Brigham Young University Prelaw Review

Volume 37 Article 5

4-2023

Against Capital Punishment

Zac Bright
Brigham Young University, bright.zacharym@gmail.com

Ben Austin (editor)
Brigham Young University

Against Capital Punishment

Zac Bright[1]

I. Introduction

In 1986, police found Ronda Morrison, a White woman, dead at her place of work in Monroeville, Alabama. Gunshot wounds, evidence of assault, and an empty cash register evidenced a gruesome murder. After six months of investigation, police arrested Walter McMillan, a Black man, as the alleged killer. The sheriff put Mr. McMillan on death row before conviction for the next fifteen months. Following those months, Mr. McMillan was convicted of murder and sentenced to life in prison with no possibility of parole. This sentence, however, did not sit well with a trial judge who proceeded to override the jury's ruling and sentenced Mr. McMillan with the death penalty. As first-degree murder was a crime that warranted the death penalty, capital punishment seemed like a better fit for the crime committed by Mr. McMillan. As a result, he returned to death row to await his execution.

In 1993, however, Mr. McMillan was acquitted of all charges and released from death row.[2] Why? Because the conviction and arrest of Mr. McMillan violated 42 U. S. C. § 1983, in which no individual can deprive another of their Constitutional rights and other relevant legal rights. Here are at least three reasons found by the Court for why Mr. McMillan's case breached this law. First, there were several Black

---

1 Zac Bright is a student at Brigham Young University majoring in Philosophy. He would like sincerely thank Ben Austin, the editor of this paper and also a student at BYU, for his insightful contributions and beautifying what was a mediocre paper.

2 McMillian v. Monroe County, 520 U.S. 781 (1997).

witnesses who testified that Mr. McMillan was eleven miles away at the time from where Ronda Morrison was murdered. At first, these testimonies were largely disregarded due to the social status of Black people in this time period. Second, law enforcement coerced witnesses to commit perjury (there is a tape recording). Third, Mr. McMillan's arrest was initiated by a coerced, false testimony from a convicted, white murderer in Monroeville. Ultimately, Mr. McMillan was on death row because of racist attitudes and rumors from a small town, and a state court that disregarded legal procedure.[3]

Despite these three violations of the law, justice was ultimately served in this particular case. The Court acquitted all charges against Mr. McMillan, and he walked away a free and innocent man. Regardless of the outcome, this case extracts two problems to consider: (i) the effectiveness and accuracy of our criminal judicial process and (ii) the legal and moral issues with capital punishment. My paper will be concerned with the latter. I will argue that death row should not have even been an option for Mr. McMullin. He was fortunate that he had a legal team to exonerate him. Others are not so fortunate.

Capital punishment has a strong legal precedence in the United States. Since the country's founding, capital punishment has been a penal option for those who commit conspicuously wrong acts. For such acts, the punishment seems to be proportional to the crime. In addition to the punishment's adherence to proportionality, capital punishment mitigates problematic outcomes such as the possibility of a convicted felon escaping to commit more murders (both in and out of prison) and removing the deterrent effect of future crimes.

I will argue, however, that capital punishment should be classified as "cruel and unusual punishment", i.e., a violation of the eighth amendment, because the penalty is disproportionate to any crime (e.g. *Furman v. Georgia*); as such, The Federal Death Penalty Act of 1994 should no longer be considered a valid law in light of its constitutional violation.

3 *Id.*

II. Background

A. Key Concepts

For various reasons, the Supreme Court has ambiguously interpreted the "cruel and unusual" clause in the Eighth Amendment. Its ambiguous interpretation allows the "cruel and unusual" clause to have wider scope to maintain relevance for various cases. However, the Court has articulated some reasons behind their classification of a punishment as "cruel and unusual". In this section, I will synthesize the reasons Courts have used to adjudicate which punishments violate the Eighth Amendment. This will be followed by a careful defining and clarification of each reason.

The Supreme Court generally cites the following reasons to evaluate whether a punishment qualifies as cruel and unusual: (i) the proportional standard, (ii) unreasonable pain, (iii) evolving standards of morality, and (iv) arbitrariness. Interpretations of these reasons varies, thus exacerbating their enigma. Regardless, these are the legal reasons often cited, so providing context will be useful. Contextualizing these broad scope reasons within the relevant case law will be helpful to understanding and evaluating my argument.

First, the proportional standard means that the punishment should match the crime in severity, or there should be a relatively equivalent compensation. This standard has been well-established and seems to best match our intuitions regarding our desire to have a legitimate criminal justice system. To illustrate this standard, imagine someone steals your watch and then destroys it. The criminal is caught, and you demand compensation. The criminal seems to deserve punishment because they acted contrary to the social mores. According to the proportional standard, you should either receive a new watch of the same value or money to match the value. The Court has acknowledged that the proportional standard's ambiguous nature grants the courts and juries significant interpretive power: "[O]ur cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive."[4]

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

Consequently, the Court holds that other factors outside of the crime, such as human dignity, are considered with regard to the proportional standard.[5]

Second, unreasonable pain has a twofold meaning. Unreasonable pain means that the punishment cannot be an "unnecessary and wanton infliction of pain".[6] Additionally, the punishment cannot be a violation of human dignity. The Court determines whether these two conditions are met by appealing to the evolving standards of morality, which I will address.

Third, of the evolving standards of morality Chief Justice Warren wrote, "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[7] This reason has come under scrutiny in several dissenting opinions of Supreme Court cases because there are no indications of what the current societal moral norms could be. However, the Court has argued that there are in fact legitimate ways to ascertain the current societal norms. One way is to look at the legislation relevant to the punishment and see if the laws are in favor or against the punishment.[8] Another way would be to elicit consensus among American citizens.[9] The evolving societal standard of morality remains to be one of the primary reasons for certain crimes to no longer have the death penalty as a penal option.

Fourth, punishments should not be arbitrary. When the Court says the punishment should not be arbitrary, they have two conditions in mind. The first condition is that the punishment should not be sentenced *ad hoc*. The second condition is that the punishment should not arbitrarily target individuals on non-relevant facts (e.g., race, sexual orientation, or gender). Justice Douglas argued that

5 *Trop v. Dulles*, 356 U.S. 86 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."

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

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

8 *Atkins v. Virginia*, 536 U.S. 304 (2002).

9 *Id., Coker v. Georgia*, 433 U.S. 584 (1977).

> The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, non-selective, and non-arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.[10]

The Court holds that the judicial and legislative branches, as well as citizens, have a responsibility to not sentence harsh sentences and that laws which facilitate this behavior should be eradicated or deemed unconstitutional.

B. Legislation

Although *Furman v. Georgia* (1972) determined the death penalty to be unconstitutional, by 1976 state governments significantly improved statutes to provide more objective and context sensitive guidelines for juries. These improvements allowed juries to adjudicate less arbitrarily regarding which criminals did deserve the death penalty sentence.[11] With these adjustments made, the Supreme Court overruled its prior precedence and reestablished the death penalty as a constitutional practice. This resulted in more state statutes establishing rigid guidelines. Such guidelines helped juries better sentence punishments proportional to the crime thereby ensuring the punishment was neither unreasonable nor disproportional. As a result, the federal government ratified The Federal Death Penalty Act of 1994. This act outlines around sixty crimes where capital punishment is a penal option.[12] These sixty crimes generally fit into these three categories: (i) homicide offenses, (ii) espionage and treason, and (iii) non-homicidal narcotics offenses.

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

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

12 18 U.S.C. § 3591 (1994).

C. The Timeline of the Supreme Court

Furman v. Georgia was the first Supreme Court case to judge that capital punishment was unconstitutional. Following this case, capital punishment was no longer federal law. Yet, within four years, the death penalty went from unconstitutional to constitutional. By 1976, the state of Georgia legislated standards and guidelines for juries on how to deal with capital punishment cases. As such, in *Gregg v. Georgia*, capital punishment regained its constitutional status. Since 1976, there has been a shift towards the abolition of capital punishment.

Coker v. Georgia argued that the death penalty was determined to be a "grossly disproportionate" punishment for the crime of rape. This decision marked the introduction of another controversial legal precedent for the Eighth Amendment and its relation to capital punishment. "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." Now the decision of whether or not capital punishment is "cruel and unusual" lies in the judges' power.

From there, there are cases like *Atkins v. Virginia*. This case decided that the execution of a person with "mental retardation" violates the Eighth Amendment. Interestingly, the dissent argues that the proportionality fails because the proportionality is decided by the intellectual judge, not the people of the jury. Then there is *Roper v. Simmons* which prohibits the execution of individuals who were under 18 at the time of the offense. And more recently, *Kennedy v. Louisiana*. In this case, the U.S. Supreme Court struck down as unconstitutional a Louisiana statute that allowed the death penalty for the rape of a child where the victim did not die. Each of these cases are only here to demonstrate the relevance of capital punishment and the evolving legal standards of the Supreme Court.

III. Proof of Claim

Recall the argument: capital punishment should be considered a violation of the Eighth Amendment "cruel and unusual" clause.

Capital punishment violates the Eighth Amendment because (i) the punishment is disproportionate to any crime, (ii) it's arbitrarily assigned, (iii) removing capital punishment is more cost effective, and (iv) there are effective penal alternatives. As a result of capital punishment becoming unconstitutional, The Federal Death Penalty Act of 1994, and any other state legislation via the Fourteenth Amendment, would cease to be law in the United States.

This section will largely follow the same structure as the previous sections. First, I will analyze what the Supreme Court means by what I call the proportional standard. I will look at the various uses of "proportional" and attempt to elucidate the underlying logic behind these uses. Once there is some bearing on what the proportional standard is to the Supreme Court, I will show how capital punishment is disproportionate to any crime. This will be the most philosophical portion of my paper. Second, I will move to a more empirical approach. I will look at issues such as the number of death penalties, as well as race, and the deterrent effect of capital punishment. Third, I will transition to practical suggestions of what we ought to do with criminals who previously qualified for the death sentence. Fourth, I will demonstrate that capital punishment is more expensive than life imprisonment (a penal alternative).

A. The Proportional Standard

The proportional standard has never been clearly defined by the Court, but it has been repeatedly used.[13] From the several Supreme Court cases that cited proportionality, I found elements, or features, of the proportional standard. I will attempt to fit them together to provide a general picture of the underlying reasons and logic of the proportional standard. The elements are the following: (i) the current moral standards of society, (ii) consequentialism, and (iii) the dignity of humans.

13 See *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

1. The Evolving Standards of Morality

The reason cited most often for why the death penalty, or any punishment, may be disproportionate to the crime comes from *Trop v. Dulles*: "[The] words of the [Eighth] Amendment is not precise, and… their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[14] With each review of the constitutionality of capital punishment, the Court checks on the public attitude and legislation relevant to this punishment. It is helpful here to look at the legislative trends of capital punishment in the United States.

In 1995, the year after the FDPA was ratified, 38 states and the federal government had capital punishment as a legal penal option. As of July 2021, the death penalty is authorized by 27 states and the federal government – including the U.S. Department of Justice and the U.S. military – and prohibited in 23 states and the District of Columbia, according to the Death Penalty Information Center. Virginia, which has carried out more executions than any state except Texas since 1976, abolished capital punishment in 2021. Virginia followed Colorado (2020), New Hampshire (2019), Washington (2018), Delaware (2016), Maryland (2013), Connecticut (2012), Illinois (2011), New Mexico (2009), New Jersey (2007) and New York (2004). Furthermore, there were 2,570 people on death row in the U.S. at the end of 2019, down 29% from a peak of 3,601 at the end of 2000, according to the Bureau of Justice Statistics (BJS).[15]

This decline in legislative support indicates that the standards of morality in society are trending towards the abolishment of capital punishment. It is unlikely there will be any sudden increases in support for capital punishment, so the Court should accept the legislative trend and take a judicial stance to oppose capital punishment. The punishment, according to societal mores, is disproportionate to the crime. The punishment may have been permissible in the past, but this does not reflect the current consensus.

14 See *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958).

15 John Gramlich, "10 facts about the death penalty in the U.S." Pew Research Center (2021), https://www.pewresearch.org/fact-tank/2021/07/19/10-facts-about-the-death-penalty-in-the-u-s/.

Every major capital punishment Supreme Court case that reevaluates its constitutionality uses the "evolving societal standards of morality" argument.[16] Yet, surveying the current social mores to determine the proportionality of a punishment to a crime seems deeply problematic. First, this standard for interpreting the Eighth Amendment is too relative. The attitudes and legislation of the American people vary and will continue to change, for better or for worse. Furthermore, what should a Court do when it lacks legislative support, but wants to determine a punishment unconstitutional? In *Kennedy v. Louisiana*, the Court had to extract data from several sources because there were many instances where the legislative support did not favor the Court's opinion.[17] Second, the way in which this standard is used makes legislators out of judges.

> Courts are not representative bodies. They are not designed to be a good reflection of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.[18]

For example, there was never a time when segregation should have been permissible, yet according to the social mores' standard for judiciary considerations, segregation would be a permissible practice. If there is a shift in moral standards, the shift will happen democratically through legislative means, as opposed to judiciary means where they must assume the current laws as valid.

---

16 See *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976), *Coker v. Georgia*, 433 U.S. 584 (1977), *Thompson v. Oklahoma*, 487 U.S. 815 (1988), *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

17 See *Kennedy v. Louisiana*, 554 U.S. 407, 20 - 22 (2008).

18 *Dennis v. United States*, 341 U.S. 494, 525 (1951).

Despite surveying social mores as being poor legal reasoning, societal moral trends can be an indication of the need for change and how we determine the proportionality of the punishment to crime. This line of reasoning from the Court does not seem to be robustly defensible against any capital punishment abolitionist position.

2. Consequentialism

In addition to surveying the national consensus regarding capital punishment, courts often defend consequentialism. In layman's terms, consequentialism says the right action is the one that leads to the best overall consequence. The converse is true as well—an action is wrong if it leads to the worst overall consequence. In this section, I will look at two cases, elucidate their consequentialist reasoning, and evaluate their reasoning and how this affects the proportional standard.

The first case is *Coker v. Georgia*. In Georgia, a prisoner serving time for murder, rape, kidnapping, and aggravated assault escaped prison. The escapee was caught and convicted of rape armed robbery, and other offences. This prisoner was originally sentenced to death for the rape of an adult woman. The Supreme Court overruled the sentencing, arguing that capital punishment "is grossly out of proportion to the severity of the crime."[19] They also argued that the punishment was an unnecessary infliction of pain. A closer look at this case will reveal that the Court utilizes consequentialism to justify why the punishment is disproportionate to the crime.

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder…. [The] death penalty… is an excessive penalty for the rapist who, as such, does not take human life.[20]

Rape does not compare to murder because rape does not result in the loss of a human life. Two conclusions can be drawn from this, one of which is that the value of a human life is disregarded. The other

19 *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

20 *Id.* at p. 598.

is that one life lost requires another life to be taken. This could be either directly proportional, i.e., a life for a life, or a capital punishment is an effective deterrence for other lives being lost. The former conclusion implies an eye for an eye principle that is intuitive, but ultimately indefensible. Following this logic would, in the case of the rapist, require the rape of the convict, i.e., a rape for a rape. Not only is this direct proportionality bizarre, but it also becomes untenable. For example, if someone stole twenty cars, does the law require that we steal twenty of their cars? Obviously not. The latter conclusion, however, yields more promising results and better reflects the court's intention. Before expounding on this, I will summarize another court case since similar reasoning can be derived from it.

In *Kennedy v. Louisiana*, capital punishment for child rape was determined to be an unconstitutional punishment. The Court argued that

> [T]here is a distinction between intentional first-degree murder and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but 'in terms of moral depravity and of the injury to the person and to the public,' *Coker*, 433 U.S., at 598 (plurality opinion), they cannot be compared to murder in their 'severity and irrevocability.' *Id.*[21]

The loss of human life is incomparable to the rape of a child, according to the Court, because the result is not as severe nor is it revocable. The reliance on results indicates that courts depend on consequentialism: "Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed."[22] The unifying principle to which they prefer is to drive down the number of capital punishments in the country.[23] This reflects a largely consequentialist view of why capital punishment is violative of the proportional standard.

21 *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

22 *Id.* at p.26.

23 *Id.* at p.28.

The Court considers the total number of deaths in the country and seeks to minimize this number as much as possible, for victims and criminals.

This brings us back to the conclusion mentioned in *Coker v. Georgia* that courts are attempting to make a massive calculation to evaluate the proportionality of the punishment to the crime. This calculation seeks to ensure that the most lives possible are spared. Although the Supreme Court used this argument to conclude capital punishment for rape was unconstitutional, most cite this calculative approach to argue against capital punishment for convicts who have committed first-degree murder. This is called the argument from deterrence. Essentially, if the convict who committed murder is executed, then there is no risk of future lives being taken and there is no risk of the convict killing fellow prisoners (as they are more prone to kill inmates). Furthermore, by having capital punishment as a penal option, people will be disincentivized to commit crimes such as first-degree murder. In the total calculation, more lives are saved when capital punishment is in force.

The argument from deterrence, however, is highly speculative. A famous study conducted by Isaac Ehrlich[24] was supposed to definitively show that capital punishment did have a deterrent effect. However, John Lamperti[25] found that the regression model used by Ehrlich has significant flaws. With better technology and more accurate statistics, we can conclude the results of capital punishment effectiveness as a deterrent are inconclusive.[26] This does not mean

24 Ehrlich, Isaac. "The Deterrent Effect of Capital Punishment: A Question of Life and Death." *The American Economic Review*, vol. 65, no. 3, 1975, pp. 397–417. *JSTOR*, http://www.jstor.org/stable/1804842.

25 Lamperti, John. "Does Capital Punishment Deter Murder?" *Does Capital Punishment Deter Murder*, Mar. 2010, https://math.dartmouth.edu/~lamperti/my%20DP%20paper,%20current%20edit.htm.

26 Per the Death Penalty Information Center (DPIC) and the World Population Review: Japan and Jamaica have the death penalty. The former has the lowest murder rate in the world, the latter has the second highest. El Salvador and Luxembourg abolished the death penalty about forty years ago. El Salvador has the highest murder rate in the world, while Luxembourg has the fourth lowest.

that we should throw out consequentialist reasoning altogether in arguing for or against capital punishment. In fact, I think that consequentialist reasoning will conclude that the death penalty is not proportional to any crime. To argue this, I will have to maintain that a calculation of the numbers of lives lost and saved should be ignored. This assumption rightly avoids the speculative realm of trying to calculate the quantitative effect of keeping or removing the death penalty. The courts will have to move to a more hybrid approach of making a quantitative and qualitative calculation.

The Court appears to already take seriously a consequentialist approach to see its fit into the proportional standard. Their calculation includes a qualitative component, however, there needs to be an analysis of the value of a human life. Once the value of the human life has been violated by some other human, that someone must have their value violated, i.e. be sentenced to death. We will keep consequentialist reasoning in our back pocket. For now, let's analyze human dignity.

3. Human Dignity

There are serious questions whether the qualitative value of a human life can be measured by any court, let alone be put into some calculation. These speculations are warranted, but courts cannot help appealing to human dignity. The two cases cited in the previous section have strong indications of the sense of respect courts have for human dignity. In the cases I have cited, and many others, crimes such as first-degree murder warrant the death penalty because in committing the action of ending a valuable human life, the criminal has lost their value in some sense. This section may admittedly feel like I am veering away from supporting the proportional standard, but I will argue that once we understand human dignity and its effect on moral responsibility, the death penalty will be disproportionate to any crime. This categorical rejection of any crime qualifying will rely on an intuitive assumption, but I am confident it won't prove to be problematic, as will be shown later in the paper.

Human dignity, according to cases, constitutes the intrinsic value of a human life and the extrinsic value added by the context of the human's life. There are no clear arguments in cases for the

intrinsic value of human life. The intrinsic value of humans seems to be an unquestionable assumption that all courts endorse, so I will not spend more time on this, although it is an important baseline. The extrinsic value, however, does introduce an interesting nuance that I think the courts have already considered, but not explicitly.

In 2002, the Supreme Court affirmed that the death penalty cannot be a penal option for those who are intellectually disabled:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.[27]

The Court considered external (in value, not physiologically) facts and concluded that a criminal who is intellectually disabled does not qualify for capital punishment. There are simple facts about the individual that mitigate their moral responsibility because they cannot help but to act contrary to moral norms.

This relates to my argument because if we consider the external factors of any criminal liable to death row, their moral responsibility would be mitigated. Hence capital punishment should not be a penal option for them. In considering the external facts, the judicial system may adopt a common argument used by capital punishment abolitionists: "[If] the innocent victim had a right to live, so does

27 *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

the murderer."[28] Yet, one could quickly object "Is there no human so wicked that they do not deserve the death penalty?" Let's consider the case of Robert Harris.

In the late 1970s, Robert Harris was going to rob a bank with his brother Daniel. They were trying to hotwire a car, but unsuccessfully. Then Harris spotted two sixteen-year-old boys in another car. He told his brother they would steal that car. Harris and his brother stepped in the car and threatened to kill the boys if they did not let them use their car for their robbery. The boys complied. Harris drove them to a hill and let them out, promising they would not be harmed. Daniel watched the boys walk up the hill when suddenly he heard a gunshot. Harris shot one of the boys. Harris then went up to the recently shot boy, put a gun to his head, and shot him. After this horrific act, Harris waved his gun in the air and laughed.

To make matters worse, after killing the young boys he proceeded to eat their hamburgers. While eating the dead boys' food, he joked with his brother about how funny it would be to dress as police officers and tell their mothers their sons were dead. Well, Harris's sick jokes did not become a reality. Robert Harris was quickly convicted of kidnapping, armed robbery, and murder. He was promptly put on death row.

But Robert Harris's horrific behavior does not stop there. While in prison, he caused death, injuries, and was generally an unpleasant individual, even for the inmates. On the day of his execution, the whole prison held a celebration for the death of this cold, wicked man. In other words, if there was a man wicked enough to deserve the death penalty, Robert Harris seems to be the perfect candidate. Not sentencing someone like him to death may be an indication of the moral failure of our justice system.[29]

I argue that we should consider the external factors, so let's look at the external factors of Robert Harris and see whether moral

28 Van den Haag, Ernest. "The Collapse of the Case Against Capital Punishment." *The Philosophy of Law: Classic and Contemporary Readings with Commentary*, edited by Frederick Schauer and Walter Sinnett-Armstrong, Oxford University Press, Inc., New York, New York, 1996, pp. 731–743.

29 See People v. Harris [Crim. No. 20888. Supreme Court of California. February 11, 1981.]

responsibility could be mitigated. Robert Harris's life began poorly and never improved. When his mother was pregnant, his father came home drunk, accused his mother of adultery, and kicked her forcefully in the stomach. The kick caused hemorrhaging causing Robert Harris to be born early. The father developed the belief that Robert was not his own and treated him as such. This caused his mother grief, so she took her anger out on her son. Robert was repeatedly abused and neglected. He would beg for love or just physical contact, but he would be kicked to the side. Harris ended up in federal prison at the age of fourteen where he was raped and beaten. Once out of prison, Robert Harris, according to his sister, had all the good beaten out of him. Harris began killing animals which then escalated to the killing of humans.[30]

As we can see whether there is a man or woman so wicked that they do deserve the death penalty is a complicated issue. Most criminal backgrounds are tragic—terrible home life, abuse, high drug use, lack of affection, etc. When we look at these external factors, we seem to have a more compassionate reaction to the criminal as a human. The act may have been wicked and deserves retribution, but not to the point of taking a human life; their moral responsibility is simply mitigated.[31] I want the following point to be clear, that the convicts who commit these horrible crimes are not exempt from all responsibility. There should be punishments for those who commit crimes; the punishment should match the crime. However, when considering external factors of those who commit crimes worthy of capital punishment (at least, according to the law), their moral responsibility is mitigated enough to question the merit of capital punishment. How someone like Robert Harris could be properly penalized will be addressed in the section about penal alternatives.

30 Carwin, Miles. "Icy Killer's Life Steeped in Violence," *Los Angeles Times*, May 16, 1982.

31 See John Martin Fischer & Mark Ravizza (eds.), *Perspectives on Moral Responsibility*. Cornell University Press. pp. 119-148 (1987).

B. Arbitrariness

This section will primarily be focused on empirical observations. The empirical evidence indicates a certain level of arbitrariness in death penalty sentencing. The punishment seems to primarily affect Black males. This seems to be either arbitrary or an inherent bias of our justice system. Nearly all (98%) of the people who were on death row at the end of 2019 were men. Both the mean and median age of the nation's death row population was 51. Black prisoners accounted for 41% of death row inmates, far higher than their 13% share of the nation's adult population that year. White prisoners accounted for 56%, compared with their 77% share of the adult population.[32] As such, the current legal practices and statutes cannot sufficiently rule out racist conceptions of individuals in juries. No "objective indica" or current legislations in place sufficiently guardrail against racial biases.

Some may refute this claim by considering other factors regarding the black population. Commonly there are arguments that there is a lack of fathers, less police force, and an overall victim attitude. These considerations may be worth exploring, but they depart from the context of capital punishment, and the discussion would turn into speculative conclusions drawn from conflicting statistics. Whether or not they are true, the effect of capital punishment is clear—proportionally, more Black men are dying on death row than other races. Removing capital punishment would resolve this particular concern and would not disrupt the concerns of those who find issues with the statistics above.

C. Cost

According to the Office of Defender Services of the Administrative Office of the U.S. Courts "The average cost of defending a trial in a federal death case is $620,932, about 8 times that of a federal

32 Gramlich, John. "10 facts about the death penalty in the U.S. Pew Research Center" (2021), https://www.pewresearch.org/fact-tank/2021/07/19/10-facts-about-the-death-penalty-in-the-u-s/

murder case in which the death penalty is not sought."[33] Importantly, this is only the federal number. In other states, the problem of monetary cost persists. In Kansas, the cost of a death penalty case averaged about $400,000 per case, compared to $100,000 per case when the death penalty was not sought. The state of California showed that the cost of the death penalty has been over $4 billion since 1978. One final example: North Carolina studies found death penalty costs to be $2.16 million more expensive per execution than sentencing murderers to life imprisonment.[34]

Furthermore, a study conducted by Susquehanna University found that, on average, the total cost of keeping an inmate on death row to execution was approximately $800,000 more than an inmate who is sentenced to life imprisonment.[35] Sentencing criminals to death row is simply more expensive. If capital punishment were eliminated as a penal option, the money saved could be put towards improving prison systems, rehabilitation programs, or towards other important government projects. It would be more productive to allocate the additional resources to improving rehabilitation programs and prison systems for the other penal alternatives.

D. Penal Alternatives

Life in prison without possibility of parole seems to be a sufficient penal alternative, but there may be other penal alternatives more effective than life imprisonment (e.g., solitary confinement). Life imprisonment without possibility of parole costs less and adds no significant burdens to the American public.

Another penal alternative could be rehabilitation programs. The advantage of life imprisonment is the possibility of rehabilitation for

33 J. Gould and L. Greenman, "Report to the Committee on Defender Services-Judicial Conference of the United States," September 2010. https://files.deathpenaltyinfo.org/legacy/documents/FederalDPCost2010.pdf

34 Death Penalty Information Center *Facts about the Death Penalty* (2016), https://www.supremecourt.gov/opinions/urls_cited/ot2016/16-5247/16-5247-2.pdf

35 McFarland, Torin, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, Susquehanna Political Review, (2016).

the criminal. A study conducted by Lipsey and Cullen found that correctional rehabilitation programs are an extremely effective practice. Hundreds of studies and systematic reviews of rehabilitation programs confirm that rehabilitation is more effective than punitive programs.[36] It is important to keep in mind that life imprisonment is still a punishment, even with rehabilitation programs. Our justice system should punish wrong acts, and convicted criminals should lose certain privileges and responsibilities that the law-abiding citizen enjoys. Our justice system should have moral robustness.

One may not be convinced that rehabilitation programs are worth the effort or the cost. The economic consequences of instituting rehabilitation programs are unknown and potentially costly. What if a prisoner, like Robert Harris, never rehabilitates? Or any prisoner who has been sentenced to life in prison without possibility of parole? Rehabilitation programs may be off the table then, but the argument against capital punishment does not require rehabilitation programs. The argument only requires an effective penal alternative, in which life imprisonment without possibility of parole succeeds.

IV. Conclusion

I have argued that capital punishment should no longer be a penal option for criminal cases at the federal level in the United States. The punishment constitutes "cruel and unusual punishment" because (i) the punishment is disproportionate to any crime, (ii) it is arbitrarily assigned, (iii) removing capital punishment is more cost effective, and (iv) there are effective penal alternatives. Some points are supported by philosophical reasoning, others by more empirical data to support the overall argument. As a result of this, The Federal Death Penalty Act of 1994 should cease to be federal law. A consequence of the invalidation of this federal law would be the catalyst to the elimination of capital punishment at the state level. This categorical rejection of capital punishment as a viable punishment may cause

36 Lipsey, Mark W., and Francis T. Cullen. "The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews." *Annu. Rev. Law Soc. Sci.* 3 (2007): 297-320.

worry about the boundaries of power between state and federal laws, but I am not confident the categorical removal of capital punishment would entail any problems for federalism. If my argument holds, capital punishment is unconstitutional. Therefore, the punishment should no longer be legally sanctioned in any federal or state laws.