court and directly impact executions in the United States. Adopted by every state and the federal government as a more humane method of execution,[65] lethal injection requires the administration of a combination of drugs, typically referred to as a "cocktail."[66] Drug manufacturers in Europe, however, are refusing to supply these drugs for executions, leaving states that execute scrambling to find replacements.[67] The EU decided "it would place new restrictions on the sale of lethal injection drugs to countries that have yet to abolish capital punishment in a move that could worsen a supply shortage that has already delayed some [US] executions."[68] This impact on the United States has been intentional:

> For decades, Europe has done all it could to bring its anti-death penalty stance to the United States. We've seen international covenants and conventions, refusals to expedite in capital cases, good old-fashioned diplomacy, even EU briefs to the [US] [S]upreme [C]ourt. Nothing has worked. Until now. Over the last several years, Europe has found a way to export

PUNISHMENT 45 (2003) ("[T]he modern European view is adamant that no civilized state should be permitted the power to employ execution as a criminal punishment. In the European rhetoric, the absence of a death penalty is a defining political matter, a question of the proper constitution of a modern state, not a criminal justice policy choice."); ANDREW HAMMEL EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE 188 (2010) ("This approach can clearly be seen in the Council of Europe's proselytizing message to new member states: 'A choice whether to abolish or retain the death penalty is also a choice about the kind of society we want to live in and the values it upholds. Abolishing the death penalty is part of a package of values marked human rights, democracy and the rule of law' (Directorate General of Human Rights 2001:10).").

[65] Baze v. Rees, 553 U.S. 35, 40–41 (2008) ("As is true with respect to each of these States and the Federal Government, Kentucky has altered its method of execution over time to more humane means of carrying out the sentence. That progress has led to the use of lethal injection by every jurisdiction that imposes the death penalty.").

[66] *See id.* at 73.

[67] *See, e.g.*, Alan Johnson, *Inmate's death called 'horrific' under new, 2-drug execution*, COLUMBUS DISPATCH (Jan. 17, 2014), http://www.dispatch.com/content/stories/local/2014/01/16/mcguire-execution.html. Ohio executed inmate Dennis McGuire on January 16, 2014 ("The state switched to the two drugs for intravenous injection for McGuire's execution because pentobarbital, the single drug used before, is no longer available as manufacturers will not sell it for use in executions."). *Id.*

[68] *Europe tries to halt execution drug sales*, CBS NEWS (Dec. 21, 2011), http://www.cbsnews.com/news/europe-tries-to-halt-execution-drug-sales/.

> its rejection of capital punishment . . . by refusing to export lethal injection drugs to the United States.[69]

Without any legal or historical support, the United States Supreme Court adopted the position that European countries and the European Union have rejected the death penalty because such places have evolved away from their brutal past.[70] While the countries responsible for producing Bloody Mary, the Reign of Terror, and Hitler currently condemn capital punishment, simply eliminating execution does not demonstrate moral superiority.

### *A. Death Penalty Abolition in Europe*

*"The man was strapped onto the bascule. The lunette was clamped around his neck. The blade fell. It was September 10, 1977. The guillotine had just claimed its final head."*[71]

In 1977, the French government beheaded Hamidi Djandoubi, convicted of the torture and murder of his girlfriend.[72] Often considered as remote as the French Revolution, the guillotine[73] remained the method of execution by the French Government until the nation abolished the death penalty in 1981.[74] In Spain, the most recent execution occurred by firing squad in 1975,[75] though other Spanish executions during the 1970s used methods that included the firing squad and strangulation by the garrote.[76] In 1964, the United Kingdom executed two prisoners

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[69] James Gibson & Corinna Barrett Lain, *Europe taught America how to end the death penalty. Now maybe it finally will*, GUARDIAN (May 5, 2014), https://www.theguardian.com/commentisfree/2014/may/05/america-end-death-penalty-finally.

[70] Pin, *supra* note 11, at 175–77.

[71] JEREMY MERCER, WHEN THE GUILLOTINE FELL 4 (St. Martin's Press, 2008).

[72] *Sept. 10, 1977: Heads Roll for the Last Time in France*, WIRED (Sept. 10, 2007, 12:00 PM), https://www.wired.com/2007/09/dayintech-0910-2/.

[73] *See* ALISTER KERSHAW, A HISTORY OF THE GUILLOTINE 20–21 (1958) (summarizing the history of the guillotine).

[74] *France and the Death Penalty*, MINISTÈRE DE L'EUROPE ET DES AFFAIRES ÉTRANGÈRES (Oct. 2, 2018), https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/abolition-of-the-death-penalty/france-and-the-death-penalty/.

[75] Richard Clark, *The garotte*, CAP. PUNISHMENT UK, www.capitalpunishmentuk.org/garrotte.html (last visited Sept. 20, 2022).

[76] *See id.* (describing the history of the "garrote").

simultaneously at separate prisons, both by hanging.[77] The abolition of the death penalty in Europe is a recent phenomenon.[78]

In death penalty cases, the United States Supreme Court has sometimes invoked a quasi-international evolving standards of decency rule.[79] If, however, the Supreme Court ignores American death penalty attitudes, then it makes even less sense for the Supreme Court to consider the laws of other countries or international trends. Such citations include *Roper*'s "international opinion" in finding that executing juveniles violates the Eighth Amendment,[80] as well as *Atkins v. Virginia*, in which the Court referred to international abolition when it found unconstitutional the execution of defendants who suffer from intellectual disabilities.[81] In his 2015 dissent in *Glossip v. Gross*, Justice Breyer further referenced other countries:

> I note, however, that many nations—indeed, 95 of the 193 members of the United Nations—have formally abolished the death penalty and an additional 42 have abolished it in practice. . . . In 2013, only 22 countries in the world carried out an execution. . . . No executions were carried out in Europe or Central Asia, and the United States was the only country in the Americas to execute an inmate in 2013. . . . Only eight countries executed more than 10 individuals (the United States, China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, Yemen). . . . And almost 80% of all known executions took place in three countries: Iran, Iraq, and Saudi Arabia.[82]

By identifying the countries that execute prisoners, Justice Breyer implicitly suggests that the countries still executing are less evolved than the progressive countries that have abolished the death penalty.

The European abolition movement, however, did not primarily stem from concerns for human rights. Although each European country abolished the death penalty at different times, a universal objective of

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77 Richard Clark, *The history of judicial hanging in Britain 1735-1964*, CAP. PUNISHMENT UK, www.capitalpunishmentuk.org/hanging1.html#last (last visited Sept. 20, 2022).

78 *Id.*

79 Roper v. Simmons, 543 U.S. 551, 561, 575 (2005).

80 *Id.* at 568, 578.

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

82 Glossip v. Gross, 576 U.S. 863, 944 (2015) (Breyer, J., dissenting) (citations omitted).

abolition was the desire for political stability.[83] Abolition was advocated for by "educated elites," and a driving concern was to protect that same class from the death penalty.[84] In fact, European political leaders moved toward abolition despite widespread popular support for the death penalty.[85]

### 1. History

While twenty-first-century scholars focus on the *fact* that European countries abolished the death penalty,[86] the *reason* for its abolition remains largely absent[87] from the literature.[88] The conventional view among scholars is that the reason for the abolition of the death penalty in Europe was the preservation of human rights and that abolition received near universal support throughout Europe.[89] No evidence, however, supports this assumption. Despite this lack of evidence, Europe's abolition of the death penalty has directly impacted both the legal status of the death penalty in the United States and actual executions.[90]

The death penalty has a long and well-documented history throughout the European countries, including countries with a modern reputation for being anti-death penalty, such as Sweden.[91] Historically, each European country administered the death penalty not only as a form

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[83] Ridvan Peshkopia & Arben Imami, *Between Elite Compliance and State Socialisation: The Abolition of the Death Penalty in Eastern Europe*, 12 INT'L J. HUM. RTS. 353, 354, 367 (2008).

[84] *Id.* at 367–68.

[85] *Id.* at 361–62.

[86] Roger Hood & Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"*, 38 CRIME & JUST. 1, 5, 29 (2009); William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 803 (1998).

[87] Although, Professor John Quigley's article offers a detailed history of post-World War II abolition. *See* John Quigley, *Why Europe Abolished Capital Punishment*, 17 OHIO ST. J. CRIM. L. 95, 127 (2019).

[88] Or, if mentioned, scholars make assumptions about the reason the death penalty was abolished. *See, e.g.*, WHITMAN *supra* note 11, at 120 ("Opposition to the death penalty-which lies, of course, at the core of modern European humanitarianism-was associated with the treatment of political dissenters as well.").

[89] Pin, *supra* note 11, at 179–81.

[90] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 561 (2005).

[91] *See* Hanns von Hofer, *Punishment and Crime in Scandinavia, 1750-2008*, 40 CRIME & JUST. 33, 44–45 (2011) ("In the middle of the eighteenth century, the death penalty was widely used (and not only for murder) . . . . In 1877, public executions were abolished. The last execution was performed in 1910, when the Guillotine was used for the first and last time. Abolition was finalized in 1921 for crimes committed during peacetime and in 1973 for crimes during wartime. The prohibition of the death penalty is now embodied in the Swedish constitution.").

of punishment but also as a form of torture: "Until the 18th century, capital punishment was practiced everywhere, accompanied, in all countries, by an amazing variety of tortures showing at the same time a great refinement of cruelty and an utter disregard of human dignity." [92] Indeed, in sharp contrast to modern American sensibilities concerning torture associated with executions,[93] the intention of executions throughout European history was to inflict maximum pain and torture.[94]

Even after some European countries had abolished the death penalty, those that continued executing never followed the American trend of trying to make executions less "cruel."[95] As late as 1962, a study of the death penalty in Europe noted that "no European country where capital punishment is still recognised has ever manifested any desire to have recourse to modern scientific methods of executions, such as the electric chair or the gas chamber, used in the United States."[96] Instead, up until abolition, European countries executed by hanging, firing squad, garrote, and beheading.[97]

i. United Kingdom

The British primarily executed by hanging, and "it had become common knowledge by the late 18th century that England executed more of its citizens than most other European countries."[98] Frequent executions existed, in part, because so many crimes carried a potential death sentence: "[b]y the early 19th century, British law foresaw the death penalty for over 200 crimes, including the theft of anything worth more than five shillings."[99] England did not have ample prison space, so while both

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[92] M. MARC ANCEL & COUNCIL OF EUROPE, THE DEATH PENALTY IN EUROPEAN COUNTRIES 8 (1962).

[93] *See, e.g.*, Hill v. McDonough, 547 U.S. 573, 580 (2006).

[94] *See, e.g.*, RICHARD J. EVANS, RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600-1987 109 (Oxford Univ. Press) (1996) (detailing an example of the punishment at the time).

[95] The United States concentrates on reducing the "cruelty" of executions because of the Eighth Amendment. Thus, the electric chair replaced hanging, as did the gas chamber. The Firing Squad likewise was abandoned, and every state that executes (including the federal government and the military) now provide for execution by lethal injection. *Description of Each Execution Method*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution/description-of-each-method (last visited Sept. 20, 2022); Baze v. Rees, 553 U.S. 35, 95–96 (2008).

[96] ANCEL & COUNCIL OF EUROPE, *supra* note 92, at 28

[97] HAMMEL, *supra* note 64, at 198–99 ("One aspect in which the United States was even more forward-looking than Europe was in the technology of executions.").

[98] HAMMEL, *supra* note 64, at 89.

[99] *Id.* at 87.

executions and deportation to the colonies remained punishment options, the British considered execution the more effective deterrent.[100]

During this time, political leaders and scholars voiced opposition to the death penalty. Philosopher Jeremy Bentham's writings opposing the death penalty helped influence the British Parliament to reduce the number of offenses punishable by execution in an 1832 Act.[101] King William IV further convened a Criminal Law Commission, which existed for sixteen years.[102] The Commission's second report in 1836 "condemned the arbitrariness with which hanging was inflicted in the UK, and recommended that it be abolished except as to a small minority of grave offenses."[103] English author William Makepeace Thackeray's 1840 essay, *Going to See a Man Hanged*, described the psychological torture involved in executions and lent support to abolitionists' arguments.[104]

Reforms throughout the 1800s limited the types and numbers of death-eligible crimes.[105] Such limitations satisfied many who had objected to the overuse of the death penalty.[106] Once British law restricted the death penalty to cases of aggravated murder, liberal philosopher John Stuart Mill opposed complete abolition.[107] Yet others continued to object to governmental power over life and death, arguing that "[t]he perception of the death penalty as a tool of tyrants which fosters a 'submissive' attitude among the people could be called the 'liberal' political argument against capital punishment."[108] Philosophers and scholars often opposed the imposition of the death penalty for such political purposes while they continued to support abolition for crimes such as murder.[109]

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[100] *Id.* at 89 ("Large cities multiplied crime by creating refuges for villainy, and England's lack of prisons meant that the only alternative to execution was transportation to the colonies, which was ineffectual as a deterrent, since transported prisoners vanished from public view and could thus no longer serve as visible tokens of deterrence.").

[101] HAMMEL, *supra* note 64, at 91.

[102] *Id.*

[103] *Id.*

[104] WILLIAM MAKEPEACE THACKERAY, GOING TO SEE A MAN HANGED, *published in* FRASER'S MAGAZINE, v. 22, 150, 156 (1840).

[105] HAMMEL, *supra* note 64, at 95.

[106] *Id.* at 96.

[107] *See id.* ("Having essentially assumed away the risk of mistaken executions, Mill reasons that the current state of English justice-inflicting death only for aggravated murder, insisting on procedurally fair trials, and authorizing executive clemency as the final safeguard against error – ensured that capital punishment would be inflicted only where it would be most useful.").

[108] *Id.*

[109] HAMMEL, *supra* note 64, at 158.

### ii. Germany

Surprisingly, the most frequent use of the guillotine did not occur during the French Revolution. Instead, Hitler adopted the guillotine as the primary method of execution for his regime in October of 1936:[110] "Before Hitler's order of 1936 making the use of the guillotine standard across the whole Reich, it had been carried out by hand-axe in Prussia and most of north Germany, and the guillotine in the south."[111]

Late in the war, when Hitler began losing to the Allied forces, he increased the number of executions.[112] Additionally, the frequency of civilian trials somewhat decreased as the Schutzstaffel (SS) replaced civilian authorities, performed the trials, and carried out executions.[113] As the war ended, Hitler incorporated the executions of political criminals (as distinct from his Jewish Holocaust) into the death camps, which had operated extra-judicially and without civilian authority throughout the war.[114] At the Natzweiler camp, for example, "141 men and women of the French Resistance were secretly shot on the day before the camp was to be evacuated in the face of the Allied advance."[115] Further, Hitler brought the injustice of the concentration camp to the German citizenry. As German efforts were failing and the war entered its final stages, "the processes of summary and public execution which had become customary in the camps began to be extended to the population in Germany as a whole."[116] SS-administered policies replaced the illusion of a civilian court system that operated independently from the military.

Civilian (political) executions actually increased at the end of the war.[117] Hitler "ordered summary judicial tribunals to be set up in areas threatened by the Allied invasions, with the power to sentence anyone to death who 'attempt[ed] to evade his obligations to the generality and in particular anyone who d[id] this from cowardice or selfishness.'"[118] In other words, these were civil courts aimed at thwarting any disloyalty to the Nazi party: "Executions were to follow immediately, and in public."[119] Hitler attempted to intimidate the Germans into supporting the

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110 EVANS, *supra* note 94, at 659.
111 *Id.* at 768.
112 *Id.* at 733.
113 *Id.* at 729, 735.
114 EVANS, *supra* note 94, at 731–33.
115 *Id.* at 733.
116 *Id.* at 734–35.
117 *Id.*
118 EVANS, *supra* note 94, at 735.
119 *Id.*

increasingly hopeless and futile war effort by increasing the public execution of "offenders" and passing various sentences in front-line German towns.[120] Clearly, by the end of the war, the Nazi Party used the death penalty primarily for political purposes, including the racial persecution of the Holocaust and the execution of anyone who objected to Hitler's rule.

### iii. Post-World War II Abolition

Scholars have noted that European countries moved to abolish the death penalty after World War II and that abolition accelerated in the latter half of the twentieth century.[121] Some have hypothesized that the horrors of war turned the wearied Europeans against more death–or, at least, state-sanctioned death.[122] Yet, abolition did not follow a predictable course, nor was it driven by only one issue. Instead, disparate causes have resulted in the current near-abolition. Scholars have over-emphasized their assumption that the European citizenry had become weary of killing and under-emphasized the historical record. Because scholars made assumptions based on stereotypes of continental sophistication, they have misinterpreted the inspirations for abolition of the death penalty in Europe. Instead of revealing a heightened recognition of human rights, European abolition stemmed from the political reality that European nations historically executed as a means to oppress and eliminate political rivals.[123]

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120 *See id.*

121 Frederick C. Millett, *Will the United States follow England (and the Rest of the World) in Abandoning Capital Punishment*, 6 PIERCE L. REV. 547, 562 (2007) ("After World War II, there was 'a floodtide of popular support for a juster, more humane society.' In fact, this was the opinion throughout Europe. The death penalty was abolished in Italy in 1944 and in Germany in 1949-due in large part to the grief and horror caused by the governments in those countries during the war."); *see also* Robert A. Stein, *The History and Future of Capital Punishment in the United States*, 54 SAN DIEGO L. REV. 1, 6–7 (2017) ("After the atrocities of the Second World War, protection of human rights became a priority.").

122 MERCER, *supra* note 71, at 156 ("In other European countries, such as Italy (1947) and West Germany (1949), the unpleasant wartime experiences led their new governments to adopt more humanistic policies and to abolish the death penalty for common crimes.").

123 *See* Davoli, *supra* note 24, at 334 ("In 1994, the United Nations debated a resolution to abolish the death penalty. The Chair of the Third Committee summarized the arguments for and against abolition."). Arguments for abolition included "the lack of evidence of deterrent effect, the right to life is the most basic human right, the irreversibility of a death sentence, the rejection of the death penalty by international tribunals," and "the death penalty sometimes veiled a desire for vengeance or provided an easy way of eliminating political opponents." *Id.*

In fact, instead of abolishing executions, some European countries re-established or expanded the death penalty after World War II.[124] For most of these countries, which had been occupied by the enemy, their first task in establishing new law "was to deal with cases of collaboration."[125] Both the victorious countries and those who lost the war moved to utilize the death penalty.[126] Indeed, new legislation sought not only to punish those who collaborated with the Nazis but also to prevent such behavior in the future.[127] Initially, such legislation "was partially identified with the violent repressive impulse which in certain liberated countries like Belgium or Norway reintroduced the death penalty, long before abandoned in law or fact, in order to ensure punishment of traitors."[128] In sharp contrast, one war-torn European country moved to abolish the death penalty with the precise intention of protecting the Nazi war criminals: Germany.[129]

The end of World War II in Germany meant that the former Nazis faced prosecution and execution by the occupying Allied forces:

> In preparing for their occupation of Germany, the British and their allies realized that military courts would be sentencing German soldiers to death for offences such as shooting prisoners of war. As the full scale of Nazi criminality became clear to them, they also realized that it would be necessary to try Germans for other serious offences as well, ranging from the mass murder of civilians by the SS death squads and concentration camp officers and guards, to the 'euthanasia'

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[124] Marc Ancel, *Collection of European Penal Codes and the Study of Comparative Law*, 106 U. PA L. REV. 329, 373–74 (1958).

[125] *Id.* at 373.

[126] *Id.* ("Nearly everywhere in Europe there was public demand for prompt and exemplary punishment. Changes of regime and revolutions, especially in countries that lost the war, resulted in legislation somewhat similar to the laws against collaborationists in the liberated countries.").

[127] *Id.* at 373-74.

[128] Ancel, *supra* note 124, at 374.

[129] EVANS, *supra* note 94, at 781. Similar to the German experience at the end of World War II, even some of those in France who had supported execution of collaborators during the war advocated for clemency after liberation; HAMMEL, *supra* note 64, at 133 ("[E]ditor of the influential Resistance journal *Le Combat*, [Albert] Camus had supported the execution of high-ranking collaborators, editorializing against calls for mercy . . . . Shortly after the liberation of France, however, Camus signed clemency petitions for collaborationist writers such as Robert Brasillach.").

> campaign of extermination against the handicapped and the judicial abuse of the death penalty itself.[130]

An International War Crimes Tribunal convened at Nuremberg and sentenced eleven high-ranking Nazis to death.[131] The United States Army executed these Nazis in 1946, and prosecutions continued at the US Army prison in Landsberg—records account for 5,133 people prosecuted for war crimes by the Allied occupying forces, and 668 of that number were condemned to death.[132] The US Allied forces "were reckoned to have executed 444 war criminals in their zone altogether."[133] Not only did the Allied occupying forces execute Nazis for war crimes, but they also used the death penalty to restore order to post-Nazi Germany, to ensure that no Nazi resistance movement rose to power, and to control anyone who was armed and likely to use weapons against the Allied authorities.[134] This demonstrates yet another example of the death penalty being used to solidify the power of the rulers.

In addition to Allied prosecutions, the German civilian court system resumed. Except for the Soviet-occupied zone, "the power over life and death was back with the German political and judicial systems by the middle of 1947."[135] Both the Allied forces and the civilian government of Germany carried out death sentences and executions;[136] thus, there was "little in the history of capital punishment in post-war Germany, either in its administration by the Allies or, crucially, in its resumed use by the German judicial system under the provisions of the Criminal Code of 1871, to suggest that it was likely to be abolished."[137] The abolition movement came from a startlingly unexpected source.

In response to the execution of Germans by the occupying Allies, conservative right-wing German party member Hans-Christoph Seebohm

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130 EVANS, *supra* note 94, at 741–42.

131 *Id.* at 743.

132 *Id.* at 743–44.

133 *Id.* at 744.

134 EVANS, *supra* note 94, at 747.

135 *Id.* at 763. The Soviet zone became hostile to the other zones and eventually led to the division between East and West Germany. Abolition of the death penalty in East Germany took a different path because of the Soviet occupation and rule of East Germany until the late 1980s. The history of the death penalty under Nazi occupation is limited in this article to the immediate years following World War II. The final execution in East Germany occurred in 1981. *Id.* at 860–61. It is worth noting that East Germany, now under the control of a communist regime, "used the death penalty for explicitly political purposes." *Id.* at 866.

136 *Id.* at 773–74.

137 EVANS, *supra* note 94, at 774.

proposed the abolition of the death penalty during the debates of the Parliamentary Council in 1948:[138]

> Abolition was necessary, he declared on 10 February 1949, in view of the excessive number of executions "not only in the period up to 1945, but also in the period since 1945." In making this plea, Seebohm was again thinking above all of the execution of war criminals, to which he and his party were bitterly opposed. Preventing Nazi war criminals from being sentenced to death would certainly help the German Party in its search for voters on the far right.[139]

Hans-Christoph Seebohm's proposals "made it clear that he was thinking in the first place not of the vast numbers of death sentences carried out under the Nazis, but of the much smaller though still considerable, number of executions of German war criminals carried out under the Allied occupation."[140] The far-right Nazi sympathizers proposed and advocated abolition, joining with other political elements in Germany that had long been against the death penalty.[141] Germany eventually adopted Seebohm's proposal as Article 102 of the Basic Law of Germany, the equivalent of a constitution.[142]

The communists in Germany also opposed the death penalty because they feared it would be used against Communists "as a political weapon against the progressive and democratic forces in the state."[143] Yet, the coalition of the communists, progressives, and democratic political groups would not have generated enough political power to abolish the death penalty in the Basic Law without the cooperation of the Nazi sympathizers: "It was only the hope of being able to save Nazi criminals from the gallows that had persuaded conservative deputies from the German party and the Christian Democrats to cast their votes in favor of abolition in sufficient numbers to secure its anchorage in the Basic Law."[144] The Nazi sympathizers then used the Basic Law to object to the death sentences imposed by the Allies against the defeated Germans.[145]

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138 *Id.* at 780–81.
139 *Id.* at 782–83.
140 *Id.* at 781.
141 EVANS, *supra* note 94, at 781.
142 *Id.* at 786.
143 *Id.* at 784.
144 *Id.* at 786.
145 EVANS, *supra* note 94, at 786, 788–89.

The Allied occupying forces continued to pass and enforce death sentences.[146] The British government felt comfortable doing so because the United Kingdom also utilized the death penalty.[147] Yet, the German prosecutors "decided to ask the occupying powers to stop passing death sentences, including sentences passed against war criminals, thus incidentally underlining once more the role of such considerations in establishing Article 102 in the first place."[148]

Germany adopted Seebohm's proposal and abolished the death penalty in Article 102 of their Basic Law in 1949.[149] While often cited as an example of lessons learned from the Nazi massacres of World War II,[150] abolition did not result from an enlightened or repentant citizenry striving to eradicate the horrors of the death camps, human experimentation, the desecration of corpses, and other Nazi atrocities. Instead, Nazi sympathizers, worried that their colleagues would meet the same fate they had dealt to those populations targeted by the Third Reich for extermination, sought to prevent the execution of Nazi war criminals by the British and American occupation authorities.[151] Indeed, as one scholar described, "[f]ar from intending to repudiate the barbarism of Hitler, the author of Article 102 wanted to make a statement about the supposed excesses of Allied victors' justice."[152] Such intentions do not demonstrate or reflect a more evolved standard of decency.

The new German government acted both to shield the Nazi war criminals from execution as well as to differentiate themselves from the Allies by condemning their use of the death penalty.[153] Hoping to save Nazi criminals from the gallows, the government "persuaded [the votes] in favor of abolition . . . . Had it merely been the question of common homicide that was at issue, the vote would never have been passed."[154] Having used the death penalty against political enemies so successfully for so long, the Nazi sympathizers wanted to eliminate the ability of their political rivals to reciprocate.[155]

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146 *Id.* at 788.

147 *Id.*

148 *Id.* at 788.

149 EVANS, *supra* note 94, at 786.

150 *See* Stein, *supra* note 121, at 6.

151 EVANS, *supra* note 94, at 781.

152 *See* Charles Lane, *The Paradoxes of a Death Penalty Stance*, WASHINGTON POST: OPINIONS (June 4, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/06/03/AR2005060301450.html.

153 *Id.*

154 *Id.*

155 *Id.*

By contrast, the German citizenry supported the death penalty for criminals.[156] Abolition did not come by popular vote.[157] Instead, it came from governmental action that disregarded societal opinion.[158] For example, accounts detailing the abolition debate in Germany show how the government "dismissed public opinion entirely, despite the popular support for reinstatement during the debates of the 1950s."[159] Germany abolished the death penalty in defiance of, rather than in support of, any post-War repudiation of or disgust toward Nazi atrocities.

On the other hand, the United Kingdom abolished the death penalty in part because of the fear of executing the innocent.[160] The abolition of the death penalty in the UK is described as "the story of a gradual two-century process in which cultural elites slowly changed the opinions of the elites in Parliament."[161] Yet, the elites did not manage to change the minds of the voters due to the shift in public opinion on the issue in the 1960s, which favored capital punishment.[162] Arguably, because England's centralized government allowed politicians to act without public approval, the politicians were still able to impose abolition on the entire country.

Looking back further, the UK abolition movement gained ground in the early twentieth century, but the World Wars intervened.[163] After World War II, the abolition movement was revived.[164] In 1948, the Royal

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156 *See* EVANS, *supra* note 94, at 799 ("Not only was public opinion broadly in favor of capital punishment during the 1950s, but calls for the reintroduction of the death penalty multiplied when particularly serious individual cases of murder were reported in the mass media."); *see also id.* at 798 (detailing the high level of popular support for the death penalty in Germany after the end of World War II).

157 *See* HAMMEL, *supra* note 64, at 170 ("As for Germany, we already have an inkling of how matters would have fared had the death penalty been a matter for the individual states of Germany. Two populous German states – Hessen and Bavaria – kept the death penalty in their own post-war state constitutions for decades after its abolition by the federal constitution.").

158 *Id.* at 169–70.

159 Berry, *supra* note 11, at 1008. Professor Berry seems to endorse this anti-democratic approach to abolition:

> Importantly, elites on both sides of the debate concurred in excluding popular sentiment concerning capital punishment from the conversation. Hammel explains, 'here we see members of the elite, speaking of and to themselves, drawing a clear line of demarcation between the kinds of arguments that should count among highly educated jurists and civil servants, and those that one encounters on the pages of a tabloid or in a bar-room debate.'

*See id.* at 1008–09.

160 HAMMEL, *supra* note 64, at 88.

161 Berry, *supra* note 10, at 1009.

162 HAMMEL, *supra* note 64, at 110.

163 *Id.* at 12.

164 *Id.*

Commission on Capital Punishment convened and studied the issue.[165] After an exhaustive investigation, in 1953, the Royal Commission concluded with three recommendations: (1) Give the jury the discretion for whether or not to impose the death penalty, (2) increase the age eligibility for capital punishment from eighteen to twenty-one, and (3) allow the jury to decide whether or not the offender was insane.[166] The Commission, however, did not recommend abolition.[167]

The final execution in England occurred in 1964.[168] Subsequently, British politicians debated the possibility of complete abolition.[169] Fear of executing the innocent became paramount, as did the concern that England was lagging behind other countries socially.[170] Several high-profile cases in which potentially innocent defendants were executed demonstrated the flaws in the procedural safeguards of the criminal justice system.[171] In 1965, the British Parliament passed a five-year "Murder (Abolition of Death Penalty Act)"[172] which led to ongoing debates as to whether or not to permanently abolish the death penalty.[173] The debate even included the British version of "evolving standards of decency." When Lord Chancellor Gerald Gardiner argued against the death penalty in 1969, he referred to the United States:

> Last year in the United States . . . the number of murders was 13,650. When one remembers that their population is four times ours, this makes our little 170 look rather silly. The number of executions for murder in the whole of the United States in each of the last 10 years has been: 41, 54, 33, 41, 18, 9, 7, 1, 2, and last year, for the first time in the history of the United States, none. My Lords, when practically the whole of the Western Christian world has either formally abolished capital

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165 *Id.* at 101.

166 HAMMEL, *supra* note 64, at 102.

167 *Id.*

168 *The History of Judicial Hanging In Britain 1735-1964*, CAPITAL PUNISHMENT UK, http://www.capitalpunishmentuk.org/hanging1.html (last visited Sept. 23, 2022).

169 HAMMEL, *supra* note 64, at 102.

170 *Id.* at 105; *see also id.* at 113.

171 *See* HAMMEL, *supra* note 64, at 103–04 ("[Timothy] Evans was convicted of murdering his wife and infant daughter, and hanged in March of 1950. . . . Years after his conviction, it was discovered that John Reginald Halliday Christie, Evans' landlord and the chief witness against him at trial, was a serial killer, and had in fact hidden the bodies of many of the women he killed in the very apartment he had rented to the Evans family. Christie was convicted of murdering his own wife in 1953. Before he was hanged, he also admitted to murdering Evans' wife.").

172 *See* Quigley, *supra* note 87, at 103.

173 HAMMEL, *supra* note 64, at 111–13.

> punishment or virtually given it up in practice, would it not be an extraordinary time for us to start using the noose again?[174]

In 1969, the abolition bill became permanent, although British law allowed for the death penalty for crimes of treason, piracy, arson in royal dockyards, and espionage until 1998.[175]

### 2. Government System

Major cultural and government structure differences exist between the United States and various European countries. Abolition in defiance of popular support reflects the European view that the educated class holds the political power and that they have the authority to make decisions without regard to the views of the citizenry.[176] As Professor Hammel notes, to the extent that the various European countries debated the abolition of the death penalty, they did so without regard to public opinion:

> In dismissing public opinion . . . [the politicians] . . . relied on four main lines of argument, which we will see recurring in other national debates:
>
> *Expertise*. The general public has no specialized training in criminology, psychology or law; and thus its opinion on capital punishment can and should be trumped by those who do possess such expertise.
>
> *Variability*. History shows that public opinion swings back and forth depending on the latest sensational case of innocence or mass murder, thus the latest poll tells us little.
>
> *Burkean Trusteeship*. The public does not have the right to directly control policy in a parliamentary system of delegated democracy. Voters must rely on their elected representatives to shape policy, and must accept that those representatives will occasionally defy the public will in the name of an important principle, or in the name of the right, enshrined in the Basic Law [German Constitution], to vote according to their conscience.

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174 *Id.* at 113.

175 *See* Quigley, *supra* note 87, at 103; *see also Abolition of the Death Penalty*, BRITISH INST. HUM. RTS., https://www.bihr.org.uk/abolition-of-the-death-penalty (last visited Sept. 23, 2022).

176 *See* HAMMEL, *supra* note 64, at 18.

> *Irrationality/Backwardness.* The general public supports the death penalty principally based on their emotional reactions to specific crimes. They are either ignorant of, or not interested in, the scientific literature on the subject. It is the role of the elite to enact rational, progressive policies based on evidence and research, even if they contradict the public will.[177]

Political differences between the United States and Europe suggest that the US remains unlikely to abolish the death penalty for the same reasons that abolition occurred in Europe. Most notably, the American political system leaves the power of government primarily in the hands of the voting citizenry.[178] This system of power from the bottom up, compared to the European model of power from the government down, ensures that the government cannot simply impose its will on an objecting citizenry. One European scholar noted with dismay that "there has not been a unified cadre of social groups in the United States with enough influence to achieve abolition. Even worse, the decentralized nature of criminal-justice policy-making in the United States is a significant obstacle, requiring almost a super-majority in many ways to eliminate capital punishment."[179] In fact, the founding principles of the United States developing a system of decentralized power was intended to ensure limited power and to avoid the dangerous creation of dictators.[180]

The European social "elite," however, imposed abolition onto the rest of society:

> The European model for abolition . . . consists of a group of political elites deciding, in their own reasoned, dispassionate judgment, that capital punishment is no longer in the best interests of the country. Once this threshold has been crossed, the political elites use their power to abolish the death penalty, irrespective of, and often contrary to, public opinion.[181]

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177 *Id.* at 83–84.

178 Libraries and School of Information Studies, *The Role of Citizens in American Democracy*, PURDUE UNIV., https://guides.lib.purdue.edu/civicsliteracy/role (last visited on Sept. 23, 2022).

179 Berry, *supra* note 11, at 1020.

180 TOM G. PALMER, CATO HANDBOOK FOR POL'Y MAKERS § 2 (8th ed. 2017).

181 Berry, *supra* note 11, at 1020.

The United States Constitution intentionally places the power of government in the people.[182] As a result, subservience to an elite group of "educated" people does not reflect American constitutional principles.[183]

One could suggest that the Court should simply abolish the death penalty because it has the power to declare laws unconstitutional. Using the evolving standards of decency doctrine, "the Court could insert its own view, acting in the same way as European elites have in Germany, Great Britain, and France, to do what it deems to be in the best interests of the United States."[184] As mentioned above, given that the American Constitution was specifically designed to limit governmental power, this vision of the Supreme Court imposing their will as "elites" onto the population, and voiding democratically established law, is unlikely to occur.[185] Additionally, the suggestion demonstrates a complete misunderstanding of how and why abolition occurred in Europe. In many European countries, "de facto abolitionist trends started first after domestic courts stopped enforcing the death penalty, while de jure abolition followed thereafter."[186] In the United States, however, the Supreme Court continues to be "confronted with state courts condemning an individual to death."[187] Death penalty abolition in Europe offers no practical application to the American criminal justice system.

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[182] Palmer, *supra* note 180 (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[183] Historians note this difference between the European and American governing systems derives from the principals of the American Revolution. *See* WHITMAN, *supra* note 11, at 15.

[184] Berry, *supra* note 11, at 1024.

[185] Roper v. Simmons, 543 U.S. 551, 589 (2005) (O'Connor, J., dissenting) ("On this record—and especially in light of the fact that so little has changed since our recent decision in *Stanford*—I would not substitute our judgment about the moral propriety of capital punishment for 17-year-old murderers for the judgments of the Nation's legislatures. Rather, I would demand a clearer showing that our society truly has set its face against this practice before reading the Eighth Amendment categorically to forbid it."); *see also id.* at 608 (Scalia, J., dissenting) ("The Court thus proclaims itself sole arbiter of our Nation's moral standards-and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.").

[186] Pin, *supra* note 11, at 184.

[187] *Id.*

### *B. United Kingdom*

The abolition of the death penalty in the UK did not indicate widespread popular approval, and some evidence is emerging that indicates the issue is not completely settled. First, a recent American criminal prosecution against British defendants, which wound its way slowly through the UK Court system, was finally resolved after a compromise was offered by the United States.[188] Secondly, imposition of the death penalty remains possible in Trinidad and Tobago, where the final court of appeal for death sentences is the UK-based Judicial Committee of the Privy Council (JCPC).[189] Finally, there was an unexpected correlation found between those who supported the movement to remove the United Kingdom from the European Union with those who supported the reinstitution of the death penalty.[190]

#### 1. Complicit

International detainment and extradition generally require the cooperation of both the requesting country and the requested country.[191] In the vast majority of cases involving the transfer of prisoners and the cooperation of governments, this is done quietly, through diplomatic means.[192] Yet, one case involving internationally-wanted criminal suspects sparked media attention when the suspects, members of a terrorist group, broadcasted the footage of the kidnapping, torture, and murder of American citizens.[193] One video posted online shows the murder of an American journalist:

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[188] *See* TANYA MEHRA, THE LONG AND WINDING ROAD TO BRINGING THE ISIS 'BEATLES' TO JUSTICE, INT'L CTR. FOR COUNTER-TERRORISM (2020); *see also IS 'Beatles' will not face death penalty in US*, BBC NEWS (Aug. 20, 2020), https://www.bbc.com/news/uk-53837724.

[189] *See* BEGINNER'S GUIDE TO THE JUD. COMM. OF THE PRIVY COUNCIL, JUD. COMM'T OF THE PRIVY COUN. (2009); *see also* Jay Chandler v. The State [2022] UKPC 19, [98] (appeal taken from Trinidad and Tobago).

[190] *See* HAMMEL, *supra* note 64, at 188.

[191] *Frequently Asked Questions Regarding Extradition*, U.S. DEPT. OF JUST., https://www.justice.gov/criminal-oia/frequently-asked-questions-regarding-extradition (last visited Sept. 23, 2022).

[192] U.N. OFF. DRUGS & CRIME, HANDBOOK ON INT'L TRANSFER SENT. PERSONS 1 (2012).

[193] Lee Ferran & Rym Momtaz, *Video Appears to Show Beheading of Journalist James Foley, Who Went Missing in Syria*, ABC NEWS (Aug. 19, 2014, 5:55 PM), https://abcnews.go.com/Blotter/james-foley-video-appears-show-beheading-journalist-missing/story?id=25043593.

> [James] Foley, dressed in orange, kneels beside an armed man clad in black. Foley delivers a statement condemning US action in Iraq . . . .
>
> . . . .
>
> . . . the figure dressed in black brandishes a knife and identifies himself as with the Islamic State . . . .
>
> . . . .
>
> . . . He then addresses President Obama directly, saying "any attempt to deny the Muslims their right to live in safety under the Islamic caliphate will result in the bloodshed of your people."
>
> Foley is then killed. The video continues, showing American Steven Sotloff, who has written for national publications like Time, also dressed in orange and on his knees.
>
> "The life of this American citizen, Obama, depends on your next decision," the figure in black says.[194]

Even for the notoriously morally ambivalent internet, the brutal video of James Foley's murder was sickening. One month later, the perpetrators again broadcasted the murder of Steven Sotloff in a highly produced video.[195] The video of the murder reveals the grotesque reality that standards of decency sometimes evolve backwards. The killers of James Foley and Steven Sotloff were born or raised in England and were British citizens.[196] Despite growing up in a supposedly progressive, "evolved" European society, these British murderers demonstrated the human capacity for committing acts of sickening brutality.

The British accents of the four murderers in the execution videos prompted the English press to nickname them "The ISIS Beatles."[197] By 2017, one member of the "ISIS Beatles" was dead, and one member was

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[194] *Id.*

[195] *Steven Sotloff: US journalist murdered by IS*, BBC NEWS (Sept. 3, 2014), https://www.bbc.com/news/world-middle-east-28871702.

[196] Sarah El Deeb & Andrea Rosa, *2 British IS members say hostage beheadings were a 'mistake'*, AP NEWS (Mar. 30, 2018), https://apnews.com/article/after-the-caliphate-islamic-state-group-syria-ap-top-news-middle-east-d3ca538ec82e4a04bdfe9031e1f8346a; *US trial for member of Islamic State group begins in Virginia*, GUARDIAN (Mar. 30, 2022, 3:42 PM), https://www.theguardian.com/us-news/2022/mar/30/the-beatles-trial-isis-terror-group-virginia.

[197] Mehra, *supra* note 188.

incarcerated in Turkey.[198] The Kurdish-led Syrian Forces (SDF) captured the two remaining members, El Shafee Elsheikh and Alexanda Amon Kotey, and transferred them to US Custody in Iraq.[199]

The UK initially provided information to and shared intelligence with the United States to aid in the prosecution of Elsheikh and Kotey.[200] This violated the UK's own legal standard, however, that the government must seek assurances that the death penalty will not be imposed before offering material aid in a prosecution.[201] In a letter leaked to the press, then-UK Home Secretary Sajid Javid stated, "I am of the view that there are strong reasons for not requiring a death penalty assurance in this specific case, so no such assurances will be sought."[202] In response to the leaked letter, many criticized the failure to seek such assurances given the abolition of the death penalty in the UK[203] Confronting the objections, security minister Ben Wallace said that the "UK government's policy on the death penalty had not changed, and that it did allow exceptions in rare circumstances. Sharing intelligence with the US would increase the chance of [Elsheikh and Kotey] facing trial."[204] The UK government, however, willingly continued to assist in other trials that had the potential to result in death sentences.[205]

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198 *Id.* ("The cell's most notorious member, Mohammed . . . was killed in a US drone strike at the end of 2015. The second member Aine Davis, who already had a record of previous convictions for drugs and weapons possession, was convicted in 2017 in Turkey for membership of a terrorist organization.").

199 *Id.*

200 *Id.*

201 Mehra, *supra* note 188; *see also* Danyal Hussain, *Mother of British ISIS Beatle George renews bid to save him from US death penalty as she challenges UK's plan to share information without assurances he won't be executed if extradited*, DAILY MAIL (Jul. 30, 2019, 9:00 PM), https://www.dailymail.co.uk/news/article-7302363/Mother-British-ISIS-Beatle-George-renews-bid-save-death-penalty.html ("A statement issued ahead of the hearing . . . said: 'The minister's letter revealed a clear and dramatic departure from the UK's longstanding international and domestic commitment to oppose the use of the death penalty in all circumstances.'").

202 Ashley Cowburn, *Sajid Javid drops UK's blanket opposition to death penalty to allow two Isis fighters to be sent to US*, INDEPENDENT (Jul. 23, 2018, 11:50 AM), https://www.independent.co.uk/news/uk/politics/uk-isis-beatles-death-penalty-sajid-javid-us-extradition-james-foley-jeff-sessions-a8459556.html#comments-area.

203 Sheena McKenzie & Nick Paton Walsh, *UK may not oppose US death penalty for ISIS 'Beatles', official says in letter*, CNN (Jul. 23, 2018, 11:55 AM), https://www.cnn.com/2018/07/23/uk/isis-beatles-death-penalty-uk-us-intl/index.html.

204 *Id.*

205 The UK is not alone. While likewise scolding any country that retains the death penalty, Germany similarly cooperated in the U.S. trial of a 9/11 terrorist conspirator, Zacarias Moussaoui. *See* Quigley, *supra* note 87, at 120.

In 2019, the mother of one defendant intervened and mounted a legal challenge to the extradition, which halted the UK's cooperation with the US[206] Ms. Elgizouli, Elsheikh's mother, argued that "the UK's position was in breach of its internationally recognised opposition to capital punishment."[207] The lawsuit alleged that the UK violated British law that requires the government to seek assurances from foreign governments that foreign prosecution will not impose the death penalty where the UK provides information about or submits to the extradition of suspects.[208] A statement issued by Ms. Elgizouli's counsel stated,

> The UK has again and again in practice refused to contribute to the risk of the application of the death penalty in proceedings elsewhere in the world and our time-honoured and proud requirement of unbreakable assurances that the death penalty not be imposed has been hammed out in decisions taken by the UK Government.
>
> Ms. Elgizouli's appeal before the Supreme Court raises questions of enormous constitutional importance, including the ability of a minister - without reference to Parliament - to authorise a complete departure from the prohibition understood by all to have the status of constitutional certainty.
>
> This all happened without any public debate.[209]

In March 2020, the Supreme Court of the United Kingdom held that "the UK government had acted unlawfully in providing or agreeing to provide material to the United States, without seeking assurances that the death penalty would not be imposed."[210]

Five months after that ruling, United States Attorney General William Barr wrote a letter to Home Secretary Priti Patel to provide assurance that "if the United Kingdom grants our mutual legal assistance request, the United States will not seek the death penalty in any

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206 Hussain, *supra* note 201.

207 *IS 'Beatles' will not face death penalty in US*, *supra* note 188.

208 Hussain, *supra* note 201.

209 *Id.*

210 *UK Supreme Court finds Government's decision to provide information to the United States to facilitate prosecution for crimes carrying the death penalty unlawful*, DEATH PENALTY PROJECT (Mar. 26, 2020), https://deathpenaltyproject.org/uk-supreme-court-finds-governments-decision-to-provide-information-to-the-united-states-to-facilitate-prosecution-for-crimes-carrying-the-death-penalty-unlawful/.

prosecutions it might bring against . . . Kotey or . . . Elsheikh."[211] Attorney General Barr detailed the lengthy history of the case in his letter:

> Five years ago, on June 19, 2015, the United States made a mutual legal assistance request for evidence in the United Kingdom's possession, obtained in the course of the United Kingdom's investigation of Kotey, Elsheikh, and others. Three years later, in April 2018, Kingdom authorities, having previously stripped Kotey and Elsheikh of their United Kingdom citizenship, concluded that prosecutions in the United States federal court system would be the best approach for securing justice for their alleged victims. Thereafter, in June 2018, then Home Secretary Javid agreed to provide the evidence that we requested in our 2015 mutual legal assistance request, without seeking a death penalty assurance.[212]

In this letter, Attorney General Barr announced that the US would no longer seek to impose the death penalty in the prosecution of the "ISIS Beatles."[213] Interestingly, Barr's willingness to dismiss the death penalty in this particularly heinous case contrasted with his commitment to upholding the executions of federal death row inmates in the United States.[214] Barr's decision, however, was influenced by the growing possibility that the "ISIS Beatles" would escape prosecution as the UK continued to face legal challenges.[215] To avoid further delay of justice for

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[211] Letter from William Barr, Attorney General of the U.S., to Priti Patel, Sec. of State for the Home Dept. (Aug. 18, 2020) (on file with U.S. Department of Justice).

[212] *Id.*

[213] *Id.*

[214] Although no federal executions had occurred since 2003, Attorney General Barr moved decisively to execute the inmates on federal death row. In fact, Barr oversaw thirteen executions during the Trump administration, the final one merely days before the inauguration of the new Biden administration. Thirteen federal executions were performed between July 14, 2020 and January 16, 2021. *See Executions Under the Federal Death Penalty,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty.

[215] Letter from William Barr, *supra* note 211 ("After two years of litigation concerning this decision . . . the Supreme Court has yet to issue its final order, and even after that order is issued, it is possible that additional litigation to block transfer of the evidence could ensue . . . it should be clearly understood that the United States will move forward with plans to transfer Kotey and Elsheikh to Iraq for prosecution in the Iraqi justice system unless, by October 15, 2020, all litigation in the United Kingdom seeking to prevent the use of United Kingdom evidence in a United States prosecution has been fully and finally resolved, and the United Kingdom has transferred the requested evidence to us, along with a commitment to provide ongoing cooperation with respect to such evidence for the duration of any legal proceedings.").

the victims' families,[216] Barr assured the UK that the US would not impose the death penalty and asked that the UK resume its cooperation with the investigation.[217] Following Barr's letter, the United States prosecuted defendants Elsheikh and Kotey without the risk of death sentences and with full cooperation from the UK government.[218]

The cases of Elsheikh and Kotey were not the first instances in which the UK had abandoned its refusal to cooperate with any foreign prosecutions that might result in a death sentence. There was at least one other case in which the UK government did not demand death penalty exclusion assurances.[219] The public, however, did not learn that the UK quietly changed its stance on cooperation with foreign prosecutions that left open the possibility of the death penalty until after Home Secretary Javid's leaked letter.[220]

In addition to revealing the UK's ambivalence toward executions occurring beyond its borders, the Elsheikh and Kotey cases demonstrate another way in which the UK Justice System dramatically differs from that of the US. During the debate over cooperation, the UK's then security minister Ben Wallace revealed that the UK denaturalized Kotey and Elsheikh.[221] Kotey—born in Paddington, London—and Elsheikh—who was born in Sudan but moved to England as a young child—lost their British citizenship.[222] By stripping the accused of their UK citizenship, the UK government effectively disclaimed responsibility for the possible death penalty prosecution of these men.

The United States Supreme Court in 1958 declared that the Eighth Amendment bars the revocation of national citizenship.[223] In *Trop*, the defendant objected to losing his US citizenship as a consequence of having deserted military service.[224] While the standard is often raised in

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[216] Not all families of the victims agreed with waiving the possibility of death sentences. *See* Robert Mendick, *Captured Jihadi 'Beatles' should suffer 'long, painful death', says victim's daughter*, TELEGRAPH (Feb. 9, 2018, 9:00 PM), https://www.telegraph.co.uk/news/2018/02/09/captured-jihadi-beatles-should-suffer-long-painful-death-says/.

[217] Letter from William Barr, *supra* note 211.

[218] Elsheikh was convicted after a jury trial and Kotey pled guilty. *See* Adam Goldman, *British Terrorist Receives Life Sentence for Role in Americans' Deaths*, N.Y. TIMES (Apr. 29, 2022), https://www.nytimes.com/2022/04/29/us/politics/isis-beatles-kotey-sentenced.html.

[219] Elgizouli v. Sec. of State for the Home Dept. [2020] UKSC 10, [142] (appeal taken from High Ct. of J.).

[220] Mendick, *supra* note 216.

[221] McKenzie & Walsh, *supra* note 203.

[222] El Deeb & Rosa, *supra* note 196.

[223] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[224] *Id.* at 87.

death penalty cases, *Trop* was the first case that announced the evolving standards of decency rule.[225]

The United States Supreme Court held that stripping Trop of his citizenship violated the Eighth Amendment, implying that denationalization is a cruel and unusual punishment.[226] Chief Justice Warren, writing for the majority, found that

> [the] use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is, instead, the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights and, presumably, as long as he remained in this country, he would enjoy the limited rights of an alien, no country need do so, because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.[227]

The UK's position on the issue of denationalization is harsh and starkly contrasts with the American policy. The UK allows revocation of citizenship for both naturalized citizens[228] and for natural-born citizens.[229] Even Kotey, one of the "ISIS Beatles," expressed his surprise that he could lose citizenship from the country of his birth.[230]

Notably, the UK allows denationalization even for those whom the punishment would render stateless (i.e., the individual would no longer be

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[225] Matthew Matusiak, et al., *The Progression of "Evolving Standards of Decency", in U.S. Court Decisions*, 39 CRIM. J. REV. 253, 253 (2014).

[226] *Trop*, 356 U.S. at 102–03.

[227] *Id.* at 101–02.

[228] U.N. High Comm'r for Refug., *Declarations and Reservations to the 1961 Convention on the Reduction of Statelessness*, Official Records of the Gen. Assemb. on Its Ninth Session, U.N. Doc. A/2890, at 49 (Sept. 20, 2006), https://www.unhcr.org/416113864.pdf.

[229] Matthew Gibney, *Should Citizenship Be Conditional? The Ethics of Denationalization*, 75 J. POLIT. 646, 652–53 (2013).

[230] El Deeb & Rosa, *supra* note 196.

a citizen of any country).[231] Ultimately, the events of 1958 and 2022 demonstrate that the UK's standards of decency have not evolved to reflect the values expressed by the United States Supreme Court on the issue of appropriate punishment. Instead, the UK's viewpoint on such issues has evolved to become irrelevant to American jurisprudence.

### 2. Complacent

Although the UK has officially outlawed the death penalty for cases tried within its borders, the UK has had ongoing connections with death penalty cases prosecuted elsewhere,[232] and one court within the UK continues to uphold death sentences.[233] The Judicial Committee of the Privy Council (JCPC) serves as the "court of final appeal for the UK overseas territories and Crown dependencies . . . [and] also serves those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of republics, to the Judicial Committee."[234] Located in London, the JCPC[235] enjoys broad jurisdiction over both civil and criminal matters.[236] The JCPC hears appeals regarding the death penalty because "[s]ome of the countries which use the JCPC employ the death penalty as punishment for very serious crimes, such as murder."[237] Among other countries, Trinidad and Tobago uses the JCPC as the court of highest appeal.[238]

In 2018, with little international press coverage and near-complete disregard from the UK citizenry, the JCPC upheld the death sentence of a citizen of Trinidad and Tobago named Jay Chandler.[239] The JCPC affirmed Chandler's sentence despite the introduction of psychiatric

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[231] Paul Arnell, *The legality of the citizenship deprivation of UK foreign terrorist fighters*, 21 ERA FORUM 395, 400 (2020).

[232] Quigley, *supra* note 87, at 116 (discussing Al-Saadoon and Mufdhi v. The United Kingdom, 2010-II Eur. Ct. H.R. 61, 88–89 (2010)).

[233] Chandler v. State [2022] UKPC 19, [98] (appeal taken from Trin. and Tobago).

[234] JUD. COMM'T. PRIVY COUNCIL, https://www.jcpc.uk/ (last visited Sept. 23, 2022).

[235] *Beginner's Guide to the Judicial Committee of the Privy Council*, *supra* note 188.

[236] *Powers*, JUD. COMM'T PRIVY COUN., https://www.jcpc.uk/about/powers.html (last visited Sept. 23, 2022).

[237] *Beginner's Guide to the Judicial Committee of the Privy Council*, *supra* note 189.

[238] *Id.*

[239] *See* Chandler v. State [2018] UKPC 5, [1], [30] (appeal taken from Trin. And Tobago); *see also cf*, Rita French, UK International Ambassador for Hum. Rights, Statement at UN Human Rights Council 46 (Feb. 24, 2021).

evidence that impacted his culpability.[240] Cases involving similar psychiatric evidence induced the United States Supreme Court to find that sentencing a mentally or intellectually disabled person to death would offend international evolving standards of decency.[241]

Although the court later commuted Chandler's sentence to life imprisonment,[242] in May 2022, the JCPC upheld the right of the Trinidad and Tobago government to maintain mandatory death sentences.[243]

The United States Supreme Court considers mandatory death sentences, in which no judge or jury is able to offer mercy to the condemned, so severe that, in 1976, it found that such punishments violate the Eighth Amendment.[244] Yet, "[n]ine of the UK's most senior judges have refused to ban the mandatory death penalty in Trinidad and Tobago."[245] Thus, the UK continues to uphold death sentences, albeit not for citizens of the UK itself.[246]

### 3. Correlation

*"When, in 1973, the killer of Sir Richard Sharples, the Governor of Bermuda, had his appeal against the death sentence rejected, his last hope was a plea to the Queen for mercy. . . . Needless to say the advice was 'reject.' She duly signed away the culprit's life, remarking as she*

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[240] *UK judges uphold death sentence of Trinidad prisoner despite him "more likely than not" having serious mental illness*, DEATH PENALTY PROJECT (Mar. 14, 2018), https://deathpenaltyproject.org/uk-judges-uphold-death-sentence-of-trinidad-prisoner-despite-him-more-likely-than-not-having-serious-mental-illness/.

[241] Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) ("Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.").

[242] Chandler v. State [2022] UKPC 19, [3] (appeal taken from Trinidad and Tobago).

[243] *Id.* [98] ("It is striking that there remains on the statute book a provision which, as the government accepts, is a cruel and unusual punishment because it mandates the death penalty without regard to the degree of culpability. Nonetheless, such a provision is not unconstitutional. The 1976 Constitution has allocated to Parliament, as the democratic organ of government, the task of reforming and updating the law, including such laws.").

[244] Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (a death penalty law violates the Eighth Amendment when it makes capital punishment mandatory for certain crimes).

[245] Dominic Casciani, *UK judges refuse to ban death penalty in Trinidad and Tobago*, BBC NEWS (May 16, 2022), https://www.bbc.com/news/uk-61468346.

[246] The possible racial implications of the UK Courts upholding death sentences in majority black countries, as well as stripping citizenship from individuals of ethnic minorities, is beyond the scope of this article.

*did so: 'Fancy appealing to me for mercy. Do you know he even shot the dog?'"*[247]

Queen Elizabeth II's final denial of mercy in a death penalty case occurred in 1973, the same year that the United Kingdom joined the European Communities, the precursor to the European Union.[248] Although the United Kingdom became a member of the European Union in 1993,[249] the UK held a referendum to leave the EU in 2016.[250] The UK formally withdrew from the EU on January 31, 2020.[251]

Commonly known as "Brexit," the vote to leave the EU came as a surprise to the media and politicians alike. Popular media surmised that socio-economic status correlated to a citizen's vote to leave the EU or to remain.[252] "The Leave campaign's stunning upset has barely sunk in, and already the pundits are flogging a familiar storyline. Those 'left behind' in the hard-luck provinces have punched privileged, corporate London in the nose."[253] There exists, however, a possible unexpected link between the death penalty and the UK's exit from the EU. Although the media did not widely publicize the opportunity to reinstate the death penalty as a reason to leave the EU, this potential reinstatement may have been an underlying factor.

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[247] Chris Mullin, *How the Queen sent a man to the gallows with the words 'Do you know he even shot the dog?': CHRIS MULLIN offers a rare insight into the monarch's steely mind and waspish wit*, DAILY MAIL (Feb. 8, 2020, 6:35 PM), https://www.dailymail.co.uk/news/article-7982259/CHRIS-MULLIN-offers-rare-insight-monarchs-steely-mind-waspish-wit.html.

[248] *Id.*; GOV'T OF IR, DEP'T OF FOREIGN AFF., IRELAND IN THE EU: A HISTORY, https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/irelandintheeu/ireland-in-the-eu-history.pdf (last visited Aug. 15, 2022). The UK joined the European Communities on January 1, 1973 along with Denmark and the Republic of Ireland. The European Commission would later become the European Union. *See Into Europe*, UK PARLIAMENT, https://www.parliament.uk/about/livingheritage/transformingsociety/tradeindustry/importexport/overview/europe/ (last visited Aug. 15, 2022).

[249] *Into Europe*, *supra* note 248 ("Britain's membership of what was then primarily an economic union came into effect on 1 January 1973. Since then the Community has developed into a much broader entity, the European Union, which was formally created by the Treaty of Maastricht of 1992. The terms of Britain's agreement to the Treaty received parliamentary approval in the European Communities (Amendment) Act of 1993, and the Union came into force in November 1993.").

[250] *What is Brexit?*, GOV'T NETH., https://www.government.nl/topics/brexit/question-and-answer/what-is-brexit (last visited Sept. 24, 2022).

[251] *Id.*

[252] Alex Burton, *The link between Brexit and the death penalty*, BBC NEWS (July 17, 2016), https://www.bbc.com/news/magazine-36803544.

[253] Professor Eric Kaufman, *Brexit Voters: NOT the Left Behind*, FABIAN SOC'Y (June 24, 2016), https://fabians.org.uk/brexit-voters-not-the-left-behind/.

One study revealed the similarities among those voting to leave the UK.[254] The most accurate predictor of a voter's choice in favor of Brexit was the opinion on the reintroduction of the death penalty:[255]

> The British Election Study's internet panel survey of 2015-16 asked a sample of over 24,000 individuals about their views on these matters and whether they would vote to leave the EU. . . [t]he probability of voting Brexit rises from around 20% for those most opposed to the death penalty to 70% for those most in favour. Wealthy people who back capital punishment back Brexit. Poor folk who oppose the death penalty support Remain.[256]

Thus, despite the fact that the UK abolished the death penalty over fifty years ago, there appears to be a resurgence of popular support for capital punishment.[257] One 2017 poll revealed that 53% of those who voted for Brexit support the return of the death penalty.[258] Even more unexpectedly, 20% of those who voted to remain in the EU also support capital punishment.[259] Additionally, there are numerous petitions to the UK government calling for the reinstitution of the death penalty as a possible sentence for a variety of crimes.[260] The practicality and legal ramifications of reinstituting the death penalty in the UK are beyond the scope of this article. Yet, the fact that Brexit has likely released the UK from the prohibition against capital punishment contained in the Charter of Fundamental Rights demonstrates that the death penalty could return.

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254 Burton, *supra* note 252.

255 *Id.*

256 *Id.*

257 Isabelle Kirk, *Britons don't tend to support the death penalty...until you name the worst crimes*, YOUGOV (Mar. 30, 2022, 4:25 AM), https://yougov.co.uk/topics/politics/articles-reports/2022/03/30/britons-dont-tend-support-death-penalty-until-you-.

258 Benjamin Kentish & Peter Walker, *Half of Leave voters want to bring back the death penalty after Brexit*, INDEPENDENT (Mar. 30, 2017, 2:26 PM), https://www.independent.co.uk/news/uk/politics/brexit-poll-leave-voters-death-penalty-yougov-results-light-bulbs-a7656791.html.

259 *Id.*

260 Search Results for 'Petitions', UK GOV'T & PARLIAMENT, https://petition.parliament.uk/petitions?q=death+penalty&state=all (last visited Sept. 24, 2022) (search "death penalty").

## IV. RELEVANCY

No longer does the evolving standard dominate the death penalty jurisprudence.[261] Perhaps a combination of factors—the inherent futility of identifying the standard society currently applies to any number of issues, not just the death penalty, and the realization that an evolving standard is really no standard at all—drove the Supreme Court to replace the evolving standard with the "superadded pain" standard.

### *A. Abolition in the United States*

The modern death penalty abolition movement has roots in the Enlightenment. In his 1764 treatise, *On Crimes & Punishments*, Italian writer Cesare Beccaria argued against the death penalty.[262] He stated his punishment theory "[t]hat a punishment may not be an act of violence, of one or of many, against a private member of society, it should be public, immediate and necessary; the least possible in the case given; proportioned to the crime, and determined by the laws."[263] Both the United States Constitution and the American Criminal Justice system later adopted many of Beccaria's principles, including speedy and public trials, proportionality, and prohibition of ex post facto laws.[264] Likewise, the abolition movement echoes Beccaria's arguments against the death penalty.

The modern abolition movement in the US primarily focuses on two political routes: (1) eliminate the death penalty legislatively through changing popular opinion and voting for legislators who will abolish the death penalty, and (2) challenge the constitutionality of the death penalty primarily by alleging Eighth Amendment violations.[265] Whether a judicial, legislative, or societal movement, the same arguments are often used to support both paths to abolition.

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261 *See* Stinneford, *Evolving Away*, *supra* note 7, at 87.

262 CESARE BONESANA DI BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 51 (Liberty Fund, Inc. 2011) (1784).

263 *Id.* at 81.

264 John D. Bessler, *The Birth of American Law: An Italian Philosopher and the American Revolution*, AMERICAN CONST. SOC'Y (Sept. 16, 2014), https://www.acslaw.org/?post_type=acsblog&p=10464; Elio Monachesi, *Pioneers in Criminology IX – Cesare Beccaria (1738-1794)*, 46 J. CRIM. L. & CRIMINOLOGY 439, 445, 447 (2015).

265 Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 525–25, 533 (2017).

### 1. Arguments against the Death Penalty in the United States

Opponents of the death penalty articulate a variety of objections. These include, inter alia: ineffectiveness as a deterrent, high cost, coarsening impact, cruelty, unfair socio-economic impact, religious beliefs, and concern that an innocent individual might be executed.[266] Such arguments mirror many of those originally articulated by Beccaria, the Italian penologist. One objection reflects his view of the inherent contradiction of teaching citizens not to kill by killing someone.[267] Statistical evidence demonstrates that there is no deterrent impact in those states that have a death penalty when compared to those that do not.[268]

There is concern that the death penalty is too costly.[269] Because those against whom the death penalty is sought are often indigent, the government frequently pays for both the defense and the prosecution.[270] Additionally, the appellate process takes many years and is quite expensive.[271] One county in South Carolina increased taxes in order to prosecute Susan Smith, who notoriously drowned her toddlers in a lake.[272] The cost of death penalty prosecutions far exceeds the costs of life imprisonment, even when it extends for forty or fifty years, but proponents of the death penalty suggest that speeding up the process and reducing the time between conviction and execution would mitigate this problem.[273]

There has long been a concern that having a death penalty harms society. Historically, officials moved executions from public squares to behind prison walls, not to spare the public a grisly spectacle but rather to

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[266] *See, e.g.*, *id.* at 553, 556; *see also* ANCEL & COUNCIL OF EUROPE, *supra* note 92, at 22. Another objection stems from the fact that the American system of government differs from all former types of government, and thus the arbitrary power given over life or death to the sovereign does not make sense in a modern democracy. *See id.* ("It will be seen that almost everywhere the pardon is still, as in olden days, in the nature of a royal prerogative.").

[267] *See* DI BECCARIA, *supra* note 262, at 53.

[268] *Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states (last visited Sept. 24, 2022).

[269] *See, e.g.*, NEV. LEGISLATURE, FINANCIAL FACTS ABOUT THE DEATH PENALTY (2011).

[270] *Id.*

[271] *Id.*

[272] *Senators seek help to pay for trial*, SPARTANBURG HERALD-JOURNAL AT GOUPSTATE.COM (Apr. 22, 1995, 12:01 AM), https://www.goupstate.com/story/news/1995/04/22/senators-seek-help-to-pay-for-trial/29574973007/.

[273] *Financial Facts About the Death Penalty*, *supra* note 269.

prevent the public from reveling in the bloodshed.[274] Executions had developed party atmospheres that continue to occur even in modern times.[275] Despite the decision to make executions more private, they continued to inspire celebrations for what many feel should be solemn occasions.[276]

Statistics demonstrate that, in the United States, members of lower socio-economic groups, the mentally ill, and minorities are more likely to receive death sentences than other groups.[277] The most significant data indicate that the race of the victim controls whether or not a defendant is sentenced to death.[278] Additionally, many religious groups object to the imposition of the death penalty.[279] They argue that killing, whether by an individual or by the government, is wrong.[280] Although none of these arguments have swayed a majority of the American public to reject the death penalty, recent abolition by individual states demonstrates that these ideas are making an impact.[281]

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[274] Kershaw, *supra* note 73, at 75 ("Not that it gave pain to the bear, but that it gave pleasure to the spectators .... The Decree of June 24th, 1939 limited these occasions henceforward to the melancholy confines of a prison-yard.").

[275] *See, e.g.*, *Smirking murderer is led to the gallows as children join crowds at public executions in Iran*, DAILY MAIL (Aug. 2, 2007, 6:06 PM), https://www.dailymail.co.uk/news/article-472376/Smirking-murderer-led-gallows-children-join-crowds-public-executions-Iran.html ("Two more criminals have been publicly hanged in Iran as children looked on and people took pictures .... Onlookers in the street and on the roofs of houses chanted and took pictures with mobile phones. Some laughed.").

[276] HAMMEL, *supra* note 64, at 126 (describing Victor Hugo's disgust with the public reaction to executions) ("The masses ... treat [an execution] as little more than a jolly, gruesome spectacle.").

[277] *See, e.g.*, Colleen Long, *Report: Death penalty cases show history of racial disparity*, AP NEWS (Sept. 15, 2020), https://apnews.com/article/united-states-lifestyle-race-and-ethnicity-discrimination-racial-injustice-ded1f517a0fd64bf1d55c448a06acccc; *Position Statement 54: Death Penalty and People with Mental Illnesses*, MENTAL HEALTH AMERICA, https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses (last visited Sept. 24, 2022).

[278] *See* U.S. GEN. ACCT. OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) ("In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks.").

[279] *Religion*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/religious-statements (last visited Sep. 24, 2022).

[280] *Id.*

[281] *States and Capital Punishment*, NAT'L CONF. STATE LEGISLATURES (Aug. 11, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx.

### 2. Growing Dissatisfaction

Some long-existing rationales for the death penalty abolition have gained traction within the US in recent years. One that is increasingly popular with the general public is concern about the execution of the innocent.[282] The United States Supreme Court addressed this from a Due Process perspective in the *Herrera* case, but nearly thirty years have passed since the decision.[283] Since then, there has been a large number of exonerations as a result of advanced DNA testing.[284] Since the establishment of The Innocence Project and the well-publicized incidents of the conviction of innocent defendants,[285] there has been increased criticism of possible flaws in the criminal justice system. Even those in favor of maintaining capital punishment do not endorse the execution of the innocent.[286]

Additionally, there have been increasing criticisms of capital punishment from those most intimately involved with the death penalty system. Some judges, prosecutors, and executioners have concluded that no matter what the safeguards or the criteria, the death penalty is a flawed system and one that does not result in the administration of justice.[287] In explaining that the death penalty should be abolished, former Colorado State Judge Leland Anderson said:

> I wish to amend the record of my moral choices and add my name to those who seek abolition of the death penalty. . . . If the endless cycle of retribution and violence is to be stopped in our society, it should begin with the law itself.[288]

Judge Anderson thus echoed Beccaria's argument that the law becomes absurd when it demands that the punishment for killing an individual is the killing of the killer.

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[282] Elizabeth Bruenig, *Not That Innocent*, THE ATLANTIC (June 9, 2021), https://www.theatlantic.com/ideas/archive/2021/06/innocence-project-death-row/619132/.

[283] Herrera v. Collins, 506 U.S. 390 (1993).

[284] *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (the Innocence Project tracks exonerations based on DNA evidence).

[285] *Id.*; Phillip Morris, *Sentenced to death, but innocent: These are stories of justice gone wrong*, NATIONAL GEOGRAPHIC (Feb 18, 2021), https://www.nationalgeographic.com/history/article/sentenced-to-death-but-innocent-these-are-stories-of-justice-gone-wrong.

[286] Bruenig, *supra* note 282.

[287] Barry, *supra* note 265, at 548, 553.

[288] Leland Anderson, *Think Like a Lawyer, Kill Like a Judge*, SYRACUSE J. L. & CIVIC ENGAGEMENT (2017).

Some feel that the death penalty process has failed to comply with the demands the Supreme Court has required in its jurisprudence. In reasserting the constitutionality of the death penalty in *Gregg v. Georgia*, the Court stated:

> Indeed, the death sentences examined by the Court in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of capital crimes, many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed. . . .
>
> *Furman* mandates that, where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. [289]

Yet, courts continue to impose death sentences in what appears to be an arbitrary and capricious manner, and judges themselves question the sustainability of the death penalty.

After struggling with the Supreme Court mandate that death sentences must be individualized and not arbitrary, Justice Blackmun dissented from a denial of certiorari in the death penalty case of *Callins v. Collins*.[290] Explaining his dissent, Justice Blackman stated,

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all . . . and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.[291]

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289 Gregg v. Georgia, 428 U.S. 153, 188–89 (1976) (citations omitted).

290 Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting).

291 *Id.* at 1143–44.

Justice Blackmun surveyed the controlling Supreme Court death penalty cases decided in the years since *Gregg* and came to the conclusion that achieving fairness in the death penalty context is impossible.[292] He opined, "I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness in the infliction of death is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether."[293]

Lower court judges have also expressed dissatisfaction with the death penalty process. Self-described "hanging" Judge Norman Barron of Delaware concluded after years of presiding over criminal cases, "I believe the application of the death penalty is quirky and capricious. In other words, it is impossible to justify why some murderers receive the death penalty while others, whose crimes are arguably worse in degree or savagery, do not."[294] Coming more than thirty years after the Supreme Court attempted to eliminate such uncertainty in the death penalty process, Judge Barron's experience revives the concerns voiced by Justice Blackmun.

Judges are not alone in their disillusion with the death penalty. After prosecuting for more than twenty years, Dallas prosecutor James A. Fry concluded that it is impossible to comply with the Eighth Amendment's requirement that courts not administer the death penalty in an arbitrary manner.[295] "For years I supported capital punishment, but I have come to believe that our criminal justice system is incapable of adequately distinguishing between the innocent and guilty. It is reprehensible and immoral to gamble with life and death."[296] Fry further explained that he comes to this conclusion not because he is soft on crime but because of the demands of justice. "I am no bleeding heart. I have been a Republican for over 30 years. I started my career as a supporter of removing violent people from society for as long as possible, and I still believe that to be

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[292] *Id.* at 1145–46.

[293] *Id.* at 1159.

[294] *NEW VOICES: Conservative Judge Who Imposed Death Sentences Changes His Mind*, DEATH PENALTY INFO. CTR. (Apr. 26, 2013), https://deathpenaltyinfo.org/news/new-voices-conservative-judge-who-imposed-death-sentences-changes-his-mind (last visited Sept. 24, 2022).

[295] Alan Bean, *"I put away an innocent man"*, FRIENDS OF JUST. (May 16, 2009), https://friendsofjustice.blog/2009/05/16/i-put-away-an-innocent-man/.

[296] *Id.*

appropriate."[297] Indeed, the sentence of life without parole as an alternative to the death penalty continues to gain in popularity.[298]

Finally, those closest to the death penalty process itself are voicing their disillusionment. One such example is a former executioner for the Commonwealth of Virginia. Chief executioner from 1984 to 1999, Jerry Givens, executed sixty-two people.[299] Givens was scheduled to execute Earl Washington, whose conviction of the rape and killing of a nineteen-year-old was later overturned because of DNA evidence.[300] "Givens said the case shook his faith in the justice system. He came within days of putting an innocent man to death."[301] In explaining his conversion from executioner for the Commonwealth of Virginia to a supporter of abolition, Givens realized, "If I execute an innocent person, I'm no better than the people on death row."[302]

### *B. The Progressive United States?*

Instead of relying upon flawed arguments about foreign countries or waiting for the Supreme Court to resurrect the evolving standard, scholars and death penalty opponents should seek other avenues to stop executions. As the United States is a decentralized country, abolition state by state has been somewhat successful. Legislative change must stem from popular support. Although some scholars may prefer that "elites" dictate policy in the United States, the European model is unlikely to work. In fact, most Americans have a negative view of the concept of elitism, and grass-roots reform of criminal law is a common phenomenon.[303]

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[297] *Id.*

[298] Cary Aspinwall, *Life Without Parole is Replacing the Death Penalty — But The Legal Defense System Hasn't Kept Up*, THE MARSHALL PROJECT (May 22, 2021, 6:00 AM), https://www.themarshallproject.org/2021/05/22/life-without-parole-is-replacing-the-death-penalty-but-the-legal-defense-system-hasn-t-kept-up.

[299] Justin Jouvenal, *Ex-Virginia executioner becomes opponent of death penalty*, WASH. POST (Feb. 10, 2013), https://www.washingtonpost.com/local/ex-virginia-executioner-becomes-opponent-of-death-penalty/2013/02/10/9e741124-5e89-11e2-9940-6fc488f3fecd_story.html.

[300] *Id.*

[301] *Id.*

[302] *Id.* Indeed, the execution of the innocent has long been a concern of abolitionists. *See* ANCEL & COUNCIL OF EUROPE, *supra* note 92, at 51 ("While an increase in the amount of crime inhibits the movement towards abolition, another factor tends to accelerate it. That factor, which is the main argument to the abolitionists, is the existence of miscarriages of justice.").

[303] *See, e.g.*, Ian Ward, *How Elites Misread Public Opinion,* POLITICO (June 17, 2022, 4:30AM), https://www.politico.com/news/magazine/2022/06/17/elites-kertzer-renshon-

The American system of government requires that the abolition of the death penalty in the United States must stem from a consensus of opinion. Justice Scalia has argued that abolition should only be accomplished through legislative action.[304] "Justice Scalia emphasized . . . the best standard for what society currently believes is decent is to examine the laws that are passed and enforced. 'The audience for these arguments, in other words, is not this Court but the citizenry of the United States.'"[305] Indeed, successful modern abolition movements in the US occur when voters elect leaders who campaign for the abolition of the death penalty.[306]

Despite its long history of once being the most voracious of executioners, in 2021, the Commonwealth of Virginia became the first Southern state to abolish the death penalty legislatively.[307] Since its formation, there have been 1390 executions, which is "second only to Texas in modern-era executions . . . ."[308] In fact, "Virginia has executed the highest percentage of its death-row prisoner population as well, a statistic partially attributable to poor representation and particularly strict procedural rules for appeals."[309] From its 413-year history of capital punishment and execution of more total inmates than any other state to becoming the first southern state to abolish the death penalty,[310] Virginia serves as a model for the modern abolition movement.

A second area in which the death penalty abolition movement should focus is the Supreme Court's holdings that torture violates the Eighth Amendment. The Supreme Court has ruled for over a hundred years that

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political-science-00039943; *see also* Kenny Lo, et al., *5 Discussions That Shaped the Justice Reform Movement in 2020*, AMERICAN PROGRESS (Mar. 18, 2021), https://www.americanprogress.org/article/5-discussions-shaped-justice-reform-movement-2020/.

304 Stanford v. Kentucky, 492 U.S. 361, 378 (1989).

305 Joanmarie Ilaria Davoli, *Justice Scalia for the Defense?*, 40 U. BALT. L. REV. 687, 696 (2011) (quoting *Stanford*, 492 U.S. at 378).

306 *See States and Capital Punishment*, *supra* note 281 ("In recent years, New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), New Hampshire (2019), Colorado (2020) and Virginia (2021) have legislatively abolished the death penalty, replacing it with a sentence of life imprisonment with no possibility for parole.").

307 Hailey Fuchs, *Virginia Becomes First Southern State to Abolish the Death Penalty*, N.Y. TIMES (July 22, 2021), https://www.nytimes.com/2021/03/24/us/politics/virginia-death-penalty.html.

308 Samantha O'Connell, *Virginia Becomes First Southern State to Abolish the Death Penalty*, AM. BAR ASS'N (Mar. 24, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/virginia-death-penalty-repeal/.

309 *Id.*

310 Fuchs, *supra* note 307.

the Constitution bans torture.[311] Executions are lawful as long as there is no more pain inflicted than is necessary to kill.[312] This prohibition has led the Court to an analysis of the relative painfulness of the different execution methods.[313] Claims that execution methods are not torture or are virtually painless, such as death by firing squad, lack any measurable evidence or standard of proof in support.[314]

While the Court has reasoned that, because the death penalty is constitutional, there must be a constitutional way to execute, the fact remains that the Court has also determined that torture violates the Constitution.[315] Thus, if an individual defendant could prove that his execution would entail torture, the Court would face the choice of either endorsing torture or finding the death penalty unconstitutional in that instance. This argument parallels the *Bucklew* case, although that case focused on physical torture.[316] Defendants contesting death sentences might persuasively present and plead the underdeveloped area of psychological or psychiatric torture.

In other countries, the focus has been on the inhumanity of years-long waits on death row prior to execution. The death row phenomenon has been defined as

> a combination of circumstances to which a prisoner is exposed after being sentenced to death and being on death row. The 'combination of circumstances' refers to the lapse of time between the sentence of death and the actual execution, the deplorable conditions of confinement, and the mental anguish endured during this wait. These circumstances, which exacerbate the detrimental effects upon prisoners, have come to dominate the torturous effects of death row.[317]

The US Supreme Court is unlikely to consider this overly general phenomenon as determinative for a specific defendant, even if evidence is presented that waiting for execution is indeed mental torture. Instead, a

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311 Wilkerson v. Utah, 99 U.S. 130, 135–36 (1879).

312 Estate of Lockett v. Fallin, 841 F.3d 1098, 1113 (2016) (citing Baze v. Rees, 553 U.S. 35 (2008)).

313 Baze v. Rees, 553 U.S. at 51, 57.

314 Blume & van Winkle, *supra* note 23, at 31; Denno, *supra* note 54, at 785.

315 *Estate of Lockett*, 841 F.3d at 1120.

316 Bucklew v. Precythe, 139 S. Ct. 1112, 1118–19 (2019).

317 Nkem Adeleye, *The Death Row Phenomenon: A Prohibition against Torture, Cruel, Inhuman, and Degrading Treatment or Punishment*, 58 SAN DIEGO L. REV. 875, 881 (2021).

defendant would likely have to present evidence demonstrating that execution itself would apply psychological torture to him. In other words, time spent waiting on death row may, in fact, be depressing, upsetting, and frightening, but that is not enough for a court to consider the wait to be torture. The defendant must establish a strong link between the psychological evidence and the moment of execution.

Instead of a focus on the wait time and the anxiety it creates, research into the immediate psychological pain caused on the day of execution would be more helpful to support the argument that execution causes psychiatric torture. For example, federal law requires that livestock be unconscious prior to slaughter to provide a humane death.[318] On the contrary, criminal defendants must be sane and conscious during execution.[319] The psychiatric state of the person being executed—at the moment prior to execution—might possibly be so extreme that it mimics the physical sensation of other prohibited punishments. Surely evidence of the psychiatric state of the individual watching the guns aimed at his heart or the poisonous needle searching for his vein might provide at least as much evidence of torture as being handcuffed to a hitching post.

Finally, there are innovative, originalist arguments against the death penalty that each defendant facing execution should assert individually. In *Bucklew v. Precythe*, the Supreme Court referred to Professor John Stinneford's article, noting that "Americans in the late 18th and early 19th centuries described as 'unusual' governmental actions that had 'fall[en] completely out of usage for a long period of time.'"[320] The Court's acknowledgment of this definition and its application to the cruel and unusual language of the Eighth Amendment should prompt individual inmates to strenuously object to the use of previously abandoned methods of execution such as firing squads, hanging, and the electric chair. If the drugs used for lethal injections become impossible to locate, the return of punishments long outdated would violate the "unusual punishment" prohibition. This logic suggests that a lack of access to lethal drugs should halt all federal executions.

## V. CONCLUSION

While the evolving standard offered much hope to death penalty abolitionists in 1972 when the Supreme Court struck down the death

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318 7 U.S.C. § 1902.

319 Ford v. Wainwright, 477 U.S. 399, 426, 435(1986).

320 *Bucklew*, 139 S.Ct. at 1123 (citing Stinneford, *supra* note 4, at 1770–71, 1814).

penalty laws in *Furman v. Georgia*,[321] time has demonstrated that linking law to societal changes works both ways; society can become less brutal, but it can also become more brutal. Evolution does not ensure that maturing cultures become more progressive or more humane. To evolve simply means to change.

The Supreme Court's evolving standard has certainly changed, but perhaps not in the manner anticipated by Justice Marshall's concurring opinion in *Furman*. First, the standard declared that America had become a mature society, leaving behind its brutal past.[322] But thirty-five states immediately reinstituted the death penalty following the *Furman* ruling,[323] forcing the Court to look elsewhere for evidence that society was moving against the death penalty. When other countries fail to demonstrate the expected anti-death penalty evolution, the Supreme Court relies on its own opinion and states that the state can impose the death penalty, but as painlessly as possible. And when the Court's own opinion evolves to agree that actually, the death penalty does express the current attitudes of the progress of a maturing society or that there is no superadded pain, then the death penalty survives the Eighth Amendment challenge.

The Court has essentially abandoned the evolving standard in analyzing whether or not a punishment violates the Eighth Amendment.[324] As this article demonstrates, however, that phrase has always lacked meaningful measurement or application. It has become apparent that evolution does not always lead to a more humane outcome. Those seeking to abolish the death penalty should more fully explore other avenues.

The experiences of other countries are no model for US abolition, as the situation in the UK and the history of Germany clearly demonstrate. Perhaps the UK will never reinstate executions, but its cooperation with other countries indicates an indifference to, if not support for, the imposition of the death penalties that occur outside its own borders. Neither does the fact that other countries have abolished the death penalty demonstrate moral superiority, as seen in the German history of abolition. As the US Supreme Court has moved away from the evolving standards of decency standard, international death penalty experiences have become even more irrelevant. There are many reasons to abolish the death penalty

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321 Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

322 *Id.* at 269.

323 Evan J. Mandery, *It's Been 40 Years Since The Supreme Court Tried to Fix the Death Penalty — Here's How It Failed*, THE MARSHALL PROJECT (Mar. 30, 2016, 10:00 PM), https://www.themarshallproject.org/2016/03/30/it-s-been-40-years-since-the-supreme-court-tried-to-fix-the-death-penalty-here-s-why-it-failed/.

324 Stinneford, *Evolving Away*, *supra* note 7, at 87.

in the United States. Relying upon false perceptions of European values for guidance is not one of them.