AN ANALYSIS OF THE DEATH PENALTY:
CONSTITUTIONAL, MORAL, AND PRACTICAL ISSUES

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Abstract

This paper undertakes a survey of three facets of the death penalty: its constitutionality, morality, and practicality. Section I provides an introduction to the work. Section II is an analysis of the constitutionality of the death penalty, beginning with the Fifth and Eighth Amendments, then considering the issue of proportionality of punishments, and ending with a consideration of Susan Gilreath’s opposition of the death penalty based on the Founders’ original intent. Section III considers the moral justifications of the death penalty from the perspectives of retribution, deterrence, and prevention, concluding that retribution and prevention are plausible justifications, while deterrence is much less plausible, if at all. Section IV evaluates the prohibitions on executing insane, mentally retarded, and juvenile offenders. Finally, section V considers the practical costs of the death penalty, including its uneven application and its monetary costs. Overall, the paper argues that although there are some moral arguments for the death penalty and it is not currently considered unconstitutional, the practical costs are too high to allow it to be continued without extensive reform.
I. Introduction

An intensely controversial issue in the United States criminal justice system is that of capital punishment. It is debated on primarily three different grounds: its constitutionality, its morality, and its practicality. This paper will undertake a survey of these issues in order to determine, overall, whether or not capital punishment should be continued. In Section II, I will consider the constitutional question behind the death penalty. This analysis will consider the Fifth and Eighth Amendments, the question of proportionality, and an argument made regarding the Founders’ original intent. Ultimately, I find that the provisions within the document are too vague to give either disapproval or approval to the practice, and it is society, within the framework of the Supreme Court’s evolving standards of decency test, that will make the final decision.

In Section III, I will consider various moral issues with the death penalty, including its contribution to the goals of retribution, deterrence, and prevention. I will find that retribution and prevention, although each is faced with many debatable ambiguities, are still plausible justifications for capital punishment. Deterrence, on the other hand, is nearly overcome by the various issues it faces, and is not a good argument in favor of the death penalty. In the context of these three goals, Section IV will also consider the morality of executing certain classes of offenders: insane persons, mentally retarded persons, and juveniles. With respect to the first two classes, only prevention can justify execution, and even then not very strongly, and I conclude that morally it is unacceptable to execute people who cannot bear full responsibility for their actions. For juveniles, however, I conclude that the case is less clear, with retribution and prevention still being served by juvenile executions.
Finally, in Section V I consider various practical issues with the death penalty. The first half of the section is concerned with the uneven application of the punishment within the justice system; issues of class, race, geography, and politics are considered. This unevenness is a great cost that comes with capital punishment, and in conjunction with the monetary costs discussed in the second part of Section V, I conclude that the practical costs of the death penalty just do not outweigh the benefits. I will then briefly summarize my research and conclude with the evaluation that although there is some moral justification for the practice of capital punishment, the overall practical costs and unevenness of application are too problematic for the system to continue, at least without major reform.

II. The Constitutional Question

In this section, I will examine the constitutionality of capital punishment. I will focus my attention on the Fifth and Eighth amendments. This will include what the Fifth Amendment says about capital punishment, and then move on to a more in-depth discussion of the Eighth Amendment that will include whether proportionality of punishments is implicit in the text, as well as a look at the “cruel and unusual punishments” clause. Finally, I will consider an article by Susan Gilreath on Originalism and capital punishment in order to evaluate the idea that the Framers’ original intent was for vague constitutional provisions to be interpreted by the society’s current norms and language.

A. Textual Analysis

The text of the Fifth Amendment states “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor be deprived of life, liberty, or property, without due process of law...” In the text itself, there is a provision for capital crimes. Nolo's Plain-English Law Dictionary defines
capital crime as “a criminal charge that is punishable by the death penalty.” Therefore, in order for there to be a provision regarding capital crimes in the Constitution, the Framers must have anticipated that such a penalty might be inflicted. The restrictions are simply that the offender must be indicted by a grand jury and have the right to due process of law. Thus, in the text of the Fifth Amendment, we see procedural requirements that must be in place should capital punishment be practiced. The implication is that the Constitution, although not necessarily condoning or explicitly protecting capital punishment, places necessary conditions on the practice of capital punishment. This is a purely procedural provision.

We next turn to the Eighth Amendment, which states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The first question that must be asked regards the meaning of “cruel and unusual.” What is the meaning of the expression? There are two components to that question: what is the meaning of cruel and what is the meaning of unusual? This question will be discussed in the framework of the early American time period, and then in contemporary times.

In the Founders’ day, capital punishment was widely practiced for a variety of offenses (Stinneford, 2011). The common usage implies that it was not unusual, and the widespread acceptance implies that the Founders’ and their society did not view it as inherently cruel. How, then, did it relate to the cruel and unusual punishments clause? Since capital punishment was widely used in the colonies, it would be reasonable to assume that the method of capital punishment was at issue, not the punishment itself. Hanging was often the method of execution in the colonies (Stinneford, 2011). Overall, it
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would seem that the Framers did not consider their method of capital punishment as it was practiced in the colonies to be cruel or unusual.

Whether capital punishment is cruel and unusual is a moral and legal issue that is continually debated. However, in current society, it would seem that capital punishment is not unusual, as it is practiced by 32 states, the federal government, and the U.S. military (Death Penalty Information Center, 2014). Whether or not it is cruel in today’s society is a more complex issue. Asking whether the practice itself is cruel is different than asking whether the method in which it is carried out is cruel. To the first, there are scholars who believe that “capital punishment imposed on anyone, including the mentally competent adult who, after a fair trial, has been found guilty of having committed a depraved crime, is cruel, within the meaning of the internationally recognized human right not to be subjected to cruel punishment” (Perry, 2013, p. 65). Other scholars believe that “murder differs in quality from other crimes and deserves, therefore, a punishment that differs in quality from other punishments” (Van den Haag, 1978, p. 840). Clearly, the moral question of capital punishment is still debated and divisive in today’s society. However, if we consider the question of cruelty in the methodology, we must look to the Supreme Court case Baze v. Rees (2008), in which the Court determined that the currently used method, lethal injection, does not establish “an objectively intolerable risk of harm” and does not violate the cruel and unusual punishments clause. In defining “cruel and unusual,” the Court turns to its evolving standards of decency test, which will be discussed later. Again, there are people who believe even the method of lethal injection is cruel, as stated by the petitioners’ argument in Baze v. Rees, but current case law holds that the method is not
unconstitutional under the Eighth Amendment. In current law, the death penalty as practiced is neither cruel nor unusual.

B. Case Law

In coming to this conclusion, the Supreme Court has developed a body of case law, with the most relevant cases beginning with *Furman v. Georgia* in 1972. In that case, the Court ruled that the death penalty statute in Georgia was cruel and unusual because it was “wantonly and freakishly imposed”¹ (*Furman v. Georgia, 1972*). This effectively placed a moratorium on capital punishment until the majority of states rewrote their death penalty statutes and the issue was revisited in *Gregg v. Georgia* four years later. Georgia had reworked their statute to include aggravating and mitigating circumstances, an automatic appeal to the Georgia Supreme Court, and a proportionality review of each case to ensure it is comparable to other death penalty cases. This reworking gave guided discretion to the jury as well as a segregation of the evidence and sentencing phases of the trial. Guided discretion to the jury included directing them to evaluate the case based on whether there were aggravating or mitigating factors present. The jury was prohibited from considering the death penalty as a sentence unless it found beyond a reasonable doubt that at least one aggravating circumstance was present. This would restrict the jury’s ability to recommend the death penalty to the cases that were beyond the average murder. Furthermore, separating the evidence and sentencing phases of the trial would narrow the jury’s focus to guilt or innocence in the first phase without thinking about sentence, and vice versa in the second phase. The Court found this to be constitutional, and other states with similar statutes were free to resume practicing capital punishment. Since then, a variety of cases

¹ Justice Stewart, concurring opinion.
have built a background of case law prohibiting such things as execution of minors and mentally retarded defendants as well as proscribing the death penalty for any crime other than murder.

The test for determining whether a punishment is cruel and unusual comes from the case *Trop v. Dulles* (1957), which is the controlling precedent, and is the evolving standards of decency test. This test relies on the idea that what is cruel and unusual must be measured by contemporary standards, not by the standards contemporary to the Constitution’s ratification. In order to measure contemporary standards, the Court looks at the policies state legislatures have adopted with regards to a punishment as well as what sentencing juries have decided. For example, in the case *Atkins v. Virginia*, in order to determine whether sentencing a mentally retarded person to death was cruel and unusual, the Court consulted how state legislatures and sentencing juries had dealt with the issue. “The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of prohibition” (*Atkins v. Virginia*, 2002). Once it had been determined that 18 states and federal law prohibited execution of mentally retarded persons, the Court also considered the actions of sentencing juries in states that did allow it. “It appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry***” (*Atkins v. Virginia*, 2002). Current public opinion as well as the justices’ own judgments have been considered as well, although some justices believe that it is inappropriate for the justices’ own judgments to be a factor.\(^2\) In the same case, *Atkins v. Virginia*, the Court concluded both

that “our independent evaluation of the issue reveals no reason to disagree with the judgment of ‘the legislatures that have recently addressed the matter’ and that there is a ‘widespread judgment about the relative culpability of mentally retarded offenders’” (Atkins v. Virginia, 2002). The Court considered its own “independent evaluation” of the matter in conjunction with the requirements of the evolving standards of decency test. Independent evaluation can be inferred to mean the justices’ aggregate opinion on the issue. The Court also considered “widespread judgment” about the issue, which can be inferred to mean public/popular opinion. Thus the Court has been known to consider other factors outside of those required in the evolving standards of decency test when making judgments.

In light of the evolving standards of decency test, two conclusions can be drawn. First, society as a whole, in terms of the entities that the test relies upon (state legislatures and juries), has not decided that capital punishment violates the Eighth Amendment. Second, should society eventually turn against capital punishment, this test provides the framework for deciding that it is cruel and unusual under the Eighth Amendment, and thus unconstitutional.

C. Proportionality

Another question that relates to the Eighth Amendment is whether the amendment demands proportionality in punishments. Prima facie, we could conclude that it does demand proportionality for certain types of punishments, i.e. bail and fines. The amendment prohibits excessive bail and fines, which seems to demand that monetary punishments, at least, be proportional to the crime. However, that is a fairly specific branch of punishments. In regards to all other kinds of punishments the text of the amendment
seems to be silent. In his article “Rethinking Proportionality,” John F. Stinneford (2011) argues, “Patrick Henry’s arguments during the Virginia ratifying convention show that the Framers’ understood the prohibition of cruel and unusual punishments to encompass excessive punishments as well as barbaric ones” (p. 946). This would imply legitimacy for demanding proportionality of punishments if excessive punishments were cruel and unusual, and therefore unconstitutional.

The author of the Harvard Law Review article “The Eighth Amendment, Proportionality, and the Changing Meaning of Punishments” (2009), argues a similar point of view. The argument begins by pointing out that punishments in the Founders’ time were mostly corporal or monetary, as well as public, with incarceration playing very little role. The fact that punishments were often carried out in public was key, because it shamed the guilty party and taught the other citizens respect for the law. In contrast, modern punishments are nearly always incarceration-based, or monetary, both of which take place outside of the public eye, eliminating the effectiveness of public shame as a tool. Therefore, the article’s author argues that the meaning of “punishments” has changed. The argument then claims that the Eighth Amendment was meant to do two things: first, to demand proportionality in monetary punishments, which means that proportionality was not an unknown concept, and second that it was meant to prohibit “self-defeating” punishments. This is where the “cruel and unusual” clause comes into play: a punishment that was torturous or barbaric was more likely to elicit sympathy from the crowd and instill a feeling of resentment towards the law, rather than a sense that justice was being done. Therefore, if we accept that the Eighth Amendment is meant to prohibit self-defeating punishments, and if we also accept that, like barbaric punishments, unreasonably lengthy prison
sentences are self-defeating, then the conclusion must be that proportionality is implied in
the Eighth Amendment. (Harvard Law Review, 2009) If this is the case, when applied to
capital punishment we must ask if the death penalty is disproportionate to the crime of
murder. If so, following this reasoning, it would be unconstitutional under this suggested
Eighth Amendment implicit proportionality requirement. However, there does not seem to
be a way to objectively determine whether capital punishment is disproportionate; it is a
question that is widely debated.

The Harvard Law Review argument is well reasoned, and compelling, but may be
flawed. First, the premise that the “cruel and unusual” clause is meant to prohibit torturous
and barbaric punishments *because* they are self-defeating is difficult to support. The
evidence used to support this claim is that the Framers prohibited barbaric punishments
because they were self-defeating; therefore the Framers intended to prohibit self-defeating
punishments. The reasoning is somewhat circular. The author cites some other scholars’
works, but mostly relies on reasoning and conjecture. Perhaps the clause prohibited those
punishments simply to protect the people from those methods of torturous punishment, or
to protect the people from their government, which is theme that can be seen throughout
the Declaration of Independence and other founding documents. The second issue is that
the author posits that because our system of punishment is so different than the system of
the Framers’ time, the meaning of “punishments” has changed. The argument that a change
in the method of punishment equals a change in the meaning of the word does not follow.
These are problems with premises of the argument, and thus make the conclusion
questionable.
The Supreme Court's jurisprudence does have something to say about proportionality under the Eighth Amendment however. In *Atkins v. Virginia*, Justice Stevens, writing for the majority, explained,

> It is a precept of justice that punishment for crime should be graduated and proportioned to the offense. We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment...a claim that a punishment is excessive is not judged by the standards that prevailed when the Bill of Rights was adopted, but rather by those that currently prevail (*Atkins v. Virginia*, 2002).

As already discussed, this is where the Court's evolving standards of decency test comes into use. However, in this Atkins opinion, the Court seems to take proportionality of punishments as a precept of justice, rather than a requirement of the Eighth Amendment. Therefore, it is still uncertain whether the Eighth Amendment demands proportionality of punishments.

D. Gilreath and Original Intent

The final argument I want to consider is that of Susan Gilreath (2003) in her article “Cruel and Unusual Punishment and the Eighth Amendment as Mandate for Human Dignity: Another Look at Original Intent.” Gilreath's (2003) central argument is that the Framers never intended to restrict the meaning of the Eighth Amendment to the meaning at the moment of ratification; therefore each generation must decide what is cruel and unusual for its own time. The second part of the argument is that the Fifth Amendment is not a validation of the death penalty, but simply a procedural requirement that it be carried about fairly. A key component of this part of the argument is analogy of the death penalty to slavery: the founders compromised and allowed slavery to be in the Constitution, but they did not condone it. Similarly, the founders allowed for protections in the procedure of the death penalty, but did not necessarily condone it. (Gilreath, 2003)
If, as Gilreath claims, the Fifth Amendment is merely a procedural safeguard that does not change the fact that it does envision that the death penalty might be practiced. Furthermore, if her argument about the contemporary meanings of cruel and unusual is valid, that does not change the fact that 32 states, the federal government, and the U.S. military all allow the death penalty (DPIC Fact Sheet, 2014). Clearly, this contemporary generation has not ruled against the death penalty.

A simple examination of the text of the Constitution cannot give a concrete answer with regards to the constitutionality of the death penalty. The Fifth Amendment is entirely procedural, and thus cannot give us a substantive ruling on the matter. The Eighth Amendment is substantive, but unclear, and also cannot give a firm conclusion. Because the document itself is unclear, Supreme Court jurisprudence has determined a test of evolving standards of decency to evaluate capital punishment. This test relies on how state legislatures have treated the issue as well as sentencing juries, with public opinion taken into account as well. By this test, capital punishment has yet to become unconstitutional.

III. Retribution, Deterrence, and Prevention

In Gregg v. Georgia (1976), the Supreme Court stated “the death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective offenders” (Gregg v. Georgia, 1976). In this section I will examine those two purposes, as well as the goal of prevention, and consider whether any or all of them are adequate justifications for the death penalty.

A. Retribution

When thinking about retribution in the context of the death penalty, there are several points to consider. First is the meaning of ‘retribution'; it is a tricky concept to
define and understand. Second is the question of how retributive we can be with respect to many crimes. Finally, we have to think about whether the death penalty is the appropriate retribution for the crime of murder. Once these issues have been considered, we can try to decide whether retribution is an adequate justification for capital punishment.

Dictionary.com defines retribution as “requital according to merits or deserts, especially for evil” (dictionary.com). Merriam-Webster’s dictionary defines retribution as simply “punishment for doing something wrong” (Merriam-webster.com). These are two very different definitions of the term, which illustrates how elusive this concept can be. The first has an idea of proportionality in it, of just deserts, while the second simply refers to a consequence. We already know that the Supreme Court considers retribution a goal of punishment, but a little more light is shed on their view of the concept in Atkins v. Virginia, which defines retribution as “the interest in seeing that the offender gets his ‘just deserts’” (Atkins v. Virginia, 2002). The Court also adds that culpability has a factor in retribution. It seems that the Court would agree with the dictionary.com definition that retribution means a punishment must satisfy this idea of just deserts: that a criminal must be punished in accordance with what he or she has done.

The next question to consider is whether we can really give many criminals their “just desert.” Some might argue that since we don’t rape rapists or execute murderers in the horrific manners in which they often murder their victims; we are not really being retributive. However, we must separate out the idea of retribution from one called lex talionis, which, roughly translated, is Latin for “retaliation by the law” (Oxford dictionary). Retribution carries the idea of proportional punishment, but lex talionis goes a step further and calls for retaliation, which is the idea of doing to another that which he or she has done
to you. Once we separate out those ideas, we can see that while retaliation may be retributive, retribution does not require retaliation. Therefore, if our system of punishments is proportional and reserves the worst punishment (many would say the death penalty) for the worst crime (murder), we have taken an important step towards satisfying the principle of retribution. However, proportionality can be satisfied without the punishment being fitting to the crime; for example, if the worst punishment in our system was ten years of incarceration, most people would say that is not nearly fitting to the crime of murder. Therefore, while proportionality may be necessary to retribution, it is not sufficient. Exact retaliation may not be necessary, but some kind of closer match to the crime is necessary to retribution, and that is where proponents of the death penalty would say that it is the closest match to the crime in terms of satisfying retribution. Opponents would say that life incarceration is just as close a match, and retribution is still satisfied.

We then must ask whether the death penalty is the appropriate retribution for murder. The first aspect to consider is whether our punishment system is proportional. On the whole, I would argue that it tries to be, in that for the most part the more severe the crime, the longer the incarceration time; or conversely a less severe crime might get community service and/or probation. The second aspect is whether the death penalty is really the worst punishment. Is it worse to be executed or to spend one’s life in prison, knowing there is no possibility of release, never being able to enjoy freedom again? This kind of forced awareness of the murderer’s lack of freedom may be a potent enough punishment. Is it worse to die after a period of time in prison, or is it worse to miss the events of life, such as a death in the family, your child’s life, and mere contact with free society? This is a difficult question to consider, and on the whole it may be a matter of each
person's preference. Some people would undoubtedly prefer to die rather than know when they wake up every day that they will never be free again. However, in most people, I would conjecture that the desire to live is so strong, the instinct of avoiding death so prevalent, that most people will try to avoid death at all costs. Furthermore, when a convict spends his or her life in prison, like all creatures, he or she will adapt to that life and perhaps find society within the prison. While that may never be as satisfying as living free in society, it may not be entirely miserable. It is impossible to determine with certainty whether life imprisonment is worse than the death penalty, but it is important to think about.

Finally, we must consider whether murder is the worst crime. If it is, then it deserves the worst punishment on this system of proportional punishments, but if it is not, then it does not deserve the worst punishment. Some might argue that being violently raped or being kidnapped and held for years is worse than murder. Those things, and their effects, can stay with a person for so long as to possibly ruin their lives, so that death might be preferable. Again, this is another question that is impossible to definitively answer, but it has serious implications for the death penalty retribution argument. If murder is not the worst crime, then it should not be punished by the worst punishment.

Overall, retribution as a goal of punishment raises many difficult questions, such as whether death is worse than life imprisonment or whether murder is worse than other horrific crimes. However, none of these difficulties cast so much doubt on retribution as a goal of capital punishment as to show that it is no longer adequate as a justification for capital punishment.

B. Deterrence
Deterrence is also a tricky concept in considering capital punishment. The idea behind deterrence as a justification for the death penalty is that the severity of the penalty will be enough to deter potential murderers (with the assumption that capital punishment is only constitutional for the crime of murder) from committing such an offense. Because it is such a final and frightening prospect, the death penalty should effectively scare off prospective offenders. However, certain facets of this issue must be considered: the measurability of deterrence, the possibility of unintended consequences, and the valuing of human life.

The first question to ask is how do we measure deterrence? The problem is that it is difficult to measure how many—if any—potential murders will be avoided, and thus innocent lives saved, because possible murderers were deterred. Those who oppose the death penalty, such as Hugo Bedau, will say,

No one can identify for certain any crimes that did not occur because the would-be offender was deterred by the threat of the death penalty and could not have been deterred by a less severe threat. Likewise, no one can identify any crimes that did occur because the offender was not deterred by the threat of prison even though he would have been deterred by the threat of death. Nevertheless, such evidence as we have fails to show that the more severe penalty (death) is really a better deterrent that the less severe penalty (imprisonment) for such crimes as murder (Bedau, 1986, p. 240).

On the other hand, someone who supports the death penalty will say,

However, in the last few years new and more sophisticated studies have led Professor Isaac Ehrlich to conclude that over the period 1933-1969, ‘an additional execution per year...may have resulted (on the average) in 7 or 8 fewer murders.’...I should now regard it as irresponsible not to shorten the lives of convicted murderers simply because we cannot be altogether sure that their execution will lengthen the lives of innocent victims (Van den Haag, 1978, p. 837).

Obviously, both parties are using similar arguments to come to different conclusions: they both believe that that it is impossible to be sure of the deterrent effect (though Van den
Haag cites a study that supports his position) but the opponent concludes that this means deterrence is not an adequate justification for capital punishment, while the supporter concludes that this uncertainty about deterrence is not sufficient reason to abolish executions.

This presents an interesting problem: if the deterrent effect is impossible to conclusively measure, can it continue to be a justification for capital punishment? Since the Court allowed the death penalty in *Gregg v. Georgia* based on its deterrence and retribution, it would seem that the Court assumes that a more severe punishment can have a greater deterrent effect. However, it seems irresponsible to assume this, when empirical evidence does not point to a conclusion either way. Van den Haag (1978) suggests that it is morally impermissible to allow convicted murderers to live just because the deterrent effect cannot be verified, but this is a different argument. Van den Haag is arguing that actual deterrence is not necessary to justify the death penalty, and the argument that we are considering is whether deterrence can justify the death penalty.

Before coming to a conclusion on that issue, it is worthwhile to consider another possibility that Bedau suggests in his cost benefit analysis of the death penalty. He claims,

Clinical psychologists have presented evidence to suggest that the death penalty actually incites some persons of unstable mind to murder others, either because they are afraid to take their own lives and hope that society will punish them for murder by putting them to death, or because they fancy that they, too, are killing with justification analogously to the lawful and presumably justified killing involved in capital punishment (Bedau, 1986, p. 240).

If what Bedau is suggesting, namely that the death penalty incites rather than deters murder, this could be a serious issue for the deterrence argument. His first result suggests that someone might murder another person in a sort of suicide attempt; that is, the murderer is hoping that the system will punish him or her with the death penalty so he or
she does not have to commit the act of suicide. It seems unlikely that a suicidal person would use the death penalty for that reason; particularly because the capital trial process is so extensive that his or her desire for death would have to be protracted, possibly for decades. However, the second unintended consequence, that of vigilante-ism, is a more plausible and worrisome possibility. It is possible that someone could set out to murder those people he or she feels are “bad” people, and feel justified because the law allows society to murder “bad” people.

Finally, the idea of deterrence brings up the question of how much a human life is worth, innocent or guilty. If we believe that we should execute convicted murderers because it will save other innocent lives, than we must believe that those innocent lives are worth more than the convicted murderer’s life. Like overall deterrence, this is almost impossible to measure, so this argument is not completely watertight.

Overall, the flaws in the deterrence argument make it hard to prove that deterrence is an adequate justification for capital punishment. The major issue is the impossibility of measuring deterrence, because if we cannot know whether the death penalty might deter potential murderers, we cannot conclude that it is justified based on deterrence. Furthermore, the unintended consequences that may come with the death penalty as well as the issues that come with how to value human life further add to the uncertainty about deterrence as an adequate justification of capital punishment. The problems with deterrence, then, are much more damaging than the problems with retribution.

C. Prevention

Closely related to the ideas of retribution and deterrence is the idea of prevention; that is, the idea that the death penalty prevents convicted murderers from committing
murder again. Hugo Bedau (1986) makes a distinction between deterrence and prevention, and then further differentiates between incapacitation and prevention, both of which are concepts that I will consider when attempting to decide whether prevention might be an adequate justification for the death penalty.

Bedau (1986) describes the death penalty as preventative “to the extent that it is reasonable to believe that if the murderer had not been executed he or she would have committed other crimes” (p. 238). He distinguishes this from the concept of deterrence, which should frighten potential offenders away from committing murder due to the severity of the punishment. The end result of both concepts is the same: no more additional murders; therefore, although the concepts operate in different ways, they are closely related.

Bedau’s (1986) real argument comes in with his distinction between incapacitation and prevention. He claims, “It is also wrong to think that in every execution the death has proved to be an infallible crime preventative” (p. 239). At face value, this seems like an odd claim to make; how could executing a murderer not prevent further crime? However, Bedau goes on to clarify that execution is only a preventative if the inmate would have committed other crimes had he or she not been executed. This seems to have the same problem as the deterrence argument: how can we possibly know what someone might have done in a given situation? As evidence, Bedau cites studies of prison records that seem to indicate that

(1) Executing all convicted murderers would have prevented many crimes, but not many murders (less than one convicted murderer in five hundred commits another murder); and (2) convicted murderers, whether inside prison or outside after release, have at least as good a record of no further criminal activity as any other class of convicted felon (Bedau, 1986, p. 239).
Finally, another important piece of Bedau’s argument states, “there is no way to know in advance which if any of the incarcerated or released murderers will kill again” (p. 239).

Bedau’s argument has some good points; if we do not know which convicted murderers might kill again, and if studies indicate that murderers have just as good a record of no further criminal activity as other classes of felons (obviously, that includes no further murders), than perhaps justifying the death penalty by means of prevention is not adequate. However, an answer to Bedau’s argument could be as simple as wanting to err on the side of caution: If the recidivism rate wouldn’t be low for a certain class of murderers, say the worst of the worst, then with respect to that class it might make sense to err on the side of caution. Once again, this brings up the question of whether an innocent life that might be saved is worth more than that of one of the worst convicted murderers. One might argue that for these “worst of the worst” murderers, many of whom have killed multiple people or killed people in an especially horrifying way; an innocent life is worth more. The convicted murderer is bringing nothing to society but pain and complete lack of respect for life, while the innocent person is contributing positively to society, or at least has not brought pain and suffering to society. This is a possible argument, but would need to be made much stronger for it to be compelling. This argument differs from the argument against deterrence as a justification, because in that case, we are trying to determine whether unknown people who have not yet committed crimes may do so, while in this case we know that a person has, in fact, committed a crime, and thus we are more wary about their potential to commit another. Once again, this is assuming that for this specific class of
murderers, the “worst of the worst,” the potential recidivism rate would not be as low as that of the average murderer. Bedau’s argument does not make that particular distinction, but rather looks at murderers in general. What if the average murderer makes up 95% of that group, and therefore has skewed the recidivism rate, while that small 5% who are the worst of the worst have a high recidivism rate? Furthermore, there is also the possibility that murderers who are sentenced to life imprisonment may murder other inmates or prison guards. In that case, the question of whether life imprisonment is preventative enough is raised. Overall, I think these differences allow prevention to remain a potentially adequate justification for the death penalty.

IV. Specific Classes of Offenders

Supreme Court capital punishment case law has dealt with three specific types of questionable offenders: insane persons, mentally retarded persons, and juveniles. The Court has decided that executing a defendant from any of these three classes is unconstitutional. This section will review the holdings in each of the relevant cases first in order to understand why the Court deemed it unconstitutional to execute any of these types of offenders. I will then evaluate the reasoning of each holding in my attempt to decide whether or not it is morally acceptable to execute a convicted murderer who is insane, mentally retarded, or under the age of 18.

A. Insane Persons

In 1986 the Supreme Court ruled in *Ford v. Wainwright* (1986) that it is unconstitutional under the Eighth Amendment to execute an insane person. The only

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3 By “worst of the worst” I am assuming that this murderer has committed his or her crime in an especially heinous way, such as with long, drawn out torture, or that he or she is a serial murderer.
relevant precedent for this issue was *Solesbee v. Balkcom (1950)*, which dealt with the execution of a convicted murderer who petitioned for a change in sentence due to post-trial insanity. However, *Solesbee* (1950) did not directly deal with the constitutionality of executing an insane person, but rather the process through which a person is determined to be insane. In *Solesbee* (1950), as well as in *Ford* (1986), the competency was decided by the State Governor through means of experts' reports, not through a judicial process. The Court affirmed this process in *Solesbee*, remaining silent on the constitutionality of the larger issue; that is, executing insane persons. Until 1986, states had discretion over that matter, as long as constitutional due process was afforded.

In *Ford* (1986), the petitioner showed no signs of incompetency at the time of his trial, but eight years after conviction began to show signs of increasingly severe mental delusions and paranoia. A doctor who had examined him earlier began to see Ford regularly, and concluded that he suffered from “a major mental disorder...severe enough to substantially affect Mr. Ford’s present ability to assist in the defense of his life” (*Ford v. Wainwright*, 1986). A subsequent doctor also concluded that

He had no understanding of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed sincerely believed that he would not be executed because he owned the prisons and could control the Governor through mind waves (*Ford v. Wainwright*, 1986).

Due to these evaluations, the procedures for determining mental competency were set in motion, and a panel of three doctors interviewed Ford once each for 30 minutes. All three reported that although he had some kind of issue, he was cognizant of what was happening to him and why. The Governor subsequently signed his death warrant on the basis of these reports. The state court and the district court rejected appeals by Ford's counsel, but the
Court of Appeals granted a stay of execution. However, the Court of Appeals affirmed the District Court’s denial of writ, which led to the case being heard by the Supreme Court.

The Court’s ruling on the constitutionality of executing an insane person was based on two factors: common law, and evolving standards of decency. The court cited writings of both William Blackstone and Sir Edward Coke in their search for a common law principle on this matter. Both men disparaged the practice as inhumane, and the Court stated “other recorders of the common law concurred” (*Ford v. Wainwright*, 1986). The Court recognized that although there were many different reasons given for this common opinion, “we know of virtually no authority condoning the execution of the insane in English common law” (*Ford v. Wainwright*, 1986). They took that to be sufficient on the common law point.

The second factor considered was the evolving standards of decency test. In this consideration the Court was even briefer: it argued that no state permits the execution of the insane, and took that to be enough of an indicator that “the intuition that such an execution simply offends humanity is evidently shared across the Nation” (*Ford v. Wainwright*, 1986). From these two factors, “this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane” (*Ford v. Wainwright*, 1986).

If we look at the three possible effects of the death penalty (retribution, deterrence, and prevention) in this matter, the results can be illuminating. As the Court notes in *Ford*, retribution is not served by executing an insane person. Why? Because if this person cannot understand why he or she is being executed, or what is actually happening with regards to his or her execution, then he or she has no understanding of being punished in consequence of a crime. Most people associate culpability with retribution; for example, if
the brakes go out on my car even though I just had them checked two weeks ago and I hit a person, most people would say that was a tragic accident and I do not deserve to be punished. However, if I am driving drunk and I hit a person, most people would be outraged and demand that I be punished. In the same way, if a person is insane and murders someone, that is generally out of his or her control. Thus culpability is much lower, and the corresponding retribution should be lower.

The case described in *Ford*, though, is slightly different. Ford was competent when he committed the murder and when he stood trial, and then later developed insanity. How does that affect his culpability for the crime committed? If he was in control of his actions when he committed the crime, is his culpability suddenly lessened because of the developed insanity? In this kind of case, I would argue that he perhaps deserves a higher degree of punishment than someone who was completely insane when committing the crime, but it still seems wrong to execute him when he has no understanding of what is happening or why. Therefore, the Court’s result still holds; retribution seems to be against executing insane persons.

Deterrence is another tricky matter. If the goal of deterrence is to make potential criminals think twice before murdering a fellow human being, then executing an insane person may not meet that goal. First of all, an insane person such as this case is describing is unlikely to understand the consequences of his or her actions anyway, so he or she is unlikely to be deterred by the threat of death. Therefore deterrence is unlikely to hold with respect to other insane potential murderers. Second, executing an insane person may elicit sympathy and outrage from people, rather than fear of the death penalty. If that is true, then the general population will not be deterred by the execution of insane persons. It is
therefore unlikely that prohibiting the execution of these people will make the deterrent effect less on those potential murderers outside of this particular class of people. However, there is another aspect to this matter. In both *Solesbee* and *Ford*, the convicted murderer developed insanity after his or her trial and sentencing. This is somewhat suspicious; it is possible that he or she could be faking it. Of course, expert evaluation would hopefully detect that possibility, but on the chance that doctors are fooled, prohibiting the death penalty for insane persons could actually incite other murderers to act insane in order to avoid their own execution. In that case, the prohibition of executing an insane person would actually allow for fraud in the system, and allow convicted murderers to escape execution, or make potential murderers believe that if they act insane after being caught, they will avoid the death penalty. However, this seems like a small possibility. It is worth noticing as a possible unintended consequence, however. Overall, it seems that the goal of deterrence is not served by executing insane persons.

Finally, the third effect of the death penalty is prevention, or preventing that particular murderer from murdering again. This seems to be the most salient argument with respect to insane persons, who can be a serious danger to others. If they are more of a danger than other convicted murderers because of their unstable mental state, they may be more likely to attempt to murder again, whether outside prison or within. Therefore, prevention may indeed be served by executing insane persons.

The final consideration, and perhaps the most important, is whether it is morally acceptable to execute insane persons. It may serve the goal of prevention, but if society does not believe it is morally okay, then prevention ceases to be relevant. On the whole, I must argue that it is not morally acceptable to execute persons who cannot understand
why they are being executed and that they are being executed. An insane person has an illness outside of his or her control, and to ignore that major factor and assume that they are culpable enough to deserve the death penalty is wrong. They are not in the position to bear the kind of responsibility for their actions that a sentence of execution should demand. To be sure, convicted murderers who are deemed insane should be confined and treated, and the goal should still be to make them suffer the consequences of their crime. I am in no way advocating that they be released from their sentence. However, to execute that person for something he or she cannot understand is cruel, arguably in the sense of the Eighth Amendment.

B. Mentally Retarded Persons

The Supreme Court ruled that it is unconstitutional to execute a mentally retarded person in the case Atkins v. Virginia (2002). This overturned the precedent case Penry v. Lynaugh (1989). The Court’s ruling was based on three factors: retributive value, deterrent value, and evolving standards of decency. I will consider each of those factors, and then evaluate whether it is cruel and unusual to execute a mentally retarded person.

The Court’s argument with respect to retribution was structured like so: mentally retarded persons “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct” (Atkins v. Virginia, 2002), and “the severity of the appropriate punishment necessarily depends on the culpability of the offender” (Atkins v. Virginia, 2002). Furthermore, the death penalty is reserved for the worst of the worst murderers, not just the average murderer. Therefore, the Court concluded “if the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does
not merit that form of retribution” (Atkins v. Virginia, 2002). The Court’s argument hinged on retribution being tied to culpability, rather than the severity of the murder or any other factor.

With respect to deterrent value, the Court’s argument was that “capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation” (Atkins v. Virginia, 2002). Because a mentally retarded person lacks the cognitive ability to plan and act deliberately, it was “less likely that they can process the possibility of execution as a penalty and, as a result, control their conduct based upon that information” (Atkins v. Virginia, 2002). Therefore, executing mentally retarded persons would not deter other mentally retarded persons from committing murder, and would not affect the deterrence of other offenders because they are unprotected by the exemption.

Finally, the Court also considered the evolving standards of decency in our society. Eighteen states and the federal government prohibited the practice of executing mentally retarded offenders, leaving 19 states that allow the practice. The Court addressed this lack of a majority by claiming that the “direction and consistency of the change” (Atkins v. Virginia, 2002), was what matters. Because anticrime legislation is much more popular than legislation protecting offenders, those changes towards protecting a certain class of offenders were significant, even though half of the death penalty states still allowed execution of mentally retarded persons. Furthermore, “even in those States that allow the execution of mentally retarded offenders, the practice is uncommon” (Atkins v. Virginia, 2002). From these premises, the Court concluded that “the practice, therefore, has become truly unusual, and it is fair to say that the national consensus has developed against it” (Atkins v. Virginia, 2002).
The arguments for and against executing a mentally retarded person on the basis of retribution are similar to those for insane persons. If retribution depends on the culpability of the offender, then the Court’s argument has merit. A mentally retarded person usually just does not have the cognitive capability to completely understand or control his or her actions. Furthermore, in this case the Court adds another dimension: if we only execute the worst of those murderers who are not mentally retarded, then how can we justify executing someone with a lower culpability while not executing those average murderers? Once again, retribution does not work for the case of mentally retarded offenders, because they are not able to bear complete responsibility for their actions.

With deterrence, the argument is again similar: if a mentally retarded person cannot think and plan and adjust based on possible consequences, then he or she is unlikely to be deterred by the threat of the death penalty. Deterrence does not hold for other mentally retarded persons, therefore. As with insane offenders, the lack of execution of mentally retarded offenders is unlikely to affect the deterrence of general potential murderers, because they are not affected by the prohibition (unless they somehow develop a mental retardation post-trial, but that is a very slim chance), being outside of that class of people. However there is one key difference in this case and that of insane persons: mentally retarded persons are generally born that way, and do not often develop mental retardation during adult life (with the exception of a brain injury, or some other medical problem). Insanity can come about, as in both Solesbee and Ford, after a particular event or even spontaneously. Therefore, with mentally retarded persons, there is much less of a danger of a convicted murderer faking the condition and getting away with it in order to avoid the
death penalty than there is with insanity cases. These factors together make lack of
deterrence a strong argument against executing mentally retarded persons.

Finally, the third aspect I want to consider is that of prevention. Like insane persons,
there are chances that a mentally retarded person will murder again, either in prison or
after release, because of his or her lack of reasoning power. However, a person who is
mentally retarded is possibly easier to contain and less volatile than one might expect from
an insane person, and seems to be less of a threat in the sense of prevention. With these
differences in mind, prevention is not a completely adequate argument for executing a
mentally retarded person.

Morally, there just does not seem to be enough justification to allow execution of
mentally retarded offenders. Prevention is less justifiable in this case than in the insanity
case, and deterrence and retribution are against the practice. As with insane persons, it
would seem that executing a person who may not have the mental competency to
understand the execution and/or why it is happening is cruel. Someone who cannot bear
full, conscious responsibility for his or her actions is not as culpable, and therefore cannot
be held to the same standard of punishment as other, more culpable murderers.

C. Juvenile Offenders

In 1988 the Supreme Court ruled in the case Thompson v. Oklahoma that it was
unconstitutional to execute a minor aged 15 or younger. The following year, in Stanford v.
Kentucky (1989), the Court ruled that it was not unconstitutional to execute a minor aged
16 or 17. That ruling stood until 2005, when the Court heard Roper v. Simmons, and
determined that it was unconstitutional under the Eighth Amendment to execute any
minor.
The Court’s reasoning, as in similar cases regarding the execution of specific classes of offenders, relied on its evolving standards of decency test as well as the contributions to retribution and deterrence. The Court noted that 18 death penalty states prohibited the juvenile death penalty, which, when added to those states that prohibit the death penalty altogether (there were 12), made over half of the country. The federal government also prohibited the juvenile death penalty. They also noted that five states had abandoned the practice since Stanford. Furthermore, in the states that did allow the practice, it was rare. The Court took these pieces of evidence together to mean that the direction and consistency of the change was against the juvenile death penalty. (Roper v. Simmons, 2005)

In terms of retribution and deterrence, the Court seemed to think those goals were very unclear in regards to juveniles. The Court argued that juvenile offenders are categorically less culpable than adult offenders because of their lack of maturity and mental development (Roper v. Simmons, 2005). This argument is similar to those seen in cases regarding insane offenders and mentally retarded offenders: if the offender is less culpable then retribution and deterrence really are not well served. Finally, the Court argued that a jury should not have to undertake the task of deciding whether a juvenile offender is sufficiently culpable for his or her actions, and that a line must be drawn somewhere.

In my own analysis of this issue, I will look at retribution, deterrence, and prevention. With respect to retribution, if it is true that juvenile offenders are less culpable than someone 18 or older, that may have some bearing on retributive value. However, unlike someone who is insane or mentally retarded, a 16 or 17 year-old is completely capable of understanding that he or she is taking someone’s life, and that the punishment could be the death penalty. Although juveniles may not be completely matured, or their
brains completely developed, they are still capable of thinking about actions and consequences, as well as making deliberate decisions. While it is true that juveniles as a class have problems with impulse control due to their yet underdeveloped brains that is not always the cause of terrible actions. In *Roper v. Simmons*, Simmons planned out the murder and led other friends to participate. If anything, the impulse control problem is applicable to those Simmons led to participate, but Simmons himself was the leader in the situation. The very fact that he planned the murder is convincing evidence that he did not act out of impulse in the moment. The culpability argument, although relevant, is less strong here than with someone who is mentally retarded or insane.

With respect to deterrence, the argument is even less stable. 16 and 17 year-olds are able to understand the possibility of consequences for their actions; such an extreme penalty as death may be terrifying enough to deter them from committing murder. In *Roper* it is noted in Justice O’Connor's dissent that the offender, Simmons, believed that he could get away with the horrific murder he committed because he was a minor. This kind of attitude is alarming, because the prohibition of execution for juvenile offenders could have just the opposite effect of deterrence: it could make potential offenders believe they will get away with the crime. With respect to adult potential murderers, however, the prohibition of juvenile executions would have little effect on deterrence, because adults would not qualify for that exemption.

With respect to prevention, the case is stronger in favor of the juvenile death penalty. An offender's young age could to increase the likelihood that the offender will get out of prison eventually, rather than having a life sentence without parole. If that is true in some cases, it is possible, although not hugely probable, that the person would commit
another murder. Even if every juvenile murderer received life in prison without parole, they have already shown at a young age a propensity for violence, and that could manifest itself again. Of course it is also possible that a young offender will see the error of his ways and never commit another violent crime. Even so, the possibility of further violence in some offenders is still there.

Overall, none of the arguments against the juvenile death penalty are completely compelling; there are reasons why juveniles are a different class of offenders than insane or mentally retarded persons. Morally, it is hard to say why someone who commits a murder that is not particularly horrifying at 18 years old is more culpable and eligible for execution than someone who is 17 years and six months old that commits a completely heinous murder. It would seem more appropriate to judge each case on its facts, and let the juries decide who was sufficiently culpable and which murders are committed in especially atrocious ways. The biggest worry is that the jury will be unable to impartially take into consideration as a possible mitigating factor the age of the offender in a case that is especially emotional. However, this could be a worry in any emotional case, juvenile or not, murder or not, and thus does not seem to be a sufficient issue to merit the prohibition of this one specific type to the exclusion of the others.

V. Practical Issues with the Death Penalty

Aside from the moral/theoretical concerns about the death penalty, there are practical issues to be considered as well. I will first look at how the death penalty is applied, specifically with regard to race and class divisions. I will consider whether capital punishment is truly reserved for the worst of the worst murderers in practice by thinking about individualized sentencing. Finally, I will consider the monetary costs of a capital trial.
In a basic cost-benefit analysis, I will weigh all of these factors and decide whether the death penalty is truly worth it to society.

A. Application

Opponents of the death penalty have argued that in practice, there are some serious problems. I will consider the issues of racial bias, class disparity, differences among and within states, politics within the legal system, and execution of innocents. Each of these issues contributes to an uneven rendering of capital punishment across the country. A proponent, such as Ernest Van den Haag, does not see uneven application as a problem:

The argument merely maintains that some guilty, but favored, persons or groups escape the death penalty. This is hardly sufficient for letting others escape it. On the contrary, that some guilty persons or groups elude it argues for extending the death penalty to them. Justice requires punishing the guilty - as many of the guilty as possible - even if only some can be punished, and sparing the innocent - as many of the innocent as possible, even if not all are spared. Morally justice must always be preferred to equality (Van den Haag, 1978, p. 836).

Van den Haag is arguing that those who got the death penalty under this uneven system deserved it, and those that did not get it also deserved it, therefore the punishment itself is not the problem, the system is. He is assuming guilt to be sufficient to merit the death penalty, but if the death penalty is supposed to be reserved for the worst of the worst, then guilt is a necessary condition, but not sufficient. Perhaps those who were executed were guilty, but not the worst of the worst, and were sentenced that way because of inadequate defense or racial bias. Then they did not deserve the death penalty, but got it anyway! Van den Haag’s assumption that guilt is sufficient for execution is unwarranted, and therefore his argument does not work. Thus we must consider those issues that lead to uneven sentencing.
The Court heard a case in 1987 called *McClesky v. Kemp*. The defendant, Warren McClesky, was a black man who had been convicted of killing a white man, and he appealed the decision on the grounds that Georgia’s criminal justice system was racially biased. He relied on a study called the Baldus study, which claimed that anyone who kills a white person is 4.3 times more likely to receive the death penalty. The Court ruled that McClesky could not prove discrimination in his particular case, that there has not been evidence of Georgia enacting its death penalty statute to further racially discriminatory practices, and that “apparent discrepancies in sentencing are an inevitable part of our criminal justice system” (*McClesky v. Kemp*, 1987). Basically, the Court dismissed concerns about racial bias in death penalty proceedings.

However, this fear is not unfounded. In the Death Penalty Information Center’s 2011 report on the death penalty, one of the main influences on the decision for death cited was that of race. Numerous studies were cited, ranging from a 1990 U.S. General Accounting Office report to the Baldus study to a University of North Carolina - Chapel Hill study and even a study done by the Associated Press. The aggregate result of these very different studies was “one of the strongest determinants of who gets the death penalty is the race of the victim in the underlying murder. If one kills a white person, one is far more likely to get the death penalty than if one kills a member of a minority” (DPIC report, 2011, p. 20). The effect of the race of the offender is less clear, but these are troubling considerations if we believe our justice should be blind to such irrelevant factors.

Cost factors are another issue in application of the death penalty. If the accused cannot afford a good private attorney, they will be appointed a public defender by the state.

States differ vastly in the quality of representation afforded indigent defendants. The number of attorneys assigned their experience in death penalty matters, their
rate of pay, and the funding made available for defense investigators and experts all affect a defendant’s chances of avoiding a death sentence (DPIC report, 2011, p. 26).

Even within a particular state certain counties may be poorer than others, which will affect the quality of representation. That a wealthy defendant with a top-notch lawyer and defense investigators has more of a chance of defending himself than a poor defendant is a serious problem. It assumes that class and wealth of the defendant makes a difference in his or her outcome, which is another factor to which justice is supposed to be blind.

Funding is just one of the differences among and within states that can affect the outcome of a capital trial. To begin with, some states do not allow the death penalty, so someone who is accused of murder in a non-death penalty state automatically has an advantage over someone who is accused of murder in a death penalty state. Furthermore, within a state, some counties may be more white or more black, and according to the DPIC, “prosecutors in communities with largely black populations may believe their constituents are not as supportive of the death penalty, or that jurors in that community would be less likely to vote for the death penalty. Opinion polls appear to bear this out” (DPIC report, 2011, p. 22). Therefore a defendant may be at an advantage depending on the county in which he or she commits the murder. Political ideology of a county can make a difference as well. If a county is more conservative, the death penalty is more likely, and vice versa. While these factors may not be nefarious on their own, their results are troubling in that a person who is tried for murder in one county may be at more or less of an advantage in his or her defense than a person tried in another county.

Politics of a community was touched on there, but there are also politics within the criminal justice system. “Elected prosecutors and judges know the power of seeking and supporting the death penalty when a murder shocks the community” (DPIC report, 2011, p.
This suggests that media involvement and public opinion can determine whether an offender is tried for the death penalty, which really should not be a factor in the justice system. Furthermore, “federal judges appear to vote consistently along party lines, thereby injecting arbitrariness into their death penalty rulings” (DPIC report, 2011, p. 24). If elected officials in the justice system are biased by their political beliefs rather than the facts of the case, then another irrelevant factor is entering into this life-and-death matter.

Finally, there is a possibility that an innocent person will be wrongly convicted and executed. Often this results from inadequate defense attorneys. If critical evidence is not presented because the counsel was unprepared or less experienced, that could send an innocent person to be executed. The finality of the punishment necessarily means that if that person is proved innocent later, he or she may not still be alive. The possibility of convicting an innocent when the punishment is life imprisonment is less horrifying than when the punishment is death.

A related issue to consider is whether the death penalty is actually given to only the worst of the worst offenders in our criminal justice system. One of the tensions in the justice system is how to have individualized sentencing (which the Court basically mandated when it ruled out automatic death penalties) and also have even, consistent application of the death penalty. The DPIC contends that this is not possible; too many irrelevant factors influence the application of the death penalty (those just discussed), but also certain factors such as cooperation with the prosecution and others can also influence case outcomes. For example, the DPIC cites one case in Washington in 2003 where a man who pleaded guilty to killing 48 people was spared the death penalty because he gave a detailed confession about all of his victims. On the other side of the problem, a mentally
A retarded woman who was a conspirator in a murder with two other people (both of whom received life sentences) and who did not actually carry out the killings was executed in 2010. (DPIC, 2011, p. 11) It is possible these are extreme cases; however the DPIC report lists several other cases that are just as unbelievable, so they are not complete anomalies. This suggests even further that too many factors are influencing the system in ways that they should not, and that the worst of the worst are not always the ones who are being executed. Individualized sentencing is supposed to be a benefit, in that each case (theoretically) is evaluated carefully on its own facts and circumstances, but these examples show that the decisions reached are not always what we hope for in a capital trial.

B. Monetary Costs

In general, a capital trial is far more expensive than a non-capital trial. The Death Penalty Information Center released a report in 2009 about the costs of a capital trial, and their website cites numerous state-specific studies on the issue. A single cost cannot be definitively stated, because costs vary from state to state according to their systems, pay scales, etc., however according to the DPIC’s report on the subject,

All of the studies conclude that the death penalty system is far more expensive than an alternative system in which the maximum sentence is life in prison. The high costs to the state per execution reflect the following reality: For a single death penalty trial, the state may pay $1 million more than for a non-death penalty trial (DPIC Costs Report, 2009, p. 14).

Although it is clear that the costs are much higher in a capital trial, looking at a specific state will be a good way to put some concrete numbers in the analysis, and to that end I will consider Kansas as a case study.
Kansas’ Judicial Council Death Penalty Advisory Committee recently published a report on Kansas’ death penalty statistics. Between 2004 and 2011, the average public defense cost for a trial and appeal where the death penalty was sought was $395,762, versus $98,963 in a trial and appeal where the death penalty was not sought. Total district court costs averaged at $72,530 per case when the death penalty was sought, versus $21,554 per case when the death penalty was not sought. In terms of time spent in court, on average a death penalty case took approximately 40 days, as compared to approximately 17 days in non-death penalty cases. Once the case has ended, the costs continue in terms of incarceration expenses. The study estimated that death penalty inmates cost an average of $49,380 per inmate to house per year, in comparison to the $24,690 per inmate per year that it costs to house a general population inmate. (Kansas Report, 2014)

These numbers are astounding. On average, it costs at least three times as much to hold a capital trial than a non-capital trial, and takes more than double the amount of time to complete the trial. Housing a death row inmate costs double what it takes to house a general population inmate. These are huge costs that are coming out of taxpayer monies, and that could be allocated elsewhere.

What benefits are we paying for exactly? Knowing that justice has been done, perhaps. Ensuring that the offender is sufficiently punished for his or her terrible crime could be another possibility. The protection of innocent people from depraved criminals, perhaps? Some will say that making these people pay for the life they took with their own is worth the exorbitant costs of a capital trial. However, when we consider where that money could be going, the reasoning is not so persuasive. Why should convicted criminals take so
much of the State’s limited resources, when it could be going to programs that help people who have not committed any crime? In light of this view, life imprisonment without parole may be a good second choice.

A death penalty supporter might object to this, saying that life in prison costs more in the aggregate than a shorter time on death row. That could be true, depending on the numbers. If a person commits murder at the age of 30 and gets life imprisonment, according to the Kansas numbers, if he lives until 70, his total costs would be just under $1,000,000 for incarceration, plus costs of trial and appeal. According to the DPIC, the average death row prisoner spends at least a decade awaiting execution, sometimes as much as twenty years. If we average it at 15, and consider the same murderer, his cost of incarceration on death row would be approximately $750,000. Theoretically, that is a $250,000 saving. However the cost of trial is so much higher, almost $350,000 more (in defense costs and district court costs, not to take into account the other costs associated with a capital trial and appeal), the saving does not seem to be so definite. Overall, the costs just do not seem to be justified by the few definable benefits.

VI. Conclusion

Capital punishment is such a controversial issue, with proponents firmly believing in its justice, retribution, and morality, while opponents see it is inhumane, costly, and uncivilized. In this paper, I have attempted to survey each of three aspects of the death penalty: its constitutionality, morality, and practicality. I have concluded that its constitutionality is ambiguous due to the vague nature of the relevant text, but currently seen as constitutional. Its morality has some justification in terms of retribution and prevention, and I have applied those ideas to the morality of executing three classes of
offenders: insane persons, mentally retarded persons, and juveniles. Finally, I have considered the practical costs of capital punishment, both in the uneven manner in which it is applied and in the monetary costs to society. Overall, I conclude that although morally and constitutionally allowable, without substantial reform the capital punishment system is too costly to recommend continuation.
References


