

Low of the Land Ep. 2: Dissecting the Death Penalty

Tiffany Jing 0:00

Hi, I'm Tiffany Jang, a freshman in Columbia College and a staff writer for The Columbia Undergraduate Law Review. And you're listening to "Low of the Land."

Since 1976, 1494 inmates have been put to death under state sanctions in the United States, and nearly 3000 are still on death row. But many contemplated and argued whether the power of capital punishment is something the state should have the power to do. Talk of abolishing the death penalty has become a key issue in our country, one that is highly controversial and heavily implicated in American politics.

Today, Jake Gray and I will be discussing the capital punishment featuring an interview we conducted with Robert Dunham, who is the Executive Director of the Death Penalty Information Center. Under United States jurisprudence, the only crime for which the death penalty can be imposed is murder.

This was first outlined in Supreme Court case *Coker v. Georgia* in 1977, in which the court discussed whether imposition of the death penalty for raping an adult woman is a violation of the Eighth Amendment. In a seven to two decision, the court held that it was a grossly disproportionate punishment for the crime of rape. With the exception of permitting capital punishment for rape of underage children, the only crime that is punishable by state execution is murder.

However, in 2008, the court revisited this particular issue and then in *Kennedy v. Louisiana*, this case found that Patrick Kennedy was guilty of raping his eight year old stepdaughter and was sentenced to death. His appeal forced the court to reconsider whether capital punishment for the crime of child rape is a violation of the protection against cruel and unusual punishments. In a narrow five to four decision, the court held that the Eighth Amendment bars states from imposing the death penalty for the rape of a child or the crime did not result and was not intended to result in the child's death. And this has set precedent for over the past decade.

But even then, when the death penalty can only be imposed for heinous crimes that result in death, there are many arguments to consider from both sides. From issues of racism and wrongful convictions to society's unforgiving sentiments towards criminals, there are many problems with the death penalty, yet even more obstacles to abolishing it.

Jake Gray 2:59

There are a variety of justifications for the death penalty that, today, seem most plausible. First, the justification for retributivism. Broadly speaking, retributivism holds that if you commit a serious crime or moral wrongdoing, then you morally deserve to suffer a proportionate punishment. For example, Immanuel Kant endorses a theory of punishment, *lex talionis*, more colloquially known as an "eye for an eye." He stated that "whatever undeserved evil you inflict upon another, within the people that you inflict upon yourself, if he has committed murder, he must die." End quote. What's most interesting, however, is that Kant's stance is considerably more progressive than what's reflected in laws, policies, and judicial decisions in the United States.

Historically, the death penalty has been used for a variety of heinous crimes in the US from rape to murder. And in fact, retributivism is making a sort of value judgment in claiming that the death penalty is the only sufficient penalty for such crimes. It's important to note that, at least philosophically, there are many who endorsed retributivism without endorsing the death penalty. Another argument for the death penalty, which has been employed historically, and has fallen off in recent years is deterrence. The reasoning is that if we make the punishment so high, then people will be deterred from committing crimes due to fear of being punished. This is an empirical claim that's been proven false over the years. For example, the murder rate and non-death penalty states has remained consistently lower than rates in states with the death penalty.

Many arguments against the death penalty stemmed from practical misapplications, which create injustice, especially since issues arise from the administration of the death penalty like racial disparities in the charging sentencing and imposition of the death penalty. Amnesty International cites a report sponsored by the American Bar Association in 2007, which concluded that one third of African American death row inmates in Philadelphia would have received sentences of life imprisonment if they had not been African American. Another practical concern is wrongful convictions. Since 1973, 151 people have been released from death row throughout the country due to evidence of their wrongful convictions. Moreover, many argue that it violates the sanctity of human life, or that it is unnecessarily cruel and cannot possibly fit the crime. Some argue that it causes a brutalization of the values of society, making life less valuable.

With plenty of controversy surrounding an issue in which people's lives are at stake, we thought it was necessary to bring in an expert on the topic to help clarify some of the facts. Robert Dunham is the executive director of the Death Penalty Information Center, which does not provide a position for or against the death penalty, but provides the information and analysis of the issues surrounding the death penalty.

Tiffany Jing 5:55

In our interview with Robert Dunham, he helped to present a bigger picture on the debate surrounding the death penalty. First, we asked him what the general justifications for allowing the death penalty are. And he talked about our human tendency to prescribe value judgments.

Robert Dunham 6:12

Proponents of the death penalty makes several arguments. The one that I don't think you can factually dispute is the value judgment that there are certain crimes that are so horrific, that no other punishment is sufficient. And that's a value judgment. And people of good faith can differ on the answer to that. Most of the other justifications are subject to factual analysis. And that's where they have their problems. You have arguments that you hear that the death penalty is necessary for public safety and that it protects police officers.

Both of those statements are false, you have statements that the death penalty is necessary as a tool to get people to plead guilty, or to provide information. There are certain circumstances in which it's true that the threat of the death penalty does lead to cases pleading out. But there are an equal number, and maybe more cases, in which the threat of the death penalty has extracted false confessions, or has led people to

provide false testimony against others, and has resulted in innocent people being sentenced to death or incarcerated for long periods of time. The other reason that you hear significantly, are things like that it is a deterrent. The death penalty is not a deterrent. There's no evidence of that. And we did a study of 31 years of FBI homicide data and FBI data on killings of police officers because we wanted to find that out. I mean, if the if the death penalty really does deter, then that's a very strong justification for it. And what we discovered was, over that 31 year period, that on average, states that have the death penalty had significantly higher rates of murder, and states that had the death penalty over this same period also had higher rates at which police officers were killed.

Now, that doesn't mean that the death penalty causes more murders, or places officers more at-risk. I think what it means is that it's irrelevant to it. And there are other social factors in those states that lead them to have the death penalty. Because when we looked at the national trends, when murder rates went up in the United States, what happened in death penalty states versus what happened in Nanda county states? And what happened when murder rates went down? What we found was that trends are trends, and that having or not having the death penalty didn't seem to make any difference at all. So the best argument that the proponents have is a value judgment that there are certain murders for which no other punishment is appropriate. The question of cost: the death penalty costs significantly more. The question of deterrence: there's no evidence that it is a deterrent. And does it make police officers safer and the public safer? The answer to that seems to be no.

Jake Gray 9:13

Next, we asked Robert Dunham what types of crimes that the death penalty is used as punishment for

Robert Dunham 9:21

In the United States, the only crime for which the death penalty may be imposed is murder. The United States Supreme Court has held on numerous occasions that the use of the death penalty as a punishment for robbery or for rape, or for another offense, in which no death arises, is unconstitutional and violates the Eighth Amendment. That didn't used to be the case. But it is the case now. The Supreme Court left open the possibility that there might be certain crimes against the country, crimes against the government, as opposed to crimes against individuals in which the death penalty could be imposed constitutionally, without an offense resulting in death. But we've never had an instance of that. And it's widely accepted that if you apply the traditional Eighth Amendment analysis, which is what are the evolved standards of decency in American society, the fact that no one has been prosecuted for the past 50 years capitally and no deaths that system has been imposed capitally for a crime against the state that did not result in death. That's a very strong argument that that punishment would now violate the Eighth Amendment.

Jake Gray 10:46

In light of the recent *Bucklew v Precythe* ruling, we asked Robert Dunham, in what way the ruling changed the legal landscape of the death penalty and its administration.

Robert Dunham 10:59

I think it's important to distinguish between two different types of death penalty issues. There are issues relating to the manner in which the death penalty is imposed, and the constitutionality of death sentences that are imposed. And then there's a separate set of cases that deals with the constitutionality of the

manner in which it's carried out. The Supreme Court decision on April 2 in the Bucklew case, deals with the latter category. And what we've seen is that the United States Supreme Court historically has been hostile to almost any kind of claim that the death penalty, that the manner in which definitely is carried out, is unconstitutional. There was a challenge near the turn of the century to electrocution. The Supreme Court said that that was not unconstitutional.

The Supreme Court, in fact, has never held that any particular method of execution was unconstitutional. Although in 2009, it appeared that they were ready to strike down the electric chair. At that time, the Supreme Court of Georgia and the Supreme Court of Nebraska, both had said that the use of the electric chair was cruel and unusual punishment. And there had been a fiasco in Florida in which the prison had applied a synthetic sponge instead of a natural sponge, to the head of a prisoner who was being executed, and the synthetic sponge caught fire, and the prisoners face caught fire and blood was streaming down his face during the course of an unnaturally torturous execution. So at that point, it appeared that the Supreme Court was going to declare the electric chair to be unconstitutional. What happened instead was that Florida did away with executions by electric chair and moved to lethal injection. So the court never did have an opportunity to rule on that.

When it comes to the question of lethal injection, the Supreme Court has, over the course of the last 15 years, significantly changed the landscape of constitutional law. Initially, there was a challenge that was brought in a case called *Baze v Rees* to the use of a drug called Midazolam. And the State of Kentucky was using Midazolam and wanted to use Midazolam because the drug that it preferred to use was no longer available. That was because the pharmaceutical companies in the United States and around the world don't want their medicines used and killing prisoners as a result of that. Sodium thiopental was actually taken off the market altogether, and the state was not able to obtain pentobarbital. So it was using a three drug protocol using a drug called Midazolam. The problem with Midazolam is that it is sedative, it's not a painkiller. And the evidence suggested that it did not have the pharmacological properties necessary to make the prisoners about to be executed unconscious, and keep him unconscious, insensate while the killing drugs were administered.

But the United States Supreme Court said based on the factual record in front of it, that the defendant had failed to meet his burden of showing that it would be unnecessarily torturous. And the opinion appeared to suggest that the prisoner had to come up with an alternate method of execution for the state to carry it out. And that was widely criticized as as macabre and barbaric. Some people said that it reminded them of a horror movie in which a villain has somebody captive, and says, I'm going to be humane in the way that you die: you get to pick your poison.

That's essentially the judgment of the United States Supreme Court. If you want to say that the method the state has chosen is torturous, we will allow you to say that only if you are able to come up with some other alternative that is available to the state, and that you consider to be, or that you can prove, is less painful. So there were a couple of cases that came up in which the court rejected challenges to lethal injection on the grounds that the defense had not met their burden of proving other available alternatives. And the kind of as applied challenges to method of execution, this entire state process will be unconstitutional for everybody has been rejected, time and time again.

So Russell Bucklew came up in a slightly different posture. He has a rare medical condition called cavernous hemangioma, I believe. And what it is, is a condition in which you have these blood filled tumors that grow and he has them on his face and on his neck and in his throat. And his argument was that execution by lethal injection was going to be unconstitutionally torturous, because these blood filled tumors were going to burst. And if they burst, his execution would not be as a result of the drugs, but he would be drowning in the blood while he was conscious, because Midazolam wouldn't knock him out. And so he'd be aware during this entire process.

The United States Supreme Court, in this opinion by Neil Gorsuch wrote that prisoners do not have a right to a painless execution, and said that the constitutional standard was whether a method of execution involved, and this is a quote from the Supreme Court, "super added pain." That is to say, if you translate that into English, that it involves pain and suffering beyond that which would be normally associated with execution. That wasn't enough though. The court went on to say that we meant it when we said that a prisoner has to come up with an alternate method of execution. And so, it doesn't matter whether the manner of death that the state chooses is torturous if the prisoner is unable to come up on his own, with some other alternative method of execution that is reasonably available to the state.

In the history of the United States, that had never been the case before, before the Baze decision, and as dissenters pointed out vociferously, there is no basis in Eighth Amendment law for that kind of judgment. So the decision was criticized as being cruel and heartless. But it also has a practical problem. At the same time that the United States Supreme Court is requiring prisoners to prove that there is an alternate method of execution that is reasonably available to the state and that will be substantially less painful, states have been engaging in a practice of secrecy that prevents the prisoners from finding out whether drugs are available. And so the combination of this requirement that the prisoner prove that there is an alternate method of execution that's available and state secrecy that prevents prisoners from finding out what evidence might exist about the availability of drugs to the States, the net result of that is that it is a virtual impossibility for prisoners to meet the burden of proving that the state is executing them in an unconstitutional manner.

The execution may well be torturous, and there is significant evidence that an execution using Midazolam is. An Ohio judge described it as being the equivalent of being subjected to waterboarding, suffocation, and liquid fire at the same time. But the United States Supreme Court has said that that doesn't matter unless you can meet what appears to be an insurmountable burden of showing that there is some other available alternative.

Jake Gray 19:41

Next, we asked Robert Dunham what support for the death penalty looks like in modern day America.

Robert Dunham 19:50

Americans views about the death penalty are much more nuanced than they're given credit for. And their response to questions about the death penalty depends largely upon what questions are asked. If you ask Americans, do you support the death penalty? You will find that a majority of Americans answer that question "yes." Now it's significantly less than it was a generation ago. In the 1980s, Gallup did a poll, I'm sorry, in the mid 1990s, the annual Gallup poll on capital punishment registered support for the death

penalty at 80%. And a poll in the late 90s, conducted by the Pew Research Center, registered support for the death penalty at 78%. Last year, in 2018, in October, Gallop's support for the death penalty was measured at 55%. And Pew had measured support at 54. So we've seen a huge drop in support for the death penalty in the abstract.

But then we find when you ask the policy question, not "Do you support or oppose the death penalty" but "What do you believe is the appropriate punishment for murder?" We find that more Americans say that life without parole is a more appropriate punishment than the death penalty. You actually have about 50% of the American public saying that they support life without parole over the death penalty, and in the range of 41-42%, saying that they support capital punishment, that they think capital punishment is the appropriate punishment.

And another thing that's interesting is in Gallop's most recent poll, for the first time since they began asking the question in 2000, fewer than half of Americans say they believe that the death penalty is being imposed fairly. So when you ask the up and down question, "yes or no death penalty or no death penalty", a small majority of Americans say "yes" to the death penalty. When you ask the policy question, where you include life without parole, or you include other sentencing options, that drops and more people say they prefer life than death. And when you ask people about fairness, the American public, generally speaking, does not think that the death penalty is administered fairly

Tiffany Jing 22:18

Regarding opposition against the death penalty, we asked Dunham what the biggest obstacle in abolishing capital punishment is.

Robert Dunham 22:28

I think there's a huge difference between death penalty politics and death penalty policy. What we've seen over the course of the last 15 years is an emerging conservative opposition to capital punishment. That's not to say that a majority of conservatives oppose the death penalty. That isn't true. But what we're seeing is that more and more people who are classic conservatives, small government conservatives and fiscal conservatives, people who are libertarian, people who are pro-life, more and more of them are coming out against capital punishment. And that has to do with a question of policy.

In about 2015, Nebraska voted to repeal its death penalty law, and Nebraska was an overwhelmingly Republican legislature. And when the legislators were asked about it, they said the difference was that they had gone from looking at the death penalty dogmatically and ideologically, as a matter of politics, and begun looking at it as a matter of pragmatism. Was it workable as a policy? And when they did that, this Republican legislature voted to overturn the death penalty statute, to repeal the death penalty statute. And then they overrode the governor's veto when he vetoed their repeal bill. The governor then took the bill, took the repeal, to the public through a referendum process and Governor Ricketts, he's the son of the owner of the Chicago Cubs. And they bankrolled the referendum process and got the repeal blocked in a process that looked a lot like politics as opposed to policy.

You didn't see a discussion of whether the death penalty was workable. You heard a lot of emotional rhetoric and a lot of fear-based rhetoric. And what we see is when when the public is faced with

fear-based rhetoric, it votes in favor of capital punishment. When it's given the facts about the death penalty as a policy, it doesn't like it. So when it comes to the question, when it comes to the question of abolishing the death penalty, the biggest hurdle the proponents have, at the state level, because death penalty is largely a state by state policy, the biggest obstacle proponents have is keeping the discussion focused on policy as opposed to something that appears to be partisan and political.

What we are seeing is one by one by one by one, state legislators are voting to repeal capital punishment. I'm speaking to you on April 12th of 2019. On April 11th of 2019, the New Hampshire legislature voted to repeal its death penalty. And last year, they did so also. Last year, the legislature was Republican controlled, and they voted to abolish the death penalty. A Republican governor vetoed the repeal bill and the legislature fell just short of the votes necessary in the State Senate to overcome that repeal. This year, there were legislative changes in the midterm elections, and the House and Senate shifted from Republican to Democratic, although it is still a legislature that has significant representation of both parties.

And the repeal bill was introduced again, passed overwhelmingly in both the House and the Senate, with veto proof super majorities. And it received bipartisan support in both the House and the Senate. So it looks as though New Hampshire is going to override Governor Chris Sununu's expected veto and become the 21st state to abolish the death penalty. It will also be the eighth state since the turn of the century to do so. And in that period, no state that had gotten rid of the death penalty has brought it back. So it looks like for abolition, we're going to see abolition kind of one state at a time. I think, ultimately, there are some core states, particularly those in the Deep South, where you are never going to reach the point of legislative abolition.

When Justice Scalia died, it appeared that there might be enough votes on the US Supreme Court to declare the death penalty unconstitutional. If Justice Scalia were replaced by another justice who is politically moderate, or perhaps liberal. And when the Republicans in the Senate were able to deny President Obama the opportunity to install a ninth justice by refusing to bring Merrick Garland's nomination to a vote, that changed things. And eventually, what happened instead of having a fifth moderate or liberal justice. President Trump was able to appoint a justice and appointed Neil Gorsuch. And then with the departure by retirement of Justice Kennedy, the appointment of Justice Kavanaugh just solidified a right of center court, that appears as though it will not be willing to consider abolishing the death penalty anytime in the near future.

Jake Gray 28:24

Finally, we asked Robert Dunham why executions peaked in the 1990s.

Robert Dunahm 28:32

Executions peaked in the 1990s because executions are a lagging indicator of what's going on. Death sentences are a leading indicator. And it takes anywhere from seven years on the short end to several decades on the long end, for a case to go through the appellate process. You know, the single most likely outcome of a capital case in the United States once a death sentence is imposed, is not that the death penalty will be carried out, it's that the conviction or death sentence will be overturned. So you have a period of time in which a case enters the system, goes through the period of appellate review, most of the

cases drop off. But then some of them go through all the way to execution. And you would expect to see a lag of maybe a decade to 15 years between the new death sentences and executions.

States began bringing back the death penalty after the US Supreme Court declared it unconstitutional in 1972. They began bringing it back in 1973-1974. And some of them didn't bring it back until the early 1980s. And once they brought it back, it took time for the first capital cases to be tried and then they had to run through the appeals process in state court. And they then had to run through the post conviction process and state. And then they had to run through the habeas corpus process in federal court.

So we began to see executions rising as we went through the 80s into the 90s, and they peaked towards the end of the 90s. And it was about a 10-15 year lag behind the execution of the I'm sorry, about 10-15 year lag behind new death sentences. Death sentences peaked in the mid 90s and began coming down. Executions peaked at the end of the 90s and began coming down. And we've now had a drop from 315 death sentences per year, in the middle of the 90s, to fewer than 40 death sentences per year, over the course of the last four years. That's an 85% drop in the number of death sentences. And we've had a drop in executions from 98 executions carried out in 1999 to around 30 executions in the last five years.

So what we're seeing is that executions went up after death sentences went up. Executions come down as new death sentences have come down, and they will continue to drop as more and more states abolish the death penalty. And as cases continue to be overturned in the courts. Now, all of that could change if the composition of the federal courts becomes more hostile to granting relief and granting review. It's already very difficult for a death row prisoner to obtain federal review of his conviction and death sentence. And if the new appointees turn out to be hostile to constitutional rights, then we may see fewer cases, overturned over time, and executions could conceivably come back up. But given the huge decline in the number of new death sentences and the continuing decline in the number of states that authorized capital punishment, I don't think that we are ever going to approach anything close to the number of executions that we saw in the 1980s and 90s.

Jake Gray 32:35

As Robert Dunham elucidated in his interview, the Supreme Court has turned back from a more anti-death penalty sentiment, but the issue is becoming less partisan over time. The issue at hand seems to be one of sentiments towards crimes and criminals more generally. So if the death penalty is to ever be abolished, we as a society need to think seriously on how we treat our criminals. This is Jake Gray from the "Low of the Land" and thank you for tuning in with us.