

THE UNIVERSITY OF COLORADO BOULDER
HONORS COLLEGE

DEPARTMENT OF PHILOSOPHY

CAPITAL PUNISHMENT:
A PHILOSOPHICAL REJECTION OF PUNISHMENT BY DEATH

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SPRING 2015

Defended on April 6, 2015

A thesis submitted in partial fulfillment of the requirements
for a baccalaureate degree in Philosophy
with honors in the College of Arts & Sciences

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ABSTRACT

Experiencing ubiquitous contention, the correlation between execution as a form of legal punishment and morality pervades in the modern era to form a central concern for examination. Competing accounts of moral theories have provided dichotomous vindications for capital punishment, indicating a substantial strife in criminal justice morality. This thesis will examine these rival philosophies in order to assess the gravity of moral theories in Supreme Court decisions. In particular, both consequentialist and retributivist theories are analyzed with respect to their conceptualizations of punishment. After examining the death penalty's legal history and the components of morality inherent in Supreme Court decisions, I assess that both consequentialist and retributive moral theories cannot account for the justification of the death penalty. Overall, an inherent association between morality and legal decisions is revealed that affirms that philosophy calls for the abolishment of capital punishment.

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ACKNOWLEDGMENTS

I would like to take this opportunity to recognize the three people from my collegiate career that both inspired this paper and helped formulate this thesis long before I even began it. As a sophomore in college I took a philosophy and law class that was taught by Professor Kacey Warren. During the course of the semester, I formed the initial mental correlations between the moral conception behind legal punishment that would come to comprise the commencement of this thesis. Second, I would like to express my gratitude towards Professor Janet Donovan, whose civil rights and liberties course forged my interest in case law. My intrigue in Supreme Court verdicts formulated during my time in the class eventually led to my consideration of how constitutionality interceded with morality in regard to capital punishment. Finally, I would like to express my infinite gratitude to Professor Dominic Bailey, whose unwavering support was immeasurable and absolutely indispensable to every step of this thesis. Without the guidance and encouragement Professor Bailey provided, this thesis would simply not have materialized.

Chapter 1

Introduction

Home to only 5 percent of the world's populace, the United States detains an astonishing 25 percent of the global convict population— there are over 2.2 million prisoners serving sentences in prisons or jails.¹ Marking a 500% increase over the past thirty years, the United States has precipitately augmented a nonpareil penal system with the highest incarceration rate in the world.² America's peerless in numbers criminal justice system has reignited one of the primary considerations of political philosophy: the relationship between punishment and justice. Arguably the most fundamental and crucial concept of political philosophy, justice pervades the modern world as an essential focus of discussion raising concerns regarding the relationship between the individual and the state.

Attending to the works of modern theorists, the answer to the query of what is required for justice has developed variably among different schools of thought. In particular, moral philosophers and legal scholars have disputed the nature and legitimization of punishment to ascertain justice for centuries. As punishment entails the infliction of a penalty on a malefactor

¹ Collier, Lorna. "Incarceration Nation." *American Psychological Association* 45.9 (2014): 56. [Http://www.apa.org](http://www.apa.org). American Psychological Association, Oct. 2014. Web. 10 Feb. 2015.

² The United States, with 707 incarcerated people per 100,000 citizens, has the largest number of people imprisoned out of any country. Although reputable data is hard to access, North Korea comes closest to this unparalleled rate with some estimates allocating 600 all the way to 800 per 100,000. See Jeremy Travis and Bruce Western, *The Growth of Incarceration in the United States: Exploring the Causes and Consequences*, The National Research Council, (2014).

for an offense comparable to the affliction the perpetrator of the illegal act metes out to his victim, it has been commonly concurred to necessitate both a moral and legal justification to achieve legitimate authority.³ Philosophers have proved disparate in their rationalization of how punishment should be justified regardless of this conventional accord, rendering the debate bisected between the partisans of consequentialism and retributivism. Utilitarianism, as the primarily historically advanced form of consequentialist ethical theories, justifies punishment in its repercussions: the moral value of any action is assessed by its impact upon the equilibrium of good and bad in social utility. In contrast, retributivists allocate the imposition of punishment as contingent to what the offender deserves, asserting that justified punishment relies on desert instead of any potential social utility resulting from discipline. Despite their divergent accounts, utilitarian and retributive considerations have been adduced in support of one of the most contentious implementations of legal punishment: the death sentence.

Dating as far back as the Eighteenth Century B.C. in the Code of King Hammurabi of Babylon with the codification of the use of formal execution for 25 varied crimes,⁴ capital punishment has persisted throughout history to compose a relentless debate concerning the morality of state execution as a form of legal punishment. Advocates of the death penalty morally vindicate it from either a utilitarian or retributive configuration primarily, although Nozick's communicative theory has been used as well. These binary justifications compose the dominant defenses of capital punishment, with the consequentialist utilitarian conception taking

³ Murtagh, Kevin. "Punishment." *Internet Encyclopedia of Philosophy*. Internet Encyclopedia of Philosophy, n.d. <http://www.iep.utm.edu/punishme/>. 20 Feb. 2015.

⁴ "Part I: History of the Death Penalty." *Part I: History of the Death Penalty*. Death Penalty Information Center, n.d. <http://www.deathpenaltyinfo.org/part-i-history-death-penalty#intro>. 12 Feb. 2015.

a vastly different approach from its counterpart. Utilitarian justifications rest on the future good that might result from the death penalty, namely its possibility of deterrence and incapacitation. Arguing that the death penalty deters potential murderers and prevents future murders by permanent incapacitation, proponents claim that utilitarian considerations assert that it is moral to execute a murderer. While a coalition of utilitarian and retributive rationalizations are offered in defense of the death penalty, the predominant justification for legal execution of criminals proves retributive.⁵

The notion that murderers deserve to die expresses the retributive operation of criminal law: just punishment for moral desert. Punishment as a whole “is now acknowledged to be an inherently retributive practice.”⁶ However, should this be what the criminal justice system is about? What is the just application of punishment, and can concerns of morality account for the controversial death penalty as a form of legal punishment? As punishment metes both a moral and legal justification, moral theorists have continuously debated the moral legitimacy of the death penalty and the Supreme Court case proceedings of capital punishment have reflected this issue. Reflecting on the moral issues utilized in these cases, does a specific theory adequately justify capital punishment? In order to address these questions, a comprehension of the moral arguments composing the capital punishment debate and the legal proceedings, which have led to the current state of the death penalty in the United States must be delineated. By scrutinizing the rulings made in capital punishment cases in America with regard to both arguments from morality and legality, the intersection between law and morality can be revealed. Ultimately, I affirm that the death penalty is ethically problematic, and the moral justifications made for

⁵ Murtagh, *supra* note 3.

⁶ Bedau, Hugo Adam. "Punishment." *Stanford Encyclopedia of Philosophy*. Stanford University, 13 June 2003. <http://plato.stanford.edu/entries/punishment/>. 22 Feb. 2015.

capital punishment in congruence with prominent cases do not provide adequate support for the continuation of the legal execution of criminals.

Chapter 2

Punishment

Punishment exists as the deliberate infliction of some pain or penalty on an agent authorized by law as a reaction to a specific action that is regarded as intolerable and subsequently labeled a crime. Used as a method to keep order and advance the state, punishment provides a necessary control to an advanced society. While legal punishment has been used since the beginning of recorded history, the practice raises a moral problem: it handles offenders in a manner it would be wrong to treat those who do not break the law.⁷ Infliction of pain on a person characteristically is adjudged to be morally indefensible; however, when utilized as a method by the state to maintain order, punishment is deemed morally justified. An important notion follows from this vehicle of justified punishment, concerning the immunity of the innocent: the state cannot legally or morally inflict punishment on an innocent.

Moral justification of authorized punishment has composed a core concern of political philosophy. Despite this, a crucial question remains: why is justification of criminal punishment so important? First, the boundaries of legal punishment are effectively informed by moral

⁷ Boonin, David. "Overview." *The Problem of Punishment*. Cambridge: Cambridge UP, 2008. 1. Print.

justifications. For instance, the Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment because of the moral implication of degrading human dignity. Without a consideration of morality, cruel and unusual punishment might be legitimized as it could allow for the overall good of society. This can be shown through the argument that torture brings about information necessary for a state's safety; however, since it is a cruel and unusual punishment for its degradation of human dignity, it is morally impermissible. Criminal law clearly has a moral force that guides our criminal justice system: laws and restrictions on those laws can be generated based on moral considerations. Second, for criminal law to have the moral force it uses, legal punishment must be justified on moral grounds. In order to address the controversial form of legal punishment known as the death penalty then, an examination of what stipulations warrant the justification of punishment must be made. I address this component by examining the two competing moral theories for the justification legal punishment, based on forward-looking and backward-looking considerations respectively: consequentialism and retributivism.

Chapter 3

Consequentialist Theories

i. History & Divergent Accounts

From ancient theorists to post-Enlightenment philosophers, the ethical doctrine of utilitarianism has been vindicated and expatiated to become one of the most prominent and augmented consequentialist theories in philosophy today. Utilitarianism was developed in the 18th century as a way to think about the legal system in regards to justice on the basis of a single acceptable and rational precept: the utility principle. Considered to be the father of utilitarianism, Jeremy Bentham outlined the principle of utility in his work titled *An Introduction to the Principles of Morals and Legislation* (1789) as a "principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question."⁸ Bentham advocates the principle of utility as a standard for judging laws and social institutions, referred to as the Greatest Happiness Principle. However, utility has a plural nature between normative and positive senses that creates agitation among theorists resulting in the array of utilitarian doctrines present in modern society.

There pervades two notable and inimical views of utilitarianism in particular: classical utilitarian theories and contemporary theories. Classical utilitarianism's vital conceptions derive from ancient Greek discussions of the ethical theory of eudaimonism and Plato; nonetheless, the

⁸ Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. 2nd ed. Vol. 5. London: Oxford at the Clarendon, 1907. Paragraph XIV. Web. 23 Feb. 2015.

most prominent augmenters of utilitarianism wouldn't surface until the 18th and 19th century with the aforementioned Bentham and John Stuart Mill. Embodying a hedonistic act interpretation of utility, classical utilitarianism expanded in the 19th century to mean the promotion of right actions as bringing about the greatest happiness for the greatest number of people. The ethical theory's proponents departed from Greek conceptions of eudaimonia, normally attributed to Aristotle, in that the hedonism of classical utilitarianism understands happiness as the only intrinsic good. John Stuart Mill states "happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure;" effectively, these are the measures that guide morality.⁹

On the other hand, contemporary utilitarianism can be seen as the amalgamation of schools of thought including act consequentialism. The normative theory of consequentialism concerns itself with answering inquiries as to what makes actions right or wrong. Effectively it encapsulates the conception that the right utilitarian act is the one that produces the greatest ratio of good to evil for all involved. On the other hand, rule utilitarianism instructs that specific actions almost always have a great utilitarian value; therefore, general rules are contrived to aid people in following these rules. Hedonistic utilitarianism exists as an example of consequentialist moral theory as it holds what matters is the aggregate happiness of people. Mill provides evidence for this when he states that the "creed which accepts as the foundation of morals 'utility' or the 'greatest happiness principle' holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness."¹⁰ Integrating an

⁹ Darwall, Stephen L. "From Utilitarianism." *Consequentialism*. Malden, MA: Blackwell Pub., 2003. 33. Print.

¹⁰ *Id.*

assertion that the moral value of action is assessed by its impact upon the utility in maximizing pleasure with the consequentialist view that the repercussions of any particular action are the basis for any judgment of it, utilitarianism poses a model for the morality of punishment on utility.

ii. Consequentialism & Punishment

*Laws are the conditions under which men, naturally independent, unite themselves in society. . . . they sacrificed one part of it (liberty) to enjoy the rest in peace and security. Some motives therefore, that strike the senses were necessary to prevent the despotism of each individual from plunging society into its former chaos.*¹¹

Of Crimes and Punishments, Cesare Beccaria, 1764.

Cesare Beccaria's 1764 work *On Crimes and Punishments* was one of the first influential works to analyze the correlation between state power and punishment. Alleging that men are born free and only give up part of their liberty to escape the state of nature, Beccaria asserted that forfeiture of this liberty via punishment can only be legitimized by its utility to society. Beccaria postulated the initial consequentialist affirmation that morality of punishment rests on forward-looking considerations of future goods that are the outcome of punishment. This would inform Jeremy Bentham's conception that the principle of utility is the basis of all moral actions. However while Beccaria and early utilitarian theorists such as Jeremy Bentham appraised the

¹¹ Beccaria, Cesare, Richard Bellamy, Richard Davies, and Virginia Cox. "XII The Purpose of Punishment." *On Crimes and Punishments, and Other Writings*. Cambridge: Cambridge UP, 1995. 26. Print.

goodness of consequences in terms of happiness, the general utilitarian theory of punishment varies from this basic conception. Utilitarianism's conception of punishment allocates that actions taken against an offender are morally correct if they create the most good or least harm than any alternative.

Justifications for punishment are often divided along the dichotomy of retributive and consequentialist theories. Fundamental to the divergence between these binary theories exists the comprehension of moral appraisal as an evaluation between instrumental or extrinsic value.¹² Retributivism asserts that punishing those who participates in offensive behavior has an intrinsic value: punishment is good in and of itself. Consequentialism proves at variance with this conception, as punishment is never solely an intrinsic good. Instead, punishment of those who commit crimes is justified, particularly in utilitarianism, as "it is a means to such future goods as *correction* (reform) of the offender, *protection* of society against other offenses form the same offender, and *deterrence* of other would-be offenders."¹³ Utilitarianism, in essence, is not reliant upon the retributivist justification of punishment as an allotment of a criminal's desert.

Punishment's utilitarian justification relies on forward-looking considerations of the societal benefits that result from its functions of deterrence, incapacitation and rehabilitation. In "The Classic Debate," Joel Feinberg outlines three propositions for the utilitarian theory of punishment:

1. Social utility expressed as correction, prevention, and deterrence exists as a mandatory

¹² Darwall, Stephen L. "Introduction." *Consequentialism*. Malden, MA: Blackwell Pub., 2003. 2. Print.

¹³ Feinberg, Joel, and Hyman Gross. "The Classic Debate." *Philosophy of Law*. 8th ed. Encino, CA: Dickenson Pub., 1975. 627. Print.

requirement for punishment to be justified.

2. Social utility is a sufficient requirement for punishment to be justified.
3. The quantum of punishment imposed is the aggregate that will serve to do the minutest harm or the most good to those impacted by it.¹⁴

The first proposition outlines that at least one of the three measures delineated to achieve social utility must be present for a punishment to be justified. Unlike retributivist theories who allocate punishment serves the purpose of giving what a criminal deserves, the utilitarian would reply that it is not necessary without a social utility being achieved. Punishment is permissible only when it prevents an offender from doing more harm through prevention, the threat of it deters potential criminals, or it reforms the criminal. Legal punishment's operation as a social control allows for a comprehensive theory that views justified infliction of harm on an offender as a tool for social achievement. At first, utilitarianism's theory entailing the use of methods to ensure social utility as rationale for punishment appears logically sound; however, there have been many criticisms of these conceptions in academic discourse. In the next subsection, I will assert that utilitarianism proves faulty in that it can commit moral fallacies such as punishing an innocent for social advantages.

iii. Criticisms

Developed by methodical philosophers nearly half a century ago, the current attributes of the

¹⁴ *Id.*

modern theory of punishment concern fundamental conceptual variations. In particular, philosophers have scrutinized a purely consequentialist theory of punishment based on the conception that the theory views legally sanctioned discipline as justified to the extent the practice attains the outcome desired. Philip Pettit captures the essence of this conventional contention in his work titled "Consequentialism." Pettit states that "[i]t is usually said against consequentialism that it would lead an agent to do horrendous deeds, so long as they promised the best consequences. It would forbid nothing absolutely: not rape, not torture, not even murder."¹⁵ Critics specifically focus on the ethical doctrine of utilitarianism as a form of consequentialism, as it places the highest value on aggregated happiness.

Utilitarians are indicted with the accusation that the ethical theory allows for one person's happiness to be sacrificed for the benefits of others; therefore, it subordinates factors of justice to the principle of utility. In particular, this applies to the theory of punishment as it allows for the punishment of a legally innocent person for social good. To illustrate this point, utilitarianism's detractors have depicted various examples that are arresting as moral considerations. The most famous encapsulation of this assessment is elucidated by J. J. C. Smart in his 1978 work "Utilitarianism and Justice." The philosopher contrives the dilemma for consequentialism and thus utilitarianism with deference to justice as follows:

The most poignant sort of case, of course, is that of the punishment of an innocent man. Suppose that in order to prevent a riot in which thousands would certainly be killed a sheriff were to frame and execute an innocent man. On utilitarian principles would not

¹⁵ Darwall, Stephen L. "Consequentialism." *Consequentialism*. Malden, MA: Blackwell Pub., 2003. 100. Print.

the sacrifice of one life in order to save thousands be justified?¹⁶

Detractors of the utilitarian school of thought stipulate that, presuming as Smart does that the violence of the ensuing riot is a worse outcome than the death of one innocent man, utilitarianism accounts for the unjust murder of one man to satisfy the overall principle of utility. Utilitarianism would affirm that it is morally right to convict and consequentially execute the innocent man, as it promotes the most social utility. However, this presents a clear conflict with punishment from desert based on the generally collective intuition that it is wrong to punish the innocent. Despite this conventional agreement on the fallibility of consequentialist theories, there exists an important stipulation of these doctrines: the condition that it is known that this is the only way to prevent the atrocity from occurring, and that this will save numerous lives which are known to be forfeited in any other circumstances.

Utilitarianism has received vast criticism on concerns of morality. In particular, critics assert that it goes against the very nature of the common notion of desert.¹⁷ As per the first proposition of the outline of utilitarian theory's punishment, social utility is an obligatory stipulation for punishment. In spite of this, most would argue that punishment should not be doled out to offenders who assuredly would never commit crime again.¹⁸ As per the utilitarian theory of punishment, there would be no need to punish this offender, as there would be no social good of correction, prevention or deterrence since the criminal would not commit a transgression again.

¹⁶ From J. J. C. Smart, "Utilitarianism and Justice," *Journal of Chinese Philosophy*, 1978. This version extracted from "Utilitarianism and Its Critics", Ed. Jonathon Glover, © 1990 Macmillan Publishing Company. ISBN 0-02-344134-8.

¹⁷ Pojman, Louis P., and Jeffrey H. Reiman. "Utilitarian Theories." *The Death Penalty: For and against*. Lanham, MD: Rowman and Littlefield, 1998. 24. Print.

¹⁸ *Id.*

Furthermore, utilitarianism could justify punishment for future crimes, should it serve the overall social utility. By eliminating desert from what constitutes justified punishment, utilitarianism allows for a criminal justice system to ignore concerns of morality. Utilitarianism and other consequentialist theories seemingly call for unjust measures, such as killing an innocent to stop more murders and the other instances mentioned. From this in the utilitarian point of view, it appears that the consequentialist principle of the moral rightness of an act being derived by its consequences is fallible in regard to justice.

I note these challenges to utilitarianism for tandem reasoning. Desert proves important for a justification of the death penalty, as several Supreme Court cases have referenced the inherent nature of punishing a murderer with execution stems from the idea that they deserve the harshest punishment available. Utilitarian conceptions seem to view that punishment exists as a mean to the end of social utility; therefore, it eliminates a central concern of morality in capital punishment of human rights as ends in itself. Having rejected the idea that utilitarianism can account for the subordination of justice as long as it serves the aggregate social utility, the legitimization of punishment must still serve the principles of justice. Consequentially, in order to justify capital punishment as a morally permissible sanction, a utilitarian justification solely reliant upon the total social utility achieved by an execution cannot be made. It must not discard concerns of an individual's rights or exclusively legitimize punishment based on its outcomes.

Chapter 4

Retributivism

i. Consequentialism vs. Deontology

Consequentialism as an ethical theory asserts a view of justice that holds morality dependent upon its ability to bring about the best possible consequences of a situation. Deontological theories are often defined by their antinomy to this doctrine on the integral concept that the evaluation of whether an agent's action is right or wrong is reliant not just on consequences; instead, agent-relative aspects of an individual's position must be considered. Introduced by Derek Parfit in *Reasons and Persons* (Oxford: Clarendon, 1984), the binary terms "agent-neutral" and "agent-relative" formed an important distinction in moral philosophy. Although the discernment between the dualistic terminology was put forward prior by Thomas Nagel in *The Possibility of Altruism* (Oxford: Clarendon, 1978) as "subjective" and "objective", Parfit popularized the distinction by its opposition to normative theories.

Over the course of the ensuing decades, agent-relativity and agent-neutrality has been applied with respect to various things, including rationale for action, principles, and values. Commonly recognized as one of the most important distinctions in pragmatic philosophy, it discerns between theories that can and cannot consider crucial factors of morality, respecting agent-centered prejudices, associative duties, and agent-centered restrictions. The multifarious applications of the distinction have come to consider the essential divergence between consequentialism and deontology. Embodying this cogitation between the two theories, Parfit

holds that deontology is agent-relative because it is a moral theory that gives different agents varied aims. On the other hand, Parfit labels consequentialism as agent-neutral since it "gives to all agents common moral aims" (Parfit 1984: 27). Appealing to moral considerations intrinsically linked with the values, relationships, projects, and further aspects of the moral agent's perspective, morality is often referred to as agent-centered or agent-relative.

Philosophers have often critiqued utilitarianism and other consequentialist theories due to its perceived compromising of the integrity of the moral agent's character in relation to values and projects, which provide meaning for the agent's life. Most notably, Bernard Williams elucidates that the consequentialist commitment to doing whatever found integral to ascertaining the best outcome can "lead to violations of what we would ordinarily think of as integrity."¹⁹ Considered in a normative sense, deontology rejects the ranking of the overall value of the states of affairs produced by alternative actions as a basis for decisions made on how to act. In referencing Williams, the philosopher Christine M. Korsgaard points out that agent-neutral theories without agent-centered restrictions have "[a] commitment to always securing the best outcome [that] never allows you to say 'bad consequences or not, this is not the sort of thing I do; I am not that sort of person.'"²⁰ Agent-relative moral constraints essentially are different from agent-neutral constraints because of their consideration of the agents performing specific actions. Due to this, many philosophers hold that agent-relative, as opposed to agent-neutral, moral constraints are essential to deontology as a whole. I emphasize this distinction between agent-relative theories and agent-neutral ones due to explicate a specific function of the deontic theory of retributivism: it discerns vengeance as a rationalization for punishment.

¹⁹ Darwall, Stephen L. *Deontology*. Malden, MA: Blackwell Pub., 2003. 227. Print.

²⁰ *Id.*

ii. Retributivism & Deontology: Punishment

Persisting as one of the most eminent deontological theories, retributivism entails justice in terms of rewards and punishments allocated to an agent reliant on their actions.²¹ In opposition to its forward-looking counterparts such as consequentialism, retributivism is strictly not teleological. While teleological accounts makes references to the *telos* or end of the process that posits punishment as the means to some good, retributivism accords to deontic theory as it considers the morality of a punishment in itself. In being agent-relative instead of agent-neutral, it rejects the negative implications of consequentialism's 'whatever it takes to secure social utility' method. Thus while consequentialist theories such as utilitarianism rests the moral justification in the potential good punishment brings about such as incapacitation or deterrence, retributivism aligns justified punishment with it being right or wrong in itself. It holds the deontological claim that the ends do not always justify the means, and posits that the desert of a punishment is obligatory. Furthermore, it refutes the common miscommunication that punishment exists because it would be wrong not to punish offenders as victims of crimes are wronged should they not be.²² However, retributivism holds a moral commitment that the criminal deserves punishment because they engaged in wrongdoing. Essentially, retributivism is agent-centered while vengeance concerns the victim's right to their attacker's punishment.²³ In

²¹ Miller, Wilbur R. "Retributivism." *The Social History of Crime and Punishment in America: An Encyclopedia*. Thousand Oaks, CA: SAGE, 2012. 1541. Print.

²² Walen, Alec. "Retributive Justice." *Stanford Encyclopedia of Philosophy*. Stanford University, 18 June 2014. Web. 23 Feb. 2015.

²³ *Id.*

this, retributivism's deontic function of being an agent-relative theory rebuffs claims of vengeance to justify punishment.

One of the most famous retributivists, Immanuel Kant in his *Groundwork of The Metaphysics of Morals* (1785) expressed the traditional notion of the moral theory.²⁴ The prominent philosopher developed a theory of punishment concerning justifiable coercion that has formed the basis for retribution. Contributing to the realm of modern philosophy, Kant outlined his ethic based upon the 'categorical imperative' of penal law. He defines this notion in that it "represents an action as objectively necessary and makes it necessary not indirectly, through the representation of some end that can be attained by the action, but through the mere representation of this action itself (its form)."²⁵ Rejecting the consequential notion of punishment as a means of achieving social utility, Kant asserts that just infliction of punishment is only legitimized "because the individual on whom it is inflicted *has committed a Crime*."²⁶ He expounded the law of retribution (*jus talionis*) to encapsulate these ideas that crimes merit punishment on their own.

Kant and retributivism in general have three propositions concerning the justification of punishment:

1. Guilt is a necessary condition for judicial punishment; that is, *only* the guilty may be punished.
2. Guilt is a sufficient condition for judicial punishment; that is, *all* the guilty must be punished. If you have committed a crime, morality demands that you suffer an evil for it.

²⁴ Kant, Immanuel. *Groundwork of The Metaphysics of Morals*. H.J. Paton trans.: 1964. 55-113.

²⁵ Darwall, *supra* note 19, at 21.

²⁶ Kant, *supra* note 24.

3. The correct amount of punishment imposed upon the morally (or legally) guilty offender is that amount which is *equal* to the moral seriousness of the offense.²⁷

Retributivists argue for each of these propositions in distinct ways. Kant's law of retaliation views an evil an offender inflicts on someone else to be returned to the offender. In that, by committing a crime the punishment returns on them. For example, a criminal who steals essentially steals from themselves. This view has been used to support the notion that a criminal deserves to suffer in the manner that they inflicted harm on another. Notably, Kant and others assert *lex talionis* at the very least to serve this purpose of desert: the punishment should inflict equal harm to the offender as was wreaked on the victim. *Lex talionis*, also known as strict equality, has come to pose the predominant conception of morality in regard to retributive justice.

Attempts to reinforce retributivism's justification of punishment led to philosophers proclaiming adherence to the balance of social equilibrium. In "Persons and Punishment," Herbert Morris adopts the assertion that criminals deserve to be punished; however, he defends this in a unique way. He details that a common citizen who abides to the law should have confidence that they will not bear the burdens others cannot, as if they do not have this assurance they will reject adhering to the law willingly. Morris allocates that the goods and burdens in a society should be equally distributed in a manner to prevent maldistribution, which legitimizes sanctions and penalties instituted to stop noncompliance.²⁸ Since a person who disobeys the rules

²⁷ Pojman, Louis P., and Jeffrey H. Reiman. "Retributivist Theories." *The Death Penalty: For and against*. Lanham, MD: Rowman and Littlefield, 1998. 11. Print.

²⁸ *Id.*

has an unfair advantage by the goods they have acquired with their noncompliance, “it is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens.”²⁹ Criminals upset the balance of social collaboration by gaining an unmerited advantage, and Morris alleges that punishment reimposes justice through the equity in benefits and burdens. Both Morris and Kant’s arguments express the notion that criminals deserve to be punished, and Morris specifies that society must rectify the state of imbalances they brought about through this punishment.

iii. Retributive Criticisms

Addressing the failings of retributivism requires an analysis of both Kant’s call for strict equality and Morris’s justification of punishment through social equality. Kant’s equality interpretation explicates the notion that offenders of the law should be punished in a way that is equal to the manner in which they transgressed. In this instance, a rapist would be raped and a torturer would be tortured. However, there pervades a very realistic charge to this account of justified punishment: the infirmity of the equality interpretation is that it proves impossible in practice. Social institutions simply cannot calculate what would be a perfectly equitable infliction of suffering on the offender as they conferred on their victim. Who would rape the rapist or torture the torturer? And what does retributivism say in regard to the serial killer who must be murdered repeatedly for all of the lives he took?³⁰ Legal punishment cannot dole out justice with exact measures to be enforced. Our social and legal institutions “are not equipped to

²⁹ *Id.*

³⁰ Pojman, *supra* note 27.

punish according to the harm inflicted but, rather, according to the wrong done, measured against specified statutes with prescribed penalties.”³¹ Overall, the strict equality of *lex talionis* proves impractical for achievement of justice, which leaves only proportional equality. I note this for my later discussion of the death penalty as a strict equality principle in retributivism is rebuffed; therefore, only proportional equality of punishments and the note of desert must be defended.

Herbert Morris asserts that criminals upturn social equity by gaining unfair access to benefits and relinquishing the burden of self-restraint. To restore the balance of society, punishment of these offenders is justified. However, critics have alleged that Morris’s postulation of punishment legitimization fails in binary respects. Louis P. Pojman asserts that the model of gaining an unfair advantage may be fine in respect to the offender who gets better grades by cheating on finals; however, this model “doesn’t work as well with sadistic crimes which may leave the criminal psychologically worse off than his victim.”³² In addition to this, contenders to Morris rejoin that not all occurrences of unfair advantage are punished, such as lying to get ahead.³³ Finally, retributivism fails in Morris’s *Fair Play* interpretation of justified punishment since common morality dictates that an individual deserves punishment even if they do not gain an advantage because they failed in their attempt to commit the crime. The crime would have inflicted suffering on others, meriting the desert aspect of punishment. Often, this challenge to the *Fair Play* model references the legal terminology that prescribes someone as guilty due to their guilty mind: *mens rea*.³⁴ Both Kant and Morris reveal fundamental errors of retributivism in

³¹ *Id.*, at 12.

³² *Id.*

³³ *Id.*

³⁴ Pojman, *supra* note 30, at 13.

justification of punishment: the principle of strict equality and fair play as a whole. Despite this, both theories identify that the concept of desert is the fundamental justification for punishment. Having rejected both strict equality and fair play, a consideration of desert forms the primary rebuttal that must be made to discard retributivism as justification for legal punishment with a consideration of proportional punishment. Ergo, legitimization of capital punishment on a retributivist basis relies on the dual assumption that murders deserve punishment, and execution proves the commensurate punishment for murder.

Chapter 5

The Death Penalty

State-sponsored execution is not a recent phenomenon; it was a common exercise of punishment in early legal codes. Despite its early foundations, capital punishment has seen monumental opposition and debate that has yet to meet conventional accord. Actively practiced in 32 American states yet barred in 18, the sanctioning of death as a means of punishment by the state clearly poses an issue for philosophical examination. Central to this analysis exists the notion that a state's infliction of punishment requires both a moral and legal justification. Although a 2010 poll by Lake Research Partners found that a majority of voters at 61% discard the death penalty in favor of another punishment for murder,³⁵ public support for state-sponsored execution of heinous criminals has mostly been the trend.

A substantial component of capital punishment's endorsement derives from inherently philosophical foundations: murderers deserve to die because they warranted their own punishment. This line of thinking that follows retributivist trends, in turn, encourages the popular perception that the state has the right to legally execute such people. Consequentialist justifications are then offered to further support the practice: the death penalty protects the innocent through incarceration and even deterrence. The moral justification for the death penalty appears to be substantial due to these legitimizations of punishment. However, morality in theory does not always match its practical outcomes. In order to assess whether the implementation of state execution as a legal punishment in the United States can be justified or not, an examination

³⁵ Reggio, Michael H. "History of the Death Penalty." PBS. PBS, n.d.
<http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html>. 25 Feb 2015.

of its actuality in the criminal justice system must be made. Using several influential Supreme Court cases, I delineate the issues of morality concerning the death penalty, which ultimately can be traced to the traditional schools of retributive and consequentialist thought.

i. American Death Penalty History Before The 1950s

Instituted by the colonial governments of the seventeenth century, capital punishment has operated as a measure of legal punishment since the very beginning of what came to be the United States. The first recorded execution in the English American colonies was in 1608 when officials executed George Kendall of Virginia for supposedly plotting to betray the British to the Spanish. A mere four years later, Virginia's governor Sir Thomas Dale instituted the Divine, Moral, and Martial Laws which imposed death as the sentence for even minor offenses, only to be mitigated seven years later.³⁶ The first legal execution of a criminal occurred in 1622 in Virginia, and this was to mark the commencement of the American use of capital punishment.

From 1776-1800, the initial reforms of the death penalty materialized. Proposing a law that proffered the death penalty being reserved for only treason and murder, Thomas Jefferson and four others saw defeat after heated debates. Philosophical objections to the death penalty in the United States further impacted the changing practice of capital punishment. Cesare Beccaria, a prominent 18th century Italian philosopher, composed his treatise *On Crimes and Punishment* that argued vehemently against the death penalty in 1767. Widely disseminated by the public, Beccaria's notion that there was no way to justify the execution of criminals by the state led to

³⁶ Reggio, Michael H. "History of the Death Penalty." PBS. PBS, n.d.
<http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html>. 25 Feb. 2015.

the first eradication of capital punishment by the Duke of Tuscany in 1786.³⁷ Beccaria's work resulted in the advancement of the American abolitionist movement, and it was one of the forces that induced the earliest attempted reforms of the death penalty by Jefferson.

In 1793, the United States divided capital crimes into the binary framework of first and second-degree murder that altered the realm of the institution of the death penalty, as it allocated execution for first-degree murders.³⁸ This paradigm eventually resulted in the modern reservation of the death sentence exclusively for first-degree murderers. Further abolitionist efforts, including Dr. Benjamin Rush's challenge to deterrence by the death penalty, led to Michigan making history in 1846 as the first American state to abolish the death penalty with the exception for crimes of treason.³⁹ The nineteenth century also saw rise to sentencing discretion, with jurisdictions "authorizing trial juries to make binding recommendations in capital cases," that mandated a judge to impose death or life imprisonment as sentences for capital offenses.⁴⁰ This would prove consequential in the challenge made by *Furman v. Georgia* a century later, which objected the arbitrary and discriminatory nature of the death penalty. Indeed, the second half of the twentieth century evident by the *Furman* decision existed as the period wherein capital punishment saw monumental legal dissension and alteration.

Employed as the standard punishment for major crimes in early American history, the death

³⁷ "Part I: History of the Death Penalty." *Part I: History of the Death Penalty*. Death Penalty Information Center, n.d. <http://www.deathpenaltyinfo.org/part-i-history-death-penalty#intro>. 12 Feb. 2015.

³⁸ Bedau, Hugo Adam. "Background and Developments." *The Death Penalty in America: Current Controversies*. New York: Oxford UP, 1997. 4. Print.

³⁹ Reggio, Michael H. "History of the Death Penalty." PBS. PBS, n.d. <http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html>. 25 Feb 2015.

⁴⁰ *Id.*, at 5.

penalty composed a pervasive instance of state-sponsored punishment that saw massive controversy. While there were instances of contention against the implementation of capital punishment, it was not until the 1950s did the death penalty see widespread disapproval of the practice. In the United States, executions plunged in numbers and various states abolished the death penalty: “[w]hereas there were 1,289 executions in the 1940s, there were 715 in the 1950s, and the number fell even further, to only 191, from 1960 to 1976.”⁴¹ Despite this climate of popular distaste for the death penalty, it was not until the 1960s that capital punishment finally was questioned on its moral and constitutional foundations.

⁴¹ *Id.*

Chapter 6

Capital Punishment's Constitutional Cases

i. *Furman v. Georgia*

There have been several substantial United States Supreme Court death penalty cases from 1972 to 2008 whose verdicts have demarcated the contemporary legal guidelines that both permit and simultaneously limit capital punishment in America. Marking the first time in United States history where the Supreme Court found capital punishment to violate the U.S. Constitution, no death penalty case pervades as more notorious than *Furman v. Georgia*. On June 29th in 1972, the sanctioned execution of murderers was struck down in a 5-4 decision by the court. Overturning the original *Furman* decision and that of two other cases, the presiding justices held that capital punishment was in violation of both the Eighth and Fourteenth Amendments, which instituted a moratorium on the death penalty.

The case of William Henry Furman involved an African American man who was sentenced to death for the crime of murder by a jury who had the option of delivering the verdict of life imprisonment instead. The jury was also not given specific criteria to evaluate in forming their penalty decision, providing considerable discretion. As these statutes provided next to no guidance for juries in allocating who received the death penalty, prejudices were given room to have an influence on sentencing. Holding that the imposition of the death penalty mandated a degree of consistency, the justices arrived at a per curiam decision based on evidence that the imposition of execution as a punishment in this case and the other cases considered constituted cruel and unusual punishment.

The decision of *Furman* was made possible by the 1962 case of *Robinson v. California*, 370

U.S. 660, where the U.S. Supreme Court adjudged that the Cruel and Unusual Punishment Clause was applicable to states via the Fourteenth Amendment. Amendment XIV, otherwise known as the Fourteenth Amendment, delineates both citizenship rights and equal protection of laws. Justice Potter Stewart's opinion in the Court asserted that the imposition of cruel and unusual punishment was in violation of both the Eighth and Fourteenth Amendments. Before the landmark *Robinson* case, the Eighth Amendment had only been implemented against the federal government; however, the incorporation of states under Amendment XIV allowed for the *Furman* application. *Furman v. Georgia* further established the conceptual guidelines for cruel and unusual punishment through the opinion of Justice Brennan. Brennan elucidated four principles that can be utilized to determine whether a punishment falls under the cruel and unusual scope. They are as follows:

1. A punishment must not be degrading to human dignity by its severity.
2. A severe punishment that is obviously inflicted in a wholly arbitrary fashion.
3. A severe punishment that is clearly and totally rejected throughout society.
4. A severe punishment that is patently unnecessary.⁴²

Despite his elucidation of these principles, Brennan qualified that a state would never pass a law that clearly breached any one of these principles. Due to this, decisions concerning the Eighth Amendment must use a cumulative test. By this, the Supreme Court evaluates a punishment as cruel and unusual if it "is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to

⁴² Feinberg, Joel, and Hyman Gross. "Furman v. Georgia." *Philosophy of Law*. 8th ed. Encino, CA: Dickenson Pub., 1975. 675. Print.

believe that it serves any penal purpose more effectively than some less severe punishment.”⁴³ In order to assess the use of execution as a punishment, these aggregate conditions must not be met for it to be considered not a deprivation of human dignity.

While the majority in *Furman* could not reach a rationale consensus in order to compose a controlling opinion, the crucial argument that manifested opposing capital punishment was that the sentence of execution was enforced in an arbitrary manner. The procedures by which sentences were determined were capricious, with no obvious criteria for who should be killed or sent to prison. Expressed by Justices Potter Stewart, Byron White and William Douglas, opinions in the case indicted that death sentences revealed a racial bias due to these discretionary procedures. Concurring with the Court, Justice Douglas affirmed that the death penalty’s application constituted unusual punishment due to its discrimination based on arbitrary factors such as race. Douglas’s opinion proclaimed that discretionary statutes informed the system of sentencing as it was in place, allowing for this negligence of justice. Justice Marshall observed that the death sentences seem to be limited to "the poor, the ignorant, and the underprivileged members of society," and conspicuously for constituents of racial minority groups, showing its unequal application.⁴⁴ During this time, a study by Marvin E. Wolfgang and Marc Riedel discovered that black criminals who committed a crime against white victims were 18 times more likely to receive the death penalty than any other offender.⁴⁵ Further affirming this thought, a 1990 report made by the non-partisan U.S. General Accounting Office found "a pattern of

⁴³ *Id.*

⁴⁴ Palmer, Louis J. "General Considerations." *The Death Penalty in the United States: A Complete Guide to Federal and State Laws*. N.p.: n.p., n.d. 24. Print.

⁴⁵ Wolfgang, Marvin E. & Riedel, Marc. "Racial Discrimination, Rape, and the Death Penalty," in *The Death Penalty in America*, ed. Hugo Adam Bedau. Oxford: Oxford University Press, 1982. 194-205. Print.

evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty."⁴⁶ The study comprehensively found that a defendant was several times more likely to be sentenced to death should the murder victim be white. Adding to the anti-death penalty argument that the system is biased, the staggering majority of death row defendants since 1997 have been executed for killing white victims, although African-Americans compose about half of all homicide victims.⁴⁷ Sentencing proved arbitrary and discriminatory in this manner, violating the equal protection component of constitutionality.

The discriminatory nature of capital punishment was supplementary expounded by its selective nature. The Court further adjudicated that no principled basis existed to discern the few people sentenced to death from thousands of others who committed crimes as bad or worse, despite not being sentenced to death. Justice Stewart recognized the unmethodical employment of execution, stating that it proved cruel and unusual to select only a few people to receive a harsher punishment for the same crime. He expresses that "For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."⁴⁸ Discretionary sentencing procedures provided no rational foundation for why some were executed, and others were not. Due to this phenomenon, Justice Stewart wrote in his concurring opinion in the case that "These death sentences are cruel and unusual in the same way

⁴⁶ Dodge, L. NCJRS Abstract. *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, 1990. Web. 3 Mar. 2015.

⁴⁷ Downey, Bernard W. M. "Black Victims of Violent Crimes." *The Journal of Criminology* 5.1 (1965): 92-95. Office of Justice Programs. U.S. Department of Justice, Aug. 2007. Web.

⁴⁸ *Furman v. Georgia*, 408 U.S. 238 (1972).

that being struck by lightning is cruel and unusual."⁴⁹ *Furman* effectively alleged that capital punishment is unusual in punishment should it discriminate against an offender due to their race or any other category akin to it, as it did in the system of the time with sentencing procedures susceptible to prejudice. Conclusively, the Court held that the imposition of the death penalty in these cases proved in violation of the Eighth and Fourteenth Amendments.

ii. Effect of *Furman* & *Gregg v. Georgia*

Furman v. Georgia effectively marked the first time that the arbitrary and discriminatory imposition of capital punishment was recognized. While *Furman* did establish a temporary ban on the death penalty, it merely alleged that the heart of the issue with state-sponsored executions was the lack of guided jury discretion, which led to these issues. As a direct result, 35 states redrafted their statutes concerning the death penalty to include guided discretion. However, it did allow for the relationship between justice and punishment to be examined: Justice White asserted that the infrequent infliction of the death penalty rendered it cruel and discarded any potential for deterrence as it “ceases to be the credible threat essential to influence the conduct of others.”⁵⁰ Justice Marshall argued a similar rejection of deterrence as justification for the practice, as the number of people who have been deterred from the death penalty cannot be calculated. Moreover, Justice Douglas revealed the proportionality component of punishment that must be met for justice, citing the Equal Protection Clause of the Fourteenth Amendment.

⁴⁹ *Id.*

⁵⁰ *Id.*

Furman's moratorium was repealed merely four years later in the precedent-setting case of *Gregg v. Georgia*, 428 U.S. 153 (1976). Upholding the death sentence of Troy Leon Gregg, the consequential case reinstated the use of capital punishment in the United States. Gregg was found guilty of armed robbery as well as murder, and he was subsequently sentenced to death. The Georgia Supreme Court affirmed his death sentence on appeal, and Gregg disputed the verdict on grounds that it constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Gregg's dispute made its way to the United States Supreme Court, where the presiding justices found in a 7 to 2 decision that the punishment of death was not in violation of the dual amendments. In addition to ending the *Furman* embargo on capital punishment, the Court's adjudication materialized two dominant features for the just application of the death sentence. In order to adhere to the Eighth Amendment's prohibition on cruel and unusual punishments, the sentencing scheme must issue impartial standards to direct and limit the discretion in sentencing capital punishment. It must also allow the judge or jury as the sentencer to consider individual aspects of the defendant, such as character and record. The criteria established by the case mandated that capital punishment proves unconstitutional should it be influenced by "passion, prejudice, or any other arbitrary factor [and] the evidence [must] support the finding of a statutory aggravating circumstance [as well as if it] is excessive or disproportionate."⁵¹ The judgment of the Court affirmed through Justices Stewart, Powell, and Stevens that the new safeguards to address the arbitrariness of sentencing were successful and thereby constitutional.

In *Gregg*, the Court importantly considered the public endorsement of the death penalty as reason for the continued legality of it. Assessing that a large proportion of American society views capital punishment as an appropriate and necessary criminal sanction, the Court stated that

⁵¹ "*Gregg v. Georgia*." *FindLaw*.
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=153>. 10 March. 2015.

the legislative response whereby 35 states enacted new statutes that allocated the provision of capital punishment.⁵² The legislation implemented by these states revealed clear support for the death penalty by the public, expressed through state legislatures. Public support revealed insufficient to justify capital punishment however, as the Court expressed that the Eighth Amendment demands more than a punishment be acceptable to society. A challenged punishment must also be found to comport with the basic concept of human dignity. As Justice Warren expressed in *Trop v. Dulles*,⁵³ the Eighth Amendment must garner meaning from the evolving standards of decency intrinsic to a maturing society. Essentially, the clause prohibiting cruel and unusual punishments is not fixed by nature; instead, it can acquire meaning, as public opinion advances through enlightenment of human justice.⁵⁴ As a direct result, *Gregg* revealed that inclusion of an assessment of modern values regarding the imposition of a challenged sanction must be made to accord with the Eighth Amendment. In addition, it indicated a fundamental concern for the dignity of man under this amendment, referenced with the *Trop v. Dulles* decision that mandates a punishment not be excessive. By the aforementioned criteria, a punishment must not concern the unnecessary and wanton infliction of pain, nor may the punishment be out of proportion to the severity of the crime. Furthermore, it indicated that capital punishment serves the social purposes of retribution and deterrence, drawing moral arguments into consideration.

⁵² *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵³ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁵⁴ *Furman v. Georgia*, 408 U.S. at 429-30 (POWELL, J., dissenting).

iii. Further Consequential Cases

The Supreme Court has outlined various procedural rules over the past several decades that have composed the legislation of death penalty sentencing. In *Coker v. Georgia*, the Court adjudicated that capital punishment was a disproportionate penalty for the offense of rape of an adult woman in cases where the victim did not die. Extending the decision of *Coker* in *Kennedy v. Louisiana*, the Court struck down a Louisiana statute that punished the rape of a child with the death penalty. The Court came to a similar decision for the crime of robbery in *Hooks v. Georgia*. In *Enmund v. Florida*, felony murder cases in which the defendant did not intend to kill or harm the victim as well as did not demonstrate a reckless indifference to human life in accordance with his actions were decided to not be punishable by death, even in the cases where the victim dies. With the important decision of *Atkins v. Virginia*, the Court excluded mentally retarded individuals from capital punishment. There have been several legislative decisions made regarding the restriction of the death penalty. *Roper v. Simmons* held that those under the age of eighteen at the time the crime is committed cannot be subject to capital punishment. These decisions made by the U.S. Supreme Court have outlined the legislation for death penalty sentencing composing a concept that "death is different" as a punishment with taking a person's life being an utmost necessary action.

The notion that death is different found its most significant reinforcement in *Woodson v. North Carolina*, 428 U.S. 280 (1976). Asserting that death is different because of its severity and permanence, the decision reflected that there needed to be heightened reliability to ensure its justification. *Woodson* also displayed the legal significance attached to consideration of individual circumstances. The Supreme Court found mandatory sentencing laws for the death

penalty to be unconstitutional under the Eighth Amendment, as they stripped judges from making individualized decisions in capital punishment cases. *Lockett v. Ohio* further underscores this conception of greater responsibility by requiring individual consideration for capital cases to achieve just punishment. *Lockett* asserted the need for consideration of aggravating and mitigating factors to ensure that sentencing would not be arbitrary. The case also delineated the notion that arbitrariness and discrimination must be eliminated for the death penalty to have any value in retribution or deterrence.

iv. A Legal Rejection of Modern Capital Punishment

Capital punishment has evolved in the United States in response to these cases and their subsequent standards. From these cases, the legal guidelines for justification of state-sponsored execution as punishment have been derived. From *Furman*, the rejection of capricious and discriminatory sentencing arises as it does not accord with the prohibition of cruel and unusual punishment and necessitates equality. *Gregg* delineates the sentencing procedures that are still in effect today; however, these can be proven problematic in their expressed implementation. Other influential cases such as *Woodson* and *Lockett* elucidate the requirement of heightened reliability in capital sentencing and procedural protection that all outline the difference of death. To justify the use of the death penalty as a legal means of punishment, it must therefore meet several qualifications:

1. As it must not violate the Eighth Amendment's prohibition of cruel and unusual punishment, it

must not be imposed arbitrarily.

2. As it must not violate the Fourteenth Amendment's protection of equality, it must not be imposed discriminatorily.

3. As it must not be imposed arbitrarily or discriminatory, sentencing procedures should have strict guidelines to eliminate these unjust forces.

Set by the precedence made in the most influential Supreme Court cases, these guidelines are mandated in law. However, it can be shown that the death penalty is still imposed both arbitrarily and discriminatorily, despite the stringent guidelines proposed to extinguish these unjust aspects.

By altering sentencing and the trial system for capital cases in general to adhere to the *Furman* ruling, the Court held that state sentencing mechanisms that effectively limit the class of offenders qualified for a potential death sentence and restrict the discretion of a jury to wantonly or freakishly condemn a person to life or death are constitutionally legitimate.⁵⁵ The Court recognized that the "basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily."⁵⁶ By enacting legislative solutions since *Furman*, the Court expressed the belief that a greater consistency would be seen in the administration of capital punishment. Despite this, the Court's belief that constricting the eligibility requirements for death sentences would eliminate arbitrariness proves inconsistent with reality.

Justice Harry Blackmun wrote in his dissent in *Callins v. Collins* in 1994 that in the twenty years that have passed since the Court "declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all . . . and, despite the effort of the States and courts to devise legal formulas and

⁵⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁵⁶ *Gregg v. Georgia* [428 U.S. 153].

procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."⁵⁷ Supporting this fact, a 2007 study of death sentences in Connecticut administered by Yale University School of Law found that African-American defendants receive death penalty at three times the rate of white defendants in cases where the victims are white.⁵⁸ Indeed, the arbitrary application of execution as a sentence points towards the reality of a criminal justice system failure in the United States. A lack of consistency proves omnipresent with ineffective sentencing procedures that result in the permeation of prejudices in the judicial system, allowing for aspects other than the offense to effect death sentences. Factors such as race are not the only components of inequitable application: geography and access to competent council determine who receives capital punishment. For instance, a 2003 study done by the University of Maryland deduced that race and geography are substantial factors in death penalty verdicts.⁵⁹ Clearly, the current imposition of the death penalty proves both arbitrary and discriminatory, violating the two stipulations respectively of the Eighth and Fourteenth Amendment necessary to justify the death penalty.

Gregg v. Georgia elucidated that sentencing procedures must have stringent guidelines to eliminate components of arbitrariness and discrimination, which render the imposition of capital punishment unconstitutional. As a result, criminal justice sentencing procedures in the United States must prove to eliminate factors that could lead to violations of both the Eighth and Fourteenth Amendments to prove constitutional. However, an examination of the justice system procedures in effect reveals this is not the case. The death penalty exists as sanctioned by *Gregg v. Georgia* verdict due to jury's sentencing decisions being strictly governed by legal criteria, yet

⁵⁷ "Death Penalty and Arbitrariness." *Amnesty International USA*. Amnesty International, n.d. Web. 2 Mar. 2015.

⁵⁸ "Studies News and Developments: 2007." Death Penalty Information Center, n.d. <http://www.deathpenaltyinfo.org/studies-news-and-developments-2007>. 12 Feb. 2015.]

⁵⁹ "Race and the Death Penalty." *DPIC*. Death Penalty Information Center. 13 Feb. 2015.

there are several challenges to the death penalty that can be made that focus on procedural defects. These objections include the selection of juries, the prosecutor's decision to prosecute for a capital or lesser crime, the court's choice to accept or reject a guilty plea, the jury's decision to convict for manslaughter or second-degree murder rather than capital murder, a defendant's right to an adequate lawyer, or the arbitrary application of the death penalty showcasing that those condemned to die are legally indistinguishable from those who are not given the death sentence. For instance, a study done by the Chicago Tribune found that 12% of those sentenced to death from 1976-1999 were represented by lawyers who were later disbarred or suspended, indicating that inadequate defenses are made which cloud death sentence verdicts.⁶⁰

The faulty argument of just sentencing decisions sanctioned by *Gregg* for which pro-death penalty supporters rest on are shaky at best with consideration of the procedural defects of the actual application of the death penalty within the modern system. Justice Stevens clearly elucidated this point in a 2008 concurring opinion made in *Baze v. Rees* when he elucidated that "decisions in 1976 upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application . . . arbitrary application . . . and . . . excessiveness."⁶¹ However, "more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders."⁶² Therefore, any system of morality set in supporting the death penalty must address this arbitrary and discriminatory nature of sentencing that still pervades. Even should they

⁶⁰ Armstrong, Ken & Mills, Steve. "Inept Defenses Cloud Verdict." Chicago Tribune. November 15. 1999.

⁶¹ *Baze v. Rees*, 553 U.S. 35 (2008).

⁶² *Id.*

attempt to justify the death penalty is morally permissible, the fact of the matter remains that since it is arbitrary and discriminatory in nature, modern capital punishment is unconstitutional.

As capital punishment's current imposition in the United States proves unjustifiable legally, can it still be accounted for by morality? As the traditional theories in defense of capital punishment are utilitarianism and retributivism, for an argument to be made that capital punishment is unjust, these theories must be refuted. In order to support the continuation of the death penalty, moral theories must adhere to these principles in their assertion of the just infliction of death as punishment.

Chapter 7

Can State Execution of Criminals Be Justified?

Execution as a means of legal punishment by the state has retained its draconian status throughout history. Some even posit that there exists no punishment greater in severity than death that remains both sanctioned and inflicted by the American government. At its core, capital punishment entails the idea that states have a legal right to use execution; however, this poses a fundamental contradiction often noted by theorists. Legal punishment entails a conflict with general morality: “How can the fact that a person has broken a just and reasonable law render it morally permissible for the state to treat him in ways that would otherwise be impermissible?”⁶³ As murder normally is morally forbidden due to life being conceived of as a rudimentary good, how can capital punishment be morally permissible? Can the human right to life be violated? If so, what are the conditions that prescribe the deprivation of this right? In order to answer this question, moral theories provide divergent accounts.

Accounts of utilitarianism and retributivism are traditionally used by philosophical and legal theorists in support of the moral permissibility of the death penalty. Utilitarianism advances capital punishment by making the crucial assumption of the ends justifying the means: imposition of the harsh sentence of execution deters future murders and protects society by taking a killer’s life. The third function commonly noted in utilitarianism’s theory of punishment is rehabilitation; however, rehabilitation is irrelevant in capital cases. Retributivism claims that the killing of murderers does not need further justification than the simple reality that the

⁶³ Boonin, David. "Overview." *The Problem of Punishment*. Cambridge: Cambridge UP, 2008. 1. Print.

punishment must fit the crime. All that matters in this conception is that the murderer gets what they deserve: a proportional punishment to the one they inflicted on their victim. Despite these allocations of the perceived justice of the death penalty, each theory must hold up to the verdicts outlining the permissibility of capital punishment as aforementioned. By adopting these theoretical frameworks and juxtaposing them with the guidelines delineated in Supreme Court cases, a moral evaluation of the current application of capital punishment can be made.

i. A Utilitarian Justification

*The purpose of punishment . . . is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.*⁶⁴

Of Crimes and Punishments, Cesare Beccaria, 1764.

Justification of capital punishment rests on a moral foundation concerning the state's right to legitimately inflict execution on a criminal as a means of punishment. Common morality dictates that the state should only implement this power in self-defense, as a protection measure of its citizens. This conception rather ubiquitously aligns itself with the utilitarian notion. As the

⁶⁴ Beccaria, Cesare, Richard Bellamy, Richard Davies, and Virginia Cox. "XII The Purpose of Punishment." *On Crimes and Punishments, and Other Writings*. Cambridge: Cambridge UP, 1995. 26. Print.

utilitarian aggregates punishment as a means of achieving social utility, the breadth of this legitimate scope extends to protection of others. Forward-looking utilitarianism dictates that the state proves legitimate in its execution of murderers due to its binary achievements: deterrence and incapacitation. In order for the consequentialist argument to prove successful in justifying execution as legal punishment, the death penalty is just if it is the only or most effective way to prevent substantial numbers of killings. Through a consideration of these forward-looking rationalizations in light of legislation and recent data, the imposition of the capital punishment can be rebuffed.

a. Protection Through Incapacitation and its Failure

Consequentialism operates as a value-based moral theory that posits legal punishment as morally permissible in respect of the outcomes it derives. Existing as one of the most prominent subsections of consequentialist ethical theories, utilitarianism asserts that punishment operates as a means to an end. Specifically, it accords legal punishment with achieving future goods such as rehabilitation of criminals, protection of society from the offender by incapacitation, and deterrence of potential transgressors. Social utility proves the ultimate measure for utilitarians in assessment of the moral permissibility of legal punishment. However, the matter of rehabilitation proves to be discarded in the utilitarian framework of the death penalty: by executing a criminal, there is no change for rehabilitation. Therefore, prevention and deterrence are the only utilitarian considerations left.

A common justification offered by supporters of the death penalty is that killing a convicted

murder will reduce the number of future murders. Complying with this line of thought, the utilitarian conception of protection by means of incapacitation finds support. Incapacitation makes repetition of crimes virtually impossible as the criminal is rendered harmless: by removing him from the public, he no longer poses a threat to innocent citizens. The argument of incapacitation often finds employment in capital punishment support rhetoric, as incapacitation in the death penalty is a permanent solution to the danger of an offender. By taking a killer's life, the death penalty's form of incapacitation prevents him from ever killing again. Despite the apparent simplicity of this argument, there proves a fundamental error to it.

Incapacitation exists as one of the social utility measures that are necessary to justify punishment for the utilitarian. However, how useful is incapacitation as a punishment for murderers? First degree murder convictions ordinarily receive the most severe sentences of any crime; however, these sentences can vary across states. After all, the "average time served for committing a criminal homicide is less than that spent on drug dealing offenses and the average murderer is released after only 6½ years."⁶⁵ These light sentences are usually the result of the absence of aggravating factors which result in a lesser sentence or the nature of the crime is deemed not severe enough to warrant the death penalty. In light of this fact, it becomes apparent how putting a criminal to death appeals as a measure taken to effectively stop potential recidivism. However, the failure of a system to put a murderer away for life does not warrant the imposition of the death penalty as an end all solution. Indeed, the only way to effectively use execution incapacitation as a method for responding to murderers would be to dictate mandatory death sentences. This line of reasoning results from the idea that preventing future murders requires the ultimate form of incapacitation by death instead of execution, so all murderers must

⁶⁵ Steffen, Lloyd. "The Moral and Spiritual Challenge of Capital Punishment." *Sacred Heart University*, 7 Mar. 2010. Web. 3 Mar. 2015.

be killed. *Woodson v. North Carolina* (1976) rejected the possibility for this in deciding that mandatory death sentences are unconstitutional as they fail to allow the consideration of special circumstances.

In addition, to state that the death penalty as incapacitation prevents future murderers presents an inherent assumption: that the offender probably will murder again, given the chance. While probabilities can be estimated for the chance of the criminal offending again, there exists no certainty in it. In fact, a study done by Marquart and Sorensen concerning the prisoners released from the *Furman* decision found that less than 1% of the paroled criminals reoffended with homicide.⁶⁶ Problematically, punishment through this justification holds the implication that it is alright to punish someone for potential future offenses, as long as it serves the overall good. Utilitarianism accounts for this perception of justice in its moral theory; however, this has been one of the issues critics have lambasted the theory for in the first place. Utilitarianism holds an explicit danger of exploiting individuals, as it allows for the sacrifice of the innocent or punishing the guilty more than they merit as long as it serves the social good. While the death penalty does incapacitate, one can only assert that incapacitation stops future crimes seen through a general trend at the very most. Even with this contention about the justification of capital punishment as means of a finite incapacitation, it does not prove morally justifiable in consideration that there exists another method of incapacitation that serves the function of both protecting innocent citizens and relieving the high costs of the death penalty: life without parole.

The six states who have abolished the death penalty since 2007 have shown a clear trend: life

⁶⁶ Robinson, Matthew. "Is Capital Punishment Just? Assessing the Death Penalty Using Justice Theory." *Journal of Theoretical and Philosophical Criminology 2nd ser.* 3.2 (2011): 27-66. Web.

without parole (LWOP) is the replacement for state-sponsored execution.⁶⁷ Indeed, life imprisonment has been the means by which states who do not impose the death penalty have chosen to punish murderers with. Mr. Justice Brennan affirms this notion in his concurrence with the *Furman v. Georgia* ruling. Responding to the charge of that state that death prevents commission of further crimes more so than any less severe punishment, he reveals the binary assumption to be addressed. First, execution is necessary to stop criminals from committing further crimes. He responds to this by stating that the threat of this criminal to society is removed by the “effective administration of the State’s pardon and parole laws [that] can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined.”⁶⁸ Other than the small chance of escape from prison, an incarcerated prisoner is incapacitated permanently from killing any innocent citizens. Studies have also found that murderers sentenced to life without parole are the least likely to kill someone in prison. Therefore, lifelong imprisonment proves an equitable manner in which to protect society, aligning with the goals of utilitarianism.

Proponents of capital punishment have met the argument that LWOP proves a viable alternative to execution for incapacitation as a means of protection with the contention it does not have the equitable level of severity that deters potential offenders. However, this assertion rests on tandem assumptions: that capital punishment deters murderers, and it deters offenders to a greater extent than LWOP. Therefore, to reject the death penalty from a utilitarian framework the case must be made that a less severe punishment such as LWOP deters as successfully as execution, or that capital punishment does not deter people from committing murder at all.

⁶⁷ "LWOP Post-Repeal." *DPIC*. The Death Penalty Information Center, n.d. Web. 2 Mar. 2015.

⁶⁸ Feinberg, Joel, and Hyman Gross. “Furman v. Georgia.” *Philosophy of Law*. 8th ed. Encino, CA: Dickenson Pub., 1975. 678. Print.

b. What is Deterrence?

Historically, punishments for criminals were extremely severe so as to derail other potential offenders and the criminal themselves from committing crime. Despite the fact that it prevented the original offender from further transgressing as they were often killed or incapacitated, it did not often avert future crime. Recognizing the failures of the current justice system during his time, Cesare Beccaria identified in his seminal work *On Crimes and Punishment* the foundation for a justified application of punishment. Allocating that the seizure of a man's freedom can only be justified by its use to society in the common good, Beccaria asserted that punishment must be lenient but inevitable to create a deterrent effect. Anything that exceeds these parameters he declares as abuse. Justice Brennan expresses this notion in his concurrence in *Furman v. Georgia* when he states that a punishment that "cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment" is unjust as it violates the clause that a state may not inflict punishments that violate human dignity.⁶⁹ Beccaria's ideals would come to form the basis for deterrence theory, which utilitarians have adopted in their justification for punishment.

Deterrence theory is often expressed in binary categories of specific and general. While specific deterrence aims at preventing the individual from reoffending, general deterrence targets the general population. Specific deterrence delineates the instance where an individual commits a crime and receives punishment for this offense. For instance, a person who drinks while

⁶⁹ *Furman v. Georgia*, 408 U.S. 238 (1972).

underage receives a ticket and further means of punishment in order to entice the offender to not drink until they legally can do so. General deterrence dissuades potential offenders from committing a crime by having them witness the punishment others receive when they do not abide by the law. Supporters of the death penalty have often used general deterrence as a method for justifying capital punishment; however, specific deterrence has been cited as the perpetrator cannot murder again once he is executed, saving innocent lives. However, specific deterrence cannot be met since the offender does not have a chance to reoffend due to his execution. The death penalty serves as incapacitation and not specific deterrence. The more pervasive argument is that since the death penalty is the harshest punishment a state can legally inflict, it will have the most powerful deterrent effect for the general populace. Therefore, capital punishment must be used instead of a less severe punishment such as LWOP.

c. Does The Death Penalty Deter Better Than Life Without Parole (LWOP)?

In criminal law, deterrence consistently appears to be inflicted extensively, as the dereliction to impose exacting punishments on illegal acts ostensibly culminates in the aggregate escalation of those crimes. Advocates of capital punishment habitually cite this phenomenon in their arguments, presuming that failure to impose the death penalty generates an appreciable surge in the quantity of innocent deaths. Deterrence theory's rationalization that penalties prevent further offenses however rests on three stipulations: that the punishment proves severe, certain, and swift. Individuals are dissuaded from perpetrating crimes only when punishment manifests as stringent enough to supersede the advantages gained from accomplishment of the misdeed,

assuredly dispensed as an inevitable reality, and distributed without delay. Absence of any of these aspects will result in the failure of disincentivizing crime; therefore, in order for punishment to appear as morally obligatory with its justification reliant upon deterrence, it must meet the triple criteria.

Proponents of the death penalty have often utilized the stringent standard of deterrence theory to assert that the austere nature of the sanction is merited, as opposed to a lesser sentence such as life without parole. Asserting that the severity of execution leads to diminished murder rates, the harsh penalty attempts to find grounds for vindication in its cost-benefit application. Deterrence theory alleges that people will not commit offenses if the negative consequences outweigh the potential benefits. Should these consequences not be severe enough, the offender is likely to commit the crime due to the cost-benefit evaluation. Adhering to deterrence theory, the imposition of death as a sentence renders the cost-benefit the negative consequence of being executed higher than committing murder in the potential offender's cost-benefit analysis. However, deterrence theory makes three critical assumptions in that it assumes people know the penalties for crimes, have control over their actions, and make the rational decisions to offend. Thus, they can operate on this cost-benefit analysis in which they decide whether the gain from their offense supersedes the peril of punishment. Rationalization of the death penalty therefore relies upon the assumption that, not only are murderers rational agents, but capital punishment proves a more significant deterrent than life without parole due to its severity.

Capital crimes are generally considered to be spontaneous occurrences that are emotionally driven as acts of passion. Due to this a large portion of murderers are unlikely to consider the punishment for their actions beforehand; therefore, they do not complete the cost-benefit analysis central to deterrence theory. As Justice William Brennan expresses in his concurrence in *Furman*

v. Georgia, it is not contested that many murders cannot be prevented by the threat of punishment as they are acts falling under the aforementioned conditions of not considering costs and benefits.⁷⁰ Instead, deterrence through execution is aimed at those rational actors who think about the consequences of committing their crimes. The idea holds that these potential killers who weigh the punishment they will receive from murdering someone will be less probable to commit the crime knowing they will be given the harsh sentence of execution. Therefore, consideration for deterrence in capital punishment solely concerns the proposed criminal who will not kill because they face the more severe punishment of death than life in prison. Justice Brennan addresses this conception in *Furman v. Georgia* when he states that an influential argument in support of the death penalty is that “the threat of death prevents the commission of capital crimes because it deters potential criminals who would not be deterred by the threat of imprisonment.”⁷¹ While evidence varies, one study finds zero effects of execution on deterrence and a substantial effect of prison conditions on crime rates. Indeed, there is no substantially conclusive evidence that indicates that more severe penalties result in greater deterrence in regard to capital crimes.

Some pose the argument that life without parole simply is not as severe as the death penalty; therefore, they are not equal in their deterrent value. Evidence does conflict on the effect of severity on deterrence in regard to capital punishment; therefore, there is no unassailable empirical basis for the assertion that the death penalty deters more than life imprisonment

⁷⁰ Feinberg, Joel, and Hyman Gross. “Furman v. Georgia.” *Philosophy of Law*. 8th ed. Encino, CA: Dickenson Pub., 1975. 678. Print.

⁷¹ *Id.*

without parole. In fact, there exists a widespread contention that life without parole can even be seen as severe enough to deter rational individuals as it is a sufficiently harsh penalty for capital crimes. Leon Scheleff's *Ultimate Penalties* argues that torture, life without parole, and capital punishment all constitute what he terms as the "ultimate penalties," as they reign incomparable in both their severity and morally objectionable nature.⁷² In essence of this, life without parole has been called death by incarceration, as prisoners die incarcerated. By its nature it can be just as severe as execution in divergent ways. LWOP prisoners die violently or because of their poor health due to prison conditions, seldom living to old ages and dying of natural causes. Giving someone LWOP due to these factors greatly increases their chances of a shorter life and a more painful death than otherwise. A study from the Death Penalty Information Center (2008) finds that 11% of the 1,099 executions dropped their appeals to be killed, sourcing this phenomenon to prisoner's finding a life sentence without parole more severe than an execution.⁷³ Even should potential murders be rational enough complete the cost-benefit analysis, life in prison without parole does not present itself as a more severe option readily apparent. Moreover, Justice Brennan renders the existence of such a person who rationally commits a capital crime knowing his sentence is life incarceration, but would not commit the offense if the penalty mandated death as implausible. Finally he attests "the available evidence uniformly indicates . . . that the threat of death has no greater deterrent effect than the threat of imprisonment."⁷⁴ The argument from severity in this case can be rejected, as life without parole presents a viable alternative to the

⁷² Scheleff, Leon. "Life Without Parole: America's Other Death Penalty." June 2008. Web. 6 March 2015.

⁷³ "Death Penalty Facts." *Amnesty International, USA*. June 2011. Web. 6 March 2015.

⁷⁴ Feinberg, Joel, and Hyman Gross. "Furman v. Georgia." *Philosophy of Law*. 8th ed. Encino, CA: Dickenson Pub., 1975. 678. Print.

death penalty in regard to deterrence.

As the severity of the death penalty has not been proven to be a greater deterrent effect than a lesser punishment such as incarceration, perhaps Cesare Beccaria's assertion that certainty of punishment instead of severity deters potential offenders proves correct.⁷⁵ The argument from certainty insists that the assured and unavoidable consequence of punishment for a crime gives the offender a clear example of what will happen to him if he offends. If a punishment is not assured then what would deter the offender from committing his crime? Scholars assert that certainty proves the most crucial component that must be assured for deterrence to achieve its desired effect due to this reasoning. Therefore, in order for capital punishment to have a deterrent effect, it must be certain that a murderer will be executed. Every year there are 22,000 homicides, even though only 300 people are sentenced to death.⁷⁶ Although execution amounts to a very harsh penalty, it cannot be a successful deterrent to murder due to the fact that about 1.5% of convicted murderers are sentenced to death row. A rational agent would not be deterred by capital punishment as they have a substantial reason to assume that they will not be executed, despite their commission of a capital crime. Justice Brennan elucidates that since the death penalty is imposed "in a trivial number of the cases in which it is legally available," it proves the arbitrary implementation of capital punishment, which "smacks of little more than a lottery system."⁷⁷ The death penalty's scarce certainty of infliction does not allow it to achieve a deterrent effect necessary for its justification.

⁷⁵ Beccaria, Cesare, Richard Bellamy, Richard Davies, and Virginia Cox. *On Crimes and Punishments, and Other Writings*. Cambridge: Cambridge UP, 1995. Print.

⁷⁶ Steffen, Lloyd. "The Moral and Spiritual Challenge of Capital Punishment." *Sacred Heart University*, 7 Mar. 2010. Web. 3 Mar. 2015.

⁷⁷ *Furman v. Georgia*, 408 U.S. 238 (1972).

Finally, the death penalty does not fulfill the mandate for deterrence, as it does not operate as a swift form of punishment. Deterrence theory asserts that an institution must be swift in delegation of its punishment via the time between the completion of the crime and the infliction of the punishment. However, most people on death row wait years to receive their execution. Inmates on death row in the United States generally await their execution for over a decade, but it can be even longer than that.⁷⁸ Potential murderers must complete the cost-benefit analysis of execution's severity for deterrence to have an effect, yet this rests on several assumptions. The probability that a criminal will be apprehended and sentenced with the death penalty must be assured; however, less than 2 percent of murderers are sentenced with capital punishment. In addition, the extensive periods of time between the perpetration of the offense, sentencing, and imposition of punishment make the chance of actually being executed distinctly miniscule. Overall, as the death penalty is not certain, nor is it swift, it does not fulfill two crucial aspects necessary for it to achieve a deterrent effect. Capital punishment's use as a more severe punishment to deter fails in consideration that rational criminals are not deterred by it due to its infrequency and prolonged time until imposition. As the purpose of punishment is to prevent crime in society as the means of social utility, utilitarianism cannot account for the continuation of capital punishment due to its failure to deter.

d. A Legal Rejection of Deterrence

In *Furman v. Georgia*, Justice Marshall assigned deterrence as the primary justification for

⁷⁸ "Time on Death Row." *DPIC*. Death Penalty Information Center, n.d. Web. 8 Mar. 2015.

capital punishment in the United States. Despite this, Richard Lempert's 1983 "Capital Punishment in the 80's" elucidates that the movement to eliminate capital punishment in the United States, which led to *Furman*, resulted from several social science studies indicating that the death penalty was unjust and did not deter. However, in *Gregg v. Georgia* the Supreme Court reinstituted capital punishment partially due to Isaac Ehrlich's article "The Deterrent Effect of Capital Punishment." Ehrlich's economic study cited that there was a deterrent effect of the death penalty, which resulted in less murders; however, this study has been markedly discredited.⁷⁹

The effectiveness of general deterrence has never been proven. A study by John Sorenson, Robert Wrinkle, Victoria Brewer and James Marquart examining data from 1984 to 1997 revealed that the number of executions was unrelated to murder rates, showing no deterrent effect. Evidence has even shown, in accordance with the brutalization effect, that murder rates rise after executions.⁸⁰ Stephen Schulhofer notes in particular the inconclusive nature of the evidence on deterrence: "whether punishment deters certain kinds of crimes at all, whether more severe penalties produce greater deterrence, even these basic questions cannot be answered with confidence."⁸¹ Indeed, Justice Brennan notes in *Furman v. Georgia* that there existed no evidence that death was a greater deterrent than life imprisonment. Furthermore, even if there

⁷⁹ See, for critiques of Ehrlich's work, Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment* (1981); Grogger, *The Deterrent Effect of Capital Punishment: An Analysis of Daily Homicide Counts* (1990).

⁸⁰ See "Effects of an Execution on Homicides in California" by Ernie Thompson. Thompson analyzed the rates of criminal homicides in L.A. before and after California's first execution after a 25-year moratorium. Thompson's study found that there were increases in homicides during the eight months after the execution. He found this evidence to support a brutalization effect.

⁸¹ Stephen Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*. 122 U. PA. L. REV. 1497, 1974. 1517. Print.

were to be a large deterrent effect from execution, the minuscule amount of executions each year and the uncertainty in which they are applied negates its potential deterrent impact.

A report made by the National Research Council of the National Academics in 2012 concluded that studies asserting a deterrent effect on murder rates from capital punishment are flawed. The report places the fault in these studies in that they do not account for the effects of noncapital punishments, they use incomplete models of potential offender's reactions to the death penalty, and estimates concerning the effect of execution are reliant on statistical models with not credible assumptions.⁸² In light of the flawed data presented by these studies, the National Research Council maintains that they should not be used when making policy decisions. Therefore the use of deterrence as a legal justification for the moral permissibility of execution as punishment fails. Even though some studies postulate that capital punishment fosters a minuscule general deterrent effect, most research posits that there is no conclusive evidence that execution deters murders and the evidence that does is faulty. Asserting that the simple possibility of deterrence justifies the institution without any supportive and legitimate data lends itself to the criticism most people assign to utilitarian models: it sacrifices the individual for the welfare of the whole. The lack of data revealing the effectiveness of deterrence as a means for prevention of murders allows for the discernment of deterrence as justification for capital punishment.

Under the United States Constitution, a penalty can be considered cruel and unusual punishment if it is excessive and does not serve a valid legislative purpose. Expressing the dominant function of the cruel and unusual punishments clause of the Eighth Amendment, Justice Thurgood Marshall in his concurrence in *Furman v. Georgia* asserts that capital

⁸² Nagin, Daniel, and John Pepper. *Deterrence and the Death Penalty*. Washington, D.C.: National Academies, 2012. Print.

punishment violates the Constitution if it is excessive or unnecessary. To assess if execution is an excessive or unnecessary penalty, Justice Marshall states that a consideration for why it is selected as a punishment must be made. In addition to this standard, a less severe penalty must not serve the function as well as the death penalty does. Should it violate these measures, capital punishment is rendered cruel and unnecessary in its infliction and therefore unconstitutional. Consequentialism alleges that punishing people for committing illegal actions is morally permissible due to the good consequences it brings about. This notion has appeared in the American criminal justice system in the form of deterrence, which has often been cited as a reason for the imposition of capital punishment. On these grounds, capital punishment appears morally obligatory if it is the most effective way to prevent murders. Therefore, in order for capital punishment to be considered as not violating the cruel and unusual punishment standard elucidated by Justice Marshall, it must be a superior deterrent than the lesser penalty of life without parole. However, the evidence has shown that this is not the case, as it falls under the cruel and unusual prohibition of the Eighth Amendment. Finally, capital punishment cannot be considered a protective measure for states, analogous to defensive killing, as it does not prove that it saves lives. A rejection must then be made for the defense of a state providing a moral foundation for state-sponsored execution.

ii. A Retributive Justification

The death penalty is said to serve two principal social purposes: retribution and deterrence of

*capital crimes by prospective offenders.*⁸³

Justice Stewart in writing his opinion of the court, 1972.

In the prominent case of *Gregg v. Georgia*, Justice Stewart elucidated the popular dichotomy of justifying capital punishment: legitimization from desert, or as a means to the end of achieving social utility by preventing further murders. As the death penalty has been proven to serve no greater deterrent value than life without parole, there exists no social utility in state-sponsored execution of criminals. However, there remains a pervasive moral contention in support of capital punishment that stems from the inherent nature of criminal punishment in society. It is the notion that murderers deserve to die.

Retributive theories have come to compose the primary justifications for criminal punishment in modern academic discourse. Justice has come to be viewed as imparting an individual with what they deserve, assigning punishment as the warranted repercussion to an offender's actions. This idea can be traced back all the way to Aristotle. In order to secure justice, criminals must be penalized as an end in itself. Retributivism has held a prolonged history in criminal justice, dating back to early societies with "eye for an eye" codes, which have come to be known as strict equality principles. Retributivists such as Immanuel Kant have endeavored to exert the ancient principle of *lex talionis* in criminal justice matters, proclaiming that equitable punishment encompasses the offender receiving the exact punishment he imparted on his victim. Other retributivists including Herbert Morris and Michael Davis focus on the unfair advantage gained by a criminal when they commit an offense. Punishment exists as a means to restore social equilibrium in this conception, and criminal sanctions can be proportional. Strict equality of

⁸³ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

punishment proves inapplicable, as it is not widely implemented considering we do not rape rapists or torture those who have tortured. It further does not prove obligatory for retributive justice, bearing in mind that we simply cannot give the exact punishment fitting the crime. Punishment has practical constraints: the serial murderer cannot be killed repeatedly, once for every person he has killed.⁸⁴ There exists further restrictions on retributive theories due to practical issues that display flawed notions. In particular, the *Fair Play* argument proves extraneous for consideration as it concerns the unfair advantage criminals gain over others through the commission of their crime. There exists cases where no discernible advantage presents itself, and the theory soberly ignores the offender who commits actions without regard for advantages— i.e., the drunk driver.⁸⁵ As a direct result, both the strict equality and *Fair Play* arguments can be jettisoned in consideration of justified punishment as they prove fundamentally flawed.

While the dichotomous factions of retributive theory did diverge in some aspects, they each converged on the general retributivist concept of desert that reigns crucial for examination. This principle entails that punishment of a criminal stems from the desert merited by offense. Therefore, a consideration of moral desert must be utilized in assessing any retributive conception of justified punishment, including the instance of capital punishment. Additionally, while the measure of strict equality in punishment (*lex talionis*) has been discarded due to the aforementioned cardinal fallacy, the retributive conception of proportional punishment remains necessary to address. Even though it is not obligatory to punish a criminal in the manner

⁸⁴ Pojman, Louis P., and Jeffrey H. Reiman. "Retributivist Theories." *The Death Penalty: For and against*. Lanham, MD: Rowman and Littlefield, 1998. 11. Print.

⁸⁵ *Id.*

identical to the crime, punishment can be commensurate with the magnitude of the offense.⁸⁶

Retributive theories accordingly impart this principle upon the death penalty debate, declaring that the correct amount of punishment imparted on a murderer is the amount that is proportionate to the offense of killing another human being. Ergo while it is not morally obligatory to adhere to the strict Kantian conception of equitable punishment that entails that if an offender “has committed Murder [he] must die,”⁸⁷ retributive theories assert that the punishment of a murderer must be proportional to his grave offense to carry out justice. Consequently, both the concept of desert and proportional punishment must be the only arguments addressed to reject a retributive defense of capital punishment.

a. Argument From Desert

Stemming from fundamental religious declarations of treating people as they treat others, a multitude of pro-death penalty advocates rely upon the retributive concept of justice for the condemned murderer. Retribution connotes justice by its very meaning, implicating murderers with the conviction that they deserve to die for their iniquitous actions. In order to reject this assertion, Stephen Nathanson articulates in his article “Should We Execute Those Who Deserve to Die,” that adversaries of capital punishment must uphold at least one of the binary propositions he delineates. Nathanson declares that the case must be made for either one of the following statements:

⁸⁶ *Id.*

⁸⁷ Kant, *supra* note 27.

1. People who commit murder do not deserve to die.
2. Even if people who commit murder deserve to die, it is wrong for the state to execute them.⁸⁸

While the first proposition provides a moral end in itself, the second reveals an inherent assumption made by advocates of capital punishment. Retribution's argument from desert postulates that murderers deserve to die with the tandem assumption that the state should execute them. However the assumption that wrongdoing merits punishment poses a unique question for analysis: why does it follow that punishment is obligatory just because an individual deserves it? Referencing David Dolinko (1991), the Stanford Encyclopedia of Philosophy notes there exists a conceptual gap in the argument from desert. The aperture between an individual "morally deserving something and others having a right to give it to her" can be seen through the example of a terrible son who inherits all of his father's estate, while the deserving and good son is left with nothing.⁸⁹ Even though one may believe that the latter son deserves to be bequeathed the estate, desert alone would not give anyone the right to take the property and bestow it on him, violating his rights.⁹⁰ As Stephen Nathanson points out, there are many means by which the government does not give allocate an offender with what they deserve precisely. For instance, Nathanson outlines that double jeopardy fulfills this notion, as the criminal justice system does not permit the retrial of an individual for a particular crime. If a person commits murder and is

⁸⁸ Nathanson, Stephen. "Should We Execute Those Who Deserve to Die?" *An Eye for an Eye: The Morality of Punishing Death*. Rowman & Littlefield. 1987. 42-59. Print.

⁸⁹ Walen, Alec. "Retributive Justice." *The Stanford Encyclopedia of Philosophy*. 2014. <http://plato.stanford.edu/archives/fall2014/entries/justice-retributive/>.]

⁹⁰ *Id.*

acquitted, but then later reveals he did commit the murder, he cannot be retried and punished even though he deserves to die.⁹¹ As desert cannot justify the transgression of rights, and the right to not suffer punishment pervades in modern society without justification, desert by itself cannot legitimize legal punishment.⁹² Therefore, the argument from desert alone does not allocate the provision of a morally correct justification for capital punishment.

b. Kantian Consideration of Desert and Error

Immanuel Kant's theory of punishment adheres closest to the dominant comprehension of retribution today. The philosopher's framework for his discussion of punishment ensues from his elucidation of the categorical imperative, which contrives a universal law. Placing importance on an individual's criminal act, Kant values individuals as ends in themselves. Kant's notion details that, instead of the utilitarian conception of an offender's punishment being a means to an end, a murder must be punished to rectify the imbalance they have created. By taking another's life, they have warranted their own punishment to restore order. Retribution under this ideology fosters a moral requisite to punish the deserving. In turn, this denotes a prohibition against punishing those who do not deserve it, as punishing a person without desert entails a violation of human dignity.⁹³

In the American criminal justice system, there exists room for error that results in the

⁹¹ Nathanson, *supra* note 88.

⁹² *Id.*

⁹³ Williams, Jennifer. "Seeing Executions as Breaching the Liminal Line." *Candler School of Theology*. 2012. 53.

punishment of innocent individuals. The punishment of innocents poses a concern for accounts of punishment concerning retribution, and it has been expounded prominently by detractors of the death penalty. As the penal system currently operates, there exists the distinct possibility of executing innocents. According to Amnesty USA, 138 people have been released from death row since 1973 due to wrongful convictions.⁹⁴ While the consequentialist would detail that the execution of innocents does not pose grounds for the abolishment of the death penalty as long as some social utility is served such as deterrence, the Kantian abstraction of retribution that is accepted by mainstream society would not. Death proves finite as a punishment: there is no room for correction. Rectification of an error made by a death sentence and subsequent execution reveals the very nature that death is different as a punishment. The violation of an individual's rights and thereby their dignity through the execution of an innocent renders capital punishment morally objectionable. Capital punishment also fails under consideration of the plausible application of the Categorical Imperative: as we must always leave room for redress when authorities commit an error, no system can be permitted that would allow for errors to not be redressed. The death penalty fails under the aforementioned criteria, as killing a prisoner who then later reveals to have been falsely convicted cannot be rectified. Despite the fact that innocents have been executed which renders capital punishment unjust in the popular Kantian conception, retributivism further reveals that it cannot allocate for the imposition of the death penalty due to another issue: the failure of proportionality in sentencing procedures.

c. Proportionality & Murder Sentencing

⁹⁴ "Death Penalty and Race." *Amnesty International USA*. Amnesty International, n.d. Web. 17 Mar. 2015.

As retributivism cannot account for strict equality or the *Fair Play* argument that Morris elucidated, the measure of proportionality in punishment must be addressed as a method of justification. While I have noted previously that our social institutions cannot account for exact equitable punishments doled to the offenders like that of which they inflicted on their victims, the measurement of proportionately in the everyday American criminal justice system can be seen. Retributivism asserts that punishment must be proportional to the magnitude of the offense, and any violation of this principle renders the punishment illegitimate. Proportionality dictates that punishing an individual more than they deserve is just as wrong as punishing an innocent individual. This notion of retributivism displays itself in the minimum and maximum sentencing statutes that guide the American legal system today. For instance, over 61 crimes carry mandatory minimum prison sentences while various offenses include maximum prison sentences as well.⁹⁵ Attempting to calculate the proportional punishment an offender should be met with, the legal system of United States codifies the idea that proportionality reigns crucial for justified punishment. Proportionality informs the system of minimum and maximum sentences; however, this matter proves complicated. There are various factors that influence the measure of what is proportional, especially in regard to murder charges. While Class-A felonies range anywhere from home invasion to murder, so do the minimum and maximum sentences. Specifically, murder and both felony murder are listed with a mandatory minimum sentence of 25 years and maximum of 60 years as Class-A felonies.⁹⁶ However, the classification of a capital felony

⁹⁵ Reinhart, Christopher. "Crimes With Mandatory Minimum Prison Sentences." *Crimes With Mandatory Minimum Prison Sentences—Updated and Revised*. N.p., 13 Nov. 2008. Web. 29 Feb. 2015.

⁹⁶ *Id.*

automatically allots a criminal execution or life imprisonment without possibility of release for both the mandatory minimum and maximum prison sentence.⁹⁷

The state classifies murder into two dominant degrees: first and second. Premeditated murders with intent and will along with malice aforethought are often referred to as first-degree murders. First-degree murders, including the murder of a police officer or other law enforcer, often are felony murder cases.⁹⁸ Second-degree murders are intentional with malicious aforethought; however, they do not have the requirement of premeditation or advanced planning.⁹⁹ Yet there are also voluntary and involuntary manslaughters. Voluntary manslaughter includes intentional killing with no prior intent, while involuntary manslaughter lack of intent but negligent behavior that leads to death. However, all charges of murder have the same underlying conception: the offender killed someone. Our commonsense morality might dictate that the man charged with involuntary manslaughter because he, as a ride operator, failed to perform a safety check of the ride that caused people to die¹⁰⁰ does not deserve to have the same sentences as a man who killed in cold blood. Or what of the drunk driver who accidentally kills three kids? Despite the fact that they killed someone, we do not believe as the strict retributivist does that they deserve to be killed in turn. Thus we see the reflection of proportionality in punishment that the retributivist allows for with respect to murders that are not intentional or premeditated.

What merits a charge of a Class-A felony of murder or felony murder that precludes a

⁹⁷ *Id.*

⁹⁸ "First Degree Murder Penalties and Sentencing." *FindLaw*. N.p., n.d. Web. 1 Mar. 2015.

⁹⁹ *FindLaw*, *supra* note 41.

¹⁰⁰ "Involuntary Manslaughter Overview." *FindLaw*. N.p.; n.d. <http://criminal.findlaw.com/criminal-charges/involuntary-manslaughter-overview.html>. 1 March 2015.

murderer from getting the death penalty? Do they not also deserve to have the strict equality of being killed themselves? No. Retributivism only accords that they deserve what is proportional, but how is one murder different from another? Do not all murderers simply deserve to die? How can the sentences for the same act of intentional, premeditated murder be different according to a retributive theory and still align with justified punishment by state execution? Do not they all deserve the same punishment, the one they deserve for murder? If we are to model the current system's application of capital punishment, it must prove that the offender gets what they deserve. These varied laws and sentencing guidelines showcase the ideology that not all people who commit murder deserve to die, reflecting moral arbitrariness in sentencing procedures. While retributivists allege that every murderer deserves to die therefore every murderer should be executed to have proportional and equitable punishment, less than 2% of murderers are put on death row. In this instance, I would argue that even if one alleges that the offender deserves to be executed by the state, the arbitrary application of the death penalty and proportional punishment lead to the rejection of execution by the retributivist.

d. A Legal Rejection of Proportionality

Composing the crux of concern for death penalty case law in the United States, the Eighth Amendment prohibits the infliction of cruel and unusual punishments that can be typified as disproportional. Standards delineated by the Eighth Amendment have evolved over time, as reflected by the wide array of Supreme Court cases concerning the influential amendment. In

particular, the case of *Weems v. United States* (1910) imparted a substantial interpretation of the proscription of cruel and unusual punishments. The Court interpreted the amendment to regard legitimate punishment as proportional to the crime committed, thus barring excessive punishments. Effectively, the Eighth Amendment was contrived to place the legitimization of punishment reliant upon proportionality. However, the American criminal justice system reveals a critical flaw in its consideration of proportionality: as mandatory sentencing procedures are outlawed for the death penalty via *Woodson*, small groups of individuals evaluate and sentence what punishment is proportional. Sentencing guidelines resulted from the Supreme Court case of *Gregg v. Georgia*, in which the Court affirmed that the death penalty mandated such principles to eliminate arbitrariness and discrimination. *Gregg*'s imposition of guided discretion mandated that lists of circumstances be given to sentencing individuals to codify what rationalizations can be used to sentence death. The Court's decision in *Gregg* has produced a lasting effect on sentencing procedures for capital punishment; however, guided discretion has not eliminated the arbitrariness in what is deemed proportional punishment.

Charges for the same act of intentional, premeditated murders vary widely in the American criminal justice system. Distinguishing sentences based on proportionality, in combination with the factors delineated by the law, encompasses other considerations: aggravating and mitigating factors which vary across districts. Aggravating factors include the offender's background, which can lengthen their sentence, while mitigating factors indicate to the sentencing court the offender "deserves a lighter sentence than they would normally receive without the presence of the mitigating factors."¹⁰¹ These factors that substantially impact the punishment a person

¹⁰¹ "Second Degree Murder Penalties and Sentencing." *FindLaw*. N.p., n.d. <http://criminal.findlaw.com/criminal-charges/second-degree-murder-penalties-and-sentencing.html>. 1 Mar. 2015.

receives for the same generalized action of murder showcase the room left for arbitrariness in providing proportional punishment. It can also be said that the application of consideration for mitigating factors in the American justice system proves problematic. For instance, a system such as the American one that does not consider poverty a mitigating factor, but does allege that a first offense from someone with good character witnesses is proves contentious. Moreover, proportionality in sentencing procedures has been misguided by discriminatory factors such as race. Capital punishment has proven historically to be “subject to the contingencies of social, historical, and political context, which is clear from the way race, gender, and class have over the centuries been factored into decision-making about criminal justice in general.”¹⁰² Perhaps the clearest indication of the influence of discriminatory factors on sentencing procedures concerning proportional punishment is that African-Americans compose one-third of all the people executed since 1977 according to Amnesty USA.¹⁰³ Prosecutors also seek the death penalty vastly more often when a murder victim is white than any other ethnicity.¹⁰⁴ The criminal justice system clearly experiences influence by factors that should not prove consequential to sentencing processes, yet the persistent matter of the situation is that they do. As retributivists cannot account for the failures of the death penalty system in regard to arbitrariness in proportionality, capital punishment can be rejected on the moral grounds of retributivism.

¹⁰² Steffen, Lloyd H. "The Right to Life, Liberty, and Security." *Executing Justice: The Moral Meaning of the Death Penalty*. Cleveland, OH: Pilgrim, 1998. 33. Print.

¹⁰³ "Death Penalty and Race." *Amnesty International USA*. Amnesty International, n.d. Web. 17 Mar. 2015.

¹⁰⁴ *Id.*

Chapter 8

Conclusion

*If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishments violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.*¹⁰⁵

Furman v. Georgia (408 U.S. 238), Mr. Justice Brennan concurring and stating the guidelines for a punishment comporting with human dignity, 1972.

Paramount to the query of what justice necessitates prevails the concernment of punishment.

Legal punishment has comprised a substantial issue for both philosophers and legal theorists

¹⁰⁵ Feinberg, Joel, and Hyman Gross. “Furman v. Georgia.” *Philosophy of Law*. 8th ed. Encino, CA: Dickenson Pub., 1975. Print.

alike to examine, as it questions the very nature of the legitimate exertion of the restriction of human rights. No realm proves more contentious in this area than the imposition of state-sponsored execution as a form of legal punishment. In particular, death as a punishment historically has been considered divergent from other criminal sanctions due to its disparity in consideration of morality. Traditionally, the death penalty has been vindicated on dichotomous foundations: because it serves some social utility, or it proves legitimate as it serves retributive justice.

Traditionally, consequence-reliant promotions of the death penalty assert that the execution of a murderer achieves the best outcome for the greatest number, which is why it is morally permissible. However, the results of any action in these theories must be pitted against every other course of action. These courses of action must aim at the optimal consequences. As Beccaria asserted, “punishments are unjust when their severity exceeds what is necessary to achieve deterrence.”¹⁰⁶ Capital punishment clearly proves inadequate in achievement of the triple criteria for deterrence due to its infrequent imposition, delayed sentencing procedures, and severity standard that can be met through life without parole. Furthermore, it provides no chance at rehabilitation, and serves the same purpose as life imprisonment under the incapacitation prong. Therefore, the best outcome is met by the abolishment of the death penalty. Even should a deterrent value be proven as a result from the death penalty, consequentialist theories reveal a fundamental flaw in morality. As there is a moral prohibition against murder in general, a substantial contention can be made that execution is still morally reprehensible even if it had advantageous consequences. Overall, the utilitarian defense for capital punishment can be rejected as it subverts agent-relative considerations for agent-neutral ones that allow for the

¹⁰⁶ Beccaria, Cesare, Richard Bellamy, Richard Davies, and Virginia Cox. *On Crimes and Punishments, and Other Writings*. Cambridge: Cambridge UP, 1995. Print.

sacrifice of an individual for social utility.

Retribution has always been a pivotal component of the foundation for the American criminal justice system, and this has revealed itself explicitly in justification for the death sentence. The notion of an offender deserving their punishment has revealed itself in multiple areas of legal sentencing, including Supreme Court verdicts on capital punishment. Holding that retribution pervades as an admissible justification of the death penalty in *Gregg v. Georgia*, the notion of desert clearly poses a central component of capital punishment's legal legitimization. However, while murderers might deserve to die, it still can be wrong for the state to impose death as a penalty upon them. As justice in capital cases concerns procedural aspects of sentencing determined by *Gregg* to negate arbitrariness and discrimination, retributive justice must take into account these procedures to assess whether proportional punishment truly is imposed. Since the current justice system reveals issues of procedural fairness that indicate a flawed justice system prone to irrelevant factors in sentencing, the state's execution of criminals cannot be justified. Executions do not prove to be morally permissible in this sense, as the state fails to address social injustices that inflict disproportional punishments. Since retributivists cannot account for the failures of the death penalty system with concerns of arbitrariness that influences the proportional requirement, a retributive moral theory cannot legitimize punishment by execution.

While both a legal and moral examination was adopted in this thesis to delve into the legitimacy of execution as a legal punishment, a consideration of the strict moral argument entailing that murderers deserve to die was partially discarded. Although this thesis addressed that many retributive arguments stem from the foundation of desert being inherent to the capital punishment argument, emphasis was placed on the contention that even if this proved true, state executions cannot be justified due to their procedural faults. The inherent concept that murderers

deserve to die stems from historical foundations of criminal justice; however, it revealed more crucial that capital punishment could not be justified despite these assertions. Further work on the nature of desert and how it has come to formulate such a substantial component of one of the most highly contested forms of legal punishment in modern society would prove invaluable.

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