THE DEATH PENALTY DEBATE:

Comparing the United States Supreme Court's Interpretation of the Eighth Amendment to that of the California Supreme Court and a Prediction of the Supreme Court's Ruling in Glossip v. Gross

KELSEY HOLLANDER*

INTRODUCTION

The United States has long grappled with the constitutionality of capital punishment. The flip-flopping history of the country's stance on the death penalty indicates that this issue not only has several underlying components, but also that it has never been and never will be a non-controversial societal problem.

As society progressed and technology advanced, the death penalty did not become obsolete but instead became even more complex. Methods of execution that the early Americans relied on, such as hanging and the firing squad, were displaced by drugs and other technological advancements. And with these new methods came increasing judicial and public scrutiny.

This paper traces the history of the United States Supreme Court's application of the Eighth Amendment to the death penalty and compares

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* Member of the California Bar; J.D. 2015, UC Davis School of Law. The author would like to thank Professor John Oakley for his time and feedback!

this to the California Supreme Court's application of the California Constitution to capital punishment. This paper will also discuss how the current shortage of lethal-injection drugs has prompted states to turn to other methods of execution, such as using a controversial drug in their lethal-injection protocol. One such case currently before the United States Supreme Court, *Glossip v. Gross,* addresses this issue. This paper will predict how the United States Supreme Court will apply the federal constitution's "cruel and unusual punishment" prohibition to this pending case.

I. THE UNITED STATES SUPREME COURT'S INTERPRETATION OF THE EIGHTH AMENDMENT

A. A BRIEF HISTORY: DOCUMENTING THE COURT'S VARIOUS OPINIONS REGARDING CAPITAL PUNISHMENT

American society instituted the death penalty as early as 1608, and American views regarding lethal punishment have greatly fluctuated ever since.[1] The mid-twentieth century saw a substantial fluctuation in the public's perception of the death penalty. While the death penalty gained traction and support from 1920 to 1940, this movement was quickly quelled by a counteracting decrease in public support for capital punishment in the 1950s.[2]

The 1960s featured new challenges to the death penalty's seemingly unbridled discretion. Until this time, the Fifth, Eighth, and Fourteenth Amendments had been interpreted as allowing the death penalty.[3] This wave of new analysis began by addressing the absolute discretion given to sentencing juries,[4] a trend that continued until *Furman v. Georgia* in

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[1] *History of the Death Penalty,* Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const (last accessed Feb. 27, 2015).

[2] *Id.*

[3] *Id.*

[4] *See* United States v. Jackson, 390 U.S. 570 (1968) (holding that the death penalty provision of the Federal Kidnapping Act, which states that the defendant shall be punished by death if the kidnapped person has not been liberated unharmed and if the verdict of the jury should so recommend, is unconstitutional because it tends to discourage of the defendant's assertion of his Fifth Amendment right to plead not

1972. However, amid the increasing scrutiny of the death penalty and the meager number of executions that actually took place in the mid-twentieth century, the federal government expanded the list of death-eligible federal offenses. A series of airplane bombings and hijackings in the late 1950s led Congress to establish such crimes as capital offenses, and killings by explosives became capital crimes in 1970.[5] Therefore, although the list of capital crimes was increasing, the era of the Civil Rights Movement spurred litigation that somewhat restricted jurors' discretion in death penalty cases.

Then in 1972, the United States Supreme Court released an unprecedented yet divided five-person majority judgment in *Furman v. Georgia*[6] that invalidated every existing capital statute and verdict.[7] The fact that each justice wrote a separate opinion, and that no justice signed more than one opinion,[8] highlighted American society's reluctance and ability to reach a resolution, a trend that is unlikely to change any time soon. In *Furman,* the justices agreed that the current death-penalty administration was unconstitutional but that this may not be the case for death sentences imposed under different procedures.[9]

Many states responded by ratifying new capital statutes, beginning just five months after the *Furman* decision was published.[10] When rewriting their statutes, states focused on reining in discretion from the jury and even the judge. The Supreme Court reviewed the constitutionality of

guilty and to deter exercise of the Sixth Amendment right to a jury trial); Witherspoon v. Illinois, 391 U.S. 510 (1968) (a juror cannot be prevented from serving on a jury for a death penalty case simply because he has indicated he had reservations about the death penalty).

5 Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role,* 26 Fordham Urb. L.J. 347, 371 (1999).

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

7 James S. Liebman, *Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963–2000,* 107 Colum. L. Rev. 1, 7–8 (2007).

8 *Id.*

9 *Id.* at 8 (however, while the justices did agree that the current system was unconstitutional, they could not agree on the basis for which it was unconstitutional. Justice Douglas believed the process was discriminatory while Justice White thought the death decisions were "arbitrarily infrequent.").

10 *Introduction to the Death Penalty,* Death Penalty Information Center (last accessed February 27, 2015), *available at* http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const (Florida rewrote its death penalty statute just five months after *Furman*).