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Infusing the Meaning of “Cruel and Unusual” Through the Digital Public Sphere: How the Internet Can Change the Debate on the Morality of Capital Punishment

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Infusing the Meaning of “Cruel and Unusual” Through the Digital Public Sphere: How the Internet Can Change the Debate on the Morality of Capital Punishment

The execution of Troy Davis was an unprecedented development in the history of the death penalty—not because of the evidence suggesting he was innocent, but because social media was able to bring debate over the death penalty into the public sphere on a large scale. Since the Supreme Court held that the death penalty is not per se unconstitutional under the Eighth Amendment in *Gregg v. Georgia*, the nature of abolition movement has shifted. Much of the debate over the death penalty now focuses on procedure, whether aiming to ensure that executions are not carried out in an “arbitrary and capricious” fashion or narrowing the class of eligible persons. In this paper, I suggest that abolitionists should return to the fundamental debate over the morality of the death penalty. As the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,” advocates for abolishing the death penalty should develop strategies to leverage the power of the internet to ensure all citizens feel the effects of the death penalty in order to stimulate debate over its morality. By examining these concepts through the case of Troy Davis, we can see how the digital public sphere can be used to spread doubts and inspire debate over the morality of capital punishment.

3 *Id. at 189.*
I. A Brief Theory of Morality: From Adam Smith to Selma

Though better known as an economist, Adam Smith also developed a rather robust moral theory built on the work of David Hume. For Smith, morality is primarily derived from the *feelings* that we experience when we imagine ourselves in a certain situation. Take for example the act where one person breaks another’s limb. According to Smith, we come to believe this is immoral through a sympathetic substitution of ourselves in the situation: “[w]hen we see a stroke aimed . . . we naturally shrink and draw back our own leg or our own arm; and when it does fall, we feel it in some measure, and we are hurt by it as well as the sufferer.” The immorality of an act, then, is determined when we imagine ourselves in the situation of another and feel that what is being done is unjust and worthy of resistance.

This theory of morality, however, leads to a problem; morality needs to be universal, not dependent on the random happenstance of our being exposed to a particular act. Our geographical or temporal distance from a tragedy should not negate the creation of moral judgments. And yet, as Smith notes, it is the incidents we are personally exposed to that lead to the greatest sense of injustice, like having one of our limbs broken. He argues, therefore, that it is our capacity for reason that allows us to impartially inject ourselves into the situation of another who we cannot see, and form moral judgments about what befalls them.

I think two principles can be derived from Smith’s description of morality. First, pain and suffering we are immediately confronted with has a greater chance of evoking moral

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7 *Adam Smith, The Theory of Moral Sentiments* Part 1, Section 1, Chapter 1 (1759)
8 *Id.*
10 Smith, *supra* note 6, Part III, Chapter 3.
11 *Id.*
12 *Id.*
condemnation. This is because our proximity to the actors and action that we are forming moral judgments about affords us more information that makes it easier to inject ourselves into the situation and imagine what it must be like. The second point, which is the corollary of the first, is that forming moral judgments about acts that are not immediately present will be facilitated by an increase in available information, specifically information that allows us to imagine ourselves from the perspective of the relevant actors. A simple thought experiment can illustrate these principles: most of us, I imagine, watching a film about a historical event such as Schindler’s List a much more emotional event than reading William Shirer’s The Rise and Fall of the Third Reich. While both depict the moral horror of the Nazi regime, seeing people and their situations imparts powerful information that makes it easier to place ourselves in a situation made distant by time or space. In such conditions the cliché that a picture is worth a thousand holds true.

Smith’s theory can also be seen at work throughout American history, especially in terms of the effect of photos and video on moral judgments. In the 1860s, a photograph taken of a slave named Gordon became a rallying point for abolitionists. The picture shows his back crisscrossed with countless scars, the result of his treatment at the hands of his owners. The image was circulated widely in magazines and cards and galvanized the anti-slavery movement. The Washington Post recently noted that “[i]t isn’t easy, even today, to look square on at the image and acknowledge the depravity that caused his suffering . . . If Lincoln didn’t have it on his desk when he reminded Americans of the terrible moral debt incurred by 250 years

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15 Id.
of slavery, he must certainly have had it in his mind’s eye.”\textsuperscript{16} The photograph is morally potent because it allows the viewer to place themselves in the situation of a slave—to image the lashings and the pain, and to feel that such a system is unjust.

One hundred years later, the civil rights movement was fundamentally altered in 1965 by an event known as “Bloody Sunday”, when protesters tried to cross the Pettus Bridge in Selma and police brutally beat and tear-gassed them.\textsuperscript{17} ABC interrupted the nation’s evening programming to broadcast footage of the violence with monumental consequences—it “forced viewers to see with their own eyes what African-Americans experienced if they wanted to exercise a basic right that was routinely available to white Americans.”\textsuperscript{18} Support for the protesters grew and only days later President Johnson addressed the nation, saying “here is no issue of States rights or national rights. There is only the struggle for human rights . . . .”\textsuperscript{19} In the case of Bloody Sunday, we can see how a nation’s moral feelings were altered once they were able to see and feel the effects of the batons and the tear gas, and they were able to imagine themselves in the situation that the marchers faced. The immediateness that TV brought forced Americans to reconsider the moral nature of segregation.

II. The History of the Death Penalty in the United States through Smith’s Moral Lens

Adam Smith’s moral theory is also evidenced in the history of the death penalty in America. Stuart Banner has written that early critics of the death penalty were motivated by their

\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
“own emotional identification with the condemned prisoners.”\textsuperscript{20} A commentator in 1817 suggested that it was not so much the stock debating points for or against the death penalty that drew people to one side or the other of abolition, but rather people’s feelings.\textsuperscript{21} Specifically, people either agreed with or opposed the death penalty based on their ability to sympathize with the situations of the condemned.\textsuperscript{22} By the second half of the 18\textsuperscript{th} century, “more and more people felt that their moral responses to individual executions justified them in expressing dissatisfaction with the criminal law.”\textsuperscript{23}

This process of identifying and sympathizing with the situation of the condemned led to changes in how death penalties were carried out. By the mid 1800s, hangings changed from a popular outdoor mass spectacle to a limited affair within the jail yard, as they were deemed too shocking for mass display.\textsuperscript{24} An explanation for this, as a Philadelphian argued, was that hangings created “emotions of pity, humanity and sympathy, which incline [viewers] to take the part of the sufferer, and to blame those who inflict those sufferings upon him.”\textsuperscript{25} Keeping them out of public sight lessened the chance that would happen.

The method of executions also changed, primarily to the electric chair and gas chamber by the early 20\textsuperscript{th} century. Part of the reason for these changes was the expectation that they would be more “humane”, meaning (in part) “less visually troubling to the spectators.”\textsuperscript{26} Hangings that had gone awry were disturbing to watch—in some cases lasting 15 minutes as the

\begin{footnotes}
\item[21] Id. at 124.
\item[22] Id.
\item[23] Id. at 108.
\item[24] Id. at 146.
\item[25] Id. at 148.
\item[26] Id. at 169.
\end{footnotes}
condemned man wriggled on the end of the noose. An early report for the New York legislature concluded that the electric chair would be far less troubling to watch. The same was thought to true of the gas chamber as well, which killed the condemned in what was seen as a humane and relatively peaceful process. Because photography of electrocutions was forbidden, and only a few were able to witness the executions, “capital punishment became a small world, shut off from the public . . . .” The gas chamber, too, removed executions from public view to a limited few. These new methods of execution changed how the public learned about death—“it was a story of death in a distant place, at the hands of a mysterious machine most would never see . . . .”

Of course there were still the occasional mistakes that led the few remaining observers to question the morality of these new methods of execution. After William Kemmler was electrocuted for 17 seconds and pronounced dead, officials discovered that he was still alive and had to shock him again for an extended period. When they did so, “[t]he capillaries in Kemmler’s face ruptured, and beads of blood appeared like sweat on his face. The overpowering smell of burnt flesh permeated the room. The hair around the electrode on Kemmler’s head started to singe . . . .” The next day, the New York Times condemned the execution with the title “Far Worse than Hanging”, saying that the death was an “awful spectacle”, and that the witnesses “felt they had taken part in a scene that would be told to the world as a public shame,

\[27\] Id. at 172.
\[28\] Id. at 180
\[29\] Id. at 199-200.
\[30\] Id. at 196.
\[31\] Id. at 204-05.
\[32\] Id. at 206.
\[33\] Id. at 186.
\[34\] Id.
as a legal crime."\textsuperscript{35} The use of the gas chamber in other executions also led some witnesses to question its morality when it produced troubling results. After watching Allen Foster gasping and retching for several minutes after gas was introduced to his execution chamber, a coroner said “never again for me . . . it’s slow torture—that’s what it is, and I cannot see anything humane about it.”\textsuperscript{36}

After the Supreme Court reinstated the death penalty in 1976,\textsuperscript{37} lethal injection became the favored method of execution. In contrast to hangings, the electric chair, and the gas chamber, lethal injections promised to minimize “the condemned person’s pain and the spectators’ discomfort.”\textsuperscript{38} As prison chaplain from Missouri commented, “[t]he guy just goes to sleep. That’s all there is to it.”\textsuperscript{39} Lethal injections continued the trend of only allowing a small audience to witness the event—usually fewer than 20 people.\textsuperscript{40} Public support for the death penalty rose to 66-76\% and remained steady through the 1990s.\textsuperscript{41} Despite this widespread support, executions received very little press.\textsuperscript{42} Out of sight and out of mind, the death penalty largely became an abstract academic debate.

Viewing the historical evolution of the death penalty through Smith’s theory of morality, we can see that Americans are uncomfortable when confronted with the realities of executions and are especially prone to question their morality when they witness the pain of the

\textsuperscript{35} Far Worse than Hanging, THE NEW YORK TIMES (Aug. 6, 1890), http://query.nytimes.com/mem/archive-free/pdf?res=9E06E4D9133BE533A25754C0A96E9C94619ED7CF
\textsuperscript{36} Banner, supra note 20, at 200
\textsuperscript{37} See Gregg, supra note 2.
\textsuperscript{38} Banner, supra note 20, at 279.
\textsuperscript{39} Id. at 297.
\textsuperscript{40} Id. at 299.
\textsuperscript{41} Id. at 275-76.
\textsuperscript{42} Id. at 303.
condemned. Therefore, modern abolitionists need a strategy to reverse the trend of removing executions from the public sphere so that sympathetic identification with the fate of the condemned can be brought to bear on factors that influence on the interpretation of the Eighth Amendment.

III. “Nor Cruel and Unusual Punishments Inflicted”

The Eighth Amendment bars the government from inflicting cruel and unusual punishments. The meaning of “cruel and usual” is not a static concept, but rather “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”

In 2002, the Court held in Atkins v. Virginia that mentally retarded prisoners cannot be executed under the evolving standard of decency, reversing its decision of just 13 years earlier. Noting a “dramatic shift” in contemporary thinking, Atkins confirmed that the content of the Eighth Amendment must be drawn from contemporary society. The Court then went on to examine several “objective” factors that informed its evaluation of modern moral norms.

44 U.S. Const. Am. VIII.
45 Trop, supra note 5, at 100-01.
46 Atkins, supra note 4.
48 Atkins, supra note 3, at 310.
49 Id. at 311.
50 Id. at 312.
The primary factor the Court relied upon was the action of state legislatures prohibiting the execution of mentally retarded individuals.\textsuperscript{51} Significantly, it was not so much the number of states that banned the practice, but “the consistency of the direction of change”\textsuperscript{52} that led the Court to believe a national consensus had developed. Even in states where such executions were not banned they were nevertheless uncommon, suggesting that citizens serving as jurors disfavored the practice.\textsuperscript{53} Next, the Court looked to the fact that organizations such as the American Psychological Association had objected to the practice, along with a wide array of religious groups.\textsuperscript{54} Finally, in an especially bold departure from precedent, the Court noted that “polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.”\textsuperscript{55} There are thus four factors the Court might consider in determining whether a national consensus has developed: (1) the creation and trend of state law; (2) jury verdicts\textsuperscript{56}; (3) the opinion of civil society organizations; and (4) public opinion polls.\textsuperscript{57} Together, along with the Court’s independent judgment, these factors were found to support a finding that the execution of the mentally retarded did not comport with the evolving standard of decency under the Eighth Amendment.\textsuperscript{58} These factors have been largely confirmed in subsequent cases striking down various types of executions.\textsuperscript{59}

\begin{footnotes}
\begin{enumerate}
\item Id. at 314-15.
\item Id. at 315.
\item Id. at 316.
\item Id. at 316 n. 21.
\item Id.
\item See also Gregg, supra note 2, at 181.
\item The Court also looked to international law, but I do not discuss that factor for the purposes of this paper.
\item Atkins, supra note 4, at 321.
\item Roper v. Simmons, 543 U.S. 657 (2005) (examining state legislatures, the practices of juries, and the trend toward abolition); Kennedy v. Louisiana, 544 U.S. 407 (2008) (looking to the practice of states and whether the punishment of execution was actually carried out).
\end{enumerate}
\end{footnotes}
These are the objective factors that opponents of the death penalty must target in their quest to abolish executions in the United States. Taken in conjunction with Smith’s theory of morality and the history of the death penalty, we are left with the conclusion that to convince the Court that capital punishment violates the Eighth Amendment’s ban on cruel and unusual punishment, Americans must again be made to see and feel the effects of executions such that their moral feelings are brought to bear and subsequently translated into state legislation, jury verdicts, civil society, and opinion polls. The internet, and the more recent development of social media, is the perfect medium to effectuate these goals.60

IV. #TroyDavis v. The State of Georgia

In 2011, Troy Davis was put to death by the state of Georgia, despite serious questions about his guilt.61 The incident was unprecedented in the amount of coverage it received and in its penetration into the national and international consciousness.62 This was largely due to social media, which was used to great effect not only to highlight the problems associated with Davis’s trial and conviction, but also to cover the execution itself. A Gallup poll taken just days after his execution found that support of the death penalty among Americans had fallen to the lowest level since Furman, and down from the historic high 17 years earlier of 80% to just 61%.63 The internet did not stop the execution of Troy Davis, but it sparked a moral outcry against the death penalty rarely seen in the United States.

60 See Adam Marshall, At the Intersection of Cyberspace and Democracy: The Internet as a Digital Public Sphere, KALAMAZOO COLLEGE (Jun. 2011), https://cache.kzoo.edu/bitstream/handle/10920/22259/AdamMarshallSIP.pdf.
62 See id.
Long before Davis’s execution took place, social media played an important role in distributing information about his circumstances. A story published on the Guardian’s website that called the execution “cruel and unusual” and “tantamount to torture” was directly tweeted almost 1,500 times, potentially reaching an audience of millions.\(^6^4\) Change.org, an online petition website, gathered over 258,000 signatures for a petition that included an emotional video describing the probable innocence of Troy Davis.\(^6^5\) Many signatories of the petition expressed fundamental moral disagreement with the death penalty.\(^6^6\) Amnesty International created an animated short film questioning the accuracy of the trial, which culminated with a photo of Troy Davis looking searchingly at the viewer.\(^6^7\)

The day of the execution, Democracy Now broadcast live from outside the prison where Davis was held, using livestream.com to discuss the morality of the death penalty, the vast array of evidence supporting Davis’s innocence, how the death penalty disproportionately affects racial minorities, and the actual process of the lethal injection.\(^6^8\) As Amy Goodman covered the event minute by minute, the world tweeted and watched with bated breath. In the run-up to his


\(^{6^6}\) *See id.*

\(^{6^7}\) *Troy Davis About to be killed by the state of Georgia*, YOUTUBE (Jan. 1, 2009), http://www.youtube.com/watch?feature=player_embedded&v=ooPHNsFqb8M.

execution, Twitter recorded 7,617 tweets per second about Troy Davis.\(^{69}\) According to ABC News,

> A flurry of messages on Twitter using the hashtags #TroyDavis and #TooMuchDoubt showed thousands of supporters of Davis were intent on flooding the Jackson District Attorney’s Office, Georgia Judge Penny Freezeman’s office, and the U.S. Attorney General’s Office with phone calls and e-mails to beg for a stay on the execution . . . Many tweets called the case a symbol of a return to Jim Crow laws and racial inequalities in the justice system.”\(^{70}\)

Journalists and protesters also tweeted photographs of Troy Davis’s sister and of the protests outside the prison, allowing followers to feel as if they were actually there, experiencing the event.\(^{71}\)

Despite the torrent of protests, Troy Davis was indeed executed. Amy Goodman reported that “[a]s we broadcast right now, as we speak with you, bring you the voices of people who have gathered here on the grounds of Georgia’s death row . . . Troy Anthony Davis is being killed.”\(^{72}\) An audio recording was made of Davis’s final statement, which is available online.\(^{73}\) A witness described what happened next:

> The lethal injection started at 10:53. He turned his head very slightly to his left, the same minute that the lethal injection started. The next minute, I have him blinking his eyes a little more—a little more rapidly for a very brief few seconds. I have him squeezing his eyes shut for maybe a second and then opening them again. And then at 10:54 . . . about a minute after the lethal injection started, I have him peering to God. And then, around 10:55, it started slowing down. And 10:58, which is five minutes after the lethal injection

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\(^{72}\) Goodman, *supra* note 63.

started, they did a consciousness check to make sure he was unconscious before they started the next two—the next two lethal injection drugs that paralyze his body and stop his heart. And after that, there was very little—there was no movement, except for slower breathing.\(^{74}\)

The time of death was 11:08 PM.\(^{75}\)

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There can be little doubt that the execution of Troy Davis forced people to place themselves in his situation and imagine what it would be like. The massive coverage by social media, the live broadcasting via the internet, and the constant stream of photos and commentary gave individuals the information and perception they needed to consider Davis’s situation.

Steven Mintz, an ethics professor, changed his mind on the death penalty after Davis’s execution, saying ”[w]hat if this was my daughter or my wife who were wronged?”\(^{76}\) Nancie McDermott, a North Carolina resident who usually ignored politics, became intrigued with Davis’s case after reading about it on the web.\(^{77}\) Speaking with the New York Times, she drew a connection between morality and sympathetic imagination:

> I think if my brother or son or dear friend from college were about to be put to death, and there was no physical evidence, and seven of nine witnesses had recanted and testified to coercion in that original testimony, would I shrug and say, ‘The jury made its decision’?\(^{78}\)

Like Mr. Mintz, Ms. McDermott imagined her own family members in the situation of Troy Davis, and felt that such a situation would be unjust. Such was also the case for Anderia Bishop,

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74 Goodman, supra note 68.
75 Id.
78 Severson, supra note 77.
who found out about Troy Davis from colorofchange.org. Speaking to the New York Times, she said “I thought, literally, it could be me, and that’s something a lot of people who are casually watching this case think . . . ” Ms. Bishop is another example of an individual expressing moral disagreement with the death penalty as the result of her imagining herself in the situation of Troy Davis, which was made possible through social media. These cases illustrate that a change in moral feeling about the death penalty is quite possible, as long as the necessary information is presented.

The online movement did not stop after the execution. Petitions at Amnesty International continue in the memory of Troy Davis, arguing that “every person is a human being with human rights. Executions are always wrong.” A recording of Troy Davis has been preserved for all to hear, and a petition on change.org calls for the creation of a “Troy Davis Bill” to abolish the death penalty. Although supporters of the death penalty did not all suddenly change their mind, the digital public sphere and social media brought to light many fundamental flaws with the justice system and revitalized a debate that spread out and became part of the historical dialogue over its morality.

79 Id.
80 Id.
V. From Troy Davis to Abolition

Opponents of the death penalty should study the effects of Troy Davis’s execution and apply it in future cases by using social media to ensure Americans truly see and feel the effects of the death penalty. Instead of focusing on the common arguments over the philosophy of retributivist notions of justice or deterrence—or lack thereof—the abolitionist movement should focus on what was already identified by protesters in 1817: the ability of individuals to sympathize with the situations of the condemned.84 Abolitionists need to bring the death penalty back into the public sphere by breaking down the prison walls that have been erected around it through the power of social media. People must be given information such that they can imagine what it is like to feel the hypodermic needle being pushed into the arm of the condemned, to imagine his thoughts as he waits for the anesthetic to take effect, his heart racing in the final moments before it will finally come to an eternal stop. We must be able to imagine what it would be like in our last seconds of life: what would you think about? What would you feel in those last fleeting moments of existence? Smith’s theory, and history, suggests that if more people can inject themselves into such a situation, and find it repulsive, they will be more likely to morally oppose the death penalty.

There are an array of strategies that advocates should use to promote a per se ban on executions under the Eighth Amendment, keeping in mind the four factors that the court has used in determining the evolving standard of decency: jury verdicts, public opinion polls, state law, and the opinion of civil society organizations.85

Jury verdicts and public opinion polls are related in that they both serve as a broad moral barometer of the community. These factors are the easiest to target via Smith’s theory of

84 Banner, supra note 20, at 124.
85 Supra, Section III.
morality and social media. Opponents of the death penalty should focus on using Twitter, Facebook, blogs, and YouTube to publicize several aspects of the death penalty. First, social media can be used to challenge existing cultural narratives on crime before the trial even takes place. As Craig Haney argues, jurors come into court “elaborately prepared—and systematically mis-educated. . . [by] countless hours of consistent media stereotypes about the nature of violent crime, the kind of person who supposedly commits it, and why.” Social media can be used to counter this narrative by educating the public and potential jurors about the lives of individuals who have been charged with crimes so that people understand that crimes do not always happen in a vacuum, and are often complicated by broken social structures that have abandoned vast swaths of our fellow humans. The point here is not to excuse a criminal act, but rather to help the public and jurors understand context so that they can imagine themselves in a similar situation and feel that death is not an appropriate punishment.

Second, social media can be used to inform the public on the problems with the criminal justice system. This tactic was especially effective in the case of Troy Davis to highlight the innocence movement and the problems of prosecutorial pressure and overreaching. There are a number of ways in which the digital public sphere is already highlighting the innocence movement. Oneforten.com seeks to use videos and social networking to bring to light the lives of exonerated persons. Witnesses to Innocence is an organization run by exonerated inmates that uses Facebook, YouTube, Twitter, and Flickr to help people understand the problems with

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our criminal justice system. These are powerful tools that help citizens imagine what it might be like for them to be falsely accused and sentenced to death, and which might encourage the public change their feelings about the morality of the death penalty.

Third, social media can be invaluable in the post-trial process for securing additional hearings and stays. As seen in the case of Troy Davis, many people deluged the offices of judges and district attorneys requesting a stay of his execution.92 Amnesty International uses online petitions to secure signatures in support of clemency petitions, such as in the case of Reggie Clemons.93 These campaigns will be even more likely to succeed if they include pictures, audio, and video that allow individuals to immerse themselves in the situation of the condemned. An example can be found in the online documentary of Scott Panetti, a schizophrenic inmate who recently won a case in the Supreme Court.94 The video, made to support his petitions for clemency, gives detailed insight into what it is like to be mentally ill and how his trial was a travesty of incompetence.95

Fourth, social media should be used to broadcast executions themselves. A recent plan in China to broadcast the execution of four men on TV was scrapped after an outcry erupted on social media sites.96 As users watched the execution draw closer, they used a poll on Weibo (the

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92 Supra Section IV.
95 Executing the Insane: the Case of Scott Panetti, YOUTUBE (Jun. 27, 2012), http://www.youtube.com/watch?v=0WTn78SIRvc.
Chinese version of Twitter) to register their disproval, and shortly thereafter the plans to show the execution were cancelled.\textsuperscript{97} Though the men were ultimately executed, the display provoked sharp dialogue online over the morality of the death penalty and its application.\textsuperscript{98}

In the United States, opponents of the death penalty could use social media to ensure executions are known in the public sphere. Photographs, live streaming video, and Tweets can all be used to help the public see what the death penalty entails. Journalists should seek approval to report live from their witness box. Admittedly this would be an uphill battle under existing First Amendment jurisprudence,\textsuperscript{99} but it is incredibly important to get information, especially visual information, to the outside world. This is especially true in cases of botched executions, which continue even in the era of lethal injection. In one case, the syringe came out of the inmate’s arm, spraying the chemicals across the room.\textsuperscript{100} Some prisoners have been reported to experience violent reactions to the chemicals used, such as “heaving chest, gasping, choking, [and] back arching off the gurney. . . .”\textsuperscript{101} If the public were able to see these executions and imagine themselves in a similar situation, they may be less likely to vote for the death penalty as jurors or approve of the death penalty in public opinion polls. The recent publicity over the execution of Dennis McGuire with a new drug combination, in which he gasped for air and appeared to be

\textsuperscript{97} Id.
\textsuperscript{99} See LINDA CARTER, ELLEN KREITZBERG, & SCOTT HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 363 (2008).
\textsuperscript{100} Michael Radelet, Examples of Post-Furman Botched Executions, DEATH PENALTY INFORMATION CENTER (Oct. 1, 2010), http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions.
\textsuperscript{101} Id.
choking for 10-13 minutes, is one example of how this reporting can impact the ongoing moral debate.\textsuperscript{102}

In terms of the other factors the Supreme Court has identified as reflecting the evolving standard of decency, moral reactions of individuals can branch out into civil society groups and legislation through the tools of the digital public sphere. Abolitionist civil society groups already use the internet to engage with individuals around the country and around the world, from Twitter,\textsuperscript{103} to YouTube,\textsuperscript{104} blogs,\textsuperscript{105} and even iPhone apps.\textsuperscript{106} These complex webs of individuals and groups can then organize online support for state legislation. The recent Yes on 34 campaign in California used social media extensively to build support for a proposition that would have ended the death penalty,\textsuperscript{107} including using YouTube to spread stories of exonerated inmates.\textsuperscript{108} Online petitions are also being used elsewhere to lobby state legislatures to end the death penalty.\textsuperscript{109} These are the types of objective factors that the Court can examine in determining the evolving standard of decency that can lead to the end of the death penalty.

\textsuperscript{103} \textit{World Coalition Against the Death Penalty}, TWITTER, https://twitter.com/WCADP (last accessed March 19, 2013).
\textsuperscript{108} SafeCalifornia, \textit{Franky Carrillo: Why I support Prop 34}, YOUTUBE (May 31, 2012), https://www.youtube.com/watch?v=UHow7sG9heE.
Finally, although the Court has not identified the digital public sphere as a direct source to be used in deciding the evolving standard of decency, it surely could look to it as it considers society’s moral position. Such a decision would hardly be novel—after the Court’s decision in *Minersville School Dist. v. Gobitis*,\(^\text{110}\) widespread violence against Jehovah’s Witnesses gave many of the justices pause.\(^\text{111}\) When Justice Douglass told Justice Frankfurter that Justice Black was having second thoughts about their ruling, Frankfurter asked if Black had been reading the Constitution.\(^\text{112}\) “‘No,’ Douglass responded, ‘he’s been reading the newspapers.’”\(^\text{113}\) Within three years, the Court completely reversed itself and upheld the religious rights of the Witnesses,\(^\text{114}\) showing that what happens in the public sphere can have a direct effect on Constitutional interpretation. Modern advocates arguing against capital punishment would do well to introduce the widespread moral disapproval expressed in the digital public sphere to the Court in as “objective” a way as possible. Given that the internet makes it possible to document the expressions of society in a way not previously possible, it would not be unreasonable for the Court to take notice of such evidence, even if it is not dispositive.

VI. Conclusion

In this paper, I have argued that abolitionists should reverse the historical exclusion of the pain and injustices of the death penalty through social media, which can facilitate the end of the death penalty. The private, “peaceful” executions that take place behind closed doors will no longer be hidden from the public sphere. The point of this strategy is to increase exposure to the


\(^{112}\) *Id.*

\(^{113}\) *Id.*

circumstances surrounding the death penalty and actual executions so that people at least have a chance to make a moral judgment via Smith’s theory of morality. Ultimately, like all social phenomena, there is no guarantee that this plan would succeed. Moral norms are constantly evolving through a variety of mechanisms. But the history of the death penalty in America shows that the population has always objected most to the morality of the death penalty when they can see and feel its effect on the condemned. Through the digital public sphere, modern abolitionists can ensure that Americans are again confronted by the realities of the death penalty so that they can sympathetically imagine the plight of the condemned. The execution of Troy Davis has shown that such a strategy has real effects. What is needed is the organization to continue these efforts until all Americans are acutely aware of what it feels like to be put to death by the state.