

NOTES

“ANTITHETICAL TO HUMAN DIGNITY”:
SECONDARY TRAUMA, EVOLVING
STANDARDS OF DECENCY,
AND THE UNCONSTITUTIONAL
CONSEQUENCES
OF STATE-SANCTIONED EXECUTIONS

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“When a death row inmate is executed, the State takes his personal autonomy. . . . This is the very definition of indignity. . . . The execution process is inhumane and brutal to all involved, from the judge or jury imposing the sentence to the prison guard who carries it out.”¹

I. INTRODUCTION

“Please don’t kill my baby.”² The heartbroken plea of Connie Ray Evans’s mother echoed incessantly in Superintendent Donald Cabana’s head.³ As warden of Parchman, Mississippi’s state penitentiary, Cabana supervised the visit between Evans and his family in the days before Evans’s execution.⁴ At 11:15 p.m., it is time to move Evans into the last-

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1. Amanda K. Eklund, Comment, *The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity*, 65 MONT. L. REV. 135, 150–51 (2004). See also *Testimony of Donald Cabana Before the Judiciary Committee of the Minnesota House of Representatives*, 79th Legislature (1995), available at http://www.theadvocatesforhumanrights.org/uploads/cabana_2.pdf.

2. DONALD A. CABANA, DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER 183 (1996).

3. *Id.*

4. *Id.* at 176–77.

night cell directly adjacent to the gas chamber.⁵ Cabana admits having grown fond of this particular prisoner, and while his job has never been easy, he knows that this execution will be different.⁶ He moves slower than usual, feet heavy, heart pounding in his chest.⁷ He notices how sweaty he has become and the weakness in his knees.⁸ Only once Cabana observes that the other corrections officers are staring at him does he realize that he has been lost in his own thoughts.⁹ He quickly dismisses the momentary confusion and proceeds with the execution process.¹⁰

Flanked by prison officials and Cabana, Evans is led from the last-night cell and seated in the large black chair in the middle of the gas chamber.¹¹ He is strapped into the chair by members of the tie-down team; they secure his arms, his legs, and his head with straps attached to the chair.¹² With Evans immobilized and no reprieve forthcoming, the execution must proceed as planned.¹³ At midnight, Cabana gives the signal for the executioner to release the cyanide crystals into the bowl of acid beneath the execution chair.¹⁴ As the poisonous gas fills the chamber, Evans begins to hold his breath in a vain attempt to delay death.¹⁵ The veins in his neck throb, his eyes roll back, and his face twitches violently as thick, yellowish drool and bodily fluids begin to drip from the corners of his mouth.¹⁶ Without noticing he is crying, Cabana wipes the tears from his eyes, thinking that this death was somehow more violent than any he had witnessed before.¹⁷ After Evans was pronounced dead, Cabana met his wife who was waiting for him outside of Parchman's administration building.¹⁸

5. *Id.* at 185.

6. *Id.* at 4, 185–86. Cabana entered into an unlikely friendship with Evans, whose quiet sense of humor and responsibility for his actions gained Cabana's respect. Alison Schneider, *Through an Executioner's Eyes*, THE CHRONICLE OF HIGHER EDUCATION, May 17, 1996, at A6.

7. CABANA, *supra* note 2, at 185.

8. *Id.* at 186.

9. Cabana recalls that he was "puzzled" when he realized that everyone in the execution room was staring at him. He wondered, "how long had I been standing there, trapped in my memories?" *Id.* at 187.

10. *Id.* at 187–88. Cabana describes coming back into reality "as if [he were] struck by a bolt of lightning." *Id.* at 187.

11. *Id.* at 10.

12. *Id.*

13. *Id.* at 13.

14. *Id.* at 188.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 190.

He looked her in the face and said: “No more. I don’t want to do this anymore.”¹⁹

Cabana’s story as a prison warden is one that is not often told;²⁰ yet, it exposes a significant social consequence of administering the death penalty.²¹ Members of execution teams and others involved in implementing the death process are impacted in powerful ways by their everyday employment.²² Exhibiting clear symptoms from post-traumatic stress disorder (“PTSD”), prison wardens like Cabana suffer chronic consequences as a result of carrying out their duties.²³

19. *Id.*

20. Cynthia F. Adcock, *The Collateral Anti-Therapeutic Effects of the Death Penalty*, 11 FLA. COASTAL L. REV. 289, 314 (2010) (“Most death penalty states guard their procedures with the strictest secrecy.”). Robert G. Elliot, an executioner during the time when the electric chair was still in use, believed that if photos were published of executions, “[p]ublic opinion might also be aroused to the extent that capital punishment would be abolished.” ROBERT G. ELLIOT, *AGENT OF DEATH: THE MEMOIRS OF AN EXECUTIONER 190–91* (1940). He made this observation when describing how witnesses to executions were extensively searched after one witness snuck into the execution chamber with a camera strapped to his leg, took a picture of the prisoner during the electrocution, and published it in an article with widespread distribution. *Id.* New York City’s Sing Sing prison executioner Dow B. Hover “took extreme precautions” to conceal his identity as an executioner by changing the license plates on his car before he left his garage so that newspaper reporters could not learn his identity. Jennifer Gonnerman, *The Last Executioner*, THE VILLAGE VOICE, Jan. 18, 2005, at 28, 29.

21. See *infra* Part III; Adcock, *supra* note 20, at 289 (noting that there are “anti-therapeutic consequences to all state-imposed punishments,” including the death penalty).

22. When asked why they do it, many of the participants in the death process view it as just a job that they are hired to do. Despite this detachment, these individuals still experience the effects of secondary trauma in carrying out their duties. See, e.g., Alex Kozinski, *Tinkering with Death*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE 1*, 14 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) (providing Ninth Circuit Court of Appeals Judge Alex Kozinski’s own account of partaking in executions as a part of his judicial oath despite personally feeling “queasiness” each time an execution is carried out in his circuit); CABANA, *supra* note 2, at 17 (describing Cabana’s own role as a warden in which overseeing an execution was “just another part of the job”); ELLIOT, *supra* note 20, at 300–01 (describing Elliot’s own job as an executioner as a “servant of the state” with “an important role to play”).

23. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424–25* (4th ed. 1994) [hereinafter *APA MANUAL*]. It is important to note that corrections officers such as wardens and members of tie-down teams are not the only members of the justice system who experience secondary trauma from their role in the state-sanctioned death process. Defense attorneys, prosecutors, prison chaplains, physicians, and even judges have reported symptomology of secondary trauma. Adcock, *supra* note 20, at 290–92. Judge Kozinski, a supporter of the death penalty, recalls his first dissent against a stay of execution. Kozinski, *supra* note 22, at 12. When the United States Supreme Court announced its decision to lift the stay of execution for Thomas Baal, Judge Kozinski realized that “Baal really was going to die, and that [he, Kozinski] would have played a part in ending his life. The thought took hold of [his] mind and would not let go. It filled [him] with a nagging sense of unease, something like motion sickness.” *Id.*

In *Gregg v. Georgia*,²⁴ the United States Supreme Court determined that the death penalty did not violate²⁵ the Eighth Amendment's prohibition against cruel and unusual punishment²⁶ because it continued to comport with society's "evolving standards of decency."²⁷ However, in the nearly forty years since the *Gregg* decision, corrections officials' secondary trauma resulting from the death penalty process has garnered further attention and study.²⁸ Analysis of the constitutionality of the death penalty should consider the effect of the punishment on not just the condemned prisoner, but also on those individuals charged with carrying out the death sentence, and its impact on the dignity of the justice system as a whole.²⁹ An analysis of the constitutionality of the death penalty that considers the secondary trauma experienced by members of execution teams demonstrates that this punishment is "antithetical to human dignity" and thus cannot comport with our standards of decency.³⁰

Part II of this Note details the background of the Supreme Court's Eighth Amendment jurisprudence and the Court's narrow construction of the concept of human dignity as limited solely to a defendant's dignity. It explains the Court's death penalty jurisprudence, its application of "evolving standards of decency" in analyzing the death penalty, and its emphasis on preserving human dignity. This Part also argues that the Eighth Amendment functions to preserve the dignity of *all* participants in

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

25. The Supreme Court's decision in *Gregg v. Georgia* "effectively ended the debate" over the constitutionality of the death penalty. Shannon D. Gilbreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. JEFFERSON L. REV. 559, 560 (2003).

26. *Gregg*, 428 U.S. at 177–78. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

27. *Gregg*, 428 U.S. at 173 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

28. Amanda Gil, Matthew B. Johnson & Ingrid Johnson, *Secondary Trauma Associated with State Executions: Testimony Regarding Execution Procedures*, 34 J. PSYCHIATRY & L. 25, 25–27 (2006).

29. "Dignity, a word that connotes a state of honor, worth, or esteem, reflects a relationship between an individual's self-worth and society at large." Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 376 (2003). See also *Furman v. Georgia*, 408 U.S. 238, 364 (1972) (Marshall, J., concurring) ("[T]he death penalty wreaks havoc with our entire criminal justice system."); Cutler, *supra*, at 378 (describing the role of decency and dignity as "twin concerns" guiding Eighth Amendment jurisprudence).

30. *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

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the death process, and that the Court’s narrow construction of human dignity improperly ignores capital punishment’s broad social impact.

Part III discusses secondary trauma, PTSD, and perpetration-induced traumatic stress (“PITS”) and explains the symptomatology of participants in the death process who suffer chronic side effects from their duties. This Part will also include personal stories from individuals such as executioners, members of tie-down teams, prison wardens, and corrections officials to illustrate the impact that the death penalty has had on their lives. Lastly, this Part will argue that social psychological research into secondary trauma in corrections officials should be considered in Eighth Amendment analysis of the constitutionality of the death penalty. Because the Supreme Court has used social psychological research to analyze issues of broad social impact, a meaningful consideration of research on secondary trauma in corrections officials would rightly shape Eighth Amendment jurisprudence towards protecting the dignity of the criminal justice system as a whole.

Lastly, Part IV proposes that the death penalty violates the Eighth Amendment given current indicia of society’s “evolving standards of decency.”³¹ It argues that capital punishment jeopardizes the dignity of the criminal justice system, evidenced by the prevalence of secondary trauma among prison officials. Moreover, the growing body of knowledge on incidents of secondary trauma in corrections officials reveals the death penalty’s broad social impact, suggesting that its devastating consequences are irreconcilable with our standards of decency. As such, the death penalty violates the Eighth Amendment’s prohibition against cruel and unusual punishment.

II. HUMAN DIGNITY AND THE SUPREME COURT’S DEATH PENALTY JURISPRUDENCE

A. THE EIGHTH AMENDMENT AND DEFINING “CRUEL AND UNUSUAL”

The Eighth Amendment’s prohibition against cruel and unusual punishment is measured by the “evolving standards of decency that mark the progress of a maturing society.”³² The concept of “cruel and unusual” does not have a firm definition; rather, it is fluid and open to continuous

31. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

32. *Id.*

interpretation.³³ The Supreme Court developed the “evolving standards of decency” doctrine in *Trop v. Dulles*³⁴ to determine whether denationalization was a cruel and unusual punishment.³⁵ In *Trop*, the petitioner was serving in the U.S. Army in French Morocco.³⁶ After the petitioner was confined for disciplinary violations, he broke free and was picked up by an Army truck a day later.³⁷ He was charged with and convicted of desertion.³⁸ As punishment for this crime, the petitioner lost his American citizenship pursuant to the Nationality Act of 1940, which authorized denationalization as punishment for wartime desertion.³⁹

In analyzing the petitioner’s challenge to his punishment, the Court had to determine whether denationalization constitutes a cruel and unusual punishment prohibited by the Eighth Amendment.⁴⁰ Chief Justice Warren noted that although the Court had not provided an exact definition of the phrase “cruel and unusual,” “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁴¹ In preserving human dignity, the Eighth Amendment operates not only as a check on the type of punishment inflicted but also “to assure that [the State’s power] be exercised within the limits of civilized standards.”⁴² The Eighth Amendment therefore prohibited denationalization, not because the punishment itself was physically cruel or torturous, but rather because denationalization results in “the total destruction of the individual’s status in organized society.”⁴³ In other words, denationalization denied the petitioner his basic human dignity.⁴⁴

33. *Furman*, 408 U.S. at 241–42 (Douglas, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)). Accord Earl Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 86–87 (1997) (describing “evolving standards of decency” as an “inquiry [that] clearly envisions the possibility of change”).

34. *Trop*, 356 U.S. 86 (1958).

35. *Id.* at 88–89.

36. *Id.* at 87.

37. *Id.*

38. *Id.* at 88.

39. *Id.*

40. *Id.* at 99.

41. *Id.* at 100.

42. *Id.*

43. *Id.* at 101. Denationalization was a denial of the defendant’s right to dignity as protected by the Eighth Amendment because “[i]n short, the expatriate has lost his right to have rights.” *Id.* at 102.

44. See Cutler, *supra* note 29, at 388 (arguing that a “punishment itself must offend man’s essential dignity” in order to violate the prohibition against cruel and unusual punishment). In addition to rejecting denationalization as a punishment because it destroyed the petitioner’s dignity, the Court also noted that among the eighty-four civilized nations of the world, only two continued to use

Cases like *Trop* demonstrate that the prohibition against “cruel and unusual punishment” is not limited solely to the death penalty but can be used to challenge a number of different types of punishments that demean human dignity.⁴⁵ For example, the Court has determined that the following all violate the Eighth Amendment: mandatory life imprisonment without the possibility of parole for juvenile offenders;⁴⁶ corrections officers’ use of excessive force against inmates;⁴⁷ overcrowding and unhealthy conditions in prisons;⁴⁸ and tying an unruly prisoner to a hitching post for extended periods of time.⁴⁹ Although each of these decisions centered on whether the punishment at issue fit within our evolving standards of decency, each case also demonstrates the role of human dignity in Eighth Amendment jurisprudence.⁵⁰

An important characteristic of the Supreme Court’s Eighth Amendment jurisprudence is that it has consistently focused on the impact of the punishment on the defendant’s dignity.⁵¹ *Trop* best illustrates this, as Chief Justice Warren’s opinion made numerous references to the

denationalization as a penalty for desertion. *Trop*, 356 U.S. at 102–03. The international community’s rejection of denationalization influenced Chief Justice Warren’s decision. *See id.*

45. *See id.* at 99 (“[I]t is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.”); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 751–52 (2006) (describing Immanuel Kant’s definition of human dignity as “protecting the moral status of every man and woman—a status which allows each person . . . equal protection against a state that demeans, humiliates, or offends. . . . [H]uman dignity also concerns how the state treats an individual”).

46. *Miller v. Alabama*, 132 S. Ct. 2455, 2457–58 (2012) (homicide offenses); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (non-homicide offenses).

47. *Hudson v. MacMillian*, 503 U.S. 1 (1992). Corrections officers also acknowledge the importance of treating prisoners humanely. *See* Michael J. Osofsky & Howard J. Osofsky, *The Psychological Experience of Security Officers Who Work with Executions*, 65 PSYCHIATRY 358, 367 (2002). For example, a death row guard at the Louisiana State Penitentiary at Angola stressed “professionalism” and “treating the inmates with decency” in his work because the prisoners “are people and deserve to be treated as such.” *Id.*

48. *Brown v. Plata*, 131 S. Ct. 1910, 1922–23 (2011).

49. *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

50. Goodman, *supra* note 45, at 743 (describing how human dignity is not a “new right or value,” but rather the Supreme Court “has repeatedly treated human dignity as a value underlying, or giving meaning to, existing constitutional rights and guarantees”); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 222–26 (2011) (describing the role of the Supreme Court in its Eighth Amendment jurisprudence as “to stop or limit activities that do not comport with how a decent society should respect the dignity of human life”).

51. *E.g.*, *Hope*, 536 U.S. at 745 (punishing a prisoner by strapping him to a hitching post); *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (failing to consider individual characteristics of the defendant when sentencing him); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (destroying defendant’s position in society by taking away his nationality).

“individual” dignity of the defendant.⁵² The Court has traditionally given the concept of dignity this narrow construction, and Eighth Amendment analysis is usually based solely on whether the defendant’s individual dignity has been violated.⁵³ The prevalence of human dignity throughout the Eighth Amendment jurisprudence demonstrates that, although the exact definition of “cruel and unusual” may fluctuate with society’s “evolving standards of decency,” a punishment will always be cruel and unusual if it fails to comport with human dignity.⁵⁴

B. THE CONSTITUTIONAL DUTY TO PROTECT HUMAN DIGNITY

The Court’s differing interpretations of the “evolving standards of decency” standard in the seminal cases, *Furman v. Georgia* and *Gregg v. Georgia*, illustrate how the same standard has been used to arrive at opposite conclusions.⁵⁵ The standard is in flux and does not lead to predictable results.⁵⁶ In spite of these interpretational differences, however, the Court’s death penalty jurisprudence has consistently and firmly been rooted in the concept of human dignity.⁵⁷ This consistency illustrates dignity’s integral role in death penalty jurisprudence.⁵⁸

52. *Trop*, 356 U.S. at 101.

53. One reason that the dignity analysis in Eighth Amendment cases has centered solely on the defendant’s individual dignity is because the issue has not been framed in any other way. The challenge to the punishment comes from the defendant in his individual capacity, and therefore the analysis is centered on the defendant, individually. Evidence of this analysis is demonstrated in the Supreme Court’s recent death penalty cases. The Court has essentially chipped away at the penalty for defendants that fall into specified categories of offenders ever since the decision in *Gregg v. Georgia*, 428 U.S. 153 (1976). In other words, the death penalty is unconstitutional as to this *specific* defendant for reasons such as this *specific* defendant’s youth, *Roper v. Simmons*, 543 U.S. 551, 555–56 (2005); mental capacity, *Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002); mental stability, *Ford v. Wainwright*, 477 U.S. 399, 401 (1986); or level of culpability, *Enmund v. Florida*, 458 U.S. 782, 786 (1982).

54. *Trop*, 356 U.S. at 100. *See also* Cutler, *supra* note 29, at 376 (describing how the Court’s Eighth Amendment jurisprudence no longer focuses on whether a punishment is torturous, but instead focuses on “whether the punishment degrade[s] our dignity”).

55. Martin, *supra* note 33, at 96. *E.g., compare* *Gregg*, 428 U.S. at 185–86 (arguing that the death penalty serves the penological purposes of deterrence and retribution), *with* *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J. concurring) (arguing that the death penalty does not serve any penological purpose that is not equally served by life imprisonment).

56. *Furman*, 408 U.S. at 241–42 (Douglas, J., concurring).

57. Cutler, *supra* note 29, at 387 (quoting *Furman*, 408 U.S. at 272 (Brennan, J., concurring) (“[T]he true significance of prohibited punishment is that it ‘treat[s] members of the human race as nonhumans, as objects to be toyed with and discarded.’”)).

58. Katherine Corry Eastman, Note, *The Progress of Our Maturing Society: An Analysis of State-Sanctioned Violence*, 39 WASHBURN L.J. 536, 546 (2000) (describing human dignity as the foundation of the prohibition against cruel and unusual punishment).

In the landmark decision *Furman v. Georgia*, the Supreme Court invalidated all death penalty sentencing schemes in the United States that failed to guide jury discretion when sentencing defendants to death.⁵⁹ To arrive at this conclusion, the Court found that giving unguided discretion to juries raised a number of constitutional concerns because such discretion (1) could procedurally facilitate private prejudice or bias,⁶⁰ and (2) was arguably degrading to human dignity,⁶¹ since it was inflicted arbitrarily,⁶² had been tempered in its use,⁶³ and had no legitimate penological purpose.⁶⁴ The high risk of arbitrariness associated with the unguided jury

59. *Furman*, 408 U.S. at 240. Justice Douglas found the sentencing schemes unconstitutional because of the risk that sentences were based on prejudice and discrimination. *Id.* at 242, 249–50 (Douglas, J., concurring). See also Howard Ball, *Thurgood Marshall’s Forlorn Battle Against Racial Discrimination in the Administration of the Death Penalty: The McCleskey Cases, 1987, 1991*, 27 MISS. C. L. REV. 335, 338 (2007). Justices White and Stewart invalidated the sentencing schemes because they arbitrarily and randomly imposed the penalty. *Furman*, 408 U.S. at 313 (White, J., concurring); *id.* at 309 (Stewart, J., concurring) (describing the states’ capital sentencing systems as “cruel and unusual in the same way that being struck by lightning is cruel and unusual”). Justices Brennan and Marshall explicitly addressed the constitutionality of the penalty itself and would have found the death penalty per se unconstitutional. *Id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

The four dissenters, Chief Justice Burger, Justice Rehnquist, Justice Powell, and Justice Blackmun, would have upheld the death sentencing schemes of the states. Specifically, Chief Justice Burger would have upheld the states’ death penalty sentencing schemes because the role of judges does not include acting as legislatures or judging the morality of a particular punishment; death has traditionally been utilized as a form of punishment; and society still recognizes the death penalty as a permissible form of punishment. *Id.* at 375–76, 381, 385–87 (Burger, C.J., dissenting). Justice Rehnquist would have upheld the schemes because the death penalty has been historically validated by the Constitution and forty state legislatures, and the judiciary should not be legislating on the death penalty with its own moral views of the punishment. *Id.* at 465–67 (Rehnquist, J., dissenting). Justice Powell would have upheld the schemes because the Court’s decision releases over 600 people on death row from their sentences, ignores historical use of the death penalty, and ignores precedent of the Court in which it has upheld death sentences and the sentencing schemes of the states. *Id.* at 417–18 (Powell, J., dissenting). Lastly, Justice Blackmun would have upheld the states’ sentencing schemes because, like Chief Justice Burger, he saw the judicial role as abstaining from legislating, especially because the citizens of this country have accepted the death penalty as legitimate. *Id.* at 405–06 (Blackmun, J., dissenting).

60. *Id.* at 242 (Douglas, J., concurring) (“It would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position or class . . .”).

61. *Id.* at 291 (Brennan, J., concurring).

62. *Id.* at 293; *id.* at 364–66 (Marshall, J., concurring); *id.* at 249–50 (Douglas, J., concurring) (“The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.”).

63. *Id.* at 341–42 (Marshall, J., concurring).

64. *Id.* at 305 (Brennan, J., concurring); *id.* at 342, 353 (Marshall, J., concurring). Warden Burl Cain of the Louisiana State Penitentiary at Angola was also troubled by the deterrent justification for the death penalty because of how long a prisoner sits on death row before he is actually executed.

discretion at issue in *Furman* rendered the capital sentencing schemes of numerous states unconstitutional.⁶⁵

Following the decision in *Furman*, many states undertook the process of altering their death sentencing statutes to comply with the Court's new requirements.⁶⁶ In *Gregg v. Georgia*, the defendant challenged the constitutionality of Georgia's post-*Furman* death sentencing scheme in which the jury was required to find the presence of at least one statutory aggravating factor before it could sentence a defendant to death.⁶⁷ The Court upheld Georgia's new sentencing scheme and declared that the Eighth Amendment did not per se prohibit the death penalty.⁶⁸ The Court interpreted "evolving standards of decency" as society's contemporary values measured by "the objective indicia that reflect the public attitude toward a given sanction."⁶⁹ Thus, the "legislative response to *Furman*" and the infrequency of jury verdicts resulting in a death sentence were indicative of society's continued and careful use of the death penalty.⁷⁰ Additionally, the Court opined that the death penalty serves as both retribution and deterrence in that the penalty displays society's outrage at killing⁷¹ and is a "significant deterrent" for planned murders.⁷²

Although "evolving standards of decency" has been the framework under which the Court's death penalty jurisprudence has operated, the Court's duty to preserve human dignity as protected by the Eighth Amendment remains the foundation of death penalty jurisprudence.⁷³ The protection of human dignity in the American system of punishment is found explicitly throughout the analysis contained in the *Furman* opinions,

Osofsky & Osofsky, *supra* note 47, at 367. Warden Cain noted: "The deterrent effect is essentially lost when an inmate is killed so many years after a severe crime that is no longer fresh in anyone's mind."
Id.

65. See *Furman*, 408 U.S. at 240.

66. *Gregg v. Georgia*, 428 U.S. 153, 179–81 (1976) (plurality opinion).

67. *Id.* at 162.

68. *Id.* at 177–78.

69. *Id.* at 173. See also Martin, *supra* note 33, at 98 (describing the *Gregg* Court's interpretation of evolving standards of decency as "a 'bean counting' exercise in which the Court looked to the actions of legislatures and juries").

70. By "legislative response," the Court was referring to the states' immediate redrafting of their death penalty sentencing statutes in an effort to make them comply with the guided discretion requirement of *Furman*. *Gregg*, 428 U.S. at 179–82, 195–97.

71. *Id.* at 183–84.

72. *Id.* at 185–86.

73. Goodman, *supra* note 45, at 789 (arguing that the Supreme Court should continue to rely on human dignity as a "constant" and integral part of constitutional standards).

including the dissents.⁷⁴ It was Justice Brennan’s concurrence in *Furman*, however, that gave the most thorough explanation of the role of human dignity in the jurisprudence.⁷⁵ According to Justice Brennan, “the basic concept underlying the [Eighth Amendment] is nothing less than the dignity of man”—meaning that, at the very least, society should punish with human dignity in mind.⁷⁶ Punishing in a way that preserves dignity requires that the government treat its people with “respect for their intrinsic worth as human beings.”⁷⁷ Although “cruel and unusual” is not a static concept, Justice Brennan emphasized in *Furman* that a punishment is undoubtedly cruel and unusual “if it does not comport with human dignity.”⁷⁸

Although *Gregg v. Georgia* did not find the death penalty to be per se unconstitutional,⁷⁹ Justice Stewart’s plurality opinion upholding Georgia’s death penalty sentencing statute explicitly emphasized the importance of preserving human dignity when applying punishment.⁸⁰ Similar to Justice Brennan’s interpretation of the Eighth Amendment in *Furman*, Justice Stewart noted that when the Court considers an Eighth Amendment challenge, it must determine whether the punishment at issue comports with dignity because dignity is “the core of the [Eighth] Amendment.”⁸¹ He ultimately reasoned that the Georgia sentencing statute in *Gregg* comported with human dignity because it restricted juries’ sentencing discretion.⁸² Georgia’s sentencing statute sufficiently limited the risk of arbitrary use of the death penalty by forcing the jury to find at least one statutory aggravating factor before imposing the penalty.⁸³

74. *E.g.*, *Furman v. Georgia*, 408 U.S. 238, 384 (1972) (Burger, C.J., dissenting) (explaining that the Supreme Court has never invalidated a punishment as “fundamentally at odds with our basic notions of decency” when the punishment has been expressly approved of by the legislatures).

75. *Id.* at 270 (Brennan, J., concurring).

76. *Id.* *See also* Eastman, *supra* note 58, at 546 (describing human dignity as the foundation of the prohibition against cruel and unusual punishment).

77. *Furman*, 408 U.S. at 270 (Brennan, J., concurring).

78. *See id.*

79. *Gregg v. Georgia*, 428 U.S. 153, 177–78 (1976).

80. *Id.* at 182.

81. *Id.*

82. Justice Stewart also argued that the death penalty serves the penological purposes of retribution and deterrence to further support his conclusion that the punishment comports with human dignity. *Id.* at 196.

83. *Id.* at 197.

In *Woodson v. North Carolina*, the Supreme Court determined that individualized sentencing, sentencing that takes into account the unique characteristics of the particular defendant, is required to preserve a capital defendant's dignity.⁸⁴ While most states, including Georgia, tempered the discretion given to juries when sentencing defendants to death,⁸⁵ North Carolina took the opposite approach, removing all discretion from the jury and drafting its death sentencing statutes to include a mandatory death sentence for a first-degree murder conviction.⁸⁶ This mandatory death sentencing process was at issue in *Woodson*.⁸⁷ The Court found that mandatory sentencing does not "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant" which is required before a death sentence may be imposed.⁸⁸ Treating all defendants convicted of a particular crime as "a faceless, undifferentiated mass" would expressly ignore the individuality of each defendant and consequently undermine that defendant's dignity.⁸⁹ *Woodson* stands for the proposition that although individualized sentencing is not used for every crime, when it comes to the most severe sanction the "fundamental respect for humanity underlying the Eighth Amendment" requires that juries consider each defendant's individual characteristics.⁹⁰

As evidenced by the cases above, the theme of dignity is integral to determining whether a punishment is cruel and unusual, emphasizing its fundamental role in analyzing the constitutionality of the death penalty.⁹¹ In the tradition of Eighth Amendment jurisprudence, each of the above cases focused on the dignity of the defendant as an individual.⁹² Although this construction of human dignity has been consistent throughout the jurisprudence,⁹³ such a narrow construction naïvely ignores other

84. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

85. *Gregg*, 428 U.S. at 197.

86. *Woodson*, 428 U.S. at 284–85.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 304–05.

91. *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

92. *E.g.*, *Woodson*, 428 U.S. at 304–05 (noting that individual characteristics of the defendant must be taken into account when considering a death sentence); *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958) (stating that the defendant's individual dignity was destroyed upon losing the "right to have rights").

93. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 745–46 (2002) (punishing the prisoner by strapping him to a hitching post); *Woodson*, 428 U.S. at 304–05 (failing to consider individual characteristics of

individuals in the capital punishment system whose dignity may be jeopardized by their duties.⁹⁴ A broader construction that encompasses protecting the dignity of both the individual defendant and the participants in executions more fully realizes the purpose of the Eighth Amendment to preserve human dignity.⁹⁵

III. SECONDARY TRAUMA AND BEING “FULLY INFORMED” ABOUT THE DEATH PENALTY

In his concurrence in *Furman*, Justice Marshall argued that national consensus on the morality of the death penalty was not “fully informed” because society was unaware of the social injustices⁹⁶ and violations of human dignity⁹⁷ inherent in the administration of capital punishment. Justice Marshall’s argument suggests that if people knew more about the death penalty, its process, and its larger social impact, our society would continue to reject it as a punishment.⁹⁸

Being “fully informed” about the death penalty requires a well-rounded understanding of how sentences are carried out and the magnitude of the punishment’s social impact.⁹⁹ Although not all information about capital punishment is readily available, studies on the social and psychological impact of participating in executions and personal memoirs

the defendant when sentencing him); *Trop*, 356 U.S. at 101–03 (destroying the defendant’s position in society by taking away his nationality).

94. See *infra* Part III.

95. See *Furman*, 408 U.S. at 270 (Brennan, J., concurring).

96. Justice Marshall particularly focused on the disproportionate application of death sentences to minority offenders and how the death penalty as administered could not eliminate the impact of race in sentencing decisions. *Id.* at 365–66 (Marshall, J., concurring). See also Eastman, *supra* note 58, at 543 (arguing that the high rate at which the death penalty is sought for poor and minority offenders demonstrates that capital punishment perpetuates social, economic, and moral oppression of certain groups in the United States).

97. See, e.g., *Furman*, 408 U.S. at 366–67 (Marshall, J., concurring) (explaining the risks of executing an innocent person in the American death penalty system). In a letter written to the Georgia Department of Corrections, six former corrections officers opposed the execution of Troy Davis because of the high risk that the state would be executing an innocent man. Jill L. Francke, *Stories from a Broken System: Corrections Officials*, EQUAL JUSTICE USA (Sept. 26, 2011, 10:13 PM), <http://ejusa.org/newslines/article/2011/09/27/stories-broken-system-corrections-officials>. The former corrections officials found this risk unacceptable not only because it would cost Davis’s life, but because it forced corrections officials to live with the “nagging doubt[,] . . . shame and guilt” associated with executing an innocent person. *Id.*

98. *Furman*, 408 U.S. at 369 (Marshall, J., concurring).

99. See *id.* at 366.

from corrections officials are available for study.¹⁰⁰ These stories expose a side of capital punishment of which many Americans are unaware,¹⁰¹ suggesting Justice Marshall's observation in *Furman*¹⁰² may very well be correct: if people were "fully informed"¹⁰³ about the traumatic effects of administering the death penalty and its social impact, then a larger segment of the population would find the penalty "antithetical to human dignity" and reject it.¹⁰⁴ One of the relatively unknown social psychological consequences of capital punishment is the risk and prevalence of secondary trauma among corrections officials, whose dignity is inherently jeopardized by their participation in the execution of prisoners.

A. SECONDARY TRAUMA: MANIFESTATIONS, SYMPTOMATOLOGY, AND LONG-TERM EFFECTS

Secondary trauma, post-traumatic stress disorder ("PTSD"),¹⁰⁵ and perpetration-induced traumatic stress ("PITS") are related anxiety-based psychological disorders,¹⁰⁶ in which PTSD and PITS can be manifestations of secondary trauma. Secondary trauma is the largest conceptually, and PTSD is a type of secondary trauma characterized as having more severe symptoms.¹⁰⁷ PITS is an extension of PTSD; the major difference between the two is that a person who suffers from PITS was actively involved in the creation of the event that caused the traumatic stress.¹⁰⁸

100. See, e.g., CABANA, *supra* note 2; ELLIOT, *supra* note 20.

101. See *Furman*, 408 U.S. at 363–69 (Marshall, J., concurring) (explaining that the average American citizen is unaware of the discrimination and prejudice in the death sentencing system, the number of wrongly executed prisoners, and the lack of retributive or deterrent justifications for the death penalty).

102. "Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand." *Id.* at 369.

103. *Id.* at 361.

104. See Gonnerman, *supra* note 20, at 29 (explaining how public support of the death penalty is based largely on the secrecy under which executions are carried out).

105. In the context of executions, PTSD has also been referred to as "executioner's stress." *Id.* at 30. Accord ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 78–79 (2000).

106. APA MANUAL, *supra* note 23, at 424; RACHEL MACNAIR, PERPETRATION-INDUCED TRAUMATIC STRESS: THE PSYCHOLOGICAL CONSEQUENCES OF KILLING 99 (2002).

107. Macy M. Lai, *Secondary Trauma*, in ENCYCLOPEDIA OF COUNSELING 849 (Frederick T. L. Leong ed., 2008), available at <http://knowledge.sagepub.com.libproxy.usc.edu/view/counseling/n270.xml>.

108. MACNAIR, *supra* note 106, at 7.

Secondary trauma describes residual effects on those who are closely connected to a psychologically traumatic event.¹⁰⁹ Simply being in close proximity to a traumatic event or traumatized person can cause the “emotional spread of the effect of trauma symptoms” to third parties.¹¹⁰ The traumatic event at issue for the purpose of this Note is participation in the execution process.¹¹¹ Within that context, secondary trauma can be experienced by a wide array of persons who implement the capital punishment system: prosecutors, defense attorneys, judges, prison wardens, corrections officers, chaplains, physicians, and others are all at risk of experiencing secondary trauma due to their close relationship and proximity to the traumatic event of death by execution.¹¹² Secondary trauma’s common symptoms include “having unwanted thoughts or images about the trauma incident, persistent avoidance of places or activities related to the traumatic incident, detachment from others, and increased arousal indicated by sleep disturbances, irritability, concentration difficulties, or being overly vigilant.”¹¹³

The American Psychiatric Association (“APA”) defines PTSD as follows:

[T]he development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1). The

109. Lai, *supra* note 107, at 849.

110. *Id.*

111. It is important to note that the APA does not distinguish trauma caused by different methods of execution (i.e., hanging, firing squad, electrocution, gas chamber, or lethal injection). What is important to a diagnosis of secondary trauma, PTSD, or PITS is that the person has witnessed or caused death, regardless of the method involved. APA MANUAL, *supra* note 23, at 424. See also Adcock, *supra* note 20, at 318; Osofsky & Osofsky, *supra* note 47, at 364 (finding that all prison work is “emotionally draining” and “exceedingly difficult”).

112. Adcock, *supra* note 20, at 290–93; *Executions Create More Victims*, EQUAL JUSTICE USA, <http://ejusa.org/learn/secondary%2Btrauma> (last visited Mar. 1, 2013); Osofsky & Osofsky, *supra* note 47, at 362–64.

113. Lai, *supra* note 107, at 849.

person's response to the event must involve intense fear, helplessness, or horror¹¹⁴

While PTSD is explicitly recognized by the APA as an anxiety disorder, PITS is not recognized as a distinct disorder; rather it is viewed as an alternative form of PTSD.¹¹⁵ The critical difference between PITS and PTSD is the role of the person in causing his or her own trauma.¹¹⁶ Those who suffer from PTSD often have a traumatic event imposed onto them, over which they exhibit no control, suggesting a more passive involvement in the traumatic event.¹¹⁷ PITS, on the other hand, is often used to describe sufferers of PTSD who were actively involved in the event that ultimately caused their traumatic stress.¹¹⁸ Thus, while PTSD is an accurate way to describe the secondary trauma caused by carrying out executions, PITS further clarifies the context of this trauma by acknowledging the active participation of prison officials in causing the death that leads to their traumatic stress.¹¹⁹

PTSD and PITS have similar symptomatology to secondary trauma, but the manifestation of PTSD and PITS symptoms is often more severe.¹²⁰ For example, people with PTSD or PITS relive their traumatic event, avoid association with anything that will trigger reliving the traumatic event, and feel overall numbing.¹²¹ The effect of these symptoms is that a person with PTSD or PITS will feel the distress "in social, occupational, or other important areas of functioning" in his or her everyday life.¹²² One of the more noticeable symptoms is "recurrent distressing dreams during which the event is replayed."¹²³ Due to these dreams, those with PTSD or PITS also experience insomnia, such as trouble falling asleep or staying

114. APA MANUAL, *supra* note 23, at 424. *Accord* Adcock, *supra* note 20, at 293. *See also* MACNAIR, *supra* note 106, at 3 (noting that causing death as an active participant can lead to a "worse psychological outcome" than PTSD in a person who was a passive victim of trauma).

115. Even though PITS is not symptomatically different enough from PTSD to warrant separate categorization, the difference between the sufferer's active or passive role in generating the trauma can be significant for accurate and therapeutic treatment. *See* MACNAIR, *supra* note 106, at 91.

116. *Id.* at 7.

117. *See* APA MANUAL, *supra* note 23, at 424.

118. MACNAIR, *supra* note 106, at 7.

119. *Id.*

120. Lai, *supra* note 107, at 849.

121. APA MANUAL, *supra* note 23, at 424. *Accord* MACNAIR, *supra* note 106, at 4–5.

122. APA MANUAL, *supra* note 23, at 424. *Accord* MACNAIR, *supra* note 106, at 4–5.

123. APA MANUAL, *supra* note 23, at 424–25. *See also* MACNAIR, *supra* note 106, at 93 (noting that intrusive imagery is more prevalent in those who were active participants in the stressor, or traumatic event).

asleep.¹²⁴ Other notable symptoms are “exaggerated startle response,” “irritability,” “outbursts or anger,” and “difficulty concentrating or completing tasks.”¹²⁵

People with PTSD or PITS often experience dissociative episodes lasting “from a few seconds to several hours, or even days, during which portions of the event are relived and the person behaves as though experiencing the event at that moment.”¹²⁶ They also experience avoidance of triggers linked with the traumatic event and psychic or emotional numbing manifested as a minimal responsiveness to the external world.¹²⁷ Increased paranoia and feeling disintegrated or out of place are also common symptoms.¹²⁸ In addition to the symptoms stated explicitly by the APA, there are also long-term consequences of secondary trauma, PTSD, and PITS. The most common long-term or delayed effects are compounded physical ailments,¹²⁹ chronic depression,¹³⁰ alcoholism,¹³¹ and suicidal thoughts or suicide.¹³²

B. SECONDARY TRAUMA IN STATE-SANCTIONED EXECUTIONS

Secondary trauma is prevalent among those who carry out executions.¹³³ This is not unexpected given that traumatic stress is

124. APA MANUAL, *supra* note 23, at 424–25. *Accord* MACNAIR, *supra* note 106, at 6. *See also* Kozinski, *supra* note 22, at 12–14 (describing Judge Kozinski’s insomnia the night before the execution of Thomas Baal).

125. APA MANUAL, *supra* note 23, at 425. *Accord* MACNAIR, *supra* note 106, at 4–5.

126. APA MANUAL, *supra* note 23, at 424–25.

127. *Id.*

128. MACNAIR, *supra* note 106, at 7.

129. *See, e.g., id.* at 34–38 (describing Dow Hover’s extreme migraine headaches); IVAN SOLOTAROFF, *THE LAST FACE YOU’LL EVER SEE: THE PRIVATE LIFE OF THE AMERICAN DEATH PENALTY* 198 (2001) (describing Donald Cabana’s three successive cardiac episodes).

130. MACNAIR, *supra* note 106, at 7.

131. *Id.*

132. *Id.* *Accord* Gil, Johnson & Johnson, *supra* note 28, at 32–33 (explaining that two of the four of New York State’s most recent executioners ended their own lives). Dr. John Hulbert, executioner at New York City’s Sing Sing Prison before Robert Elliot, oversaw 140 executions, after which he reported health problems and that he “was tired of killing people.” Gonnerman, *supra* note 20, at 30. Shortly after he abruptly quit his position at Sing Sing, Dr. Hulbert died of a self-inflicted gunshot wound. *Id.* Dow B. Hover, also of Sing Sing Prison, ended his own life in 1990 by locking himself in his garage with the car engine running. *Id.* at 32.

133. *See* MACNAIR, *supra* note 106, at 3, 7. While secondary trauma is very common among participants in the death process, it is not always universal. There are a number of active participants, such as Robert Elliot, who reported no conscious feelings of common PITS symptoms. However, one reason why the trauma may not be universally reported is that symptoms of PITS caused by carrying out executions may not manifest until later on, even as late as when the person has retired from such

commonly associated with witnessing or causing death.¹³⁴ Executioners often experience problems with sleeping, disassociation from time, numbing, and chronic symptoms such as recurring nightmares, intrusions, avoidance, and severe physical ailments.¹³⁵ To illustrate the prevalence of secondary trauma caused by executions, this Subsection will provide a brief look into the experiences of participants in the death process who are often anonymous figures: prison wardens, corrections officers, and executioners. These personal stories provide a glimpse into the procedural aspects of carrying out executions and illustrate the pervasiveness of secondary trauma among corrections officials.

Donald Cabana served as superintendent of Mississippi's Parchman Penitentiary in the 1980s.¹³⁶ Cabana's memoir, *Death at Midnight*, details his career in corrections, which culminated at Parchman, where he oversaw the executions of Edward Earl Johnson and Connie Ray Evans.¹³⁷ While Cabana often described his position as superintendent as just a job that he was commissioned by the state of Mississippi to carry out, it is evident that he began to feel the effects of his work.¹³⁸ His description of his role as "another part of the job" illustrates Cabana's use of disassociation as a coping mechanism.¹³⁹ Cabana's physical and psychological reactions to his duties as a prison warden, both during executions—hearing his own heart pounding, sweating, disassociation with time, recurring thoughts of Evans's mother,¹⁴⁰ having trouble sleeping¹⁴¹—and then after executions—recurring flashbacks, avoidance of his corrections duties, hypervigilance in his corrections duties,¹⁴² physical ailments such as recurring cardiac

work. Thus, a person experiencing secondary trauma caused by their former work with executions may not associate the stress from such work with the symptoms they currently are experiencing. *See id.* at 40–42.

134. APA MANUAL, *supra* note 23, at 424. *See also* MACNAIR, *supra* note 106, at 3, 7 (explaining that causing death can cause PTSD).

135. MACNAIR, *supra* note 106, at 3, 32, 33, 34–38. Dow Hover, executioner at New York's Sing Sing Prison, experienced extreme migraine headaches. Gonnerman, *supra* note 20, at 30. His daughter noted that Hover's headaches were "severe for a long time It seemed like he had headaches all the time." *Id.*

136. CABANA, *supra* note 2, at 126. *Accord* SOLOTAROFF, *supra* note 129, at 127.

137. CABANA, *supra* note 2, at 155–56, 187–89. *Accord* Schneider, *supra* note 6, at A6.

138. CABANA, *supra* note 2, at 17.

139. *Id.*

140. *Id.* at 185, 186, 187, 183, 190.

141. *Id.* at 16. *Accord* MACNAIR, *supra* note 106, at 32–33.

142. CABANA, *supra* note 2, at 183, 190, 191.

problems¹⁴³—are all common symptoms of PITS. The fact that Cabana still exhibited symptoms even after his retirement is evidence of the long-term impact that work with executions can have.¹⁴⁴ In addition to the symptoms recognized by the APA, Cabana also fought an internal battle with the morality of his work.¹⁴⁵ He was often plagued by thoughts of his faith¹⁴⁶ and doubts as to whether he had ever executed an innocent person.¹⁴⁷ This type of mental anguish also likely contributed to Cabana’s traumatic stress and his realization that he did not “want to do this anymore.”¹⁴⁸

Dr. Allen Ault was the commissioner of the Georgia Department of Corrections from 1992 until 1995, during which he oversaw five executions.¹⁴⁹ Like Cabana, Dr. Ault knew his oversight of executions was part of the job, concluding that the death penalty must be right because it was the law.¹⁵⁰ Dr. Ault tried to maintain a humane and formal atmosphere

143. SOLOTAROFF, *supra* note 129, at 198.

144. See MACNAIR, *supra* note 106, at 40 (noting the delayed onset of symptoms of PITS in executioners).

145. SOLOTAROFF, *supra* note 129, at 198. Ron McAndrew, warden of a Florida state penitentiary, describes that he “started taking a look at [his] own conscience” after a particularly disturbing electrocution during which a five-inch flame shot out from the prisoner’s headpiece. See also Joanne Young, *Ex-Warden Cites Collateral Damage of the Death Penalty*, LINCOLN J. STAR, Feb. 27, 2009, at B1.

146. Cabana, a Catholic, once sought absolution from his priest for his role in executions and acknowledges that he has not completely absolved himself for his participation. Schneider, *supra* note 6, at A6. See also Osofsky & Osofsky, *supra* note 47, at 367 (describing how corrections officials at the Louisiana State Penitentiary at Angola often turned to the clergy, Bible verses, and religious beliefs to help them cope with their work as a part of an execution team). Jim Willet, warden of the busiest death chamber in the nation, the Huntsville unit in Texas, comments about the eighty-four executions he has overseen: “Just from a Christian standpoint, you can’t see [an execution] and not consider that maybe it’s not right.” Sara Rimer, *In the Busiest Death Chamber, Duty Carries Its Own Burdens*, N.Y. TIMES, at 1 (Dec. 17, 2000), available at <http://www.deathpenaltyinfo.org/node/581>. The head of the tie-down team at Huntsville, Kenneth Dean, recalls that he “researched” whether his role in executions would violate his faith, noting that he consulted his pastor to make sure he “wasn’t misinterpreting what the Bible said about the death penalty.” *Id.*

147. SOLOTAROFF, *supra* note 129, at 199. New York City’s executioner Dow B. Hover and his wife also struggled with the morality of his being employed as an executioner, and whether Hover was “going to go to hell because of it.” Gonnerman, *supra* note 20, at 30. Together, they sought the guidance of their minister and decided that Hover would be able to perform his execution duties and not risk his soul in doing so. *Id.*

148. CABANA, *supra* note 2, at 190.

149. Dr. Allen Ault, *I Ordered Death in Georgia*, NEWSWEEK (Sept. 25, 2011), available at <http://www.thedailybeast.com/newsweek/2011/09/25/ordering-death-in-georgia-prisons.html>.

150. *Secondary Trauma: The Death Penalty Creates New Victims*, Video Interview with Dr. Allen Ault, EQUAL JUSTICE USA (Sept. 2, 2009), http://www.jsnet.eku.edu/justice/courses/cor320/video/COR320_DeanInterview.html [hereinafter *Secondary Trauma*].

when carrying out executions,¹⁵¹ noting that his staff always did their “best” to maintain the routine even though they experienced their own PTSD-like symptoms, some turning to alcohol and drugs as coping mechanisms.¹⁵² Dr. Ault’s description of his own experience after overseeing those five executions indicates that he suffered symptoms of PITS: trouble sleeping, recurring and vivid nightmares, dissociation from his mother and wife because he did not want them to know about his recurring nightmares,¹⁵³ and hypervigilance in trying to reform prisons after his retirement from the Georgia Department of Corrections.¹⁵⁴ Even during his tenure as commissioner, Dr. Ault knew he was experiencing trauma and sought the aid of a psychologist.¹⁵⁵ Dr. Ault sought treatment because he was having flashbacks, remembering the faces of the men whose executions he oversaw, and experiencing nightmares.¹⁵⁶ In a taped interview with Equal Justice for America, Dr. Ault chokes back tears and pauses for a significant amount of time before he can continue describing one of the executions he oversaw, noting that “it’s still hard” to recall those men and those moments.¹⁵⁷ Like Cabana, Dr. Ault admits that he left his position in 1995 because: “I had had enough: I didn’t want to supervise the executions anymore.”¹⁵⁸

Donald Hocutt was an executioner who often worked with Donald Cabana at Parchman.¹⁵⁹ He was usually selected as the executioner in gas chamber executions because of his extensive knowledge of machinery, as gas chambers frequently needed maintenance for successful operation.¹⁶⁰ In addition to the maintenance of the chamber, Hocutt’s job was to release the

151. Maintaining strict procedures and protocol is often a way that execution teams are able to cope with their work. *See* Rimer, *supra* note 146. The emphasis on procedures helps the participants in the death process disassociate their work from the reality that a prisoner is about to die. *See id.* Kenneth Dean, the head of the tie-down team who worked with Warden Jim Willet of Huntsville in Texas, notes that people with his position “cope with their jobs by focusing on the routine.” *Id.*

152. Ault, *supra* note 149.

153. Disassociation from family and not wanting to talk about work as an executioner is common. *See* Gonnerman, *supra* note 20, at 30. Dow Hover’s children recall that he never discussed his work at home or any other time with his family. *Id.* This is a common sign of disassociation and avoidance in people who suffer from PTSD. MACNAIR, *supra* note 106, at 7.

154. Ault, *supra* note 149.

155. *Secondary Trauma*, *supra* note 150.

156. *Id.*

157. *Id.*

158. Ault, *supra* note 149.

159. SOLOTAROFF, *supra* note 129, at 127–28.

160. *Id.* at 70.

cyanide crystals into the sulfuric acid to generate the poisonous gas.¹⁶¹ After the decision in *Gregg v. Georgia*, Hocutt served as the executioner in one of the most infamous gas chamber executions in history.¹⁶² Jimmy Lee Gray was executed at Parchman before head straps were used to secure prisoners’ heads during executions.¹⁶³ The lack of restraints on Gray’s head while he inhaled the poisonous gas led to violent thrashing of his head, which banged incessantly against a metal pole holding the chair in the gas chamber in place, until Gray ultimately succumbed to the gas.¹⁶⁴

Hocutt’s PITS symptoms have ranged from failing health,¹⁶⁵ irritability,¹⁶⁶ depression,¹⁶⁷ flashbacks,¹⁶⁸ extreme nightmares,¹⁶⁹ and stress-induced episodes.¹⁷⁰ His stress-induced episodes and nightmares are arguably the most intense consequences of his work as an executioner.¹⁷¹ For example, Hocutt was particularly affected by the execution of Leo Edwards.¹⁷² Whether it was Edwards’s death in particular or simply the stress of his position, Hocutt woke up the morning after Edwards’s execution and began actively searching for Edwards in his kitchen cabinets, below the sink, and even in packages of food, and expressed confusion to his wife when he could not locate Edwards.¹⁷³ Hocutt has also described a vivid recurring dream in which he is monitoring the prisoners of Parchman during their work in the cotton fields.¹⁷⁴ Without any disturbance by the prisoners, Hocutt moves through the cotton rows, shooting the

161. *Id.* at 87–88.

162. *Id.* at 74.

163. *Id.* at 88–90.

164. *Id.*

165. *Id.* at 184 (describing Hocutt’s high number of physical ailments: maturity-onset diabetes, diverticulitis, arthritis, partial deafness, and gout).

166. *Id.* at 185 (“There was simply no stress that [Hocutt] could bear, and he exploded at the tiniest hitch.”).

167. Hocutt described his onset of depression as “a constant negative draw” that caused him to feel “like the shittiest human being in the world.” *Id.*

168. When discussing his flashbacks, Hocutt explicitly mentions the execution of Edward Earl Johnson. *Id.* at 195–96. This execution weighed heavily on Hocutt because of the amount of time the death actually took, and the speculation that Johnson had been innocent of the crime for which he was executed. *Id.* Hocutt recalled that his depression started after Johnson’s execution. *Id.*

169. *Id.* at 187; LIFTON & MITCHELL, *supra* note 105, at 89.

170. SOLOTAROFF, *supra* note 129, at 180.

171. *E.g., id.* at 180–81, 188.

172. *Id.* at 178–80.

173. *Id.* at 180–81.

174. *Id.* at 188.

unsuspecting prisoners with a machine gun, one by one.¹⁷⁵ Like both Cabana and Dr. Ault, Hocutt has reflected on his experience as an executioner in a negative way, equating it with “being in a car wreck that’s going on forever.”¹⁷⁶

C. SOCIAL SCIENCE RESEARCH OF SECONDARY TRAUMA BELONGS IN EIGHTH AMENDMENT JURISPRUDENCE

The careers and personal experiences of Cabana, Dr. Ault, and Hocutt expose a devastating social consequence of implementing the capital punishment system in America.¹⁷⁷ Each time an execution is carried out, those in the corrections field experience its traumatic impact, which causes lasting psychological and physical damage.¹⁷⁸ Such a broad social consequence rightfully should be considered when analyzing the constitutionality of the death penalty because of the constitutional duty to preserve the dignity of all involved in the process of punishing.¹⁷⁹

Eighth Amendment jurisprudence generally follows an analytical path¹⁸⁰ in which the Court looks to (1) whether the punishment has been historically used;¹⁸¹ (2) whether the punishment respects human dignity by falling within society’s evolving standards of decency,¹⁸² as measured by the objective indicators of national consensus;¹⁸³ (3) whether the

175. *Id.*

176. LIFTON & MITCHELL, *supra* note 105, at 89.

177. *See supra* Part III.B.

178. *See id.*

179. *See* ROSEMARY J. ERICKSON & RITA J. SIMON, THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS 1 (1998).

180. This Eighth Amendment analytical path has been divided into multiple factors to measure “evolving standards of decency,” the most common of which are history, legislation, jury use of the punishment, and other indicia that can include: the Court’s own judgment, international consensus, and the opinions of religious and professional organizations. Cutler, *supra* note 29, at 380–86.

181. *Gregg v. Georgia*, 428 U.S. 153, 176–77 (1976).

182. *Trop v. Dulles*, 356 U.S. 86, 101–03 (1958).

183. *Gregg*, 428 U.S. at 179–81. Justice Marshall rejected the interpretation of “evolving standards of decency” as a simple exercise of counting which legislatures imposed the death penalty. John D. Burrow, *The Most Unfortunate Decisions: Forging an Understanding of Justice Thurgood Marshall’s Jurisprudence of Death*, 6 HOWARD SCROLL SOC. J. REV. 1, 14–15 (2004). For Justice Marshall, the ultimate concern was whether a punishment comported with human dignity, meaning that a punishment could not be constitutional solely because certain segments of society decided to impose it. *Id.* Thus, the sheer number of legislatures that impose the death penalty would not be determinative of the death penalty’s constitutionality if the death penalty did not also ultimately comport with human dignity. *See id.*

international community accepts or rejects the punishment,¹⁸⁴ and lastly, (4) whether the Court¹⁸⁵ finds that the punishment is proportional to the crime¹⁸⁶ and serves legitimate penological purposes.¹⁸⁷ What is lacking in the Court’s Eighth Amendment jurisprudence is an analysis of the social impact of a punishment,¹⁸⁸ and whether that impact is acceptable to society as comporting with human dignity, the foundation of all Eighth Amendment inquiries.¹⁸⁹

Social science research has been used throughout the Supreme Court’s jurisprudence as evidence of the societal impact of a particular issue.¹⁹⁰ Social science research is defined as data “dealing with social, social-psychological, and psychological issues.”¹⁹¹ Thus, studies and data on the impact of secondary trauma in the capital punishment system would fall into the “social-psychological” category. One of the most notable uses of social science research by a party was the use of studies to demonstrate the traumatic psychological impact of segregation on African-American children by then-NAACP lawyer Justice Marshall in *Brown v. Board of Education*.¹⁹² The Court accepted the validity of these types of studies and determined that segregation in public schools created an impermissible

184. *Trop*, 356 U.S. at 102–03.

185. “Evolving standards of decency” has been interpreted to include not only objective indicia of national consensus from legislatures and juries, but also the Supreme Court’s own judgment on the constitutionality of the punishment at issue. Martin, *supra* note 33, at 100.

186. *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring).

187. *Gregg*, 428 U.S. at 182–83; *Furman*, 408 U.S. at 305 (Brennan, J., concurring).

188. See ERICKSON & SIMON, *supra* note 179, at 1–3.

189. *Furman*, 408 U.S. at 270 (Brennan, J., concurring).

190. *E.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2465 n.5 (2012) (psychological studies on the development of juvenile minds, personalities, responsibility for their actions, and susceptibility to outside influences); *McCleskey v. Kemp*, 481 U.S. 279, 291–93 (1987) (the Baldus study regarding the impact that the race of a murder victim has on a jury’s willingness to impose the death penalty); *Lockhart v. McCree*, 476 U.S. 162, 173–74 (1986) (studies regarding the role that strong opposition or support of the death penalty plays in a prospective juror’s ability to impose a capital sentence in cases where it is legally appropriate); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (studies regarding the psychological impact on schoolchildren caused by being placed in segregated schools). See also ERICKSON & SIMON, *supra* note 179, at 12–18 (describing the history of social science research, the law, and Supreme Court decisions).

191. ERICKSON & SIMON, *supra* note 179, at 2–3. Social science research can also include public opinion polls and surveys. *Id.*

192. *Brown*, 347 U.S. at 494–95. In *Brown*, the Court specifically analyzed the issue of segregation by “consider[ing] public education in the light of its full development and its present place in American life throughout the Nation,” suggesting the Court was looking to the broader social impact of public education as well. *Id.* at 492–93.

psychological feeling of inferiority among African-American schoolchildren in violation of the Fourteenth Amendment.¹⁹³

While Justice Marshall presented social science research in *Brown v. Board of Education* to resolve an equal protection issue, the Supreme Court has also looked at social science research in Eighth Amendment cases.¹⁹⁴ The Court made notable use of psychological studies and opinions from the American Psychological Association and other mental health organizations in the recent Eighth Amendment case *Miller v. Alabama*.¹⁹⁵ *Miller* considered whether mandatorily sentencing a defendant to life without the possibility of parole for a homicide offense committed when the defendant was a juvenile violated the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁹⁶ The American Psychological Association and other mental health groups submitted an amicus curiae brief to educate the Court about juvenile personality and psychological characteristics.¹⁹⁷ The brief was filed in support of the petitioners, two juveniles that were convicted of homicide offenses and mandatorily sentenced to juvenile life without parole ("JLWOP").¹⁹⁸ The Court made significant use of the American Psychological Association's amicus brief by referencing its findings on juvenile mind and behavior patterns in earlier juvenile punishment cases like *Roper v. Simmons* and *Graham v. Florida*.¹⁹⁹ The Court ultimately held in *Miller* that mandatory JLWOP was cruel and unusual in violation of the Eighth Amendment.²⁰⁰ Writing for the Court, Justice Kagan specifically cited *Graham*, in which the Court held that

193. *Id.*

194. *See Miller*, 132 S. Ct. at 2465 n.5.

195. *Id.* at 2464–65, 2465 n.5.

196. *Id.* at 2460.

197. *Id.* at 2465 n.5; Brief for the American Psychological Association, et al. as Amici Curiae in Support of Petitioners at 1, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) [hereinafter *Miller APA Brief*].

198. *See generally Miller APA Brief*.

199. *Miller*, 132 S. Ct. at 2464–65. In footnote 5 of the *Miller* opinion, Justice Kagan explicitly notes that the American Psychological Association's studies on juvenile behavior and psychological characteristics supporting the proposition that juveniles are less culpable than adults "have become even stronger" in the time since *Roper v. Simmons* and *Graham v. Florida* were decided. *Id.* at 2465 n.5.

200. *Id.* In *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010), the Supreme Court invalidated JLWOP as a punishment for juveniles convicted of non-homicide offenses. The American Psychological Association and other mental health groups also filed an amicus brief in that case, once again, in support of the petitioner, a juvenile sentenced to JLWOP for multiple aggravated assault and burglary convictions. Brief for the American Psychological Association, et al. as Amici Curiae in Support of Petitioners at 3–5, 28, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621) [hereinafter *Graham APA Brief*].

juvenile non-homicide offenders have “twice diminished moral culpability,” which was based on the American Psychological Association’s social psychological research.²⁰¹ This research was imperative to the Court’s determination that mandatory JLWOP was a disproportionate punishment for juveniles, even those who have committed homicide.²⁰² The use of social science research in deciding *Miller* is yet another example of the Court’s willingness to consider and decisively utilize social psychological research in its Eighth Amendment jurisprudence.²⁰³

However, not all social science research has been readily accepted in Supreme Court cases in which the defendant was challenging a death sentence.²⁰⁴ In *McCleskey v. Kemp*,²⁰⁵ the defense presented social research and statistics, called the Baldus study, to support its argument that the death penalty was disproportionately inflicted on African-American defendants when the victim was white and was not similarly imposed in cases in which the victim was an African-American.²⁰⁶ Thus, the defense argued, such disproportionate imposition of the death penalty based on the victim’s race was discriminatory and rendered the punishment unconstitutional.²⁰⁷ The Court rejected these arguments, finding the Baldus study insufficient to demonstrate a discriminatory purpose when jurors imposed the death penalty.²⁰⁸ Additionally, the parties in *Lockhart v. McCree*, another death penalty case, presented data on “death-qualified” juries: juries that are not morally opposed to sentencing a defendant to death if the law requires it.²⁰⁹

201. *Graham*, 130 S. Ct. at 2027; Graham APA Brief, *supra* note 200, at 3–5, Argument Part I.

202. *Miller*, 132 S. Ct. at 2468–69.

203. *See id.* at 2465 n.5.

204. *E.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (rejecting studies regarding the impact of the race of a murder victim on a jury’s willingness to impose the death penalty); *Lockhart v. McCree*, 476 U.S. 162, 173–74 (1986) (rejecting studies regarding the role that strong opposition or support of the death penalty plays in a prospective juror’s ability to impose a capital sentence in cases where it is legally appropriate).

205. *McCleskey*, 481 U.S. at 279.

206. *Id.* at 291–93. *See also* Ball, *supra* note 59, at 363–65 (describing how the Court considered the Baldus study but ultimately rejected its findings because it did not conclusively demonstrate a discriminatory purpose when juries imposed the death penalty on African-American defendants convicted of killing white victims).

207. Although *McCleskey* concerned a defendant challenging his death sentence, it is both an Eighth Amendment and Fourteenth Amendment case. *McCleskey*, 481 U.S. at 286.

208. *Id.* at 297. “Discriminatory purpose” is a constitutionally necessary showing when a defendant mounts an equal protection challenge to a facially neutral law regarding race, like a death sentencing statute. *Id.*

209. *Lockhart*, 476 U.S. at 167.

In *Lockhart*, the trial judge systematically used voir dire questioning to exclude potential jurors who had moral or religious “scruples” against imposing the death penalty.²¹⁰ The defendant challenged these juror exclusions because of the increased likelihood that the judge could impanel a jury that was predisposed towards imposing the death penalty.²¹¹ The defense presented social science research “indicating that the absence of jurors with such scruples created a jury that was pro-prosecution and therefore conviction-prone.”²¹² In his majority opinion for the Court, Justice Rehnquist rejected this body of research because no prior Supreme Court opinions had ever relied on social research to change a procedural aspect of a trial, such as jury selection.²¹³

The Court in *Lockhart* was critical of the studies on death-qualified juries because accepting the studies would have changed a procedural aspect of criminal trials—how to choose jurors that represent the community—instead of implementing a broader social goal.²¹⁴ In fact, the successful use of social science research in cases like *Brown* and *Miller* indicates that the Court is more willing to consider such social science research on broad social issues than on procedural issues.²¹⁵ Even though the social science research presented in *McCleskey* and *Lockhart* was not considered as convincing as the studies presented in *Brown* or *Miller*,²¹⁶ these cases strongly indicate that the Court will consider evidence of social

210. *Id.* at 166.

211. *Id.* at 167–68.

212. ERICKSON & SIMON, *supra* note 179, at 17.

213. *Lockhart*, 476 U.S. at 173–74; ERICKSON & SIMON, *supra* note 179, at 17; Donald Bersoff, *Social Science Data and the Supreme Court: Lockhart as a Case in Point*, 42 AM. PSYCHOLOGIST 52, 56–57 (1987).

214. *See Lockhart*, 476 U.S. at 173–74; ERICKSON & SIMON, *supra* note 179, at 17.

215. *E.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2464–65, 2465 n.5 (2012) (considering studies on the psychological development of juveniles); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (considering studies on the social impact of school segregation). *See also* ERICKSON & SIMON, *supra* note 179, at 16–17 (describing the Supreme Court’s aversion to social science research used to change the judicial process but its willingness to consider such studies in deciding issues of broader social scope and impact).

216. *Compare Miller*, 132 S. Ct. at 2464–65 (finding studies on juvenile psychological development relevant to determining the culpability of juvenile offenders in order to mete out proportionate punishments), *and Brown*, 347 U.S. at 494–95 (finding the studies on psychological impact on schoolchildren constitutionally relevant to the issue of school segregation), *with Lockhart*, 476 U.S. at 173–74 (finding studies on death-qualified juries prone to sentencing defendants to death unpersuasive to change a procedural aspect of criminal trials), *and McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (finding the studies on the role of the race of the victim in death penalty sentencing insufficient proof of discriminatory purpose).

impact in its death penalty jurisprudence because studies on secondary trauma present a broad social issue as opposed to a procedural one.²¹⁷

Research on secondary trauma should be considered in Eighth Amendment jurisprudence because the consequences of capital punishment have a social impact on the lives of those employed to carry out executions.²¹⁸ This devastating phenomenon was arguably unheard of at the time of the *Gregg* decision²¹⁹ but has since garnered further study, revealing the prevalence of secondary trauma in the capital punishment system.²²⁰ Secondary trauma experienced by the members of execution teams, prison wardens, corrections officials, and numerous others who are charged with implementing this punishment is a broad social consequence of capital punishment in America.²²¹ Such a consequence calls into question whether our capital punishment system upholds these individuals’ dignity.²²² Thus, research concerning the broad social impact of the death penalty is critical to determine whether the penalty remains within current standards of decency and continues to comport with human dignity.

IV. ANALYZING THE CURRENT CONSTITUTIONALITY OF THE DEATH PENALTY WITHIN THE FRAMEWORK OF HUMAN DIGNITY

Since its decision in *Gregg v. Georgia*, the Court has not substantively questioned the constitutionality of the death penalty.²²³ Instead, categorical challenges to the death penalty’s use have dominated recent death penalty

217. See ERICKSON & SIMON, *supra* note 179, at 16–17.

218. *Supra* Part III. See also Adock, *supra* note 20, at 293 (“Given this expansive web of those involved in death cases, the almost seven thousand individuals who landed on America’s death rows since 1977 translates into tens of thousands of persons who potentially suffered collateral trauma from an execution.”); Burrow, *supra* note 183, at 28 (describing Justice Marshall’s view that capital punishment is “a static concept that [does] not properly weigh the sentiments of the public” even though society is impacted by it).

219. See Gil, Johnson & Johnson, *supra* note 28, at 25–27.

220. See *supra* Part III. *E.g.*, Gil, Johnson & Johnson, *supra* note 28, at 25–27; Osofsky & Osofsky, *supra* note 47 (studying the presence of secondary trauma and depression among corrections officials at Louisiana State Penitentiary at Angola).

221. Adcock, *supra* note 20, at 293. See also *supra* Part III.

222. See Eklund, *supra* note 1, at 150–51 (describing the execution process as “inhumane” and “brutal” to all the participants in the death process).

223. *Gregg v. Georgia*, 428 U.S. 153, 177–78 (1976) (plurality) (holding that the death penalty as a punishment is not per se unconstitutional). Accord Martin, *supra* note 33, at 84.

jurisprudence, including whether the punishment as administered,²²⁴ the type of offender sentenced to death,²²⁵ or the type of crime for which the death penalty is available fits within society's evolving standards of decency.²²⁶ In forty years, the Court has not looked at how implementing the death penalty impacts society as a whole or whether the death penalty continues to comport with human dignity.²²⁷

Because "evolving standards of decency" is a flexible standard measured by changes in our social values²²⁸ and recent studies into secondary trauma among executioners have begun to shed light on this issue,²²⁹ the Court should now substantively review the impact of the death penalty on the dignity of our society as a whole²³⁰ through the use of social

224. *E.g.*, *Gregg*, 428 U.S. at 162 (statutory aggravating factor must be present before the defendant can be sentenced to death); *Florida v. Proffitt*, 428 U.S. 242, 248–50 (1976) (statutory procedures requiring the judge to consider specific aggravating and mitigating factors and set them forth in writing when the death penalty is imposed); *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (individualized sentencing and consideration of mitigating factors by the jury required); *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (guided discretion of the jury in sentencing).

225. *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 555–56 (2005) (minors); *Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002) (the mentally retarded); *Ford v. Wainwright*, 477 U.S. 399, 401 (1986) (the insane). The author recognizes that use of the term "mentally retarded" is no longer politically correct or culturally sensitive. However, in an attempt to remain accurate to and consistent with the language of the Supreme Court, this term appears periodically throughout the footnotes in connection with the *Atkins* case and is in no way meant to be offensive.

226. *E.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (holding that juvenile life without parole was unconstitutional for nonhomicide crimes); *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding that the death penalty was unconstitutional for the rape of a child under twelve years old); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that the death penalty was constitutional for non-triggerman felony murder where defendant was a major participant in the felony and displayed reckless disregard for human life); *Enmund v. Florida*, 458 U.S. 782, 786 (1982) (holding that the death penalty was unconstitutional for non-triggerman felony murder where the defendant was a minor participant in the felony and did not have intent to kill); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death penalty was unconstitutional for rape of an adult woman).

227. *See* Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 *HAMLIN L. REV.* 311, 339 (2005) (arguing that the Supreme Court needs to revisit the constitutionality of the death penalty because it has been too long since it took a measurement of society's standards of decency, a measurement that the "evolving standards of decency" test requires).

228. *Id.* at 334–35. *See, e.g.*, *Atkins*, 536 U.S. at 314–15 (noting the directional shift towards banning the execution of the mentally retarded in state legislatures after the *Penry v. Lynaugh*, 492 U.S. 302 (1989) decision as a transformation in our standards of decency towards a national consensus against executing the mentally retarded).

229. *See supra* Part III.

230. Participants in the death process often express a fear about how society will view or judge them for their role in executions. *See* Osofsky & Osofsky, *supra* note 47, at 367–68. This legitimate

science research. If the Court adopts this analytical framework that includes an analysis of the social impact of the death penalty, it becomes clear that the death penalty’s consequences do not comport with our standards of decency or human dignity.

A. “EVOLVING STANDARDS OF DECENCY” PERMITS A SUBSTANTIVE REEVALUATION OF THE DEATH PENALTY

Although the Supreme Court determined the death penalty was not *per se* prohibited by the Eighth Amendment’s ban on cruel and unusual punishment,²³¹ “evolving standards of decency” is not a static test; rather, it allows the Court to reevaluate whether a punishment that was once acceptable continues to comport with human dignity.²³² American society’s standards of decency have evolved in the forty years since the Court seriously considered the constitutionality of the death penalty as a punishment.²³³ In light of this evolution, the “evolving standards of decency” standard invites the Court to revisit the constitutionality of the death penalty.²³⁴ Revisiting this issue would reveal that states continue to gradually disapprove of the use of the death penalty,²³⁵ the international community both rejects and restricts its use as a punishment,²³⁶ the use of the death penalty violates human dignity,²³⁷ and social science research into secondary trauma among corrections officials reveals that the death penalty has an impermissible and devastating social impact.²³⁸ A combined

concern is yet another reason why the impact of implementing the death penalty on society as a whole should be taken into consideration. *Id.*

231. *Gregg v. Georgia*, 428 U.S. 153, 177–78 (1976) (plurality).

232. *Furman v. Georgia*, 408 U.S. 238, 241–42 (1972) (Douglas, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)). *Accord* Martin, *supra* note 33, at 87 (describing “evolving standards of decency” as an “inquiry [that] clearly envisions the possibility of change”).

233. *See Gregg*, 428 U.S. at 177–78.

234. *See Varland*, *supra* note 227, at 336 (arguing that the Supreme Court “must affirmatively maintain the [Eighth] Amendment’s progressive standards” which includes reconsidering the death penalty in light of societal changes).

235. *More Evidence Against the Death Penalty*, N.Y. TIMES (Apr. 12, 2012), http://www.nytimes.com/2012/04/13/opinion/more-evidence-against-the-death-penalty.html?_r=0 [hereinafter *More Evidence*]; *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/recent-legislative-activity#2013> (last visited Sept. 28, 2013) [hereinafter *Recent Legislative Activity*].

236. Video Report of Death Sentences and Executions 2011, AMNESTY INT’L USA (Mar. 26, 2012), <http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2011> [hereinafter *Death Sentences and Executions*].

237. *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958).

238. *Adcock*, *supra* note 20, at 293.

analysis of these factors leads to the conclusion that the death penalty violates the Eighth Amendment's prohibition on cruel and unusual punishment.

1. "Evolving Standards of Decency" Measured by Objective Indicia of National Consensus

Despite historical acceptance of the death penalty as a legitimate punishment,²³⁹ there has been a steady and consistent change in the use of the death penalty in the United States, suggesting that our standards of decency reject it as a legitimate punishment.²⁴⁰ The reduced number of state legislatures currently authorizing the use of the death penalty, compared with the number in 1976 after the *Gregg* decision, objectively indicates a national consensus.²⁴¹ As of 2013, there are thirty-two states with death penalty statutes, plus the federal death penalty and the United States Military death penalty.²⁴² Currently, eighteen states plus the District of Columbia have abolished, or effectively abolished, the death penalty.²⁴³ However, these numbers do not provide a complete picture of the *direction* of change in the national consensus on the death penalty.²⁴⁴ Since the *Gregg* decision, Connecticut, Illinois, Massachusetts, New Jersey, New Mexico, New York,²⁴⁵ Rhode Island, Maryland, and the District of Columbia have all abolished the death penalty.²⁴⁶ On the other hand, only

239. *Gregg v. Georgia*, 428 U.S. 153, 176–77 (1976).

240. *E.g.*, *More Evidence*, *supra* note 235.

241. Martin, *supra* note 33, at 96 (citing *Furman v. Georgia*, 408 U.S. 238, 385–90 (1972) (Burger, C.J., dissenting)). *See also States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Mar. 1, 2013) [hereinafter *States*] (providing the numerical breakdown of states that impose the death penalty and states that do not).

242. *States*, *supra* note 241.

243. *Id.*

244. The consistency of the direction of change in national consensus has become an integral part of the "evolving standards of decency" analysis, in which the Court considers whether state legislatures have indicated a move towards tempering or restricting the use of a punishment entirely or for a given class of persons in addition to considering the objective number of legislatures that either permit or prohibit the punishment. *See Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002); *Roper v. Simmons*, 543 U.S. 551, 565–67 (2005).

245. New York's position on the death penalty is more difficult to clearly define than the other states. *See New York*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/new-york-1> (last visited Sept. 28, 2013) [hereinafter *New York*]. Even though New York reinstated its death penalty statute in 1995, the New York Court of Appeals reduced the only remaining death row sentence to life in prison in 2007. *Id.* Also, all of the execution equipment in the state was removed from prison facilities in 2008, effectively ending all executions in New York. *Id.*

246. *States*, *supra* note 241.

two states, Oregon²⁴⁷ and New York,²⁴⁸ reinstated their death penalty statutes after *Gregg* was decided. Thus, even though the current total number of states with death penalty statutes exceeds the number of states that have abolished the death penalty, it is clear that since the *Gregg* decision, the direction of change has steadily been towards decreasing the use of this punishment.²⁴⁹ The objective numerical decline in the number of states with death penalty statutes suggests the national consensus is shifting from retention of the death penalty towards abolition.²⁵⁰

In addition to these numbers, the actual number of times a death sentence has been carried out within a given period has also steadily declined since 1976.²⁵¹ Since the *Gregg* decision, 1347 prisoners in total have been executed in America.²⁵² However, an examination of these numbers year-by-year and even state-by-state, demonstrates that the punishment is not frequently used in states with death penalty statutes, and its overall rate of use is declining.²⁵³ For example, Oregon, one of the few states that banned the death penalty and then reinstated it after the *Gregg* decision, has executed two people since it reinstated the penalty in 1984.²⁵⁴ Additionally, the state of New York recently reinstated its death penalty in 1995, yet it has no prisoners currently on death row because the last death sentence was reduced to life in prison in 2007, and in 2008, all execution equipment was removed from the state’s prison facilities.²⁵⁵ Over the past three years, the number of executions per year has reached a plateau: in 2010 there were forty-six executions, in 2011 there were forty-three executions, and in 2012 there were also forty-three executions.²⁵⁶ Statistics

247. *History of Capital Punishment in Oregon*, OREGON.GOV, http://www.oregon.gov/DOC/GECO/Pages/cap_punishment/history.aspx (last visited Sept. 28, 2013) [hereinafter *Oregon*].

248. *New York*, *supra* note 245.

249. *See States*, *supra* note 241.

250. *Id.*

251. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last updated Sept. 28, 2013) [hereinafter *Number of Executions*].

252. *Id.*

253. *E.g.*, *Oregon*, *supra* note 247 (describing Oregon’s infrequent use of the death penalty as measured by the actual number of executions carried out since it reinstated its death penalty statute); *Number of Executions*, *supra* note 251.

254. *Oregon*, *supra* note 247.

255. *New York*, *supra* note 245 (describing New York state legislature’s rejection of a bill to reinstate the death penalty citing concerns over executing innocent prisoners).

256. *Number of Executions*, *supra* note 251.

like these demonstrate that even among the states with death penalty statutes, the actual use of the penalty is both infrequent and gradually declining, showing a trend of restricting its use.²⁵⁷

Another objective indicator of national consensus further illustrating the trend towards abolishing the death penalty is the growing number of states considering legislative proposals to ban the death penalty.²⁵⁸ As of 2012, thirteen state legislatures were considering proposed death penalty bans in their state legislatures,²⁵⁹ and now in 2013, two more states are considering proposed death penalty bans in their legislatures, bringing the total to fifteen.²⁶⁰ Although these are just proposals and have not yet passed into law, the level of discussion among legislatures concerning banning the death penalty demonstrates a gradual move towards abolition.²⁶¹ While the rate of change in national consensus on the use of the death penalty has not been rapid, the direction of change has been consistent since the *Gregg* decision.²⁶² The consistent direction of change measured by the objective indicators explained above demonstrates that the death penalty as a punishment no longer falls within our society's evolving standards of decency.²⁶³

2. International Consensus on the Death Penalty

In addition to the consistent direction of change among the states towards banning the death penalty as a punishment, the international community's approval and use of the death penalty is also steadily on the decline, moving towards international abolition.²⁶⁴ While some justices have rejected international consensus as an indicator when considering the

257. *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring); *Number of Executions*, *supra* note 251.

258. *More Evidence*, *supra* note 235 (reporting that, as of April 12, 2012, California, Florida, Georgia, Kansas, Kentucky, and Washington all had proposed death penalty bans in their legislatures and that Ohio, Oregon, and Pennsylvania were reviewing their death penalty laws); *Recent Legislative Activity*, *supra* note 235.

259. *More Evidence*, *supra* note 235.

260. *Recent Legislative Activity*, *supra* note 235.

261. *Id.* (reporting the increased number of state legislatures addressing proposed death penalty bans).

262. *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002).

263. *See id.*

264. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (last updated Dec. 31, 2012).

constitutionality of a punishment under the Eighth Amendment,²⁶⁵ international consensus has influenced the Court’s Eighth Amendment jurisprudence since *Trop v. Dulles*.²⁶⁶ Thus, international use and approval of the death penalty is relevant to the inquiry of the death penalty’s constitutionality.²⁶⁷ According to the Death Penalty Information Center and Amnesty International USA, 141 countries are abolitionist (having abolished the death penalty, or not formally abolishing it but not utilizing it), while fifty-seven are retentionist (having retained the use of the death penalty as a punishment), including the United States.²⁶⁸ In the past ten years, twenty-two countries have either abolished the death penalty entirely or restricted its use.²⁶⁹ Further, among the retentionist countries, the number of countries that have actually conducted an execution has consistently declined: in 2011, twenty countries carried out executions, which is significantly down from the thirty-one countries that carried out executions in 2002.²⁷⁰ Similar to the direction of change in American state legislatures, the direction of change in the international community has consistently been towards abolition even though the rate of change has not been rapid.²⁷¹ Because international consensus informs our Eighth Amendment jurisprudence, the international direction of change towards abolition is a significant indicator that the death penalty does not fit within our standards of decency.

265. Justice Scalia, in particular, has been a harsh critic of the use of international consensus in Eighth Amendment jurisprudence because such statistics and information arguably does not resolve the issue of national consensus in the United States. *Roper v. Simmons*, 543 U.S. 551, 622–25 (2005) (Scalia, J., dissenting). Additionally, Justice Scalia rejected the majority’s analysis of international consensus on executing juveniles, which seemingly suggested that the laws of the United States should come perfectly in line with the laws of other countries. *Id.*

266. *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958). While the discussion of international consensus was somewhat limited in earlier cases, its analysis in recent Eighth Amendment cases has expanded. Compare *id.* at 102–03 (including a cursory discussion of international consensus on denationalization comprising one paragraph of the opinion), with *Roper*, 543 U.S. at 575–78 (discussing international use of the death penalty for juveniles convicted of murder, which was analyzed in its own section of the opinion and spanned three pages).

267. *Trop*, 356 U.S. at 102–03.

268. *Abolitionist and Retentionist Countries*, *supra* note 264.

269. *Id.*

270. *Death Sentences and Executions*, *supra* note 236.

271. *Abolitionist and Retentionist Countries*, *supra* note 264. See also *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002).

3. Comporting with Human Dignity

Ultimately, the Eighth Amendment's prohibition against cruel and unusual punishment is grounded in preserving human dignity.²⁷² In *Trop v. Dulles*, denationalization violated the Eighth Amendment's prohibition against cruel and unusual punishment because such a punishment destroyed human dignity by terminating a person's place in organized society.²⁷³ If denationalization was destructive to human dignity because it denied a person the ability to be recognized by ordered society,²⁷⁴ then a state execution is the ultimate denial of human dignity because it erases a person's position in society more so than denationalization would.²⁷⁵ An execution does not just cause a person to "los[e] the right to have rights,"²⁷⁶ as denationalization does, but removes the person totally from existence itself. This complete and total destruction of life is "antithetical to human dignity" in the same way that denationalization is, if not more so.²⁷⁷

Additionally, executions conducted by the state do not comport with human dignity because all human beings, regardless of any crimes of which they are convicted, have inherent dignity that the state should respect and preserve.²⁷⁸ The Eighth Amendment is not simply a prohibition against particular types of punishment, but has clearly been read by the Supreme Court as protecting human dignity from the powers of the state that may be utilized in an oppressive way.²⁷⁹ Ending human life is the ultimate denial of human dignity, and the state's use of the death penalty to punish certain criminal offenders is a prime example of the powers of the state oppressing the dignity of its citizens.²⁸⁰ This exercise of government power that degrades its citizens' dignity is prohibited by the Eighth Amendment.²⁸¹

272. *Trop*, 356 U.S. at 101.

273. *Id.* at 101–03.

274. *Id.* at 101–02.

275. *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring); Gilbreath, *supra* note 25, at 579 (arguing that capital punishment is "the ultimate expression of governmental oppression of human dignity," which is the type of abuse of state power that the Framers feared).

276. *Trop*, 356 U.S. at 102. *See also* Gilbreath, *supra* note 25, at 579.

277. *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

278. Michael J. Perry, *Capital Punishment and the Morality of Human Rights*, 44 J. CATH. LEGAL STUD. 1, 11 (2005) (arguing that "every human being has inherent dignity").

279. *See* Gilbreath, *supra* note 25, at 581 ("It is appropriate, then, to look at the Eighth Amendment not as a proscription of procedure but as a mandate for recognition and protection of human dignity, as the concept was inherent in the philosophical genesis of the Bill of Rights . . ."); *Trop*, 356 U.S. at 101–03.

280. Gilbreath, *supra* note 25, at 580–82.

281. *See id.* at 581–82.

4. Social Impact of the Use of the Death Penalty

The Eighth Amendment’s purpose to preserve human dignity is not limited to the dignity of only the condemned prisoner but protects the dignity of all humans in American society, including those given the difficult task of implementing our capital punishment system.²⁸² The prevalence of secondary trauma among participants in the death process is supported by psychological evidence,²⁸³ research studies conducted on corrections officials,²⁸⁴ and personal stories from those working in corrections that have experienced these traumatic events.²⁸⁵ Additionally, psychological studies into secondary trauma have not been fully explored and certainly were not of widespread study at the time of the *Gregg* decision.²⁸⁶ Now, with more information and newer studies on the psychological impact of executions on corrections officers available, it is appropriate to consider this social science research. Social science research has revealed more information about the death penalty’s social impact, similar to the social science research about juvenile psychological development in *Miller*²⁸⁷ and about segregation’s negative psychological impact on African-American schoolchildren in *Brown*.²⁸⁸ The information about secondary trauma among corrections officials illustrates an impermissible social consequence of maintaining the death penalty as a punishment.²⁸⁹ This social consequence is one that demeans the dignity of corrections officials, who sacrifice their physical and mental health to carry out executions in the name of the state.²⁹⁰ The Eighth Amendment prohibits the state’s active destruction of corrections officials’ individual dignity in

282. *Furman v. Georgia*, 408 U.S. 238, 369 (1972) (Marshall, J., concurring).

283. *E.g.*, APA MANUAL, *supra* note 23, at 424–25.

284. *E.g.*, Osofsky & Osofsky, *supra* note 47 (studying the presence of secondary trauma and depression among corrections officials at Louisiana State Penitentiary at Angola).

285. *E.g.*, *supra* Part III.B.

286. *See* Gil, Johnson & Johnson, *supra* note 28, at 26–27.

287. *Miller v. Alabama*, 132 S. Ct. 2455, 2464–65, 2465 n.5 (2012) (accepting the social psychological studies on juvenile mental development).

288. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (accepting studies regarding the psychological impact on schoolchildren caused by being placed in segregated schools).

289. *See supra* Part III.

290. *See* Adcock, *supra* note 20, at 293; Gilbreath, *supra* note 25, at 581 (“[T]he power we invest in our government, through the social contract, to punish us as citizens, does not translate into a power by our government to dehumanize us.”).

this way.²⁹¹ Not only does a state's execution of a prisoner deny that individual his or her constitutional right to dignity, it also denies American citizens charged with the task of implementing our capital punishment system their constitutional right to dignity.²⁹² The widespread social impact of secondary trauma—evidenced by social science research, personal stories and descriptions about working in the capital punishment system, and the APA's recognition that such work leads to conditions like PTSD or PITS—demonstrates its high risk and prevalence in America's capital punishment system.²⁹³ A punishment that causes such devastating consequences is irreconcilable with preserving human dignity.²⁹⁴

B. FUTURE IMPLICATIONS OF BEING “FULLY INFORMED” ABOUT SECONDARY TRAUMA AND THE DEATH PENALTY

In his concurrence in *Furman v. Georgia*, Justice Marshall keenly observed that Americans, if they knew, would be distressed by the facts on capital punishment: “Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.”²⁹⁵ While Justice Marshall was specifically referring to the impermissible role of race and prejudice in death penalty sentencing, his logic equally applies to secondary trauma.²⁹⁶ Secondary trauma experienced by those who implement the death process is another hidden consequence of administering the death penalty.²⁹⁷ This consequence is “hidden” in large part because of the secrecy under which state executioners operate,²⁹⁸ the

291. *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958). *See also* Eklund, *supra* note 1, at 150–51 (arguing that the execution process degrades the dignity of all actors involved, including prison guards who carry out death sentences).

292. Eklund, *supra* note 1, at 150–51.

293. *See supra* Part III.

294. *See Furman v. Georgia*, 408 U.S. 238, 365–67 (1972) (Marshall, J., concurring); Eastman, *supra* note 58, at 529 (arguing that capital punishment is the premeditated killing of another human being).

295. *Furman*, 408 U.S. at 369 (Marshall, J., concurring).

296. *See Adcock, supra* note 20, at 319 (quoting Dr. Matthew B. Johnson's recommendation that the “[p]ress and public access to the entire state execution process is essential to ensure that the full extent of the human costs are known and recorded to fully assess the effects”).

297. Gonnerman, *supra* note 20, at 29 (observing that debates about the constitutionality of the death penalty “rarely . . . focus on how the death penalty affects those most intimately involved, transforming everyday people into professional killers”).

298. Adcock, *supra* note 20, at 314; Gonnerman, *supra* note 20, at 29 (“Maintaining public support for the death penalty has long depended on keeping the act of killing prisoners shrouded in secrecy—no television cameras, no interviews with the execution team, no revealing of the

infrequency of executions in general, and the fact that secondary trauma in corrections officials who oversee executions is only now seriously being studied.²⁹⁹

This reality raises the question of how we should educate average American citizens about secondary trauma so that they are “fully informed” and able to arrive at a consensus about the death penalty after all relevant facts are brought to light. A couple of suggestions have been made. If state executions were conducted more transparently,³⁰⁰ by giving ordinary citizens access to the realities of the death penalty process, this would lead to a more informed populace.³⁰¹ Transparency can be increased by conducting further studies³⁰² into the trauma experienced by those involved in the death penalty process such as judges, defense attorneys, prosecutors, physicians, chaplains, emergency medical technicians, corrections officers, and prison wardens.³⁰³ These studies could increase the body of literature available on secondary trauma,³⁰⁴ PTSD, and PITS in the execution process, similar to the way in which studies about PTSD in war veterans have increased general awareness about that social consequence of war.³⁰⁵

Beyond increased empirical and qualitative studies, executioner Robert G. Elliot suggested that because capital punishment is supposedly supported by the American public, drafted by the legislators that represent the public, and carried out in the name of the people whom the condemned prisoner has wronged, ordinary American citizens should be required to

executioner’s identity.”); Austin Sarat, *The Cultural Life of Capital Punishment: Responsibility and Representation in Dead Man Walking and Last Dance*, 11 *YALE J.L. & HUMAN.* 153, 156 (1999) (describing capital punishment in the United States as “at best, a hidden reality”).

299. Gil, Johnson & Johnson, *supra* note 28, at 26–27.

300. See Adcock, *supra* note 20, at 319.

301. Another method to increase transparency would be to require that in capital cases, jury instructions include a list of the possible punishments as well as detailed descriptions of them. See ELLIOT, *supra* note 20, at 309 (arguing that “an intensive campaign of education” is one way in which the population can learn more about the death penalty). This would entail providing a description of a prisoner’s incarceration for life without the possibility of parole sentence and a description of the execution process for a death sentence. See *id.* If presented with the realities of all possible punishments available for a capital crime, including the death penalty, juries that are comprised of ordinary American citizens would be able to make a more informed decision about imposing a sentence of death. See *id.*

302. Adcock, *supra* note 20, at 318 (“More research is needed to fully understand the extent of the anti-therapeutic, or therapeutic, effects of the death penalty.”).

303. *Id.* at 290–92.

304. See Gil, Johnson & Johnson, *supra* note 28, at 26–27 (“Secondary trauma from state executions is not an area that has been extensively studied.”)

305. See generally MACNAIR, *supra* note 106, at Chapter 2.

witness executions as a regular part of their civic duties.³⁰⁶ If witnessing executions was as commonplace as jury duty for American citizens, Elliot argues, the public would not only be more informed about the process, but would also be forced to take civic responsibility for the punishment that it has approved.³⁰⁷ While this is certainly a radical method for educating citizens, it addresses a critical problem with the American death penalty system: average citizens are simply unaware of its realities and consequences.³⁰⁸

A notable consensus among current and retired participants in the death process is that while they may begin their employment supportive of the death penalty or undecided as to its morality and utility, their first-hand experiences lead them to ultimately oppose it.³⁰⁹ Such changes in position on the death penalty are indicative of what could happen if all Americans were “fully informed” about the realities of the death penalty.³¹⁰ If every citizen were given the opportunity to experience what prison wardens and members of tie-down teams experience, then a stronger national consensus than even the direction of change noted above would develop, marking a significant evolution in our standards of decency.³¹¹ The consequences of secondary trauma examined in this Note demean the dignity of those who are charged with implementing our system of capital punishment and are forced³¹² to live a life filled with physical ailments, psychological trauma,

306. ELLIOT, *supra* note 20, at 309. See also Rimer, *supra* note 146 (noting that “[t]hose who champion the death penalty, the law enforcement officials who call for it, the juries who vote for it, the judges who uphold it, the pardon boards and the governors who sign off on it, are not the ones who walk into the death chamber and help end lives”); Osofsky & Osofsky, *supra* note 47, at 369 (describing how everyday citizens, like the authors [Osofsky & Osofsky] of this study, “have tended to disassociate [them]selves from the execution—it is carried out by others”). But see *Witnesses to an Execution*, N.Y. TIMES (Apr. 13, 2001), available at <http://www.nytimes.com/2001/04/13/opinion/witnesses-to-an-execution.html> (arguing that executions should not be publicly broadcast because it “would coarsen our society” to view the exact same act—the taking of a life—for which the condemned prisoner is being punished).

307. See ELLIOT, *supra* note 20, at 309.

308. *Furman v. Georgia*, 408 U.S. 238, 363–69 (1972) (Marshall, J., concurring).

309. E.g., ELLIOT, *supra* note 20, at 303, 309; LIFTON & MITCHELL, *supra* note 105, at 89; Ault, *supra* note 149. See also Eklund, *supra* note 1, at 152 (“The killing of a helpless captive is a brutally degrading experience. If only those who have personally participated in an execution could vote on the death penalty, I suspect it would be abolished permanently.”).

310. *Furman*, 408 U.S. at 369 (Marshall, J., concurring). See also ELLIOT, *supra* note 20, at 309 (“In my opinion, [support of the death penalty] will remain unchanged until the public is sufficiently aroused against the futility and needlessness of legally taking human life.”).

311. *Furman*, 408 U.S. at 369 (Marshall, J., concurring).

312. See Gilbreath, *supra* note 25, at 579.

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and “nagging doubt” about their participation in executions.³¹³ An increased awareness among ordinary American citizens about this destruction of human dignity would doubtlessly strengthen and solidify our growing national consensus towards rejection of the death penalty.³¹⁴

V. CONCLUSION

Constitutional analysis of a potential Eighth Amendment violation is incomplete without exploring the impact of the challenged punishment on human dignity and society as a whole. Punishment, more specifically the process of putting a prisoner to death, is not an isolated event. In fact, evidence of secondary trauma demonstrates the exact opposite: that implementing the death penalty has far-reaching consequences that reveal its indignity and irreconcilability with our evolving standards of decency. As Justice Marshall observed in *Furman v. Georgia*, being “fully informed” about the death penalty includes looking at its consequences.³¹⁵ In the context of executions, the traumatic consequences of our capital punishment system demean the dignity of prison officials, wardens, and executioners. If secondary trauma experienced by members of the death process were more widely studied, accepted, and known, our society would continue to reject the death penalty as inhuman and cruel to implement. An Eighth Amendment jurisprudence that considers the death penalty’s social consequences, such as secondary trauma in participants in the death process, would undoubtedly conclude that administering death is inherently irreconcilable with preserving human dignity.

313. Francke, *supra* note 97.

314. See Perry, *supra* note 278, at 11 (“There are several reasons to oppose capital punishment, only one of which is that every human being has inherent dignity.”).

315. See *Furman*, 408 U.S. at 365–66 (Marshall, J., concurring).

