

**No Due Process:
How the Death Penalty Violates the Constitutional Rights of the Family Members of
Death Row Prisoners**

On May 25, 2001, Shakeerah Hameen stood behind a Plexiglass wall at the Delaware Correctional Center and watched as the state of Delaware dripped lethal chemicals into her husband, Abdullah Hameen, as he lay strapped to a gurney. He was killed at midnight and buried before the day ended, but Shakeerah was too ill to attend his burial. After watching the state kill her husband, she physically and emotionally fell apart. She developed an intense migraine headache, had diarrhea, and had a bad asthma attack. Her blood pressure skyrocketed. Over the subsequent days she did not improve. The asthma turned into a bronchial infection and the diarrhea persisted. Her breathing became so labored that she could not be alone.

For three months, Shakeerah was too ill to go to work. Besides the physical illness, she teetered on insanity, barely able to function. Although she was a devout Muslim, she was too depressed to pray. After three months, Shakeerah returned to work, but she was too weak to work full-time. In fact, Shakeerah never regained sufficient strength to return to work full-time. Five years after the execution, the highly-talented and once vital woman still struggles to maintain herself and her family.

After Abdullah's execution, his son, called "Little Hameen" by the family, attempted suicide with a drug overdose. His depression and anger interfered with his ability to continue with his education. He started getting into trouble with the law and ultimately was charged with capital homicide, the same as his father.¹

¹ Rachel King, *CAPITAL CONSEQUENCES: FAMILIES OF THE CONDEMNED TELL THEIR STORIES*, 87-122 (Rutgers University Press 2005).

Unfortunately, these stories are not unique. Since the death penalty's reinstatement in 1976,² an estimated 7,600 people have been sentenced to death.³ Researchers estimate that for every person on death row at least eight people, either family members or close kin, are closely affected by that sentence.⁴ Not all of the condemned prisoners have been, or will be executed,⁵ but their families still suffer horribly from the process of a death penalty prosecution.

Many scholars and advocates have spent years developing theories to challenge the constitutionality of the death penalty from the point of view of the condemned person. These challenges have been brought primarily under the Eighth Amendment, but also under the equal protection clause of the Fourteenth Amendment. Some commentators have even suggested a substantive due process challenge to the death penalty.⁶ However, no one has yet to challenge capital punishment from the perspective of the family members who are intimately, and tragically, affected by the punishment. This article

² The year 1976 marks the beginning of what is called the "modern era" of the death penalty in the United State. In 1972, the Supreme Court struck down all death penalty statutes in the case of *Furman v. Georgia*, 408 U.S. 238 (1972), on the grounds that the way the penalty was administered was so arbitrary and unfair that it violated the Eighth Amendment. As a result of that ruling, all prisoners on death row at that time had their sentences commuted to life in prison. States quickly revised their capital punishment statutes and in 1976 the court upheld some of the newly revised statutes in the case of *Gregg v. Georgia*, 428 U.S. 153 (1976), reinstating the death penalty.

³ For years 1977-2004, see Capital Punishment Statistics, United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2006) available at: <http://www.ojp.usdoj.gov/bjs/cp.htm>; for 2005, see Capital Case Data Project of the American Judicature Society (March 2006) available at http://www.ajs.org/jc/death/jc_death.asp.

⁴ Estimate by Professor Susan Sharp, a sociologist at the University of Oklahoma.

⁵ According to the most recent statistics kept by the NAACP LDF: 1016 people have been executed since the resumption of executions, and 3377 people are on death row in the United States – 1,451 of those are in only three states: California, Texas, and Florida. See *Death Row USA*, NAACP LDF, April 2006 available at: <http://www.naacpldf.org/content.aspx?article=297>.

⁶ Ursula Bentele, *Does the Death Penalty, By Risking Execution of the Innocent, Violate Substantive Due Process*, 40 HOUS. L. REV. 1359 (2004) and Daniel Bird, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329, (2003). The author would like to acknowledge that she relied heavily on these excellent articles. See also Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789, 811-813 (1996) (suggesting substantive due process challenges to the death penalty since Eighth Amendment challenges are failing). These scholars use the right to life as the basis of the challenge, as opposed to the right to liberty that I am suggesting.

makes the case that the death penalty violates the constitutional rights of the family members of the death row inmates.

Part I establishes standing for the family members to sue. There is a long line of Supreme Court precedent establishing a fundamental right to marry,⁷ to procreate and to live with ones' family members. I have summarized the holdings of these cases as "the right to family." This right has been articulated and protected by the substantive due process clause of the Fourteenth and Fifth Amendments. As such, it is protected by the most stringent of all constitutional standards – strict scrutiny. The right to family can only be intruded upon if there is a compelling state interest, and even then the law must be narrowly tailored. The death penalty interferes with this "right to family" by irrevocably harming the family. The harm occurs even if the family member is not executed. Therefore, anyone who has a family member charged with a capital crime would have standing to claim a violation of his or her due process rights.

Part II sets forth the harm suffered by family members of capital defendants giving examples of how the death penalty harms parents, children, spouses, siblings and extended family. The harm comes not just from the prosecution of the case, but from the greater community as well. By labeling a person as worthy of death, the death penalty prosecution stigmatizes the death row families creating a situation whereby they experience shame and harm from the larger society.

Part III shows there is no compelling state interest because the death penalty has failed consistently over decades to fulfill the policy goals for which it exists, namely deterrence, retribution, incapacitation and denunciation and vindication of legal order,

⁷ The right to marry is limited to when there are only two individuals, see *Reynolds v. United States*, 98 U.S. 145, 164-66 (1878) (holding religious practice does not prohibit prosecution for polygamy) and, in most states, when the two individuals are of the opposite sex.

which I am calling “restoration of societal norms.” This failure is both penological and philosophical.

Part IV argues that lesser forms of punishment, such as lengthy prison sentences including life in prison without parole, are more narrowly tailored to accomplish the goal of punishing offenders, without causing the tremendous and irreparable harm to the family structure.

Part V addresses other issues such as who has standing to bring the claim, how would it be brought, and could the theory be applied to other types of punishment.

I. The Constitution Protects the Right to Marry, Procreate and Create a Family – it provides a protected “Right to Family”

The Fourteenth and Fifth Amendments to the United States Constitution provide that no person shall be deprived of life, liberty or property without due process of law. “Life” and “property” are terms that are more or less easily described, but the more amorphous concept is liberty. Liberty is more than just freedom from unfair incarceration; it includes the right to pursue a life and protects certain fundamental aspects of life, most especially the right to a family.

Family relationships are such an integral part of our legal system that family members are allowed to act on behalf of other members of their family in situations where that person cannot, or will not, act on his her own behalf. For example, in *Cruzan v. Missouri Department of Health*, the parents of Nancy Cruzan petitioned to have life support removed from their comatose daughter.⁸ Similarly, family members frequently act as “next-of-friend” bringing appeals on behalf of death row prisoners who have

⁸ 497 U.S. 261 (1990). Although the Court denied the Cruzan’s petition on substantive grounds, there was never any challenge to their legal standing to act on their daughter’s welfare.

chosen not to continue them.⁹ Again, this shows that family members have a legal interest in the welfare of the person on death row that courts have consistently recognized.

Indeed, the family relationship is such a fundamental core aspect of our legal system that we take it for granted. In a long line of cases, stretching back nearly a century, the Supreme Court has articulated an evolving jurisprudence that defines the parameters of the right to family that is a liberty interest protected by the substantive due process clause of the Fourteenth and Fifth Amendments.

1. The Substantive Due Process Clause Protects the Parent/Child Relationship

The general parameters of this Fourteenth Amendment's liberty interest were set out in *Meyer v. Nebraska*,¹⁰ a case that dealt with a statute that forbade teaching German in public schools.¹¹ On its face, one would not think that a law forbidding foreign language instruction would implicate constitutional rights, but in striking down this law, the Court used the case to set forth the liberty rights protected by the substantive due process clause, recognizing the right to "marry, establish a home, and bring up children."¹²

The Court said:

While this [C]ourt has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the

⁹ Family members frequently seek to act on behalf of condemned death row prisoners who have chosen to give up their appeals. Courts typically permit family members, or other close associates, to act on behalf of prisoners when they are incompetent to make the decision to end their appeals. See for example, *Dennis v. Budge*, 378 F. 3d 880 (9th Cir. 2004); *Vargas v. Lambert*, 159 F.3d 1161 (9th Cir. 1998); *Commonwealth v. Haag*, 809 A.2d 271 (Pa. 2002).

¹⁰ 262 U.S. 390 (1923) (Court struck down a statute that forbid teaching German in public schools on grounds that it violated a parents' liberty interest in planning their children's education).

¹¹ In another education-related case, the Court upheld the right of parents to educate one's child as they choose. *Pierce v. Society of Sisters*, 268 U.S. 510 (1923).

¹² *Meyer*, 262 U.S. at 399.

right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of free man. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts¹³

This seminal case gives standing to family members to challenge laws that implicate the family, and established the supremacy of the courts to review the states' use of police power in those situations that interfered with the family relationship. In *Meyer* the parents had standing to sue because of their interest in their relationship with their children, and their interest in what happened to their children.

Similarly, the parents of death row inmates have an interest in what happens to their children. Of course, the rights of the parents to make important decisions regarding their children do not trump the rights of the state in all instances, but the Supreme Court made it clear in *Meyer* that the police power must be narrowly tailored, and it is the duty of the Court to oversee that authority to make sure that the legislative action is not “arbitrary or without reasonable relation to some purpose within the competency of the state to effect.”¹⁴ As will be demonstrated later, the manner in which the death penalty is applied is arbitrary and therefore is not a reasonable relation to the purpose for which it is in effect.

¹³ *Meyer*, 262 U.S. at 399-400 (citations omitted).

¹⁴ *Id.*

The parameters of the parent child relationship were explored in a series of child custody cases starting with *Stanley v. Illinois*.¹⁵ In this case, a natural father, who had raised his children from birth with the mother of the children (to whom he was not married), lost custody of his children, without a hearing, after the mother died under an Illinois statute that presumed that since he had not married the mother he was, ipso facto, an unfit parent. The Supreme Court reversed, holding that the due process clause mandated that Stanley be entitled to a full custody hearing.¹⁶

Stanley's right to have a relationship with his children stemmed both from the fact that he was the children's biological father, but also from the fact that he had been living with the children and raising them.¹⁷ The Court found that Stanley's parental relationship was entitled to substantive due process protection. Similarly, the strength of the relationship between parents and their children, even if one or the other of them is on death row, should be entitled to protection under the substantive due process clause.

2. The Substantive Due Process Clause Protects the Right to Marry and Procreate

In the later part of the 20th century, the cases addressing the "right to family" have evolved largely in the context of expanding privacy rights associated with marriage, procreation and sexuality. In *Skinner v. Oklahoma*, the Court addressed the issue of whether a state could pass a law requiring mandatory sterilization for third time felony

¹⁵ 405 U.S. 645 (1972).

¹⁶ *Id.* at 657-58.

¹⁷ In a subsequent case, the Supreme Court upheld a Georgia law that permitted a stepfather to adopt the child of his wife without first obtaining the consent of the natural father, when the natural father had had an intermittent relationship with his child but had never sought to obtain legal custody of him. *Quilloin v. Walcott*, 434 U.S. 246 (1978). ("Best interest of the child" overrode a natural father's right to block adoption of his child when the child wanted to be adopted by the stepfather and had been living with him and his mother for nine years).

offenders.¹⁸ In striking down the statute the Court stated, “We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”¹⁹

The right to marry, and to enjoy a marital relationship without interference from the state, was addressed in *Griswold v. Connecticut*.²⁰ In a slightly different twist, the Court upheld the right of a married couple *not* to procreate and struck down a law which prohibited a married couple from using contraceptives on the grounds that it unduly burdened marital privacy. The Court stated that the rights guaranteed in the Bill of Rights are themselves protected by “penumbras, formed by emanations” that gave the rights “life and substance.”²¹ Prohibiting the use of contraceptives impeded several fundamental constitutional rights that had a “maximum destructive impact upon that relationship.”²² In describing the marriage relationship, the Court wrote:

We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet is an association for as noble a purpose as any involved in our prior decisions.²³

The right to marry was again affirmed in *Loving v. Virginia*, where the Court struck down a miscegenation statute, once again affirming, “The freedom to marry has long been

¹⁸ 316 U.S. 535 (1942).

¹⁹ *Id.* at 541.

²⁰ 381 U.S. 479 (1965).

²¹ *Id.* at 484.

²² *Id.* at 485.

²³ *Id.* The right to use contraceptives was extended to non-married people in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

recognized as one of the vital personal rights essential to the orderly pursuit of happiness.”²⁴

The fundamental right to marry was the rationale for striking down mandatory leave laws for pregnant women²⁵ and a law that required a non-custodial parent, who was under a court order to pay child support, to get court approval before marrying.²⁶

The legal, and moral, sanctity of a marriage does not end just because a person is charged with a capital crime or sentenced to death.²⁷ A convicted offender may lose his liberty rights to the extent that the state may incarcerate or execute him, but the state has no interest in terminating the marriage relationship, even if one member of the couple is on death row. The death row family member should have standing to challenge the death penalty on the grounds that it interferes with the sanctity of their family relationship.

3. The Substantive Due Process Clause Protects the Sanctity of the Family

The Court further articulated the “right to family” in *Moore v. City of East Cleveland*²⁸ when it struck down a housing regulation that limited occupants of a single family dwelling to people recognized as members of the immediate family. Mrs. Moore was prosecuted for living with her son and two grandsons in violation of a city housing ordinance, which she argued violated her substantive due process rights. The city urged the Court not to “expand” substantive due process rights noting that nothing in prior case

²⁴ 388 U.S. 1, 11 (1967).

²⁵ *Cleveland Board of Education v. LaFluer*, 414 U.S. 632 (1974).

²⁶ *Zablocki v. Redhail*, 434 U.S. 374 (1978)(striking down a Wisconsin statute that required a person paying child support to obtain court approval before marrying).

²⁷ I know of no instances where a marriage was ended because a person was sent to prison or death row. Indeed, a prisoner has a constitutionally-protected right to marry even after he is incarcerated. *Turner v. Safley*, 482 U.S. 78 (1987).

²⁸ 431 U.S. 494 (1977).

law “gives grandmothers any fundamental rights with respect to grandsons.”²⁹ The Court disagreed that it was “expanding” substantive due process rights, stating that:

[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history (and), solid recognition of the basic values that underlie our society. Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.³⁰

Again, the Court reaffirmed the right to family as a cherished cultural value, and at the same time made it clear that this right did not only apply to the immediate nuclear family, but extended to grandparents (and presumably other extended family relationships) as well.

The Supreme Court has addressed the sometimes conflicting values between the rights of biological family members versus those living together as a family. A decisive case discussing these conflicting rights was the case of *Michael H. v. Gerald D.*³¹ While married to Gerald D., Carole gave birth to a child, Victoria, fathered by Michael H., with whom she had been having an adulterous affair. For the next several years, Carole and Victoria lived at various times with Gerald D. and Michael H., both of whom held the child out to be their daughter. Eventually, Carole settled down with her husband Gerald and had two other children with him.

Michael H. sought custody and visitation with Victoria, who was indisputably his biological daughter, and with whom he had established a relationship. Under California law, if a child was born to a married couple, it was presumed to be a child of the

²⁹ Moore, 431 U.S. at 500.

³⁰ *Id.* at 503.

³¹ 491 U.S. 110 (1989).

marriage, and only the husband or wife had standing to challenge the legitimacy of the child, except in limited circumstances.

Michael H. argued that the California statute violated his substantive due process right to a relationship with his child. The Court disagreed. In upholding the statute, the Court looked at history and tradition as the basis for determining questions of substantive due process. Writing for a 5-4 majority, Justice Scalia, pointed out that historically the family unit had been protected; whereas there was no tradition or history of protecting biological fathers who had children out of wedlock.³²

[T]he legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family against the sort of claim Michael asserts.”³³

In the cases post *Michael H.*, the Supreme Court has begun placing more and more emphasis on the importance of examining history and legal traditions in cases where the parties assert substantive due process rights. In *Washington v. Glucksberg*,³⁴ four physicians and a group of terminally ill patients challenged Washington State’s law that banned assisted suicide on the grounds that it violated substantive due process. In upholding Washington’s ban on assisted suicide, the Court wrote a lengthy, detailed analysis of the history of laws prohibiting suicide and assisting suicide, and articulated a test for determining substantive due process claims:

³² In his dissent, Justice Brennan argued that Scalia’s methodology of defining fundamental interest was misguided. He suggested that the “tradition” at issue was that of parenthood, not the “tradition” of raising children in an intact nuclear family. Brennan suggests that had the issue been framed differently, Michael H. would have prevailed. *Michael H.*, 491 U.S. at 142 (Brennan, J. Dissenting).

³³ *Id.* at 124.

³⁴ 521 U.S. 702 (1997).

Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive due process cases a “careful description” of the asserted fundamental liberty interest.” Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decision making,” that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores*, the Fourteenth Amendment “forbids the government to infringe... ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”³⁵

The families of death row inmates meet all the requirements set forth in *Glucksberg*, and their “right to family” should be protected by the substantive due process clause.

Conclusion

As the above cases illustrate, the right to family, which includes the right to marry, procreate, or not, and live with family members, is deeply rooted in our nation’s history and tradition. It is a right that is recognized by all members of the Supreme Court from the most liberal to the most conservative. The families of death row prisoners have rights protected by the substantive due process clause, which meet the test articulated in *Glucksberg*.³⁶ They have a right to have a relationship with their family member, be it spouse, parent or extended family member, a right that is deeply rooted in our nation’s history. This right has been carefully described and defined in a series of Supreme Court cases stretching back nearly a century.³⁷

³⁵ *Glucksberg*, 521 U.S. at 719.

³⁶ *Id.*

³⁷ The issue of how to “carefully describe rights” came into play in the recent opinion from the D.C. Circuit Court of Appeals in the case of *Abigail Alliance for Better Access to Developmental Drugs vs. Andrew von Eschenbach and Michael Leavitt*, 445 F.3d 470 (D.C. Cir. 2006). In *Abigail Alliance*, the plaintiffs sought access to Phase II experimental cancer drugs on the grounds that they had a substantive due process right to have access to drugs that had been found during Phase I trials to be safe, but had yet been approved

Family relationships are the powerful glue that holds together our society. Those relationships are not diminished when one family member is no longer living physically with the others. Children move away to college or join the service, spouses live separately from each other to pursue careers or other interests, grandparents leave their families to travel or live in warmer climes, but this physical separation does not make them any less of a family member. So too, if a family member is separated because of a death sentence, that person is still a part of the family, and the family still suffers from the loss of that relationship.

When the state charges, prosecutes, convicts and executes a person the state is interfering with the constitutionally protected family relationships of that person. The constitutional remedy is not limited to those families where a family member has been executed, nor is it limited to cases involving innocent family members. The imposition of a death sentence, whether on an innocent or guilty person, irrevocably destroys family life. Because a death sentence impinges on constitutionally-protected family relationships, the government must show a compelling state interest in order to justify the continued use of death penalty statutes.

for commercial distribution. The District Court had dismissed the plaintiffs' case on a summary judgment motion, but the D.C. Circuit Court reversed. The majority opinion stated that a terminally ill patient has a substantive due process right to access experimental drugs that could potentially save her life. Under *Glucksberg*, the majority described the right as "a right of control over one's body" that "has deep roots in common law." *Id.* at 480. The dissent disagreed. It stated that there is no "right" to have access to experimental drugs, and that under *Glucksberg*, lower courts have no constitutional authority to expand substantive due process "rights." This opinion points out a flaw in *Glucksberg*, which is who decides how to define the right at stake. Regardless of the ultimate outcome of *Abigail Alliance*, the issue of who describes the right is not a concern with my theory, because the right to pursue family relationships has a long history, and has been articulated in many different factual scenarios ranging from educating ones' children (*Meyer*) to access to birth control (*Griswold and Eisenstadt*) to custody decisions (*Michael H.*).

II. The Death Penalty Infringes Upon the Constitutionally-Protected Right to Family

1. The Prosecution of Capital Cases Causes Physical and Emotional Trauma

In order to determine whether the death penalty is sufficiently narrowly tailored to survive a substantive due process challenge, one must first determine the right to be protected, and then determine if the government interest is sufficient to justify interference with that right.³⁸ Since the right to family has already been identified as worthy of substantive due process protection, this section examines how the death penalty interferes with those constitutionally-protected relationship.

There is not a large body of literature on the subject of the effects of the death penalty on families, but within the literature there is sufficient research to establish the harm done to families.³⁹ There are no firm numbers, but one expert estimates that every person on death row (3,373 as of January 2006)⁴⁰ has on average eight significant family relationships including children, spouses, parents, extended family and “fictive kin” (non-family members who are so close to the prisoner that they are in effect, his family).⁴¹

The decision to charge a person with a capital crime immediately isolates and condemns the family members of the defendant. The stigma associated with such a

³⁸ Glucksberg, 521 U.S. at 721-22.

³⁹ This article relies on five sources for its information about the effect on the families of capital defendants. Rachel King, *CAPITAL CONSEQUENCES: FAMILIES OF THE CONDEMNED TELL THEIR STORIES*, (Rutgers University Press 2005) (documenting the experiences of nine families of capital defendants); Susan Sharpe, *HIDDEN VICTIMS: THE EFFECTS OF THE DEATH PENALTY ON FAMILIES OF THE ACCUSED*, (Rutgers University Press 2003) (documenting the experiences of 52 family members of capital defendants); Elizabeth Beck, Brenda Sims Blackwell, Pamela Blume Leonard, and Michael Mears, *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382 (2002-2003) (documenting the experiences of nineteen families of capital defendants); Rachel King, *The Impact of Capital Punishment on Families of Defendants and Murder Victims' Family Members*, 89 JUDICATURE 292,295 (2006); Rachel King and Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 FLA. ST. U .L. REV. 1119 (1999).

⁴⁰ See Death Penalty Information Center at www.deathpenaltyinfo.org.

⁴¹ Information provided by Professor Susan Sharpe.

charge causes intense hardship and irrevocably changes family relationships. Psychologist Katherine Norgard, whose son was sentenced to death, describes the experience as “chronic grief,” a never-ending painful saga with which most people cannot identify, which alienates the families even further. The fact that her government was preparing to kill her child constantly weighed on her mind. In grocery stores, at church, or community meetings, Norgard wondered if the people she was interacting with supported her child’s execution.⁴² She describes chronic grief as:

a psychic wound that will not easily heal. It is encased in shame, hopelessness, and isolation from community support. *Family members of the condemned are marginalized when their government decrees that the family’s loved one is dispensable and the machinery of the death penalty begins its slow grind toward the goal of execution.* The ongoing loving bond between the family members and the condemned becomes invisible to others outside death row.

Family members of the condemned experience repeated nightmares, sleepless nights, difficulty concentrating, impaired short-term memory, hypervigilance, a constant aching grief, and episodes of uncontrollable crying. We try to avoid thinking about the death penalty so we might go on with our lives, but intrusive thoughts plague our every hour. *It is as though we have a huge D on our forehead marking us as members of a caste suffering from indelible despair.* (Emphasis added.)⁴³

The harm caused by the death penalty is not limited to the judicial process. The stigma and shame associated with a capital case results in ill treatment from the larger community. One woman said that human feces was left at her doorstep. Some people experienced harassment at work and others at church.⁴⁴ A participant in Professor Elizabeth Beck’s study of family members of capital defendants stated:

that she only felt safe on her side of the tracks, where other low-income African Americans lived. She was afraid when she had to

⁴² Rachel King, *The Impact of Capital Punishment on Families of Defendants and Murder Victims’ Family Members*, 89 JUDICATURE 292, 295 (2006).

⁴³ King, *supra* note 1, at 3.

⁴⁴ Sharpe, *supra* note 39, at 120.

cross the tracks, particularly during the trial. “I was scared too about being his mother. Like doomed. You feel like somebody is going to do something to you[.]”⁴⁵

Beck found that helplessness was the overriding feeling people experienced. She identified three themes experienced by all family members. “Their inability to ensure that the defendant’s story was fully and accurately presented, their inability to address the victim’s family,⁴⁶ and their inability to hire a high-powered lawyer.”⁴⁷

Many people lose the support of their friends and community. One woman said that, “All my friends from Oklahoma just abandoned me. They didn’t support me at all during the years, and when I came down for [my brother’s] execution, not one of them showed any support. Not one of them called or came over, NOT ONE!”⁴⁸ This woman developed high blood pressure, migraine headaches, depression and sleeplessness.⁴⁹

In addition to stigma, there is also the problem of what Norgard labels “chronic grief.” The grief experienced by death row family members is unique because others don’t share the experience. As Norgard wrote “People experiencing grief have support groups available to help them. We have none. There are books and articles to read to help people process the grief and understand their experience. . . . Poetry abounds about grief. There is no poetry about the condemned.” Other researchers have also tried to

⁴⁵ Beck, *supra* note 39, at 408.

⁴⁶ The rules forbidding contact between the victim and defendant’s families can create painful rifts that interfere with the healing process. Family members of capital defendants are often told that they may not have any contact with the victims’ family. This prevents them from reaching out and apologizing or expressing sympathy to the victim’s family. It is extremely awkward for the defendants’ families to sit in the courtroom day after day and not be able to reach out to the other family. One father who did try to speak to the victims’ family was told by a victim’s advocate to return to his side of the courtroom. See generally Sharp. Lois Robison, whose mentally ill son Larry had killed his next-door-neighbors, had been told for years not to contact the victims’ families. One day Lois decided she had had enough and approached the family and told them how sorry she was. The victim’s mother started crying and said that they had been waiting for years to hear that. King, *supra* note 1, at 184-220.

⁴⁷ Beck, *supra* note 39, at 408.

⁴⁸ Sharp, *supra* note 39, at 37.

⁴⁹ *Id.* at 38.

describe this experience. Some have called it “ambiguous loss” similar to that of family members of service personnel who are missing in action.⁵⁰ Researcher Pauline Boss has coined the term “frozen sadness.” “The person experiencing this is often in a cycle of hope and despair, due to the uncertainty of the situation. The repetitive nature of this cycle is particularly destructive, in part because of its long-term nature.”⁵¹

Sociologist Susan Sharp compares the pain that the death row family members experience with that of the murder victims’ family members, which in some ways is similar but in other ways is different.

[T]heir pain is not one of immediate loss. Instead, they experience immediate horror and a long, slow loss. Furthermore, they are frequently treated as if they are also guilty. When asked what they would like people to know, they overwhelmingly indicated that they were victims and yet they were treated as if they had committed the crimes themselves.”⁵²

One family member, who has a brother with multiple disabilities on death row, described what it is like for death row family members:

I see families, who, like us, live with not only the sorrow and pain of what their loved one has done, but with an agony and profound sense of dread as we wait our loved one’s executions. We know down to the last detail how they will be killed; we just don’t know the “when.” We know that we are powerless to stop it, and we wonder if we will have the strength to bear it. I’ve heard it said that those who are on death row will die a thousand deaths while waiting for their execution. We know that we will also die a thousand deaths before our loved one is executed. We know that the weight of this punishment will be borne by those of us who will go on living. . . those of us who saw their value and knew that they were not just garbage to be thrown out.⁵³

⁵⁰ Sharp, *supra* note 39 at 52.

⁵¹ *Id.* at 163.

⁵² *Id.* at 165.

⁵³ *Id.* at 169.

The death penalty destroys families of guilty people and families of innocent people. Consider the story of Sandra⁵⁴ whose brother was convicted for murdering his wife and spent eight years in prison before he was finally exonerated. The children were left without parents and when no family members could care for them they were sent to foster care with another family. The family was embarrassed and shamed by their loved ones' imprisonment and death sentence. Prior to the charge, the brother had had a home, cars and a boat, and did not qualify for a public defender. He and his parents spent their life savings hiring two attorneys. Unfortunately, like many families of capital defendants, they did not have the resources to hire highly skilled defense lawyers, so they hired lawyers who had no experience with representing capital defendants, which is akin to hiring an internist to do complicated brain surgery. After the brother was convicted, and the family's resources were depleted, he qualified for a public defender. His new lawyer convinced the appellate court to reverse the conviction on the grounds that he had received ineffective assistance of counsel. The brother was eventually acquitted at retrial. Sharp describes what it was like for the family:

The trial was difficult for all family members. Sandra was still overseas and had to wait for the news. She had no support; her husband would not talk to her about it [her husband was in the military and was very concerned that his brother-in-laws' legal problems would hurt his career], and he did not want her talking to others there because of concerns about his career. Her aging parents, especially her mother, had to locate attorneys and do all the work because her sister became too upset to do anything.

...

Upon acquittal, he was free, but his and his family's lives were destroyed. His children were now part of another family. His parents had spent most of their savings for retirement on his attorneys. He was also unable to work steadily. The years on death row had taken a toll, leaving him with emotional problems that interfered with his stability.

⁵⁴ Sharp, *supra* note 39, at 112-115. The name has been changed to protect her confidentiality.

He has received no compensation from the state for the ordeal that he and his family had undergone.⁵⁵

Sandra's family is not unique. Family members of death row defendants often experience extreme health problems related to the stress of the case. One father of a death row prisoner experienced sky-rocketing blood pressure while his wife gained 60 pounds, became suicidal and smoked so much that she ended up in the hospital with lung disease.⁵⁶ Another mother became so ill she needed an organ transplant and ended up spending most of her time in a wheelchair.⁵⁷ One sibling who attended a day of the trial came back so emotionally distraught that "it set her back ten years." Another sibling whose brother was convicted developed severe depression and an anxiety disorder and was eventually declared disabled.⁵⁸ One woman, whose brother was on death row, developed asthma, migraine headaches, and bulimia. Her mother has panic attacks, diabetes, asthma, lupus, and depression and has threatened to kill herself if her son is executed."⁵⁹

11 of the participants in Professor Beck's study suffered from serious depression.

One participant described sitting in a room in the back of her house, where she cried for hours. A third participant explained that "there have been no good days" since her son's arrest, only bearable days. She likened her experience to rape, explaining, "A rape, that's what you have been through, you feel so dirty, so stupid, sub-human."⁶⁰

Some turn to alcohol and drugs to numb the pain. Karen's cousin, Kevin Stanford, was sentenced to death. The two were very close and had grown up like brother and sister.

⁵⁵ Sharp, *supra* note 39, at 113, 115.

⁵⁶ *Id.* at 32.

⁵⁷ *Id.*

⁵⁸ *Id.* at 40.

⁵⁹ *Id.* at 120.

⁶⁰ Beck, *supra* note 39, at 407.

Both had been subjected to sexual and physical abuse as children. Karen had witnessed a babysitter forcing a dog to sexually penetrate Kevin. This same “caregiver” forced the two young cousins to have sexual contact. None of the information about Kevin’s abuse was given to the jury that made the decision to sentence him to death. Karen described Kevin’s sentencing:

My whole family watched the news on TV when Kevin was sentenced to death. I just couldn’t believe it. I thought about all the problems he had in his life and all the things that had never been addressed. But that was too much for me, so whenever I thought about it too much I just kept drinking to blot it out.⁶¹

Besides the trauma and chronic grief experienced by death row family members, many also experience tremendous fear. In Professor Elizabeth Beck’s survey of family members of death row defendants she found that many of them were afraid of various aspects of the process:

[T]hey feared that the trial was stacked against their loved one, and many assumed that racial prejudice or their social and economic status would negatively impact the trial process and outcome. Eleven family members feared defense attorneys or other members of the defense team. Nine participants feared attorney incompetence. Others feared interactions with defense attorneys because they perceived the attorneys as hurtful and abusive.⁶²

Some families even fear going to trial because of the threat of a death sentence if their loved one is convicted. Families distrusted that they would get a fair hearing in court, or in the court of public opinion. With the threat of a death sentence hanging over a person’s head, many defendants chose to plead guilty to the crime in exchange for a life sentence instead of risking going to trial and facing a possible death sentence. Beck and

⁶¹ King, *supra* note 1, at 167.

⁶² Beck, *supra* note 39, at 408.

her colleagues documented the phenomena of capital defendants pleading to cases instead of going to trial and risking a death sentence. She explains:

Three family members indicated that the threat of a death penalty was an impediment to presenting the defendant's version of the offense, and family members watched helplessly as stories were not fully told or correctly represented. In a patricide case, a mother wanted the jury to know what her son's father had put him through in life. However, her son's attorneys were more concerned about avoiding a death penalty and persuaded her son to plead guilty. She had hoped that by telling her son's story fully, some good might have come out of the tragedy. She explained, "Look at the families out there that are going through something like what me and my children went through. Another mother, whose son also pleaded guilty, said there were many things that happened the night of the murder that never came out and that it was the threat of the death penalty that made it impossible to risk a jury trial. A mother whose son pleaded guilty explained, ["If it had not been a death penalty case, it would have been completely different. He would have gone to trial and had the opportunity to defend himself. Because it was a death penalty case we had no choice but to take a plea because the thoughts of losing him were so drastic.[""]⁶³

Also, the high profile nature of death penalty cases often skews media coverage against defendants. Families fear speaking to the media because they feel that their side of the story is not accurately portrayed. Some felt that the sensationalist treatment of the case may have influenced the outcome of the trial. For example, a single shooting at a birthday celebration was characterized as "a birthday massacre."⁶⁴ One woman recounted the media showing a picture following the execution of her loved one that depicted the ambulance driver laughing as he transported the body.⁶⁵

⁶³ Beck, *supra* note 39, at 409.

⁶⁴ *Id.* at 400.

⁶⁵ *Id.*

2. The Death Penalty Harms Children

There are no statistics on how many of the approximately 3,400 people on death row today, or the more than 1000 people executed during the modern era, have, or had, children. Children suffer the most from the death penalty. They are the most victimized by the death penalty because they had no ability to chose their parents, or control their parents' actions, yet they are dependent on their parents, regardless of how dysfunctional they are. The State's execution of a parent is the ultimate act of violence against a child's family. An execution by its nature induces extreme trauma on a child and represents the exact type of harm states seek to protect children from through family law and the family court system.⁶⁶ Beck and colleagues described the types of harm experienced by children of incarcerated parents: psychological trauma from parent-child separation; difficulty establishing healthy relationships; truancy, aggression, and withdrawal; and a decline in their social and financial conditions.⁶⁷ Beck speculates that these problems are even more pronounced for the children of people on death row.⁶⁸

One particularly poignant case is that of Little Hameen, mentioned in the introduction. His father, Abdullah Hameen, was executed in Delaware after a lengthy

⁶⁶ Over the past decade the effects of domestic violence on children have been well documented. These effects include post traumatic stress disorder, increased risk of depression and anxiety, aggressive behavior, and difficulty complying with authority. See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 561-562 (Feb. 2006). Cities and states throughout the country recognized the substantial effects of violence on children and have taken measures to protect children. The City of New York attempted to institute a policy within the Administration for Children's Services, the city's child welfare agency, whereby the city would remove to foster care any child residing in a home where domestic violence occurred regardless of whether the children themselves were the subjects of the abuse. See *Nicholson v. Scopetta*, 3 N.Y. 3d 357 (N.Y. 2004). In further recognition of violence's significant negative effects on children, only Connecticut, the District of Columbia, and four United States territories do not consider the presence of violence in the home when making child custody decisions. Annette M. Gonzalez and Linda M. Rio Reichmann, *Representing Children in Civil Cases Involving Domestic Violence*, 39 FAM. L. Q. 197, 198 (Spring 2005).

⁶⁷ Beck, *supra* note 39, at 395.

⁶⁸ *Id.*

incarceration.⁶⁹ There was no doubt that Hameen was guilty of the crime – a shooting in the course of a drug deal. During the time Hameen was incarcerated he had been a model prisoner. He took advantage of every opportunity to educate and improve himself. He started a peace group that brought together citizens from the community and prisoners to discuss important social issues. He counseled juvenile offenders against pursuing a life of crime. Most importantly, he did every thing he could possibly do to support and love his son and wife, including frequent visits, phone calls, and letters.

When the time came for his execution, many believed, including prison personnel, that the Governor would commute Hameen’s sentence to life in prison because of his extraordinary efforts at rehabilitation. Yet, this did not happen and Hameen was executed in May of 2001.

Understandably angry, confused and deeply saddened, Little Hameen attempted suicide. There were no programs available to help counsel him or assist him in obtaining an education or a trade. If his father had been murdered by a person, rather than the state, Little Hameen would have been considered a victim, and would have qualified for certain services from the state. As it was, he was not considered a victim. He received no apology for the loss of his father and no sympathy from state officials or anyone else outside the immediate family. Under normal circumstances, when a child loses a parent, that child is entitled to their parents’ social security benefits; but this is not the case with the children whose parents are executed.⁷⁰ Insecure, angry, grieving and lost, it is not surprising that Hameen turned to street life and eventually ended up being charged with a capital crime, repeating the cycle of his father.

⁶⁹ King, *supra* note 1, at 87-123.

⁷⁰ Sharp, *supra* note 39, at 171.

While this is a dramatic example, it illustrates that the effect of the death penalty is not limited to the offender or the offender's family. People can disagree about the morality of Hameen's execution, but his son did not deserve to suffer the way that he did. Even if society would like to ignore his rage we cannot afford to, because it turned to violence that affected others.

Many states do not even permit simple physical conduct between parent and child. One mother described how painful it was to hear her daughter say that she wanted to sit on her father's lap, which was not permitted by the prison. The mother told Sharp:

Seeing the pain in [the child's] face and knowing that much of the anger she has inside is a result of her shame at having a dad that society finds worthless enough to want to eliminate, despite her love for him. The death penalty is so cruel and confusing to these children who have parents on death row.⁷¹

Perhaps the most poignant story is that of a Texas mother who begged prison officials to allow her to hold her son one last time before his execution, a request which was denied. After the execution, they let her hold his still warm, but lifeless, body.⁷²

Children sometimes experience harassment and threats at school. In one particularly dramatic case, two children, the brother and sister of a capital defendant who were in ninth and tenth grade respectively, had to leave school because the principal feared for their lives.⁷³ Other parents withdrew their children from school because of ongoing painful ridicule.⁷⁴

3. The Execution Creates Additional Harm to the Families

⁷¹ Sharp, *supra* note 39, at 152.

⁷² *Id.* at 173

⁷³ Beck, *supra* note 39, at 399.

⁷⁴ Sharp, *supra* note 39, at 123.

The capital trial process is harmful to families, but not surprisingly, the execution is especially harmful, and perhaps most harmful to the mothers of death row defendants. One sister whose brother was executed reported that she lost her mother and her brother the same day. Her mother withdrew from the world and was never the same again. One mother died of a heart attack prior to her son's impending execution; another collapsed after her son's execution and within a year, died of heart failure.⁷⁵ Another mother was in intensive care when her son was executed because she had attempted suicide after her last visit with him.⁷⁶ A mother, who had already gone through the experience of losing another child, described the depression that she felt after her sons' execution as so intense that she couldn't get out of it.⁷⁷ Another [mother] said, "I am very mad now. I have a short fuse. My personality is totally altered."⁷⁸

Three participants in Sharp's survey who had already had a child die of other causes said that their experience with their convicted sons on death row was more painful than the other losses.⁷⁹

Other family members experienced, "suicidal thoughts, functional impairment, chronic sadness, inability to feel pleasure, irritability, and physical symptoms."⁸⁰ For some, the functional disability was complete. One mother described how she could not do anything for years, even open her mail or pay a bill. "I lost everything... I became a burden on my family."⁸¹

⁷⁵ Sharp, *supra* note 39, at 36.

⁷⁶ *Id.* at 18.

⁷⁷ Beck, *supra* note 39, at 406.

⁷⁸ *Id.* at 407.

⁷⁹ Sharp, *supra* note 39, at 18.

⁸⁰ *Id.*

⁸¹ Beck, *supra* note 39, at 406.

Participants also experienced physical symptoms such as, “the inability to control diabetes and high blood pressure, worsened emphysema, diverticulitis, massive heart attacks, and a rapidly spreading cancer.”⁸² Darlene Chambers, who witnessed her husband’s execution, beat the glass and screamed in pain and collapsed and was hospitalized for shock and exhaustion.⁸³

The stress often affects the entire family unit, seriously compromising its stability. In one family alone, the mother of the executed man died of heart failure within a year of his execution. The sister developed high blood pressure, migraine headaches and depression. Another sibling drinks alcohol all day long. A niece is incapable of holding down a job because she sleeps all day long.⁸⁴

III. The Death Penalty Cannot Survive a Substantive Due Process Challenge Because it Fails to Achieve its Stated Penological or Philosophical Goals

The idea of challenging the death penalty on substantive due process grounds is not a completely novel concept. Some scholars have suggested such a challenge,⁸⁵ and two courts have used it as a basis for declaring the death penalty unconstitutional.⁸⁶

These commentators and courts have all made the case that the death penalty violates the

⁸² Beck, *supra* note 39, at 407.

⁸³ Sharp, *supra* note 39, at 87.

⁸⁴ *Id.* at 103.

⁸⁵ Hugo Bedau, *Interpreting the Eighth Amendment: Principled Vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789, 812 (1996); Ursula Bentele, *Does the Death Penalty, By Risking Execution of the Innocent, Violate Substantive Due Process*, 40 HOUS. L. REV. 1359 (2004); and Daniel Bird, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329, (2003). These scholars use the right to life as the basis of the challenge, as opposed to the right to liberty that I am suggesting. The author would like to acknowledge that her analysis borrowed heavily from this excellent and thoroughly researched article.

⁸⁶ *Commonwealth v. O’Neal*, 339 N.E.2d 676 (Mass. 1975), in this pre-Gregg opinion, the Massachusetts Supreme Court struck its death penalty on substantive due process grounds. In *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), Federal District Court Judge Jed S. Rakoff stated that “execution under the Federal Death Penalty Act, by cutting off the opportunity for exoneration, denies due process and, indeed, is tantamount to foreseeable, state-sponsored murder of innocent human beings,” rev’d, 313 F.3d 49 (2d Cir. 2002).

substantive due process rights of the defendant.⁸⁷ Challenging the death penalty from the perspective of the family members is a novel idea.

It is, however, a novel idea that has a strong legal basis. The “touchstone” of substantive due process analysis is the “protection against arbitrary action of government.”⁸⁸ Professor Bentele wrote, “[S]ubstantive due process analysis dictates an examination of the government’s objectives in engaging in activities that threaten the life and liberty of its citizens. Only when the government can justify encroachment on individual life and liberty by reference to compelling societal goals, does it satisfy due process standards.”⁸⁹ A rigorous examination of the modern death penalty shows that the government encroachment on liberty cannot be justified.

To undertake a substantive due process challenge, one must first consider the state’s objectives in using the death penalty law. One must also take into account that “death is different” and as such is held to a higher form of scrutiny than other forms of punishment.⁹⁰ In its post-*Furman* jurisprudence, the Supreme Court has acknowledged several interests a state may have to support its practice of capital punishment including deterrence,⁹¹ retribution,⁹² incapacitation, and denunciation and vindication of legal and

⁸⁷ In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court held that if a claim is governed by a specific provision of the Constitution, no substantive due process analysis should be undertaken. Because many death penalty claims are grounded in the Eighth Amendment, claimants do not raise substantive due process claims. In this situation, the family members do not have any Eighth Amendment rights since they are not being subjected to punishment themselves. Therefore, an Eighth Amendment challenge would not bar their use of a substantive due process claim.

⁸⁸ *County of Sacramento v. Lewis*, 523 U.S. at 845 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

⁸⁹ Bentele, *supra* note 6, at 1367-68.

⁹⁰ R. George Wright, *The Death Penalty and the Way We Think Now*, 33 *LOY.L.A.L.*, 533, 353 (2000). “Legions of commentators and courts note that death is different.”

⁹¹ But see Donald L. Beschle, *What’s Guilt (or Deterrence) Got to Do With it?: The Death Penalty, Ritual, and Mimetic Violence*, 38 *WM. & MARY L. REV.* 487 (1997) for a discussion on how the real function of the death penalty is not to deter crime or to seek retribution, but it is to provide society with a ritualized killing, whose function is to reaffirm social norms.

⁹² Bird, *supra* note 6, at 1367.

moral order.⁹³ At least one commentator has suggested that Justice Scalia believes that vengeance is an acceptable rationale for the death penalty.⁹⁴ However, even if true, that belief is not widely accepted as an appropriate rationale, so, I will not discuss it here.⁹⁵

Deterrence and retribution are the two most commonly cited reasons for the death penalty.⁹⁶ Even in states where statutes or the state constitution have suggested that retribution is not a valid penological objective in a state, the state courts or legislatures consistently have read retributive interests into the law.⁹⁷

This section will examine each of the stated purposes of the death penalty – retribution, deterrence, incapacitation, and denunciation and vindication of legal and moral order, which I am categorizing as “reaffirmation of societal norms.”

Most of the discussion focuses on retributive justice because it is the theory of punishment most central to discussions of the death penalty.⁹⁸ Also, there is a large body of legal-philosophical literature that discusses retribution theory in the context of the death penalty.

⁹³ Bedau, *supra* note 6, at 812 citing *Furman v. Georgia*, 408 U.S. 238, 331 (1972)(Brennan, J., concurring).

⁹⁴ See Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 68 (1992).

⁹⁵ Some commentators believe that some of the justices have incorrectly confused vengeance and retribution in their writings about the death penalty, which has resulted in retribution theory not being given its due as a valid rationale for the death penalty. Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1180-82 (2003).

⁹⁶ Deterrence recognizes the state's “interest in preventing capital crimes by prospective offenders.” Deterrence is utilitarian in its purpose, seeking “social benefits through the use of punishment as a means.” The theory is that “the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.” Repeatedly the Court has recognized deterrence as a valid interest and there is no sign of any abatement of that position. Retribution recognizes the state's “interest in seeing that the offender gets his ‘just deserts.’” Retribution is not a utilitarian interest; rather it “is directed at imposing merited harm upon the criminal for his wrong...” Retribution is distinct, however, from retaliation and vengeance. “The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.” Bird, *supra* note 6, at 1367.

⁹⁷ *Id.* at 1367-1368.

⁹⁸ B. Douglas Robbins, *Resurrection From a Death Sentence: Why Capital Sentences Should be Commuted Upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1130 (2001).

1. The Manner in Which the Death Penalty is practiced does not Accord with Principles of Retributive Justice

Many justices, criminologists, philosophers and lay people believe that retribution is a legitimate rationale for capital punishment. The central notion of retributivism is that criminals deserve punishment, which justifies its infliction.⁹⁹ Kant believed that punishment must never be used to promote “some other good for the criminal or civil society,” but must “in all cases be imposed on him only on the ground that he has committed a crime.”¹⁰⁰ Professor Dan Markel has defined retributive justice as follows:

Retributive justice is to communicate certain ideals to an offender convincingly determined to have breached a legitimate legal norm. The social project of retributive justice possesses a good that has its own internal intelligibility and attractiveness, independent of what consequences follow.¹⁰¹

Punishing offenders may have other benefits, such as deterring others, but this is not a basis for punishment under retributivist theory.¹⁰² Retributive justice, which had fallen out of favor as a valid penological goal by the mid-70’s, enjoyed a resurgence at the end of the 20th century. Justices Scalia, Thomas, and former Chief Justice Rehnquist, are great believers in retributivist theory. In his dissent in *Morgan v. Illinois*,¹⁰³ Scalia, joined by Rehnquist and Thomas, quoted Immanuel Kant, the intellectual father of modern retributivists.¹⁰⁴

Whoever has committed Murder, must die.... Even if a Civil Society resolved to dissolve itself with the consent of its members...the last Murderer lying in the prison ought to be executed before the

⁹⁹ David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1627 (1992).

¹⁰⁰ *Id.*

¹⁰¹ Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 411 (2005).

¹⁰² Robbins, *supra* note 98, at 1116.

¹⁰³ 504 U.S. 719, footnote 6 (1992)(Scalia, J., Rehnquist, Chief J., and Thomas, J. dissenting).

¹⁰⁴ Hegel built upon Kant’s philosophy, and is also considered one of the “fathers” of retribution theory.” Hegel argues that “since life is the full compass of a man’s existence, the punishment [for murder]... can consist only in taking away a second life.” Wright, *supra* note 90, at fn 119.

resolution was carried out. This ought to be done in order that every one realize the desert of his deeds...¹⁰⁵

Even more moderate Justices, like Justice Stewart, believed, that if properly applied, the death penalty served the social purpose of retribution.¹⁰⁶

Superficially, the death penalty appears to be an appropriate means of accomplishing retribution. However, some scholars challenge this notion. They believe that the inequities associated with the implementation of the death penalty lessen its retributive appeal.¹⁰⁷ For example, scholar Thom Bassett suggests that the problem of racial bias in the application of the death penalty in light of the *McCleskey v. Kemp* decision threatens to sever the connection between capital jurisprudence and moral theory.¹⁰⁸ In *McCleskey* the Court ruled that statistical evidence of racial discrimination in Georgia was not sufficient to raise an equal protection challenge to the administration of the death penalty;¹⁰⁹ instead a defendant must establish intentional discrimination in his or her particular case, a nearly impossible burden to meet. *McCleskey* effectively made it impossible for defendants to raise issues of racial discrimination in death penalty sentencing, and, according to Bassett, has had the result that the death penalty does not accord with the ideals of retributive justice.

The law is a moral enterprise in that it inevitably entails thinking in terms of a discipline that philosophers call ‘moral philosophy,’ ‘moral

¹⁰⁵ David Niven and Kenneth Miller, *Death Justice*, unpublished manuscript (anticipated publication Northern Illinois University Press 2007) at 259-60.

¹⁰⁶ *Gregg*, 428 U.S. at 183.

¹⁰⁷ Markel, *supra* note 101, at 427. Markel has described his ideals of retributive justice as “CCR,” which stands for “Confrontational Conception of Retribution.” Instead of focusing so much on the idea of “just deserts,” Markel outlines three other principles: “[F]irst, moral accountability for unlawful actions; second, equal liberty under law; and third, democratic self-defense. On this view, punishment is attractive because it effectuates certain ideals that are widely understood and embraced by citizens of complex liberal democracies such as ours. Conversely, when a liberal democracy fails to create credible institutions of criminal justice, it undermines our commitment to these principles, though not under all circumstances.”

¹⁰⁸ Thom Bassett, *Risking Cruelty: McCleskey v. Kemp, Retributivism, and Ungrounded Moral Judgment*, 52 SYRACUSE L. REV. 1, 6 (2002).

¹⁰⁹ *Id.* at 16.

reasoning,’ or ‘ethics.’ The criminal law in particular is a moral enterprise concerned with the bare minimum standards of socially acceptable behavior. . . . As such, . . . the death penalty requires moral justification. . . . [o]peration of the death penalty as sanctioned in McCleskey cannot be morally justified within the retributivist framework.¹¹⁰

There are three basic tenets that Bassett argues are required for true retributive justice: the punishment must be proportionate, the punishment must accord with the “dignity of man,” and the punishment must be commensurate with what the offender deserves, i.e. “just deserts.”

The “just deserts” theory treats offenders as “moral actors” who have choice in their actions, and punishment should flow from those actions.¹¹¹ Determining “seriousness” requires evaluating the harm done by the act and the degree of the actor’s culpability.¹¹² Some believe that people sentenced to death, who go through a genuine experience of repentance and remorse, may no longer deserve to be executed.¹¹³

Bassett references several philosophers, but primarily refers to Andrew von Hirsch. According to von Hirsch, “punishment is justified if it manifests respect for a person, by expressing social condemnation of his freely chosen but wrongful conduct, and if it satisfied the requirements of cardinal and ordinal proportionality.”¹¹⁴ Cardinal proportionality “establishes an upper and lower limit of punishment and mandates different punishments for different crimes in light of the seriousness of the respective offenses.”¹¹⁵ Ordinal proportionality requires that “persons convicted of crimes of comparable severity should receive punishments of comparable severity. . . . It follows

¹¹⁰ Bassett, *supra* note 108, at 5.

¹¹¹ *Id.* at 19.

¹¹² Robbins, *supra* note 98, at 1012.

¹¹³ *Id.* at 1164.

¹¹⁴ Bassett, *supra* note 108, at 18.

¹¹⁵ Bassett, *supra* note 108, at 20.

that punishing one crime more severely than another expresses greater social disapproval of the first crime and is warranted only to the extent that it is more serious.”¹¹⁶

The idea that punishment must accord with the “dignity of man” is a principle underlying Supreme Court Eighth Amendment jurisprudence. “A challenged punishment offends the dignity of man principle if it is excessive. Examples of excessive punishments include those that make no ‘measurable contribution to acceptable goals of punishment,’ or exceed the proportionality of the crime, thereby offering nothing more than unnecessary and wanton infliction of pain and suffering.”¹¹⁷

Combining these three tenets of deserts, proportionality, and dignity of man, Bassett concludes that “A contemplated death sentence is morally impermissible unless and until it is reliably demonstrated that the offender deserves the punishment.”¹¹⁸ He calls his proposition “The Condition of Reliable Demonstration of Desert,” which sets forth two principles necessary for imposition of the death penalty. “(1) A contemplated punishment may be inflicted only after its appropriateness is reliably demonstrated; and (2) The more severe a contemplated punishment, the higher the degree of certainty of its appropriateness is required before it may be imposed.”¹¹⁹

Not all retributivists support such an egalitarian notion of retribution. For example, Ernest van den Haag¹²⁰ believes that if a person deserves the death penalty, i.e.

¹¹⁶ *Id.* at 22.

¹¹⁷ Seung Oh Kang, *The Efficacy of Youth as a Mitigating Circumstance: Preservation of the Capital Defendant’s Constitutional Rights Pursuant to Traditional Eighth Amendment Jurisprudence*, 28 SUFFOLK U. L. REV. 747, 752-753 (1994) citing *Enmund, v. Florida*, 458 U.S. 782, 788 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); and *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

¹¹⁸ Bassett, *supra* note 108 at 33.

¹¹⁹ *Id.* at 33-34.

¹²⁰ According to Professor R. George Wright, Ernest van den Haag is the “leading contemporary American advocate of the death penalty who was strongly influenced by the Kantian-Hegelian approach.” Wright, *supra* note 90, at 566. However, according to Laufer and Hsieh, despite his Kantian-style rhetoric, van den

the person was guilty of a crime worthy of death, then the fact that the punishment is not given to another person does not make it any less deserving of the person who received it.

To put it starkly, if the death penalty were imposed on guilty blacks, but not on guilty whites, or, if it were imposed by a lottery among the guilty, this irrationally discriminatory or capricious distribution would neither make the penalty unjust, nor cause anyone to be unjustly punished, despite the undue impunity bestowed on others.¹²¹

Similar to van den Haag, Christopher Meyers argues that a person selected to receive the death penalty on the basis of racial prejudice suffers no moral wrong because he already deserved a death sentence by virtue of his actions.¹²² However, as Bassett points out, Meyers fails to consider the fact that race distorts the sentencing process so that people who do not deserve the death penalty are sentenced to death.¹²³

The Court, at least rhetorically, has adopted the Bassett view of retribution, not the van den Haag/Meyer one. The *Gregg* Court said, “*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”¹²⁴

I am relying on Bassett’s paper, and the work of others, to demonstrate how problems in the implementation of the death penalty threaten the moral underpinnings of retributive justice. Besides the problem of racial injustice identified by Bassett, the tremendous problem of innocent people being sentenced to death, as well as the fact that

Haag did not fashion himself as a retributivist but, “found comfort in deterrence theory.” William S. Laufer and Nien-he Hsieh, *Choosing Equal Injustice*, 30 AM. J. CRIM. L. 343 (2002).

¹²¹ Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1663 (1986).

¹²² Bassett, *supra* note 108, at 13.

¹²³ *Id.*

¹²⁴ *Id.* at 12 citing *Gregg v. Georgia*, 428 U.S. 153, 188-189 (1976)(stating that death sentences imposed under sentencing procedures that carried a “substantial risk” of arbitrary or capricious administration of capital punishment are invalid under *Furman*).

the death penalty is not imposed rationally amongst convicted murderers – it is not always imposed upon the most serious offender and is often imposed on those offenders that did not commit the worst crimes – are also reasons why the death penalty fails to achieve the goal of retributive justice.

A basic concept of criminal responsibility is that as punishment increases in severity, the justification for punishment must be more seriously and rigorously demonstrated.¹²⁵ Because of the finality of the death penalty, it is held to a higher standard than other forms of punishment.¹²⁶ As Justice Stewart wrote, “The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality, differs more from life imprisonment than a 100-year prison sentence differs from one of only a year or two.”¹²⁷ As the following argument will demonstrate, the current manner in which the death penalty is administered fails to meet the requirements of *Gregg*, and fails to meet the requirements necessary for true retributive justice.¹²⁸

A. Innocent People are frequently wrongly convicted

There have been more than 120 people released from death rows because of innocence since *Gregg*.¹²⁹ Statistics on exonerations indicate that there may be as many

¹²⁵ Samuel J.M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices' Positions*, 24 ST. MARY'S L.J. 1, 10 (1992).

¹²⁶ Likewise, because of the seriousness of killing another person, some believe that death is the only appropriate punishment to murder and that any length of imprisonment, no matter how long, is an inadequate response. Wright, *supra* note 90, at 561.

¹²⁷ *Gregg*, 428 U.S. at 305.

¹²⁸ J. Michael Echevarria, *Reflections on O.J. and the Gas Chamber*, 32 SAN DIEGO L. REV. 491, 496 (1995)(pointing out that the prosecution did not seek the death penalty against O.J. Simpson, even when the crime was a gruesome double homicide, was most likely due to the fact that O.J. was a popular football hero and the prosecutors feared no jury would impose a death sentence, demonstrates the “arbitrary nature of the death penalty when it is sought on retributive grounds.”)

¹²⁹ Death Penalty Information Center, available at: www.deathpenaltyinfo.org.

as one exoneration for every five to seven executions.¹³⁰ These high numbers suggest that innocent people have been executed. Indeed, according to one study, over 70% of the public believes that innocent people have already been executed – most likely in Texas.¹³¹ Frank Zimring, using an actuarial model examining the recent history of exonerations, concluded that the execution of the innocent is “all but inevitable.”¹³² Historically, the problem of innocent people being executed has served as a strong motivator for jurisdictions to abandon the death penalty. In 1847, Michigan became the first English speaking jurisdiction to abolish the death penalty after it was established that an innocent person was hung.¹³³ Great Britain decided to abolish their death penalty laws after the revelation that an innocent person had been executed¹³⁴ while the territory of Alaska and Canada abolished their death penalty under strong suspicion that innocent individuals had been executed.¹³⁵

Pre-modern era studies of innocence documented 23 individuals who may have been innocent and were executed in the past century.¹³⁶ The same researchers argue that the number of wrongful convictions and executions has been underreported.¹³⁷

¹³⁰ Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179, 1186 (2003).

¹³¹ Richard C. Dieter, *Innocence and the Crisis in the American Death Penalty*, Death Penalty Information Center, September 2004, 5. Available at: www.deathpenaltyinfo.org

¹³² Bentele, *supra* note 6, at 1365.

¹³³ Beschle, *supra* note 91, at 530.

¹³⁴ Donald F. Paine, *Impeachment by Bad Acts and Convictions: The Trials of Evans and Christie*, 42 TENN. BAR JOURNAL 27 (May 2006); *Innocent* available at www.innocent.org.uk/cases/timothyevans/timothyevans.pdf

¹³⁵ Canadian Human Rights Commission, *Human Rights in Canada: A Historical Prospective* available at www.chrc-ccdp.ca/en/timePortals/milestones/70mile.asp; Averil Lerman, *The Trial and Hanging of Nelson Charles*, ALASKA JUSTICE FORUM 13(1) (Spring 1996) available at http://justice.uaa.alaska.edu/forum/fl31sp96/a_nelson.html

¹³⁶ Charles Lanier and James Acker, *Capital Punishment, The Moratorium Movement, and Empirical Questions*, 10 PSYCHOL. PUB. POL'Y & L. 577, 593 (2004) citing Hugo Adam Bedau and Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STANFORD LAW REVIEW 21 (1987).

¹³⁷ *Id.* at 593 citing Michael Radelet and Hugo Adam Bedau, *The Execution of the Innocent*, 6 LAW AND CONTEMPORARY PROBLEMS 105 (1998).

No one has yet been able to establish conclusively that an innocent person has been executed during the modern era.¹³⁸ However, an innocent man died in prison before he was exonerated. Frank Lee Smith was sentenced to death in Florida for a rape and murder for which he claimed to be innocent. The state of Florida repeatedly denied his requests for DNA testing. Smith died in prison from cancer while fighting for his freedom. Posthumous DNA testing established his innocence, but this did little to help Smith who spent the last years of his life in prison condemned for a crime he had not committed.¹³⁹

Sister Helen Prejean, a nun who regularly serves as a spiritual advisor to death row prisoners, wrote a compelling book describing her experiences with Dobie Gillis Williams and Joseph O'Dell, whom she believed to be innocent.¹⁴⁰ A June 2006 expose in the Chicago Tribune suggests that Carlos DeLuna, executed in Texas in 1989, was probably innocent.¹⁴¹

Justice Ruth Bader Ginsburg has suggested that innocent people may be being executed and pointed to inadequate representation as part of the problem.

If statistics are any indication, the system may well be allowing some innocent defendants to be executed. . . . People who get well represented at trial do not get the death penalty. I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial.”¹⁴²

¹³⁸ See Reasonable Doubt: Is the US Executing Innocent People? A report by Equal Justice USA, available at <http://www.quixote.org/ej/grip/reasonabledoubt/index.html> (detailing 15 cases of executed people with strong claims of innocence).

¹³⁹ Dieter, *supra* note 131, at 14.

¹⁴⁰ Sister Helen Prejean, *THE DEATH OF INNOCENTS*, 3-144 (Random House 2004).

¹⁴¹ Maurice Possley and Steve Mills, *Did This Man Die. . . for This Man's Crime?*, The Chicago Tribune, June 24, 2006, available at: http://www.chicagotribune.com/news/specials/broadband/chi-tx-htmlstory_0.7935000.htmlstory.

¹⁴² Dieter, *supra* note 131, at 3.

In a similar vein, former Justice Sandra Day O'Connor told a meeting of the Minnesota Women Lawyers, "Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."¹⁴³

The problem of innocence has become so acute that two federal judges have written about their concern that innocent people may be executed. In striking down the federal death penalty as unconstitutional, U.S. District Court Judge Jed Rakoff wrote in a 2002 opinion:

The Court found that the best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty, a meaningfully number of innocent people will be executed who otherwise would eventually be able to prove their innocence.¹⁴⁴

U.S. District Court Judge Michael Ponsor, who presided over the federal capital trial of Kristen Gilbert wrote:

The experience [of sitting on a capital case] left me with one unavoidable conclusion: that a legal regime relying on the death penalty will inevitably execute innocent people – not too often, one hopes, but undoubtedly sometimes. Mistakes will be made because it is simply not possible to do something this difficult perfectly, all the time. Any honest proponent of capital punishment must face this fact.¹⁴⁵

¹⁴³ Justice Sandra Day O'Connor, Remarks at the Meeting of the Minnesota Women Lawyers, July 2, 2001.

¹⁴⁴ Dieter, *supra* note 131, at 33 citing *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), rev'd by 313 F.3d 49 (2d Cir. 2002).

¹⁴⁵ Dieter, *supra* note, at 34.

Convicting and executing the wrong person are not consistent with retributive justice.¹⁴⁶

There is no rationale for killing a person who has not committed a crime. It is not just. It is not necessary for incapacitation and it is not a deterrent.

Besides the cost of executing innocent people, there are other costs at stake in accepting a system that permits execution of the innocent. Rampant examples of injustice weaken peoples' faith in the criminal justice system and breakdown the fabric of social order, a cost that will affect all of us.

Any system of criminal justice will inevitably punish the innocent and punish the guilty more than they deserve.¹⁴⁷ The question is: what degree of error is constitutionally acceptable? The current level of error should not survive a substantive due process challenge, because the compelling governmental interests do not outweigh the significant problems.¹⁴⁸

B. Death for the Most Vulnerable, not the most deserving¹⁴⁹

Under Supreme Court jurisprudence, the death penalty is to be reserved for the worst of the worst offenders; the reality is that the death penalty is reserved for those who have the worst lawyer and who are least able to defend themselves.¹⁵⁰ The common

¹⁴⁶ “[T]he concern for accuracy in distribution of punishment is fundamentally a retributivist concern that renders the death penalty deeply problematic as an institutional practice[.]” Markel, *supra* note 101, at 463.

¹⁴⁷ Laufer, *supra* note 120, at 355.

¹⁴⁸ As scholar Ursula Bentele concludes: “When a capital punishment system results, despite full deliberation, in erroneous decisions depriving a person of life, substantive due process demands a showing of compelling government interests if the system is to be maintained.” Bentele, *supra* note 6, at 1378.

¹⁴⁹ Race plays a large role in determining who is sentenced to death and could be a large part of this section. Because it is such a large part of capital sentencing, I am discussing that separately in section C. I have included a separate section, B, discussing unjust sentencing practices because racial bias is not the only factor leading to unjust sentencing results.

¹⁵⁰ Stephen B. Bright, *Counsel for the Poor: The Death Penalty Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994).

saying, “Capital Punishment means them without the capital get the punishment,” is unfortunately true.

The death penalty has, in some sense, become largely a symbolic punishment. Less than 1% of murders result in a death sentence, but there is no indication that of the small number of people who are actually sentenced to death or executed that they were the most serious offenders. Professor David McCord examined all death penalty cases in 2004 looking at as many facts as he possibly could about each death-eligible case.¹⁵¹ He identified a total of 469 defendants who met the “worst of the worst” standard. He found that only 30 percent of those 469 had been sentenced to death, meaning that the vast majority received a sentence other than death. Many of the 341 murderers who were spared the death penalty had more serious cases than those who received it. Of the 2 most aggravated cases that year -- Oklahoma City bomber Terry Nichols and serial killer Charles Cullen -- neither man received the death penalty. Of the 11 serial killers, only 5 were sentenced to death.¹⁵²

Furthermore, the system fails to capture and prosecute all offenders. Many homicides go unprosecuted. The more the system fails to prosecute, the more the burden of the death penalty falls on a select group of people.¹⁵³

While being poor and receiving incompetent counsel do not always go together, they often do. Death rows are filled with mentally ill,¹⁵⁴ mentally retarded,¹⁵⁵ and poor¹⁵⁶

¹⁵¹ David McCord, *If Capital Punishment were Subject to Consumer Protection Laws*, 89 JUDICATURE 304, 305 (2006). Professor McCord turned this piece into a full-length law review article published as *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More Than Three Decades After Furman*, 71 Brooklyn Law Review 797 (2006).

¹⁵² Professor Baldus hypothesizes that the failure of federal and state courts to conduct meaningful proportionality review has resulted in haphazard imposition of the death penalty for mid-range cases. He suggests that in the most aggravated cases, the death penalty is imposed regardless of the race of the victim, but in the middle range cases it is imposed more haphazardly and less frequently. Donnelly, *supra* note 125, at 83.

¹⁵³ Marvin E. Wolfgang, *We Do Not Deserve to Kill*, 13 T.M. COOLEY L. REV. 977, 987 (1996).

people. A truly retributive justice philosophy requires just deserts for those who are most blameworthy, not those who are most vulnerable.

The Court in *Gregg* required that death penalty sentencing schemes must afford discretion to the sentencing authority. In any discretionary system, there are bound to be unequal results. The standard is that the “discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”¹⁵⁷ The problem is that 30 years after *Gregg*, we have failed to develop a system where the discretion does not produce “wholly arbitrary and capricious action.” According to some experts, the death-eligible class today is about as large as it was before *Furman*, and capital sentencing schemes are as inconsistent as they were pre-*Furman*.¹⁵⁸

Under a system of true retributive justice, all persons facing capital charges would begin on an equal playing field and have access to competent counsel. This change alone would go a long way in leveling the playing field, thus minimizing arbitrary and capricious results.

¹⁵⁴ Cruel and Inhumane: Executing the Mentally Ill, Amnesty International Magazine, available at: http://www.amnestyusa.org/magazine/cruel_and_inhumane_executing_the_mentally_ill.html (documenting the prevalence of mentally ill and mentally retarded people on death row); American Civil Liberties Union, Mental Illness and the Death Penalty in the United States, available at <http://www.aclu.org/capital/mentalillness/10617pub20050131.html?ht=death%20row%20mental%20illness%20death%20row%20mental%20illness> (January 31, 2005) (estimating that 5-10% of inmates on death row are mentally ill).

¹⁵⁵ Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution*, 30 J. Legis. 77, 86 (2003); Elaine Cassel, Executing the Mentally Ill and the Mentally Retarded: Three Key Recent Cases from Texas and Virginia Show How States Can Evade the Supreme Court’s Death Penalty Rulings, January 22, 2006, at FindLaw Legal News and Commentary available at: <http://writ.news.findlaw.com/cassel/20060622.html>.

¹⁵⁶ Colleen Bowers, The Death Penalty Doesn’t Deliver, July 12, 2006, Jackson Free Press (discussing generally discrimination against poor people in the implementation of the death penalty); Lanier and Acker at 581 (discussing documented socio-economic bias in the manner in which the death penalty is implemented in Nebraska); Bright, *supra* note 150.

¹⁵⁷ *Gregg*, 428 U.S. at 189.

¹⁵⁸ Stephen P. Garvey, “*As the Gentle Rain From Heaven*”: *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, foot note 68 (1996).

Retributive justice requires an examination of the system that actually administers the penalty. When that system results in “substantial number of cases in which defendants are erroneously convicted . . . or erroneously sentenced to death, the social goal of expressing community condemnation of “the worst of the worst” is no longer served.¹⁵⁹

C. Racism and Geographical Disparity Play a Role in Death Sentencing

The Supreme Court struck down the death penalty in 1972 on the grounds that the way it was administered violated the Eighth Amendment. One of the Court’s concerns was the role that race played in death sentencing.¹⁶⁰ Four years later, the Court upheld newly revised statutes that were supposed to ensure fairness. Many believe that the past thirty years have not shown a significant increase in fairness. Racial discrimination persists in the use of the death penalty from the charging decisions made by prosecutors¹⁶¹ through jury selection¹⁶², jury deliberations and sentencing. In many jurisdictions, African-Americans are tried in courtrooms where the judge, prosecutor, defense attorneys, bailiffs, police and jury are all white.¹⁶³ One study revealed that only

¹⁵⁹ Bentele, *supra* note 6, at 1385.

¹⁶⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁶¹ Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 327 (1988)(reporting significant discrepancies in the treatment of potentially capital cases by county); *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1520-57 (1988)(discussing race and prosecutor’s charging decisions); Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 775 (1990-91)(prosecutorial decisions based on legal factors and on the race of the victim).

¹⁶² See *Miller-El v. Cockrell*, 537 U.S. 322, (2003); *Miller-El v. Dretke*, 545 U.S. ____ (2005).

¹⁶³ See generally Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995).

1% of the District Attorneys in death penalty states are black and only 1% are Hispanic. The remaining 97.5 % are white, and almost all of them are male.¹⁶⁴

Noted death penalty attorney Professor Steven Bright argues that the manner in which the death penalty is practiced in the United States is a direct result of our country's history of slavery, lynching and racial violence.¹⁶⁵ Lynchings were common until 1920 when Congress threatened to pass an anti-lynching law. Lynchings were then replaced by trials, which were often little more than a quick submission to a mob demand. Serena Hargrove noted:

Lynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob's demand. Responsible officials begged would-be lynchers to 'let the law take its course,' thus tacitly promising that there would be a quick trial and the death penalty. . .Such proceedings retained the essence of mob murder, shedding only its outward form.¹⁶⁶

Indeed, Charles Black suggests that it simply may not be possible to administer capital punishment fairly because of our society's history and the lingering effects of racial discrimination.¹⁶⁷

As discussed earlier, the Supreme Court abdicated addressing the problem of racial discrimination in the infamous Georgia case of *McCleskey v. Kemp*.¹⁶⁸ There, the Court was presented with research conducted by Professor David Baldus that found that in Georgia defendants were 4.3 times more likely to receive the death penalty solely

¹⁶⁴ Jeffrey Pokorak, *Probing the Capital Prosecutor's Perspective: Race and Gender of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817-1819 (1998).

¹⁶⁵ See generally Bright, *supra* note 163.

¹⁶⁶ Serena Hargrove, *Capital Punishment: 21st Century Lynching*, 6 U.D.C. L.REV. 33 (2001).

¹⁶⁷ Donnelly, *supra* note 125, at 50.

¹⁶⁸ 481 U.S. 279 (1987).

because the victim was white rather than black.¹⁶⁹ In a narrow 5-4 decision, the Court refused to rely on this statistical evidence as proof of discrimination and ruled that Warren McCleskey would have to produce evidence of intentional discrimination, a nearly impossible burden to meet, before he would be entitled to challenge his death sentence on the basis of race. The Court's decision erected a wall protecting death penalty systems from race-based challenges.

Interestingly, even Justice Anton Scalia, who voted with the majority in *McCleskey*, believed that racial discrimination did exist. He wrote in a confidential memo about the *McCleskey* decision, revealed when Justice Marshall's papers were made public, "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this Court, and ineradicable, I cannot honestly say that all I need is more proof."¹⁷⁰ As with the risk of executing innocent people, Justice Scalia is willing to live with a death penalty system that risks killing based on race.

Other studies, including one by Professors Samuel Gross and Robert Mauro, found that race played a role in seven other jurisdictions besides Georgia. Examining all homicides reported by the FBI from Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia, the researches identified a "remarkably stable and consistent patten of racial discrimination in the imposition of the death penalty in all eight states."¹⁷¹

¹⁶⁹ Scott Howe, *The Futile Quest for a Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2109 (2004).

¹⁷⁰ *Id.* at 2122.

¹⁷¹ See generally Samuel R. Cross and Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).

A 1990 report of the General Accounting Office (GAO) analyzed all of the then-existing post-*Furman* studies and concluded that race influenced the charging and sentencing decisions in death penalty cases.¹⁷²

More recent studies also reported racial bias. A study in New Jersey of 703 formally- charged homicide cases found that the odds of a homicide involving a white victim would go to trial were nearly three times greater than with Hispanic victims and five times greater than with black victims.¹⁷³ In some Southern states, African-Americans are the victims in over 60% of the murders, but 85% of the death cases are cases with white victims.¹⁷⁴

Professor Baldus has published more recent studies from Georgia that reached the same conclusions as his original study, as well as a study in Philadelphia on all death-eligible defendants prosecuted from 1983 to 1993, which found race-of-the-defendant bias.¹⁷⁵ However, the Philadelphia study differed from Georgia in that the primary source of the racial disparities in Philadelphia was from the jury, rather than from the prosecutor.¹⁷⁶ A study of 502 homicides that occurred between 1993 and 1997 concluded that defendants whose victims were white were 3.5 times more likely to be sentenced to death than defendants whose victims were nonwhites.¹⁷⁷ A later study by the Committee

¹⁷²Howe, *supra* note 168, at 2115. [The GAO experts] noted that “in 82 percent of the studies, race of the victim was found to influence the likelihood” that a murderer would receive a death sentence. They also noted that “[t]his finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques” and that it “held for high, medium, and low quality studies.” The experts also noted that many of the studies found a race-of-defendant influence, although this factor was not as “clear cut” and that it “varied[d] across a number of dimensions.”

¹⁷³ *Id.* at 2114.

¹⁷⁴ See Bright, *supra* note 163, at 461.

¹⁷⁵ Howe, *supra* note 168, at 2117-18.

¹⁷⁶ *Id.*

¹⁷⁷ Howe, *supra* note 168, at 2119.

on Racial and Gender Bias in the Justice System published by the Pennsylvania Supreme Court called for a moratorium on the death penalty due to identified bias.¹⁷⁸

A study of all Maryland cases between 1978 and 1999 found “pronounced bias against killers of white victims and within the white-victim cases, additional bias against black offenders.”¹⁷⁹ The New York Capital Defender Office reported widely divergent capital-charging practice – 20% of the state’s murders occurred outside New York City, but 65% of death penalty notices were filed outside the city.¹⁸⁰

Preliminary studies of the federal death penalty showed “disproportionate numbers of minority offenders facing federal death penalty charges as well as marked geographical disparities in the capital prosecutions initiated in the several federal districts throughout the country.”¹⁸¹ Three quarters of those convicted under 21 U.S.C. section 848, the federal drug kingpin law that provides for the death penalty, are white, but 33 out of 37 of the first 37 prosecutions brought under the death penalty provisions of the statute were against members of minority groups.¹⁸²

Some scholars speculate that African-Americans benefit from these discriminatory patterns. They argue that since most homicides are interracial, it follows that most black victims are being killed by black defendants. The fact that death penalty jurisdictions consistently devalue the lives of black victims (by seeking the death penalty against killers of white victims but not black victims) means that the black defendants

¹⁷⁸ Pennsylvania Supreme Court, *Committee on Racial and Gender Bias in the Justice System*, (March 2003).

¹⁷⁹ Howe, *supra* note 168, at 2118.

¹⁸⁰ Lanier, *supra* note 136, at 599.

¹⁸¹ *Id.* at 599 citing, “The Federal Death Penalty System: A Statistical Study 1998-2000) U.S. Department of Justice (2000), available at: <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>.

¹⁸² See Bright, *supra* note 163, at 464.

who are most likely to be killing the black victims are spared being sentenced to death.¹⁸³

While there may be some truth to this argument, it fails to explain why it is that such a high percentage of black people convicted of killing white victims are sentenced to death given that the majority of people who kill whites are white.

Some jurisdictions where race has not been identified as a problem have found that geography plays a role in death sentencing. A study done at the request of the Nebraska Commission on Law Enforcement and Criminal Justice concluded that there was no significant evidence of racial bias in the treatment of offenders, but found that there were wide geographic disparities in charging and plea bargaining practices and a significant effect of victims' socioeconomic status on charging and sentencing outcomes.¹⁸⁴

The Joint Legislative Audit and Review Commission (JLARC) of the Virginia Legislative Assembly also found that geography figured more significantly than race in prosecutors' charging decisions. "Prosecutors in urban centers were less likely to seek death against capital-eligible defendants than those in rural areas, notwithstanding factually similar crimes."¹⁸⁵

Studies show in the abstract the perniciousness of capital punishment, but what is even more shocking is how racism plays itself out in the courts. For example, William Dobbs, who was an African-American man in Georgia convicted of the murder of a white man, was referred to as "colored" and "colored boy" by the judge and defense attorney and the prosecutor called him by his first name. Two of the jurors admitted to having

¹⁸³ John C. McAdams, *Racial Disparity and the Death Penalty*, 61 LAW & CONTEMP. PROBS. 153, 161-62 (1998).

¹⁸⁴ Lanier, *supra* note 136, at 581.

¹⁸⁵ *Id.* at 583.

called Dobbs a “nigger.”¹⁸⁶ Dobbs’ own defense attorney seemed to be his own worst enemy. The lawyer made his opinion about blacks known throughout the trial. The federal district court reviewing the case characterized the attorney’s views in this way:

Dobbs’ trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because “my granddaddy had slaves.” He said that integration has led to deteriorating neighborhoods and schools and referred to the black community in Chattanooga as “black boy jungle.” He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items.¹⁸⁷

Dobbs is not alone. Bright identified five other Georgia capital cases where the defendants’ own attorneys had used racial slurs. He also documented a case where the judge called the parents of an African-American defendant “nigger mom and dad.” He noted that around this same time, CBS fired a commentator who made a racial slur, but the judge experienced no repercussions whatsoever¹⁸⁸ suggesting that racism in sports announcing will not be tolerated, but racism in capital trials will be.

Despite the fact that it is unconstitutional for prosecutors to strike potential jurors from serving on a jury because of their race, the practice is common. A notorious training video made by the Philadelphia District Attorney’s office instructed new prosecutors, in violation of the constitution, not to select young black women or blacks from low income areas for jury duty because, “young black women are very bad to have on the jury and blacks from low-income areas are less likely to convict.” The video

¹⁸⁶ Bright, *supra* note 164, at 444.

¹⁸⁷ *Id.* at 445.

¹⁸⁸ *Id.* at 446.

instructed prosecutors how to hide racial motives in their jury strikes.¹⁸⁹ Similarly, District Attorney Ed Peters of Mississippi publicly announced his policy to “get rid of as many black citizens as possible when exercising his peremptory challenges.”¹⁹⁰ Neither District Attorney experienced any repercussions for their illegal conduct.

The legacy of discrimination identified in *Furman* has not been corrected in the thirty years since *Gregg*. Entrenched racial bias in the application of the death penalty undermines the principles of retributive justice. As scholar Scott Howe wrote, “If the State relies on aggravating evidence that does not relate directly to the defendant’s personal culpability, the death sentence is unjust compared to the punishment imposed in murder cases involving defendants of equal desert [culpability] who do not receive the death penalty.”¹⁹¹

If the State is using race or geography as a factor in seeking or obtaining death sentences, it is not comporting with the requirement of ordinal proportionality, and is, therefore, not abiding by principles of retributive justice. As Bassett concludes:

Death sentences imposed in the face of a strong and empirically verified risk of racial bias in capital cases are morally inconsistent with retributivism, independently of whether racial discrimination actually entered into any given capital sentencing decision. This is because retributivism forbids exposing defendants to an excessive risk of improper punishment and racial bias creates such a risk in today’s capital sentencing regime. Because the McCleskey Court sanctions systemic racial discrimination in the imposition of the death penalty, the McCleskey decision is morally inconsistent with retributivism.¹⁹²

2. The Death Penalty is Not an Effective Deterrent to Homicide

¹⁸⁹ Hargrove, *supra* note 166, at 42.

¹⁹⁰ *Id.* at 43.

¹⁹¹ Bassett, *supra* note 108, at 30.

¹⁹² *Id.* at 31.

Whether the death penalty actually deters homicides is a subject that has been debated widely. Prominent criminologist Ernest van den Haag stated that “Common sense, lately bolstered by statistics, tells us that the death penalty will deter murder, if anything can. People fear nothing more than death.”¹⁹³ Another scholar suggests that a “common-sense” conclusion is that the fact that “the death penalty either deters or does not deter are both speculative.”¹⁹⁴ Interestingly, 67% of law-enforcement officials “do not believe capital punishment reduces the homicide rate.”¹⁹⁵ Justice Breyer recently analyzed a number of deterrence studies in the case of *Ring v. Arizona* and concluded that “[s]tudies of deterrence are, at most, inconclusive.”¹⁹⁶ It seems fair to conclude, that there is no clear evidence that abolishing the death penalty has led to an increase in homicides, or conversely, that reinstating it has led to a decrease.¹⁹⁷

Many scholars are emphatic in their assertion that the death penalty is not a deterrent, and if anything, may actually increase homicides. Scholars Charles Lanier and James Acker claim that the overwhelming body of research shows “no credible evidence that capital punishment is a superior deterrent to murder than is life imprisonment.”¹⁹⁸

¹⁹³ Lauer and Hsieh, *supra* note 120.

¹⁹⁴ Donnelly, *supra* note 125, at 48.

¹⁹⁵ Robbins, *supra* note 98, at 1131.

¹⁹⁶ *Ring v. Arizona*, 536 U.S. 584, 615 (2002) (Breyer, J. concurring) citing Sorensen, Wrinkle, Brewer, & Marquart, *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQUENCY 481 (1999)(no evidence of a deterrent effect); Bonner & Fessenden, *Absence of Executions: A Special report, States With No Death Penalty Share Lower Homicide Rates*, N.Y. Times, Sept. 22, 2000, p. A1 (during the last 20 years, homicide rate in death penalty states has been 48% to 101% higher than in non-death-penalty States); see also Radelet & Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & C. 1, 8 (1996) (over 80% of criminologists believe existing research fails to support deterrence justification).

¹⁹⁷ Donnelly, *supra* note 125, at 24.

¹⁹⁸ Lanier, *supra* note 136, at 591 citing C.J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. PITT. L. REV. 321 (1999); W.C. Bailey, *An Analysis of the Deterrent Effect of the Death Penalty in North Carolina*, 10 N.C. CENT. L.J. 29 (1978); W.C. Bailey, *Deterrence and the Death Penalty for Murder in Utah: A Time Serious Analysis*, 5 J. CONTEMP. L. 1 (1978); W. C. Bailey, *Deterrence and the Death Penalty for Murder in Oregon*, 6 WILLAMETTE L. REV. 67 (1979); W.C. Bailey, *The Deterrent Effect of the Death Penalty for Murder in Ohio*, 28 CLEV. ST. L. REV. 51 (1979); W. C. Bailey, *Disaggregation in Deterrence and Death Penalty Research: The Case of Murder*

They cite to thirteen studies to support this assertion as well as a study by scholars Peterson and Bailey who reviewed the mass of studies on the death penalty and deterrence.¹⁹⁹ Renowned scholar David Baldus claims a nearly complete consensus on the agreement that the death penalty does not deter crime more effectively than life imprisonment. “If there is any marginal deterrent effect from the death penalty, it is beyond our capacity to measure and document.”²⁰⁰ Any studies purporting to show a deterrent effect have been thoroughly discredited in the research community for their “faculty methodologies and failure to stand up under attempted replication.”²⁰¹

One long-time supporter of deterrence theory is Joanna Shepard, a criminologist at Duke University. Shepard has spent much of her career researching deterrence theories using econometric models. She had previously published articles claiming that for every execution on average three murders were deterred.²⁰² Shepherd has since revised her findings after she conducted a state-by-state analysis of the homicide figures. Her newest conclusion is that jurisdictions are too varied to draw uniform conclusions. She recalculated the deterrence rate on a state-by-state basis and found that while in some jurisdictions the death penalty does have a deterrent effect, in others there is no deterrent

in Chicago, 74 J. CRIM. L. & CRIMINOLOGY 827 (1984); W.J. Bowers and G. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?* 26 CRIME AND DELINQUENCY 453 (1980); S. Cameron, *Review of the Economic Evidence on the Effects of Capital Punishment*, 23 JOURNAL OF SOCIO-ECONOMICS 197 (1994); J. K. Cochran, M.B. Chamlin, and M. Seth, *Deterrence or Brutalization? An Impact Assessment of Oklahoma’s Return to Capital Punishment*, 32 CRIMINOLOGY 107 (1994); T. Sellin, CAPITAL PUNISHMENT, Harper & Row 1967; K.B. Smith, Explaining Variation in State-Level Homicide Rates: Does Crime Policy Pay? 59 JOURNAL OF POLITICS 350 (1997); J. Sorenson, R. Wrinkle, V. Brewer, and J. Marquart, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 CRIME AND DELINQUENCY 481 (1999); Kilman Shin, DEATH PENALTY AND CRIME 1-71 (1978); Franklin E. Zimring & Gordon J. Hawkins, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 186-90 (1973).

¹⁹⁹ Lanier, *supra* note 136, at 591.

²⁰⁰ David C. Baldus, *Keynote Address: The Death Penalty Dialogue Between Law and Social Sciences*, 70 IND. L.J. 1033, 1034 (1995)(footnotes omitted).

²⁰¹ Bentele, *supra* note 6, at 182. See foot note 108 of Bentele’s article for a lengthy analysis of this academic dispute.

²⁰² Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283 (June 2004).

effect, and in some the death penalty has a brutalizing effect, increasing the number of homicides.²⁰³ Other scholars have also concluded that capital punishment actually increases homicides.²⁰⁴ However, some researchers have concluded that capital punishment may deter other crimes such as robbery, burglary, and assault, when executions receive a certain amount of television coverage.²⁰⁵

Another indicator that the death penalty is not a deterrent to murder is the fact that states without the death penalty have consistently had lower homicide rates than states with it. Sellin first established this in 1967 and 1980 and these numbers were replicated in 1988.²⁰⁶

In 2000 The New York Times reported:

[There are] no crime trends supporting a deterrent effect of capital punishment. Indeed, 10 out of 12 states without capital punishment have homicide rates below the national average...while half the states with the death penalty have homicide rates above the national average...[D]uring the last 20 years, the homicide rate in states with the death penalty has been 48 percent to 101 percent higher than in states without the death penalty.²⁰⁷

In conclusion, there is simply not enough evidence that capital punishment deters crime to withstand a strict scrutiny challenge. The overwhelming majority of researchers believe that it does not. Some believe that it actually increases the homicide rate. As

²⁰³ See generally Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005).

²⁰⁴ Lanier, *supra* note 136, at 591 citing W.C. Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 CRIMINOLOGY 711 (1998); W.J. Bowers and G. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?* 26 CRIME AND DELINQUENCY 453 (1980); J. K. Cochran, M.B. Chamlin, and M. Seth, *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107 (1994); E. Thomson, *Deterrence Versus Brutalization: The Case of Arizona*, 1 HOMICIDE STUDIES 110 (1997); J. Michael Eshevarria, *Reflections on O.J. and the Gas Chamber*, 32 SAN DIEGO L. REV. 491, 494-95 (1995)(citing to studies that show that "empirical data concerning the death penalty's deterrent value shows that the justification is dubious at best.")

²⁰⁵ William C. Bailey & Ruth D. Peterson, *Capital Punishment and Non-Capital Crimes: A Test of Deterrence, General Prevention, and System-Overload Arguments*, 54 AL. L. REV. 681, 699 (1990).

²⁰⁶ Echevarria, *supra* note 128, at 501-02.

²⁰⁷ Lanier, *supra* note 136, at 591.

Justice Breyer concluded, at best, the studies are inconclusive. At worst, the death penalty may accomplish the opposite of what it intends to do.

The public appears to be losing confidence in the death penalty as a form of deterrence since a high in 1983 dropping from 63% in 1983 to 44% in 2000.²⁰⁸ A 2004 study reported even less public belief in deterrence -- only 35%.²⁰⁹ However, a 1986 poll showed that 73% of those in favor of the death penalty would still be in favor of it even if it were proved that there was no deterrent effect.²¹⁰ Still, public perception as to whether the death penalty is a deterrent is vitally important, because public perception is probably a reflection of individual beliefs, and is, therefore, an indication of whether people are deterred by the threat of a death sentence.

3. The Manner in Which the Death Penalty is Practiced and its Consequences Lessons its Ability to Vindicate Legal and Moral Order

Superficially, the death penalty appears to be a compelling way for the state to denounce serious crime and vindicate legal and moral order. Professor Sigler points out that Justice Stewart in his *Gregg* opinion, stressed the importance of the denunciatory rationale as being “essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”²¹¹ Further, Stewart quotes Lord Justice Denning: “[I]n order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them.”²¹²

²⁰⁸ Lanier, *supra* note 136, at 590. Similarly a 2001 Gallup poll asked respondents whether the execution of Timothy McVeigh would deter future acts of violence. Only 30% thought that it would, whereas 66% responded that it would not.

²⁰⁹ CNN/USA TODAY/Gallup Poll, June 2, 2004.

²¹⁰ Echevarria, *supra* note 128, at 512-13.

²¹¹ Sigler, *supra* note 95, at 1184.

²¹² Sigler, *supra* note 95, at 1184.

However, a deeper examination of the reality of the death penalty reveals a crumbling infrastructure upon which no solid house can be built. The serious problems in the administration of the death penalty undermine its ability to serve as an effective means of denouncing or vindicating crime, or of restoring moral order.

A. There are Serious Problems with the Administration of the Death Penalty

When Illinois Governor George Ryan declared a moratorium on executions in 2000, the tenor of the death penalty debate in this country changed.²¹³ The impetus for Governor Ryan's unusual move was the revelation of serious problems such as the exoneration of 13 death row inmates in a state where only 12 had been executed during the modern era. Governor Ryan was not an abolitionist, but he did not want to preside over the execution of an innocent person. He appointed a highly qualified, bi-partisan commission to study the Illinois system, and come up with recommendations to ensure that no innocent person would be executed.

After two years of serious study, the Commission produced 85 recommendations, some of which were adopted by the Illinois legislature.²¹⁴ Significantly, the Commission also concluded that the only way to ensure that innocent people would not be executed was to eliminate the death penalty.²¹⁵ Before leaving office, Ryan commuted the death

²¹³ A copy of the press release announcing the Governor's decision is available at the State of Illinois Home page at: <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=359>.

²¹⁴ Lanier, *supra* note 136, at 579. Among the recommended changes included:

Changes in police practices to help safeguard the reliability of evidence produced during pretrial investigations; the introduction of guidelines and centralized review to help regulate prosecutors' capital-charging decisions; significant restrictions in the range of death penalty eligible murders; periodic training for judges and attorneys in capital cases; and the commitment of substantial additional resources. The Commission also recommended that better data on capital cases be collected. It is noteworthy that no state in the country comes close to meeting the standards recommended by the Commission.

²¹⁵ Illinois Commission Highlights Death Penalty's Inherent Flaws, Human Rights Watch, April 17, 2001, available at: <http://hrw.org/english/docs/2002/04/17/usdom3860.htm>.

sentences of all but seven people²¹⁶ on death row to life in prison,²¹⁷ after determining that the manner in which the death sentences had been obtained could not guarantee their accuracy or fairness.

The same year as Ryan's dramatic pronouncement, Professor James Liebman and scholars at Columbia University Law School released a comprehensive study of every death penalty appeal from 1973 to 1995.²¹⁸ The review of literally thousands of cases revealed that 68% of all death penalty cases were reversed due to serious errors at trial, resulting in new trials or new sentencing hearings. Upon retrial, 82% of the cases resulted in a sentence less than death, and in 7% of those cases, the defendants were found to be innocent.²¹⁹ The three most common reasons for these errors were incompetent defense attorneys, prosecutorial misconduct and faulty jury instructions.²²⁰

Other factors that have contributed to the high incidence of wrongful convictions include police misconduct, racial prejudice, unreliable jail house witnesses and faulty forensic science.²²¹ For example, serious problems in the operation of forensic laboratories have been discovered in several locations including Oklahoma, Virginia and Texas. The most shocking examples of laboratory dereliction came out of Harris County, Texas, where the laboratory had been providing false DNA evidence for the last twenty-five years.²²² The significance of these lab failures can be best understood by considering that 35% of all executions in the United States during the modern era came out of Texas,

²¹⁶ Markel, *supra* note 101, at 408.

²¹⁷ *Id.*

²¹⁸ James Liebman, Jeffrey Fagan and Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, available at: <http://www2.law.columbia.edu/instructionalservices/liebman/>.

²¹⁹ Dieter, *supra* note 131, at 12.

²²⁰ Other research indicates that many jurors rely on factors wholly unrelated to jury instructions and in many cases make up their minds about the appropriate sentence before the sentence phase of the trial even begins. Lanier, *supra* note 136, at 597.

²²¹ Blackerby, *supra* note 130, at 1186-87.

²²² Markel, *supra* note 101, at 450.

the overwhelming majority out of Harris County.²²³ The laboratory was shut down and the federal government took the highly unusual step of striking all of the results from CODIS, the national DNA database.²²⁴

Official misconduct is more likely to occur when a defendant is represented by an incompetent, or inexperienced, lawyer, because prosecutors and police take advantage of their incompetence or inexperience. An example of this is the case of Glenn Ford from Louisiana whose court-appointed trial attorney was an oil and gas law specialist who had never tried a criminal case and had never appeared before a jury. Taking advantage of the lawyer's inexperience, the prosecutor withheld a series of police reports suggesting that Mr. Ford's co-defendants had actually shot and killed the victim and hid the murder weapon. These reports were not discovered until Mr. Ford had competent post-conviction representation. Mr. Ford, who was black, was tried by an all white jury to which his trial lawyer did not object.²²⁵

Other stories of incompetent defense counsel abound as Charles Lanier and James Acker note:

There is no shortage of stories involving scandalous representation provided to indigent defendants on trial for their lives – stories involving sleeping lawyers (*Burdine v. Johnson*, 2001), intoxicated lawyers (*People v. Garrison*, 1989), lawyers wholly unfamiliar with death penalty law and procedures (*Frey v. Fulcomer*, 1992), lawyers making racist remarks about their clients (*Ex parte Guzman*, 1987; *Goodwin v. Balkom*, 1982), lawyers who ended up disbarred and even

²²³ Dieter, *supra* note 131, at 32.

²²⁴ *Id.* at 31. Dieter and the Death Penalty Information Center's report highlights a number of disturbing aspects of the scandal starting with the fact that the head of the DNA lab, James Bolding, was not qualified for the job. He had been dismissed from the University of Texas' Ph.D. program and he had failed algebra and geometry and never took statistics. Jobs at the lab had been given to graduates without the required degrees. Among those hired to do DNA tests were two workers from the city zoo – one who had most recently been cleaning elephant cages and the other who had done DNA research on insects – and a person who could not speak English.

²²⁵ R. Neal Walker, *How the Malfunctioning Death Penalty Challenges the Criminal Justice System*, 89 JUDICATURE 265, 268 (2006).

incarcerated shortly after representing their clients (Young v. Kemp, 1985; Young v. Zant, 1984), and lawyers lacking the experience and resources to mount any semblance of an effective defense.²²⁶

Many death row families were seriously disillusioned with the justice system because of the incompetence of their loved ones' attorney. Tragically, many families used life savings to hire incompetent attorneys only to later learn their family member would have been better defended by a public defender. Some of their family members were represented by attorneys with drinking problems; some of the attorneys had had problems with ethical violations; and some were disbarred after representing their family member. Many had no experience whatsoever in trying capital cases.²²⁷

These experiences are backed up by state studies. A *Chicago Tribune* investigation of the death penalty in Illinois found that “at least 33 death row inmates had been represented at trial by an attorney who has since been disbarred or suspended.”²²⁸ A similar investigation by the *Seattle Post-Intelligencer* found that “one-fifth of the 84 people who have faced execution in the past 20 years were represented by lawyers who had been, or were later, disbarred, suspended or arrested.”²²⁹

Not surprisingly, many family members lost faith in the criminal justice system from what they perceived to be an unfair process that their loved one endured. One father, who was retired military who had previously had complete faith in the justice system, lost that faith after his son's trial. One of the witnesses testified that his son “was near the scene of the crime in his Volkswagen – that they had to push it. And we knew it wasn't true because [the victim] was killed in December of 1982 and the car wasn't

²²⁶ Lanier, *supra* note 136, at 589.

²²⁷ See generally Sharp, *supra* note 39 and King, *supra* note 1.

²²⁸ Dieter, *supra* note 131, at 11.

²²⁹ *Id.*

bought until September of 1983.” Further salt was rubbed into this wound when the prosecutor suggested that the family falsified the records. Police chemist Joyce Gilchrist testified that the hair found proved that “[this man’s son] was in close and violent contact with the victim.” Later Gilchrist was discredited and fired after revelations that for many years, in dozens of cases, she had falsified evidence. The jury never learned that absolute identification from hair examination is not possible.²³⁰

The problems in the administration of the death penalty have reached such epic proportions that 2,000 organizations and governmental bodies have called for moratoria – a temporary suspension in the use of executions – until concerns of fairness can be addressed.²³¹

A system of justice as flawed as this teaches its citizens that criminal justice does not coincide with actual justice. It teaches contempt for the law and may impair obedience to the law.²³² It lacks the moral authority to vindicate legal and moral order.²³³

B. The Death Penalty Victimizes Other People Involved in its Implementation

The death penalty harms other people besides the death row families. Although there is very little research on secondary victimization, there is evidence that juries,

²³⁰ Sharp, *supra* note 39, at 117-118.

²³¹ Dieter, *supra* note 131, at 9.

²³² Sherry F. Colb, *Freedom from Incarceration: Why is this Right Different from all other Rights?* 69 N.Y.U. L. REV. 781, 820 (1994).

²³³ Laufer, *supra* note 120, at 354. According to Laufer and Hsieh, “perceptions of legitimacy are integral to the survival of any social institution.” Erosion of state authority is a natural consequence of a criminal justice system that tolerates racial discrimination, incompetent defense attorneys, prosecutorial misconduct and faulty jury instructions, all in an effort to implement the death penalty.

judges,²³⁴ prosecutors, defense attorneys, prison personnel,²³⁵ and witnesses to an execution may experience prolonged trauma.²³⁶

In a recent Tennessee Bar Journal article, Senior Judge Gilbert Merritt of the U.S. Sixth Circuit Court of Appeals noted that “state and federal judges agree that the judicial administration of the death penalty is by far the most difficult, time-consuming, frustrating and critical joint problem that the Tennessee state and federal judiciary have to grapple with on a daily basis.”²³⁷

This perspective is, of course, not shared with all players in the system. Harris County Prosecutor Bill Hawkins recently wrote an article documenting how the death penalty did not take much of a toll on the Texas criminal justice system, and concluded: “The truth is that whatever the cost, be it financial, a citizen’s time, or the time and stress on the trial participants, the impact of the death penalty on the criminal justice system is worth the price.”²³⁸

There is a growing body of research establishing that jurors who serve on capital trials suffer a variety of psychological and physical symptoms. The Capital Jury Project, a national research program sponsored by the National Science Foundation, has

²³⁴ See Henry Leyte-Vidal and Scott J. Silverman, *Living With the Death Penalty*, 89 JUDICATURE 270 (2006) (gives an account of judges’ experiences with the death penalty, some of which were negative, others were not).

²³⁵ See Bob Herbert, *Inside the Death House*, N.Y. Times, Oct. 9, 2000, at A 21 and *Witness to an Execution*, NPR radio broadcast Oct. 20, 2000 (detailing the trauma experienced by members of the execution team in Texas); and Donald Cabana, *DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER*, University of British Columbia Press, 1996 (a first-hand account of a Mississippi prison warden whose experience with the death penalty turned him into an abolitionist).

²³⁶ Lanier, *supra* note 136, at 603.

²³⁷ Michael Hintze, *Tinkering with the Machinery of Death Capital Punishment’s Toll on the American Judiciary*, 89 JUDICATURE 254, 257 (2006) citing 41 Tenn. B.J. (September 2005), available at <http://www.tba.org>.

²³⁸ Bill Hawkins, *Capital Punishment and the Administration of Justice a Trial Prosecutor’s Perspective*, 89 JUDICATURE 254, 261 (2006).

conducted in-depth interviews with capital jurors in 14 states. Researchers have identified

one or more physical and/or psychological symptoms that could be related to jury duty. These included reoccurring thoughts about the trial that would keep the jurors awake at night or nightmares about the crime and the defendant, stomach pains, nervousness, tension, shaking, headaches, heart palpitations, sexual inhibitions, depression, anorexia, faintness, numbness, chest pain, and hives. . . . Findings showed that jurors whose jury panel rendered a death penalty did sustain greater PTSD [Post-Traumatic Stress Disorder] symptoms than did jurors whose jury panel rendered a life sentence.²³⁹

Steve Presson, a capital attorney in Oklahoma, has represented many capital defendants and has, over the years, become close to many. One client, Scott Hain, who was a juvenile at the time of the crime, was devastated when he learned that his parents would not witness his death and did not want his remains or his property. He asked Steve to take his ashes to Hawaii and scatter them there and told Steve that “[he] had been more of a father figure to him than anyone else in his life.”²⁴⁰ Nine of Presson’s clients have been executed, which has caused him tremendous pain. Other capital attorneys have experienced similar stress.

Others harmed by the death penalty process are the family members of the murder victims. Many victims’ family members oppose capital punishment and believe that it harms them.²⁴¹ Even those family members who support capital punishment are often harmed by the process. The long and complicated appeals process, necessary to ensure accuracy and fairness, is often characterized by repeated court hearings, including new

²³⁹ Michael Antonio, *Jurors’ Emotional Reactions to Serving on a Capital Trial*, 89 JUDICATURE 282, 283 (2006) (While a large majority of jurors reflected negatively upon their experience serving on a capital case, some enjoyed it. Some jurors reported the experience as “quite exciting and really enjoyed it,” “a learning experience,” and “very rewarding, educational.”)

²⁴⁰ Sharp, *supra* note 39, at 154.

²⁴¹ See generally, Rachel King, *DON’T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY*, Rutgers University Press (2003).

trials or sentencing hearings. Victims are retraumatized by these hearings and the media attention that they attract.

For victims that oppose capital punishment, they are sometimes treated so poorly that they lose the status of “victim.” This happened to Audrey Lamm and her father Guss Lamm of Oregon who requested permission to speak before the parole board seeking clemency for the killer of their mother and wife. This request was denied on the ground that they were not “victims” under the victims’ rights laws of Oregon.²⁴² Felicia Floyd and Chris Kellett opposed the execution of their father, who had murdered their mother and grandmother. While they were given the opportunity to testify against the execution before the parole board, the board discounted their remarks considering them to be “supporters of the defendant” and not “victims” of the homicide.²⁴³

Another particularly extreme example of mistreatment towards a victim was that of SueZanne Bosler whose father, a Mennonite minister, was murdered in the parsonage where the family lived. Ms. Bosler was attacked and left for dead. She did not want the killer, James Bernard Campbell, a young black man who was border-line mentally retarded, to be sentenced to death; she supported a life sentence without the possibility of parole. She begged the prosecutor to resolve the case with a plea agreement to a life sentence, but he would not. Instead, she had to endure being a witness at trial and in three subsequent sentencing trials. (Campbell’s sentence was twice overturned by appeals courts because of prosecutorial misconduct.)

After a decade of litigation, Ms. Bosler was tired of being used by the state in its efforts to kill Campbell while she was denied the opportunity to tell the jury that she

²⁴² King, *supra* note 241, at 189-225.

²⁴³ King, *supra* note 1, at 123-152.

opposed it. She hired an attorney who advised her of a way that she could legally express her opposition to the death penalty to the jury. When she was testifying, the prosecutor asked her what she did for work as a way to get the jury to know her and she replied that she was a hairdresser and she traveled around the country working to end the death penalty. The prosecutor and judge were furious with her, and the judge threatened to throw her in jail for contempt of court if she mentioned opposition to the death penalty again. On the third sentencing hearing, ten years after the crime occurred, the jury sentenced Campbell to life.²⁴⁴ Besides the stress and strain of ten years of litigation, the state also spent untold resources on its unsuccessful attempt to kill Campbell.

Another aspect of the death penalty that is stressful for families is that it often causes a rift between family members who support it and those who oppose it. This is a common occurrence, and sometimes family members are pitted against each other. This happened with Maria Hines who opposed the execution of her brother's killer, whereas her sister-in-law supported it. Before the execution, the media turned their disagreement into a major issue, pitting them against each other until there were so many bad feelings that it created a rift which has still not healed nearly 20 years later.²⁴⁵ Ms. Hines, who had befriended the killer, felt tremendous sadness and grief after his execution, and deep sadness because of the estrangement with her extended family.²⁴⁶

Like Ms. Hines, Sue Norton befriended Robert Knighton (known as BK) who killed her father and stepmother and spoke publicly against his execution. Her sister supported the execution. Their disagreement became the focus of many media stories.

²⁴⁴ Rachel King, *The Impact of Capital Punishment on Families of Defendants and Murder Victims' Family Members*, 89 JUDICATURE 292, 294 (MARCH-APRIL 2006).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

After all his appeals failed, Mrs. Norton witnessed BK's execution, at his request. The stress of BK's execution made Mrs. Norton, a cheerful and optimistic person, stressed and tearful. After the execution, she reported,

“I am just trying to maintain. . . I bawled all the way home the other day and Gene [her husband] listened to me talk for two hours. He has been so good. I have not been out of the house since. I was supposed to go to the store and do some errands this morning, but did not go. I hate leaving the house alone.”²⁴⁷

The stress was compounded by the fact that she and her sister disagreed with each other, which became a big part of the story of BK's execution.²⁴⁸

Johnnie Carter witnessed the execution of the man who killed her granddaughter. She did not condone his crime, but she opposed his execution. At her request, she met the man in prison and he answered questions about the murder for her. When he asked her to witness the execution, she agreed. “It took my breath away,” she said of the experience. After the execution, the family members who supported the execution were escorted to an area inside the prison for a press conference, but Ms. Carter was told to go outside into the cold rainy night.²⁴⁹

By harming others involved in the process, especially the victims' family members, the death penalty loses much of its moral authority. Any benefit to society inured from the death penalty is outweighed by its negative impact -- creating rifts within families, re-traumatizing victims, and traumatizing jurors, judges and prison personnel. In the effort to restore moral order, the death penalty creates other moral problems.

²⁴⁷ Sharp, *supra* note 39, at 158.

²⁴⁸ Another example of disagreement between family members occurred during the execution of Carla Faye Tucker. Ron Carlson, the brother of one of Tucker's victims became close to Tucker; at her request, he witnessed her execution as one of her witnesses, while the husband of the victim witnessed the execution for the state. This aspect of the execution became a big news story, which only increased the tension between the two, creating a permanent rift. See King, *supra* note 241, at 57-83.

²⁴⁹ Sharp, *supra* note 39, at 160.

C. The High Cost of the Death Penalty Lessens its Ability to Serve as an Effective Denunciation or Vindication of Legal and Moral Order

The cost of capital punishment may not be an appropriate area of discourse in discussions of morality. If capital punishment were working as a deterrent and were applied fairly, the cost of carrying out the punishment should be of little concern. However, given that the death penalty is not serving the social goals, the fact that it also costs significantly more than other punishments should be a concern when considering whether it is an appropriate way to denounce violence and vindicate social order.

It is difficult to obtain precise figures, and the costs vary significantly between jurisdictions, but several studies have concluded that death penalty systems demand significantly more resources than jurisdictions where life imprisonment is the maximum punishment.²⁵⁰ Some numbers that are particularly noteworthy are that each execution in North Carolina (when you consider the total costs involved) exceeds \$2 million. California taxpayers could save \$90 million a year by abolishing the death penalty. Several country budgets have been bankrupted by the cost of bringing capital cases.²⁵¹

Despite the millions spent (or misspent) on capital punishment, there is little return for the money. As Lanier and Acker explain:

Ironically, though, the considerable financial investments incurred in virtually all capital prosecutions produce a modest return in the form

²⁵⁰ Acker, *supra* note 136, at 588 citing R. M. Bohm, THE ECONOMIC COSTS OF CAPITAL PUNISHMENT: PAST, PRESENT, AND FUTURE, in J.R. Acker, R.M. Bohm, & C.S. Lanier (Eds.), *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (2nd ed., pp. 573-594) Durham, NC: Carolina Academic Press (2003); P.J. Cook and D.B. Slawson, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA, Durham, NC: Terry Sanford Institute of Public Policy (1993); M. Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985); R.L. Spangenberg and E. R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOYOLA L. REV. 45 (1989); M. Costanzo, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY, ST. MARTIN'S PRESS (1997); DEATH PENALTY INFORMATION CENTER (1994).

²⁵¹ *Id.* at 588.

of executions. Only about half of trials in which a death sentence is sought result in conviction for a capital crime and a sentence of death. Even in cases in which death sentences are imposed, later judicial review results in as many as two out of three capital convictions and/or sentences being vacated. The great majority of offenders thus will end up serving lengthy prison sentences, even though huge sums of money were fruitlessly spent pursuing their execution. These extra costs are not a factor in systems in which life imprisonment is the maximum punishment.²⁵²

Based on calculations of the Indiana Criminal Law Study Commission, the average death penalty case from trial to execution (using 10 years in prison as a calculation – many prisoners are in much longer before execution) was \$667,560, whereas the typical life-without-parole case from trial to death (using 47 years in prison for calculations) where a death penalty was never sought was \$551,016. This means that even including the costs of 47 years in prison (which is much longer than most prisoners survive in prison) was still \$116,544 less expensive than a death case which included an estimating 47 years in prison.²⁵³ This figure does not include any expenses incurred when capital convictions are vacated in collateral proceedings, on appeal or upon federal review, and remanded for further proceedings, all of which are frequent occurrences. Between the period of 1986 and 2005, 35% of all Indiana death row defendants had their cases remanded to trial court for further proceedings.²⁵⁴

4. The Death Penalty is not necessary to Incapacitate Offenders

There is no arguing with the fact that executing an offender incapacitates him or her. However, with today's modern penal system, it is not necessary to execute an offender to accomplish the goal of incapacitation. Every state, and the federal

²⁵² Acker, *supra* note, at 588.

²⁵³ Brent E. Dickson, *Effects of Capital Punishment on the Justice System*, 89 JUDICATURE 278, 280 (2006).

²⁵⁴ *Id.*

government, has high security prisons, which keep dangerous offenders from escaping or killing while incarcerated. While escapes and prison murders do happen, they are rare.

The public has a legitimate interest in the concern that a convicted killer, if released, may kill again. But the rate of recidivism among released murderers is extremely low,²⁵⁵ and in any event, most defendants who are not sentenced to death are sentenced to life without parole, which Justice Breyer has suggested is a sufficient punishment alternative to ensure an offender does not commit further crimes.²⁵⁶

Furthermore, it is hard to argue that the death penalty is necessary to incapacitate murderers when the overwhelmingly majority of people who commit homicide are not sentenced to death. Of the estimated 6,300 people sentenced to death since 1976, only 1,012 of them have been executed.²⁵⁷ Researchers estimate that only 2.2% of offenders arrested for murder are sentenced to death.²⁵⁸ Of the 21,000 homicides a year, only 300 are sentenced to death, and an even smaller number, well less than 100 most years, are actually put to death. While not all of the 21,000 homicides would have been death eligible, many of them would have been.

Short of a mandatory death penalty, which the Supreme Court has declared unconstitutional, there will always be discrepancies and inconsistencies in death

²⁵⁵ Lanier, *supra* note 136, at 592-93 citing Marquart & Sorensen, A National Study of the *Furman*-Commuted Inmates: Assessing the Threat to Society from Capital Offenders, 23 Loyola (LA) L. Rev. 5, 26 (1989)(985 did not kill again either in prison or in free society). See also Sorensen & Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & C. 1251, 1256 (2000) (studies find average repeat murder rate of .002% among murderers whose death sentences were commuted). But see *Roberts v. Louisiana*, 428 U.S. 325, 354 (1976)(White, J., dissenting)(“[D]eath finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not”).

²⁵⁶ Lanier, *supra* note 136, at 590 citing *Knight v. Florida*, 528 U.S. 990 (1999)(Breyer, J., dissenting from denial of certiorari).

²⁵⁷ See Death Penalty Information Center at www.deathpenaltyinfo.org.

²⁵⁸ John Blume, et. al, *Explaining Death Row's Population and Racial Composition*, 1 J. EMP. L. STUD. 165 (2004).

sentencing.²⁵⁹ However, the point is that the death penalty is so infrequently used that it has become more symbolic than normative. It is difficult to argue that the death penalty is a necessary means of incapacitating murderers when so few of them are actually subjected to it.

IV. Any Legitimate Criminal Justice Interests a State May Have in Using the Death Penalty are not sufficiently narrowly Tailored to Survive a Strict Scrutiny Analysis

A substantive due process challenge requires balancing the states' interests against the rights of the individual. In this case, the harm caused to the families cannot be justified by the death penalty because it has failed so completely to live up to the goals for which it exists. The manner in which the death penalty is practiced does not comport with its stated criminal justice goals such as deterrence, retribution, incapacitation and restoration of social order. To the extent that it does accomplish these goals, "the infringement is [not] narrowly tailored to serve a compelling state interest."²⁶⁰ Under *Glucksberg*, the government may not infringe on "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."²⁶¹ Strict scrutiny further requires that state action limiting the exercise of a fundamental right must be the least restrictive means to serve that end.²⁶²

²⁵⁹ The Supreme Court struck down a mandatory death penalty scheme in *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). Professor Steven Gey believes that Justice Scalia has endorsed the constitutionality of mandatory death penalty schemes. *See Gey, supra* note 94, at 92. As much as I dislike agreeing with Scalia, the mandatory approach seems to be one way to address the problem of arbitrary and uneven sentencing. However, what would likely happen is that, like in the case of mandatory drug sentencing, a mandatory death penalty would increase the importance of the prosecutor's discretion in seeking a death sentence, and would still result in unfairness.

²⁶⁰ *Glucksberg*, 521 U.S. at 719.

²⁶¹ *Id.*

²⁶² Sherry F. Colb, *Freedom from Incarceration: Why is this Right Different from all Other Rights?* 69 N.Y.U.L. REV. 781 (1994) citing Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* secs. 16-7-12 at 1454-65 (2ed. 1988).

The death penalty for the sake of retribution falls short of meeting that goal because of the numerous problems with the way it is practiced that make it an essentially unfair punishment. The problem of wrongful convictions and the possible execution of innocent people severely diminishes the death penalty as a form of retribution. Inevitably innocent people will be executed. The state's legitimate interests in punishing murderers cannot be justified by killing innocent people, when other acceptable forms of punishment are available. Indeed some scholars believe that the twin requirements of individualized sentencing and eliminating arbitrariness in sentencing cannot be reconciled.²⁶³ Justice Blackmun ultimately came out against the death penalty because of his skepticism that the two goals could ever be reconciled, and his belief that if the two goals could be reconciled, the Supreme Court had failed to do so. He wrote:

[E]ven if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability to strike an appropriate balance between the Furman promise of consistency and the Lockett requirement of individualized sentencing, the Court has retreated from the field.²⁶⁴

As regards to the death penalty as a form of deterrence, too many studies indicate that the homicide rate "bears no relation to the existence or non-existence of capital punishment."²⁶⁵ The uncertainty surrounding the deterrence debate, suggests that it cannot pass a strict scrutiny challenge. Additionally, the fact that some research indicates that

²⁶³ Donnelly, *supra* note 125, at 44-45. According to Donnelly, "[r]etributive theory requires greater rigor in relating punishment to desert than is possible under the sentencing methods approved by the Supreme Court." The Court is correct that human dignity requires a consideration of mitigating factors and mercy for each individual. This is not a basis, however, for justifying on retributive grounds the death penalty for those executed. The death penalty, as currently administered, is not based on respect for the human dignity of potential victims because it is not carefully related to deterrence. Rather, it is based, as the Supreme Court frequently indicates, on a societal goal of retribution, a goal which either expresses society's desires or reinforces society's values. See also Gey, *supra* note 94, at 103.

²⁶⁴ Sigler, *supra* note 95, at 1194.

²⁶⁵ Echevarria, *supra* note 128, at 530.

the death penalty may have a brutalizing effect, strengthens the argument that the death penalty as a deterrent cannot survive a strict scrutiny challenge.

The death penalty's strongest policy argument is that it is an effective means of incapacitation. However, a strict scrutiny analysis requires that the state use the most narrowly-tailored means to accomplish its goal. Given the availability of modern penal systems, and lengthy prison terms such as life in prison without parole, the state's justification for using the death penalty as a means to incapacitate prisoners is no longer valid.²⁶⁶ Further, in the unlikely event that a person convicted of first-degree murder would ever be released from prison, a number of studies have established that convicted murderers have a lower recidivism rate than other criminals.²⁶⁷

I would argue that the death penalty falls so short of the mark of accomplishing its stated goals that it does not even pass a rationale based scrutiny, let alone a strict scrutiny standard.²⁶⁸ However, even if some believe otherwise, that the death penalty does accomplish its stated goals, it still does not pass the second part of the strict scrutiny test, which requires that the penalty be narrowly drawn. Alternatives to the death penalty are certainly available and can accomplish the states' goals of deterring, punishing, incapacitating and restoring moral order, perhaps even better than capital punishment

²⁶⁶ Donnelly, *supra* note 125, at 13.

²⁶⁷ Echevarria, *supra* note 128, at 506. In 1988, Marquart and Sorenson studied Texas death row inmates who had been released into general population after their sentences were commuted to life. The researchers found that of the 46 inmates in the group, not one committed another homicide. The following year, the researchers broadened their study by looking at 558 inmates from twenty-nine states and the District of Columbia whose death sentences had been commuted. Only 6 (or 1 percent) committed another murder while incarcerated. A follow up study showed that non-homicide offenders were four times as likely to be rearrested. See also ALLEN BECK & BERNARD SHIPLEY, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 2 (1989) (noting 6.6% recidivism rate for released murderers and 31.9% recidivism rate for released burglars).

²⁶⁸ According to Gey, "[T]he current capital punishment system is subject to attack not only on the empirical ground that it fails to produce predictable results, but also on the theoretical ground that the system is irrational because it is not based on any legitimate state interest." Gey, *supra* note 94, at 111. However, Professor Mary Sigler has written an article criticizing Gey's analysis on the grounds that it is too superficial. See generally Sigler, *supra* note 95, at 1184-1194.

does.²⁶⁹ Given the myriad of problems involved in capital punishment, we should not have a “perfect” punishment, where the penalty is irrevocable, when we have an “imperfect system.”²⁷⁰

V. Who, What, When and How -- the practical aspects of the theory.

There are a number of questions that are obviously raised by this substantive due process argument such as who can bring this challenge, how do they bring it, and could the theory be applied to other types of punishment. I will address these questions generally.

Who Can Bring the Claim?

It is not my intention that this argument would be raised by the defendant at a sentencing hearing. If there is one point I am trying to make, it is that family members of people on death row have constitutional rights protected by the Due Process Clause that are entirely separate from those of the defendant. Some may argue that this challenge is unfair to the death row prisoner who has no family members. This is true. I can only reiterate what I already stated, that the right I am discussing is for the family member, not for the prisoner.

The Supreme Court has already ruled that the Due Process Clause protects certain family relationships including parent child (*Meyers and Stanley*), spouses (*Griswold, Loving, and Michael H.*), and grandparents and extended families (*Moore v. City of East Cleveland*). Presumably anyone who is in the immediate family such as spouses, parents or children, or close extended family such as grandparents, cousins or aunts and uncles,

²⁶⁹ If incarceration serves as well to protect society as capital punishment, than imposing capital punishment may be “excessive” under the Eighth Amendment. Sigler, *supra* note 95, 1157.

²⁷⁰ Echevarria, *supra* note 128, at 497.

would have standing to bring a suit enjoining the prosecution of a capital case on the grounds that it interferes with their constitutionally-protected right to family.

Challenging Other Types of Punishment

The next obvious question is should a family member have standing to challenge *any* type of punishment, even a prison term. The answer to that question is, it depends. On the one hand, death is different in kind from every other form of punishment. As former Justice Brennan wrote in *Furman*, “In comparison to all other punishments today... the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.”²⁷¹ No other punishment completely severs the family relationship.

Because death is different, the state is under an obligation to show that the harm done to the family can be justified for other legitimate purposes. Because the death penalty so completely fails to meet its policy goals, and it causes extreme harm to families, it cannot survive a strict scrutiny analysis. It is far easier to imagine eliminating the death penalty than it is to imagine eliminating prisons altogether.²⁷²

A substantive due process attack on other forms of punishment would be more difficult to make because the degree of arbitrariness acceptable in death sentences should be less than in other forms of punishment.²⁷³ Further, one hopes that other forms of punishment are more narrowly drawn so that they are not so manifestly unfair as the death penalty. Unfortunately, this is not necessarily the case. There are other forms of punishment that severely interfere with the family relationship, and that may not withstand a strict scrutiny challenge. The example that springs to mind is a challenge to some of the excessive and draconian punishments for drug crimes, where the state does

²⁷¹ 408 U.S. 238, 291 (1972).

²⁷² Donnelly, *supra* note 125, at 53.

²⁷³ *Id.*

not get any great benefit from sentencing drug offenders to lengthy terms, but there is a tremendous harm to the families.

Can the State remedy the Harm Caused by Providing Services to the Families?

The state could reduce the harm to the death row families by providing services such as therapy, counseling, and economic assistance. Most states offer some type of service to homicide victims, and these statutes could be used to provide similar assistance to people whose family member was a victim of state-sponsored homicide. This would have been helpful to the family of Abdullah Hameen, especially to his son, who had he had the benefit of counseling or vocational assistance, may not have ended up in prison. However, this type of assistance does not go far enough. Just as no punishment will ever restore the victims' family to wholeness, no amount of state assistance will restore the family members of the prisoner for the harm caused by the death penalty.

Viability of the Claim

Courts may be reluctant to entertain this type of claim because it is so novel. However, the argument is grounded in long-held constitutional principles and should be sufficient to give family members standing to bring suit. If a court refuses to entertain the claim, it will likely be not because the claim lacks solid legal footing, but because there is political fear of the repercussions of attacking the death penalty in this manner.

Conclusion

In its' per curium opinion striking down the death penalty in 1972, the connecting thread of the five separate opinions was the principle that punishment must be rational. The Court determined that the manner in which the penalty was applied was so arbitrary, discriminatory, and irrational, that it violated both the Eighth Amendment and the Due

Process clauses of the Fifth and Fourteenth Amendments.²⁷⁴ Assuming *arguendo* that states have legitimate penological interests in using the death penalty, those interests are not sufficient to withstand a strict scrutiny analysis.

Families of death row defendants suffer infringement of their constitutional right to family when the death penalty is used. The harm occurs not just from the execution, but from the charging and prosecution of the case as well. The right to family is a long-established fundamental right protected by the Fourteenth Amendment to the Constitution. This right to family is “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.”²⁷⁵ Further, it has been carefully described through jurisprudence.

The death penalty does not serve the compelling interests for which it supposedly exists – to deter crime, to incapacitate offenders, to restore moral order, and to serve as a form of retribution. Even if it serves those interests, it is not the least restrictive means available to do so. A lengthy prison sentence, including life in prison, serves the same goals better and does not create the harm to the families caused by the death penalty.

Because of the fundamental nature of this right, the government may not infringe upon it unless the infringement is narrowly tailored to serve a compelling state interest. The death penalty is not narrowly tailored because it fails to accomplish its purported penological interests of deterrence, incapacitation, retribution, and restoration of moral order. There are other punishments available, namely lengthy incarceration, including

²⁷⁴ Beschle, *supra* note 91, at 492-93.

²⁷⁵ Glucksburg, 521 U.S. at 719.

life in prison without parole, that better accomplish the penological goals and do not destroy completely the family relationship.

It is time for courts to recognize the constitutional right of death row family members to preserve and protect their family relationships.