

A Measured Approach to the Death Penalty

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Abstract

Capital punishment is a fixture of the American justice system. To the disdain of many, the death penalty has endured despite numerous problems. While a number of objections to capital punishment are deeply rooted in religious, moral, and philosophical beliefs, major issues can be found in its implementation and basic procedure as well. My paper discusses the history of capital punishment in the United States, with a focus on the movements to abolish or alter the death penalty, as well as proposes solutions to several important legal and procedural issues. In order to deal with problems such as racial bias, wrongful conviction, and proportionality of the crime to the punishment, several additional safeguards must be put into place throughout the litigation process. The basis of this study will reflect the ongoing struggle to reconcile the constitutional rights of the accused with society's desire to promote a safe community.

The death penalty is one of the most debated and fought over issues in the United States. Despite decades upon decades of legal, religious, and philosophical literature and opinions from every possible source, no clear answer exists for the questions raised by capital punishment. Ultimately, the majority of Americans support the death penalty, at least in some cases. The real issue then, is the manner in which the death penalty is applied in order to preserve fairness and equitability.

The history of the death penalty in the United States is a long and tumultuous one. Various waves of support and opposition, oftentimes accompanying major decisions by the Supreme Court or state governments, keep the issue of capital punishment alive. It is critical to recognize this ebb-and-flow relationship if one is to fully understand the law surrounding the death penalty, as well as the measures that must be taken to correct the mistakes of the larger system that sanctions the punishment.

Because it is the laws set by our country's legislatures and their interpretations by our courts that ultimately decide the fate of thousands of lives. Reforms, while gradually imposed and authorized since the mid-1970's, remain lacking in many areas. In order to deal with issues such as the racial bias that so often has wracked our nation, as well as the potential innocence of those convicted under faulty and questionable circumstances, the system that exists to guide a defendant to his or her death must be critically examined and constantly questioned.

In order to be fully transparent, I should note that I am a strong advocate for the abolition of the death penalty. Not only do I object due to religious purposes, but I also take issue with the, to quote the Supreme Court, "arbitrary and capricious manner" in which the death penalty is applied (*Furman v. Georgia*). However, I recognize that a fair system of sentencing that reserves the ultimate punishment for only the worst of the worst is significantly better than the existing

capital punishment scheme. Through an understanding of the death penalty, not only can we improve our justice system, but also our society as a whole.

Historically Horrid: The History of the American Death Penalty

In order to delve into the laws governing the death penalty, as well as problems associated with it, some basic understanding of capital punishment's history must be obtained. However, the focus of this section will not be on the major changes within the legal application of the death penalty, but rather its emergence and use throughout the United States. Special attention will be given to the movement to abolish capital punishment.

The history of capital punishment in the United States predates the formation of the country by nearly 200 years. The first execution in British North America occurred in the Jamestown settlement when Captain George Kendall was executed in 1608 for being a potential Spanish spy (Death Penalty Information Center). This was only the beginning for capital punishment in colonial America. Over the next 100 years, various colonies, including New York and the Massachusetts Bay Colony, established their own sets of criminal laws. Oftentimes, these laws would also include religious crimes, as they did in the Virginia Colony. Punishments were largely draconian in nature, and death was a common penalty.

Colonial Pennsylvania often led the charge to limit the imposition of the death penalty. The first steps it took came in 1682 when the crimes punishable by death were limited to treason and murder (*Capital Punishment*, 91). This stands as one of the first instances of popular, religiously-influenced objections to the death penalty. The largely pacifist Quaker population of the state would, in 1794, be the first to establish the common method of distinguishing between murder by degree. First-degree murder was the only crime punishable by death (*Capital*

Punishment, 92). In fact, it was in Philadelphia that the first American group opposed to capital punishment was founded. In 1845, the American Society for the Abolition of Capital Punishment was created.

Throughout the Eighteenth and Nineteenth centuries, a number of measures were taken by state governments to abolish or limit the death penalty. Many were unsuccessful, such as the abolition attempt in 1785 by the Virginia legislature which failed by one vote. However, there were promising signs toward abolition. In 1846, Michigan became the first state to abolish the death penalty for all crimes except treason (*Capital Punishment*, 91-92). The federal government, during this time, also took steps in limiting the death penalty. By 1897, only treason, murder, and rape remained as capital crimes.

Beginning in the 1960's, prominent legal groups, primarily the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People Legal Defense and Education Fund (NAACP LDF), began challenging the constitutionality of the death penalty on a nationwide scale. Over the next decade, the use of the death penalty varied widely by state. Some states, such as Maryland in 1961, reinstate the death penalty. Others, including Oregon in 1964 and West Virginia in 1965, abolish capital punishment (*Capital Punishment*, 97-98). With the increased legislation and legal challenges, a de facto national moratorium on the death penalty steadily went into effect. This moratorium became legally significant when the Supreme Court, as discussed later, determined that the death penalty was being applied in an "arbitrary and capricious manner" (*Furman v. Georgia*).

After the Court's ruling in *Furman*, support for capital punishment steadily rose throughout the country. By 1976, new death penalty statutes were held to be constitutional and executions resumed the next year. Gary M. Gilmore became the first person to be executed in

the United States since 1967 (*Capital Punishment*, 104). Since the Supreme Court's decisions in *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976), support for the death penalty has both waxed and waned depending on the decade. As discussed below, the Court has steadily, with a few exceptions, limited the use of capital punishment throughout the United States.

As of April 26th, 2018, 1474 people have been executed since the reintroduction of the death penalty in 1976. 821, or about fifty-five percent, of those people were white, while 506, or thirty-four percent, were black. More telling in the imposition of the death penalty than the overrepresentation of black defendants, is the overwhelming percentage of victims, seventy-six percent, who were white. There is conclusive data linking the race of the victim to a greater chance of receiving the death penalty (Death Penalty Information Center). Various studies between different states suggest those who kill a white person are around three times as likely to be sentenced to death rather than receive an alternative punishment such as life in prison without the possibility of parole.

Arbitrary and Capricious: The Laws of Capital Punishment

The law surrounding capital punishment cannot be discussed without some explanation of the Court's past precedent regarding the Eighth Amendment and its incorporation. Since the Eighth Amendment's ratification in 1791, the Supreme Court has repeatedly examined the meaning of cruel and unusual punishment and its implications. The most significant of these decisions stands as *Furman v. Georgia* (1972). When determining the constitutionality of the death penalty as it existed in 1972, the Court extensively reviewed the history of the Eighth Amendment. Multiple justices cite the changing nature of the Amendment, and place importance on the case of *Wilkinson v. Utah* (1878).

Wilkerson served as the first major instance of the Court specifically expanding the scope of the Eighth Amendment to include certain punishments. The Court in its opinion wrote of the horror stories given as examples in English law that would constitute cruel and unusual punishment under the Constitution citing, “where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female” (*Wilkerson v. Utah*). The Court believed that these were clear examples of cruel and unusual punishment, despite these types of punishment not being at issue within the case at hand. Instead, within *Wilkerson*, the Supreme Court held that execution by a firing squad using muskets did not violate the Eighth Amendment. *Wilkerson v. Utah* only applied these protections on a limited basis. At the time, they only applied to the federal government, as Utah was a territory and not a state yet. Nevertheless, as Justice Warren would describe almost seventy years later, prohibiting harsh actions by the government in the name of preserving law and order would be a sign of “evolving standards of decency that mark the progress of a maturing society” (*Trop v. Dulles*).

While *Wilkerson v. Utah* was a step toward our current system it did not actually stop any cruel and unusual punishments or executions from taking place. The first instance of the Supreme Court actively overturning a punishment came over thirty years later. The decision in *Weems v. United States (1910)* began a tradition of Supreme Court intervention into the Eighth Amendment. The facts of *Weems* clearly point to a level punishment that was unusual and cruel for the crime that was committed. Paul Weems was an officer in the United States military. He was accused and convicted of falsifying documents and then sentenced to fifteen years of hard labor. During his work, he was chained by the wrists and ankles. The Supreme Court found that

this punishment was far too severe for the crime, and overturned his sentence. While further protections were given at the federal level, the Eighth Amendment safeguards against cruel and unusual punishment were not applied to the state crimes for a number of years.

In the case of *Robinson v. California (1962)* the Supreme Court first incorporated the Eighth Amendment, determining that the state governments were restricted for imposing cruel and unusual punishments. The case facts caused a level of controversy though. The petitioner had been charged and convicted under a California law criminalizing drug addiction. The Court, unable to produce a pure majority, had to rely on a mixture of a four-person plurality and a concurrence in order to form a majority. Ultimately, the decision overturned Mr. Robinson's prison sentence after the Supreme Court acknowledged that drug addiction was a disease and the punishment of a medical condition constituted cruel and unusual punishment under the Eighth Amendment (O'Brien, 1235).

Capital punishment has consistency been upheld by the Supreme Court as a constitutional punishment within the confines of the Eighth Amendment. In the history of the United States, a brief, four-year period from 1972 to 1976 stands as the only time when death was considered a cruel and unusual punishment. Following the decision in *Furman v. Georgia*, the Supreme Court began reviewing new, revised death penalty statutes. While many death penalty abolitionists viewed *Furman* as a success, a number argued that it was only a brief roadblock in the fight against capital punishment. However, within their concurring and dissenting opinions, many of the justices in *Furman* agreed with the sentiment expressed by Justice William Douglas in his concurrence: "It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous." Since *Furman*, only a select

group of dissenting justices, such as Justice Thurgood Marshall, have held that the death penalty in all its forms is cruel and unusual.

Within four years, the Supreme Court reaffirmed the death penalty as constitutional in the majority opinion in *Gregg v. Georgia* (1976). The Court has since followed in the precedent set by *Furman* and *Gregg*. Namely, that the death penalty cannot be applied in an “arbitrary and capricious manner” (*Furman v. Georgia*). The issue in *Furman v. Georgia* was not that death was cruel or unusual, but that it was being applied in a manner that violated the Due Process clause of the Fourteenth amendment in conjunction with the Eighth Amendment’s cruel and unusual punishment clause. The Court found that juries and judges alike had too much discretion in applying the death penalty, suggesting a pattern that lead to unfair sentencing due to a number of factors, including race, socioeconomic status, and quality of representation. While arguments against the death penalty on the grounds of unfair racial application were staples of groups such as the ACLU and the NAACP LDF throughout the 1960’s and 1970’s, the Court chose not to rule on this issue in *Furman* or *Gregg* (O’Brien, 1243-1244).

Rather, the Supreme Court found in *Gregg* that the newly utilized method of bifurcating a capital punishment trial that had been adopted in a number of states reduced the arbitrariness of the death penalty’s application (O’Brien, 1245). Under this system, which many states adopted following *Furman*, the trial was split into two parts. Beginning with the guilt phase, a jury would determine whether or not a defendant was guilty of a capital crime. Only certain crimes would be subject to the death penalty. States laid out a fairly concise range of crimes, primarily revolving around premeditated murder and other particularly egregious crimes such as rape. If the defendant is found guilty, then the second phase of the trial would begin. In the penalty phase, the jury, or in some states a judge, would first hear evidence on aggravating factors

presented by the prosecution that warranted the death penalty, such as the defendant's prior criminal history or whether the victim fell into a protected class such as a child. Following the presentation of aggravating factors, the defense would offer evidence of mitigating factors. These were intended to convince the jury not to impose a death sentence but rather a sentence of life imprisonment. Mitigating factors were very broad and were composed of reasons such as a lack of criminal history, mental illness, or a troubled childhood. With the imposition of these new procedural safeguards, the Court found in favor of the state of Georgia and affirmed the death penalty (*Gregg v. Georgia*).

Furman and its progeny, instead of eliminating the use of capital punishment, have ruled on the procedural protections that people must be given when facing the death penalty. Cases such as *Apprendi v. New Jersey* (2000) and *Ring v. Arizona* (2002), controlled the type of evidence and manner of its presentation within capital punishment trials. *Apprendi* stands as a landmark decision that greatly increased the role of a jury in any criminal trial, while *Ring* expanded *Apprendi's* application to capital cases. In *Apprendi*, the petitioner had plead guilty to unlawful possession of a firearm. During his sentencing hearing, evidence was introduced suggesting the initial crime was racially motivated. The judge sentenced Mr. Apprendi to twelve years in prison, which was two years over the normal maximum for the unlawful possession charge. Mr. Apprendi appealed, arguing that his Sixth Amendment right to trial had been infringed because of a lack of evidence beyond a reasonable doubt. Upon appeal from the Supreme Court of New Jersey, the Supreme Court reversed the state court. It was determined that all evidence, except a defendant's prior convictions, must be presented before a jury in order to enhance a defendant's sentence. *Ring* expanded *Apprendi's* holdings to include evidence of aggravating factors. Here, prosecutors had presented testimony of a conspirator of Mr. Ring.

However, the conspirator only testified before the sentencing judge, not a jury. The decisions in these two cases virtually eliminated the use of judges as triers of fact in the penalty phase of a capital trials. These two cases serve as an example to the difficulties capital defendant's face. As Justice Scalia wrote about the right of a jury trial, "It has never been efficient; but it has always been free" (*Apprendi v. New Jersey*).

Other protections for protected classes of people, mainly those under the age of eighteen and those deemed by the Court as "mentally deficient," have been added in cases such as *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005). In *Atkins*, the petitioner was convicted of a number of crimes, including armed robbery and capital murder. While the prosecution presented a number of aggravating factors, the defense only presented one. Through the testimony of one psychiatrist, the defense claimed that Mr. Atkins was "mildly mentally retarded." Nonetheless, he was sentenced to death. After appealing through to the Supreme Court, the Court determined that the execution of a someone with an intellectual disability was cruel and unusual punishment under the Eighth Amendment (*Atkins v. Virginia*). However, the Court also found that the state governments had certain levels of discretion when determining what constituted an intellectual disability. This was leniency was curtailed several years later in *Hall v. Florida* (2014). Under Florida's old guidelines, anyone with an IQ of seventy or over was determined not to have an intellectual disability. The decision in *Hall* determined that this kind of strict standard was cruel and unusual. Those with IQ's over seventy would now have other opportunities to present other evidence of intellectual disability, such as the testimony of a psychiatrist (*Hall v. Florida*).

As mentioned, the Supreme Court has determined that the age of a defendant when a crime was committed plays a role in their potential sentence. The Court has examined the constitutionality of executing a minor on multiple occasions. The current law was decided on in

Roper v. Simmons (2005). The decision in *Roper* found that anyone under the age of eighteen cannot be executed without violating the cruel and unusual punishment clause of the Eighth Amendment (*Roper v. Simmons*). The age determination applies to the age at which a crime was committed. So, if a person committed capital murder at the age of seventeen, as was the case in *Roper*, but during the course of appeals was now over eighteen, then they still could not be executed. The decision overturned *Stanford v. Kentucky* (1989), which held that those under the age of eighteen but over the age of sixteen could be executed legally.

Additionally, the Court has ruled that punishments, as relating to the death penalty, must be proportional to the crime committed. For this reason, the Supreme Court ruled in *Coker v. Georgia* (1977) and *Kennedy v. Louisiana* (2008) that even major violent crimes like rape and rape of a minor did not equate to a sentence of death. *Coker* laid the groundwork for debates surrounding proportionality. In this case, the petitioner was convicted of rape under Georgia law. After being sentenced to death under the new penalty phase constructed following *Furman v. Georgia* (1972), Coker appealed, arguing that a sentence of death for the crime of rape constituted cruel and unusual punishment. Upon appeal from the Supreme Court of Georgia, the Supreme Court found in favor of the petitioner and reversed the state court. Justice White wrote in the majority opinion that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment” (*Coker v. Georgia*). Over thirty years later, the Court extended that protection, albeit by a slim margin, to the crime of rape of a child when death did not occur in the case of *Kennedy v. Louisiana* (2008). While some states still maintain that other crimes besides certain degrees of murder warrant the death penalty, the constitutionality of these statutes is called into question following the decisions in both *Coker* and *Kennedy*.

These decisions continue to reflect the wisdom of Justice Warren by showing an evolving standard of decency. A majority of states, thirty-one to be specific, though still authorize the use of capital punishment, even if it is not frequently used. The general mood of the nation has steadily marched toward total abolition, though this is not likely to occur soon.

Modifying Our Approach: Problems and Proposed Solutions

Key issues exist within the American system of capital punishment. While many, including myself, believe that capital punishment in all its forms is cruel and unusual, the majority of Americans believe that the death penalty is justifiable in some circumstances. Major problems involving racial discrimination, the potential innocence of those convicted, and proportionality of the crime remain despite the actions of the courts. I believe that for some of these problems, especially proportionality and racial discrimination, steps can quickly be taken so that truly only the worst of the worst are sentenced to death.

It is clear today that “the twin issues of variable prosecutorial discretion and variable jurisprudence” remain a key roadblock to a fairly imposed death penalty (*Stay of Execution*, 99). Because unspoken racial bias and discriminatory attitudes cannot be legislated out of our system of capital punishment easily, the alternative is to lessen the extent that prosecutors have in pursuing capital cases. The first step in this process is to limit the type of crime that is death penalty eligible in order to prevent meritless or common cases from ever coming to trial. The next step extends into the trial process itself, as aggravating factors should be curtailed while mitigating factors should be expanded.

In most states with the death penalty, two classes of murder exist that are death penalty eligible. The first is pre-meditated first-degree murder. The other is the broader range of capital

murder when an additional felony or felonies are committed in the same criminal act as the murder. Under a new proposed system, a second felony would not necessarily warrant the death penalty. Rather, only those that are especially aggravated and violent would merit capital murder. This new classification would include murder, coupled with crimes such as rape, kidnapping, torture or mutilation of a corpse, terrorism or treason, or multiple murders. This process would eliminate more common, lower level felonies such as theft as legal justifications for the death penalty. Robbery-murders, for instance, make up a substantial bulk of death penalty cases. One study found that in Harris County, Texas, seventy-nine percent of all capital cases were robbery-murder, with an even higher percentage for African-Americans when divided by race (*Stay of Execution*, 113). Potential benefits of these reforms are wide ranging and have been supported by major governmental and nonprofit groups in Illinois, California, and Washington D.C., among others. From this, we would see a “greater uniformity in the death penalty’s application in different counties, and the freeing up of resources for capital trials and appeals” (*Stay of Execution*, 113).

The next step that must be taken is the limiting of aggravating factors during the penalty phase of a trial. Ultimately, the same goal would be achieved if both the type of victim that warranted an aggravating factor was reexamined, as well as method of committing the crime. Within the same vein of thought, only certain people should receive special protections. Currently, the killing of most public officials, including judges, police officers, and elected officials, as well as those who are particularly young or disabled, warrants the imposition of the death penalty in most cases (*Capital Punishment*, 43). Instead of applying a large blanket protection to public officials, laws should be rewritten to focus on those who implement justice in trials, namely judges, witnesses in a trial, and jurors. Other protections should be extended to

those who cannot defend themselves as easily or at all. This class would contain those who are mentally or physically handicapped, the very young and very old, and pregnant women.

Mitigating factors, unlike aggravating circumstances, should be made more widely acceptable and easily admissible in a trial. A number of factors currently exist, and usually fall into several different categories such as the defendant's mental state, degree of involvement, or lack of criminality (*Capital Punishment*, 44-45). Some of these, such as mental illness and age, should preclude the consideration of the death penalty in all circumstances. The Supreme Court in decisions such as *Atkins v. Virginia*, has indicated that this may be the case. However, evidence of coercion, possible consent or understanding of the victim, and the overall role of the defendant in the crime should be expanded throughout the United States.

The issue of innocence remains in most cases no matter how much evidence is presented. The rise of groups such as the Innocence Project have shown light on the procedural failures of many criminal trials, especially those of capital crimes. For example, since its inception in 1992, the Innocence Project has exonerated 356 people who were wrongfully convicted, twenty of whom who were convicted of a capital crime and sentenced to death (Innocence Project). The focus of the Project provides a clear example of a possible improvement within death penalty trials. It should be easy for a jury to convict only those who actually committed an offense if there is definitive DNA proof linking a person to the crime. To that extent, all DNA evidence that is collected for a capital case should be tested, and the evidence, barring other evidentiary issues, presented at trial. As it has been shown, a number of people have been exonerated because of this testing. Unfortunately, the time they lost, whether spent on death row or not, can never be replaced or returned. It should therefore be the responsibility of the government to

prevent these issues from ever arising by testing all available DNA evidence for a trial itself, as well as retesting any inconclusive evidence when new techniques emerge.

Beyond the initial trial phase, additional protections should be instituted at the appellate level. Many wrongful convictions only come to light years after a trial, as the average amount of time spent on death row, before exoneration, is fourteen years (Innocence Project). Oftentimes, it seems that judges are focusing more on clearing cases from their docket rather than ensuring justice. I propose that multiple levels of mandatory appeals be implemented. The first round, as is currently the case in many states, would come immediately after the trial. Appellate judge panels at either the state or federal level should receive the trial record and, only to the benefit of the petitioner, determine if factual guilt actually exists. After this initial appeal goes through to its appropriate court of last resort, a small gap in time should be legally mandated and the appeal should be heard again along with any new issues that may have arisen. This second round of appeals should be heard by new sets of judges in order to prevent any bias or predetermination. This process can be repeated as many times as the country's legislatures deem appropriate, but should occur at least once. This process can be waived if the petitioner chooses to decline anything beyond their initial appeal, but should be an opt-out style program rather than opt-in. Additionally, the existence of multiple rounds of mandatory appeals should not prevent petitioners from filing appeals at other times.

Evolving Standards of Decency: Where to Go Now

It is critical for any and all capital punishment abolitionists, as well as the staunchest supporters of the death penalty, to understand the information behind the topic. For opponents of the death penalty, a grasp on the tortured history of capital punishment in the United States serves as important motivation for the goals of the broader abolition movement. For its

supporters, knowledge on the flaws of the system, as well as its potential successes, allow for corrections to be made and faith to be restored in the justice system.

The history of the death penalty is intertwined with the history of the United States. Since before the birth of our nation, as early as the first English settlement at least, capital punishment has been a commonly sanctioned crime. Over time, as our understanding of the punishment widens and our standards rise, support for the death penalty has faded. However, a majority of Americans still support capital punishment. It is important then for abolitionist to work within the current system to help prevent as many executions as possible.

Certain procedural safeguards should be more widely implemented in order to protect against wrongful conviction and bias. Removing some discretion from prosecutors by only allowing the most violent of murders to be death penalty eligible is but one step toward a more equitable system. Regardless of one's beliefs regarding capital punishment, it is important to recognize the flaws in our existing system, and work to prevent them. Only then will we have a better understanding of the death penalty, and its long, arduous history.

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